27 January 2022

Case 2/2021

FINAL DECISION

[ ],
Appellant,
v
the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair
Helen Louri-Dendrinou, Co-Rapportuer
Marco Lamandini, Co-Rapporteur
Kaarlo Jännäri

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FINAL DECISION

In Case 2/2021,

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

[ ], with headquarters [ ], represented by [ ] (hereinafter the "Appellant")

v

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

(Together referred to as the "Parties"),

THE APPEAL PANEL,

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

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 12 May 2021 - SRB/EES/2021/49 (hereinafter the "Contested Decision") determining the minimum requirement for own funds and eligible liabilities for [ ].

2. By email of 16 May 2019 sent by the Head of [ ] to the SRB member [ ] [ ] submitted a letter dated [ ] to the SRB requesting a waiver from the internal minimum requirement and eligible liabilities ("iMREL") for its [ ] subsidiary [ ] pursuant to Article 45(12) of Directive 2014/59/EU ("BRRD") and Article 12(10) of the SRMR applicable *ratione temporis* at the time of the letter.

3. At the time of the [ ] letter of [ ] Article 45(12) BRRD read as follows:

> 12. The resolution authority of a subsidiary may fully waive the application of paragraph 7 [MREL requirement on an individual basis] to that subsidiary where:
>
> (a) both the subsidiary and its parent undertaking are subject to authorisation and supervision by the same Member State;
>
> (b) the subsidiary is included in the supervision on a consolidated basis of the institution which is the parent undertaking;
>
> (c) the highest level group institution in the Member State of the subsidiary, where different to the Union parent institution, complies on a sub-consolidated basis with the minimum requirement set under paragraph 7;

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

(d) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities to the subsidiary by its parent undertaking;

(e) either the parent undertaking satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;

(f) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;

(g) the parent undertaking holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary; and

(h) the competent authority of the subsidiary has fully waived the application of individual capital requirements to the subsidiary under Article 7(1) of Regulation (EU) No 575/2013.

4. At the time of the [ ] letter of [ ] Article 12(10) SRMR read as follows:

> 10. The Board may decide to waive the minimum requirement for own funds and eligible liabilities on an individual basis to a parent institution provided that the conditions laid down in points (a) and (b) of Article 45(11) of Directive 2014/59/EU are met. The Board may decide to waive the minimum requirement for own funds and eligible liabilities on an individual basis to a subsidiary provided that the conditions laid down in points (a), (b) and (c) of Article 45(12) of Directive 2014/59/EU are met.

5. Those articles were subsequently repealed and replaced by new Article 45f(3) and 45f(4) by Directive 2019/879/EU and by new Article 12h(1) and 12h(2) by Regulation (EU) No 877/2019, respectively. In particular, the new text of the SRMR as amended by Regulation 877/2019 started to apply from 28 December 2020.

6. Article 45(f)(3) and 45(f)(4) read as follows:

> 3. The resolution authority of a subsidiary that is not a resolution entity may waive the application of this Article to that subsidiary where:
>
> (a) both the subsidiary and the resolution entity are established in the same Member State and are part of the same resolution group;
>
> (b) the resolution entity complies with the requirement referred to in Article 45e;
>
> (c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 59(3), in particular where resolution action is taken in respect of the resolution entity;
>
> (d) the resolution entity satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;
>
> (e) the risk evaluation, measurement and control procedures of the resolution entity cover the subsidiary;

(f) the resolution entity holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary.

4. The resolution authority of a subsidiary that is not a resolution entity may also waive the application of this Article to that subsidiary where:

(a) both the subsidiary and its parent undertaking are established in the same Member State and are part of the same resolution group;

(b) the parent undertaking complies on a consolidated basis with the requirement referred to in Article 45(1) in that Member State;

(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the parent undertaking to the subsidiary in respect of which a determination has been made in accordance with Article 59(3), in particular where resolution action or powers referred to in Article 59(1) are taken in respect of the parent undertaking;

(d) the parent undertaking satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;

(e) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;

(f) the parent undertaking holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary.

7. Article 12h of the SRMR as amended by Regulation 877/2019 reads as follows:

Article 12h

Waiver of the minimum requirement for own funds and eligible liabilities applied to entities that are not themselves resolution entities

1. The Board may waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where:

(a) both the subsidiary and the resolution entity are established in the same participating Member State and are part of the same resolution group;

(b) the resolution entity complies with the requirement referred to in Article 12f;

(c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity.

2. The Board may waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State where:

> (a) both the subsidiary and its parent undertaking are established in the same participating Member State and are part of the same resolution group;
>
> (b) the parent undertaking complies on a consolidated basis with the requirement referred to in Article 12a(1) in that participating Member State;
>
> (c) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the parent undertaking to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the parent undertaking.

8. According to the explanation in the [ ] letter of [ ], this [ ] letter followed a workshop held on [ ] between the SRB resolution team and [ ] resolution staff "[ ]". In the same letter, [ ] noted that "[ ]". [ ] further noted that "[ ]". For these reasons, "[ ]", [ ] asked the SRB to grant such a waiver to [ ].

9. The annex to the [ ] letter of [ ] offered a comparison of the conditions for the granting of an iMREL waiver set out in the original text of SRMR and those resulting from the amended text following the Regulation 877/2019. The fourth criterion, listed as "[ ]" in the annex, is the one relevant for this appeal. It is described in the annex as follows: "[ ]". The annex specifies that this requirement did not represent a condition under the original text of SRMR, but it is a condition under the amended SRMR.

10. On 3 June 2019, [ ] and SRB staff held a meeting (labelled as "[ ]) and the SRB presented to [ ] the five conditions which had to be met to obtain the waiver [ ]. One of the five condition was that "[ ]. The SRB clarified in this respect that "[ ] granting capital waivers". It further stated that in order to assess if such condition is met, banks should provide all necessary information to verify that: " [ ]".

11. On [ ], [ ] provided via e-mail some information on the fulfilment of these 9 criteria.

12. On [ ], the Appellant sent to the SRB a non-paper, titled "[ ]". This document addresses the conditions to be met to obtain the waiver and, in detail, the requirement of funds transferability. The document also drew parallels with the practice followed by the ECB and national competent authorities in their supervisory role when assessing the similar requirement in the context of waivers over capital and liquidity requirements.

13. On [ ], the SRB requested [ ] to submit by [ ] a legal opinion "[ ]". Upon request of [ ], such deadline was postponed to [ ].

14. A legal opinion prepared by the internal legal department of [ ] and reviewed by an external law firm, dated [ ] and a description of the "[ ]" were then timely submitted by [ ] to the SRB. The legal opinion addressed thoroughly and from several different angles the reasons why, in [ ]'s opinion, there were no legal impediments to the transfer of funds or repayment of liabilities where no resolution actions are taken under applicable [ ] law.

15. On 25 November 2019, the SRB decided on an exceptional basis not to take a decision concerning the iMREL requirement for [ ] as well as for other entities of another group which had requested the iMREL waiver and for which there was no parallel capital waiver granted by the ECB. It noted that the legal opinion provided by [ ] concluded that there was no obstacle in the [ ] legislative framework to transfer funds between the parent entity and the subsidiary, even in the case of resolution action, and that the SRB, at that stage, had not identified obstacles to such transfer and had taken note of the analysis provided by the bank. The SRB noted, however, that a similar issue is also present in the context of the waiver from capital requirements and that the SRB did not know to what extent the ECB supported the bank's analysis on the absence of obstacles to the transfer of funds. It also noted that discussions with the ECB were ongoing on this matter. The SRB further pointed out that, although such a capital waiver is not a condition for the granting of an iMREL waiver, the absence of it would reduce the level of comfort for the SRB to waive MREL for the same entity. The SRB further noted that the amendments to the BRRD adopted in 2019 and a recent SRB consultation paper on the topic envisioned the use of guarantees for the next cycle of MREL determination. As a consequence, the MREL determination for [ ] for the 2019 resolution planning cycle did not include any iMREL target for [ ] nor was a waiver granted.

16. On [ ], in the context of the 2020 resolution planning cycle, the SRB presented to [ ] the 2020 MREL policy, including the iMREL policy during a meeting labelled "[ ]". In this context, the SRB asked [ ] to submit additional documents to assess a potential waiver for [ ], including (i) "[ ]", (ii) "[ ]" and (iii) confirmation that no material change in the group structure occurred since the last resolution planning cycle in order to accept the legal opinion provided for in the previous cycle.

17. On [ ], [ ] sent an email to the SRB noting that "[ ]", [ ] confirmed its "[ ]". [ ] noted that in its analysis [ ] should "[ ]" [i.e. the amendments to SRMR adopted in 2019] because "[ ]".

18. On [ ], the SRB sent an email to [ ] reverting on the MREL waiver request for [ ] and reiterated that "[ ]" should also include "[ ]". In the same email the SRB further specified that "[ ]". [ ] reacted the same day to the SRB email noting that "[ ]".

19. On [ ], [ ] informed the SRB that the group had decided "[ ]" combining [ ] and [ ] but this "[ ]" was not "[ ]"; [ ] also added in this respect that it still needed "[ ]".

20. On [ ], in the context of exchanges of view between the Appellant and the SRB concerning what kind of guarantees could be considered eligible for the purpose of the waiver, the Appellant sent to the SRB examples of guarantees endorsed by the ECB for capital waivers under Article 7(1) CRR, noting that also hard comfort letters were accepted.

