



**11 January 2023**

Case 2/2022

# **FINAL DECISION**

[ . ]

v

**the Single Resolution Board**

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

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## FINAL DECISION

In Case 2/2022,

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<sup>1</sup> (the “SRMR”),

[ . ], with headquarters in [ . ], [ . ], [ . ] and [ . ], with headquarters in [ . ], [ . ], [ . ] both represented by [ . ], [ . ], [ . ] (hereinafter, each of them and/or all of them together, the “**Appellant**”)

v

**the Single Resolution Board** (hereinafter the “**Board**” or “**SRB**”)

(the Appellant and the Board together referred to as the “**parties**”),

### THE APPEAL PANEL,

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

makes the following final decision:

#### **Background of facts**

1. This appeal was filed against the SRB decision of 23 March 2022 – SRB/EES/2021/162 (hereinafter “**the Contested Decision**”) determining the minimum requirement for own funds and eligible liabilities (hereinafter “**MREL**”) for [ . ] (hereinafter “[ . ]”) and [ . ] [ . ], [ . ], [ . ] (hereinafter “[ . ]”), [ . ], [ . ], [ . ], [ . ], [ . ] and [ . ]
2. Pursuant to Article 3(1)(24b)(b) SRMR the SRB is the group-level resolution authority of the resolution group which consists of [ . ] as [ . ] and [ . ] and [ . ], including [ . ].
3. On 15 December 2021, the Board in its First Extended Executive Session discussed on a preliminary basis the draft decision on the MREL for [ . ] and its resolution group for the 2021 resolution planning cycle and adopted the draft MREL decision and on 3 January 2022 invited [ . ] to submit within 10 days its observations as part of a formal right to be heard process.
4. On 17 January 2022, [ . ] provided its comments to the draft MREL decision, including a comment in which [ . ] contended that when the internal MREL (hereinafter “**iMREL**”) capacity is computed, own funds should be taken into account, notably when the ECB does not require a combined buffer requirement at the level used for setting the iMREL target (i.e. at the individual level, if such requirement is only set at the consolidated or subconsolidated level).

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<sup>1</sup> OJ L 225, 30.7.2014, p.1.

5. The [ . ] comments were analysed and considered in the right to be heard assessment memorandum (hereinafter “**RTBH Memorandum**”) at point 1 of Section IV of the RTBH Memorandum.
6. The Appellant’s comments and the SRB’s response in the RTBH Memorandum were as follows:

No.	Comments received from	Assessment	Impact on the MREL determination
1	<p>Considering recital 1 and 3 of the draft decision, and in compliance with article 12g(1) of Regulation (EU) 806/2014, the MREL applicable to , as per section II-c of the draft decision) is set on an individual basis, with no derogation on this rule allowing to set MREL on a consolidated basis:</p> <ul style="list-style-type: none"> <li>- on the one hand, because the subsidiary is established in and not in a third country;</li> <li>- on the other hand, in the absence of exemption request at the day of application of article 12g imposing a MREL requirement at its own subsidiaries mentioned in the draft decision at Sections II-d and .</li> </ul> <p>As per article 2 of the draft decision, the must meet the requirements set at article 1 through liabilities and/or own funds that, respectively, fulfil all the conditions mentioned at article 12g(2)a and/or b of Regulation (EU) 806/2014. The article 2 does not mention any eligibility distinction of liabilities as they are used meeting the ratio expressed in percentage of total risk</p>	<p>Pursuant to point (6) of the first subparagraph of Article 128 of Directive 2013/36/EU (CRD) the “combined buffer requirement”(CBR) means the total Common Equity Tier 1 (CET 1) capital required to meet the requirement for the capital conservation buffer (CCB) extended by the following, as applicable: (a) an institution-specific countercyclical capital buffer (CCyB); (b) a G-SII buffer; (c) an O-SII buffer; (d) a systemic risk buffer.</p> <p>In the knowledge of possible differences between resolution and prudential perimeters, the co-legislators inserted in Article 45c(4) BRRD a mandate to develop a methodology to estimate the requirement referred to in Article 104a of CRD (i.e. the Pillar 2 capital requirement) and the CBR at resolution group level. The relevant Commission Delegated Regulation (EU) 2021/1118 has been published in the Official Journal and it is in force since 28 July 2021. Since the 2021 Resolution Planning Cycle, the SRB applies this Delegated Regulation. The SRB also uses the same methodology to determine the value of</p>	None

<p>exposure or in percentage of leverage ratio exposure.</p> <p>In particular, neither these regulatory conditions, nor the draft MREL decision applicable to make reference to the own funds exclusion used for meeting the global buffer requirement mentioned at article 128, in fine of Directive 2013/36/UE.</p> <p>If such exclusion applies, it should be mentioned the same way it is mentioned in recital 3 paragraph 2 of Section I of the draft decision related to the MREL set for the central body and the affiliated entities, together with the appropriate regulatory basis.</p> <p>According to us, it seems normal it does not, because:</p> <ul style="list-style-type: none"> <li>- the MREL requirement for in the draft decision is set on an individual basis;</li> <li>- considering the absence of requirement for calculating a solvency ratio on an individual basis, the ECB does not require any own funds buffer under article 128 in fine of Directive 2013/36/UE;</li> <li>- is not a "resolution entity at the consolidated level of the resolution group", and as a consequence, Delegated Regulation EU 2021/1118 does not apply.</li> </ul> <p>The MREL-eligible own funds exclusion for a percentage determined on the basis of the supervisory reports on consolidated perimeter (single level of solvency reporting required by the ECB) for reconstituting an own funds buffer requirement on an individual basis not required by the ECB has no sound legal ground according as far as we know. The argument of using by analogy the Delegated Regulation EU 2021/1118 is not acceptable with regards to the financial interests at stake, as the group had the opportunity to share its views to the resolution authority teams (SRB and ), in particular during the High Level Meeting 08/12/2021.</p>	<p>the CBR when considered in addition to the MREL-TREA for the purposes of Articles 10 and 10a SRMR. The SRB is of the view that such approach consistently reflects the economic considerations on the function of CBR in a loss-absorption scenario.</p>	
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	The SRB monitoring requirements may not be stricter than the terms of the final MREL decision, the addition of the CBR to the individual MREL to be met by having no legal basis.		
2.	As a general comment, we regret the instability of the SRB policy related to internal MREL, the lack of prior consultation with the institutions regarding its evolutions, out of which, some have significant consequences on the funding plan and ALM structuration within the group.	The Board takes note of the comment of the bank.	None
3.	We do also regret that the internal MREL perimeter be more extensive than the solvency ratio perimeter set by the ECB, in a context where the internal MREL exemption conditions remain, in our view, disproportionate and could be more transparent, notably, as they are beyond the regulation set in level 1 texts (in particular, by regulation SRM 806/2014, article 12h).	The Board takes note of the comment of the bank.	None

7. On 23 March 2022, the Board in its Extended Executive Session approved the Contested Decision, which was notified to the relevant national resolution authorities on 29 March 2022 together with the instructions for its implementation.
8. On 5 May 2022, the [ . ] (hereinafter “[ . ]”) implemented the Contested Decision by means of its decision of 29 April 2022, notified to [ . ] on 5 May 2022.
9. On 16 June 2022, the Appellant filed a notice of appeal against the Contested Decision, contesting in particular section IIc of the Contested Decision that sets the iMREL requirements for [ . ] on an individual basis in light of the outcome of the resolvability assessment.
10. The notice of appeal was served to the Board by the Secretariat of the Appeal Panel on 20 June 2022, indicating that the Board was requested to file its response in accordance with the Appeal Panel’s Rules of Procedure by 4 July 2022.
11. On 22 June 2022, the Board filed a request for an extension of the deadline to file the response until 1 August 2022. The Secretariat informed the Appellant of such request and invited the Appellant to file observations, if any. On 27 June 2022, the Appellant informed that it had no objections but in turn asked for an extension of its future deadline to file a reply to the Board’s response until 20 September 2022.
12. On 29 June 2022, the Appeal Panel granted to both parties the requested extensions.
13. On 1 August 2022, the Board filed its response.

14. On 20 September 2022, the Appellant filed its reply.
15. On 23 September 2022, the Board asked for an extension of the deadline to file a rejoinder equivalent to the one given to the Appellant to file its reply. The extension was granted.
16. On 7 November 2022, the Board filed its rejoinder.
17. On 9 November 2022, the Appeal Panel requested the parties to deposit with the Secretariat by 21 November 2022 certain documents and namely (1) all applicable [ . ] legal provisions implementing in [ . ] Article 128, last paragraph CRD; (2) [ . ]'s individual financial report as of 31 December 2020 and [ . ] consolidated financial report as of 31 December 2020; (3) A schedule duly showing the precise amount of CET1 individually available at [ . ] as of 31 December 2020, 30 June 2021 and 31 December 2021 and at the date of the Contested Decision; (4) A schedule duly showing the required and actual amount of the consolidated Combined Buffer Requirement (hereinafter “**CBR**”) for [ . ] and [ . ] as of 31 December 2020, 30 June 2021 and 31 December 2021 with separate indication if and to what extent CET1 individually available at [ . ] level was used at consolidated level to meet the CBR; (5) SRB's Rules of Procedure, or guidelines, or policies or manuals, if any, concerning the procedural steps to be taken by the relevant groups and entities, and their timeline, in the context of the annual resolution planning cycle (hereinafter “**RPC**”) in order to apply for, or obtain an iMREL waiver.
18. On 11 November 2022, upon request of the Board, the Appeal Panel indicated that all parties were allowed to respond to each of the five requests for submission of documents, but the Appeal Panel expected that at a minimum the Board delivered the documents mentioned under points (1) and (5) and the Appellant the documents under points (2) to (4). The Appeal Panel also clarified that both parties would have had full access to the documents submitted by the other party, with the possible exception of items under point (5) which are not public, if any.
19. On 17 November 2022, the Appellant deposited (1) a copy of all applicable [ . ] legal provisions implementing in [ . ] Article 128, last paragraph CRD, which is transposed into [ . ] law in article [ . ] of the [ . ]; (2) a copy of [ . ]'s individual financial report as of 31 December 2020; a copy of [ . ]'s consolidated financial report as of 31 December 2020; (3) the schedule duly showing the precise amount of CET1 individually available [ . ] as of 31 December 2020, 30 June 2021 and 31 December 2021 and at the date of the Contested Decision; (4) the schedule duly showing the required and actual amount of the consolidated Combined Buffer Requirement for [ . ] and [ . ] of 31 December 2020, 30 June 2021 and 31 December 2021 with separate indication if and to what extent CET1 individually available at [ . ] level was used at consolidated level to meet the CBR.
20. On 21 November 2022, the Board deposited the applicable legal provisions of Article 128, last paragraph CRD, and namely Article [ . ] of the [ . ] and section 4.2. of the version of the SRB MREL Policy dated May 2021. The Board also mentioned section 5.2. of the SRB MREL Booklet, noting however that this is an internal SRB document, classified ‘SRB RED’

and thus the highest confidentiality level and sought confirmation from the Appeal Panel that, if deposited, the document would remain confidential vis-à-vis the Appellant.

