9 January 2025

Case 4/2024

FINAL DECISION

[.]

v

the Single Resolution Board

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

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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 seat at [.], [.], and with address for service [.], [.], at the offices of [.], of which [.] and [.], 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 Hannah Ehlers, Eleftheria Diamanti, Sean Kerr, Christos Lamaris-Adamis, Cathal Flynn, Joan Rius Riu, Ana Raquel Lapresta Bienz

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

THE APPEAL PANEL,

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

makes the following decision:

Background of facts

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

2. The notice of appeal was notified by the Secretariat of the Appeal Panel to the Board on 24 July 2024, informing the parties that the Board was granted six weeks until 4 September 2024 to serve its response.

3. The notice of 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 and also a request to suspend the instruction to [.] (the "[.]"). The notice of appeal further included a request for motivation evidence pursuant to Article 15 of the Appeal Panel's RoP.

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

4. The notice of 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 and also a request to suspend the instruction to [.] (the "**[.]**"). The notice of appeal further included a request for motivation evidence pursuant to Article 15 of the Appeal Panel's RoP.

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

6. 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.

7. On 26 July 2024, the Appellant submitted the [.] [.] 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.

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

> 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, ECLI: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, if any, to the Appellant's rejoinder on the suspension request.

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

10. On 31 July 2024, the parties were informed that the Appeal Panel taking into consideration the Board's reasoned request and the Appellant's observations to the Board's request, decided to grant the Board the extension to submit its response 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.

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

12. On 19 August 2024, the Appellant submitted its rejoinder on the suspension request.

13. On 26 August 2024, the Board submitted its reply to the Appellant's rejoinder on the suspension request.

14. On 30 August 2024, the Appeal Panel notified to the parties its decision on the suspension request. The Appeal Panel did not grant the requested suspension holding that the Appellant had failed to offer sufficient arguments or evidence to justify a suspension of the Contested Decision on grounds of "serious and irreparable" harm, and has thus failed to justify the urgency of the measures. The decision of the Appeal Panel on the suspension request is reproduced here below:

> In Case 4/2024,
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> 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[2] (hereinafter the "**SRMR**"),
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> **[.],** having its seat at [.], [.], and with address for service [.], [.], at the offices of [.], of which law firm [.], lawyers, with the right of substitution, represent [.] in these proceedings (hereinafter, the "**Appellant**")
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> v
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> **the Single Resolution Board** (hereinafter the "Board" or "SRB"), represented in these proceedings by its agents Hannah Ehlers, Eleftheria Diamanti, Sean Kerr, Christos Lamaris-Adamis, Cathal Flynn, Joan Rius Riu, Ana Raquel Lapresta Bienz
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> (the Appellant and the Board collectively referred to hereinafter as the "parties"),

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

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

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 [.] decision of [.] implementing the Contested 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).

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.

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 taking into consideration the Board's reasoned request and the Appellant's observations to the Board's request, decided to grant the Board the extension to submit its response 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 Reporting 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), [.] ([.]), 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 boni 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.

19. However, the Appeal Panel may, if it considers that circumstances so require, suspend the application of the contested decision.

20. 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.

21. 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

22. 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".*

23. 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).

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

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

(b) Substance.

30. 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.

31. 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).

32. 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).

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

34. 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 [.] 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.

15. On 25 September 2024, the Board submitted its response to the notice of appeal. On 26 September 2024, the Appeal Panel notified the Appellant of the SRB's response and informed the Appellant that it could reply within three weeks of service, i.e., until 17 October 2024.

16. On 17 October 2024, the Appellant submitted its rejoinder to the Board's response. On 21 October 2024, the Appel Panel notified the SRB of the Appellant's rejoinder and informed the Board that it could submit a rejoinder, in any, to the Appellant's reply within three weeks of service, i.e., until 11 November 2024.

17. On 29 October 2024, the Appeal Panel, upon reasoned request of the SRB decided to extend the deadline to file the Board's reply until 18 November 2024.

18. On 31 October 2024, the Appeal Panel informed the parties that it intended to hold a hearing for the oral discussion of the case on 3 December 2024 and asked the parties to confirm their attendance. Both parties promptly confirmed.

19. On 12 November 2024, the Appeal Panel notified to the parties its procedural order no 2, which was as follows:

> Dear parties in case 4/2024,
>
> The Appeal Panel wishes to thank both parties for the confirmation of their attendance to the hearing on 3 December 2024 in Brussels. Enclosed is the agenda of the hearing, with indication of the expected timeline for pleadings, answers to the Appeal Panel's questions and rebuttals.
>
> The parties are kindly requested to inform the Secretariat by the close of business of Friday 22 November 2024 of the names and roles of the persons who will attend the hearing.
>
> As to the Appellant's request for motivation evidence as raised in section VII of the notice of appeal and reiterated in more recent exchanges, the Appeal Panel wishes to refer to paragraphs 186 and 187 of its decision of 14 April 2023 in case 1/22 where the Appeal Panel noted that:
>
> > 186. (…) to be fully in line with the legal requirements and due legal process the intense process of dialogue and cooperation (regardless of whether the parties agree or disagree) must find expression and continuity in the decision itself, and in the summary of the resolution plan if, and to the extent that this is the instrument used to explain how and where the Board has made a "full assessment" of the relevant elements. In the Appeal Panel's view, unlike the Right to be Heard Assessment Memorandum which is a specific annex of the MREL decision, all previous communications lack a clear legal status without a proper formal acknowledgement and indeed, some of the Board presentations include ample disclaimers stating that they are not intended to create any binding legal effects (see, e.g., MREL Policy presentation of [.]; or IRT workshop presentations of [.] and [.]).
> >
> > 187. Even if these previous interactions, put together, could hypothetically create binding effects, based on the principle of the protection of legitimate expectations, in the Appeal Panel's view the requirement under Article 12d(8) SRMR of a statement of reasons including the full assessment of the relevant elements requires that the results of all those interactions - which are relevant for the MREL decision - expressly and clearly result from the MREL decision itself and accompanying documents. The content need not be as detailed as that of specific interactions, but if the aim is to incorporate the substance of such interactions as part of the assessment and statement of reasons, there must be a formal acknowledgement of such interactions, and their content.
>
> The Appeal Panel further notes that, according to settled case law of the European courts, in order "*to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings"* (judgment of the Court of 17 December 1998, case C-185/95 P Baustahlgewebe GmbH v Commission, ECLI:EU:C:1998:608, paragraph 93).
>
> The Appellant's request for evidence referred to *"all the evidence [the Board] has regarding its previous communications with [.] as referred to in the Joint Decision in relation to CBR and the application of the O-SII Buffer, and in general, to submit all the relevant evidence about why the O-SII Buffer was included in the MREL-TREA calibration on the level of [.] "* and has been justified by the Appellant arguing that *"this evidence is essential for [.]to gain an accurate understanding of the Joint Decision. [.] moreover reserves its right to, on the basis of the newly submitted evidence, revise or supplement her argumentation accordingly."*
>
> In the Appeal Panel's view, the request "*in general, to submit all the relevant evidence about why the O-SII Buffer was included in the MREL-TREA calibration on the level of [.]* " does not precisely

identify what documents may be within the scope of its request. Furthermore, the Appellant

offers no clear justification as to why the documentation pertaining to the internal decision-making process of the Board, to the extent that it is not referred to or incorporated in the statement of reasons of the Contested Decision, is relevant for the just determination of the appeal.

The Appellant also makes an additional request of evidence concerning documents referred to in the Joint Decision, and specifically at page 33, point 1 of the RTBH assessment, which in turn is made an integral part of the Contested Decision. The RTBH assessment makes a reference to several communications by the [.] concerning the application of the O-SII. The majority of these documents are already part of the file as annexes A3 (decision [.]), A6 (decision [.]) and A7 (decision [.]) to the notice of appeal and annexes B7 (confirmation by the [.]) and B8 to the Board's response. The documents produced by the Board in its response (B7 and B8) include the exchanges with the [.] regarding the application of the O-SII buffer, and a confirmation by the [.] of its previous communications regarding the application of said buffer. After these documents were produced the Appellant was also given an opportunity to incorporate any novel findings related to these internal communications in its rejoinder, filed on 17 October 2024.

