



DECISION

given by

the
BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

In the appeal case brought by
Societatea de Asigurare-Reasigurare City Insurance SA.
Against
The European Insurance and Occupational Pensions
Authority

Decision D 2021 03

Board of Appeal
Marco Lamandini (President)
Pat McArdle
Katalin Mero
Lars Afrell
Beata Maria Mrozowska (Co-Rapporteur)
Michele Siri (Co-Rapporteur)

Place of this decision: Paris

Date: 14 April 2021

APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the “ESAs Regulations”)

1. This is the decision of the Joint Board of Appeal of the European Supervisory Authorities on the appeal filed with notice of appeal of 16 December 2020 (the “**Notice of Appeal**”) by the appellant Societatea de Asigurare-Reasigurare City Insurance SA (“**City Insurance**” or the “**appellant**”) under Article 60 of the ESAs Regulations. The appellant is represented in the appeal by Mr. Horea Popescu, Mr. Horia Draghici and Ms. Cristina Popescu of the law firm CMS Cameron McKenna Nabarro Olswang LLP SCP. The respondent is the European Insurance and Occupational Pensions Authority (“**EIOPA**”) established by Regulation (EU) No 1094/2010 and represented in the appeal by EIOPA in-house Principal Legal Counsel Mr. Szabolcs Dispiter.

Background of facts

2. On 17 January 2020 the Autoritatea de Supraveghere Financiară (“**ASF**”) of Romania informed EIOPA of its intention to conduct a balance sheet review exercise (“**BSR**”) in 2020; the previous Romanian BSR dated back to 2015 and according to ASF a new BSR “would be an efficient instrument for the review of the current challenges of the [Romanian] market, that remains dominated by motor insurance and that is characterized by a high level of concentration”. The ASF invited EIOPA to accept being “involved again in the new exercise to be performed by ASF” and to consider “joining ASF in steering this project”.
3. The ASF’s letter stated that the 2020 BSR would build on the previous 2015 BSR exercise, but that there were ongoing internal discussions on its “calibration to the current context of the Romanian insurance market”. In turn, “aspects such as governance, coverage of the market, cut-off date and methodology” were (at the time) “yet to be agreed”.
4. EIOPA replied to the ASF’s letter on 31 January 2020 (EIOPA-20/045). EIOPA’s Chairman welcomed the initiative, noting that it could “contribute to enhancing the overall credibility of the sector and address the current challenges”. EIOPA accepted therefore the ASF’s invitation to cooperate and nominated two EIOPA experts to participate in the BSR exercise.
5. On 19 February 2020, the ASF and EIOPA issued a joint statement on their respective websites regarding their intention to launch “an independent assessment of the Romanian insurance sector through a BSR”. This statement explained that “an assessment of the assets and liabilities of insurance undertakings, including the level of technical provisions, governance issues, prudential parameters are part of the exercise. Insurance undertakings will be selected based on their market share and business model, ensuring representativeness of around 90% of the Romanian market. The cut-off date for the balance sheet data used in this exercise will be 31 March 2020. The exercise is expected to be launched in the second semester of the year 2020”.

6. The joint statement announced that “a steering committee that will include ASF and EIOPA will be responsible for overseeing the exercise”. More specifically, “the exercise will be performed by independent consultants/auditors with high professional reputation and international experience, under the coordination and oversight of ASF and EIOPA within the steering committee”.
7. The joint statement further clarified that “at the end of the review, ASF will publish a report with the outcome of the exercise”.
8. In its meeting of 11 March 2020, the Board of the ASF approved the performance of the BSR for the Romanian insurance sector (the “**ASF Decision**”). The ASF Decision defined the scope of the BSR and further clarified that the results of the BSR could then lead to the adoption of follow-up measures applicable to the insurance undertakings such as possible supervisory actions, including those concerning capital adequacy, which would then be made public. The Board of the ASF also approved the criteria to be applied in the adoption of follow-up measures, if any. In this context, it was determined that, if follow-up actions should prove necessary, the Steering Committee would submit a proposal to the Board of the ASF which would also include the expected deadlines for the insurance undertakings to comply with the required actions.
9. Based on the (non-binding) proposal of the Steering Committee, the Board of the ASF will make a decision on the required actions. Additional supervisory actions may be applied according to applicable national law.
10. On 1 April 2020, the ASF and EIOPA announced on their websites that, due to the special circumstances arising from the COVID-19 pandemic, they had decided to postpone the start of the BSR. The statement specified that the new cut-off date for the balance sheet data and the amended BSR exercise timeline would be communicated in due course.
11. On 2 July 2020, the ASF and EIOPA announced on their websites that the cut-off date for the balance sheet data was 30 June 2020 and the BSR was expected to be launched in the second half of 2020.
12. On 22 July 2020, the ASF posted on its website the announcement for the selection of the auditors together with the methodology. The ASF subsequently posted further announcements as follows: (i) on eligible auditors, on 27 August 2020; (ii) on the allocation of auditors, on 10 November 2020; (iii) on the updated deadlines for the BSR, on 18 November 2020; (iv) on the updated list of the allocation of auditors, on 26 November 2020.
13. The BSR is currently ongoing with the final reports for the Steering Committee expected in April 2021. The ASF will eventually publish a report on the outcome of the BSR exercise.

