Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

10 July 2024*

(Economic and monetary policy – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Regulation (EU) No 806/2014 – Minimum requirement for own funds and eligible liabilities – Decision of the SRB not to grant a waiver – Appeal before the Appeal Panel of the SRB – Dismissal – Condition that there is no impediment to the prompt transfer of own funds – SRB's margin of discretion – Legal certainty – Obligation to state reasons)

In Case T-540/22,

French Republic, represented by T. Stéhelin, E. Timmermans and B. Travard, acting as Agents,

applicant,

v

Single Resolution Board (SRB), represented by H. Ehlers, M. Fernández Rupérez and L. Forestier, acting as Agents, and by H.-G. Kamann and F. Louis, lawyers,

defendant,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of F. Schalin, President, P. Škvařilová-Pelzl, I. Nõmm (Rapporteur), G. Steinfatt and D. Kukovec, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure,

further to the hearing on 14 November 2023,

gives the following

* Language of the case: French.

Judgment

1 By its action based on Article 263 TFEU, the French Republic seeks the annulment of Decision No 3/2021 of the Appeal Panel of the Single Resolution Board (SRB) of 8 June 2022 dismissing the appeal brought against Decision SRB/EES/2021/44 of 4 November 2021 determining the minimum requirement for own funds and eligible liabilities ('the contested decision').

Background to the dispute

2 On 6 November 2020, a banking group ('the banking group concerned') submitted, in respect of one of its subsidiaries, an application for waiver of the minimum requirement for own funds and eligible liabilities ('MREL') applied on an individual basis pursuant to Article 12g 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 funds in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1), as amended by Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 (OJ 2019 L 150, p. 226), in accordance with Article 12h(1) of that regulation, for the 2020 resolution planning cycle.

3 By Decision SRB/EES/2021/44 of 4 November 2021 determining the minimum requirement for own funds and eligible liabilities, the SRB refused the waiver application made by the banking group concerned in respect of one of its subsidiaries.

4 On 21 December 2021, the Autorité de contrôle prudentiel et de résolution (Authority for Prudential Supervision and Resolution, France; 'the ACPR') ('the appellant before the Appeal Panel') brought an appeal against Decision SRB/EES/2021/44 before the Appeal Panel of the SRB.

5 On 8 June 2022, the Appeal Panel, by the contested decision, dismissed the appeal brought by the appellant before the Appeal Panel.

Forms of order sought

6 By application lodged at the Registry of the General Court on 2 September 2022, the French Republic brought the present action.

7 The French Republic claims that the Court should:

– annul the contested decision;

– order the SRB to pay the costs.

8 By separate document lodged at the Registry of the General Court on 2 September 2022, the French Republic also requested that the Court, pursuant to Articles 88 and 89 of the Rules of Procedure of the General Court, adopt a measure of organisation of procedure consisting in asking the SRB to produce its internal MREL booklet.

9 The SRB contends, in essence, that the Court should:

– dismiss the action;

– order the French Republic to pay the costs.

Law

10 In support of its action, the French Republic raises three pleas in law, alleging that the SRB, first, incorrectly interpreted and applied Article 12h of Regulation No 806/2014 and 'exceeded the limits of its discretion', second, breached the principle of legal certainty and, third, failed to satisfy its obligation to state reasons.

The first plea, alleging that the SRB incorrectly interpreted and applied Article 12h of Regulation No 806/2014 and 'exceeded the limits of its discretion'

11 In the context of its first plea, the French Republic submits that the Appeal Panel wrongly endorsed the SRB's interpretation and application of Article 12h(1)(c) of Regulation No 806/2014 because they amount, in essence, to requiring 'as a matter of principle' the provision of a specific guarantee and to permitting 'by way of exception' the possibility of derogating from such a requirement. It criticises that panel for not having sought to determine whether, in the present case, the SRB was justified in requiring such a guarantee.

12 That first plea consists of two parts, alleging that the SRB, first, incorrectly interpreted and applied Article 12h(1)(c) of Regulation No 806/2014 and, second, exceeded the limits of its discretion under Article 12h(1)(c) of Regulation No 806/2014.

The first part, alleging an incorrect interpretation and application of Article 12h(1)(c) of Regulation No 806/2014

13 In the context of the first part of the first plea, the French Republic submits that the SRB was wrong to require 'as a matter of principle', when examining a waiver application made pursuant to Article 12h(1) of Regulation No 806/2014, a specific guarantee between the resolution entity and its subsidiary in order to consider the condition laid down in Article 12h(1)(c) thereof to be satisfied. It argues that there was a sufficiently probative and consistent body of evidence, established by the appellant before the Appeal Panel, demonstrating that, by the requirement of a specific guarantee, the SRB had not simply interpreted and applied the condition laid down in Article 12h(1)(c) of Regulation No 806/2014, but had in fact applied a test provided for in other EU legislation of the same level which does not apply in the present case.

14 The SRB disputes the French Republic's line of argument.

15 As a preliminary point, it must be recalled that, to avoid banking entities structuring their liabilities in a manner that impedes the effectiveness of the bail-in tool and thus to protect customers' deposits in the event of massive losses, the EU legislature required banks to comply with the MREL at all times. The MREL is expressed as a percentage of the total liabilities and

own funds of the entity. It must also be noted that Article 12g of Regulation No 806/2014 imposes an MREL ('the internal MREL') on entities (here: the subsidiaries of a banking group) which are not themselves resolution entities.

16 The internal MREL can be satisfied in two ways. First, the subsidiary can issue commitments in favour of the resolution entity (here: the parent company of the banking group concerned), for example in the form of bonds. Second, that parent company can satisfy its subsidiary's internal MREL by means of a guarantee which fulfils a number of cumulative conditions listed in Article 12g(3) of Regulation No 806/2014.

17 Article 12h(1) of Regulation No 806/2014 provides that the internal MREL may be waived in respect of subsidiaries where three cumulative conditions are met. The condition set out in point (c) of that provision states that 'there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary in respect of which a determination has been made in accordance with Article 21(3), in particular where resolution action is taken in respect of the resolution entity'.

18 It must also be borne in mind that the statement made in Article 12h(1) of Regulation No 806/2014 to the effect that 'the [SRB] may waive the application of Article 12g in respect of a subsidiary of a resolution entity established in a participating Member State' where the three conditions listed in that provision are satisfied necessarily means that the provision, in part, imposes a strict obligation on the SRB and, in part, delegates a discretion to it (see, to that effect and by analogy, judgment of 13 July 2018, *Banque postale* v *ECB*, T-733/16, EU:T:2018:477, paragraph 39).

19 As a first stage, the SRB examines whether the three conditions contained in Article 12h(1) of Regulation No 806/2014 are met. If those conditions are not met, it is not entitled to grant a waiver of the MREL. It is therefore bound by a strict obligation and must refuse the waiver application.

20 If the three conditions set out in Article 12h(1) of Regulation No 806/2014 are met, the second stage is reached. In such circumstances, the SRB 'may' grant a waiver of the MREL. This is thus a possibility, which necessarily means that the SRB has the right to grant a waiver or not to do so. It therefore has discretion in that respect (see, to that effect, judgment of 13 July 2018, *Banque postale* v *ECB*, T-733/16, EU:T:2018:477, paragraph 41).

21 In the contested decision, the Appeal Panel considered, in essence, that the SRB had not erred in law in interpreting Article 12h(1)(c) of Regulation No 806/2014. The Appeal Panel refutes that the approach taken by the SRB, in order to determine whether a banking group requesting the waiver satisfied the condition laid down in the abovementioned provision, consisted in requiring 'as a matter of principle' the provision of a specific guarantee and of allowing 'by way of exception' the possibility of derogating from such a requirement.

22 In order to determine whether the Appeal Panel erred in law when it reviewed the SRB's examination of the condition contained in Article 12h(1)(c) of Regulation No 806/2014, in the context of the waiver application from the banking group concerned, that provision has to be interpreted.

23 In that regard, it is settled case-law that the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole (see judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 49 and the case-law cited; order of 24 October 2019, *Liaño Reig* v *SRB*, T-557/17, not published, EU:T:2019:771, paragraph 59).

24 First, with regard to the literal interpretation of Article 12h(1)(c) of Regulation No 806/2014, it must be stated that that provision simply lays down the condition that there must be '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'.

25 Thus, Article 12h(1)(c) of Regulation No 806/2014 does not provide for the possibility of requiring a specific guarantee in order to satisfy the condition that there is no current or foreseen material impediment to the prompt transfer of own funds or repayment of liabilities ('the impediment to the prompt transfer of own funds'), nor does it prohibit the SRB from requiring a specific guarantee in that regard.

26 In those circumstances, further examination of Article 12h(1)(c) of Regulation No 806/2014 is required in the form of a contextual and teleological interpretation of Article 12h of that regulation, in order to determine whether that provision allows the SRB to require a specific guarantee for the condition contained in Article 12h(1)(c) of the regulation to be met and for a waiver of the internal MREL to be granted in respect of the subsidiary concerned.

27 Second, the contextual interpretation of Article 12h(1) of Regulation No 806/2014 involves examining, on the one hand, the *travaux préparatoires* for that regulation and, on the other hand, its relationship with the other provisions of that same regulation taken as a whole as well as with provisions of other acts of EU law.

28 In that regard, it must be recalled that Article 12h of Regulation No 806/2014 was inserted by Regulation 2019/877.

29 It is apparent from the *travaux préparatoires* for Regulation 2019/877 – that is to say, from Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 806/2014 as regards loss-absorbing and Recapitalisation Capacity for credit institutions and investment firms (COM(2016) 851 final, 23 November 2016) – that the following two types of amendments are part of the same legislative package. The first set are proposed amendments to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6), which are intended to include the minimum requirement for the total loss-absorbing capacity (TLAC) standard, that is, a standard adopted at the G20 summit held in Antalya (Türkiye) on 15 and 16 November 2015; the objective of that standard is to ensure that global systemically important banks have the necessary loss-absorbing and recapitalisation capacities in the event of resolution. The second set are proposed amendments to Regulation No 806/2014, providing for additional obligations imposed on a case-by-case basis on systemic banks and general requirements imposed on banks established in the banking union.

30 With regard to the proposals for amendments to Regulation No 806/2014, the *travaux préparatoires* show that Articles 12g and 12h (which will become Articles 12f and 12g of Regulation No 806/2014) concern the level of application of the MREL and that, as far as concerns institutions regarded as resolution entities, the MREL applies at the resolution group level. Those *travaux préparatoires* also set out that the proposals introduce the concept of an 'internal MREL', in line with a similar concept brought forward by the TLAC standard, and that means that other resolution group entities which are not themselves resolution entities are required to issue eligible debt instruments within a resolution group and that those instruments must be bought by the resolution entities. The proposals further specify that, subject to certain safeguards, the internal MREL can be replaced by collateralised guarantees given by the resolution entity to other resolution group entities.

31 It is likewise apparent from those same *travaux préparatoires* that Article 12i (which will become Article 12h of Regulation No 806/2014) specifies that, subject to certain safeguards, the internal MREL of a subsidiary may be waived by the SRB if both the subsidiary and the parent undertaking are established in the same participating Member State.

32 Thus, the reference to the requirement of a guarantee is clearly mentioned only in relation to future Article 12g of Regulation No 806/2014, which concerns the 'application of the requirement to entities that are not themselves resolution entities'. The discussions regarding future Article 12h of that regulation, relating to the possibility of a waiver of the internal MREL, did not cover the possible requirement of a guarantee in that context.

33 As regards the relationship between Article 12h(1) of Regulation No 806/2014 and the other provisions of Regulation No 806/2014 taken as a whole or provisions of other acts of EU law, it must be recalled that recital 83 of Regulation No 806/2014 provides that, 'to avoid entities structuring their liabilities in a manner that impedes the effectiveness of the bail-in tool, it is appropriate to establish that the entities should meet at all times [the MREL] which may be subject to the bail-in tool, expressed as a percentage of the total liabilities and own funds of the entity'.

34 As for Regulation 2019/877, recital 19 thereof states that, 'if both the resolution entity or the parent and its subsidiaries are established in the same Member State and are part of the same resolution group, the [SRB] should be able to waive the application of the MREL that applies to those subsidiaries that are not resolution entities or to permit them to meet the MREL with collateral guarantees between the parent and its subsidiaries, that can be triggered when the timing conditions equivalent to those allowing the write-down or conversion of eligible liabilities are met' and that 'the collateral backing the guarantee should be highly liquid and have minimal market and credit risk'.

35 Recital 19 of Regulation 2019/877 sets out, in essence, the content of new Articles 12g and 12h of Regulation No 806/2014.

36 Article 12g(3) of Regulation No 806/2014 provides that the SRB may permit entities which are not themselves resolution entities to satisfy the internal MREL imposed on them with a guarantee that must fulfil nine cumulative conditions. The provision requires that the guarantee is collateralised for at least 50% of its amount. As follows from paragraph 34 above, this means that the parent company is in fact required to pre-position its liquid assets in order to back that guarantee.

37 As for Article 12h(1) of Regulation No 806/2014, it provides, as recalled in paragraph 17 above, for the possibility of waiving the internal MREL in respect of a subsidiary provided that the conditions contained in that provision are satisfied, including the condition that there is no impediment to the prompt transfer of own funds.

38 It must also be borne in mind that the last sentence of recital 2 of Regulation 2019/877 states that 'the provisions of Regulation … No 806/2014, as amended by this Regulation, on the loss-absorbing and recapitalisation capacity of institutions and entities should be applied in a manner consistent with those in Regulation … No 575/2013 and in Directives 2013/36/EU … and 2014/59/EU'. It must be observed that a provision similar to Article 12h of Regulation No 806/2014 appears in Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190), as amended by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (OJ 2019 L 150, p. 296).

39 Article 45f(3)(c) of Directive 2014/59 provides for the possibility of a waiver in respect of a subsidiary where 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.

40 However, unlike Regulation No 806/2014, Article 45f(3) of Directive 2014/59 also expressly imposes an additional condition, separate from the condition that there is no impediment to the prompt transfer of own funds, namely that of a guarantee offered by the parent company in favour of its subsidiary. More specifically, Article 45f(3)(d) of Directive 2014/59 requires that 'the resolution entity satisfies the competent authority regarding the prudent management of the subsidiary and [that it] has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary'. It also states that the latter condition is not mandatory if the risks in the subsidiary are of no significance. Thus, save where the risks are of no significance, that additional condition must be met in order for the SRB to be able to exercise its discretion to grant a waiver or not to do so. It must be stated that no such condition appears in Article 12h(1) of Regulation No 806/2014.

41 It is therefore apparent from a contextual interpretation that the requirement of collateralised guarantees between the parent company and its subsidiaries is laid down in Article 12g of Regulation No 806/2014 solely in order to comply with the internal MREL and that the condition of a guarantee does not appear in Article 12h(1) of the same regulation in the context of a waiver, unlike what the legislature provided for in Directive 2014/59, which was also adopted in the field of resolution.

42 At this stage, it follows from the foregoing that the possibility of obtaining a waiver under Article 12h(1) of Regulation No 806/2014 cannot in any way be made conditional upon the requirement of a collateralised guarantee similar to that provided for in Article 12g(3) of the same regulation. An approach to the contrary would render Article 12h(1) of Regulation No 806/2014 wholly redundant and thus constitute a manifest infringement of that provision.

43 However, the foregoing considerations cannot support the French Republic's argument that the SRB may not require 'any guarantee' in the context of examining a waiver application. It cannot be inferred from the contextual interpretation above that the failure to mention a guarantee in the provision relating to the examination of an application for waiver of the internal MREL (namely, Article 12h(1) of Regulation No 806/2014) prevents *ipso jure* the SRB from imposing a requirement of that kind in the context of that examination. While the SRB is obliged to refuse a waiver application if one of the cumulative conditions laid down in Article 12h(1) of Regulation No 806/2014 is not satisfied, it does, nevertheless, enjoy a degree of discretion to determine under which circumstances the third of those conditions (namely, there is no impediment to the prompt transfer of own funds) is satisfied. Accordingly, it cannot be ruled out that, having regard to the discretion it enjoys to assess the third condition contained in the abovementioned article, it may be justified in requiring a guarantee – which is different from that provided for in Article 12g(3) of Regulation No 806/2014 – so as to counter an impediment to the prompt transfer of own funds.

44 Third, the Court considers it appropriate to continue its analysis with a teleological interpretation of Article 12h(1)(c) of Regulation No 806/2014. In the context of that interpretation, account must be taken of the general objective pursued by Regulation 2019/877 and Regulation No 806/2014.

45 In that regard, the legislature sets out, in recital 5 of Regulation 2019/877, the primary objective pursued by that regulation, namely that 'the [SRB ensures] that institutions and entities have sufficient loss-absorbing and recapitalisation capacity to ensure a smooth and fast absorption of losses and recapitalisation in the event of resolution, with a minimum impact on taxpayers and financial stability[; that] should be achieved through compliance by institutions with an institution-specific MREL as set out in Regulation … No 806/2014'.

46 Thus, as the SRB contends in essence, the primary objective common to Regulation No 806/2014 and Directive 2014/59, which is pursued by the legislature by imposing the MREL on all of the institutions in a banking group, is to ensure an effective resolution with a minimum detrimental impact on the real economy, the financial system and public finances.

47 Furthermore, according to recitals 17 and 18 of Regulation 2019/877, whereas institutions or entities that are identified as resolution entities should be subject to the MREL only at the consolidated resolution group level, institutions or entities that are not resolution entities should comply with the MREL at individual level.

48 The rule is therefore that each subsidiary of the banking group concerned must comply with the internal MREL. In view of what is at stake in terms of minimising the impact on taxpayers and of securing the financial stability underlying that obligation, an exception to the rule is conceivable only if the conditions for granting such an exception are met. The SRB's decision to waive the internal MREL thus must not jeopardise the objective of minimising the impact on taxpayers and of securing the financial stability which formed the basis for establishing the obligation to pre-position the internal MREL at the subsidiary level. As the SRB rightly observes, if the internal MREL is not pre-positioned at the subsidiary level and if the subsidiary's losses were to exceed its legal capital, the subsidiary itself would have to be placed under resolution and such a situation would be at odds with the objective underlying the internal MREL.

49 The view must therefore be taken that the SRB is to be guided by the objective recalled in paragraph 46 above when it applies Regulation No 806/2014 and examines whether the conditions contained in Article 12h(1) thereof are met.

50 Thus, when the SRB examines an application for waiver of the internal MREL, it falls to it to assess whether there are other arrangements which could act as functional substitutes for the internal MREL. Within the context of its discretion, as recalled in paragraph 43 above, there is nothing to prevent it from considering that, according to the circumstances specific to each waiver application, a guarantee is necessary in order to satisfy the condition that there is no impediment to the prompt transfer of own funds. However, for the reasons set out in paragraph 42 above, it may not require a guarantee which is similar in characteristics to that provided for in Article 12g(3) of Regulation No 806/2014.

51 In that regard, it is important to note that it is not apparent from the contested decision that the SRB required the banking group concerned to provide a guarantee corresponding to, or having characteristics similar to, that provided for in Article 12g(3) of Regulation No 806/2014 nor, a fortiori, that the Appeal Panel endorsed such an approach by the SRB.

52 That conclusion cannot be called into question by any of the arguments put forward by the French Republic.

53 First, the French Republic cannot effectively criticise the Appeal Panel and the SRB for having focused solely on the general purpose of the resolution framework and the internal MREL, which is common to Regulation No 806/2014 and Directive 2014/59, and having failed to take into account the objectives specific to that regulation, which consist in reducing the risks of fragmentation of the internal market in financial services. It claims that the waivers of the internal MREL applicable between entities located within the same Member State contribute to those objectives by reducing the barriers to the circulation of liquidity and intragroup capital.

54 As is stated in essence in recital 18 of Regulation 2019/877 and as has been recalled in paragraph 47 above, the primary objective of the measure consisting in making institutions or entities that are not resolution entities subject to the internal MREL at the individual level is to avoid potentially disruptive effects on the market by allowing the SRB to resolve a resolution group without placing certain of its subsidiaries under resolution.

55 In that context, the objective of reducing the barriers to the circulation of liquidity and intragroup capital, pursued by Article 12h of Regulation No 806/2014, which provides that the SRB may waive the application of the internal MREL under certain conditions, appears to be secondary. Such an aim cannot be pursued to the detriment of the primary objective recalled in paragraph 54 above.

56 In that connection, it must be recalled that recital 2 of Regulation 2019/877 provides that the provisions concerned in Regulation No 806/2014, as amended by those of Regulation 2019/877, are to be applied in a manner consistent with those, inter alia, in Directive 2014/59. However, Article 45f(3)(d) of Directive 2014/59 provides that the parent company has to declare that it guarantees the commitments of its subsidiary only if the risks in the subsidiary are of some significance. The legislature thus gives priority to a prudent approach by allowing the waiver without requiring a guarantee only if strict conditions are satisfied and, in particular, if such a waiver presents, in essence, no risk.

57 For reasons of consistency, the provisions of Regulation No 806/2014, as amended by those of Regulation 2019/877, must likewise be applied such that the grant of the waiver may be envisaged only if strict conditions are met. It follows that, when the SRB examines whether the condition contained in Article 12h(1)(c) of Regulation No 806/2014 is satisfied, it may take the

view that, in the case in question, the requirement of a guarantee is necessary in order for that condition to be fulfilled. The fact that Article 12h(1) thereof does not explicitly provide for the requirement of a guarantee from the parent company in favour of its subsidiary means that the legislature gave the SRB a degree of discretion as to the potential need for such a guarantee. By contrast, no such discretion was afforded to the resolution authority in the context of examining a waiver pursuant to Directive 2014/59.

58 Second, the French Republic also relies unsuccessfully on the response from the Commission to a question put by a Member State concerning the transposition of Directive 2019/879. The Commission had stated that the legislature had intentionally not reproduced Article 45f(3)(d) to (f) and 4(d) to (f) of Directive 2014/59, as amended by Directive 2019/879, and that it was for the national resolution authorities and, in the light of the principles relating to the delegation of power established in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), the SRB to take them into account when they were implementing the provisions of Regulation No 806/2014.

59 The approach adopted by the SRB, which was found by the Appeal Panel not to contain any error in law, is consistent with the guidance provided in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), since that approach in no way establishes that there is an automatic obligation to provide a guarantee in order for the requirement that there is no impediment to the prompt transfer of own funds to be satisfied and because it rather affords the SRB a margin of discretion in that regard which may prompt it to require a guarantee if, according the circumstances of the case, it deems one to be necessary.

60 Third, the French Republic relies on the SRB's public 'MREL Policy' guidance ('the public guidance') and on its internal booklet in order to assert that the SRB in fact systematically requires that a guarantee is provided in each individual case without a case-specific examination and that, in reality, it regards the provision of that guarantee as a condition intended to prove that there is no impediment to the prompt transfer of own funds within the meaning of Article 12h(1)(c) of Regulation No 806/2014.

61 The French Republic's line of argument, based on the SRB's internal booklet and public guidance and consisting in claiming, in essence, that the SRB has established a new and entirely independent condition which is not provided for in the legislation, namely that a guarantee must be provided, cannot succeed.

62 First of all, the reference to a guarantee for the purpose of demonstrating that there is no impediment to the prompt transfer of own funds was inserted into Annex II to the public guidance only in June 2022 and therefore did not exist when the SRB adopted its Decision SRB/EES/2021/44 of 4 November 2021.

63 Next, the public guidance clearly states that it is not intended to create any legally binding effect and that it is not in any way a substitute for the legal requirements laid down in the applicable EU and national laws. That guidance further states that it may not be relied upon for any legal purposes, does not establish any binding interpretation of EU or national laws and does not serve as, or substitute for, legal advice.

64 Furthermore, in accordance with the view taken by the Appeal Panel (paragraph 82 of the contested decision), the approach described in the version of the public guidance as amended in June 2022, which allows the SRB to require a specific guarantee in the context of assessing the

condition that there is no impediment to the prompt transfer of own funds, is compatible with the wording of Article 12h(1)(c) of Regulation No 806/2014, as is apparent, in particular, from paragraphs 44 to 51 above.

65 The fact that Annex II to the version of the SRB's public guidance as amended in June 2022 states that, to demonstrate the free transferability of funds in a resolution scenario, banks applying for a waiver must 'normally' submit proof of a guarantee, does indeed show that the SRB favours the solution of a guarantee, which is presented as the safest approach to ensuring that there is no impediment to the prompt transfer of own funds. However, Annex II to that version of the guidance cannot be interpreted as meaning that the SRB requires, 'in all cases, as a matter of principle and automatically', that a guarantee is provided. By specifying in that same annex that, where the specificities of an individual case so justify, the SRB may adopt a different approach to its assessment of compliance with Article 12h of Regulation No 806/2014, the SRB confirms that it continues to assess on a case-by-case basis how the condition that there is no impediment to the prompt transfer of own funds can be satisfied.

66 In addition, as regards the SRB's internal booklet, the French Republic submits that the SRB, first, stated in that booklet that providing a guarantee was a wholly independent condition in order to be granted a waiver and, second, altered that approach by presenting the provision of that guarantee as evidence intended to prove that there is no impediment to the prompt transfer of own funds within the meaning of Article 12h(1)(c) of Regulation No 806/2014. However, that tends rather to indicate that the SRB did indeed take into account the scope of that provision, from which it follows that the provision of a guarantee cannot be required *ex officio* and automatically, rather that the need for such a guarantee may be envisaged when assessing the requirement that there is no impediment to the prompt transfer of own funds. As is apparent, in particular, from paragraphs 44 to 51 above, there is nothing to prevent the SRB from requiring a guarantee, according to the circumstances of the individual case, in order for the requirement under Article 12h(1)(c) of Regulation No 806/2014 to be satisfied.

67 Lastly, and in any event, it is clear from the extracts of Decision SRB/EES/2021/44 and from the contested decision, in particular from paragraphs 68 to 71 of the latter, that the SRB, in the present case settled the question of the lack of impediment to the prompt transfer of own funds by stating that it was carrying out a case-specific analysis of the situation of the banking group concerned and, in particular, of the 2014 and 2015 guarantees put forward by the group in question to satisfy that condition, and that the Appeal Panel examined that approach by the SRB and found that that analysis did not contain any error in law because it had been carried by reference to the actual situation.

68 Thus, the reasoning followed by the Appeal Panel and that followed by the SRB are not based on the SRB's public guidance or on its internal booklet and do not therefore automatically apply the condition that a guarantee must be provided. This very point was made by the Appeal Panel in paragraph 79 of the contested decision, where it observed that Decision SRB/EES/2021/44 was an individual decision relating to the banking group concerned and did not refer to the SRB's public guidance or to its internal booklet.

69 In that regard, the considerations relating to the internal booklet and to the public guidance, which are contained, inter alia, in paragraphs 71 to 73 of the contested decision, are a response to the arguments raised by the appellant before the Appeal Panel and seek to demonstrate that the inclusion of the guarantee in those two documents did not turn the SRB's exercise of its discretion into a de facto automatic requirement.

70 In the light of the foregoing, the first part of the first plea must be rejected.

The second part, alleging that the SRB exceeded the limits of its discretion under Article 12h(1)(c) of Regulation No 806/2014

71 The French Republic submits that the Appeal Panel should have found that the SRB had exceeded the limits of its discretion. In the first place, it claims that Article 12h of Regulation No 806/2014 lays down a precise framework for the SRB's powers, based on objective criteria, and that therefore the use of those powers must be the subject of a thorough review conducted in the light of those criteria. However, on the one hand, the Appeal Panel took the view that the requirement of a specific guarantee was simply a possibility open to the SRB, at the end of an in-depth assessment, and, on the other hand, it endorsed the SRB's approach of requiring, as a matter of principle, the provision of a specific guarantee and of allowing only 'by way of exception' the possibility of derogating from such a requirement. The French Republic thus criticises the Appeal Panel for having failed in reality to carry out an effective review of the SRB's exercise of its discretion. In the second place, the French Republic submits that the Appeal Panel did not review whether the SRB had correctly exercised its discretion when the latter had assessed the content of the guarantee. In the third place, and in that regard, the Appeal Panel failed to explain the scope of the 'constrained and limited' discretion enjoyed by the SRB when it examined whether the conditions laid down in Article 12h(1)(a) to (c) of Regulation No 806/2014 were met.

72 In the first place, it is necessary to examine whether, as the French Republic claims, the Appeal Panel endorsed an approach by which the SRB required, 'as a matter of principle', the provision of a specific guarantee and allowed only 'by way of exception' the possibility of derogating from such a requirement, thus requiring that a guarantee be provided without exercising its discretion as recalled in paragraph 43 above and, therefore, without a precise and case-specific analysis of the relevant evidence having been conducted beforehand.

73 First and foremost, it must be recalled that, under Article 85(3) and (4) of Regulation No 806/2014, any natural or legal person may bring an appeal before the Appeal Panel against a decision of the SRB, such as Decision SRB/EES/2021/44, that the appeal is to state the grounds upon which it is based and that it falls to the Appeal Panel to decide upon that appeal. It therefore follows that the Appeal Panel is to examine the grounds raised before it.

74 In the present case, the French Republic does not contest that, as is clear from the summary of the grounds contained in paragraph 35 of the contested decision, the appellant before the Appeal Panel had argued that, by means of its internal booklet and its public guidance, the SRB imposed *de facto* an additional condition for the grant of a waiver which was not provided for in Regulation No 806/2014 and thus erred in law by exceeding the limits of its discretion, by failing to have regard to the objectives pursued by the provisions applied and depriving them of any practical legal effect. The appellant had submitted, in essence, that the approach *in abstracto* adopted by the SRB made it practically impossible for the waiver to be obtained.

75 It must also be recalled that the bank concerned relied on two guarantees in order to argue that there was no current or foreseen material practical or legal impediment to the prompt transfer of own funds within the meaning of Article 12h(1)(c) of Regulation No 806/2014. The guarantees in question from the parent undertaking guaranteeing the commitments of its subsidiary had been given in 2014 and 2015 in the context of applications for derogation from the application of prudential requirements on an individual basis and from the application of liquidity requirements on an individual basis pursuant to Articles 7 and 8 of Regulation No 575/2013.

76 It must be made clear that the arguments raised by the appellant before the Appeal Panel in support of its first ground did not concern the substantive assessments made by the SRB concerning the 2014 and 2015 guarantees upon which the banking group concerned relied to argue that the condition that there was no impediment to the prompt transfer of own funds was met. The arguments in question concerned the alleged error in law committed by the SRB because it exceeded its powers by automatically applying a condition not contained in Article 12h(1) of Regulation No 806/2014.

77 It thus fell to the Appeal Panel to verify whether the SRB had carried out a case-specific examination of the situation of the banking group concerned and of the guarantees put forward in support of its waiver application and whether it had thus complied with the limits of its discretion. In that context, it had to verify that the assessment made by the SRB was not a disguised examination *in abstracto* of the 2014 and 2015 guarantees but rather a credible case-specific analysis.

78 Accordingly, the French Republic is wrong to claim that the grounds and arguments raised by the appellant before the Appeal Panel, based on the error in law committed by the SRB by incorrectly applying Article 12h(1) of Regulation No 806/2014 and on the latter's exceeding of the limits of its powers, should necessarily have led the Appeal Panel to examine whether the SRB was justified, in the light of all the relevant factors of the individual case, to require a specific guarantee.

79 Having regard to the grounds relied on by the appellant before the Appeal Panel, as recalled in paragraph 76 above, it is necessary to determine whether the Appeal Panel could have been right to take the view that the SRB's analysis – at the end of which the SRB found there to be a risk that the 2014 and 2015 guarantees might not function in a non-viability scenario and that those guarantees did not satisfy the condition that there was no impediment to the prompt transfer of own funds – had been genuine and specific.

80 In that regard, it must be recalled that Article 12h(1) of Regulation No 806/2014 does not lay down precise rules as to how the condition that there is no impediment to the prompt transfer of own funds is to be met, but rather requires, in essence, that the SRB makes sure that the existing mechanisms, such as guarantees, are functionally equivalent to an internal MREL in a crisis scenario and, therefore, that there is no risk that, if the point of non-viability of the subsidiary is reached, the directors of the parent undertaking could hypothetically decide to pull out and thus to abandon the subsidiary, and not to 'down-stream funds' or to absorb losses or recapitalise.

81 In the present case, this meant that the Appeal Panel had to determine that the SRB had conducted a genuine and specific examination of the 2014 and 2015 guarantees and their effectiveness in a crisis scenario so as to enable the SRB to establish whether those existing mechanisms were functionally equivalent to an internal MREL in a gone concern scenario and, therefore, whether they allowed the banking group concerned to satisfy the condition that there is no impediment to the prompt transfer of own funds.

82 In that regard, first, it is apparent from the contested decision, in particular from paragraphs 4, 7, 12, 15, 49, 68, 75, 76, 88, 108, 110 and 116 thereof, that the Appeal Panel did examine whether the SRB had carried out a case-specific analysis of the waiver application.

83 The Appeal Panel recalled that the SRB had noted that the 2014 and 2015 guarantees had been provided in a different context, that is to say, pursuant to Articles 7 and 8 of Regulation No 575/2013, with a view to allowing the banking group concerned to benefit from a derogation

from the application of the prudential requirements in terms of capital, on an individual basis, and from the application of the prudential requirements in terms of liquidity, on an individual basis. It found that the SRB had stressed that there was a possible scenario in which the deterioration of the situation of the subsidiary led to its default if the financial assistance by the guarantor had not yet been provided. It stated that the SRB had considered that, in such a situation, the purposes of the guarantees no longer applied.

84 The Appeal Panel stated that the SRB had relied in that regard on the assessments made by the internal resolution team. As is clear from paragraph 75 of the contested decision, that team had expressed strong reservations about the fact that the right to apply a guarantee, if one existed, would persist in the case of the default or failure of the subsidiary, and had pointed out that the subsidiary's creditors could themselves invoke an enforceable right against the guarantor, so that ultimately the parent undertaking, that is to say, the guarantor, would be relieved of its legal obligation to guarantee against the failure of the subsidiary when that obligation would be most needed.

85 In paragraph 75 of the contested decision, reference is also made to the statements by the internal resolution team to the effect that the prompt transfer of own funds by the parent undertaking had to be guaranteed to the subsidiary in respect of which a determination of non-viability had been made in accordance with Article 21(3) of Regulation No 806/2014 and that the finding that the subsidiary was failing or likely to fail could be made in a situation in which that subsidiary was still able to meet its obligations and, therefore, in which the 2014 and 2015 guarantees were not yet triggered and could not be used to provide the support required.

86 It is thus apparent from the contested decision that the SRB's examination of the existing mechanisms was in no way fictitious, rather that it did indeed carry out a genuine and specific analysis of the situation of the banking group concerned. Therefore, the French Republic is wrong to claim that the SRB imposed a guarantee automatically and *in abstracto*.

87 It follows that the Appeal Panel could rightly have taken the view, in essence, that the SRB had conducted an examination *in concreto* of the situation of the banking group concerned in order to determine whether that group satisfied the conditions contained in Article 12h(1) of Regulation No 806/2014.

88 Second, the conclusion that the Appeal Panel was right to take the view that the SRB had conducted a genuine and specific analysis of the situation of the banking group concerned also follows from the position adopted by the Appeal Panel, inter alia, in paragraphs 73, 74 and 83 of the contested decision. It is unambiguously stated therein that the SRB had a margin of discretion to determine whether there were impediments to the prompt transfer of own funds and that, in that context, the SRB could find there to be no impediment and grant a waiver even if the parent undertaking had not provided a guarantee in favour of its subsidiary. In that regard, the Appeal Panel explained that the condition that there is no obstacle to the prompt transfer of own funds could be met in accordance with the special statutory provisions under applicable national law and according to contractual arrangements existing between the companies within a group.

89 Third, the SRB's exercise of its discretion and the examination *in concreto* of the condition in Article 12h(1)(c) of Regulation No 806/2014 are also supported by the Appeal Panel's finding that the reasoning set out in the contested decision, as regards the lack of impediment to the prompt transfer of own funds, was not based on the SRB's public guidance or its internal booklet, as is apparent from paragraphs 61 to 68 above.

90 For that reason, the French Republic's request that the Court adopt a measure of organisation of procedure ordering the SRB to produce the versions of its internal booklet applicable in 2020 and 2021, on the ground that the booklet in question stated that the provision of a guarantee between the resolution entity and its subsidiary was a necessary condition with which the internal resolution teams were obliged to comply pursuant to Article 12h of Regulation No 806/2014, must be refused.

91 In that regard, it must be observed that the references made to the SRB's internal booklet in the contested decision primarily appear in the context of the Appeal Panel's response to the arguments raised by the appellant before the Appeal Panel which are based on that document. The line of argument which the French Republic seeks to advance by relying on the versions of the SRB's internal booklet applicable in 2020 and 2021 is ineffective, since it could not call into question the conclusion rightly reached by the Appeal Panel that the SRB did carry out a case-specific analysis of the condition that there was no impediment to the prompt transfer of own funds in respect of the subsidiary of the banking group concerned.

92 None of the arguments put forward by the French Republic can cast doubt upon that conclusion.

93 In the context of an initial argument, the French Republic alleges that the Appeal Panel endorsed the SRB's approach of assuming that the guarantees could not be activated in the event of a crisis and failed to conduct an in-depth analysis of national law in order to assess that question.

94 That line of argument cannot succeed. On the contrary, as is apparent, inter alia, from paragraph 86 above, the Appeal Panel ensured that the SRB had carried out a case-specific analysis of the facts and evidence before it, without applying the slightest 'assumption' in that regard. Further, it is not apparent from the contested decision that the banking group concerned or the appellant before the Appeal Panel identified provisions of applicable national law or agreements within that group which would have allowed the condition set out in Article 12h(1)(c) of Regulation No 806/2014 to be satisfied. The only elements put forward in support of the waiver application, with a view to demonstrating that there was no impediment to the prompt transfer of own funds, relate to the 2014 and 2015 guarantees. However, those very guarantees were specifically analysed by the SRB.

95 In that regard, the French Republic's arguments, based on the manifest error of assessment allegedly committed by the SRB by disregarding the beneficial effects produced by existing 'internal arrangements', in a resolution scenario, and by taking the view that the 2014 and 2015 guarantees could not be used in a crisis scenario, must be rejected in any event because they are wholly unsubstantiated.

96 First, the French Republic does not identify the 'internal arrangements' upon which it relies to support its line of reasoning, nor, a fortiori, does it explain how those arrangements could have produced beneficial effects in the event of a resolution scenario.

97 Second, the French Republic does not point to any provision of national law or national legal principle which supports its line of argument relating to the allegedly usable nature of the 2014 and 2015 guarantees. At the very most, it cites a judgment of the Cour de cassation (Court of Cassation, France) of 4 February 1985, arguing that that judgment established that the concept of a 'group interest' may allow, subject to certain conditions, the strict defence of a company's corporate interest to be set aside where that company grants financial assistance to another company in the same group. With regard to that concept of a 'group interest', the French

Republic also refers in its reply, by means of a hyperlink, to a report from June 2015 entitled 'Vers une reconnaissance de l'intérêt de groupe dans l'Union européenne?' by the *Club des Juristes (Commission Europe)*, which briefly lists the conditions to be fulfilled under French law 'to prevent directors from being found to have misused corporate funds because of the provision of financial assistance between companies within the same group' (pages 16 and 17 of that report).

98 It must be stated that both the French Republic's explanations and the content of the report to which it refers are, to say the very least, vague and imprecise. They do not make it at all possible to determine the conclusions which the SRB should have drawn from them in the present case with regard to the 2014 and 2015 guarantees. In addition, as is apparent from the French Republic's own pleadings, conditions have to be met in order for the concept of a 'group interest' to allow the strict defence of a company's corporate interest to be set aside. The French Republic has not explained how those conditions were met in the present case.

99 In the second argument, the French Republic claims that errors were made by the SRB in its interpretation of Article 12h(1) of Regulation No 806/2014 because the legislature referred only to 'material' and 'foreseen' impediments and not to 'any potential' 'future impediment', and the reality of such impediments was not demonstrated in the present case.

100 That argument must be dismissed. The Appeal Panel did not commit any error in the interpretation of Article 12h(1) of Regulation No 806/2014 by taking the view, in essence, that the impediment to the prompt transfer of the 2014 and 2015 guarantees and the risk arising as a result did indeed fall under the concepts of 'risk' and 'current or foreseen material impediment' within the meaning of the abovementioned provision. As is apparent from paragraphs 82 to 85 above, the examination conducted by the Appeal Panel to determine whether the SRB had carried out a case-specific analysis of the waiver application actually shows that the 2014 and 2015 guarantees had been provided in a different context and that, in certain scenarios, there was a material risk that they would not be triggered or could no longer be triggered.

101 In the second place, the French Republic submits that the Appeal Panel erred in taking the view that the SRB had carried out a case-specific examination of the situation of the banking group concerned in order to determine the proportionate 'content' of the guarantee. It claims that the SRB determined that content automatically and without any specific analysis of the situation at a level at least equivalent to the hypothetical amount of the internal MREL which would have been applied without a waiver, and that, therefore, that content is disproportionate.

102 Such a line of argument must be rejected. The Appeal Panel recalled, first of all, in paragraph 75 of the contested decision, that the SRB needs to be reasonably satisfied that the existing guarantee was functionally equivalent to the pre-positioned internal MREL in a crisis scenario. Next, it pointed out that, in the present case, the SRB had taken the view, in the context of its discretion as recalled in paragraph 43 above, that the 2014 and 2015 guarantees, the only guarantees put forward by the banking group concerned in support of its waiver application, posed the risk of not being usable in a crisis scenario and thus being non-existent. Lastly, it noted that, in order to cover the risk in question, the SRB had considered that a guarantee that was functionally equivalent to the internal MREL in a crisis scenario and of an amount equivalent to the hypothetical amount of that internal MREL was therefore necessary.

103 In so doing, the Appeal Panel rightly found that the SRB had carried out a case-specific examination of the situation of the banking group concerned with a view to determining the content of the guarantee.

104 Furthermore, and in any event, for the reasons stated in paragraphs 96 to 98 above, it is necessary to reject the arguments based on the application of French law put forward by the French Republic with a view to demonstrating that the Appeal Panel had erred in its examination of the approach adopted by the SRB to determine the content of the guarantee and to establishing that that approach by the SRB was abstract and disproportionate.

105 In the third place, the French Republic submits that the Appeal Panel stated that the SRB had a 'constrained and limited' discretion when examining the conditions set out in Article 12h(1)(a) to (c) of Regulation No 806/2014 under which the waiver is permitted, but that it failed to explain the scope of that discretion and, therefore, did not examine the conclusions to be drawn, in the present case, from that discretion.

106 Such a line of argument is unfounded.

107 It is apparent from paragraphs 18 to 20 above that Article 12h(1) of Regulation No 806/2014, in part, imposes a strict obligation on the SRB and, in part, delegates a discretion to it.

108 As the Appeal Panel noted in paragraphs 58 to 61 of the contested decision, the discretion enjoyed in the second stage referred to in paragraph 20 above is not relevant in the present case, because the question at issue is not whether the SRB duly exercised that discretion once all the conditions had been met. In that regard, as recalled in paragraph 43 above, while the SRB is obliged to refuse a waiver application if one of the cumulative conditions laid down in Article 12h(1) of Regulation No 806/2014 is not met, it does enjoy a degree of discretion as regards the determination of the circumstances under which the third of those conditions (namely, there is no impediment to the prompt transfer of own funds) is satisfied.

109 Accordingly, and in view of the pleas alleging that the SRB has established an automatic requirement to provide a guarantee in order to be granted the waiver and thus exceeded its discretion in the course of the first stage, it fell to the Appeal Panel to examine whether the SRB had indeed carried out a case-specific assessment when it had analysed the situation of the banking group concerned and the 2014 and 2015 guarantees relied on by that group and had found them to be ineffective and that a guarantee from the parent company in favour of its subsidiary was required.

110 It is apparent from the reasoning stated in paragraphs 22 to 103 above that the Appeal Panel did indeed carry out the examination referred to in paragraph 109 above. It is likewise apparent from the abovementioned paragraphs that, having completed that examination, the Appeal Panel was right to have taken the view that the SRB had indeed carried out a case-specific assessment and that it had therefore neither established nor applied a new condition not provided for in Article 12h(1)(c) of Regulation No 806/2014 nor, accordingly, exceeded the limits of its discretion under that provision.

111 In view of the foregoing, there was no need for the Appeal Panel to provide any further explanations as to the scope of the SRB's margin of discretion or to examine the conclusions to be drawn from it.

112 In the light of the foregoing, the second part of the first plea must be rejected.

113 The first plea must therefore be dismissed as unfounded.

The second plea, alleging a breach of the principle of legal certainty

114 The French Republic submits that there was a breach of the principle of legal certainty because the criteria applied by the SRB for the purpose of examining the waiver application were neither clear nor precise and could not be foreseen by the banking group concerned. In that regard, it states that, on the date on which the application for waiver of the MREL was made to the SRB, the public guidance intended to set out the SRB's MREL practice did not mention the need to provide a guarantee, and it claims that the requirement of a guarantee was included in the SRB's internal document.

115 The SRB disputes that line of argument.

116 The principle of legal certainty is a fundamental principle of EU law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly (judgment of 9 March 2017, *Poland* v *Commission*, C-105/16 P, not published, EU:C:2017:191, paragraph 54).

117 The principle of legal certainty requires, inter alia, that rules of law be clear, precise and predictable in their effects, particularly where they may have negative consequences for individuals and undertakings (judgment of 28 September 2022, *Malacalza Investimenti* v *ECB*, T-552/19 OP, not published, EU:T:2022:587, paragraph 52).

118 That principle requires that the binding nature of any act intended to produce legal effects must be derived from a provision of EU law which must be expressly indicated as its legal basis and which prescribes the legal form to be taken by that act (see judgment of 19 June 2015, *Italy* v *Commission*, T-358/11, EU:T:2015:394, paragraph 123 and the case-law cited). The principle of predictability is an integral part of the principle of legal certainty (see, to that effect, judgment of 16 July 2014, *National Iranian Oil Company* v *Council*, T-578/12, not published, EU:T:2014:678, paragraphs 111 and 112).

119 In the first place, it is important to recall that the provision the application of which lies at the heart of the present dispute is Article 12h(1)(c) of Regulation No 806/2014. That provision states that, for the waiver of the internal MREL to be granted, the requirement that 'there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary' must be satisfied. That provision must be regarded as being clear, precise and predictable in its effects, that is to say, that it states that the waiver may not be granted if there is an impediment to the prompt transfer of own funds.

120 First, Article 12h(1)(c) of Regulation No 806/2014 cannot be required to set out the various specific hypotheses in which the condition laid down in that provision is or is not satisfied, given that not all those hypotheses can be determined in advance by the legislature (see, to that effect, judgment of 20 July 2017, *Marco Tronchetti Provera and Others*, C-206/16, EU:C:2017:572, paragraph 42). It is impossible to list the examples of impediments to the prompt transfer of own funds, just as the legislature cannot be required to state positively the measures which would ensure compliance with the condition that there are no such impediments.

121 Second, the principle of legal certainty does not preclude the relevant authorities from having some discretion in the application of the criteria laid down in the legislation. In the present case, the fact that the SRB enjoys a degree of discretion in assessing whether there is an impediment to

the prompt transfer of own funds or in assessing the appropriate manner in which that condition is to be satisfied does not mean, however, that there has been a breach of the principle of legal certainty.

122 In that context, it must be observed that, in its pleadings, the French Republic argued that it had not claimed that Article 12h(1)(c) of Regulation No 806/2014 prohibited the SRB from requiring a specific guarantee under any circumstances and thus acknowledged, in essence, that that provision did allow the SRB to require a specific guarantee. Accordingly, the SRB's request that the parent company of the banking subsidiary concerned provide a guarantee is not a priori unforeseeable, and therefore, nor does it constitute a breach of the principle of legal certainty.

123 In the second place, consideration must be given to the French Republic's line of argument that economic operators received contradictory signals as far as concerned the SRB's public guidance and its internal booklet and could thus have had legitimate doubts as to the correct interpretation of Article 12h(1)(c) of Regulation No 806/2014. The French Republic in fact asserts that, on the date on which the waiver application was made, the public guidance intended to provide the banking institutions with explanations as regards the SRB's practice in relation to the MREL made no reference whatsoever to the need to provide a guarantee, but, in its internal booklet, the SRB had made the grant of the waiver of the minimum requirement for own funds conditional upon the provision of a specific guarantee. It states that that requirement of a specific guarantee had not been explicitly included in the public guidance until June 2022. In its view, there were thus significant discrepancies between the applicable legislation (which did not lay down any requirement of a specific guarantee), the public guidance (which did not provide for any specific guarantee before June 2022) and the SRB's internal booklet (which did contain such a mandatory requirement) which were capable of constituting a breach of the principle of legal certainty.

124 That line of argument must be rejected.

125 First, although it is true that, when the waiver application which gave rise to the contested decision was made, the requirement of a specific guarantee for the purpose of satisfying the condition that there was no impediment to the transfer of own funds was not contained in the public guidance, that fact did not mean, however, that the SRB could never request such a guarantee. The banks could not reasonably interpret the lack of a clear statement in that regard as a definitive waiver, by the SRB itself, of the right to require a specific guarantee.

126 In that regard, and second, the 2020 public guidance clearly stated that the party applying for the waiver '[was] required to demonstrate that there [was] no impediment to the prompt transfer of own funds or repayment of liabilities'. The 2020 public guidance therefore unambiguously restated the obligation to be satisfied by those applying for the waiver – namely, the existence of an intragroup loss-transfer mechanism ensuring that potential impediments to the transfer of own funds were overcome – but did not limit the possible mechanisms for achieving that goal. In so doing, the SRB therefore implicitly permitted the option adopted by the mechanism in question in the form of a guarantee from the parent undertaking in favour of its subsidiary.

127 In that regard, the French Republic unsuccessfully relies on the judgment of 12 February 2014, *Beco* v *Commission* (T-81/12, EU:T:2014:71), in which the Court found there to have been a breach of the principle of legal certainty. The judgment in question concerned an interpretative notice from the Commission intended to provide explanations to economic operators, but which

ultimately had the opposite result because it sent out 'contradictory signals'. However, for the reasons set out in paragraph 126 above, there must be found to have been no contradictory signals or unforeseeable measures in the present case.

128 Third, contrary to the French Republic's claims, the exchanges which took place between the banking group concerned, the SRB and the internal resolution team in the course of the administrative procedure can be taken into account in assessing compliance with the principle of legal certainty, which is not determined solely *in abstracto*. In addition, the Appeal Panel observed, in particular in paragraphs 73 and 87 of the contested decision, that the SRB and the internal resolution team had clearly expressed their reservations concerning the liquidity and capital commitments provided in respect of the subsidiary by means of the 2014 and 2015 guarantees. The banking group concerned had thus been kept abreast of the SRB's position in the circumstances of the present case.

129 Fourth, it follows from the examination of the first plea that the Appeal Panel in no way endorsed an approach allegedly adopted by the SRB which consisted in applying an obligation, as a matter of principle and automatically, to provide a specific guarantee in respect of the banking group concerned. That panel was right to take the view that the SRB had given specific consideration to the case in question and, in particular, to the 2014 and 2015 guarantees.

130 In that regard, the SRB rightly notes that it carried out a case-by-case assessment over the course of the resolution planning cycle for the year 2020 and that it did not request a guarantee from all banks. It states that it granted six waivers, three of which were not subject to guarantees. That fact bears out the Appeal Panel's conclusion that the SRB does not require, automatically and *in abstracto*, that a specific guarantee is provided.

131 Lastly, the versions of the SRB's internal booklet applicable in 2020 and 2021 were not available to the banking group concerned. In those circumstances, that document cannot have given 'contradictory signals' to or misled the banking group concerned. Furthermore, it is not clear from any paragraph of the contested decision that the Appeal Panel endorsed an approach by which the SRB applied instructions contained in its internal booklet in a purely mechanical fashion.

132 In the light of all the foregoing, the second plea must be dismissed as unfounded.

The third plea, alleging a failure to satisfy the obligation to state reasons

133 The French Republic submits that the Appeal Panel was wrong to take the view that the SRB had satisfied the obligation to state reasons. In the French Republic's view, the statement of reasons contained in the SRB's decision, a decision endorsed by the Appeal Panel, is incomplete, because it fails to explain comprehensibly why the condition laid down in Article 12h(1)(c) of Regulation No 806/2014 was not met or which features of a guarantee would likely meet the SRB's expectations. The SRB therefore failed to demonstrate why there was an impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary. The French Republic adds that the Appeal Panel simply stated that the evidence provided by the banking group concerned (in particular, the 2014 and 2015 guarantees) could be insufficient in a crisis scenario to ensure the prompt transfer of own funds, and that such a statement of reasons cannot establish that there is a 'current or foreseen material practical or legal' impediment to the transfer of own funds.

134 The SRB contends that this plea must be dismissed.

135 The statement of reasons required, inter alia, by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unambiguous fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (see judgment of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraph 85 and the case-law cited).

136 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of concern within the meaning of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 8 July 2020, *Crédit agricole* v *ECB*, T-576/18, EU:T:2020:304, paragraph 130 and the case-law cited).

137 In the present case, having regard to the grounds relied on by the appellant before the Appeal Panel, as set out in paragraphs 76 to 78 above, the Court takes the view that, in the contested decision, the Appeal Panel did go into the crucially important facts and points of law, because the reasons stated therein enabled, first, the French Republic to ascertain the reasons for that decision in order to contest it and, second, the European Union judicature to exercise its power of review over the legality of that decision.

138 The French Republic was able to contest the merits of the reasoning followed by the Appeal Panel in the contested decision. It was able to claim that the Appeal Panel had endorsed a misinterpretation, by the SRB, of Article 12h(1)(c) of Regulation No 806/2014 and had disregarded the SRB's 'exceeding of its powers'. In addition, as is apparent from the analysis of the pleas and arguments raised in the application above, the Court has been able to rule on that line of argument and exercise its power of review over the legality of the contested decision.

139 In particular, the reasons, reproduced inter alia in paragraphs 82 to 88 above, upon which the Appeal Panel relied to find that the SRB had carried out a specific examination of the situation of the group concerned, enabled the French Republic to ascertain, to the requisite legal standard, the reasons for the approach adopted by that panel.

140 Furthermore, and in any event, the reasons stated in the SRB's decision enabled the French Republic to ascertain why the SRB had considered it necessary for the parent undertaking to provide a guarantee in favour of its subsidiary in order to satisfy the condition laid down in Article 12h(1)(c) of Regulation No 806/2014 and why the SRB had taken the view that the 2014 and 2015 guarantees were insufficient in that regard. It must be added that the context was very familiar to the banking group concerned. As is apparent from the contested decision and from the SRB's decision, various in-depth exchanges took place between the banking group concerned and the SRB over the course of the administrative procedure, detailed explanations about the inadequacy of those guarantees were provided and the internal resolution team with responsibility for the banking group concerned provided that group with a list of the key features of a guarantee, features deemed relevant to the further assessment of the waiver application.

141 The French Republic is therefore wrong to claim that the statement of reasons for the contested decision is inadequate.

142 It follows that the third plea must be dismissed as unfounded.

143 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

144 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the French Republic has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the SRB.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders the French Republic to pay the costs.

Schalin Škvařilová-Pelzl Nõmm

Steinfatt Kukovec

Delivered in open court in Luxembourg on 10 July 2024.

[Signatures]