The Appeal Panel notes, however, that some of the documents referred to in the RTBH assessment have not been produced by either party, or that, for some of these decisions or communications, further clarification is needed. Therefore, for the just determination of this appeal, the Appeal Panel seeks the following clarifications regarding the documents referred to in the Contested Decision RTBH assessment:

- Regarding the [.] decisions [.] and [.], the Appeal Panel asks the parties to clarify whether these are decisions in the Appellant's possession, as communicated by the [.] to the Appellant.
- Regarding the reference to the [.] Decision of [.], the Appeal Panel requests the Board to clarify whether this refers to the communication from the [.] to the European Systemic Risk Board (ESRB) (part of the file, as Annex A6) or a different decision, and this in light of the fact that the email from the [.] to the Board [.] [.] refers to *"the [.] letter informing [.] about the latest amendment of the applicable buffer percentage".*
- Regarding the reference made in the [.] (Annex B6) to *"We can follow [.]'s reasoning in its e-mail of 5 June 2024"*, the Appeal Panel asks the parties to clarify whether this email was, or was not incorporated to the file.
- Regarding the reference in the Contested Decision RTBH assessment to the fact that *"[.] confirmed to the Board that the CBR for [.] at consolidated level included the O-SII buffer"* the Appeal Panel asks the Board to clarify when and how this confirmation took place. The Board has filed a clarification from the [.] regarding these matters (B7), with the date [.]. However, the Contested Decision, and its RTBH assessment, date from [.]

The Appeal Panel **requests the parties to offer the requested clarifications and produce by the close of business of Friday 22 November 2024 the documents referred to above**, including, when necessary, a translation in English, or to offer reasons why they cannot be produced.

Finally, the Appeal Panel wishes to ask the parties that, **in their initial pleadings at the hearing**, the parties ***also*** address the following questions:

(1) whether or not the imposition by [.] of the O-SII buffer at the level of [.] (irrespective of its actual implementation by the Appellant) flows from an interpretation and application of Article [.] and [.] in connection with [.] [.] in conformity with Article 128 CRD (see to this effect, in the supervisory context, Joined Cases T-647/21 and T-99/22, Sber v ECB, ECLI:EU:T:2024:127 at para 61); the parties are kindly requested to also present and discuss in this connection, if available, relevant domestic case-law and other authorities pertaining to the above mentioned provisions of [.];

> If the answer to the first question is negative:
>
> (2) whether or not the above mentioned [.] provisions do correctly transpose into [.] law Article 128 CRD and, if the answer is negative again, whether or not the Appellant could claim vertical direct effects from Article 128 CRD to justify the non-imposition of the O-SII buffer at the level of [.]
>
> and if the answer to the question (2) is affirmative:
>
> (3) whether or not primacy of EU law and the principle of legality imply that the Board should disapply the relevant [.] provisions and the [.] determinations on the O-SII buffer as applicable at the level of [.] in accordance with the case law of European courts (*Fratelli Costanzo* Case C-103/88 ECLI:EU:C:1989:256).

20. On 18 November 2024, the Board submitted its rejoinder.

21. On 22 November 2024, both parties submitted the documents and offered the clarifications requested by the Appeal Panel with its procedural order no 2.

22. On 3 December 2024, a 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, and with further notice of the Secretariat of the Appeal Panel of 3 December 2024, the parties were invited to submit the written text of their pleadings at the hearing, without amendments, by the close of business of 6 December 2024. Both parties submitted promptly their pleadings.

23. On 16 December 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

24. The main arguments of the parties 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

25. The Appellant submits that the Contested Decision, in imposing an MREL-TREA of [.] on both [.] and [.] , has incorrectly applied one component of the combined buffer requirement (the "**CBR**"), the other systemically important institution (the "**O-SII**") buffer, at the level of [.] .

26. The Appellant argues that the O-SII buffer has previously consistently been applied (only) at the highest level of consolidation, so at the level of [.] , the European parent holding company of which [.] is a [.] subsidiary. In the Appellant's view, with the Contested Decision the Board has adopted an amended approach by applying the O-SII buffer both at [.] and [.] and claims that pursuant to Article 12 of the SRMR, the Board has the task and responsibility to assess whether an O-SII Buffer could and should indeed have been included in the (internal) market confidence charge (the "**iMCC**") imposed on [.].

27. The Appellant invokes six grounds of appeal:

28. First, the Board incorrectly held that the O-SII buffer applies to and should be included in the iMCC for [.] while the same buffer requirement also applies to [.]. This interpretation, in the Appellant's view, is contrary to Article 131 CRD, because it does not provide for application of the O-SII buffer to more than one entity (within the same jurisdiction).

29. Second, in establishing that the O-SII buffer applies to [.], the Board based itself on informal communications of [.] that are inconsistent, incorrect and unreliable and could not serve to support the Contested Decision.

30. Third and alternative to the first and second ground, if the Board contends that it has no discretion to determine the applicability of the O-SII buffer to [.], it failed to motivate why it applied the O-SII buffer to [.] in deviation of past practice. The Board cannot invoke a formal decision from [.] because no such decision exists. The lack of motivation is the more poignant because the circumstances – especially the inconsistency between current and past practices – called for an extensive motivation.

31. Fourth, the application of the O-SII buffer as a component of the iMCC for [.] leads to a disproportionate outcome. It does not serve the aim that is intended by setting the internal MREL.

32. Under the fifth and sixth ground, the Appellant submits that the Contested Decision is contrary to the EU general principles of legitimate expectations and legal certainty.

33. As such, [.] requests the Appeal Panel to partially, with respect to the iMCC or iMREL-TREA for [.], remit the Joint Decision to the Board for amendment, to the extent possible. If the Contested Decision is considered indivisible the Appellant requests that the Contested Decision be remitted in full.

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

Board

35. The Board argues that the Appellant has been designated as O-SII by the national supervisory authority, [.] and this status influences the size of its MREL target. The Appellant is […] in Europe. It is an O-SII and the CBR to which it is subject includes the O-SII buffer. In accordance with the national ([.]) transposition of CRD, the O-SII buffer is applied to the Appellant directly and to its parent, [.] , which acts as the resolution entity (point of entry) for the [.] . Accordingly, the O-SII buffer forms part of the CBR, which is a direct input to the value of the internal market confidence charge of the Appellant (the legal default value of which corresponds to the CBR minus any counter cyclical buffer).

36. The Board contends that some of the substantive grounds of this appeal fall outside the scope of the Appeal Panel's review and should be considered as inadmissible. According to the Board, the appeal is predicated on the misguided assumption that the composition of the CBR and its components (including the O-SII buffer) are decided by the SRB. On the contrary, the question whether a particular element (such as the O-SII buffer) forms part of the CBR for a given entity is ultimately dependent on determinations made by national supervisory authorities acting under the national transposition of Union law. It is not dependent on the views of any resolution authority, including the SRB. Those are therefore matters beyond the competence of both the SRB and its Appeal Panel.

37. Similarly, in the Board's view, the Appellant's claims that national law has incorrectly transposed the CRD are clearly not justiciable by the Appeal Panel.

38. Separately, the Board also reaffirms its view that, for college banks as it is the case of the Appellant, only appeals against the SRB decision, and not the joint decision agreed in the resolution college as it is the Contested Decision, should be admissible.