The appeal and the proceedings before the Board of Appeal.

14. On 16 December 2020, the Secretariat of the Board of Appeal received the Notice of Appeal filed by the appellant with the Joint Board of Appeal of the European Supervisory Authorities pursuant to Article 60 of Regulation (EU) No 1094/2010 (the “**EIOPA Regulation**”) in which it requested the Board of Appeal to “issue a decision finding that (i) EIOPA has acted in excess of its regulated competence insofar as its role and involvement in the Romanian BSR exercise are concerned; (ii) the Romanian BSR exercise is excessive, disproportionate, inopportune and discriminatory (not only in comparison to other EU Member States, but also by comparison to EU-based insurers operating in Romania on a freedom of services or freedom of establishment basis – which are neither subject to the Romanian BSR exercise nor to similar measures in their home Member States; (iii) EIOPA’s participation in the Romanian BSR exercise is in breach of the principles of proportionality, non-discrimination and in contradiction to EIOPA’s regulated mission/objective to foster and ensure supervisory convergence across the EU; and (iv) EIOPA’s participation/involvement in the organization and conduct of the Romanian BSR exercise in a coordination/steering role be effectively ceased as of the date of such decision”.
15. On 18 December 2020, the Secretariat of the Board of Appeal notified to the parties the following communication from the President of the Board of Appeal:

Dear Parties,

The President thanks the Appellant for the appeal sent by mail service and received by the Board of Appeal Secretariat on 16 December 2020.

The President, having consulted with the Board of Appeal, makes the following observations:

*Subject to the view of the parties, in light of Article 6 of the BoA Rules of Procedure, the President proposes to give (i) EIOPA three weeks from the notice of these directions to respond to the appeal, (ii) the appellant two weeks to reply to EIOPA response; (iii) EIOPA two weeks to present, if any, a rejoinder to the appellant’s reply. Due to the imminent holidays, the President proposes to suspend the three weeks period from December 23 to January 3. In this way, EIOPA’s response would be due on **January 20, 2021**. The parties are required to address both the admissibility and the merit of the appeal by that date.*

According to Article 18 of the BoA Rules of Procedures, parties are entitled to make oral representations (if necessary, due to the ongoing coronavirus emergency, via videoconference). In the absence of a request, the Board of Appeal may require oral representations if it considers it to be necessary for the just determination of the appeal. Both parties are invited therefore to communicate to the Secretariat of the Board of Appeal, one week from the expiry of the deadline for EIOPA to present a rejoinder to the appellant’s reply if they intend to make oral representations. The Board of Appeal shall issue further case management directions after the expiry of the above-mentioned deadline concerning the hearing and, if deemed necessary by the Board, further submissions in the merits.

The parties are asked to confirm this proposal with the Secretariat (by mail) and raise any other points they wish to raise at this stage.

The President wishes also to inform the parties that the filing and service of any further communication between the Parties and between the Parties and the Board of Appeal and its Secretariat (including the filing and service of the Respondent's response pursuant to Article 6 of the Rules of Procedure and of any other submissions of the parties) may take place by email. The acting secretariat of the Board of Appeal (boardofappeal@eba.europa.eu) must always be copied.

The parties shall be informed in due course about the sitting composition of the Board of Appeal according to Article 3(4) of the BoA Rules of Procedure and about the designated rapporteur or co-rapporteurs for the case.

16. On 21 December 2021, EIOPA agreed with the case management directions. In turn, on 19 January 2021, the appellant also agreed with the case management directions, reserving the right to request a hearing of oral representations in due course after the submission of the EIOPA rejoinder.
17. On 20 January 2021, EIOPA submitted its response addressing both the admissibility and the merits of the appeal.
18. On 3 February 2021, the appellant filed a Reply to EIOPA's response.
19. On 17 February 2021, EIOPA filed a Rejoinder to the appellant's reply.
20. On 18 February 2021, the Board of Appeal informed the parties of the sitting composition of the Board of Appeal for the appeal, that the President had designated Beata Mrozowska and Michele Siri co-rapporteurs and invited the parties to communicate within one week if they intended to make oral representations, anticipating that, due to the restrictions imposed by governments to counteract the COVID-19 pandemic, the hearing, if requested, would have to be held via videoconference and that the Board of Appeal reserved, in the event the parties did not intend to make oral representations, the right to ask questions in writing, if need be. The appellant informed the Board that it intended to make oral representations.
21. The date of the hearing was then agreed with the parties and on 25 March 2021 the hearing was held via Webex videoconference. During the hearing the parties exercised their right under Article 60(4) of the EIOPA Regulation to make oral representations, answered all the questions raised by the members of the Board of Appeal and were granted the opportunity to make final replies. Also, the representative of the appellant made, in this context, a final statement.
22. At the end of the hearing, the Board of Appeal held that evidence was complete in relation to the appeal under Article 20 of Board of Appeal's Rules of Procedure for the purposes of Article 60(2) of the EIOPA Regulation and the President informed the parties that the appeal was considered lodged as of the date of 25 March 2021.