21. On [ ], [ ] following "[ ]", sent its formal request for obtaining a MREL waiver for its subsidiary [ ] including a comfort letter "[ ]". Such comfort letter was addressed by [ ] to the

SRB and the National Resolution Authority, was dated [ ] and was signed by the CEO of [ ] and was as follows:

[ ].[2]

22. From [ ] onwards there were exchanges of emails between the SRB and [ ] concerning the content of the comfort letter and also exchanges of views between the National Resolution Authority and the SRB on the same issue. In particular, with an email of [ ], [ ] clarified that:

[ ]

23. However, on 17 December 2020 the SRB adopted a draft decision proposing the rejection of the application for the waiver because "the letter of comfort does not provide sufficient assurance to the Board that the resources necessary for loss absorption and/or recapitalisation (…) will be available when needed". The Board considered that the guarantee could be unilaterally revoked at any time and that it did not appear to confer an actionable right to the subsidiary.

24. With letter of [ ], the SRB informed [ ] of its right to be heard regarding the determination of MREL. With letter of [ ] [ ] submitted that the comfort letter "[ ]".

25. With email of [ ] the SRB informed [ ] of the following:

[ ].

26. With email of [ ] [ ] informed the SRB of the following:

[ ]

27. On 12 May 2021, the SRB adopted the Contested Decision, rejecting the request for the waiver of the iMREL for [ ].

28. The notice of appeal was submitted to the Appeal Panel on 30 June 2021. The Chair of the Appeal Panel appointed as Co-Rapporteurs the Members Professor Helen Louri-Dendrinou and Professor Marco Lamandini and the appeal was notified by the Secretariat of the Appeal Panel to the Board on 7 July 2021.

29. On 15 July 2021, the Board requested an extension of the initial deadline to respond which was granted by the Appeal Panel on 20 July 2021. The Appeal Panel also granted the Appellant an extension of the deadline for the Appellant to submit a reply to the Board's response of two weeks. By letter of 26 July 2021 the Appellant requested an extension of this deadline by four weeks. The Appeal Panel granted such extension.

30. On 18 August 2021, the Board submitted its response to the appeal.

31. On 29 September 2021, the Appellant submitted its reply to the Board's response.

[2] [ ]

32. On 6 October 2021, the Board asked an extension until 11 November 2021 of the deadline to submit a rejoinder to the Appellant's reply. The Appeal Panel granted such an extension until 29 October 2021.

33. On 11 October 2021, the Chair of the Appeal Panel wrote to the Parties to propose that a hearing be held in person on 23 November 2021. The Board asked however for a rescheduling of such a hearing, due to other concomitant duties, and the Appeal Panel and the Parties agreed that the hearing be held in Brussels, at the SRB premises, on 7 December 2021.

34. On 29 October 2021, the Board submitted its rejoinder.

35. On 3 November 2021, the Appeal Panel sent to the Parties a procedural order addressing a claim of the Board that the Appellant had breached its duty of confidentiality by submitting as evidence [ ]. The procedural order was as follows:

> The Appeal Panel wishes to clarify its position on the claim of inadmissibility of certain confidential documents which have been submitted by the Appellant well in advance of the hearing, so that both Parties can prepare for the hearing having a clear understanding of the documents which will be relied upon by the Appeal Panel in its final determination on the appeal. The content of this procedural order shall be also reproduced in the text of the final decision.
>
> * * *
>
> [ ]
>
> The Appeal Panel further notes that, under its Rules of Procedure, the decision can be published in a redacted version, where redactions are considered necessary weighting the legitimate interest of one party to keep certain information confidential against the need of transparency, which allows the public to understand the issues debated and the reasons of the decision. Therefore, in view of the concerns raised by the Board as to the publication of the full text of the decision, in order to ensure to both Parties their right to be heard on possible redaction of the final decision, the Appeal Panel shall communicate the full text of the final decision to both Parties, asking both Parties to: (i) inform the Appeal Panel within 3 working days from the date of notice of the decision of the redactions, if any, requested for the public version of the final decision and of the reasons justifying such requests; (ii) reply to the other Party's request within the following 2 working days. The Appeal Panel shall then adopt its decision on the redactions, if any, to be made on the public version of the final decision to be published on the SRB website.

36. On 12 November 2021, in preparation for the hearing, the Appeal Panel sent to the Parties some questions, asking the Parties to address those questions at the hearing. The communication of the Chair of the Appeal Panel to the Parties was as follows:

> In view of the forthcoming hearing of 7 December 2021, and in the interest of the procedure to facilitate both Parties in the preparation for the hearing, the Appeal Panel wishes to anticipate to the Parties some questions that the Parties are invited to answer at the hearing. These are not the only questions which shall be raised by the Appeal Panel during the hearing, but are questions that, in the Appeal Panel's view, may need some factual or legal verification in advance by the legal counsels of both Parties and the answers may result more accurate at the hearing if the Parties have time to check internally the factual or legal content.

TO BOTH PARTIES:

1. Could the Parties clarify what was the Group Resolution Strategy envisaged in the Resolution Plan, and how it affects both [ ] ([ ]) and [ ] ([ ])? Could the Parties clarify more specifically if the [ ] resolution plan envisioned some kind of financial support from [ ] to [ ]? Is the financial support envisaged in the resolution plan contemplated as a way to upstream [ ]'s losses or potential liabilities? Is the financial support and, if so, the upstreaming of losses, a precondition contemplated by the resolution authority to ensure an SPE effective resolution? If yes, are these envisioned measures made an undertaking of [ ] by the resolution plan?

2. Regarding the Extended Executive Sessions of [ ], and [ ], where the appellant voted in favour of the draft version and final version of the appealed decision: What was the understanding of both Parties as to the implications of an affirmative or negative vote?

3. On the legal standing and enforceability of the parent support, and subsequent developments: Could the Parties elaborate on the pre-existing "loss transfer mechanisms" of [ ] group? In particular, what kind of financial support arrangements, cash pooling, service agreements were in place in 2019-2021 within the [ ] group, and comprising [ ]? Did they signify a commitment from [ ] to prevent [ ] from being FOLTF (or can such a commitment of the parent company be derived by [ ] law provisions concerning groups of companies or banking groups)? Could the Parties elaborate on the new "loss transfer mechanism" which seems to be currently in place (and opened the way for the IRT proposal to grant the waiver)? Is it an intra-group arrangement? What is the difference between this and the previous arrangement?

TO THE APPELLANT:

4. Could the Appellant clarify if the comfort letter whose addressees were the Appellant and the SRB was to be considered fully enforceable under [ ] law by [ ] vis-à-vis [ ]? In case of positive answer please detail the basis for it under [ ] law.

TO THE BOARD:

5. Could the Board explain why, although iMREL and a prepositioned collateralised guarantee are not designed as enforceable by third Parties, and notably creditors of the bank, but are relevant in the relationship parent company and subsidiary only, it requested a first demand guarantee, which may have implications as to the possibility for third Parties to directly rely on it?

6. Could the Board explain why it considered that, although [ ] offered to release in due course and on time before the end of the year a guarantee compliant with its final determination, it did not consider the option to grant the waiver subject to the future release of such guarantee, stating the reasons underlying its stance as regards its ultimate option on the said waiver?

37. On 23 November 2021, the Appellant wrote to the Appeal Panel noting that in its rejoinder the Board informed that the SRB was going to grant [ ] waivers from iMREL across [ ] different banking groups in the 2020 resolution planning cycle without specifying any detail about such waivers and the factual and legal circumstances justifying the same. It asked therefore that the Board be compelled to provide evidence of such waivers or be directed by the Appeal Panel to give further information.

38. On 25 November 2021, the Appeal Panel informed the Parties that due to the worsening of the COVID-19 crisis an in-person hearing was not viable anymore and that therefore, on 7 December 2021, the scheduled hearing would have been held via videoconference.

39. On the same date, the Appeal Panel addressed the Appellant's request of 23 November 2021 and, considering on one hand the relevance of the allegation that the SRB is granting waivers across [ ] different banking groups in the 2020 RPC and on the other hand the duty of confidentiality, directed the Board, pursuant to Article 11(1) Rules of Procedure to provide to the Appellant further specific information concerning such alleged waivers, in a way which would preserve the right of defence of the Appellant and the protection of confidentiality, to the extent needed, by 30 November 2021.

40. On 30 November 2021, the Board sent a communication to the Appeal Panel as follows:

> I refer to the above-mentioned Procedural Order whereby the Chair of the Appeal Panel directs the SRB, pursuant to Article 11(1) of the Appeal Panel's Rules of Procedure, to provide further specific information on the waivers granted by the SRB in the 2020 Resolution Planning Cycle (RPC).
>
> I hereby inform you that in the 2020 RPC, the SRB is granting waivers to subsidiaries of [ ] banking groups, through [ ] SRB decisions. The total of waivers awarded is [ ] because in the case of one group, two subsidiaries are waived.
>
> I refer to the table below which includes references to the relevant decisions of the SRB.
>
> SRB decisions in the 2020 RPC in which waiver(s) granted

Decision numbers	Date
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]
[ ]	[ ]

41. On 3 December 2021, the Appellant wrote to the Appeal Panel to express its concern about the SRB's response to the Appeal Panel's procedural order and asked more information about the waiver allegedly granted by the Board, noting that otherwise its right of defence would have been severely hampered.