39. On the merit, the Board, as to the first ground, contends that it has correctly determined the Appellant's iMREL on the basis of its consolidated situation, and has properly calibrated its iMCC at the legally mandated default level. In determining the iMCC component of the Appellant's iMREL, the Board used the same percentage values of all applicable components of the Appellant's CBR (including the O-SII buffer) and applied them to the reduced value of TREA used generally by the SRB in the calibration of the recapitalisation amount, reflecting the Board's expectation that the resolution of the group would slightly reduce the Appellant's TREA (i.e., balance sheet depletion). Moreover, as regards the basis of calibration, the SRB has taken advantage of the flexibility newly afforded by Directive (EU) 2024/1174 (the "**Daisy Chain Directive**") to set the Appellant's iMREL on the basis of its sub-consolidated, rather than its individual situation. This has saved the Appellant from the deduction regime that would otherwise apply to an intermediate entity such as [.]and which would otherwise have significantly eroded the bank's iMREL capacity.

40. On the second ground, the Board contends that it did not make any error of assessment in determining the Appellant's iMREL. The Appellant, in the Board's view, is wrong in its claim that the SRB had any obligation to assess whether the O-SII buffer should count towards the iMCC of [.] or could 'second guess' the national supervisory authority that determines which

entities of the group are subject to the O-SII buffer, in what amount, and on the basis of what consolidation. The Board further understands that the approach to the O-SII buffer of the national supervisory authority has been consistent since [.].

41. On the third ground, the Board argues that it has clearly explained, in the decision, the reasons supporting all elements of the Appellant's iMREL determination, in full conformity with its obligation to state reasons. The quality of the Board's explanation of the calibration of the Appellant's iMCC is consistent, in the Boards' view, with the standard of the Appeal Panel, as explained and applied in case 5/2023. The Board has applied the default value of iMCC, as explained in the recitals of the decision. The SRB did not determine that any lower amount was credible or feasible, or that any higher amount was necessary. When questioned by the Appellant during its right-to-be-heard ("**RTBH**") process about the inclusion of an O-SII buffer, the Board provided a coherent explanation. The Appellant may not agree with the rationale for the SRB's decision, but it clearly understands it, as evidenced by the detailed substantive challenges made by the Appellant in this appeal.

42. On the fourth ground, the Board argues that it has not breached the general principle of proportionality. The Appellant comfortably meets its MREL target. Even if the SRB had calibrated the target at the lower level preferred by the Appellant, this would have made, comparatively, little difference in economic terms. Indeed, the Board believes that the Appellant is less concerned to challenge the decision on account of its economic impact but more out of concern about its reading of the O-SII buffer decisions communicated to it by [.]. However, as observed above, in the Board's view that is a matter beyond the competence or concern of the Appeal Panel. Also, the Appellant's allegation that application of the O-SII buffer to [.] 's iMCC was not suitable or necessary are unfounded.

43. On the fifth and sixth grounds, the Board argues that it has not violated (a) the principle of protection of legitimate expectations, because while the Appellant may consistently have believed that it, as an entity, was not subject to an O-SII buffer, that was clearly not the consistent practice of the national supervisory authority responsible for determining which entities are subject to that buffer and in what amount nor (b) the principle of legal certainty, because the MREL determination on a sub-consolidated basis was eminently foreseeable in light of recent changes in law and dialogue between the SRB and the bank during the resolution planning phase.

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

Findings of the Appeal Panel

(a) Admissibility of the appeal.

45. The Board challenges the admissibility of certain aspects of the appeal. It argues first that this appeal is predicated on the misguided assumption that the composition of the CBR including the O-SII buffer is decided by the SRB. However, the O-SII buffer forms part of the CBR for

a given entity due to determinations made by national supervisory authorities acting under the national transposition of Union law. It is not dependent on the views of the Board. This, in the Board's view, takes these matters beyond the competence of both the SRB and its Appeal Panel. Second, in the Board's view, the Appellant's claims that national law has incorrectly transposed the CRD, or that the interpretation by [.] of national law is contrary to CRD are clearly not justiciable by the Appeal Panel. Third, the Board reaffirms its view that, for college banks, only appeals against the SRB decision, and not the joint decision agreed in the resolution college as it is the Contested Decision, should be admissible.

46. The Appeal Panel refers, on the latter point, to its decision on admissibility of 29 June 2022 in case 1/2022 and notes that, so far, European courts have not addressed this issue. The Appeal Panel considers therefore that there is no reason, as long as European courts have not adopted a different view on this, for the Appeal Panel to change its findings on this matter. For the reasons discussed in the decision of 29 June 2022 in case 1/2022, which are applicable *mutatis mutandis* also in the present case, the Appeal Panel considers that the appeal against the Contested Decision, which is the joint decision agreed in the resolution college, is therefore admissible.

47. As to the other arguments on inadmissibility, the Appeal Panel acknowledges that the O-SII buffer is not set by the Board, and it is a component of the CBR, which is dependent on determinations made by national supervisory authorities. In principle, therefore, the Board needs to take into account the O-SII buffer as such in its determinations on the MCC. The Appeal Panel notes, however, that the Appellant's plea is that the Board, in exercising its own mandate to determine the applicable MREL, including the MCC, was under its own task, responsibility and obligation to consider the prudential capital buffer-setting framework. Furthermore, the Appellant also claims that the O-SII buffer is part of the CBR and the CBR and its components are harmonised by CRD through provisions which are sufficiently precise.

48. According to settled case-law of European courts (see Case C-103/88 *Fratelli Costanzo* ECLI:EU:C:1989:256) any administrative authority, including European agencies and institutions, are under the same obligation of a national court to apply the provisions of a directive which are unconditional and sufficiently precise and to refrain from applying provisions of national law which are inconsistent with such provisions of a directive. Therefore, to the extent that the Appellant is claiming that the Board breached the obligations arising from its responsibility to set MREL, and in particular the MCC, to the extent that [.]'s interpretation of the national ([.]) transposition of Article 131 CRD were not in conformity with CRD and that the Appellant claims to rely on vertical direct effects of Article 131 CRD against [.], which is a part of the state, those claims are admissible. As a matter of fact, if the claims that [.] violated Article 131 CRD were founded, the Board could not implement by reference and as such the [.] 's decision on the imposition on the Appellant of the O-SII buffer, but should refrain from applying it so as to ensure primacy of EU law and the full application of the principle of legality.

49. The Board's claims of inadmissibility of certain parts of the appeal are therefore dismissed.

(b) First ground of appeal

50. For clarification purposes, it is useful to indicate, from the outset, that the Appellant is a so-called 'intermediate entity' in the sense of the Daisy Chain Directive and it is not a resolution entity itself. The resolution entity is a [.] (the "**[.]**") which sits on top of the Appellant and therefore within its group the Appellant is the subsidiary of the resolution entity. The Appellant controls in turn other subsidiaries within the same resolution group. The Daisy Chain Directive grants the Board discretion to calculate iMREL for such intermediate entities on a consolidated basis, not an individual basis, which means that the holdings of own funds and eligible liabilities by the intermediate entity in its subsidiaries are not deducted from the intermediate entity's own funds and eligible liabilities, as otherwise required by Article 72e(5) CRR. The controversy arose because, as the Board went on to assess the Appellant's consolidated situation, it concluded that the Appellant was subject to an O-SII buffer (and according to [.] its [.] was also subject to an O-SII buffer). The Board then took the Appellant's O-SII buffer into consideration as part of the CBR, and it used the CBR as a reference for calculating the Appellant's iMCC.

51. On its first ground of appeal, the Appellant claims that the Board incorrectly held that the O-SII buffer applies to and should be included in the iMCC for [.] while the same buffer requirement also applies to [.] , its [.]. This interpretation, in the Appellant's view, is contrary to Article 131 CRD, because Article 131 CRD does not provide for, nor justifies the application of the O-SII buffer to more than one entity within the same jurisdiction.

52. The Appellant claims that Article 131(1) CRD requires the national supervisory authority to identify and designate O-SIIs in its jurisdiction in a way that, in the Appellant's view, it is clear from Article 131(1) CRD that an O-SII can be identified on a consolidated *or* sub-consolidated level, i.e., at the level of the [.] or of the Appellant, but not both simultaneously.