The contentions of the parties.

The appellant

23. In its Notice of Appeal and in its further submissions, the appellant argues that by actively participating in and coordinating the Romanian BSR exercise, EIOPA is acting beyond its competences and *ultra vires*, because the EIOPA Regulation does not grant to EIOPA “specific prerogatives to coordinate/steer BSR exercises implemented by national supervisory authorities at local level”. In the appellant’s view, only in emergency situations and under the strict terms and conditions set out in Article 18 of the EIOPA Regulation, can EIOPA, where deemed necessary, coordinate actions undertaken by national competent authorities. However, in the appellant’s view, there is no indication in the present appeal that the specific circumstances of an emergency situation which would justify the application of Article 18 are met in the current situation of the Romanian insurance market.
24. The appellant further notes that the BSR is not a stress test nor a Union-wide exercise and that, therefore, EIOPA cannot justify its participation in it under Article 32 of the EIOPA Regulation.
25. The appellant notes that the legality of the BSR exercise launched by the ASF has been challenged before the Romanian courts where the case is still pending. The appellant argues, however, that through its participation in the BSR, EIOPA is “endorsing and conferring apparent legitimacy to the BSR” when the BSR, in the appellant’s view, is “obviously disproportionate, inopportune and discriminatory”. To support this view, the appellant offers an overview of the Romanian insurance market and of the Romania’s existing supervisory regime.
26. In the appellant’s view the BSR exercise launched by the ASF is evidently disproportionate and inopportune due to the fact that (i) the current situation of the insurance market in Romania does not justify an exercise of this type and magnitude; (ii) the alleged ASF’s concerns used to justify the BSR are only applicable or relevant for a very limited segment of the Romanian insurance sector and do not reach the level of severity/significance that would justify an exercise of this size and complexity.
27. The appellant further contests EIOPA’s decision to engage in the ASF’s BSR, taking a coordination/steering role because in this way EIOPA (i) clearly endorses the BSR exercise and (ii) acts, to some extent, as a substitute national regulator.
28. The appellant analyses in detail the Romanian insurance market to show that the BSR is completely unnecessary and disproportionate.
29. The appellant also claims that EIOPA “is applying a double standard to EU Member States in similar situations (from a prudential/solvency perspective)” and this is demonstrated by the fact that “other EU Member States experience

(a) similar degrees of concentration of the insurance market (with similar reliance/dependence on motor vehicle insurance) (b) similar levels (on average) of SCR, MCR and quality of own funds”, but “out of all these EU Member States (many of which do not even impose a supervisory regime of the same calibre as the Romanian supervisory and reporting regime), only Romania has been singled out (for reasons which simply cannot be defended) as the only EU Member State in dire need for a comprehensive BSR exercise”. In so doing, EIOPA is acting, in the appellant’s view, in a discriminatory manner.

30. In the appellant’s view, EIOPA is acting:

- i. outside the limits of its mandate, as set out in the applicable legislative framework;
- ii. in disregard of the principle of proportionality (also in a cost-benefit perspective); and
- iii. in a manner that effectively discriminates against Romanian insurance undertakings by comparison with similar undertakings in other European Member States, also because EU insurance/reinsurance undertakings which operate in Romania on a freedom of services or (secondary) freedom of establishment basis are *not* caught under the scope of the Romanian BSR, nor are they subject to a similar BSR exercise in their home Member State.

31. In the appellant’s view, EIOPA is acting beyond its regulated competence because the EIOPA Regulation does not confer upon EIOPA specific prerogatives to coordinate/steer balance sheet review exercises adopted and implemented by national supervisory authorities at local level.

32. The appellant further underlines that the BSR is focussed on assessing Solvency II compliance, although there is no evidence or indication of real concerns in this respect. The fact that the Romanian insurance market is concentrated on motor vehicle insurance (and, specifically, mandatory third-party liability motor vehicle insurance) has no relevance for own funds or technical reserves of the insurance undertakings (which are the specific focus of the BSR). According to the appellant, the cause (and solution) to this peculiarity of the Romanian insurance market must be sought elsewhere, as it is contingent on the level of financial education of the population, the level of awareness and familiarity of the market with the insurers and their products, the standard of living and the level of income/revenue.