21. On 22 November 2022, the Appeal Panel informed the parties that, due to the (only) internal nature of the SRB MREL Booklet, which in the given circumstances would make its provisions not relevant for the determination of the appeal, it was not necessary for the Board to submit such document and that the procedural order of 9 November 2022, as specified on 11 November 2022, was adjusted accordingly.
22. On 24 November 2022, a hearing took place at the SRB premises in Brussels. At the hearing both parties appeared and presented oral arguments, reiterated their respective positions and added further considerations of fact and law. The parties also answered questions from the Appeal Panel for the clarification of facts relevant for the just determination of the question of admissibility of the appeal.
23. On 24 November 2022, the Appeal Panel, having consulted the counsels of the parties at the hearing and with their agreement, requested the Board to deposit by 28 November 2022 “the documents the Board mentioned in the hearing, concerning alleged exchanges between the Internal Resolution Team and the Appellant regarding the possibility of a waiver and the alleged answer that the [ . ] and/or [ . ] did not intend to apply for an iMREL waiver for [ . ]”. At the same time, the Appeal Panel also granted to both parties the right to submit by 5 December 2022 written observations, if any, on (i) the documents provided in response to the request of 24 November 2022 and (ii) the documents submitted by the other party following the Appeal Panel’s Procedural Order of 9 November 2022 as specified on 11 November 2022.
24. On 28 November 2022, the Board submitted the documents in response to the request of the Appeal Panel of 24 November 2022.
25. On 1 December 2022, the Appeal Panel issued a new Procedural Order seeking additional clarifications on two final issues as follows:

Dear Parties.

The Appeal Panel thanks both parties for their help during the oral hearing of this case, both through their statements and rebuttals, and in answering the questions of the Appeal Panel. During the hearing, some aspects emerged that required ulterior clarification. Some of those aspects, such as the production of additional evidence regarding the request of a waiver, were addressed during the hearing itself, and the Appeal Panel thanks both parties for their assistance in this regard.

Nonetheless, the Appeal Panel will seek some additional clarification on two final issues.

(A) On the scope of [ . ].

The Appeal Panel understands from the evidence in the file that [ . ] in place between [ . ] ([ . ]) and [ . ], as described in recital (2) of Section I of the appealed decision does not include [ . ], which is a subsidiary of [ . ], yet not [ . ] to the purposes of such [ . ]. Both parties are invited to confirm that this understanding of the Appeal Panel is correct and, if it is not, to provide the necessary information to explain why it is not.

(B) On the calculation of the iMREL for [ . ].



The Appellant alleged in its rejoinder that “*by failing to take into account key elements – including the derogation granted by the ECB – when applying an iMREL to [ . ], the Appealed Decision illegally requires, in addition to the iMREL, the equivalent of a CBR*”. In the Appellant’s own words, “*by deciding to exclude, on the basis of an illegal application of Article 128, last para. of the CRD (see para. 10 below), in its calculation of [ . ]’s iMREL, [ . ]’s Common Equity Tier 1 capital (in the amount of EUR 4,6 billions €, as of 31 December 2020)*”.

Later, the Appellant indicates that “*in the present case CET1 capital can count – and should have been counted – in the calculation of [ . ]’s MREL expressed in terms of TREA*” and also that “*As a consequence, by incorrectly applying 128, last para. of the CRD in its calculation of [ . ]’s iMREL, the SRB underestimated the own funds and eligible liabilities (by 1,1 billion €, as of 2020-12-31) that [ . ] needed to cover its iMREL and illegally imposed the equivalent of a CBR on [ . ]*” (Appellant’s rejoinder, para. 11).

The Board, in its Reply to the Rejoinder, stated, on the application by analogy of the Commission Delegated Regulation 2021/1118, that: “*The SRB notes that the Appellant’s interpretation of an alleged “application by analogy” of the CDR is misleading*”, because “*The purpose of the CDR is to estimate CBR for resolution entities at the resolution group level when it is used as an input for MREL calibration of a resolution entity and where the resolution group is not subject to that requirement (i.e. because the perimeter of the resolution group differs from the prudential perimeter of the banking group). However, the SRB has not used CBR as input for MREL calibration for [ . ]*” (SRB Reply to the Rejoinder, para. 32). On the contrary, according to the Board, “*the SRB rather referred to its own methodology to estimate the amount of CBR to be maintained on top of iMREL for the purposes of monitoring compliance with Article 10 and 10a SRMR. That methodology reflects an interpretation of the term “combined buffer requirement” in Article 10a SRMR when the basis on which the supervisor set that requirement (sub-consolidated in this case) does not align with the basis on which the SRB set the MREL target on top of which a buffer needs to be maintained in order to avoid MDA restrictions (i.e. individual).*” (SRB Reply to the Rejoinder, para. 33).

Although the issue of the interplay between iMREL and CBR was addressed during the hearing, the Appeal Panel seeks some additional clarification of the calculations of the iMREL. For this purpose, the Appeal Panel requests the parties to provide the following clarifications.

1.- First, the Appeal Panel requests the Appellant to provide a more detailed explanation of the figure of “*EUR 4,6 billions €*” of CET1 which it alleges are being “*excluded*”, and of the figure of “*1,1 billion €*” of own funds and eligible liabilities, which were allegedly underestimated. This should include the calculation of this amount, and an explanation of why, and how, are they being “*excluded*” from the possibility of being used to meet the iMREL targets set out in Article 1 of Section IIc of the appealed decision.

In this regard, although the Appeal Panel is asking the Appellant to clarify this aspect, being the party who produced the figures, the Board can also express its views about the calculation of the figure, and its relevance or irrelevance for the case.

2.- Second, the Appeal Panel requests the Board (i) to clarify the calculation of the iMREL and notional CBR pursuant to Article 10a SRMR in the concrete case of [ . ], including a reference to the perimeter, and the balance sheet being used (whether the individual balance sheet in both cases, or the sub-consolidated balance sheet in the case of the CBR), and a clarification of the fact of whether a calculation of the CBR has already been made; and (ii) to clarify the application of the “*no double counting*” rule of Article 128 CRD in its methodology for calculating iMREL in the case at hand, in particular whether it assesses [ . ]’s compliance with iMREL first (and therefore whether the stacking order between iMREL and CBR for purposes of Article 10a SRMR binds institutions to meet the iMREL requirement before they can meet the CBR under Article 10a SRMR), and then it assesses the CBR for purposes of Article 10a SRMR, or whether it calculates the notional amount of the CBR first, and, when assessing iMREL and the way the target set out in Article 1 can be met through own funds as indicated in Article 2 of Section IIc of the appealed decision, it disregards the amount of own funds considered for the calculation of the notional CBR.

In this regard, although the Appeal Panel is asking the Board to clarify this aspect, being the party who made the statements, the Appellant can also express its views about the calculations being made, and its relevance or irrelevance for the case.

Both clarifications should be succinct, and answers to question (B) should limit themselves to a specific explanation of the calculations, as a matter of fact. The request for clarification should not be understood as a request for, or an opportunity to, produce new legal arguments.

To this effect:

1.- Both parties are invited to provide the additional clarifications by the 7<sup>th</sup> December 2022 COB.

2.- Each party will be given the opportunity to express its views on the clarification provided by the other party by the 9<sup>th</sup> December 2022 COB.

26. On 5 December 2022, the Appellant submitted written observations concerning the documents provided by the Board in response to the Appeal Panel's request of 24 November 2022 and enclosed further documents.
27. On 5 December 2022, the Board submitted written observations concerning the information provided by the Appellant in response to the Procedural Order of 9 November 2022.
28. On 7 December 2022, the Appellant submitted written clarifications in response of the Appeal Panel's Procedural Order of 1 December 2022 and enclosed further documents.
29. On 7 December 2022, the Board submitted written clarifications in response of the Appeal Panel's Procedural Order of 1 December 2022.
30. On 8 December 2022, the Board asked for a postponement until 12 December 2022 of the deadline to submit its observations on the clarifications of the Appellant submitted on 7 December 2022, explaining the reasons for such a request. The requested postponement was granted by the Appeal Panel to both parties.
31. On 9 December 2022, the Board further asked for a longer postponement from 12 December 2022 until 16 December 2022, explaining the reasons for such a request. This postponement requested by the Board was also granted by the Appeal Panel, and extended to both parties.
32. Each party submitted its final observations, expressing its views on the clarification provided by the other party in response to the Appeal Panel's Procedural Order of 1 December 2022, the Board on 15 December 2022 and the Appellant on 16 December 2022.
33. On 19 December 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 purpose of Article 85(4) of Regulation 806/2014 and Article 20 of the Rules of Procedure.

### **Main arguments of the parties**

34. The main arguments of the parties on the merit of the appeal are briefly summarised below and are then more thoroughly described and considered in the findings of the Appeal Panel with respect to each of the grounds of appeal. 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

35. The Appellant raises three grounds of appeal: with the first plea, the Appellant contends that the SRB committed an error of law and [ . ] should not have been subject to an internal MREL; with the second plea, the Appellant contends that Section IIc of the Contested Decision (the Section concerning the MREL determination for [ . ]) violates the principle of proportionality; with the third plea, the Appellant contends that Section IIc of the Contested Decision is based on a manifest error of assessment, combined with a misuse of powers.
36. The Appellant, as to the first plea, argues that subsidiaries of a resolution group, which are not themselves resolution entities, such as [ . ] shall comply with MREL requirements on an individual basis but such requirement can be derogated by the Board if it is given a collateralized guarantee to meet the iMREL requirement as provided for by Article 12g(3) SRMR or if the requirement for iMREL is waived by the Board in accordance with Article 12h(1) SRMR. The Appellant notes that [ . ] has been granted by the ECB a waiver under Article 6(1) CRR concerning prudential requirements at individual level and argues that the SRB determination of iMREL should align with prudential requirements, in order to take into account “the clear intention of the European legislator to ensure the complementary nature of the supervision and resolution of credit institutions”. This translates, in the Appellant’s view, in a principle, whereby where an entity is not subject to prudential requirements on an individual level in the supervisory context, it should not be subject to iMREL requirements at the individual level in the resolution context. The Appellant further contends that the SRB cannot apply, for the determination of the iMREL at the individual level of an entity which is not a resolution entity, the methodology set out in the Commission Delegated Regulation 2021/1118, adopted in accordance to Article 45c(4) BRRD, whose scope of application is limited to resolution entities at the resolution group consolidated level. The Appellant further argues that the Contested Decision requires, in addition to the iMREL expressed in percentage of risk weighted assets at an individual level, the equivalent of a CBR and contends that this is without legal basis, because “in the absence of a solvency ratio calculation on an individual basis, the ECB does not require compliance with any capital buffer under Article 128 of CRD IV” at individual level. For this reason, the Appellant claims with its first plea that the SRB is not allowed “to exclude a CBR that is explicitly not required by the supervision at solo level in determining the MREL applicable to [ . ] at an individual level, and in identifying the own funds that can effectively be taken into account to respect this requirement”.
37. With its second plea, the Appellant argues that section IIc of the Contested Decision is not proportionate in its determination of iMREL for [ . ] because (i) the SRB should have applied less onerous and constraining alternatives to iMREL which were credible and feasible in the instant case, also considering that [ . ] is a [ . ] [ . ] of the [ . ] [ . ] and that the [ . ] resolution entity is subject to MREL at consolidated level and (ii) “in view of the financial implications

of the measure, the application of a contestable CBR in addition to the iMREL to the [ . ]” is disproportionate to the pursued objectives of the resolution.