42. On 6 December 2021, the Appeal Panel wrote to the Parties noting that it considered insufficient for the proper understanding of the waivers granted the extremely laconic information provided by the Board on 30 November 2021 and invited the Board to provide before or at the hearing more detailed information as to such waivers in accordance with the directions given by the Appeal Panel on 25 November 2021. The Appeal Panel further informed the Board that, failing such information, it would consider, to the effect of the deliberation of the case, that no valid evidence had been given by the Board to support its claim that some other waivers had been meanwhile granted.

43. On the same day, the Board responded in writing insisting that it could not provide further information on the waiver granted because "the SRB is bound by the obligation to protect the confidentiality of business secrets of the financial institutions falling within its remits".

44. At the hearing both Parties appeared and presented oral arguments and the Appeal Panel asked questions to both Parties for the clarification of facts relevant for the just determination of the appeal. The Parties answered to the questions raised in written form on 12 November 2021 by the Appeal Panel (the Board in a more structured form at the end of the initial pleadings; the Appellant in the frame of its initial pleadings) and expanded on the points of facts and of law which, in their views, were supporting their respective positions. The Parties also answered additional questions raised by the Appeal Panel during the hearing.

45. At the end of the hearing, the Chair of the Appeal Panel informed the Parties that with a subsequent communication the Parties would have been informed on the next step of the procedure.

46. On 15 December 2021, the Appeal Panel sent to the Parties a procedural order as follows:

> Further to the hearing of 7 December 2021, the Appeal Panel wishes to thank both Parties for their helpful discussion of the case.
>
> Due to the importance and complexity of the case, both parties are now granted the possibility, if they so wish, to submit to the Secretariat of the Appeal Panel by the close of business of 22 December 2021 the text of their pleadings at the hearing (speaking notes, as actually used in the 7 December 2021 hearing).
>
> Moreover, as a necessary clarification over certain relevant aspects of the case and of the Parties position, which the Appeal Panel considers important for the just determination of the appeal, the Parties are with this Procedural Order directed pursuant to Article 11 of the Rules of Procedure to kindly answer in writing (maximum 10 pages) by the close of business of 14 January 2022 the following questions:
>
> 1. Could both Parties please specify, with reference to [ ] law or any other legal provision which the Parties may deem applicable to the comfort letter issued by [ ] ([ ]) on [ ], what are the provisions under applicable law and/or the settled interpretation of the relevant provisions by the competent national courts which may justify or contradict the conclusion that a comfort letter issued by a parent company as the one issued by [ ] on [ ] in the instant case could be revoked without any condition and at any time? The Panel will appreciate if the references made are precise, and refer to specific court rulings and/or cite the specific relevant text.
>
> 2. Could both Parties please specify, with reference to [ ] law or any other legal provision which the Parties may deem applicable to the comfort letter issued by [ ] on [ ], whether or not, under applicable law and/or the settled interpretation of the relevant provisions by the competent national courts, the comfort letter issued by [ ] on 26 November 2020 in the instant case did confer an actionable/enforceable right on the subsidiary vis-à-vis the parent company? The Panel will appreciate if the Parties justify the binding nature and enforceability of the comfort letter on specific grounds (e.g. obligation of result, (ir)revocability, going against one's own conduct - good faith) that help the Panel assess the degree of certainty of said enforceability and binding nature.
>
> 3. Could both Parties please specify, with reference to the procedure for the adoption of the MREL decision by the Board in the instant case:

a) whether the decision had to be necessarily adopted on 12 May 2021 or could be postponed to a subsequent meeting of the Board in view of a possible agreement with [ ] on the final text of the letter of comfort issued by [ ]?

b) assuming that in the ongoing cycle a decision of waiver is adopted following the IRT positive assessment, what would be the implications of such new decision in respect of the appealed decision and the ongoing appeal of such decision?

4. Could both Parties please specify, detailing the legal provisions they deem relevant for such understanding and the grounds for the interpretation of the regime at stake, whether in the context of a request for a iMREL waiver, the Board could in principle issue also a decision granting the iMREL waiver subject to one or more conditions precedent provided that such conditions ensure that the SRB expectations as to the full compliance with the legal requirements for such a waiver are fully met by the resolution entity and its subsidiary by a certain deadline?

Once received the written answers to these questions, the Appeal Panel shall assess if the appeal can be considered lodged for the purpose of Article 20 of the Rules of Procedure. The Parties shall be timely informed on the next steps of the procedure.

47. With email of 17 December 2021, the Board objected to the possibility for both Parties to submit their speaking notes at the hearing, raising the concern that this may offer the opportunity to introduce new arguments. The Appeal Panel responded to this objection with a communication to both Parties on 21 December 2021, drawing their attention to the specific requirement in the procedural order of 15 December 2021 that the speaking note submitted by the Parties after the hearing should be identical in content to the pleadings actually made at the hearing. On 23 December 2021 the Appellant submitted the speaking notes of its pleadings at the hearing. The Board preferred not to avail itself of the same possibility.

48. On 14 January 2022, both Parties submitted their written answers to the post hearing questions posed by the Appeal Panel with the procedural order of 15 December 2021.

49. On 19 January 2022, 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

50. The main arguments of the Parties are briefly summarised below. 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

51. The Appellant argues, in the first place, that, with the Contested Decision, the Board has denied the requested waiver, because it has imposed additional conditions for the granting of a waiver other than those set out in the SRMR. In the Appellant's view, this was done by the Board a first time regarding the conditions originally set out in Article 12(10) SRMR, which required that only the conditions listed in letters (a), (b) and (c) of Article 45(12) of BRRD in

its original text, without more, had to be met. This was also done by the Board, a second time, after the SRMR was amended in 2019, regarding the conditions currently set out in Article 12h(1) and 12h(2) SRMR as amended. The Appellant notes, in this respect, that although current Article 12h requires that there must not be current or foreseen practical or legal impediments to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary for which the waiver is sought, the SRB introduced a new condition in its policy for assessment of iMREL waivers, requiring credit institutions to provide "evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary in an amount that is equal to, at least, the amount of an hypothetical MREL requirement which would had been set if the subsidiary were not waived". The Appellant further argues that this requirement had been presented initially as a separate condition and afterward as part of the condition on the absence of material practical or legal impediments to the prompt transfer of funds under Article 12h(2)(c)(1) SRMR as amended.

52. The Appellant claims that, in so doing, the SRB has made virtually impossible for credit institutions pertaining to a group to obtain the waiver from the iMREL and that in this way the SRB deprived the provisions that allow a waiver to be granted of their practical effect. The Appellant notes that, to its knowledge, the only cases in which such a waiver has been granted under Article 12h SRMR are very specific cases where an unlimited liability of the parent vis-à-vis obligations of its subsidiaries exist due to some specific legal forms of the subsidiary.

53. With its first plea, therefore, the Appellant claims that the SRB erred in law and exceeded its powers by disregarding the objectives pursued by the provisions it sought to apply and by depriving them of any practical legal effect by making the waiver virtually impossible to obtain.

54. With its second plea, the Appellant argues that the Board has violated the principle of legal certainty as a result of the SRB's lack of clarity regarding the conditions that need to be fulfilled to benefit from the waiver and the unforeseeable and recurring changes in those conditions. The uncertain context originated by the SRB behaviour did, in the Appellant's view, make it impossible for [ ], to successfully apply for a waiver. This was so because, due to the SRB's behaviour, the conditions for the granting of the waiver "were subject to constant instability and were neither clear and precise".

55. With its third plea, the Appellant argues that the Board also infringed the principle of good administration set out in Article 41 of the Charter, because such principle entails the duty of the European institutions and agencies to examine carefully and impartially all the relevant aspects of the individual case. In the Appellant's view, the Board did not substantiate sufficiently its assessment and its request of a first demand guarantee "does not accurately reflect the assessment of facts and policy developments" and is unlawful.

56. The Appellant asks therefore the Appeal Panel to remit the case to the Board.

57. The Appellant further requests that the decision of the Appeal Panel be published in accordance with Article 24 of the Rules of Procedure of the Appeal Panel.

58. In its reply to the Board's response, the Appellant maintains that all three pleas in law are well founded and maintains all its initial requests and asks the Appeal Panel to also reject the Board's request regarding the admissibility of the evidence submitted by the Appellant consisting of confidential documents as well as the redaction of the public version of the final decision.

Board

59. The Board argues that the appeal is to be rejected as unfounded.

60. With regard to the first plea, the Board argues that, far from disregarding the objectives of the provisions of the SRMR relating to the iMREL waivers, the SRB had careful regard both to their specific objectives and to the broader goals of the SRMR. In particular, the SRB argues that the [ ] application for a waiver failed on the statutory criteria. Thus, the Board did not even reach the point where it would have been permitted by EU legislation to award a waiver to [ ]. Moreover, the Board argues that the fact that it has awarded waivers to other banks on the basis of the same framework applied in the instant case, demonstrates that the Appellant's claim that the SRB has made impossible to obtain a waiver is without foundation.

61. With regard to the second plea, the Board argues that the Appellant's argument conflates the question whether the SRB has lawfully applied certain provisions of the SRMR (i.e., Article 12h(1)(c) SRMR) with the question whether the SRB has infringed the principle of legal certainty, which concerns EU rules in general. In this regard the SRB submits that the Contested Decision involves the application of EU legislation to a particular case and, therefore, it cannot be considered to breach the principle of legal certainty, as interpreted by the case-law of the Court of Justice of the European Union. In addition, the SRB argues that no situation which could give rise to a legitimate expectation has been created with regard to the present case.