33. In its reply, the appellant further argues that EIOPA's claim that its involvement in the Romanian BSR does not amount to a "decision" within the meaning of Art. 60 of the EIOPA Regulation is unfounded. In the appellant's view, EIOPA may or may not have issued a formal document titled "decision", but it cannot be denied that it has *de facto* taken a decision to participate in the BSR, in a role that goes beyond mere assistance/facilitation. In the appellant’s view, it would be untenable to argue that EIOPA's actions fall outside the scrutiny of the Board of Appeal simply because EIOPA has not issued a formal written document in the form of an official "decision".

34. It is equally evident, in the appellant's view, that EIOPA's role in the BSR is significant, as shown by the large prerogatives given to the Steering Committee (in which EIOPA participates) in the Methodological Guide for the BSR exercise and in the follow up actions. During the hearing, the appellant also pointed out that this role was further extended, because EIOPA and ASF took upon themselves a technical role which, originally, they intended to confer on external auditors.
35. Further, the appellant argues that it has an individual and direct interest in the appeal because as a Romanian insurance undertaking, the appellant is directly subject to, and affected by, the BSR. Indeed, in the appellant's view, all potential effects/consequences and follow-up actions of the BSR will apply to the appellant as well. The fact that the BSR is not directed at one specific and individual recipient, but at all insurance undertakings on the Romanian market (including the appellant) does not make the BSR exercise less of direct and individual concern for any of the Romanian insurance undertakings on an individual basis (including the appellant).
36. The appellant further notes that, although EIOPA claims that its participation in the BSR is consistent with its competence and prerogatives under Art. 1(6), Art. 2(4), 8(1) and 32(1) of the EIOPA Regulation, EIOPA has failed to show the proper legal basis for EIOPA to coordinate/steer balance sheet review exercises implemented by national supervisory authorities at national level.
37. The appellant notes, in this respect, that Article 18 of the EIOPA Regulation cannot be invoked in the circumstances, because it applies only "in case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union". None of these conditions are met in the instant case.
38. The appellant also notes that the BSR is neither a stress test nor a "Union-wide stress test" which EIOPA is entitled to coordinate in accordance with Article 32 of the EIOPA Regulation, because in the present case EIOPA is assuming a coordination/steering role with respect to a purely national supervisory exercise.
39. Finally, the appellant also notes that, whilst under Article 29 of the EIOPA regulation, EIOPA should play an active role in building consistent supervisory practices throughout the Union, BSR exercises of this kind have been performed only in Romania and Bulgaria and, quite surprisingly (in the appellant's view), in Romania twice in few years.

EIOPA

40. EIOPA contends, first, that the appeal is inadmissible. EIOPA recalls that a review by the Board of Appeal is only possible in relation to certain decisions taken by EIOPA, and specifically the decisions referred to in Articles 17 (Breach of Union law), 18 (Action in emergency situations) and 19 (Settlement of

disagreements), which “are taken by the Board of Supervisors of EIOPA as an extraordinary measure in the last stage of the underlying proceedings, with binding effects on the addressee(s)”. EIOPA argues that a “similar decision-making power currently is only granted to EIOPA in sectoral legislation, namely in Article 16 of Regulation (EU) No 1286/2014 of the European Parliament and of the Council in relation to product intervention”. In EIOPA’s view, “the specific reference to these articles confirms that a general right of appeal against any decision adopted by EIOPA is not foreseen under Article 60 of the EIOPA Regulation”. EIOPA refers in this regard to case T-660/14 SV Capital OÜ v. European Banking Authority (EBA).

41. EIOPA further argues that only the direct addressee or persons directly and individually concerned by that decision may lodge an appeal and recalls settled case-law of the CJEU in the application of Article 263 of the Treaty on the Functioning of the European Union (“TFEU”), according to which a physical or legal person is individually concerned by an act which is not addressed to that person only if that act affects that person by reason of certain attributes which are peculiar to that person or by reason of circumstances in which that person is differentiated from all other persons and by virtue of those factors distinguishes that person individually just as in the case of the person addressed.
42. Based upon the foregoing, EIOPA argues, in the first place, that it did not adopt any decision under Articles 17, 18 and 19 or under any Union acts referred to in Article 1(2) of the EIOPA Regulation and that the Appellant itself acknowledges that it has been “unable to identify a specific decision taken by EIOPA in relation to its participation in the Romanian BSR exercise”.
43. In the second place, EIOPA argues that its letter of 31 January 2020 (EIOPA-20-045) is not a challengeable decision which falls within the scope of Article 60 of the EIOPA Regulation. The content of the letter does not relate or refer to any breach of Union law, emergency situation, mediation or product intervention. It was simply EIOPA’s communication to the ASF in which EIOPA accepted the ASF’s invitation and offered its cooperation.
44. In the third place, EIOPA argues that the appellant failed to demonstrate that EIOPA’s cooperation with the ASF with regard to the BSR is of direct and individual concern to it, noting also that EIOPA’s letter of 31 January 2020 was addressed to the ASF and its participation in the BSR is based on a voluntary and non-binding bilateral arrangement. However, EIOPA has no direct supervisory power over financial institutions (Article 2(5) of the EIOPA Regulation) and day-to-day supervision is the exclusive competence and responsibility of the national supervisory authorities (Article 2(5) of the EIOPA Regulation).
45. Furthermore, the BSR is an initiative of the ASF and is based on an ASF decision. The pending case initiated by the appellant in Romania against the ASF decision confirms, in EIOPA’s view, that the ASF decision can be

challenged before national courts and that the Board of Appeal has no competence in this matter.