38. With the third plea, the Appellant argues that the SRB has violated the principle of good administration in the exercise of its discretion in the determination of the iMREL requirement, because “it failed to take key aspects of the case into consideration when applying an [i]MREL to [ . ] on an individual basis and when considering a contestable CBR to be respected on top, having consequences on understating the appreciation of the level of [ . ] own funds and eligible liabilities to cover the [i]MREL requirement expressed in percentage of risk weighted assets (by 1,1, billion EUR as of 31.12.2021”. More specifically, the Appellant contends that the SRB committed a manifest error of assessment in that “it failed (i) to take into account the crucial comments made by the Appellant in the course of the RTBH Process (...) and (ii) to take into account the ECB decision of 2 February 2022 exempting [ . ] from meeting own funds requirements on an individual basis. Moreover, the Appellant contends that the SRB “acted beyond the limits provided in the Delegated Regulation 2021/1118 and Article 45 BRRD.
39. With its reply to the Board’s response, the Appellant further clarified, in the first place, that the Appellant does not claim that the Contested Decision contains an express decision imposing to [ . ] a binding CBR on top of the iMREL, but that the Contested Decision, by failing to take into account the derogation granted by the ECB to capital requirements on an individual level for [ . ], “illegally requires, in addition to the iMREL, the equivalent of a CBR”. The Appellant specifies that “by deciding to exclude (...) in its calculation of [ . ]’s iMREL [ . ]’s CET1 capital (in the amount of EUR 4,6 billions as of 31.12.2000)”, the Contested Decision “has, as a consequence, that [ . ] must maintain additional CET1 capital on top of the amount necessary to meet the iMREL (i.e. the “equivalent” of a CBR, although [ . ] had benefitted from a derogation in that respect from the ECB). In the second place, the Appellant notes, as to the first plea, that by failing to align with the ECB decision, the SRB “breached the principle of mutual sincere cooperation with the ECB (...) as provided under Article 12(1) SRMR” and that the SRB “illegally applied Article 128, last paragraph CRD in its calculation of [ . ]’s iMREL” because that provision, if correctly read a contrario, illustrates that “if the prudential supervisor decided not to impose a CBR, the CET1 capital is not used to satisfy the CBR and can therefore be used to calculate the iMREL”. Therefore, in the Appellant’s view, “by incorrectly applying Article 128, last paragraph CRD in the calculation of [ . ]’s iMREL, the SRB underestimated the own funds and eligible liabilities (by 1,1, billion EUR as of 31 December 2020) that [ . ] needed to cover its iMREL and illegally imposed the equivalent of a CBR on [ . ]”. In the third place, as to the second plea, the Appellant claims that [ . ] and [ . ] “were under no obligation to formally request a waiver from iMREL” and it was up to the SRB to take into account less onerous alternatives, which may result more proportionate in the specific circumstances than the setting of the iMREL for [ . ]. In the fourth place, as to the third plea, the Appellant argues that the Contested Decision is not plausible and falls outside the scope of the SRB’s powers.

40. With the written observations submitted after the hearing on 5 December 2022, the Appellant reiterated its position, and argued that the written exchanges between the Internal Resolution Team and the Appellant concerning the iMREL waiver deposited by the Board following the procedural order of the Appeal Panel of 24 November 2022 “refer to a previous analysis/resolution cycle, made in 2021” and those emails “are indeed dated July and September 2021”. The Appellant also argues that those emails are “taken out of their context” and that the statement made by [ . ] of 28 September 2021 “cannot be interpreted as a permanent decision not to request waivers in future resolution cycles (such as the one in the case at hand)”.
41. With its written observations of 7 December 2022, the Appellant answered the Appeal Panel’s questions of 1 December 2022, and showed “the calculation the Appellant believes the SRB has used to determine [ . ]’s iMREL”.
42. With its written and final observations of 16 December 2022, the Appellant further clarified and reiterated its position on the Appeal Panel questions of 1 December 2022.

#### Board

43. The Board argues that the three pleas against the Contested Decision rely in essence on two main arguments: that the SRB was not allowed to set an iMREL for [ . ] or in the alternative that [ . ] should have benefitted from an automatic iMREL waiver or should have been allowed to use a collateralised guarantee to meet iMREL based on the fact that [ . ] was awarded a waiver from individual capital requirements and that in the Contested Decision the SRB allegedly requires in addition to the iMREL the equivalent of a CBR and therefore the Contested Decision is based on a manifest error of assessment.
44. The Board considers, as to the first argument, that setting iMREL for [ . ] results from the mere application of the legal framework that requires the SRB to set iMREL targets for the subsidiaries of resolution entities to be determined on the basis of subsidiaries’ individual situation even in cases where those subsidiaries are exempted from solo capital requirements. As to the possibility of awarding a waiver from iMREL obligations or allowing the use of collateralized guarantees to meet iMREL, the Board notes that the Appellant did not file any request in this respect in the context of the 2021 RPC and that, therefore, the Board was under no obligation to consider such possibility nor did it have the relevant information to be able to assess whether the legal requirements pertaining to the award of an iMREL waiver or the use of a collateralized guarantee were met.
45. With regard to the second argument, the Board argues that the Contested Decision does not involve setting the level of the CBR nor does it establish the obligation to comply with it. The only legally binding obligation resulting from the Contested Decision refers to the obligation to comply with the MREL target set therein.
46. The Board concludes therefore that, as to the first plea, the SRB did not err in law, was not required to align with the ECB decision not to apply own funds requirements to [ . ] and the

methodology used by the SRB to determine the iMREL for [ . ] is not deprived of legal basis. The Board notes in this respect that “the Appellant’s disagreement refers to the rules applied for computing the MREL capacity and the monitoring of the compliance with the MREL requirements, but not with the specific levels of MREL set in the Contested Decision”, yet “those rules are outside the scope of the Contested Decision which is the object of this appeal”. As to the second plea, the Board argues that it did not violate the principle of proportionality by setting iMREL for [ . ] because the granting of an iMREL waiver or allowing the use of collateralized guarantees is not automatic, but requires that “the relevant entity has provided evidence of the compliance with the statutory conditions and the SRB is persuaded that those measures would not jeopardise the resolution objectives”. The Board notes in this respect that “in this context the waiver for solo requirements obtained in the context of prudential supervision is only one of those relevant elements. Other elements such as the relevant size of [ . ]” (which footnote 34 of the Board response summarizes as follows: EUR 170 billion of total assets, EUR 101 billion TEM and EUR 45,4 billion TREA) and “the fact that the subsidiary provides critical functions would also have to be considered”. The Board further argues that “in the absence of any request for waiver or authorization for the use of collateralized guarantees, the SRB was under no obligation and was not in a position to consider those alternatives”. As to the third plea, the Board concludes that it did not commit any manifest error of assessment of misuse of its powers, because the Appellant has failed to adduce sufficient evidence in order to demonstrate that the assessment made by the Contested Decision is not plausible. The Board also denies that it misused its powers in the determination of the iMREL pursuant to Articles 12a(1), 12d(6) and 12g(1), first subparagraph SRMR.

47. With its rejoinder the Board argues that any challenge to the Contested Decision related to the issuance of additional CET1 in order to maintain a CBR on top of iMREL is outside the scope of the appeal and beyond the remit of the Appeal Panel pursuant to Article 85(3) SRMR and thus must be declared inadmissible. As to the merit of the appeal, the Board reiterates that it did not err in law, because the SRB did not unlawfully apply Article 128, last paragraph CRD and that the issuance of additional CET1 to maintain CBR on top of iMREL does not result from the Contested Decision, but from the combined effect of Article 10a SRMR and Article 128, final subparagraph CRD. Furthermore, the Board contends that it did not apply by analogy Commission Regulation No 2021/1118 and rather used a methodology indirectly based on the one laid down in such Regulation. As to the second plea, the Board maintains that under Article 12h(1) and 12g(3) SRMR it is not obliged to consider an iMREL waiver or the use of a collateralised guarantee on its own initiative. As to the third pleas, the Board maintains that it did not commit a manifest error of assessment or misuse of its powers and that, since the third pleas is based on the allegations made in the first and second pleas, as far as they are unfounded, also the third plea is unfounded.
48. With its written observations of 28 November 2022, the Board submitted the documents requested and noted that, in light of such documents, “it is apparent that during the 2021 RPC, [ . ] never claimed that the SRB had to consider the opportunity to grant iMREL waivers on its own initiative, without any prior request from [ . ]. On the contrary [ . ] was aware that it

had to apply for iMREL waivers. [ . ] considered to apply for iMREL waivers, before deciding ultimately not to do so”.

49. With its written observations on 5 December 2022, the Board commented the documents submitted by the Appellant in response of the Procedural Order of 9 November 2022 as specified on 11 November 2022 and argued that such documentation and information is irrelevant for the just determination of the appeal. In this context, the Board also noted that “Article 2 of the operative part of Section IIC of the Contested Decision is not linked with the no-double counting rule of CET1”. According to the Board, such Article 2 of the Contested Decision “simply reflects the restrictions on internal MREL eligibility provided for in Article 12g(2)(a) and (b) SRMR in relation to eligible liabilities and own funds respectively. These restrictions basically aim to ensure the ‘upstreaming’ of a subsidiary’s losses to its parent, e.g. by requiring that the iMREL is subscribed by the parent rather than external investors”. The Board further reiterated its view that the Contested Decision “only determined MREL targets for [ . ], including internal MREL targets for its subsidiaries”, yet “neither establishes the value of the CBR nor does it set out any obligation to issue additional CET1 to maintain CBR on top of internal MREL”.
50. With its written observations of 7 December 2022, the Board answered the Appeal Panel’s questions of 1 December 2022, and reiterated its view that the Contested Decision does not set the CBR for [ . ]. For the sake of completeness, the Board further clarified that for the purposes of monitoring compliance with Article 10a SRMR the Board does not consider relevant the level of the CBR which the supervisor has established for [ . ] on the basis of [ . ]’s own consolidated situation (i.e., including also [ . ]’s subsidiaries), because this would be disproportionate from a resolution perspective; instead, the SRB extrapolates from that larger value a smaller one, by applying the same percentage of the sub-consolidated position to the *individual* balance sheet of [ . ]. This *notional* CBR, however, in the Board’s view, is in no way connected to or a pre-requisite for the determination of the iMREL target for [ . ]. The Board further reiterated that the “no double counting rule” is irrelevant for the MREL determination and that “compliance with Article 10a SRMR is verified after having set MREL targets”. In this respect, the Board stated that “in accordance with the legal injunction against double counting, and the so-called ‘stacking order’ approach, any own funds which a bank may have at its disposal will (to the extent needed) count towards the minimum requirement (i.e., MREL) in priority to the CBR”.
51. With its written and final observations of 16 December 2022, the Board further clarified and reiterated its position on the Appeal Panel questions of 1 December 2022.

### **Findings of the Appeal Panel**

52. The parties have filed written submissions on their diverging views on the merit of the appeal and have made oral representations at the hearing. They have also duly answered in writing

further questions of the Appeal Panel made after the hearing to seek some final clarifications. As such, both parties have been granted full right to raise all their arguments in defence and to counterargue as well in respect to the other party's submissions. The parties' contentions have been fully taken into account by the Appeal Panel, whether expressly referred to herein or not. The Appeal Panel acknowledges that the issues debated in this appeal are new and raise complex questions. The Appeal Panel has duly appreciated the contributions offered by the legal counsels of both parties to discuss in detail the relevant aspects of this case.

*(a) The applicable legal framework.*

53. This appeal poses, in fact, interpretative questions which result from combining a complex legal framework, composed by (i) on the one hand, certain rules laid down in the SRMR (Articles 10a, 12, 12a, 12d, 12g, 12h), in the BRRD (Article 45c), in the CRD (Articles 128, last paragraph and 129 and their national implementation) and in the CRR (Articles 7 and 11 CRR), (ii) on the other hand, implementing provisions of Article 45c BRRD laid down in Commission Delegated Regulation 2021/1118, to which the SRB has made reference in its RTBH Assessment and, finally, (iii) general principles of EU law, such as the principle of proportionality, which may be called into action also in respect of an iMREL determination by the SRB.

54. More specifically, as to the applicable legal rules, Article 12, paragraph (1) SRMR provides that:

*The Board, after consulting the competent authorities, including the ECB shall determine the requirements for own funds and eligible liabilities as referred to in Articles 12a to 12i, subject to write-down and conversion powers, which are to be met at all times by the entities and groups referred to in Article 7(2) and by the entities and groups referred to in point (b) of Article 7(4) and in Article 7(5) when the conditions for the application of these paragraphs are met. (emphasis added)*

55. Article 12a, paragraph (2) SRMR provides that:

*The requirements [for own funds and eligible liabilities] shall be calculated in accordance with Article 12d(3), (4), or (6), as applicable, as the amount of own funds and eligible liabilities and expressed as percentages of:*

- a) the total risk exposure amount of the relevant entity referred to in paragraph 1 of this Article, calculated in accordance with Article 92(3) of Regulation (EU) No 575/2013; and*
- b) the total exposure measure of the relevant entity referred to in paragraph 1 of this Article, calculated in accordance with Articles 429 and 429a of Regulation (EU) No 575/2013. "*

56. Article 12d, paragraph (6) SRMR provides that:

*For entities that are not themselves resolution entities the amount referred to in the first subparagraph of paragraph 2 shall be the following:*

- (a) for the purpose of calculating the requirement referred to in Article 12a(1), in accordance with point (a) of Article 12a(2), the sum of:*



- i. *the amount of the losses to be absorbed that corresponds to the requirements referred to in point (c) of Article 92(1) of Regulation (EU) No 575/2013 and Article 104a of Directive 2013/36/EU of the entity; and*
- ii. *a recapitalisation amount that allows the entity to restore compliance with its total capital ratio requirement referred in point (c) of Article 92(1) of Regulation (EU) No 575/2013 and its requirement referred to in Article 104a of Directive 2013/36/EU after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21 of this Regulation or after the resolution of the resolution group;*

*(b) for the purpose of calculating the requirement referred to in Article 12a(1), in accordance with point (b) of Article 12a(2), the sum of:*

- i. *the amount of the losses to be absorbed that corresponds to the entity's leverage ratio requirement referred to in point (d) of Article 92(1) of Regulation (EU) No 575/2013; and*
- ii. *a recapitalisation amount that allows the entity to restore compliance with its leverage ratio requirement referred to in point (d) of Article 92(1) of Regulation (EU) No 575/2013 after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21 of this Regulation or after the resolution of the resolution group.*

*For the purposes of point (a) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (a) of the first subparagraph of this paragraph, divided by the total risk exposure amount.*

*For the purposes of point (b) of Article 12a(2), the requirement referred to in Article 12a(1) shall be expressed in percentage terms as the amount calculated in accordance with point (b) of the first subparagraph of this paragraph, divided by the total exposure measure.*

*When setting the individual requirement provided in point (b) of the first subparagraph of this paragraph, the Board shall take into account the requirements referred to in Article 27(7).*

*When setting the recapitalisation amounts referred to in the previous subparagraphs, the Board shall:*

- a) *use the most recently reported values for the relevant total risk exposure amount or total exposure measure, adjusted for any changes resulting from actions set out in the resolution plan; and*
- b) *after consulting the competent authorities including the ECB, adjust the amount corresponding to the current requirement referred to in Article 104a of Directive 2013/36/EU downwards or upwards to determine the requirement that is to apply to the relevant entity after the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21 of this Regulation or after the resolution of the resolution group.*

*The Board shall be able to increase the requirement provided in point (a)(ii) of the first subparagraph of this paragraph by an appropriate amount necessary to ensure that, following the exercise of the power to write down or convert relevant capital instruments and eligible liabilities in accordance with Article 21, the entity is able to sustain sufficient market confidence for an appropriate period which shall not exceed one year. (emphasis added)*

*Where the sixth subparagraph of this paragraph applies, the amount referred to in that subparagraph shall be equal to the combined buffer requirement that is to apply after the exercise of the power referred to in Article 21 of this Regulation or after the resolution of the resolution group, less the amount referred to in point (a) of point (6) of Article 128 of Directive 2013/36/EU. (emphasis added)*

*The amount referred to in the sixth subparagraph of this paragraph shall be adjusted downwards if, after consulting the competent authorities, including the ECB, the Board determines that it would be feasible and credible for a lower amount to be sufficient to ensure market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3), after the exercise of the power referred to in Article 21 or after the resolution of the resolution group. That amount shall be adjusted upwards if, after consulting the competent authorities including the ECB, the Board determines that a higher amount is necessary to sustain sufficient market confidence and to ensure both the continued provision of critical economic functions by the institution or entity referred to in Article 12(1) and its access to funding without recourse to extraordinary public financial support other than contributions from the Fund, in accordance with Article 27(7) and Article 76(3) for an appropriate period which shall not exceed one year.’’*

57. Article 12g, paragraph (3) SRMR provides that the Board “may permit” the iMREL requirement of a subsidiary calculated at individual level to be met in full or in part with a collateralised guarantee “provided by the resolution entity which fulfils the (...) conditions” set out in the same Article 12g(3), letters from a) to i).

58. Article 12h, paragraph (1) SRMR provides that:

*The Board **may waive** (emphasis added) the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Members 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. (emphasis added)*

59. Article 10a, paragraph (1) SRMR provides that:

*Where an entity is in a situation where it meets the combined buffer requirement when considered in addition to each of the requirements referred to in points a), b) and c) of Article 141a(a) of Directive 2013/36EU but it fails to meet the combined buffer requirement when considered in addition to the requirements referred to in Articles 12d and 12e of this Regulation, when calculated in accordance with point (a) of Article 12a(2) of this Regulation, the Board shall have the power, in accordance with paragraphs 2 and 3 of this Article, to prohibit an entity from distributing more than the Maximum Distributable Amount related to the minimum requirement for own funds and eligible liabilities (‘M-MDA’), calculated in accordance with paragraph 4 of this Article, through any of the following actions:*

- a) *make a distribution in connection with Common Equity Tier 1 capital;*
- b) *create an obligation to pay variable remuneration or discretionary pension benefits, or to pay variable remuneration if the obligation to pay was created at a time when the entity failed to meet the combined buffer requirement; or*
- c) *make payments on Additional Tier 1 instruments.*

*Where an entity is in the situation referred to in the first subparagraph, it shall immediately notify the national resolution authority and the Board thereof.’’*

60. Article 45c, paragraph (4) BRRD provides that:

*“EBA shall develop draft regulatory technical standards specifying the methodology to be used by resolution authorities to estimate the requirement referred to in Article 104a of Directive 2013/36/EU and **the combined buffer requirement for resolution entities at the resolution group consolidated level** where the resolution group is not subject to those requirements under that Directive. (emphasis added)*

*EBA shall submit those draft regulatory technical standards to the Commission by 28 December 2019.*

*Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.’’*

61. Article 128, last paragraph CRD provides that :

*Institutions shall not use Common Equity Tier 1 capital that is maintained to meet the combined buffer requirement referred to in point (6) of the first paragraph of this Article, to meet any of the requirements set out in points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013, the additional own funds requirements imposed pursuant to Article 104a of this Directive to address risks other than the risk of excessive leverage, and the guidance communicated in accordance with Article 104b(3) of this Directive to address risks other than the risk of excessive leverage.*

*Institutions shall not use Common Equity Tier 1 capital that is maintained to meet one of the elements of its combined buffer requirement to meet the other applicable elements of its combined buffer requirement.*

*Institutions shall not use Common Equity Tier 1 capital that is maintained to meet the combined buffer requirement referred to in point (6) of the first paragraph of this Article to meet the risk-based components of the requirements set out in Articles 92a and 92b of Regulation (EU) No 575/2013 and in Articles 45c and 45d of Directive 2014/59/EU.’’*

62. Article 129(1) CRD provides that:

*In addition to the Common Equity Tier 1 capital that is maintained to meet any of the own funds requirements set out in points (a), (b) and (c) of Article 92(1) of Regulation (EU) No 575/2013, Member States shall require institutions to maintain a capital conservation buffer of Common Equity Tier 1 capital equal to 2,5 % of their total risk exposure amount calculated in accordance with Article 92(3) of that Regulation on an individual and on a consolidated basis, as applicable in accordance with Title II of Part One of that Regulation.’*

## 63. Article 7 CRR provides that:

*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.*

*2. Competent authorities may exercise the option provided for in paragraph 1 where the parent undertaking is a financial holding company or a mixed financial holding company set up in the same Member State as the institution, provided that it is subject to the same supervision as that exercised over institutions, and in particular to the standards laid down in Article 11(1).*

*3. Competent authorities may waive the application of Article 6(1) to a parent institution in a Member State where that institution is subject to authorisation and supervision by the Member State concerned, and it is included in the supervision on a consolidated basis, and all the following conditions are satisfied, in order to ensure that own funds are distributed adequately among the parent undertaking and the subsidiaries:*

- a) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities to the parent institution in a Member State;*
- b) the risk evaluation, measurement and control procedures relevant for consolidated supervision cover the parent institution in a Member State.*

*The competent authority which makes use of this paragraph shall inform the competent authorities of all other Member States. ‘*

## 64. Article 11 CRR provides that:

*1. Parent institutions in a Member State shall comply, to the extent and in the manner set out in Article 18, with the obligations laid down in Parts Two, Three, Four, Seven and Seven A on the basis of their consolidated situation, with the exception of point (d) of Article 430(1). The parent undertakings and their subsidiaries that are subject to this Regulation shall set up a proper organisational structure and appropriate internal control mechanisms in order to ensure that the data required for consolidation are duly processed and forwarded. In particular, they shall ensure*

*that subsidiaries not subject to this Regulation implement arrangements, processes and mechanisms to ensure proper consolidation.*

*2. For the purpose of ensuring that the requirements of this Regulation are applied on a consolidated basis, the terms ‘institution’, ‘parent institution in a Member State’, ‘EU parent institution’ and ‘parent undertaking’, as the case may be, shall also refer to:*

- a) a financial holding company or mixed financial holding company approved in accordance with Article 21a of Directive 2013/36/EU;*
- b) a designated institution controlled by a parent financial holding company or parent mixed financial holding company where such a parent is not subject to approval in accordance with Article 21a(4) of Directive 2013/36/EU;*
- c) a financial holding company, mixed financial holding company or institution designated in accordance with point (d) of Article 21a(6) of Directive 2013/36/EU.*

*The consolidated situation of an undertaking referred to in point (b) of the first subparagraph of this paragraph shall be the consolidated situation of the parent financial holding company or the parent mixed financial holding company that is not subject to approval in accordance with Article 21a(4) of Directive 2013/36/EU. The consolidated situation of an undertaking referred to in point (c) of the first subparagraph of this paragraph shall be the consolidated situation of its parent financial holding company or parent mixed financial holding company.*

*3a. By way of derogation from paragraph 1 of this Article, only parent institutions identified as resolution entities that are G-SII entities shall comply with Article 92a of this Regulation on a consolidated basis, to the extent and in the manner set out in Article 18 of this Regulation.*

*Only EU parent undertakings that are a material subsidiary of a non-EU G-SII and are not resolution entities shall comply with Article 92b of this Regulation on a consolidated basis to the extent and in the manner set out in Article 18 of this Regulation. Where Article 21b(2) of Directive 2013/36/EU applies, the two intermediate EU parent undertakings jointly identified as a material subsidiary shall each comply with Article 92b of this Regulation on the basis of their consolidated situation.*

*4. EU parent institutions shall comply with Part Six and point (d) of Article 430(1) of this Regulation on the basis of their consolidated situation where the group comprises one or more credit institutions or investment firms that are authorised to provide the investment services and activities listed in points (3) and (6) of Section A of Annex I to Directive 2014/65/EU.*

*Where a waiver has been granted under Article 8(1) to (5), the institutions and, where applicable, the financial holding companies or mixed financial holding companies that are part of a liquidity sub-group shall comply with Part Six and point (d) of Article 430(1) of this Regulation on a consolidated basis or on the sub-consolidated basis of the liquidity sub-group.*

*5. Where Article 10 of this Regulation applies, the central body referred to in that Article shall comply with the requirements of Parts Two to Eight of this Regulation and Chapter 2 of Regulation (EU) 2017/2402 on the basis of the consolidated situation of the whole as constituted by the central body together with its affiliated institutions.*

*6. In addition to the requirements laid down in paragraphs 1 to 5 of this Article, and without prejudice to other provisions of this Regulation and Directive 2013/36/EU, when it is justified for supervisory purposes by the specificities of the risk or of the capital structure of an institution or*

*where Member States adopt national laws requiring the structural separation of activities within a banking group, competent authorities may require an institution to comply with the obligations laid down in Parts Two to Eight of this Regulation and in Title VII of Directive 2013/36/EU on a sub-consolidated basis.*

*The application of the approach set out in the first subparagraph shall be without prejudice to effective supervision on a consolidated basis and shall neither entail disproportionate adverse effects on the whole or parts of the financial system in other Member States or in the Union as a whole nor form or create an obstacle to the functioning of the internal market.’’*

65. Delegated Regulation 2021/1118 expressly applies to “resolution entities at the resolution group consolidated level” when the group is composed of more than one resolution group and the CBR applies to the Union parent institution at the group consolidated level but not at the resolution entity of one resolution group which does not cover the entire group and provides a methodology to calculate the CBR for such resolution entity.

66. The Appeal Panel must decide primarily on the basis of the rules referenced above and their necessary textual, contextual and teleological interpretation, taking into account the general principles of law which may be applicable to the SRB determination of iMREL and the particular facts of the case providing the context for the application of such normative regimes.

*(b) The scope of the appeal and the question of admissibility of certain aspects of the pleas of the Appellant, and namely those concerning Article 10a SRMR, the CBR, and its proposed calculation.*

67. According to Article 85, paragraph (3) SRMR any legal person, such as the Appellant, may appeal against a “decision of the Board referred to in (...) Article 12, paragraph (1) (...) which is addressed to that person”. Article 12, paragraph (1) SRMR, as noted above, provides that the Board, after consulting the competent authorities, including the ECB shall determine the requirements for own funds and eligible liabilities as referred to in Articles 12a to 12i, subject to write-down and conversion powers, which are to be met at all times by the entities and groups referred to in Article 7, paragraph (2) and by the entities and groups referred to in point (b) of Article 7, paragraph (4) and in Article 7, paragraph (5) when the conditions for the application of these paragraphs are met. The Contested Decision determining the iMREL for [ . ] and [ . ] is such a decision.

68. In the present appeal, the Appellant is challenging the Contested Decision claiming, on one hand, that no iMREL should have been imposed on [ . ] and the Board erred in law and misused its powers in imposing it. This is an admissible challenge, and the parties agree on such admissibility. The pleas of the Appellant pertaining to such an aspect shall be considered below, where the Appeal Panel addresses the merit of the appeal.

69. Yet the Appellant is also challenging, on the other hand, that the Contested Decision, when applying an iMREL to [ . ], illegally requires, in addition to the iMREL, the equivalent of a CBR. As to this part of the appeal the Board has raised a preliminary claim of inadmissibility. It is disputed between the parties whether and to what extent the Contested Decision has only

identified the targets of iMREL set out in Article 1(1) or also specified that a certain amount of CET1 capital available at the individual level at [ . ] cannot be used and cannot be computed to meet such iMREL targets, and this would imply that the Contested Decision is setting, in section IIc, a requirement for [ . ] substantially equivalent to a CBR.

70. The Board contends that how [ . ]'s iMREL capacity is computed and the monitoring of its compliance with the iMREL requirements is outside the scope of the Contested Decision, which only sets out the specific levels of iMREL and does not mention in Section IIc any CBR for [ . ]. Therefore, in the Board's view, any challenge to the Contested Decision concerning the alleged need for the issuance of additional CET1 in order to maintain a CBR *on top of* iMREL is outside the scope of the appeal and beyond the remit of the Appeal Panel pursuant to Article 85, paragraph (3) SRMR and must be declared inadmissible. The need for such additional CET1 would directly stem, in the Board's view, from Article 10a SRMR and Commission Delegated Regulation 2021/1118 whose methodology is indirectly applied and in no way from the Contested Decision.
71. The Appellant contends, on the contrary, that the SRB illegally applied Article 128, last paragraph CRD in its calculation of [ . ]'s iMREL, because, in the Appellant's view, "if the prudential supervisor decided not to impose a CBR, the CET1 capital is not "used to satisfy the CBR" and can therefore be used to calculate iMREL. The Appellant claims therefore that "by incorrectly applying Article 128, last paragraph CRD in its calculation of [ . ]'s iMREL, the SRB underestimated the own funds and eligible liabilities (by 1,1 billion EUR as of 31 December 2020) that [ . ] needed [in the sense, that had available] to cover its iMREL and illegally imposed the equivalent of a CBR on [ . ]".
72. The Appeal Panel preliminarily notes that Article 1 of Section IIc of the Contested Decision provides that [ . ]'s iMREL on an individual basis is 15,83% of the total risk exposure amount (hereinafter "**TREA**") and 5,95% of leverage ratio exposure (hereinafter "**LRE**"). In this regard, there is a contrast between the provisions concerning external MREL, and the provisions concerning the internal MREL for the subsidiary concerned in the present appeal (i.e., [ . ]). Article 1(3) of Section I of the Contested Decision (concerning [ . ]'s external MREL on a consolidated basis at the level of the resolution group) stipulates that "of the requirement referred to in paragraph (1) expressed in terms of TREA, [ . ] shall meet an amount equal to at least 13,5% TREA using subordinated instruments other than own funds that [ . ] uses to comply with the combined buffer requirement". In contrast, Article 1 of Section IIc of the Contested Decision does not expressly mention own funds used to comply with the CBR. Furthermore, Article 2 of the Contested Decision indicates that the subsidiary "shall meet 100% of the requirements established under Article 1 (1) of this Section using (a) liabilities, and/or (b) own funds that respectively meet all conditions set out in points (a) and/or (b) of Article 12g" of SRMR. Thus, a literal reading of Section IIc of the Contested Decision suggests that [ . ] is not expressly prevented from using, to meet its iMREL requirement, own funds used to comply with the CBR.

73. Thus, the interpretative difficulties mostly arise in this case as a result of the statements made in the RTBH Memorandum. Section IV of the RTBH Memorandum explicitly addresses, in its Point 1, the issue of the use of [ . ]’s CET1 own funds to meet the iMREL requirement in a context where the ECB has waived the requirement for calculating the solvency ratio on an individual basis. The text comprises both a comment made by the Appellant, and a reply to that comment from the Board. It is necessary to determine whether these statements are relevant to ascertain the Appellant’s obligations, and, if they are relevant, their precise meaning.
74. As to their relevance, in accordance with Recital (11) of the Contested Decision, in its general Section, “the results of the Board’s assessment are set out in the relevant assessment memorandum that forms an integral part of this decision”. The Board argues that, in spite of this, the RTBH Memorandum does not produce any binding legal effects on the Appellant, since only the operative part of Section IIc could do so. However, to the extent that the RTBH Memorandum helps to ascertain the meaning of such operative part, and its binding legal effects, it must be taken into account. Thus, for all legal purposes pertaining to the assessment of the case, the meaning of Section IV, part 1 of the RTBH memorandum must be ascertained.
75. As to their meaning, and as mentioned above, Section IV of the RTBH Memorandum contains the Appellant’s comment, and the Board’s assessment, in reply to the comment.
76. In its comment, the Appellant stresses that Article 2 of Section IIc neither makes any distinction on the eligibility of instruments, nor mentions the “own funds exclusion” of the CBR under Article 128 CRD. And, thus, it argues that, if the exclusion under Article 128 CRD of own funds applies, it should be mentioned in the same way as it is mentioned in the recitals of the general Section of the Contested Decision. Then, the comment states that the own funds exclusion mentioned in Article 128 CRD should not apply in the present case because (i) MREL for the relevant entity is set on an individual basis, (ii) since there is no requirement to calculate a solvency ratio on an individual basis, the ECB does not require a CBR, and (iii) [ . ] is not a resolution entity at the consolidated level, and as a consequence Commission Delegated Regulation 2021/1118 does not apply. Finally, it *also* states that the “MREL-eligible own funds exclusion” for “reconstituting an own funds buffer requirement” (presumably, a CBR-equivalent) on an individual basis not required by the ECB has no sound legal basis, and the use of analogy of the Commission Regulation is not acceptable.
77. The text of the Appellant’s comment suggests several implications: first, that a CBR is somehow being applied; second, that, whereas the CBR is calculated on a consolidated basis, under Article 128 CRD, in this case it is being calculated on an individual basis for the entity, and this has no legal basis; third, that the inclusion of a CBR somehow results in the exclusion of a figure of own funds that would otherwise be used to comply with iMREL, pursuant to the double-counting rule. This has implications for (i) the application of a CBR in a situation where the ECB does not require one, (ii) the calculation of such CBR, and (iii) the exclusion of CBR funds from iMREL, based on the double-counting rule.



78. In its assessment, the Board refers to Article 128 (6) CRD, for the calculation of the CBR. Then, it adds that, in the knowledge of possible differences between resolution and prudential perimeters, the legislators inserted in Article 45c(4) BRRD a mandate to develop a methodology to calculate Pillar 2 *and CBR* at resolution group level, and that, since the 2021 RPC the SRB considers applicable the methodology of Commission Delegated Regulation 2021/1118 and uses the methodology adopted therein to “determine the value of the CBR when considered in addition to the MREL-TREA for the purposes of Articles 10 and 10a SRMR”. The Board did not expressly refer, in its response to Point 1 of Section IV of the RTBH Memorandum, to Article 128 CRD, which was mentioned instead by the Appellant in its comment.
79. In other words, the Board’s response referred primarily to matters of (i) CBR application, based on Article 10a SRMR, and (ii) CBR calculation, based on Commission Delegated Regulation 2021/1118. It did not expressly address the Appellant’s considerations on (iii) the exclusion of CBR funds from iMREL, based on the double-counting rule.
80. Thus, the question to be addressed by the Appeal Panel in order to determine on the admissibility of this part of the appeal is, whether Section IIc of the Contested Decision read together with Point 1 of Section IV of the RTBH Memorandum, which is made an integral part of the Contested Decision, can be interpreted to indicate that the Contested Decision not only determined the iMREL targets for [ . ] as set out in Article 1 of Section IIc but also required that, in calculating [ . ]’s CET1 own funds necessary to meet the iMREL target set forth in Article 1 the entity could not use the funds used to maintain a CBR in addition to the iMREL, under Article 10a SRMR and using the methodology adopted by Commission Delegated Regulation 2021/1118.
81. The Appeal Panel acknowledges that there was some level of ambiguity in the response given by the Board in the RTBH Memorandum that, in itself, does not contribute in the best possible way to the clarification of the admittedly complex issues at stake. The response of the SRB in the RTBH Memorandum suggests that the SRB considers that, although individual capital requirements for [ . ] have been waived by the ECB, the CBR under Article 10a SRMR would remain applicable to [ . ] *in addition* to the MREL-TREA (CBR application), and the use of the methodology set out in Commission Delegated Regulation 2021/1118 (CBR calculation). This conclusion of the Board in the RTBH Memorandum is also consistent with an email sent by the SRB to the Appellant few months before the adoption of the Contested Decision, on 12 November 2021, which expressly stated that “regarding [ . ], the SRB confirms that the sub-consolidated CBR (applied to the individual TREA) at the level of [ . ] must be maintained and complied with in addition to the individual internal MREL. This rule is an application by analogy of delegated regulation 2021/1118 to entities which are not resolution entities”.
82. However, by not explaining the relationship between the calculation of the CBR, for purposes of Article 10a, and iMREL (i.e., exclusions resulting from double-counting), the Board’s explanation was ambiguous. Read together with the Appellant’s comment, the Board’s assessment, without any clarification on the “stacking order” and thus the sequence of meeting

of such requirements via the existing [ . ]'s CET1, was ambiguous on whether the SRB considered that existing [ . ]'s CET1 own funds should be first computed as CBR under Article 10a SRMR or as iMREL. As such, and in this sensitive context, such lack of clarity may have originated undesirable and avoidable misunderstandings on the implications for iMREL of the computation of a 'notional' CBR under Article 10a SRMR in addition to the iMREL, which the Board considers necessary.

83. An ambiguous explanation in the RTBH, however, does not change the meaning of the operational part of Section IIc, if this is not reflected in such part of the Contested Decision nor in its recitals. The Appeal Panel recalls, again, that in Section IIc of the Contested Decision there is no express indication that [ . ] should meet the iMREL requirement using own funds other than own funds than those used or to be used to comply with the CBR pursuant to Article 10a SRMR. This contrasts with the inclusion of such express indication in the different context of Article 1(3) of Section I of the Contested Decision.
84. In the Appeal Panel's view, this difference in wording is eloquent. It means that any reference by the Board to a 'notional' CBR in addition to the iMREL for the purposes of Article 10a SRMR, as the one made in the RTBH Memorandum, remains outside the proper scope of the iMREL determination.
85. Consistently, in the course of the appeal, the Board acknowledged, namely when answering the questions raised by the Appeal Panel, that "any own funds which a bank may have at its disposal will (to the extent needed) count towards the minimum requirement (i.e., MREL) in priority to the CBR" (Board's written observations, 7 December 2022, p. 3).
86. Therefore, the Appeal Panel considers that the Board is correct in saying that (i) the Contested Decision determines only [ . ]'s iMREL targets as set out in Article 1 of Section IIc of the Contested Decision, that (ii) in the determination of the [ . ]'s iMREL targets the 'notional' CBR under Article 10a SRMR played no role in the calculation of such iMREL targets and that (iii) as a consequence, the Contested Decision does not set any obligation for [ . ] to issue additional CET1 to maintain the 'notional' CBR on top of iMREL pursuant to Article 10a SRMR. Such an obligation, in the Board's view, stems directly from Article 10a SRMR. The CBR calculation for purposes of Article 10a SRMR, for its part, does not affect the calculation of iMREL, by excluding any capital amounts from the calculation, or otherwise.
87. The Appeal Panel considers, therefore, that the Board's response in the RTBH Memorandum, that the SRB uses the methodology set out in Commission Delegated Regulation 2021/1118 "to determine the value of the CBR when considered in addition to the MREL-TREA for the purposes of Articles 10 and 10a SRMR" is not part of the determination of the iMREL requirements for [ . ]. This would have happened, for example, if the Contested Decision had set for [ . ] a market confidence amount pursuant to Article 12d(6), subparagraph sixth SRMR, which is clearly not the case.

88. Thus, the response given by the Board in Section IV of the RTBH Memorandum needs to be understood, in the Appeal Panel's view, as a warning that, according to the Board, Article 10a SRMR applies *also* to [ . ], even if it is not a resolution entity, and even if it is not subject to a supervisory CBR on an individual level (which applies however on a sub-consolidated and consolidated level). Under that interpretation, [ . ]'s existing own funds could be insufficient to meet both the iMREL requirements, and *also* the 'notional' CBR *on top of* iMREL pursuant to Article 10a SRMR, calculated applying by analogy the methodology set out in Commission Delegated Regulation 2021/1118 on top of iMREL.
89. In other words, the Board's response in Section IV of the RTBH Memorandum needs to be interpreted as a description of the consequences that may arise, in the Board's view, after the iMREL determination is set and is fully complied with by [ . ] using its existing own funds.
90. Therefore, in the Appeal Panel's view the Contested Decision, including Section IV of the RTBH Memorandum does not impose any legally binding limitation as to [ . ]'s own funds that can account for, and can be used to meet the iMREL requirement. If the Contested Decision had intended to impose such a result, Article 1 ought to have expressly specified that [ . ] could use to meet the iMREL-TREA target set out in Article 1 only own funds not used to comply with the CBR provided for in Article 10a SRMR, applicable by analogy also to [ . ], in the amount determined in application of the methodology set out in Delegated Regulation 2021/1118.
91. There is nothing in the text of the operative part of Section IIc of the Contested Decision nor in its recitals that makes or suggests such requirement nor prevents [ . ] from accounting all its own funds against its iMREL targets as set out in Article 1, or excludes any own funds from such calculation.
92. This is in line with the principle, acknowledged by the Board in the course of the appeal, that there is a "stacking order" between MREL (including iMREL) and CBR, meaning that institutions meet the MREL/iMREL requirement first and then the CBR<sup>2</sup>. The Appeal Panel further notes that, in the given circumstances of the present case, since [ . ] is not subject to a CBR at individual level, there are no own funds at individual level earmarked for CBR.
93. In addition, the Appeal Panel notes that the situation described in Article 10a SRMR occurs when a credit institution meets the CBR in addition to its Pillar 1 and Pillar 2 capital requirements, but *fails* to meet the 'notional' CBR *in addition to* the MREL. Thus, in the Appeal Panel's view, to assess a CBR shortfall under Article 10a SRMR (where applicable), the entity must first be MREL compliant, which means that available own funds must have been accounted for MREL.

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<sup>2</sup> Compare also Haentjens, in Brussels Commentary, *European Banking Union*, Binder, Gortsos, Lackhoff, Ohler eds. (Nomos 2022), p.557, under Article 10a, § 10; Banco de Portugal, 'Interaction between regulatory minimum requirements and capital buffers', Financial Stability Report, 2020, p. 175, figure 4, note; ESRB, 'Report of the Analytical Task Force on the overlap between capital buffers and minimum requirements', December 2021, p. 14 and p. 17, footnote 31.

94. Furthermore, the consequences under Article 10a SRMR are not automatic, and have their own procedure. Article 10a paragraph (1), provides for (i) the notification by the credit institution to the national resolution authority and the SRB, (ii) for the Board's power to prohibit distributions beyond the Maximum Distributable Amount related to MREL (hereinafter "**M-MDA**") (iii) an exercise of such a power only after the Board makes an assessment "after consulting the competent authorities, including the ECB, where applicable". Such assessment needs to be repeated at least every month for as long as the entity continues to be in the relevant situation. Finally, Article 10a, paragraph (3) requires that the Board exercises those powers if it finds that the entity is still in the situation referred to in paragraph (1) nine months after such situation has been notified by the entity, unless the Board finds that certain derogatory conditions listed in Article 10a, paragraph (3) are met.
95. The text of Article 10a SRMR indicates that the procedure under Article 10a (i) is "downstream" to the MREL decision, (ii) must be initiated after the MREL decision is taken and only as a result of the specific assessment under Article 10a SRMR and (iii) materializes in a decision posterior and different from the MREL decision, which is adopted under a different legal basis (Article 10a instead of Article 12 SRMR).
96. This is also consistent with a teleological interpretation, because in the Appeal Panel's view, the only CBR which can be determined in a MREL decision under Article 12d SRMR is the one expressly mentioned in Article 12d(6) SRMR, i.e. the market confidence amount which is included in the recapitalisation amount. However, as the Board concedes in the present appeal, this is not the case of the Contested Decision which, in the determination of the iMREL targets for [ . ], does not incorporate a market confidence charge.
97. This means, in the Appeal Panel's view, that with its response in Section IV of the RTBH Memorandum the Board could not, and did not limit the possibility for [ . ] to meet the MREL requirements set out in Article 1 of Section IIc of the Contested Decision with its own funds available as specified in Article 2, nor affected the calculation of iMREL in any way. The Board merely warned the Appellant that, contrary to the Appellant's understanding, the Board, after the iMREL decision, would have assessed if [ . ], after complying with iMREL, using its own funds, complied also with the additional requirements under Article 10a SRMR, with the effects contemplated under Article 10a SRMR.
98. The Appeal Panel finds therefore that:
- (a) the Contested Decision did not refer to the requirement of a CBR under Article 10a SRMR in a way that could result in the exclusion of own funds from the calculation of iMREL, or in a way that could affect iMREL calculations and the meeting of the iMREL targets set out in Article 1 using existing [ . ]'s CET1;
  - (b) the Contested Decision did not, and could not, include any binding determination vis-à-vis the Appellant under Article 10a SRMR, because the assessments and powers provided for in Article 10a SRMR require a different decision which is

posterior to, and downstream of, the iMREL decision (and thus other than the Contested Decision) and is grounded on a different legal basis; and

- (c) any such subsequent decision which the Board may possibly adopt pursuant to Article 10a SRMR as warned in Section IV of the RTBH Memorandum is not a decision among those listed in Article 85 SRMR and for which an appeal may be filed before the Appeal Panel. Such a decision pursuant to Article 10a SRMR, once adopted, would need therefore to be challenged by the Appellant directly before the General Court.

99. For these reasons, the plea concerning the alleged setting by the Contested Decision of a requirement equivalent to a CBR pursuant to Article 10a SRMR is inadmissible before the Appeal Panel.

100. It would correspond to the General Court to decide on the lawfulness of a decision pursuant to Article 10a SRMR, if it is eventually adopted by the Board (as the response in Section IV of the RTBH Memorandum suggests that it would) and in particular to decide:

- a) Whether Article 10a SRMR applies to a credit institution for which capital requirements at the individual level (yet not at sub-consolidated level) have been waived, although the language of the first paragraph of Article 10a, paragraph (1) SRMR refers to a situation where a credit institution “meets the combined buffer requirement when considered in addition to” prudential own funds Pillar 1 and Pillar 2 requirements under Article 141a, points a), b) and c) CRD and is therefore not waived from such requirements; and
- b) Whether, in a situation such as the case at hand, the methodology set out in Commission Delegated Regulation 2021/1118, adopted in accordance to Article 45c(4) BRRD, whose express scope of application is limited to resolution entities at the resolution group consolidated level may apply for the identification of a ‘notional’ CBR at the individual level of an entity which is not a resolution entity. Indeed, Commission Delegated Regulation 2021/1118 expressly refers to a different context where the external MREL at consolidated level needs to be adjusted in order to take into consideration the fact that, if the resolution strategy follows a multiple point of entry approach, resolution entities and their resolution groups would not coincide with the whole perimeter of the prudential group, and thus the calculation of the CBR on top of the external MREL for each resolution entity needs to be adjusted. It remains to be clarified by the European courts if the methodology adopted in Article 3 of Commission Delegated Regulation 2021/1118 to calculate the CBR for each resolution entity is the expression of a principle that may work also in other contexts, such as the one of [ . ], which is not a resolution entity and is going to be resolved following a single point of entry approach.

*(c) On the merit of the appeal. The first and second pleas.*

101. With the exclusion of the aspects of the appeal which are inadmissible as specified in the previous section of this decision, the Appeal Panel deems appropriate to consider together, in its determination on the merit of the appeal, the first and second grounds of appeal, which are intrinsically related and deserve a comprehensive consideration. In so doing, the Appeal Panel can first examine all the contentions where the Appellant alleges that the Board erred in law under various respects. This determination is logically precedent, in the Appeal Panel's view, to any consideration on whether the Board committed a manifest error of assessment or misuse of powers (third plea of the Appellant), which will be considered at a second stage.
102. The Appellant, with the first and second grounds of appeal, argues in essence that the SRB erred in law in imposing the iMREL requirement for [ . ].
103. With the first limb of the first ground, the Appellant notes that subsidiaries of a resolution group, which are not themselves resolution entities, such as [ . ], shall comply with iMREL requirements on an individual basis but the Board may permit such requirement to be met in full or in part by a collateralized guarantee as provided for by Article 12g(3) SRMR, or may waive the iMREL requirement in accordance with Article 12h(1) SRMR. The Appellant further notes that [ . ] has been granted by the ECB a waiver under Article 6(1) CRR concerning prudential requirements at individual level. The Appellant argues therefore that the SRB determination of iMREL should have been aligned with the waiver from prudential requirements, in order to take into account "the clear intention of the European legislator to ensure the complementary nature of the supervision and resolution of credit institutions". In the Appellant's view, therefore, no iMREL requirement for [ . ] should have been imposed.
104. With the second ground, the Appellant argues that the Board erred in law and violated the principle of proportionality because it did not assess, in the given circumstances of the case, whether it could waive the iMREL requirement for [ . ], and argues that, to that effect, a formal request from the Appellant was not necessary.
105. The Board considers, on the contrary, that setting iMREL for [ . ] results from the mere application of the legal framework that requires the SRB to set iMREL targets for the subsidiaries of resolution entities to be determined on the basis of subsidiaries' individual situation even in cases where those subsidiaries are exempt from individual capital requirements. As to the possibility of awarding a waiver from iMREL obligations or allowing the use of collateralized guarantees to meet iMREL, the Board notes that the Appellant did not file any request in this respect in the context of the 2021 RPC and that, therefore, the Board was under no obligation to consider such possibility, nor did it have the relevant information to be able to assess whether the legal requirements pertaining to the award of an iMREL waiver or the use of a collateralized guarantee were met.
106. The Appeal Panel notes that, according to Article 12h and 12i SRMR the SRB "may" waive internal MREL for subsidiary institutions qualifying as non-resolution entities or for affiliated

credit institution of a central body if the conditions respectively set out in Article 12h and 12i SRMR are met.

107. The Appeal Panel further notes, as a relevant point of law, that the SRMR does not expressly require a formal application for an iMREL waiver. Article 12h and 12i SRMR, from a textual point of view, provide for that “the Board may waive” the application of the iMREL without a specification that this can occur solely “upon request” or “if the credit institution so requires”.
108. The SRB MREL Policy of May 2021 - applicable at the time of adoption of the Contested Decision, which was 23 March 2022 – stipulates at its section 4.2. that “the SRB may exercise its discretion to grant waivers where the minimum conditions set out in Article 12h SRMR are met and where “the files *sent* to the SRB are complete” and further notes, at footnote 77 of page 25, that “provided that *the complete application* is submitted at an early stage of the resolution planning cycle, the SRB decision as to whether to grant a waiver will be reflected in the MREL decision. If the review is completed outside of the cycle, the SRB conclusion may lead to a revision of the existing MREL decision”. The same MREL Policy, of May 2021, further specifies, at § 83, that “*waiver applicants* must demonstrate that there is no impediment to the prompt transfer of own funds or repayment of liabilities” and that “the *bank applying* for an MREL waiver is expected to demonstrate that the loss transfer mechanism between the subsidiary and the resolution entity in place is commensurate with the size of the subsidiary and substitutes the need for a prepositioning of loss-absorbing and recapitalisation capacity, even if the resolution entity itself is in a FOLTF situation”. The current MREL Policy, June 2022 edition (adopted after the Contested Decision and thus not applicable in the instant case) also includes identical statements at page 24, text and footnote 76 and at § 83.
109. The Appeal Panel further notes that, according to Article 12g, paragraph (3) SRMR the Board may also permit the iMREL to be met in full or in part with a collateralised guarantee. The Appeal Panel acknowledges therefore that, in the context of Article 12g, paragraph (3) SRMR, the co-legislators may have indeed assumed that the credit institution *makes an application*, because the Board’s decision needs to be supported by a collateralised guarantee provided by the resolution entity, and failing such guarantee the Board cannot consider the compliance with iMREL through this alternative means. In this context, therefore, the necessary submission of such document, in the Appeal Panel’s view, would clearly imply an active role of the credit institution in asking for the waiver through a request for the waiver duly accompanied by the requisite collateralised guarantee.
110. The Appeal Panel finds, however, that the same conclusion cannot be inferred by analogy from Article 12g, paragraph (3) SRMR also for the iMREL waivers permitted pursuant to Articles 12h and 12i SRMR. The conditions to be satisfied under Articles 12h and 12i SRMR are indeed different than those under Article 12g SRMR, and most notably do not require a collateralised guarantee.

111. The Appeal Panel further notes that the Contested Decision clarifies, at recital (9) that it “comprises the Board’s determination of MREL for [ . ], [ . ] and [ . ], including waivers, where applicable” and, at recital (8) that the MREL for [ . ] and its [ . ] is determined at consolidated level in accordance with Article 12f(3) SRMR “depending on the features of [ . ] and of the preferred resolution strategies”. The features of the [ . ] are detailed in Section I, recital (2), of the Contested Decision including the finding that “[ . ] applicable to [ . ] and its [ . ], as further implemented in the internal general decision DCG I and II adopted by the [ . ] is construed in such a way that its implementation would result in a loss-sharing tool involving [ . ] up to the exhaustion of their overall resources, including their own funds”.
112. However, the Contested Decision differentiates (at recital (1), page 2 of the Contested Decision) between [ . ] and its [ . ], i.e., all entities included in the list referred to in Article R512-21 of the [ . ], on one hand, and the [ . ] such as [ . ], on the other hand. As noted by the [ . ] in its communication of 29 April 2022 to [ . ] notifying the MREL requirements, “the SRB concluded from the analysis that the own funds and eligible liabilities issued by [ . ] and its [ . ] are considered eligible to comply with the MREL requirement on a consolidated basis at the resolution group level. It follows that no credit establishment [ . ] is subject to an individual MREL requirement since the provisions adopted entail de facto an exemption for [ . ]”. The Appeal Panel notes that this “implied waiver” applies to the [ . ], but not to [ . ] such as [ . ].
113. Responding to the questions for clarification raised by the Appeal Panel on 1 December 2022, the Board confirmed that [ . ] in place between [ . ] and [ . ] does not include [ . ]. The Appellant did not argue that [ . ] applies directly to [ . ]. Instead, it claimed that since [ . ] is a [ . ], which is itself a [ . ], [ . ], “[ . ] indirectly and by extension benefits from [ . ]”. That is, in the Appellant’s view, the fact that both the parent company of the entity, and the parent of the parent, are [ . ], they are indirect beneficiaries of the [ . ].
114. However, in the Appeal Panel’s view, the Appellant failed to show and to duly specify and evidence throughout these proceedings that these alleged benefits, which the Appellant itself characterizes as “indirect” and “by extension”, are sufficient to consider [ . ] as part of [ . ].
115. At the hearing, the Board, for the first time, mentioned that the Appellant not only failed to make a formal request for a waiver from the iMREL for [ . ] during the RPC 2021 but also expressly informed the SRB, in exchanges with the internal resolution team (hereinafter “**IRT**”), that it did not intend to request a waiver from iMREL for [ . ] in that particular RPC. The counsels for the Appellant stated at the hearing, when specifically questioned on that allegation, that such circumstance was not known to them. The Appeal Panel invited therefore the Board to deposit by 28 November 2022 the relevant documentation in support and granted both parties the possibility to fully express their position on those documents. Both parties deposited documents and made written observations.
116. The Board deposited the written exchanges between the IRT and the Appellant of 6 July 2021 and 28 September 2021. With the latter communication, [ . ] confirmed to the IRT that “it did



not intend to apply for iMREL waivers”. The Appellant deposited written exchanges of 1 September 2021 and 12 November 2021 and claimed that [ . ]’s statement of 28 September 2021 “cannot be interpreted as a permanent decision not to request waivers in future resolution cycles (such as the one in the case at hand)”. The Appeal Panel notes, however, that the Contested Decision was adopted in the 2021 RPC, and thus in the same RPC to which the [ . ] statement of 28 September 2021 refers.

117. The Appeal Panel finds that the particular factual circumstances of the case, as documented by the exchanges between the IRT and the Appellant, are relevant for the determination of the appeal.
118. Those exchanges, in the Appeal Panel’s view, rule out that, in the given circumstances, the Board could grant on its own initiative a waiver that the credit institution itself, after having been informed of the possibility to request a waiver, clearly and expressly communicated to the Board that it did not intend to seek for the 2021 RPC (as ultimately evidenced in the documentation produced after the hearing upon invitation by the Appeal Panel, as a necessary step to fully ascertain the factual context of the case given the late stage of the procedure in which certain factual allegations came to be produced) .
119. Moreover, the Appellant failed to show, in the Appeal Panel’s view, that in the given circumstances, the Board did have the relevant information to be able to assess whether the legal requirements pertaining to the award of an iMREL waiver or the use of a collateralized guarantee were met.
120. First, as discussed above, the SRMR contemplates two exceptions to the general rule to comply with iMREL for non-resolution entities, i.e., where the Board *permits* the requirements to be met through a collateralized guarantee, under Article 12g(3) SRMR, and where the Board *waives* the requirement altogether, under Article 12h SRMR. In the scenario of collateralized guarantee, which is a case where iMREL is *complied* with, and not waived, the resolution entity and the subsidiary must clearly take the initiative, because they need to provide said guarantee.
121. Second, if the exception sought by the entity is that of the “waiver” of iMREL, the requirements are (a) that both the subsidiary and the resolution entity are in the same Member State, (b) that the resolution entity complies with MREL on a consolidated level, and that (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 this case, [ . ] is not direct part of [ . ] in place between [ . ] as [ . ] and [ . ]. The Appellant has alleged that it was an “indirect beneficiary” of this [ . ]. However, the meaning and implications of this are not clear to the Appeal Panel, and they may have been similarly unclear to the Board. Indeed, there is nothing in the file of this appeal that may indicate that, failing a request for a waiver from [ . ] and its supporting documentation, the Board had nonetheless sufficient information to assess compliance with these requirements, especially the third one, and may have therefore granted a waiver on own initiative.

122. The existence of a capital waiver by the supervisory institution does not change this conclusion. The Appeal Panel holds that, contrary to the Appellant's claim, (i) the Board is not obliged to automatically grant an iMREL waiver if the ECB has granted a capital waiver and (ii) an ECB waiver is not, per se, a sufficient indication that also an iMREL waiver needs to be granted. The Appeal Panel acknowledges, indeed, that the Board must be able to exercise its discretion in this respect also because the Board's assessment relates to the credit institution as a (potential) gone concern. Thus, an assessment of the ECB, which relates to the credit institution as a going concern, is relevant, but not binding upon the SRB. Supervisory and resolution needs as such may be conducive, in certain circumstances, to different outcomes in complex assessments as the those of prudential and iMREL waivers.
123. This is even more so in a situation where, as in the case at hand, capital requirements are waived for [ . ] by the ECB at its individual level, but not at its sub-consolidated level (as shown by the ECB decision of 2 February 2022 ECB-SSM-2022-[ .]6, at the bottom of page 6 of the Annex I).
124. The Appeal Panel is therefore persuaded that the presence of a capital waiver from the competent supervisory authority does not imply an automatic MREL waiver, although it is an important element which needs to be considered among all other factual and legal circumstances of the case in the assessment on whether the SRB has received sufficient comfort, depending on bank-specific elements, that the conditions set out in Article 12h SRMR are met to grant a waiver.
125. However, as already mentioned, an appellant who wishes to claim that a waiver should have been granted in the given circumstances of the case needs, first of all, to provide evidence that the factual elements necessary for such an assessment were all available to the Board. The Appellant failed to give such evidence.
126. Based upon this finding, the Appellant has failed to show compelling evidence to support that the Board should have granted a waiver on its own initiative. As noted above, in the given circumstances, the Appellant failed to show: (i) that, failing a request from the credit institution and, in consequence of that, of the supporting documentation, the Board had knowledge on its own of all factual elements necessary for the assessment that a waiver should indeed be granted, and accordingly (ii) the objective basis upon which the Board should have on its own initiative pondered, in the context of the discretion given to it by Article 12h SRMR, the granting of a waiver, when the credit institution itself considered expressly that there was no sufficient reason to ask for such a waiver, nor produced relevant factual evidence supporting such waiver.
127. The Appeal Panel is therefore persuaded that, in the given circumstances, the Board has not violated any relevant procedural and substantive rule nor the proportionality principle and that, therefore, the first limb of the first plea and the second plea, where the Appellant raises an issue of error in law, are unfounded.

*(e) On the third ground of appeal*

128. With the third plea the Appellant argues that the SRB did commit a manifest error of assessment or misuse of power by failing “to take key aspects of the case into consideration when applying a MREL to the [ . ] on an individual basis and when considering a contestable CBR to be respected on top”.
129. The second aspect of the plea is inadmissible for the reasons stated in the previous section of this decision concerning admissibility and needs to be deferred to the General Court, if a decision pursuant to Article 10a SRMR is eventually adopted by the Board in respect to [ . ] to that effect.
130. The first aspect of the plea is unfounded for the reasons already discussed above and briefly reiterated here below.
131. In the Appeal Panel’s view, in the given circumstances of the instant case the Appellant expressly informed the SRB that it did not intend to avail itself of a waiver and there is no evidence in the file that the Board, failing a request for a waiver from the Appellant, had knowledge of all factual elements necessary for the assessment whether a waiver may be granted.
132. Moreover, the Appeal Panel finds that, contrary to the Appellant’s claim, the Board is not obliged to automatically grant an iMREL waiver if the ECB has granted a capital waiver and an ECB waiver is not, per se, a sufficient indication that also an iMREL waiver needs to be granted because the SRB’s assessment relates to the credit institution as a (potential) gone concern whereas the ECB’s assessment relates to the credit institution as a going concern. This is even more so in a situation where, as in the case at hand, capital requirements are waived for [ . ] by the ECB at the individual level, but not at the sub-consolidated level (as shown by the ECB decision of 2 February 2022 ECB-SSM-2022-[ . ]-6, at the bottom of page 6 of the Annex I).
133. The Appellant has failed therefore to adduce evidence to show that the Board committed a manifest error, or abused its powers, in not granting a waiver to [ . ] from its iMREL requirements nor has shown that the factual elements necessary for the granting of such waiver were all available to the Board.

On those grounds, the Appeal Panel hereby:

**Dismisses the appeal**

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Helen Louri-Dendrinou

(SIGNED)

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Kaarlo Jännäri

(SIGNED)

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Luis Silva Morais  
Vice-Chair and Co-Rapporteur

(SIGNED)

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Marco Lamandini  
Co-Rapporteur

(SIGNED)

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Christopher Pleister  
Chair

(SIGNED)

For the Secretariat of the Appeal Panel:

[ . ]

(SIGNED)