53. In turn, the national supervisory authority must apply, in the Appellant's view, the O-SII buffer solely either at the consolidated or sub-consolidated levels, but not at both levels concurrently. The national implementation (Article [.] [.] of the [.]), according to the Appellant, provides for a dynamic reference to Article 131 CRD which shows that the national legislator wished to seek full alignment with the CRD and it is [.] 's interpretation and application of the applicable legal framework which is not in conformity with CRD.

54. The Board, on the contrary, contends that it has determined the Appellant's iMREL on the basis of its consolidated situation, and has properly calibrated its iMCC at the legally mandated default level. In determining the iMCC component of the Appellant's iMREL, the Board used the same percentage values of all applicable components of the Appellant's CBR (including the O-SII buffer). Moreover, as regards the basis of calibration, the SRB has taken advantage of the flexibility newly afforded by the Daisy Chain Directive to set the Appellant's iMREL on the basis of its sub-consolidated, rather than its individual situation. This has saved the Appellant from the deduction regime that would otherwise apply to an intermediate entity such as [.] and which would otherwise have significantly eroded the bank's iMREL capacity.

55. As to the applicability of the O-SII buffer at both consolidated and individual level, the Board notes that it is apparent from Article 3(3) CRD that requirements laid out in that Directive

(including the O-SII buffer) that apply to a bank also apply to its holding company approved under Article 21a thereof. This already indicates that the O-SII buffer can simultaneously apply both to the level of the operating company, the Appellant, and the level of its holding company.

56. Moreover, the Board contends that, even if the national transposition of Article 131 were considered stricter than the Directive itself (*quod non*), this would still be entirely normal given that CRD is a measure of minimum harmonisation.

57. From a factual point of view, the Board further notes that while hold [.] structures are comparatively uncommon in the Banking Union there are certain cases where O-SII buffers have been set at consolidated and sub-consolidated levels for both a mixed financial holding company and for the operating companies sitting beneath it.

58. The Appeal Panel notes that the relevant paragraphs of Article 131 CRD are as follows:

> Article 131
>
> Global and other systemically important institutions
>
> 1. Member States shall designate an authority to be responsible for identifying, on a consolidated basis, G-SIIs, and, on an individual, sub-consolidated or consolidated basis, as applicable, other systemically important institutions (O-SIIs), which have been authorised within their jurisdiction. That authority shall be the competent authority or the designated authority. Member States may designate more than one authority.
>
> G-SIIs shall be any of the following:
>
> (a) a group headed by an EU parent institution, an EU parent financial holding company, or an EU parent mixed financial holding company; or
>
> (b) an institution that is not a subsidiary of an EU parent institution, of an EU parent financial holding company or of an EU parent mixed financial holding company.
>
> O-SIIs may either be an institution or a group headed by an EU parent institution, an EU parent financial holding company, an EU parent mixed financial holding company, a parent institution in a Member State, a parent financial holding company in a Member State or a parent mixed financial holding company in a Member State.
>
> 5. The competent authority or the designated authority may require each O-SII, on a consolidated, sub-consolidated or individual basis, as applicable, to maintain an O-SII buffer of up to 3 % of the total risk exposure amount calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013, taking into account the criteria for the identification of the O-SII. That buffer shall consist of Common Equity Tier 1 capital.

59. The Appeal Panel further notes that Article 21a of CRDV (Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU) has required entities to seek approval in order to act as a FHCs or a mixed financial holding company (the "**MFHC**s") of a credit institution. FHCs and MFHCs are subject to ongoing supervision. FHCs and MFHCs must provide the consolidating supervisor with information required to monitor the structural organisation of the group and compliance with conditions

on which the approval is granted. FHCs or MFHCs are in principle directly responsible for compliance with its group's consolidated prudential requirements.

60. The rationale for the new CRDV regime has been that a credit institution controlled by a FHC or MFHC is not always able to ensure compliance with the requirements on a consolidated basis throughout the supervised group, and thus (M)FHCs must be *also* brought under the direct scope of supervisory powers pursuant to the CRD V and CRR II to ensure compliance on a consolidated basis. Thus, the idea behind the reform effected by Directive 2019/878 is to capture additional risks that may otherwise escape the regulatory/supervisory perimeter, not to introduce a dichotomy between FHCs and the entities controlled by them.

61. The Appeal Panel further notes that, according to paragraph 3 of Article 131 CRD:

> "O-SIIs shall be identified in accordance with paragraph 1. Systemic importance shall be assessed on the basis of at least any of the following criteria: (a) size; (b) importance for the economy of the Union or of the relevant Member State; (c) significance of cross-border activities; (d) interconnectedness of the institution or group with the financial system. EBA, after consulting the ESRB, shall issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, by 1 January 2015 on the criteria to determine the conditions of application of this paragraph in relation to the assessment of O-SIIs. Those guidelines shall take into account international frameworks for domestic systemically important institutions and Union and national specificities. After having consulted the ESRB, EBA shall report to the Commission by 31 December 2020 on the appropriate methodology for the design and calibration of O-SII buffer rates".

62. The European Banking Authority (EBA) has issued the guidelines pursuant to Article 131(3) CRD on 16 December 2014 as EBA/GL/2014/10. In those Guidelines, paragraph 5, the EBA indicates the following:

> "In the first step, relevant authorities should calculate a score for each relevant entity at least at the highest consolidation level of the part of the group that falls under its jurisdiction (i.e., at the level which is not the subsidiary of another entity authorised or domiciled in the same Member State), including subsidiaries in other Member States and third countries, and subject to the optional exclusion pursuant to paragraph 10 where applicable. Without limitation to the previous sentence relevant authorities may additionally apply the methodology specified in these guidelines at other appropriate levels for informing their decision how the O-SII buffer should be calibrated and at which consolidation level it should apply".

63. The focus of the EBA Guidelines is the *identification* of O-SIIs, not the *determination* or calibration of the O-SII buffer. As the Guidelines state, in p. 4, *"*these guidelines do not contain provisions on the requirement to maintain an O-SII buffer pursuant to Article 131(5) of Directive 2013/36/EU."

64. Read in this context, the above paragraph shows that the process of identifying O-SIIs includes "at least" an assessment at the highest consolidated level, while the authorities may "additionally" apply the methodology at other appropriate levels. The EBA Guidelines refer to the setting of the O-SII buffer at a "level" in singular. However, the Appeal Panel understands that, in the above context, this is meant to exemplify why the authorities may desire to apply the methodology to identify O-SIIs at more than one level, and not to exclude the possibility of determining an O-SII buffer at more than one level. Thus, it appears that the

EBA Guidelines' approach, in line with the 2019 reform, is to capture sources of systemic risk at all relevant levels, not to force a dichotomy between different levels of consolidation for purposes of the O-SII buffer.

65. The non-exclusionary approach is confirmed more specifically in other explanatory documents. Answering a question raised by the Austrian Central Bank, the European Commission, as indicated in the European Banking Authority Q&A repository with reference 2017_3342, has held the following:

> Question:
>
> Article 131(5) of the CRD (Directive 2013/36/EU) states that "the competent authority or designated authority may require each O-SII, on a consolidated or sub-consolidated or individual basis, as applicable, to maintain an O-SII buffer". May the competent authority or designated authority also require a single O-SII to maintain an O-SII buffer both on a consolidated AND individual basis?
>
> Background on the question
>
> From the formulation "on a consolidated or sub-consolidated or individual basis" it is not entirely clear, if this is meant exclusively (either or but not more than one) or inclusively (one or more of these items). Economically, institutions can be (and are) systemically important both on an individual and consolidated basis therefore favoring the inclusive interpretation. However, Article 133 dealing with the Systemic Risk Buffer explicitly states the inclusive view, while this statement is lacking in Article 131 for O-SII. (Article 133(3) for comparison: "…on an individual, consolidated, or sub-consolidated basis, as applicable in accordance with Part One, Title II of that Regulation. The relevant competent or designated authority may require institutions to maintain the systemic risk buffer on an individual and on a consolidated level.")
>
> Submission date
>
> 13/06/2017
>
> Final publishing date
>
> 17/11/2017
>
> Final answer
>
> Article 131(5) of the CRD (Directive 2013/36/EU) should be read in connection with Articles 131(1) and 131(3) of the same directive.
>
> The identification of O-SIIs should take into account the criteria set in Article 131(3) of the CRD and the related EBA Guidelines (EBA/GL/2014/10). According to these Guidelines, as a general principle, authorities should assess the systemic importance of institutions at their highest consolidation level, in the first step. Relevant authorities may additionally apply the methodology specified in these guidelines at other appropriate levels. Thus, if the methodology allows it, O-SIIs can be identified at different levels of consolidation.
>
> The provisions of Article 131(5) of the CRD allow to impose O-SII buffers for O-SIIs at different levels of consolidation, in order to accurately address the systemic risk stemming from their systemic importance.
>
> When imposing one or more O-SII buffer(s) at different consolidation levels, the provisions of

Article 131(8) of the CRD should be complied with, where applicable.