46. On the substance of the appeal, EIOPA contends that its participation in the BSR is justified and appropriate and in accordance with its mandate under the EIOPA Regulation and refers, in particular, to Article 1(6), Article 2(4), Article 8(1) and Article 32(1).

47. In particular, EIOPA's participation in the BSR is justified under Article 8(1) of the EIOPA Regulation, according to which EIOPA is required:

- i. to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the legislative acts referred to in Article 1(2);
- ii. to monitor and assess market developments in the area of its competence;
- iii. to foster, where relevant, the protection of policyholders, pension scheme members and beneficiaries, consumers and investors.

48. Further, EIOPA recalls the principle of sincere cooperation provided for in Article 4(3) TEU and argues that, in the context of the European System of Financial Supervision, EIOPA and the national supervisory authorities have a general duty to cooperate and assist each other in fulfilling the objectives of sectoral legislation falling under EIOPA's remit. EIOPA further notes that the BSR aims at ensuring the consistent application of Directive 2009/138/EC of the European Parliament and of the Council (so called Solvency II), thereby contributing to the efficient functioning of financial markets. EIOPA highlights, in this respect, that the general duty to cooperate can go beyond the specific tasks enumerated in the EIOPA Regulation and can cover other actions where cooperation between EIOPA and the national supervisory authorities is necessary within EIOPA's scope of action according to Article 1(2) of the EIOPA Regulation. EIOPA notes that its assistance to the ASF in the BSR exercise is in line with EIOPA's objectives. The BSR aims at ensuring the consistent application of Directive 2009/138/EC and is also meant to verify if specific risks arising out of market concentration or specific business lines are adequately identified and managed by the insurers and supervised by the ASF. The overall goal is to foster the protection of policyholders in a more robust and resilient insurance sector in Romania.

49. EIOPA further notes that "participation in BSR exercises fits well with EIOPA's financial stability toolkit to monitor and assess market developments in the area of its competence, as required by Articles 8(1)(f) and 32(1) of the EIOPA Regulation", because it helps to identify "the relevant micro-prudential trends, potential risks and vulnerabilities at an early stage and it can provide a comprehensive picture on local market developments with potential cross-border implications". Finally, EIOPA argues that the EIOPA Regulation does not restrict EIOPA on how to engage bilaterally with national supervisory authorities and notes that over the years, EIOPA developed several tools and

practices in this regard, including participation in balance sheet reviews. EIOPA notes that it “first took part in a balance sheet review and stress test in 2014-2015. The Romanian authorities decided in June 2014, in the context of the third EU medium-term financial assistance programme, albeit of a precautionary nature, jointly with a Stand-by Arrangement with the International Monetary Fund, to perform a BSR in light of the persistence of several internal and external pockets of vulnerability”.

50. This exercise was the first comprehensive balance sheet review and stress test with third party involvement in the insurance sector in a Member State. The second balance sheet review was initiated and implemented by the Bulgarian supervisory authority in 2016-2017 under the National Reform Programme agreed between the European Commission and the Bulgarian government. EIOPA co-chaired the steering committee together with the Bulgarian supervisory authority and alongside the European Commission, the Bulgarian Ministry of Finance, the national central bank and the European Securities and Markets Authority (ESMA). Besides the ongoing Romanian BSR, EIOPA is not aware of any forthcoming exercise, but, being a national prerogative, it is for the national supervisory authorities to consider such measures and request EIOPA’s assistance in the future”.

51. With its Rejoinder, EIOPA reiterates its view that the Board of Appeal can hear appeals on the merits only in those cases where EIOPA has decision-making power, as specified by recital 58 of the EIOPA Regulation. And this is not the case.

Discussion by the Board of Appeal of the parties’ contentions

52. The Board of Appeal is part of the governance structure of EIOPA (and the other European Supervisory Authorities of which it is a joint body under their founding regulations). The members are required to be independent in making their decisions and undertake to act independently and in the public interest (Article 59 of the EIOPA Regulation).

53. As an appeal body of EIOPA, the Board of Appeal must decide whether the decisions of the Board of Supervisors were correct or not and may confirm the decisions or remit the cases to the Board of Supervisors (Article 60(5) of the EIOPA Regulation). The Board of Appeal must consider the issue of admissibility of the appeal prior to the full consideration of the merits of the appeal.