62. With regard to the third plea, the SRB argues that the Contested Decision has fully respected the right to be heard and the obligation to give reasons. In particular, the SRB argues that the statement of reasons of the Contested Decision in relation to the SRB's determination not to waive the application of iMREL under Article 12g of the SRMR in respect of [ ] is sufficiently clear and precise to fully fulfil the obligation to state reasons as prescribed by Article 296 TFEU and Article 41(2)(c) of the Charter.

63. [ ].

64. In its rejoinder the Board has reiterated its position, arguing that, as a general observation, the contested legal act in the present appeal is the Contested Decision, not the SRB's policy on MREL and that, [ ], this evolution neither affected the Contested Decision nor created any prejudice for [ ]. On the first plea, the Board argues that the Appellant's argument that the

Board sought to legislate 'via the back door' is unfounded and does not consider the margin of appreciation granted to the Board in the assessment of the third statutory criterion under Article 12h(1)(c) SRMR. On the second plea, the Board argues that none of the arguments raised by the Appellant with its reply to the Board's response may invalidate the position of the Board as presented in its response, and further that the Appellant for the first time in its reply claims that the Board infringed the principle of protection of legitimate expectations and hence this new claim should be considered inadmissible under Article 16(3) of the Rules of Procedure of the Appeal Panel (or, in the alternative, should be rejected as unfounded). As to the third plea, the Board argues that the Appellant for the first time in its reply claims that the Board did not conduct the right to be heard process with an actual diligence and hence this argument should be considered inadmissible under Article 16(3) of the Rules of the Procedure of the Appeal Panel (or, in the alternative, should be rejected as unfounded). Finally, the Board notes that the practical remedy sought by the Appellant is already underway in the 2021 resolution planning cycle and, based on the new loss transfer mechanism provided, the internal resolution team now recommends that [ ] should be given a waiver (though the ultimate decision rests with the Board). [ ]. However, [ ] has no practical need for the requested waiver because: a) as of 30 June 2021, it had a surplus above the iMREL requirement that it would have to meet absent a waiver by 1 January 2022; and b) it is expected to merge with its parent in 2023, before the final MREL deadlines apply in 2024, removing it from the scope of iMREL requirements entirely.

Findings of the Appeal Panel

65. The Parties have filed written submissions on their diverging views on the merit of the appeal, and have made oral representations at the hearing. The Parties have also answered, both at the hearing and in writing afterwards, several questions raised by the Appeal Panel to better clarify certain aspects of detail of the present appeal. The Appeal Panel acknowledges therefore, in the first place, that the Parties and their legal counsels have been very helpful in enlightening the complex issues debated in this appeal. All the Parties' contentions have been taken into account by the Appeal Panel, whether expressly referred to herein or not. The Appeal Panel also wishes to acknowledge the high quality of the submissions of both Parties and of their pleadings at the hearing and that this has greatly contributed to a better understanding of this complex case by the Appeal Panel.

66. The Appeal Panel recalls that the Contested Decision was based on Article 12h of SRMR as amended in 2019, and that the waiver requested by [ ] was denied because the Board considered that, absent a guarantee of the resolution entity complying with the specific requirements specified by the Board to [ ] with the communication of 16 March 2021 referred to in paragraph 25 above, the condition set out in Article 12h(1)(c) was not met. In other words, lacking such guarantee in the form prescribed by the Board, the SRB concluded that it could not be satisfied that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution

entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity".

(a) The first plea of the Appellant.

67. The Appeal Panel notes, as a preliminary observation on the merit concerning the first plea in law of the Appellant, that a condition like the one set out in letter c) of Article 12h(1) of the SRMR is also present, but in a different context and with regard to possible derogations from the application of prudential requirements on an individual basis, in Regulation (EU) No 575/2013 ("CRR") as amended in 2019 in Article 7(1) CRR. Article 7(1) CRR reads as follows:

> 1. Competent authorities may waive the application of Article 6(1) to any subsidiary of an institution, where both the subsidiary and the institution are subject to authorisation and supervision by the Member State concerned, and the subsidiary is included in the supervision on a consolidated basis of the institution which is the parent undertaking, and all of the following conditions are satisfied, in order to ensure that own funds are distributed adequately between the parent undertaking and the subsidiary:
>
> (a) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking;
>
> (b) either the parent undertaking satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the permission of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of negligible interest;
>
> (c) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;
>
> (d) the parent undertaking holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary.

68. There is therefore a textual difference between Article 12h SRMR and Article 7 CRR on the need of a parent guarantee as a condition for the waiver, because such need is expressly set out only in letter (b) of Article 7 CRR (as an alternative to the situation where the risks of the subsidiary are of negligible interest), and as a positive condition which adds to the negative condition set out in letter (a) of the same Article 7, which requires that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking".

69. The same textual difference exists between the original Article 45(12) BRRD and now Article 45(f)(3) and 45(f)(4) as amended in 2019 and Article 12h SRMR, because also Article 45(12) and now Article 45(f)(3) and 45(f)(4) BRRD set out expressly, as a condition for the waiver, not only the negative condition of "no impediments" is met (Article 45(12)(d) BRRD; Article 45f(3)(c) and 45f(4)(c)), but also that the positive condition of a suitable parent company guarantee is in place (Article 45(12)(e) and now 45f(3)(d) and 45f(4)(d) BRRD.

70. The Appeal Panel considers, therefore, that, due to the difference in wording between Article 12h SRMR and Articles 7 CRR, 45(12) and now 45f(3) and (4) BRRD, a first interpretative question that needs to be addressed for the determination of this appeal is whether, according to a literal, contextual and teleological interpretation, one can construe the negative condition (notably the absence of "current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities") set out in Article 12h, letter c) as capable of implying also a positive condition consisting in the issuance of a guarantee by the resolution entity in a text approved by the SRB.

71. Differently said, it must be clarified if, despite the silence of Article 12h on this, in the words used by Article 7, letter b) CRR or Article 45(12)(e) and now Article 45f(3)(d) and 45f(4)(d) BRRD, the resolution entity is nonetheless bound to "declare, with the permission of the competent authority, that it guarantees the commitments entered into by the subsidiary" in order to meet the condition set out in Article 12h(1)(c). With its first plea the Appellant considers, as noted above, that the SRB introduced the positive requirement of an express guarantee of the parent company as a new condition in its policy for assessment of iMREL waivers, requiring notably credit institutions to provide "evidence that the resolution entity or parent undertaking has guaranteed the obligations of the subsidiary in an amount that is equal to, at least, the amount of an hypothetical MREL requirement which would had been set if the subsidiary were not waived". The Appellant further argues that this requirement had been presented initially as a separate condition and afterward as part of the condition on the absence of material practical or legal impediments to the prompt transfer of funds under Article 12h(2)(c)(1) SRMR as amended. The Appellant claims that, in so doing, the SRB has (i) [ ] on a general basis the list of requirements set out in Article 12f, thereby exercising *de facto* regulatory powers, (ii) made virtually impossible for credit institutions pertaining to a group to obtain the waiver from the iMREL (in this way depriving the SRMR provisions allowing for a waiver of their practical effect) and therefore (iii) erred in law and exceeded its powers.

72. The Appeal Panel acknowledges that, from a literal and contextual perspective Article 7 CRR and 45(12), now Article 45f(3) and 45f(4) BRRD contain two distinct conditions: one negative and one positive. Conversely, the text of Article 12h SRMR does not expressly mention the positive condition of the necessary release of a guarantee by the resolution entity and expressly refers only to the negative condition of the absence of impediments to the prompt transfer or funds or repayment of liabilities. However, in the Contested Decision, the negative condition is considered as not met because the SRB was not satisfied with the comfort letter proposed by [ ]. Thus, the Contested Decision considered lacking a document that corresponds, in the resolution context, to the positive condition required in the prudential context by Article 7 letter (b) CRR and, in the resolution context, by Article 45(12) and now Article 45f(3)(d) and 45f(4)(d) BRRD.

73. The Appeal Panel is therefore called to determine in the present appeal, as a response to the first plea raised by the Appellant, whether the Board acted beyond its mandate and/or committed an error of law in finding that Article 12h SRMR allows the Board to require, as a

condition for the granting of a waiver, the issuance by the parent company of a guarantee of the commitments of the subsidiary.

74. The Appeal Panel notes that, in accordance with settled case law, the interpretation and application of Article 12h SRMR cannot be limited to its textual interpretation but need also to take account of the background of the relevant provision and of the objectives it pursues. A teleological interpretation is particularly relevant regarding EU provisions pertaining to banks' prudential supervision and resolution, as held by the CJEU with its judgment of 2 October 2019, Crédit Mutuel Arkea v ECB, C-152/18, ECLI:EU:C:2019:810 at paragraph 53.

75. The Appeal Panel also notes that Article 12h(1) expressly provides that "the Board may waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State", where the conditions set out in the same Article are met. This means, in the Appeal Panel's view, that, once the Board has ascertained that all conditions are met, the Board has still a margin of discretion in granting or not granting the waiver, as made clear by the word "may" used by the relevant provision. According to the case-law of the General Court of the European Union, when a prudential rule confers to the competent authority the power to grant derogations from the applicable prudential regime when certain conditions are met, this means that the authority is given a discretion to refuse such derogations "even when the conditions set out in that provision are met" (see to this effect judgment of 13 July 2018, La Banque Postale v European Central Bank, T-733/16, ECLI:EU:T:2018:477, at paragraph 58; see also judgment of 13 July 2018, BPCE v European Central Bank, T-745/16, ECLI:EU:T:2018:476 and judgment of 13 July 2018, Crédit Agricole v European Central Bank, T-758/16, ECLI:EU:T:2018: 472; compare also judgment of 14 April 2021, Crédit Lyonnais, T-504/19, ECLI:EU:T:2021:185).