66. In the Appeal Panel's view, the above interpretation is persuasive and confirms the textual and contextual reading of Article 21a CRD. This interpretation however contradicts the Appellant's assertion, in its first ground of appeal, that Article 131 CRD does not allow the simultaneous application of the O-SII buffer to more than one entity of a group within the same jurisdiction. The Appeal Panel finds therefore that, since the Appellant has based its first ground of appeal on this interpretation of Article 131 CRD, contesting the [.] 's interpretation that the O-SII buffer can be simultaneously applied to both the holding company and its subsidiary, intermediate entity, the first ground of appeal is unfounded.

67. In addition, the Appeal Panel notes that the Appellant has also failed:

(a) to demonstrate that, even assuming (*quod non*) that Article 131 CRD would contemplate the application of the O-SII buffer only at the level of one entity, the national framework, when implementing Article 131 CRD, could not set a stricter requirement and provide for the application of the O-SII buffer at the level of more than one entity of the group. CRD is indeed a minimum harmonization measure, which in principle does not preclude the possibility for Member States to goldplate the minimum requirements set out in the directive. It would have been therefore for the Appellant to demonstrate why the imposition of a stricter requirement would in fact violate Article 131 CRD;

(b) to discharge the burden of proof to demonstrate that at the time [.] adopted its decision to apply the O-SII buffer in [.] (communication of [.], whose addressee was [.], and thus the Appellant) [.] already was, under national law and at a time when CRD had not yet harmonized (M)FHCs, a regulated (M)FHC, and thus an entity within the regulatory remit of [.]. If this was not the case (and it was for the Appellant to give evidence that it was), it would be hardly possible for [.] to impose a requirement such as the O-SII buffer on an entity (potentially) falling (at the time) outside its supervisory remit.

68. For all the reasons stated above, the first ground of appeal must be dismissed.

(c) Second, third, fifth and sixth grounds of appeal.

69. On its second ground of appeal the Appellant argues that in establishing that the O-SII buffer applies to the Appellant, [.], the Board made an error of assessment by relying on wrong information provided by the national macroprudential authority; specifically, communications by the national macroprudential authority that are inconsistent, incorrect and unreliable and could not serve to support the Contested Decision.

70. In particular, the Appellant alleges (i) that the Board did not rely on any formal decision by the national authority, because the national authority communicated with the bank only informally (and informal communications were unreliable); (ii) that the national authority made its only decision in [.] to impose the O-SII buffer "at the highest level of consolidation", without ever formally changing its approach (and thus its change of approach in [.] was inconsistent with past practice);and (iii) that the information communicated by the national authority was contrary to Article 131 CRD (and thus incorrect).

71. The Appeal Panel notes that the Appellant's second ground of appeal is inextricably linked to its third, fifth and sixth grounds of appeal, which will be addressed together. In its third ground of appeal the Appellant argues, as an alternative, that, by failing to refer to a formal decision by the national macroprudential authority signalling a change of practice, the Board failed to motivate a deviation from its own past practice, that the Board's justification created great uncertainty about the level at which the O-SII buffer applied, and thus about the iMCC, and that the Board failed to address the concerns raised by the Appellant in the RTBH process. In its fifth and sixth grounds of appeal the Appellant argues that, in deviating from past practice, the Board violated the general EU law principles of the protection of legitimate expectations, and legal certainty.

72. The Board, for its part, regarding the Appellant's second ground, submits that the national supervisory authority communicated its decision to the Appellant by means of formal decisions, and in a clear manner, that the [.] decision was clear in stating that the Appellant was subject to an O-SII buffer, and that this conclusion was unequivocally confirmed by subsequent communications from the national authority to the Appellant, and to the European Systemic Risk Board ("**ESRB**"). On the Appellant's third, fifth and sixth grounds of appeal the Board submits that it provided a sufficient reasoning for the calibration of the iMCC, including the use of the CBR as the default amount, or the consultation with other authorities, that this justification created no uncertainty as to the level to which the iMCC applied, and that it duly addressed the Appellant's comments in exercise of its RTBH. The Board also argues that its actions did not, and could not, give rise to a legitimate expectation on the side of the Appellant that the assessment of MREL would not change, and that its actions did in no way violate the principle of legal certainty.

73. The conflict arises in this case because until [.] the Board assessed the MREL requirements of the Appellant, [.] ([.] in the Contested Decision), without plugging the O-SII buffer amount into the calculation of the loss absorbency and recapitalisation amounts, and it changed that approach in [.], by plugging the O-SII buffer amount into the calculation.

74. The communications referring to the O-SII buffer are multiple. Some of these communications have been provided by the parties as part of their written evidence, some were requested by the Appeal Panel in its procedural order no. 2, as part of its measures of inquiry to gain a more complete view. The following paragraphs analyse (1) the communications between the national authority and the Appellant, (2) between the national authority and the ESRB, (3) between the Board and the national authority, and (4) between the Board and the Appellant.

75. (1) Regarding the communications between the national supervisory authority and the Appellant, both parties refer to the communication of [.] as the first relevant statement about the application of the O-SII buffer. Both parties reach different conclusions about the tenor of this communication.

76. The [.] communication is ambiguous. On the one hand, the Appellant is the main addressee of the measures. The decision as such is addressed to "[.] ", and its "subject" states "Decision to impose a systemic relevance buffer [.] ". The decision itself states that (emphasis added)

"[.], [.] (hereinafter [.]) communicated that [.] ([.]) should be considered systemically important". Then it indicates that "[.] is labelled as O-SII" and that " [.] imposes the maximum [.] O-SII buffer on [.]". In other parts the decision also states that the application of the relevant standards results in "a G-SII buffer of [.] for [.] ", or that "an SRB of [.] will apply to [.]" On the other hand, the [.] decision states that (emphasis added) "The G-SII buffer, the O-SII buffer and the SRB buffer are imposed by [.] at the highest consolidated level. For [.], this is the consolidation level based on [.]" Thus, although the communication clearly refers to the Appellant as the entity subject to the measure, there is some ambiguity about the meaning of the term "consolidation level" in the expression "the highest consolidated level".

77. However, after the [.] decision, [.] clarified its position in several other communications with the Appellant. These communications sought to comply with the annual review of the buffers under Article 131 CRD, and, as such, they indicate the parts that change, and the parts that remain the same. These communications are clear that the Appellant is subject to the O- SII buffer.