54. The parties have filed written submissions and have also made oral representations. This was helpful in illuminating the issues and has been carefully considered by the Board of Appeal. All the parties’ contentions have been taken into account, whether expressly referred to herein or not.

55. The findings of the Board of Appeal are as follows.

I - Settled case law of the CJEU on the admissibility of an appeal before the Board of Appeal.

56. At the heart of the admissibility issue of this appeal is the question if, and to what extent, the appellant is challenging an EIOPA decision - or, at least, the participation in the Romanian BSR exercise - with an appeal which is within the competence of the Board of Appeal.

57. In its judgement of 9 September 2015, in case T-660/14, SV Capital OU v EBA, EU:T:2015:608 the General Court stated the following:

65 Next, it must be noted that, in accordance with Article 60(1) of Regulation No 1093/2010, any natural or legal person, including competent authorities, may appeal against a decision of the EBA referred to in Articles 17, 18 and 19 of that regulation and any other decision taken by the EBA in accordance with the EU acts referred to in Article 1(2) of the regulation which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

66 It follows that, in order for an appeal to the Board of Appeal to lie against a decision of the EBA, for the purpose of Article 60 of Regulation No 1093/2010, that decision must either have been taken in accordance with the EU acts referred to in Article 1(2) of that regulation, or be one of the decisions referred to in Articles 17 to 19 of the regulation.

67 First, and despite the fact that infringement of certain provisions of Directive 2006/48 was alleged in support of the complaint, the decision of the EBA was not based on Article 1(2) of Regulation No 1093/2010. The EBA did not express any view in its decision on whether or not that directive had been infringed by the competent authorities or by the credit institution concerned.

68 Secondly, it suffices to point out that the decision of the EBA is clearly not one of the decisions referred to in Articles 18 and 19 of Regulation No 1093/2010, by which the EBA may require national supervisory authorities to take specific action to address an emergency or to settle disagreements that may arise in cross-border situations between those authorities, and this is common ground between the parties. Furthermore, it suffices to note that no breach of the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of that regulation, as referred to in Article 17(1) of the regulation, was alleged in support of the applicant's complaint, and this was confirmed by the applicant at the hearing. In addition, contrary to what is claimed by the applicant, it is not apparent either from the letter of 2 July 2013 that it sent to the EBA, or from its reply to the EBA's response, submitted on 20 May 2014 in the administrative procedure, that the applicant alleged breach of the standards referred to in Articles 10 to 15 of Regulation No 1093/2010 following the submission of the complaint.

69 Thirdly, as pointed out in paragraphs 46 and 49 above, it suffices to note that the applicant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 which may request the EBA to initiate an investigation into an alleged breach of or failure to apply EU law (which are limited to the competent authorities, the Parliament, the Council, the Commission and the Banking Stakeholder Group).

70 The applicant also does not claim to be a member of the Banking Stakeholder Group, established in accordance with Article 37 of Regulation

No 1093/2010, to help facilitate consultation with stakeholders in areas relevant to the tasks of the EBA. In that respect, it can be seen from Article 37(2) that that group is composed of 30 members, representing in balanced proportions credit and investment institutions operating in the European Union, their employees' representatives as well as consumers, users of banking services and representatives of SMEs.

71 Fourthly, it should be noted that, except in the case of a refusal to initiate an investigation upon a request by one of the entities exhaustively listed in Article 17(2) of Regulation No 1093/2010, the recommendations made or decisions taken by the EBA pursuant to Article 17(2) to (6) of that regulation are addressed to either the competent authorities or the financial institutions concerned. Article 17(3) of that regulation provides that 'the [EBA] may ... address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law'. According to Article 17(4), '[w]here the competent authority has not complied with Union law ... the Commission may, after having been informed by the [EBA], or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law'. In addition, Article 17(6) of Regulation No 1093/2010 states that 'where a competent authority does not comply with the formal opinion ..., the [EBA] may ... adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice'.

72 It follows from the examination of the relevant provisions of Regulation No 1093/2010 that the decision of the EBA challenged before the Board of Appeal in the present case cannot be regarded as being based, having regard to its nature, on one of those provisions. Accordingly, the Board of Appeal did not have competence to decide on the appeal brought before it on the basis of Article 60(1) of Regulation No 1093/2010.

58. On appeal the CJEU, in its judgment of 14 December 2016, in case C-577/15 P, SV Capital OU v EBA, EU:C:2016:947 upheld the General Court judgment and reasoned as follows.

35 (...) as the General Court pointed out in paragraph 66 of the judgment under appeal, in order for an appeal to the Board of Appeal to lie against an EBA decision, that decision must be either one of the decisions referred to in Articles 17 to 19 of Regulation No 1093/2010 or a decision taken in accordance with the Union acts referred to in Article 1(2) thereof.

36 As the General Court was fully entitled to note in paragraphs 67 to 71 of the judgment under appeal, none of those conditions is satisfied in the present case.

37 In the first place, the EBA decision of 21 February 2014 is not based on Article 1(2) of Regulation No 1093/2010. As the General Court rightly noted in paragraph 67 of the judgment under appeal, notwithstanding the fact that infringement of certain provisions of Directive 2006/48 was alleged in support of the SV Capital's complaint, the EBA did not express any view in that decision on whether or not that directive had been infringed by the competent authorities or by the credit institution concerned.

38 In the second place, it is common ground that that decision is not one of the decisions, referred to in Articles 18 and 19 of Regulation No 1093/2010, by which the EBA may require national supervisory authorities to take specific

action, respectively, to address an emergency or to settle disagreements that may arise in cross-border situations between those authorities.

39 In the third place, contrary to the requirements of Article 17(1) of Regulation No 1093/2010, no breach of the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15 of that regulation was alleged in support of that complaint.

40 In the fourth place, the appellant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 which may request the EBA to initiate an investigation into an alleged breach or failure to apply EU law. In particular, the appellant does not claim to be a member of the Banking Stakeholder Group, established in accordance with Article 37 of Regulation No 1093/2010.

41 Moreover, the General Court's finding that the appellant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 is in no way altered, contrary to what the appellant seems to claim, by the fact that the EBA may initiate investigations on its own initiative.

42 Therefore, since the General Court's findings in the judgment under appeal are not vitiated by any error of law, the second ground of appeal must also be rejected.

II – Whether or not the appeal is admissible in the factual and legal circumstances of the present case.

59. Article 60 of the EIOPA Regulation is as follows:

Article 60

Appeals

1. *Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.*

2. *The appeal, together with a statement of grounds, shall be filed in writing at the Authority within three months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision.*

The Board of Appeal shall decide upon the appeal within three months after the appeal has been lodged.

3. *An appeal lodged pursuant to paragraph 1 shall not have suspensive effect.*

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

4. *If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations.*

5. *The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority.*

That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.

6. The Board of Appeal shall adopt and make public its rules of procedure.

7. The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority.

60. In the instant case, the parties agree that the appeal does not relate to any decision adopted by EIOPA under Articles 17, 18 or 19 of the EIOPA Regulation.

61. The first issue to be addressed is therefore to ascertain if the participation of EIOPA in the BSR amounts to a decision and whether such a decision can be considered as based on the acts referred to in Article 1(2) of the EIOPA Regulation. Article 1(2) stipulates, in this respect, that the Authority shall act within the powers conferred by this Regulation and within the scope of Directive 2009/138/EC with the exception of Title IV thereof, of Directive 2002/87/EC, Directive (EU) 2016/97 and Directive (EU) 2016/2341 of the European Parliament and of the Council, and, to the extent that those acts apply to insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision and insurance intermediaries, within the relevant parts of Directive 2002/65/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.

62. The Board of Appeal considers that in the instant case EIOPA did not take the initiative but accepted the ASF's invitation to cooperate in the BSR initiated by ASF and designated for this purpose two EIOPA experts to participate in the BSR exercise. Although the EIOPA engagement in the BSR implied also a decision of the EIOPA management to do so and such engagement was communicated to ASF in the Chairman's letter, this decision essentially only implies a participation in a supervisory action adopted by a national competent authority.

63. The Board of Appeal considers, in the first place, that in the SV Capital case the CJEU clarified that the scope of Article 60 of the ESAs Regulations must be narrowly construed and that acts of the European Supervisory Agencies, in order to be reviewable by the Board of Appeal, must amount to a decision "based on Article 1(2)". In the Board of Appeal's view the participation of EIOPA in the BSR, at the request of the national competent authority, is not a decision based on Article 1(2), if this latter provision is narrowly interpreted in line with the principle stated by the CJEU.

64. The Board of Appeal considers, in the second place, that, since EIOPA participation in the BSR was publicly announced with a joint statement of 19 February 2020, and was further confirmed and specified with EIOPA announcements on its website of 1 April and 2 July 2020, even if one would assume that such EIOPA participation could be challenged with an appeal under Article 60, the period prescribed by Article 60 of the EIOPA Regulation for bringing the appeal had expired by the date of the appeal (three months

from the day on which the Authority published its decision). Indeed, since the ASF decision was adopted on 11 March 2020 and was challenged by the appellant before the national court, in the Board of Appeal's view the appellant was aware of the EIOPA involvement in the BSR at the latest at the time of the EIOPA announcements on its website following the ASF decision.