76. However, such discretion is not the one applying in the instant case. As correctly noted by the Board in its response and further discussed (and essentially agreed) by the Parties at the hearing, also responding to a specific question of the Appeal Panel, the contested issue is not whether the Board exercised correctly such discretion, once all conditions were met, but instead whether the Board erred in law in considering that one of those conditions was not met. The Board's position is that the negative condition pursuant to Article 12h(1)(c) was not met because the SRB was not satisfied with the content of the comfort letter offered by [ ]. Thus, the matter is whether the Board acted in excess of its powers by imposing such a positive condition and whether the imposition of such a condition was in violation of the principles of legal certainty, legitimate expectations and good administration.

77. In other words, the Appeal Panel finds that Article 12h requires a two-pronged test from the resolution authority in order to finally determine the response to the request for a waiver: in the first place, an assessment that the conditions set out in Article 12h are met; if so, in the second place, a more discretionary assessment that, according to the informed judgment of the authority and taking into consideration all factual elements of the case, such a waiver may and in the end will be granted.

78. This has important implications for the review of decisions such as the one under appeal. The authority is indeed bound by the conditions set forth in Article 12h SRMR, not only in the sense that it is not entitled to grant a waiver if those conditions are not met, but also in the sense that, if the conditions are met, it is then obliged to acknowledge that they are met to then make an ulterior assessment on whether it considers technically sound and appropriate to grant the requested waiver. In the instant case, however, the Parties have diverging views on whether the conditions were actually met, and the Parties and the Appeal Panel all agree that the Board never reached the stage of deciding whether to grant the waiver, based upon its discretionary and technically informed assessment, even when all conditions set out in Article 12h are met, but rather concluded that the condition under Article 12h(1)(c) SRMR was not met.

79. The Appeal Panel further finds that the assessment whether the conditions of Article 12h are met is not an exercise of discretion in the proper sense, but rather a verification that the factual and legal requirements of Article 12h(1)(c) are satisfied. Nonetheless, due to the relative open-ended nature of the requirements set out in letter (c), the assessment is not automatic either, and it implies, as also the Board acknowledged at the hearing, a complex, factual and legal assessment on whether or not "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity". This assessment of the occurrence or not occurrence of condition (c) entails, in turn, for the Board a margin of appreciation, which, in the Appeal Panel's view is, however, more constrained and limited than the one granted in the second stage of the assessment, where the Board is literally given the discretionary power not to grant the waiver, even if all conditions are met.

80. The assessment on whether or not the conditions set out in Article 12h are met must be also fully respectful of general principles of EU law.

81. As to these principles, the Appeal Panel recalls, as a matter of background, that with regard, first, to the principle of legal certainty, according to the Court's settled case-law, 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 for 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 (see judgment of 11 July 2019, Agrenergy and Fusignano Due, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraphs 29 and 30 and the case-law cited). 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 (judgment of 21 June 2007, ROM-projecten, C-158/06, EU:C:2007:370, paragraph 26 and the case-law cited). More recently the CJEU was adamant

in reiterating those principles also in the context of bank resolution in its judgment of 29 April 2021, Banco de Portugal, Fundo de Resolução, Novo Banco SA, Sucursal en España v VR, C-504/19, ECLI:EU:C:2021:335.

82. As to the principle of legitimate expectations, the Appeal Panel recalls that in accordance with settled case-law (see, in a resolution context, judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570 and in the supervisory context judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 357-361), the right to rely on that principle presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an institution, body or agency of the European Union, by giving that person precise assurances, has led him to entertain well-founded expectations (judgments of 16 December 2010, Kahla Thüringen Porzellan v Commission, C-537/08 P, EU:C:2010:769, paragraph 63, and of 13 June 2013, HGA and Others v Commission, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132).

83. As to the principle of good administration, Article 41 of the Charter sets out that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions". A component of such fundamental right may therefore be considered the duty to state reasons, and also the respect of the proportionality principle.

84. The Contested Decision substantiated the Board's decision not to waive the application of MREL under Article 12g SRMR, because the condition set out in Article 12h(1)(c) was not met in points 12-19 of its section IIa.

85. It is apparent from the Contested Decision that, in the first place and with specific reference to the first plea in law of the Appellant, the Board did not address expressly, in the Contested Decision, the question whether a parent company's guarantee is necessary to (in the words of the Contested Decision, at paragraph 15) "ensure (in the absence of prepositioned MREL at the level of the Banking Union Subsidiary 1) that there is no current or foreseen material, practical or legal impediment to the prompt transfer of own funds of repayment of liabilities by the resolution entity to Banking Union Subsidiary 1 in circumstances where the latter has been judged no longer viable in accordance with Article 21(3) SSMR, in particular where resolution action is taken in respect of the resolution entity". In so doing, the Board took only an implied position as to the legal issue pertaining to the relationship existing between Article 45(12), now Article 45f(3) and 45f(4) BRRD and Article 12h SSMR because, without addressing expressly the issue, it concluded that the negative condition of the "no impediment to prompt transfer of funds" within the group could be interpreted as requiring also the

positive condition of the grant of a parent company guarantee, although (i) the negative and positive conditions are two separate conditions in Article 45(12), now Article 45f(3) and 45f(4) BRRD as well as in Article 7 CRR, and (ii) Article 12h SRMR expressly provides for the negative condition, but not for the positive one.

86. From this textual difference the Appellant draws important inferences. It considers, making also reference to a document of the European Commission, that this difference in wording was intended by the legislators to differentiate between both regimes for waivers, by excluding some additional requirements from consideration by the resolution authority. Thus, it concludes that the SRB, in interpreting the negative condition as if it also included the positive condition of the guarantee which is absent in the express text of Article 12h, is imposing in reality a general requirement applicable to all requests for waivers. Such a requirement is beyond those set out in the applicable legislation and in the Appellant's view it is imposed by the SRB to all credit institutions [ ]. As noted above, in so doing, in the Appellant's view, the SRB is not only erring in law, but also trespassing its mandate, entering into the legislative or regulatory territory pertaining to European institutions (and precluded to a European agency).

87. The Board, being asked at the hearing by the Appeal Panel to comment on the legislative history of the relevant provision and to discuss the possible rationale of the difference in wording between the relevant provisions of the BRRD and SRMR on this specific point, could not explain why there is in fact such a textual difference and referred to the [ ] on any questions of policy. At the same time, however, the Board also produced with its reply of 29 October 2021 an email of the [ ] of 15 October 2020 which, in its view, supports the SRB conclusion that the SRB may in practice need guarantees to ensure prompt transfer under letter (c) of Article 12h(1) SRMR, despite the textual differences on waiver conditions between the SRMR and the BRRD. The Board maintains therefore that, no matter the difference in wording, its request that, in the context of a group resolution plan designed as a single point of entry resolution, a robust and effective (in a gone concern scenario) parent guarantee be in place, if a waiver from the iMREL requirement is to be granted, is warranted under the condition (c) set out by Article 12h SRMR and thus as a prerequisite for the positive assessment that there are no impediments to the transfer of funds in the group as a condition for the grant of the waiver.

88. Responding to a question raised by the Appeal Panel, the Board further clarified that the resolution plan in place at the time of the Contested Decision did not envisage any other mechanisms for the transfer of funds from the parent company (and resolution entity) to [ ] other than the prepositioned iMREL. The Board acknowledged that, in the event a waiver is granted, the resolution plan should also be amended, so that both the MREL decision and the resolution plan, albeit clearly being two separate and different decisions, develop hand in hand. It further added, however, that the resolution plan, in the Board's view, does not create binding obligations upon the resolution entity and its group, but rather consists merely of the plan adopted by the resolution authority to tackle resolution in the unlikely but still possible

event of a resolution. For this reason, the Board considers essential that the losses and funds' transfer mechanisms put in place by the group to benefit from a waiver are not only legally binding, but also robust and effective in a gone concern scenario in the prudent judgment of the competent resolution authority.

89. The Appeal Panel considers quite unfortunate that the requirements for the grant of a waiver set out in Article 45(12), and now Article 45f(3) and 45f(4) and Article 12h SRMR are not aligned and that the legislative history, to the extent that it could be verified through public available information by the Appeal Panel, does not seem to entirely illuminate on the reasons why there is such a textual difference.

90. Despite the ambiguity resulting from this difference in wording, the Appeal Panel is however persuaded that the objective of the condition set out under letter c) of Article 12h is to ensure that, in the resolution context (and thus in a "gone" scenario of the banking group), the group resolution action is not prevented, and there is a positive assessment that it can be rolled-out smoothly along the lines set out in the resolution plan (unless adjustments are needed at the point of non-viability for unforeseen changes in relevant circumstances), without undue legal or practical impediments in the up-streaming of losses by the subsidiary to the resolution entity and in the down-streaming of funds by the resolution entity to the subsidiary. More specifically, the provision aims at ensuring that the choice to waive the iMREL requirement is neutral as to the resolvability of the group, because other arrangements are in place, within the group, which can act as functional substitutes of the iMREL with equivalent effects as the conversion or write down of iMREL at the level of the subsidiary. In principle, therefore, also a guarantee of the parent company may serve to this scope and may be one of the arrangements available as an alternative to the prepositioning of iMREL, having equivalent effects.