78. In its communication of [.] , [.] states that "[.], the [.]. (hereinafter [.]) imposed on [.] (hereinafter [.]) a systemic risk relevant buffer (O-SII) of [.] of risk weighted assets. In addition, [.] imposed on [.] a systemic risk buffer (SRB) of [.] of risk-weighted assets", i.e., there is a clear reference to (and only to) [.]. In its subsequent communication to the bank, on [.], produced at the request of the Appeal Panel, [.] clearly refers to [.] as the addressee of the measure. The communication also reiterates that (emphasis added): "[.] (hereinafter: [.]) on [.] addressed [.] (hereinafter: [.]) imposed a systemic relevance buffer (O-SII) of [.] of risk weighted assets". This communication refers to the relevant EU law provisions (Article 131 CRD) and national law (Section [.] of the [.] under the [.]). The communication otherwise indicates that the O-SII buffer will continue to apply in [.]. The next communication, [.] addresses the Appellant again, and it includes very similar language, referring back to the communication of [.], and reiterating the reference to the "[.]", i.e., to [.]. The communication indicates that the G-SII buffer is re-established, but that this has no effect, since the O-SII buffer is higher. On its communication [.] [.] again addressed the Appellant, referred to the [.] communication, and identified the Appellant as "[.]". This communication indicates that the O-SII buffer will be amended with effect from [.], and "[.] will be required to maintain a [.] systemic relevance buffer".

79. Then, in its communication [.], [.] informs the Appellant, copying the Board, that, in its letter [.], it reiterated that the letter [.] had set the O-SII buffer "for [.]" at [.] and that this same letter (the [.] letter) set the O-SII buffer at [.]. This communication states the application of the O-SII buffer for "[.]" on four occasions, then adding that "The O-SII buffer for [.] is automatically also applicable to [.]". Thus, the emphasis is clearly on the Appellant, and then, *also* its parent holding company.

80. From the above one cannot conclude that [.] acted unreliably or inconsistently in its interactions with the Appellant. The communication of [….] also says that its view is "confirmed in the notification to the ESRB". To those notifications we now turn.

81. (2) The national supervisory authority's position is further confirmed in its communications with the ESRB, which also dispel the doubts about the dichotomy between the addressee of the measures, and the "level" at which the measures are calculated. In its communication to the ESRB of [.], the national macroprudential authority not only refers to the Appellant ("[.]("[.]")). It also includes its unique Legal Entity Identifier (LEI). It also states that "[.] O-SII in case of [.]", i.e., the Appellant. The communication also states that "[…]" (emphasis added). However, it subsequently adds the following (emphasis added):

> "[….]".

82. Thus, the text differentiates between "scope", i.e., the entity/ies subject to the measure, and "level", which, it is clarified, refers to the calculation. The text says that in one case (the Appellant's case) the "[….]. The *calculation* of the requirement then takes into account the highest consolidation level. That is the level of assets that act as the denominator for the ratio to which the percentage ([.], [.], depending on the year) applies.

83. In its subsequent communication to the ESRB [.] the language is a bit different (emphasis added):

> "[….]".

84. In this communication [.] differentiates again between "scope" and "level". However, it provides a slight change of message, stressing that, according to the national provisions, the buffer requirement applies to the […].

85. Thus, the Appeal Panel acknowledges that the national supervisory authority uses different emphasis and language. However, one thing is clear: the principal addressee of the O-SII buffer is the Appellant. Then, according to [.] 's position as expressed in its most recent […] communication to the ESRB, this measure […]. Thus, with respect to the imposition upon the bank of the requirement, the authority's practice cannot be considered unreliable or inconsistent *vis-à-vis* the ESRB either.

86. (3) [.] also clarified its position to the Board in its communications during [.]. The communication [.] to the Appellant, referred to above also copied to the Board. Subsequently, on [.] [.] confirmed that it had revised the proposed joint decision elaborated by the Board, and made slight changes, which means that it agreed with the proposed approach. This was further, and more explicitly confirmed in its communication of […] that, in its view, the Appellant had been told in the [.] decision (the [.] communication referred to above) that it would be subject to an O-SII buffer, that it was given the opportunity to file objections, that it did not make use of this opportunity, that the subsequent communications (express reference is made to the one [.] , and [.]) were confirmations of the position, as stated in [.], that these communications legally also qualified as "decisions".

87. Thus, the evidence presented by the parties shows that, throughout 2024, [.] presented a clear, reliable and consistent approach.

88. (4) Finally, the Board made its position clear to the Appellant in the slides of its workshop of [.]. Furthermore, as required by the Appeal Panel, the "process of dialogue and cooperation (regardless of whether the parties agree or disagree) must find expression and continuity in the decision itself" (Appeal Panel's decision of 14 April 2023 in case 1/2022, paragraph 186), and in this case it did (namely in the Contested Decision Section IVb and in the RTBH assessment memorandum, which forms an integral part of the Contested Decision). More specifically, in the RTBH assessment memorandum the Board not only replies to the Appellant's objection regarding the reliance on the O-SII imposed on the Appellant as a basis for calculating the iMCC. It also refers to the successive communications between [.] and the Appellant, which have been discussed above under (1), and refers to the "engagement with the authorities", as described under (3). One must note, too, that the RTBH process was initiated on the [.], followed by the Appellant's comments, and the response was incorporated in the Contested Decision.

89. Thus, the Appeal Panel sides with the Board on this, concluding that the Board did not rely on a practice that was unreliable or inconsistent.

90. Even if the Board relied on a practice by the national macroprudential authority that does not appear unreliable or inconsistent, the Appellant also claims that in 2024 the Board changed its own assessment of the Appellant's internal MREL, for the 2023 Resolution Planning Cycle (the "**RPC**"), and this because the Board calculated the Appellant's recapitalisation amount (the "**RCA**"), specifically the iMCC using as a basis the Appellant's CBR (minus the Countercyclical Buffer (CCyB)) including the O-SII buffer, whereas before 2024 the Board had not included the O-SII buffer as part of the CBR (and thus of the iMCC). The Appellant argues that the Board *failed to duly motivate,* i.e., give reasons for this change of criterion (third ground of appeal) and breached the principle of the protection of legitimate expectations and legal certainty (fifth and sixth grounds).

91. Regarding the duty to state reasons, the Appeal Panel, relying on the case-law of the Court of Justice, has already held in past precedents that the duty to state reasons is particularly important in the prudential and resolution context. The obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. In that vein, first of all, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review.

92. The Appeal Panel further notes that, before 2024, Article 12g(1) SRMR stated that subsidiaries of a resolution entity, which were not resolution entities, had to comply with the iMREL levels *"on an individual basis"*. This, in the Appeal Panel's view, can factually explain why up to the last RPC the Board considered only the Appellant's individual position.

93. Then, the Daisy Chain Act was adopted, amending Article 12g SRMR with a new sub-paragraph 3, which would apply from 13 May 2024. This new provision derogated from the requirement to calculate iMREL "on an individual basis", and, subject to certain conditions, allowed the Board to calculate the iMREL requirement "on a (sub)consolidated basis".

94. As already noted above, the Daisy Chain Directive sought to allow a more benign treatment of certain group structures, where, […]. In such a structure, making the Appellant calculate iMREL on an individual basis would force it to deduct the iMREL holdings in its own subsidiaries under Article 72e(5) CRR. Calculating iMREL on a (sub)consolidated basis allowed the Appellant to compute the iMREL held in its subsidiaries for calculating its own requirements.

95. The Board provided a detailed explanation of this (favourable) change of approach in the Contested Decision, in Section IIa, paragraph 4. According to the Board's statement, calculation of iMREL on an individual basis (deducting the iMREL in the subsidiaries) would have decreased the Appellant's iMREL capacity by [.]. The Board also explained, in paragraph 5 of the Contested Decision, that, in order to account for Pillar 2 requirements (Article 104a CRD), which are calculated only at a consolidated level (for the resolution entity) and at an individual level, it needed to calculate such requirements for the Appellant, *as if* the Appellant had to calculate them on a (sub)consolidated level. In doing this the Board complied with its duty to explain its methodological choices.

96. In fact, the Appellant does not object to the Bord's explanation of its more benign treatment, or to the need to establish a Pillar 2 requirement on a (sub)consolidated basis, but to the lack of explanation of the inclusion of an O-SII buffer within the CBR (minus CCyB) value used as a reference to calculate the iMCC (and thus the RCA).