65. Even more importantly, the Board of Appeal finds, in the third place, that EIOPA's participation in the BSR, whilst *de facto* possibly significant in economic or practical terms for the appellant, has no immediate effects on the legal position of the appellant and therefore does not produce legal effects in the sense required by settled case law. Indeed, contrary to the appellant's allegations, EIOPA's participation is not capable of affecting the interest of the appellant by bringing about a distinct change in its legal position or by adversely affecting its legal position (see e.g. judgement of 6 December 2007, case C-516/06 P, *Commission v Ferriere Nord*, ECLI:EU:C:2007:763).
66. According to settled case-law, the condition that the contested act must be of direct and individual concern to a natural or legal person requires the fulfilment of two cumulative criteria, namely that the contested measure must, first, directly affect the legal situation of the individual and, secondly, leave no discretion to the addressee who is entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (see, *inter alia*, judgment of 6 November 2018, C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission*, EU:C:2018:873). Neither of those two conditions is satisfied in the instant case.
67. As to the former, the position of the CJEU is extremely rigorous in holding that non-legal, purely economic or practical, *de facto*, effects of an act (as the ones which, in the instant case, could derive upon the appellant from the BSR exercise in which EIOPA is participating) cannot be taken into account when assessing the direct concern requirement (see to this effect, recently, judgment of 5 November 2019, C-663/17 P and C-669/17 P, *ECB v Trasta Komerbanka and Others*, EU:C:2019:323, paragraphs 109 and 112; see also judgment of 28 February 2019, C-465/16 P, *Council v Growth Energy and Renewable Fuels Association*, EU:C:2019:155 paragraph 81 and the case-law cited).
68. As to the latter, in the instant case, despite EIOPA's participation, the BSR is, and remains, an ASF Decision, a decision which has been adopted by the ASF on its own initiative and based upon ASF's assessment of its desirability in the specific market situation of the Romanian insurance sector, without the ASF being bound in any way by any binding EIOPA's recommendation or request (see to this effect judgment of 18 December 2018, C-219/17, *Fininvest and Berlusconi v Banca d'Italia*, EU:C:2018:1023, paragraph 46) and which the appellant has already challenged before the competent national court in a case which is still pending. Moreover, the Board of Appeal notes that, should the ASF adopt, at the end of the current BSR supervisory (stock taking and assessment) exercise concerning the overall Romanian insurance market, specific supervisory measures *vis-à-vis* an individual insurance undertaking, the ASF

decision to adopt those individual measures may be challenged by the addressee before the competent national court.

69. The appellant, who is not the addressee of the contested EIOPA decision to participate in the BSR, failed therefore to show that that such participation by EIOPA in the national BSR is of individual and direct concern to it.
70. The Board of Appeal finally notes that its finding that, for the reasons stated above, the appeal is inadmissible does not affect the right of the appellant to an effective remedy, because as the CJEU has also recently recalled in respect of a recommendation issued by the European Banking Authority under Article 17 of the EBA Regulation (judgment of 25 March 2021, C-501/18, *BT v Balgarska Narodna Banka*, paragraph 82) with a statement which can however be transposed by analogy, despite the different legal and factual context of the present appeal, “it follows from Article 19(3)(b) TEU and the first paragraph of Article 267(b) TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation and validity of acts of the institutions of the Union without any exception (see to that effect judgments of 13 December 1989, C-322/88, *Grimaldi*, EU:C:1989:646, paragraph 8; of 13 June 2017, C-258/14, *Floresku and Others*, EU:C:2017:448, paragraph 71; of 20 February 2018, C-16/16 P, *Belgium v Commission*, EU:C:2018:79, paragraph 44, and of 14 May 2019, C-319/16, C-77/17 and C-78/17, *M and Others*, EU:C:2019:403, paragraph 71 and the case-law cited).”
71. It follows that, should the appellant and the national court before which the ASF Decision has been challenged (and before which the case is still pending) consider (i) that a question of validity of the EIOPA decision to participate in the BSR is relevant to the effect of the determination by the national court on the validity of the ASF Decision under the applicable national law and (ii) that EIOPA’s participation to the BSR could actually be considered beyond the clear EIOPA mandate to promote supervisory convergence (and thus an *ultra vires* act in respect of the scope of action and powers set out in Article 1 of the EIOPA Regulation and of the tasks conferred upon EIOPA by the EIOPA Regulation), such question could be referred to the CJEU under Article 267 TFEU. Indeed, whilst the Board of Appeal, for the reasons stated above, cannot examine the merits of the appeal, the CJEU has, in principle, jurisdiction to give a preliminary ruling on a similar question, to the extent that this is considered relevant and necessary by the national judge.

The decision

On these grounds, the Board of Appeal unanimously decides that the appeal is inadmissible.

The original of this Decision is signed by the Members of the Board in electronic format, as authorised by Article 22.2 of the Rules of Procedure and countersigned by hand by the Secretariat.

Marco Lamandini (President)
(SIGNED)

Lars Afrell
(SIGNED)

Pat McArdle
(SIGNED)

Katalin Mero
(SIGNED)

Beata Mrozowska
(Co-Rapporteur)
(SIGNED)

Michele Siri
(Co-Rapporteur)
(SIGNED)

On behalf of the Secretariat
Tijmen Swank
(SIGNED)

A signed copy of the decision is held by the Secretariat.