91. The Appeal Panel finds therefore that, having regard to the objectives and finality of Article 12h(c) SRMR, the textual difference between Article 12h and Article 45(12) now Article 45f(3) and 45f(4) BRRD cannot be construed as precluding the SRB from requiring under Article 12h(c) the parent company to guarantee the commitments entered into by its subsidiary on the assumption that *ubi lex voluit, dixit, ubi non dixit, noluit.* Instead, the Appeal Panel concludes that the text of Article 12h SRMR suggests that the SRB is given, in the SRMR context, a margin of appreciation in considering whether or not such a guarantee is necessary in order to positively assess the negative condition of the "no impediment" under letter c) of said Article 12h. In other words, in the Appeal Panel's view, the Board is not obliged to require such a guarantee as a precondition for the waiver, as it would be if the positive condition set out in Article 45(12) and now 45f(3) and 45f(4) had been transposed also in Article 12h SRMR, but has a margin of appreciation to subject its positive assessment that no practical or legal impediments are in place also to the fact that the parent company issues such a guarantee This means that, whereas under the BRRD the verification of the meeting of the additional positive condition of the guarantee is mandatary for the competent resolution authority, and it must be done before exercising its discretion in granting or not granting the iMREL waiver, in the SRMR the guarantee is not mandated by law, but may be still required by the competent

authority in the exercise of its assessment on whether or not there are impediments to the up-streaming or down-streaming of funds in the resolution context.

92. In the Contested Decision the Board specifies, in recital (2), that it considered, together with the [ ] national resolution authorities which are also part of the resolution college, that "a-single-point-of-entry approach is an appropriate point of entry strategy for [ ] and its subsidiaries". The Contested Decision further specifies, in Section IIa, Sub-Section 1, paragraph 1, that the resolution strategy implies that [ ] "has sufficient *ex ante* loss-absorbing capacity to satisfy its minimum own funds requirements necessary to maintain its banking licence after write down and conversion at the point of non-viability". This means that, according to the group resolution plan, although the resolution entity is the parent company [ ], resolution action should also ensure loss absorption and recapitalisation at the point of non-viability of [ ], so that, should the bank become failing or likely to fail, the viability of [ ] can be promptly restored.

93. Unless a waiver is granted, the iMREL calculated in the Contested Decision is the legal requirement that makes feasible and credible the achievement of such result.

94. The Appeal Panel sides therefore with the Board that, if the iMREL requirement is to be waived, there must be in place sufficient arrangements which could ensure that, should [ ] be failing or likely to fail, the resolution strategy of restoring its viability by absorbing its losses and recapitalising it is promptly available and the resolution entity (which represents the single-point-of-entry for the group resolution plan) can be obliged to take action functionally equivalent to the writing down or conversion of the prepositioned iMREL which would be held by the same (lacking a waiver). Therefore, the Appeal Panel finds that, although it is certainly unfortunate that Article 12h SRMR is ambiguous when read in conjunction with Article 45f BRRD, the Board did not err in law in the application of Article 12h nor did it exceed its powers by concluding that it may require [ ] to issue a parent company guarantee as a means to ensure that no practical or legal impediments are in place pursuant to letter c) of Article 12h.

95. Furthermore, as mentioned above, apart from the discretion which is given to grant or not to grant a waiver, the Board also enjoys a margin of technical appreciation when assessing whether the impediments mentioned in letter c) of Article 12h SRMR exist. Thus, the Appeal Panel also finds that the Board's conclusion that, lacking the prepositioning of iMREL and failing a [ ] guarantee, there may be a risk that, at the point-of-non-viability of [ ], [ ] and its directors may decide not to down-stream and absorb losses nor recapitalise the subsidiary but rather abandon it to insolvency or liquidation for legal or economic reasons does not show a manifest error in assessment.

96. A teleological interpretation of Article 12h SRMR shows, therefore, in the Appeal Panel's view, that it is legitimate to conclude that, in the absence of a formal commitment, including a suitable guarantee, of the parent company and resolution entity, there may be practical or legal impediments to the prompt transfer of own funds or repayment of liabilities of the

subsidiary failing or likely to fail and that, therefore, in the absence of such formal commitments or guarantees the group resolution strategy may be impaired, to the extent that prepositioned iMREL is not replaced by arrangements functionally equivalent.

97. The Appeal Panel further notes that the Board clarified at the hearing that the iMREL decision and the resolution plan decision go hand in hand. Thus, if a waiver is granted and the resolution plan is amended accordingly, the amended resolution plan would provide that, as part of the resolution strategy, the resolution entity should promptly transfer funds to the subsidiary for which the iMREL requirement was waived. However, even then, such group resolution plan may not be sufficient to ensure that the resolution entity and the subsidiary and their directors are under a legal obligation, and a fiduciary duty, to timely and duly perform such an obligation to transfer funds, where necessary. The Board noted at the hearing, in this regard, that its understanding is that the resolution plan does not create a legal obligation for the resolution entity and its subsidiaries to comply with said plan. The resolution plan as such cannot be therefore the legal source of a positive duty for the parent company and its directors to ensure the performance of the resolution plan, including the transfer of funds necessary to that purpose.

98. Thus, the first plea in law of the Appellant cannot be upheld. It results from the foregoing that with the Contested Decision the Board did not err in law in the interpretation and application of Article 12h nor committed a manifest error in assessment in the exercise of the margin of appreciation granted to it by the open-texture provision of Article 12h, letter c).

99. Furthermore, the Appeal Panel notes that this appeal relates to the Contested Decision, which is an individual decision concerning [ ] and its group, whereas it does not refer to the SRB's iMREL policy [ ], which, as such, are outside the scope of this appeal and, in any event, beyond the remit of the Appeal Panel. The Appellant's claims concerning the iMREL policy are therefore inadmissible. The Appeal Panel further notes in this respect that, in its view, the Board's interpretation and application of Article 12h, [ ], remains an exercise of interpretation and application of the applicable legal provision in the specific case and does not morph into a *de facto* exercise of regulatory powers. The Appeal Panel agrees with the Appellant, as a general statement, that European non legislative institutions or agencies cannot, by interpretation, claim tasks reserved to the EU co-legislators. This applies even to courts, as the CJEU held in its judgment of 23 March 2000, Sagpo, Joined Cases C-310/98 and C-406/98, ECLI:EU:C:2000:154, where the Court concluded that "the Court is not entitled to assume the role of the Community legislature and interpret a provision in a manner contrary to its express wording. It is for the Commission to submit proposals for appropriate legislative amendments to that end". However, in the case at hand, for the reasons stated above, the Appeal Panel finds that the interpretation and application of Article 12h made by the Board is not contrary to the wording of Article 12h, letter c) and is, instead, compatible with the ambiguous wording of the provision and in line with the contextual and teleological interpretation of the same.

100. Finally, the Appeal Panel also notes that, contrary to the Appellant's claim, this interpretation and application of Article 12h does not make it virtually impossible for credit institutions pertaining to a group to obtain the waiver from iMREL (in this way depriving the SRMR provisions allowing for a waiver of their practical effect), as it is also shown by the fact that it is currently pending a proposal to the Supervisory Board of the IRT, preliminarily endorsed by the Board, to grant such a waiver to [ ] in the current cycle. In its answer to the questions of the Appeal Panel of 14 January 2022, the Board acknowledged indeed that "[ ] submitted on [ ] a revised version of the guarantee" (which was annexed to such answer to the Appeal Panel) and "following such submission, on [ ] the Board endorsed, on a preliminary basis, the award of an iMREL waiver to [ ] in the First Extended Executive Session", which is scheduled from [ ].

(b) The second plea in law

101. With its second plea, the Appellant argues that the Board violated the principle of legal certainty, because the SRB's lack of clarity regarding the conditions that need to be fulfilled to benefit from the exemption and the unforeseeable and recurring changes of these conditions made it impossible for [ ], in such an uncertain context as the one originated by the SRB behaviour, to successfully apply for a waiver. This was so because, due to the SRB behaviour, the conditions for the granting of the waiver "were subject to constant instability and were neither clear and precise".

102. The Appeal Panel acknowledges that the principle of legal certainty, which is a fundamental principle of EU law as noted above in paragraph 81, requires that EU legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them (for an application of this general principle as to the requirement of the previous proper publication of the relevant legislation, compare Grand Chamber, judgment of 11 December 2007, Case C-161/06, Skoma-Lux sro, ECLI:EU:C:2007:773). The Appeal Panel also notes that in the exchanges of views which took place during the 2019 and 2020 resolution planning cycle between the SRB and [ ], as shown by the letters and other documents described in paragraphs 16-26 above, the SRB position on the fulfilment of the letter c) condition and the need of a guarantee progressively evolved from a more lenient to a stricter approach. This was likely due to the novelty of the matter and the need also for the SRB to reach a final position, also in light of exchanges of view with the ECB on the parallel experience on prudential waivers and the extent of its desirable (in the authorities' perspective) transposition in the resolution context.