97. However, to the extent that the inclusion of the CBR in 2024 reflected the methodological changes resulting from the Daisy Chain Directive, these changes were explained and motivated in the Contested Decision in Section IIa, paragraph 4. The CBR (minus the CCyB) as the reference value to calculate the iMCC (as part of the RCA) was determined by the national authority at the Appellant's consolidated level, and as such was reflected in the Contested Decision in Section IIa, paragraph 5, and the choice of this CBR as the reference value to calculate the iMCC was based on Article 12d(6) SRMR, and was reflected in the Contested Decision in Section IIa, paragraph 9. Whether the CBR (minus CCyB) included the O-SII buffer, in turn, did not depend on the Board's choice or reasoning. It was part of how [.], as the national authority determined the CBR "[…]", as stated in the Contested decision in Section IIa, paragraph 5.

98. Thus, the Appellant's allegation that the Board did not provide sufficient reasons in the decision on how the internal MREL was calibrated (first limb of the third ground) is unfounded.

99. The same is also true with the Appellant's allegation that the Board's "limited motivation

caused uncertainty" about the application level of the O-SII buffer for the iMCC determination (third limb of the third ground). The statement in the Contested Decision in Section IIa paragraph 5, that the Board applied the value "as determined by the competent authority at the Appellant's "consolidated level" is not contradicted by any statement in paragraph 9, nor by the Board's MREL Policy.

100. Paragraph 9 refers to the use of the CBR (minus the CCyB) as the reference value to calculate the iMCC.

101. The MREL Policy refers to "calibration levels" in the sense of the percentage applicable to calculate the buffer, not in any sense that may contradict the very clear reference to the "[…]" in paragraph 5. In any event, this passage of the MREL policy is not quoted nor referred to in paragraph 9.

102. Furthermore, the Board did not limit itself to include a detailed explanation of the consequences of the application of the Daisy Chain Directive, plus a more succinct explanation of the calibration of the iMCC (and thus the RCA). The Appellant was also made clearly aware of the fact that the CBR (minus CCyB) amount taken as a reference for calculating the iMCC would include an O-SII buffer. The Board made sure of this in its Workshop of [.] and this factor was addressed in detail in the RTBH assessment memorandum attached to (and being an integral part of) the Contested Decision.

103. There the Board addressed the Appellant's objections about the inclusion of the O-SII buffer. The Board indicated that the CBR (minus CCyB) amount used as a reference was supplied by the national macroprudential authority, and it referred to the successive statements where the national macroprudential authority had indicated its position. Thus, the Appellant's allegation that the Board did not refer to a formal decision or notification by the national authority (second limb of the third ground) is also unfounded. That the successive statements by [.] referred to by the Board did not meet, in the Appellant's view, the level of formality to be treated as formal "decisions" has nothing to do with the requirement to adequately state reasons.

104. For the same reason, the Appellant's allegation that the Board did not adequately address the Appellant's concerns (fourth limb of the third ground) is also unfounded. The Board provided a clear explanation of the reasoning followed in including the O-SII buffer as part of the CBR (minus CCyB) amount, and thus as part of the iMCC amount. The Appellant may disagree with the Board's reliance on the [.] 's determination of the CBR including the O-SII buffer, but its objections show that it understood the process followed. The Appellant's objections were not implemented through changes in the MREL calculation, but they were well noted, and addressed in detail in the RTBH assessment memorandum, which made explicit reference to the exchanges between the Appellant and the national authority, as well as between the national authority and the Board. Regarding the protection of legitimate expectations, the Appeal Panel has already held in past precedents, based on the case-law of the Court of Justice, that the protection of legitimate expectations contemplates, in the first place, requirements

such as the existence of "precise, unconditional and consistent assurances" originating from "authorised and reliable sources", so as to create legitimate expectations, and consistent with the applicable rules; in the second place, held that when a prudent and circumspect economic operator is able to foresee the adoption of an EU measure likely to affect his interests, he cannot rely on that principle if the measure is adopted. Nor can economic operators have a legitimate expectation that an existing situation, which is capable of being altered by the EU institutions in the exercise of their discretion, will be maintained.

105. The practice by [.] , including its communications to the Appellant, the ESRB, or the Board, or the communications by the Board to the Appellant can in no way be considered "precise, unconditional and consistent assurances" that an O-SII buffer would not be applied to the Appellant, and that a CBR (minus the CCyB) without the O-SII buffer would be taken as a basis for calculating the iMCC by the Board. As the analysis above suggests, it could and should have been taken as evidence of the contrary, i.e., that an O-SII buffer would be computed as part of the CBR, and thus for purposes of the iMCC.

106. Furthermore, the possibility of the calculation of the RCA (and thus iMCC) on a consolidated basis stemmed directly from the adoption of the Daisy Chain Directive, which is a development to be expected from any economic operator in the field.

107. Finally, with regard to the principle of legal certainty, the Appeal Panel, with reference to the case-law of the European Courts, has already held in past precedents that that principle requires, on the one hand, that the rules of law be clear and precise and, on the other hand, that their application be foreseeable by those subject to the law, in particular, where they may have adverse consequences for individuals and undertakings. Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly. Furthermore, the Court has recalled that the imperative of legal certainty must be observed all the more strictly in the case of rules liable to have financial consequences. More recently the CJEU was adamant in reiterating those principles also in the context of bank resolution.

108. In the present case the Appeal Panel acknowledges that a situation where the Board, as the competent resolution authority, becomes aware of the fact that a bank within its remit is subject to an O-SII buffer only when it is seeking to calculate its MREL on a consolidated level is regrettable. The cooperation among the Banking Union's authorities participating to both the supervisory and resolution mechanisms should ensure a more fluid exchange of information also on macroprudential buffers and the Appeal Panel wishes to stress the importance of such effective cooperation in future practice. However, that cannot be a basis for concluding that the Board should be responsible for any mistake on the side of the Appellant as to its applicable O-SII buffer, and consequently its MREL (in its iMCC component).

109. The Board could only calculate the Appellant's MREL RCA, and thus its iMCC, on a

consolidated basis only after the adoption of the Daisy Chain Directive in 2024. When it calculated this requirement on a consolidated basis, it necessarily inquired about the Appellant's consolidated situation. It was then made aware of the fact that the O-SII buffer applied to the Appellant and to its […]. It was made privy to the communications between [.] , on one side, and the Appellant, and the ESRB, on the other side, and these communications and practice suggested that an O-SII buffer applied to the Appellant, at its consolidated level. The Board then explained the situation to the Appellant, calculated its iMCC and iMREL, actively engaging with the national supervisory authority, and seeking clarification of the relevant aspects for this calculation. It shared its findings with the Appellant, and duly addressed its objections.

110. Even if the system of cooperation between the Board and the national authorities on macroprudential buffers should have worked more smoothly already in the past and this unfortunate misalignment in the relevant information concerning the application of an O-SII buffer to the Appellant since [...] offers guidance for future practice, in the present case this does not translate into a violation of the principle of legal certainty to the detriment of the Appellant, yet rather into a factor which delayed the consideration of the O-SII buffer in the calculation of the iMCC of the Appellant.

111. The reasons why the Appellant could conclude, up until 2024, that it was not subject to an O-SII buffer by [.] , on the face of communications suggesting the clear opposite, is a matter that pertains to the application of enforcement of the O-SII buffer and falls outside the Appeal Panel's remit.

112. What is relevant for the Appeal Panel is that nowhere in the communications filed as evidence by the parties, and especially in those between the Board and the Appellant, is it possible to observe a breach of the principle of legal certainty.

113. For all the reasons stated above, also the second, third, fifth and sixth grounds must be dismissed.

(d) The fourth ground of appeal.

114. On its fourth ground of appeal the Appellant claims that the Board acted in breach of the principle of proportionality.

115. The Appellant argues that the principle of proportionality requires that a measure such as the Contested Decision be suitable and necessary to achieve the desired end and does not impose a burden on the individual that is excessive in relation to the objective sought to be achieved.

116. In this case, in the Appellant's view, according to the recitals to the BRRD, the purpose of establishing the MREL is "to avoid institutions structuring their liabilities in a manner that impedes the effectiveness of the bail-in tool" and to ensure that sufficient eligible instruments are maintained to ensure the implementation of the preferred resolution strategy. To this end, the BRRD and SRMR adopt a "top-down approach", which requires an assessment at the

individual level of the resolution entity and non-resolution entities in the group.

117. In the Appellant's view, this was explicitly confirmed by the Board in its consultation on the future of MREL, earlier in 2024. In its feedback statement in response to the consultation, the Board stated that it "maintains its general view that the decision on whether an iMCC is necessary for a non-resolution entity should depend on the characteristics of the subsidiary in question, examined on a case-by-case basis". The Appellant claims that the MREL determined for [.] does not meet these criteria, because the application of the O-SII buffer to [.] 's iMCC (i) is not suitable in view of the single-point-of-entry resolution strategy adopted by the resolution plan and of the fact that there are no impediment to the free transfer of funds between [.] and [.] ; (ii) is not necessary, because the Contested Decision does not indicate that it has identified impediments to the resolvability at the level of [.] that actually require that [.] maintains an iMCC including the O-SII buffer; (iii) imposes an excessive burden in relation to the desired end because it brings about an increase of the MCC although there is no deterioration of the resolvability of [.] .

118. The Appellant notes that, since [.] has a higher TREA than [.] , imposing the same MREL-TREA requirement on [.] as on [.] effectively results in the [.] internal MREL becoming the constraining MREL factor, as it is higher in absolute numbers than the MREL-TREA for [.].

119. The Appellant further argues that the Board did not consider a possible downward adjustment of the iMCC, which according to the MREL Policy is possible depending on the resolvability of the specific institution and if satisfactory progress has been made with respect to an institution's resolvability. In particular, the Appellant argues that only for direct subsidiaries of resolution holding company's, the SRB maintains in its MREL Policy that the MCC is calibrated at the level of the resolution entity. In the Appellant's view, it is not clear why no differentiation should take place between the resolution entity and its direct subsidiary. This puts the subsidiary at a disadvantage in comparison to both the holding company/resolution entity as well as in comparison to other subsidiaries that can benefit from the downward adjustment.

120. The Board, conversely, contends that the application of the O-SII buffer to [.] 's iMCC was suitable because it reflects the legal default value of the iMCC (CBR minus CCyB) which includes the O-SII buffer. If the legislator considered the O-SII buffer to be a non-suitable component for the CBR in the context of the iMCC, there would have been an explicit exclusion (similarly to the CCyB).

121. The Board further notes that the legal framework does not prohibit the possibility that the percentage level of iMCC for a subsidiary of a resolution entity corresponds with the one for the external MCC of the resolution entity.

122. In addition, the Board opposes the Appellant's statement that inclusion of the O-SII buffer to both [.] and [.] cannot be conducive to increasing market confidence. Such statement, in the Board's view, is based on the erroneous assumption that the market is only interested in the

situation of [.], being the entity that externally issues eligible liabilities instruments. However, market confidence is pertinent also for [.] itself. As [.] itself highlights towards its investors, [.] , as a "clean" holding company, is dependent on dividends and distributions of its operating subsidiaries (chiefly, [.]) in order to fulfil its obligations towards external investors.

123. The Board also argues that the lack of impediments to the free transfer of funds between [.] and [.] could be relevant in the context of an iMREL waiver in accordance with Article 12h SRMR, but this is not a consideration that could support the exclusion of the O- SII buffer from the iMCC as the O-SII buffer is clearly part of the iMCC legal default value.

124. The Board further insists that the application of the O-SII Buffer to [.] 's iMCC was necessary because inclusion of the O-SII buffer is based on the application of the legal default amount and it is not subject to identifying impediments to resolvability.

125. Finally, the Board contends that the application of the O-SII buffer to [.] 's iMCC did not impose an excessive burden in relation to the desired effect, because the difference in absolute terms between [.] 's external MREL and [.] 's iMREL corresponds to only [.] of [.] 's MREL capacity.

126. The Appeal Panel considers that there are no indications in the file that support a finding that the Board's reliance on the default amount of the iMCC, i.e., the CBR, including the [.], was disproportionate under the circumstances and that a downward adjustment was feasible and credible in the circumstances.

127. The Appeal Panel refers to its past precedents, where it held that the principle of proportionality is a fundamental principle of EU law, but one that is extensively acknowledged by the SRMR, and thus a claim of lack of proportionality should be assessed under the SRMR framework and its guiding and precise rules and principles (see Appeal Panel decision of 14 April 2023 in case 1/22, paragraphs 224 and ff.). Article 12d(3) subparagraph (8) SRMR states that the amount "shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to sustain market confidence…". Thus, there shall be an adjustment, (only) once the Board determines, after consulting the competent supervisor, that a different amount is needed, which may be lower, if feasible and credible, or higher, if necessary. The Board's determination on the possible adjustment entails an exercise of discretion on its side. The fact that no adjustment has been made based on the feasibility or credibility of a lower amount means that the Board has projected into the future which amount may reasonably be expected to be necessary to sustain market confidence for a period not exceeding a year. This is a complex, and uncertain exercise, which is why the legislator provides a reference point, or base amount, the CBR post-resolution.

128. In the Appeal Panel's view, it cannot be inferred from the fact that the Board did not deviate from the reference amount, that the Board omitted to make the relevant determination nor that it erred in its determination. Conversely, the Appellant has not offered conclusive and compelling evidence that the Board committed an error of assessment in not requiring a lower

MCC.

129. Quite to the contrary the Appeal Panel finds persuasive the argument put forward by the Board that in the present case it has applied the same calibration formula for the iMCC of the operating subsidiary as for the MCC of the resolution entity, an approach justified by the type of structure of the bank concerned.

130. As noted by the Board, in a structure such as the one of the Appellant's group, composed by [….] . […]. In light of this structure, the Appeal Panel considers reasonable the conclusion reached by the Board that the possibility of the operating company to regain market confidence after resolution depends on the capacity of the holding company to attract funding from the external market; and thus, the Board calibrates iMCC at the same level as that of the resolution entity.

131. It must also be noted that both the MREL at the level of the parent holding company, and the iMREL at the level of the Appellant, are calculated on a consolidated basis. Thus, the holdings of own funds and eligible liabilities at the level of the subsidiaries count for calculating both the MREL at a consolidated level (for the parent holding company) and the iMREL at a subconsolidated level (for the Appellant).

132. In fact, the use of a consolidated approach to calculate *both* the MREL for resolution entities, and the iMREL for intermediate parent companies is one of the main changes brought by the Daisy Chain Directive referred to above. The purpose of said Directive is precisely "to ensure proportionality and a level playing field between different types of bank [.] structures" and this because, in the case of structures with intermediate entities, as it is the case in the Appellant's group, "such intermediate entities could be disproportionately affected by the existing deduction rules".

133. Thus, the Board's intent, when calibrating the iMREL for the Appellant, was to make use of the discretion granted by the Daisy Chain Directive to make the requirements more proportionate, in the sense of less burdensome without compromising resolution objectives, by applying iMREL on a consolidated, not individual basis. As it assessed the Appellant's (sub)consolidated situation, however, the Board realized that an O-SII buffer applied also at such (sub)consolidated level.

134. The Appeal Panel considers therefore that the principle of proportionality has not been violated and the determination of the iMCC for the Appellant in the default value of the CBR was suitable, necessary and did not impose an excessive burden in relation to the desired effect, and was reasonable and justified by the specificities of the group structure of the Appellant.

135. The fourth ground of appeal must therefore be dismissed.

On those grounds, the Appeal Panel hereby:

Dismisses the appeal.

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

Marco Lamandini Co-Rapporteur	Christopher Pleister
Chair	
SIGNED	SIGNED

For the Secretariat of the Appeal Panel:

Esther Brisbois

SIGNED