103. In the present case, however, the Appeal Panel recalls that the Contested Decision was adopted on 12 May 2021 upon the formal request of a waiver made by [ ] on 27 November 2020. Before the adoption of the Contested Decision:

a) On [ ], in the context of the 2020 resolution planning cycle, the SRB presented to [ ] the 2020 MREL policy, including the iMREL policy during a meeting labelled "[ ]". In this

context, the SRB asked [ ] to submit additional documents to assess a potential waiver for [ ], including "[ ]";

b) Since [ ] objected to this interpretation of the applicable legal requirements, on [ ] the SRB sent an email to [ ] reverting on the MREL waiver request for [ ] and reiterated that "[ ]" should also include "[ ]". In the same email the SRB further specified that "[ ]".

c) From 27 November 2020 onwards there have been exchanges of messages between the SRB and [ ] concerning the content of the comfort letter provided by [ ].

d) With email of [ ] the SRB informed [ ] of the content of the guarantee which was expected by the Board as follows:

[ ]

104. In light of the foregoing, and of the conclusions reached by the Appeal Panel as to the first plea in law, the Appeal Panel finds that, although [ ] never agreed with the interpretation of Article 12h made by the Board, there was clarity at the time of the adoption of the Contested Decision regarding the conditions that need to be fulfilled, in the Board's view, to benefit from the waiver from the iMREL for [ ]. Contrary to the Appellant's claim, at the time of adoption of the Contested Decision and in the months which preceded it, there is no evidence in the file that there were indeed unforeseeable and recurring changes of these conditions which, in the words of the Appellant could have "made it impossible for [ ], in such an uncertain context as the one originated by the SRB behaviour, to successfully apply for a waiver". The Board's requirement that a parent company's guarantee should be in place was clear and was a precise requirement, even if there was no agreement with [ ] that this requirement was actually supported by Article 12h SRMR.

105. During these proceedings, when making reference to the principle of legal certainty the Appellant also referred to the principle of the protection of legitimate expectations. The principle was not the subject of separate treatment, but it is a distinct principle, as outlined above. The principle presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union (judgment of 16 July 2016, Tadej Kotnik and Others, C-526/14, ECLI:EU:C:2016:570, or judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 357-361). In the present case, the exchanges between the Parties did not contain precise, unconditional and consistent assurances from the Board suggesting that it would agree with the Appellant's interpretation of relevant provisions, or grant the waiver as requested. Therefore, this was not a situation where, following precise assurances from an institution, body or agency of the European Union, the Appellant could entertain well-founded expectations (judgments of 16 December 2010, Kahla Thüringen Porzellan v Commission, C-537/08 P, EU:C:2010:769, paragraph 63, and of 13 June 2013, HGA and Others v Commission, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132).

106. For the reasons set out above, the Appeal Panel finds that also the second plea of the Appellant cannot be upheld.

(c) The third plea in law.

107. With its third plea, the Appellant argues that the Board also infringed the principle of good administration set out in Article 41 of the Charter, because such principle entails the duty of the European institutions and agencies to examine carefully and impartially all the relevant aspects of the individual case. In the Appellant's view, the Board did not substantiate sufficiently its assessment and its request of a first demand guarantee "does not accurately reflect the assessment of facts and policy developments" and is unlawful.

108. On the third plea in law the Appeal Panel recalls that, in accordance with settled case-law, the duty to state reasons pursuant to Article 296 TFEU is of very fundamental importance (consider to this effect, judgment of 21 November 1991, Hauptzollamt München v Technische Universität München, C-269/90, paragraph 14). Only in this way can the court (and in the present appeal, the Appeal Panel) verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present. The Appeal Panel further notes that the duty to state reasons is particularly important in the prudential and resolution context, as also significantly acknowledged by the General Court, in its judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, ECLI:EU:T:2017:377 paragraph 122-124 and the case-law cited and in its very recent judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, ECLI:EU:T:2021:669 paragraphs 385-387. 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. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the courts, to provide the person concerned with sufficient information to ascertain whether the decision may be vitiated by an error enabling its validity to be challenged. Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

109. Having thoroughly pondered the aforementioned aspects and relevant case law, the Appeal Panel finds that the statement of reasons given by the Board, as to why the comfort letter dated [ ] provided by [ ] was deemed inadequate, is insufficient.

110. The Contested Decision substantiated the Board's decision not to waive, in the instant case, the application of MREL under Article 12g SRMR, because the condition set out in Article 12h(1)(c) was not met, in points 12-19 of its section IIa. In particular, the Contested Decision concluded, at paragraph 16-18, that the Board deemed insufficient the comfort letter provided by the parent company and resolution entity [ ] and addressed to the Board, dated [ ]. With this letter, as discussed above, the parent company (and resolution entity) declared that "[ ]" "[ ]".

111. The Board considers, with the Contested Decision, that this letter of comfort does not provide sufficient assurances because (i) "the letter may be unilaterally revoked without any condition and at any time"; (ii) "any financial resources prepositioned by the resolution entity in the fulfilment of the conditions stipulated in the letter could be moved or withdrawn at any time and without notice, also in the run-up of a potential declaration under Article 21(3) SRMR"; (iii) the letter does not appear to confer an actionable right on Banking Union Subsidiary 1 (i.e [ ]) and in the absence of a corresponding binding obligation on the resolution entity, the transfer of funds and repayment of liability […] cannot be adequately ensured".

112. In the Appeal Panel's view, first, the reasons given must be "appropriate to the measure in question". Second, the statement of reasons must "disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure". In the Appeal Panel's view, this means taking into account both the economic relevance of the decision, but also the nature of the decision and the review of the decision itself. In this case, the Board justified its decision on the basis of its having a *technical* margin of appreciation, as per Article 12h(1)(c) SRMR, which refers to (i) current or foreseen, (ii) material, (iii) practical or (iv) legal impediment to the transfer of funds. Thus, the statement of reasons must be specifically related to the justification of these elements, and as the case has shown, the reasoning behind these elements was complex. Within this context, in the Appeal Panel's view, none of the Board's three arguments given in the Contested Decision meets the procedural requirement of a proper statement of reasons. That is different from the question (not raised in the grounds of appeal presented by the Appellant and thus precluded to the Appeal Panel consideration in the instant case) whether the reasons given are correct, which concerns the substantive legality of the contested measure.

113. The first argument given by the Board to reject the request for the waiver, namely that the letter may be unilaterally revoked without any condition and at any time, was not, in the Appeal Panel's view, sufficiently motivated.

114. The Appeal Panel asked the Parties to detail in writing about their views on said revocability under the applicable [ ] law, since the letter of comfort was issued by a [ ] parent company to its [ ] subsidiary, and its impact on the effectiveness of a comfort letter issued by a parent

company as the one issued by [ ] on [ ] in the instant case. The Parties provided their answers on 14 January 2022, offering opposite conclusions. These showed that the effectiveness of the guarantee, the possibility to terminate it without prior notice and the date from which such termination becomes actually effective depends on the language of the guarantee itself, but also on the principles that govern the interpretation and enforceability of contracts and promises under the applicable national ([ ]) law, such as the principles of good faith or abuse of rights.

115. The Appeal Panel acknowledges that reference to national law in the context of the assessment of a guarantee (issued under national law) provided to meet the condition of Article 12h(c) SRMR does not transform nor incorporate that national law into EU law and such national law, in this context, may therefore be approximated to the factual sphere. However, national law is also part of the EU rule of law, a fundamental principle of EU law. In the instant case, however, the Appellant has not raised a ground of appeal on the substantive illegality of the Contested Decision due to a false or mistaken application of [ ] law in the assessment of the revocability and enforceability of the guarantee, which could also translate into an incorrect assessment of the SRB that the condition of letter c) of Article 12h was not met (see, by way of analogy, Opinion of Advocate General Kokott of 27 January 2011, Edwin Co. Ltd, C-263/09 P, ECLI:EU:2011:C:30, paragraphs 55, 57 and 64). Yet, the Appellant has challenged the Contested Decision as contrary to the principle of good administration and, therefore, it is up to the Appeal Panel to ascertain if the Board duly fulfilled its obligation to state reasons laid down in Article 296 TFEU as 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 (for which, as noted, no ground of appeal was raised).

116. The Appeal Panel is not persuaded that the Contested Decision meets this essential procedural requirement.

117. In the first place, the Contested Decision states that according to [ ] applicable law the [ ] comfort letter could actually be "unilaterally revoked at any time and without any condition". This, however, does not identify how the different aspects that determine the comfort letter's effectiveness, also beyond the language of the guarantee itself, and in particular its interpretation and application under the general principles of interpretation of contracts and promises, and legal principles such as good faith and the prohibition of abuse of rights, were weighed by the Board (if they were at all).

118. From the Board's decision it is not possible to deduce whether the problem was that the relevant legal principles offered insufficient comfort, that the language of the guarantee overruled these principles, both, or something else entirely. Nor was it possible to deduce whether this raised a (material) legal impediment, practical impediment, or both.

119. The insufficiency of the reasons stated by the Contested Decision, in the specific circumstances of the instant case, is further emphasized by the fact that [ ], with the letter of [ ], informed the SRB that it considered that the revocation of the comfort letter would have

made immediately necessary the issuance and subscription of the amount of iMREL that the letter of comfort would have replaced. This suggested that an early termination or revocation of the letter may not be effective, under the general principles of good faith and abuse of right recognized by applicable law as interpreted and applied by [ ] courts, as long as the iMREL was not issued. The Contested Decision did not even mention the position of [ ] on this specific point, and ultimately in its content ignored any objection raised by [ ] to its finding that the letter of comfort could be revoked without conditions and at any time. The Contested Decision has thus, on the whole, failed to address any alternative to its reading as to the possibility under applicable law to revoke the effects of the letter of comfort before having validly issued the iMREL that the letter of comfort was called to replace, and in so doing it has intrinsically failed to provide sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged.

120. This was further confirmed by the positions expressed by the Parties in their submissions and at the hearing. Also, during the hearing and throughout these proceedings, the Parties debated the question whether the revocation (or termination) of the parent guarantee would automatically result in the revocation of the iMREL waiver, and a restoration of the iMREL target. In these appeal proceedings, and in particular with its answer to the questions of the Appeal Panel of 14 January 2022, the Board maintained the view that the revocation (or termination) would not cause that repealed MREL target to "come back to life". However, for all relevant legal purposes pertaining to the obligation to state reasons, this argument is absent in the statement of reasons of the Contested Decision, and it was also disputed by the Appellant. Again, the views of both parties reflected different degrees of reliance in the interpretation of the guarantee, and the construction of principles such as good faith or abuse of rights under applicable ([ ]) law. However, it is impossible to deduce from the statement of reasons of the Contested Decision whether, and to what extent, a thorough analysis not only of the literal text of the letter of comfort but also of the legal principles governing its interpretation and application under applicable law (as suggested by [ ] in its exchanges with the IRT) was a relevant factor considered by the Board in its decision, from a (material) legal or practical perspective.

121. Furthermore, the possible early termination at any time and without condition of the letter of comfort is further linked, in the Contested Decision, to the argument (in paragraph 18 of the Contested Decision), that "there is no minimum duration specified in the letter, which is not consistent with the legislation requiring MREL instruments to have a maturity of at least one year" (Article 72c(1) CRR). However, the Board does not explain in the Contested Decision why the 1-year requirement set out for MREL instruments may be automatically transposed by analogy to a parent guarantee, which is structurally different from MREL instruments, nor why a 1-year guarantee provides better protection than a guarantee with undetermined duration assuming, e.g., that the termination of the same could not become effective until the iMREL originally waived due to the letter of comfort is issued and subscribed by the parent company.

122. Regardless of which interpretation is considered legally correct, and whether, beyond *the* correct legal interpretation, the Board was entitled to impose a margin of safety, based on potential practical impediments, the omission of any motivation on such critical points failed, in the Appeal Panel's view, to properly justify why the letter of comfort delivered by [ ] was insufficient (as to its duration and firmness of commitment), considering cumulatively the specific circumstances of the case, the nature of the Contested Decision and its importance. The Board stated as justification for its decision the letter (c) of article 12h(1) SRMR, which, as explained before, grants a margin of appreciation, but one that is technical, and not purely discretionary. Therefore, all relevant technical grounds of the decision should be perceptible from the text of the decision itself. In light of this, the decision failed to "disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure", and it did not "provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged" (judgment of 16 May 2017, Landeskreditbank Baden-Württemberg v ECB, T-122/15, paragraphs 122-124 and the case-law cited and judgment of 6 October 2021, Ukrselhosprom Versobank v ECB, T-351/18 and T-584/18, paragraphs 385-387).

123. The second argument of the Board to justify its objection to the comfort letter issued on [ ] by [ ] relates to the lack of prepositioned resources "segregated" to the purpose of fulfilling the commitments of the guarantee. In the Appeal Panel's view, also this argument does not provide a sufficient statement of reasons. A textual, contextual and teleological interpretation of the relevant legal framework shows that the guarantee required under Article 45(12), now Article 45f(3) and 45f(4) BRRD and 7 CRR does not require any prepositioned resources once the guarantee is granted. This guarantee is different indeed from the guarantee allowed as a substitute of the iMREL pursuant to Article 12g(3), which requires, among other conditions, that the guarantee is collateralised (conditions from letter d) to letter i) of Article 12g(3) SRMR). Thus, regardless of the Board being justified, or not, in requiring a guarantee under letter (c) of Article 12h SRMR, it should have explained why said guarantee should have conditions that are not contemplated even under Articles 45f(3) and 45f(4) BRRD and 7 CRR, which expressly refer to such guarantees, and why absent said conditions, there are material legal or practical impediments to the transfer of funds. The rationale for this is not present in the decision, and thus the Contested Decision fails also on this count to satisfy the duty to state reasons in accordance with the required threshold in this context.

124. The third argument of the Board relates to the fact that the letter of comfort does not appear to confer an actionable right on the subsidiary vis-à-vis the parent company. This is so, in the Board's view, because the addressees of the comfort letter are the resolution authorities and not [ ] itself.

125. The Appeal Panel acknowledges that the [ ]'s letter of comfort is formally addressed to the SRB and the national resolution authority and not to [ ]. However, under applicable ([ ]) law the enforceability of a letter of comfort depends not only on the formal addressee, but also on who is the beneficiary of the letter, and the interpretation of such letter by the courts. The

Board may have had concerns about possible legal impediments to the enforceability of the comfort letter by [ ] as beneficiary, or even considered that enforceability stronger by a direct addressee for practical reasons, or may have had some other reasons, legal or practical, for its preference. However, none of these concerns, considerations or reasons transpire as such from the decision.

126. Nor the Contested Decision clarifies to what extent the fact that the letter of comfort was not a "first demand" guarantee was an important factor in the assessment. The silence of the Contested Decision on this point is especially noteworthy. On one hand, because, as noted above in paragraphs 25 and 26 the SRB clarified with its letter of [ ] that it considered essential such a "first demand" qualification and [ ] expressed its concerns, as to the implications under applicable ([ ]) law of such qualification, also in terms of unlimited liability of the parent company vis-à-vis [ ] creditors with its letter of 31 March 2021. On the other hand, because the guarantee issued by [ ] in the current resolution cycle on [ ] (submitted as evidence by the Board on 14 January 2022) is indeed expressly qualified as a "first demand" guarantee. This seems to suggest that also this aspect was considered relevant by the Board in reaching its conclusions to reject the request for a waiver in the 2020 resolution planning cycle, but no considerations or reasons whatsoever transpire from the Contested Decision on this relevant point. Incidentally the Appeal Panel notes in this regard that a concern similar to the one raised by [ ] in its exchanges with the SRB as to the possible, negative implications of a qualification as first demand guarantee under applicable ([ ]) law seems to be reflected in the provision of Article 19(9) BRRD, which, in the different but neighbouring context of group financial support agreements, expressly sets outs that "Member States shall ensure that any right, claim or action arising from the group financial support agreement may be exercised only by the parties to the agreement, with the exclusion of third parties" (i.e. entities not pertaining to the group).

127. Finally, the Appeal Panel recalls that the CJEU in it judgment 25 June 2015, CO Sociedad de Gestión y Participación SA, Atradius and Others, C-18/14, ECLI:EU:C:2015:419, held that if a private entity is willing to give commitments to a competent authority, the competent authority and the private entity should cooperate in good faith and the authority should examine with the greatest care whether the imposition of restrictions or requirements would, taking account of those commitments, sufficiently meet the reasonable grounds that it identified and would thus be of such a nature as to enable the proposed application to be approved (see in particular paragraph 39 of said judgment).

128. In the specific circumstances of the instant case, considering that resolution planning and MREL determination are performed annually, the Appeal Panel is also persuaded that a careful statement of reasons fully compliant with Article 296 TFEU is of fundamental importance in the context of iMREL waivers, not only to better inform the addressee of the decision on whether there are grounds for appeal, but also to sufficiently guide the same in the following resolution planning cycle in meeting all requirements, in a spirit of mutual trust and loyal cooperation between the European and national resolution authorities and the credit

institutions, where all parties make a genuine effort to assist each other in the assessment towards the fulfilment of the legal goals at stake.

129. Based upon all the foregoing, the Appeal Panel upholds the third plea in law in the sense discussed above and finds that the Contested Decision, as to the reasons stated to deny the requested waiver for [ ], cannot be confirmed and must therefore be remitted to the Board.

130. The Appeal Panel also notes however, conclusively, that the Parties informed the Appeal Panel at the hearing of 7 December 2021 and with the SRB written answer to the Appeal Panel questions of 14 January 2022 that in the ongoing policy cycle [ ] has reiterated a request for a waiver for the iMREL of [ ] and has delivered shortly before the hearing of 7 December 2021 a guarantee which the SRB's IRT found suitable to the purpose and that on 15 December 2021 the Board endorsed on a preliminary basis the award of an iMREL waiver to [ ] in the First Extended Executive Session which is scheduled from [ ].

131. In light of these factual developments, and by way of analogy with settled case law of the Union courts where the subject-matter of the dispute disappears in the course of the proceedings due to the replacement of the challenged act (see, for example, Order of 27 November 2021, Trasta Komercbanka v ECB, T-247/16, paragraph 57; judgment of 6 October 2021, Ukrselhosprom and Versobank v ECB, Joined Cases T-351/18 and T-584/18, ECLI:EU:T:2021:669, paragraph 89 and case-law cited) the Appeal Panel considers that:

a) on the one hand, since the Contested Decision is not yet replaced and the appeal is thus not moot, the Contested Decision cannot be confirmed for the reasons discussed above and must therefore be remitted to the Board according to Article 85 SRMR;

b) on the other hand, however, the Board may not need to adopt an amended decision replacing the Contested Decision in compliance with this Appeal Panel's decision in the very specific circumstances of this case and in light of the above mentioned and decisive developments. This may be the case if, by the time that the Board should adopt such an amended decision replacing the Contested Decision, the matter is, for all legal purposes, finally solved by the adoption by the Second Extended Executive Session scheduled from [ ] of a new MREL decision in the current MREL policy cycle, granting the requested waiver on ground of the [ ] guarantee delivered on [ ].

On those grounds, the Appeal Panel hereby:

Remits the case to the Board, with the specifications made in paragraph 131 of this decision.

Helen Louri-Dendrinou Co-Rapporteur	Kaarlo Jännäri	Luis Silva Morais Vice-Chair

Marco Lamandini Co-Rapporteur	Christopher Pleister Chair

For the Secretariat of the Appeal Panel: