Reports of Cases

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

1 June 2022 *

(Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Right to be heard – Duty to state reasons – Articles 18 and 20 of Regulation (EU) No 806/2014 – Non-contractual liability)

In Case T-523/17,

Eleveté Invest Group, SL, established in Madrid (Spain), and the other applicants whose names are listed in the annex,[1] represented by B. Cremades Roman, J. López Useros, S. Cajal Martín and P. Marrodán Lázaro, lawyers,

applicants,

v

European Commission, represented by L. Flynn and A. Steiblytė, acting as Agents, and by J. Rivas Andrés, lawyer,

and

Single Resolution Board (SRB), represented by J. King and M. Fernández Rupérez, acting as Agents, and by B. Meyring, S. Schelo, F. Fernández de Trocóniz Robles, T. Klupsch and S. Ianc, lawyers,

defendants,

supported by

Kingdom of Spain, represented by J. Rodríguez de la Rúa Puig and L. Aguilera Ruiz, acting as Agents,

and by

Banco Santander, SA, established in Santander (Spain), represented by J. Rodríguez Cárcamo, A.M. Rodríguez Conde, D. Sarmiento Ramírez-Escudero and J. Remón Peñalver, lawyers,

* Language of the case: Spanish.

[1] The list of the other applicants is annexed only to the version sent to the parties.

interveners,

APPLICATION (i) based on Article 263 TFEU for annulment of Decision SRB/EES/2017/08 of the Executive Session of the SRB of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, SA, and for annulment of Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p. 15), (ii) based on Article 268 TFEU seeking compensation for damage allegedly sustained by the applicants following those decisions, and (iii) for a finding of invalidity in respect of the provisional valuation and for compensation,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of M. van der Woude, President, M. Jaeger, V. Kreuschitz, G. De Baere (Rapporteur) and G. Steinfatt, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 16 June 2021,

gives the following

Judgment

I. Legal framework

1 Following the 2008 financial crisis, it was decided that a banking union should be set up in the European Union, underpinned by a comprehensive and detailed single rulebook for financial services, valid for the internal market as a whole and composed of a single supervisory mechanism and new frameworks for deposit insurance and bank resolution.

2 The first stage towards setting up the banking union consisted of the establishment of a single supervisory mechanism (SSM) by Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63). According to recital 12 of that regulation, an SSM should ensure that the European Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations. To that end, Regulation No 1024/2013 confers specific tasks on the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the European Union and each Member State.

3 Thereafter, 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) was adopted. Recital 1 of that directive states the following:

'The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investment firms … Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery and resolution framework is to obviate the need for such action to the greatest extent possible.'

4 The objective of Directive 2014/59 is to establish common rules for minimum harmonisation of national provisions governing the resolution of banks in the European Union and provides for cooperation between resolution authorities for deficiencies in cross-border banks. In that regard, Directive 2014/59 provides, inter alia, in Article 3(1) that each Member State is to designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.

5 However, given that, first, Directive 2014/59 did not lead to the centralisation of decision making in the field of resolution, that it essentially made resolution tools and common resolution powers available to the national authorities of each Member State, and that it left them a margin of discretion as regards the use of those tools and the use of national financing arrangements for resolution, and that, second, that directive did not completely avoid the taking of separate and potentially inconsistent decisions by Member States regarding the resolution of cross-border groups, it was decided to put in place a Single Resolution Mechanism (SRM).

6 Thus, the second stage towards the creation of the banking union consisted in the adoption of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

7 Recital 12 of Regulation No 806/2014 provides:

'Ensuring effective resolution decisions for failing banks within the Union, including on the use of funding raised at Union level, is essential for the completion of the internal market in financial services. Within the internal market, the failure of banks in one Member State may affect the stability of the financial markets of the Union as a whole. Ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States is in the best interests not only of the Member States in which banks operate but also of all Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal market. Banking systems in the internal market are highly interconnected, bank groups are international and banks have a large percentage of foreign assets. In the absence of the SRM, bank crises in Member States participating in the SSM would have a stronger negative systemic impact also in non-participating Member States. The establishment of the SRM will ensure a neutral approach in dealing with failing banks and therefore increase stability of the banks of the participating Member States and prevent the spill-over of crises into non-participating Member States and will thus facilitate the functioning of the internal market as

a whole. The mechanisms for cooperation regarding institutions established in both participating and non-participating Member States should be clear, and no Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for financial services.'

8 Under the first paragraph of Article 1 of Regulation No 806/2014, the purpose of that regulation is to establish uniform rules and a uniform procedure for the resolution of the entities defined in Article 2, which are established in the participating Member States, namely banks whose home supervisor is the ECB or the national competent authority in Member States whose currency is the euro or in Member States whose currency is not the euro which have established a close cooperation in accordance with Article 7 of Regulation No 1024/2013 (see recital 15 of Regulation No 806/2014).

9 The second paragraph of Article 1 of Regulation No 806/2014 provides that those uniform rules and that uniform procedure are to be applied by the Single Resolution Board (SRB), established in accordance with Article 42 of that regulation, together with the Council of the European Union and the European Commission, and the national resolution authorities, within the framework of the SRM established by that regulation. It is also provided that the SRM is to be supported by a Single Resolution Fund (SRF).

10 Pursuant to Article 16(1) of Regulation No 806/2014, the SRB is to decide on a resolution action in relation to a financial institution established in a participating Member State, where the three conditions laid down in Article 18(1) of that regulation are satisfied.

11 The first condition requires that the entity is failing or is likely to fail. The assessment of that condition is carried out by the ECB, after consulting the SRB, or by the SRB, and is deemed to be satisfied if the entity is in one or more of the situations listed in Article 18(4) of Regulation No 806/2014.

12 The second condition requires there to be no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame.

13 The third condition requires that a resolution action is necessary in the public interest, that is to say that it is necessary in order to achieve one or more of the resolution objectives, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

14 Article 14 of Regulation No 806/2014 defines the resolution objectives as follows: to ensure the continuity of critical functions; to avoid significant adverse effects on financial stability, in particular by preventing contagion; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors and investors; and to protect client funds and client assets.

15 Article 20(1) of Regulation No 806/2014 provides that, before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the SRB must ensure that a fair, prudent and realistic valuation of the assets and liabilities of the entity concerned is carried out by a person independent from any public authority, including the SRB and the national resolution authority, and from the entity concerned.

16 According to Article 20(15) of Regulation No 806/2014, the valuation is to be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments.

17 Where the conditions laid down in Article 18(1) of Regulation No 806/2014 are satisfied, the SRB is to adopt a resolution scheme.

18 When acting under the resolution procedure, the SRB, the Council and the Commission must ensure that the resolution action is taken in accordance with certain principles set out in Article 15 of Regulation No 806/2014, which include the principle that the shareholders of the institution under resolution are to bear first losses and the principle that no creditor is to incur greater losses than would have been incurred if the entity covered by the resolution action had been wound up under normal insolvency proceedings.

19 In the resolution scheme, the SRB is to determine the application of the resolution tools. Article 22(2) of Regulation No 806/2014 lists the various resolution tools available, namely the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool.

20 In the resolution scheme, the SRB may also exercise the power to write down or convert the capital instruments in the entity concerned in accordance with the conditions laid down in Article 21 of Regulation No 806/2014. Under Article 19 of Regulation No 806/2014, a resolution action may also involve the grant of State aid or use of the SRF.

21 According to Article 18(7) of Regulation No 806/2014, immediately after its adoption, the SRB is to transmit the resolution scheme to the Commission. Within 24 hours from the transmission of the resolution scheme by the SRB, the Commission must either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme in the cases not covered in the third subparagraph, namely compliance with the public interest criterion or a material modification of the amount of the SRF. As regards those discretionary aspects, within 12 hours from the transmission of the resolution scheme by the SRB, the Commission may propose to the Council to object to the resolution scheme adopted by the SRB on the ground that it does not fulfil the criterion of public interest or to approve or object to a material modification of the amount of the SRF provided for in the resolution scheme adopted by the SRB. The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB.

22 Article 18(9) of Regulation No 806/2014 states that the SRB is to ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme is to be addressed to those authorities and must instruct them to take all necessary measures to implement the scheme in accordance with Article 29 of that regulation by exercising resolution powers.

23 After a resolution action has been adopted, under Article 20(16) of Regulation No 806/2014, the SRB is to ensure that a valuation is carried out by an independent person in order to determine whether the shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings. Pursuant to Article 76(1)(e) of Regulation No 806/2014, that valuation may lead to the payment of compensation to shareholders or creditors if they have incurred greater losses under the resolution than they would have incurred in a winding up under normal insolvency proceedings.

II. Background to the dispute and events subsequent to the action being brought

24 The applicants, Eleveté Invest Group, SL and the 19 natural and legal persons whose names are listed in the annex, were shareholders in or held additional Tier 1 capital instruments or Tier 2 capital instruments issued by Banco Popular Español, SA ('Banco Popular') before a resolution scheme was adopted in respect of Banco Popular.

A. The situation of Banco Popular before the resolution scheme was adopted

25 The Banco Popular group, of which Banco Popular was the parent company, was the sixth largest banking group in Spain at the time of the resolution.

26 In 2016, Banco Popular undertook a capital increase of EUR 2.5 billion.

27 On 5 December 2016, the Executive Session of the SRB adopted a resolution plan for the Banco Popular group ('the 2016 resolution plan'). The preferred resolution tool in the 2016 resolution plan was the bail-in tool provided for in Article 27 of Regulation No 806/2014.

28 On 3 February 2017, Banco Popular published its 2016 annual report in which it disclosed the need for extraordinary provisions in the sum of EUR 5.7 billion, leading to consolidated losses of EUR 3.485 billion, and the appointment of a new chairman.

29 On 10 February 2017, DBRS Ratings Limited (DBRS) (now DBRS Morningstar) downgraded Banco Popular's rating, with a negative outlook, in view of Banco Popular's weakened capital position following a net loss which was higher than that anticipated in its annual report, mentioned in paragraph 28 above, and the bank's struggle to reduce its elevated stock of non-performing assets.

30 On 3 April 2017, Banco Popular announced the results of internal audits, indicating that corrections to its 2016 annual report might be required. Those adjustments were made in Banco Popular's financial report for the first quarter of 2017.

31 At the general shareholders' meeting of Banco Popular on 10 April 2017, the Chairman of the Board of Directors announced that the bank envisaged either a further capital increase or a corporate transaction to address the group's capital position and its level of non-performing assets. The Chief Executive Officer (CEO) of Banco Popular was replaced after less than one year in office.

32 Following the announcement of 3 April 2017 on the need to adjust the financial results of 2016, DBRS, on 6 April, downgraded Banco Popular's rating, again with a negative outlook. On 7 April, Standard & Poor's, and on 21 April 2017, Moody's Investors Service ('Moody's') also downgraded Banco Popular's rating with a negative outlook.

33 In April 2017, Banco Popular initiated a private sale process with a view to achieving its sale to a strong competitor, which would restore its financial situation. The deadline for potential purchasers interested in acquiring Banco Popular to submit their bids was initially set at 10 June 2017 and then delayed until the end of June 2017.

34 On 5 May 2017, Banco Popular presented its financial report for the first quarter of 2017, reporting losses of EUR 137 million.

35 On 12 May 2017, the liquidity coverage requirement of Banco Popular dropped below the minimum threshold of 80% set by Article 460(2)(c) of 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).

36 By letter of 16 May 2017, Banco Santander, SA informed Banco Popular that it could not make a concrete bid in the context of the private sale process.

37 On 16 May 2017, in a communication of a relevant fact to the Comisión nacional del mercado de valores (CNMV) (National Securities Market Commission, Spain), Banco Popular stated that potential purchasers had expressed an interest in the private sale process, but that it had not received any concrete bids.

38 On 19 May 2017, FITCH downgraded Banco Popular's long-term rating.

39 On 23 May 2017, the Chair of the SRB, Ms Elke König, granted an interview to the television channel Bloomberg, in which she was questioned, inter alia, on the situation of Banco Popular.

40 In May 2017, several press articles reported on the difficulties faced by Banco Popular. By way of example, it is worth mentioning an article of 11 May 2017, published on the website *elconfidencial.com*, entitled 'Saracho orders the urgent sale of Popular to JP Morgan and Lazard due to risk of insolvency' (*Saracho encarga la venta urgente del Popular a JP Morgan y Lazard por riesgo de quiebra*). That article states that the Chairman of the bank had instructed JP Morgan and Lazard to organise the urgent sale of the bank due to a risk of insolvency, as a result of the massive outflow of deposits by private and institutional clients, and that he considered that the only way of ensuring the viability of the bank was the complete and imminent sale of the entire group. The article explains that, 'in view of persistent deposit outflows and the closure of external sources of financing, the bank ran a serious risk of insolvency and [its Chairman] was therefore forced to activate the most drastic measure and gradually refrain from selling its assets in order to improve its own fund ratios and meet the requirements of the ECB'.

41 On 15 May 2017, an article published on the website *elconfidencial.com*, entitled 'The ECB inspects Banco Popular for two months in full sales process' (*El BCE inspecciona a Banco Popular durante dos meses en pleno proceso de venta*), reported that the sales plan for Banco Popular, implemented by its Chairman, took place after the ECB's inspection, which had confirmed the gap in provisions. According to that article, the ECB inspectors had concluded that Banco Popular's difficulties were associated with its stock deficit to cover its property exposure and that it was to avoid occasional withdrawals of deposits. The inspectors also expressed their dissatisfaction with the presentation of the 2016 accounts.

42 On 31 May 2017, Reuters news agency published an article entitled 'EU warned of resolution risk for Banco Popular' (*La UE, advertida de riesgo de una resolución ordenada en Banco Popular*). That article states inter alia that, according to an anonymous high-ranking EU official, one of Europe's top bank watchdogs had warned EU officials that Banco Popular might need to be placed under resolution if it failed to find a buyer. According to that article, that official also stated that the Chair of the SRB had recently issued an 'early warning' and had declared that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention.

43 On the same day, the SRB published a press release disputing the content of that article.

44 In the first days of June 2017, Banco Popular had to face massive liquidity outflows.

45 On the morning of 5 June 2017, Banco Popular submitted an initial request for emergency liquidity assistance to Banco de España (Bank of Spain), then a second request, in the afternoon, containing an extension of the amount requested on account of extremely acute liquidity movements. On the basis of a request from the Bank of Spain and following the ECB's assessment on the same day as Banco Popular's request for emergency liquidity assistance, the Governing Council of the ECB did not raise any objections to urgent liquidity assistance to Banco Popular for the period up to 8 June 2017. Banco Popular received part of that emergency liquidity assistance, then the Bank of Spain stated that it was not in a position to provide additional emergency liquidity assistance to Banco Popular.

46 On 6 June 2017, DBRS and Moody's downgraded Banco Popular's rating.

B. Other facts prior to the adoption of the resolution scheme

47 On 23 May 2017, the SRB hired Deloitte as an independent expert to carry out a valuation of Banco Popular in accordance with Article 20 of Regulation No 806/2014.

48 On 24 May 2017, on the basis of Article 34 of Regulation No 806/2014, the SRB asked Banco Popular to supply the information required in order to carry out its valuation. On 2 June 2017, Banco Popular was also asked to supply information about the private sale process and to be ready to provide access to the secure virtual data room that it had established in the context of that process.

49 On 3 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/06, addressed to the Fondo de Reestructuración Ordenada Bancaria (FROB) (Fund for Orderly Bank Restructuring (FROB), Spain), concerning the marketing of Banco Popular. The SRB approved the immediate launching of the sale process for Banco Popular by the FROB and informed the latter of the requirements concerning the sale, in accordance with Article 39 of Directive 2014/59. In particular, the SRB instructed the FROB to contact the five potential purchasers which had been invited to submit bids in the context of the private sale process.

50 Of the five potential purchasers, two decided not to participate in the sale process and one was excluded by the ECB for prudential reasons.

51 On 4 June 2017, the two potential purchasers which had decided to participate in the sale process, Banco Santander and Banco Bilbao Vizcaya Argentaria, SA (BBVA), signed a non-disclosure agreement and on 5 June 2017 were given access to the virtual data room.

52 On 5 June 2017, the SRB adopted a first valuation ('valuation 1'), pursuant to Article 20(5)(a) of Regulation No 806/2014, which had the objective of informing the determination whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met.

53 On 6 June 2017, the ECB made a 'failing or likely to fail' assessment of Banco Popular, after consulting the SRB, in accordance with the second subparagraph of Article 18(1) of Regulation No 806/2014.

54 In that assessment, the ECB stated that over the preceding months, Banco Popular had experienced a substantial deterioration of its liquidity position, primarily driven by a significant depletion of its deposit base. Banco Popular was confronted with material cash outflows across all customer segments. The ECB listed the events which had led to the liquidity problems faced by Banco Popular.

55 In that regard, the ECB noted that, in February 2017, when presenting its annual accounts, Banco Popular had disclosed the need for extraordinary provisions in the sum of EUR 5.7 billion, leading to losses of EUR 3.485 billion for 2016, and replaced its long-standing Chairman who had initiated a revision of the bank's strategy. The announcement of additional provisions and year-end losses led to Banco Popular's rating being downgraded by DBRS on 10 February 2017 and caused significant concerns on the part of Banco Popular's customer base, which were reflected by significant unexpected deposit withdrawals and a high frequency of customer visits to the bank's branches.

56 The ECB also stated that the release by Banco Popular of an ad hoc disclosure on 3 April 2017, reporting on the outcome of several internal audits with a potentially significant impact on the bank's financial statements, and the confirmation that the bank's CEO would be replaced after less than one year in office, triggered another wave of deposit outflows. The ECB noted that that wave was also fuelled by:

– a downgrade of Banco Popular's rating by Standard & Poor's on 7 April 2017;

– an announcement by Banco Popular, on 10 April 2017, that it would not pay dividends and that a capital increase or corporate transaction could be required due to its tight capital position and the necessary alignment of the non-performing assets' coverage to its peers;

– a downgrade of Banco Popular's rating by Moody's on 21 April 2017;

– the disclosure of worse-than-expected results for the first quarter of 2017;

– continuous negative media coverage such as the articles of 11 May and 15 May 2017, referred to in paragraphs 40 and 41 above, suggesting that the Chairman of Banco Popular had mandated an urgent sale of the bank due to the imminent risk of bankruptcy or illiquidity, and that the bank was facing a significant additional need for provisioning resulting from an on-site inspection by the supervisor.

57 The ECB also found that deposits lost since 31 May 2017 were particularly relevant, after disclosure in the media of the fact that the bank could face wind-down if the sale process then under way was not successful within a very short period.

58 In addition, the ECB noted that, while Banco Popular had developed various additional liquidity generating measures over the preceding weeks and started to implement them, the magnitude of the realised and still expected inflows was insufficient to remedy the depletion of Banco Popular's liquidity position on the date of the assessment. The ECB also stated that, even with the recourse to the emergency liquidity assistance in respect of which the Governing Council of the ECB had not raised any objections on 5 June 2017, the liquidity situation on that date did not suffice to ensure Banco Popular's ability to meet its liabilities by 7 June 2017 at the latest.

59 The ECB considered that the measures put in place by Banco Popular had not been sufficient to reverse the deterioration of its liquidity position. The ECB stated that, as an alternative measure to ensure its capacity to meet all liabilities as they fell due, Banco Popular was trying to implement a corporate transaction, namely its sale to a stronger competitor. However, the ECB considered that, in view of the deterioration of Banco Popular's liquidity position and the lack of evidence of its capacity to turn around its liquidity situation in the near future, together with the fact that negotiations had so far not led to a positive outcome, confirmation of such a private transaction was not foreseeable in a time frame that would allow Banco Popular to be able to pay its debts or other liabilities as they fell due.

60 The ECB considered that, at the same time, there were no available supervisory or early intervention measures that could immediately restore the liquidity position of Banco Popular and allow it sufficient time to implement a corporate transaction or other solution. The measures available to the ECB as the competent authority under the national transposition of Article 104 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and of Articles 27 to 29 of Directive 2014/59, or of Article 16 of Regulation No 1024/2013, could not ensure that Banco Popular would be in a position to pay its debts or other liabilities as they fell due, given the extent and pace of the liquidity deterioration observed.

61 In conclusion, taking into account, in particular, the excessive deposit outflows, the speed at which liquidity had been lost from the bank and the inability of the bank to generate further liquidity, the ECB considered that there were objective elements indicating that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due. The ECB concluded that Banco Popular was deemed to be failing, or in any case likely to fail in the near future, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

62 On 6 June 2017, the Board of Directors of Banco Popular informed the ECB that it had reached the conclusion that the bank was likely to fail.

63 On the same day, the FROB issued a letter containing information on the sale process ('the process letter') setting the deadline for the submission of bids at midnight on 6 June 2017.

64 Still on the same date, BBVA, one of the two potential buyers of Banco Popular, informed the FROB that it would not be making a bid.

65 Also on 6 June 2017, Deloitte submitted a second valuation ('valuation 2') to the SRB, drawn up pursuant to Article 20(10) of Regulation No 806/2014. The purpose of valuation 2 was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and to inform the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool. That valuation, inter alia, estimated the economic value of Banco Popular at EUR 1.3 billion in the best-case scenario, at minus EUR 8.2 billion in the worst-case scenario and at minus EUR 2 billion for the best estimate.

66 On 7 June 2017, Banco Santander submitted a concrete bid.

67 By letter of 7 June 2017, the FROB informed the SRB that Banco Santander had submitted a bid at 3.12 a.m. on 7 June and that the price offered by Banco Santander for the sale of Banco Popular shares was EUR 1. The FROB stated that its governing committee had selected Banco Santander as awardee of the competitive sale process of Banco Popular and had decided to propose to the SRB to designate Banco Santander as buyer in the SRB's decision on the adoption of a resolution scheme in respect of Banco Popular.

C. The resolution scheme for Banco Popular of 7 June 2017

68 On 7 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/08 concerning a resolution scheme in respect of Banco Popular ('the resolution scheme') on the basis of Regulation No 806/2014.

69 According to Article 1 of the resolution scheme, given that the conditions provided for in Article 18(1) of Regulation No 806/2014 had been met, the SRB decided to place Banco Popular under resolution as of the resolution date.

70 Accordingly, the SRB considered, first, that Banco Popular was failing or was likely to fail, second, that there were no alternative measures that could prevent the failure of Banco Popular within a reasonable time frame and, third, that resolution action in the form of a sale of business tool in respect of Banco Popular was necessary in the public interest. In that regard, the SRB stated that the resolution was a necessary and proportionate way to meet the two objectives referred to in Article 14(2) of Regulation No 806/2014, namely to achieve the continuity of the bank's critical functions and to avoid significant adverse effects on financial stability.

71 In Article 5.1 of the resolution scheme, the SRB decided the following:

'The resolution tool to be applied to [Banco Popular] shall consist in the sale of business pursuant to Article 24 of [Regulation No 806/2014] for transferring shares to a purchaser. The write-down and conversion of capital instruments will be exercised immediately before the application of the sale of business tool.'

72 Article 6 of the resolution scheme concerns the write-down of capital instruments and the sale of business tool. In Article 6.1, the SRB set out the measures which it had adopted pursuant to its write-down power provided for in Article 21 of Regulation No 806/2014.

73 Accordingly, in Article 6.1 of the resolution scheme, the SRB decided:

– first, to write down the nominal amount of Banco Popular's share capital in an amount of EUR 2 098 429 046, resulting in the cancellation of 100% of Banco Popular's share capital;

– subsequently, to convert all the principal amount of the additional Tier 1 instruments issued by Banco Popular and outstanding as at the date of the decision relating to the resolution scheme into newly issued shares of Banco Popular ('the New Shares I');

– subsequently, to write down to zero the nominal amount of the 'New Shares I', resulting in the cancellation of 100% of those 'New Shares I';

– lastly, to convert all the principal amount of the Tier 2 capital instruments issued by Banco Popular and outstanding as at the date of the resolution decision into newly issued shares of Banco Popular ('the New Shares II').

74 Article 6.3 of the resolution scheme provides that those write-down and conversion measures are based on valuation 2, as corroborated by the results of an open and transparent sale process conducted by the Spanish resolution authority (the FROB).

75 In Article 6.5 of the resolution scheme, the SRB stated that it was exercising the powers conferred on it by Article 24(1)(a) of Regulation No 806/2014 concerning the sale of business tool, and ordered that the 'New Shares II' be transferred to Banco Santander free and clear of any rights or liens of any third party, in consideration of a purchase price of EUR 1. It was specified that the purchaser had already consented to the transfer.

76 The SRB also stated that the transfer of the 'New Shares II' should be made on the basis of the purchaser's binding offer of 7 June 2017 and implemented by the FROB under Ley 11/2015 de recuperación y resolución de entidades de crédito y empresas de servicios de inversión (Law 11/2015 on the recovery and resolution of credit institutions and investment firms) of 18 June 2015 (BOE No 146 of 19 June 2015, p. 50797, 'Law 11/2015').

77 The resolution scheme was submitted to the Commission for endorsement at 5.13 a.m. on 7 June 2017.

78 On 7 June 2017, at 6.30 a.m., the Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for [Banco Popular] (OJ 2017 L 178, p. 15), and notified it to the SRB. Consequently, the resolution scheme entered into force on the same day.

79 Recital 4 of Decision 2017/1246 states the following:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation (EU) No 806/2014.'

80 On the same day, the FROB adopted the necessary measures to implement the resolution scheme in accordance with Article 29 of Regulation No 806/2014. In that context, the FROB approved the transfer of Banco Popular's new shares resulting from the conversion of the Tier 2 instruments ('the New Shares II') to Banco Santander.

D. Facts subsequent to the adoption of the resolution decision

81 On 14 June 2018, Deloitte sent to the SRB the valuation of difference in treatment, provided for in Article 20(16) to (18) of Regulation No 806/2014, carried out in order to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings ('valuation 3'). On 31 July 2018, Deloitte sent to the SRB an addendum to that valuation, correcting some formal errors.

82 On 28 September 2018, following a merger by acquisition, Banco Santander became the universal successor of Banco Popular.

83 On 17 March 2020, the SRB adopted decision SRB/EES/2020/52 determining whether compensation needed to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular had been effected. A communication concerning that decision was published on 20 March 2020 in the *Official Journal of the European Union* (OJ 2020 C 91, p. 2). In that decision, the SRB considered that the shareholders and creditors who were affected by the resolution of Banco Popular were not entitled to compensation from the SRF under Article 76(1)(e) of Regulation No 806/2014.

III. Procedure and forms of order sought

84 By application lodged at the Court Registry on 7 August 2017, the applicants brought the present action.

85 By document lodged at the Court Registry on 31 October 2017, the SRB requested the Court, pursuant to Article 92(3) of the Rules of Procedure of the General Court, to order measures of inquiry concerning the production of certain documents referred to in the annex. By decision of 28 November 2017, the Court decided not to grant that request for measures of inquiry at that stage in the proceedings.

86 By documents lodged at the Court Registry on 6 November and 5 December 2017, respectively, Banco Santander and the Kingdom of Spain applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission and the SRB.

87 On 16 February 2018, in the context of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court requested the SRB to lodge the latest, non-confidential version of the resolution scheme, as well as a non-confidential version of valuation 2, which were published on the SRB's website. The SRB lodged the documents within the prescribed time limit.

88 On 6 July 2018, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court put written questions to the main parties. The main parties complied with that request within the prescribed time limit.

89 By document lodged at the Court Registry on 1 August 2018, the applicants filed a request for confidential treatment, vis-à-vis Banco Santander and the Kingdom of Spain, of certain information contained in the annexes to the application.

90 By orders of 12 April 2019, the President of the Eighth Chamber of the General Court granted the Kingdom of Spain and Banco Santander leave to intervene and granted the requests for confidential treatment filed by the applicants in respect of them.

91 By letter lodged at the Court Registry on 16 April 2019, the applicants made an application for modification of the measures of inquiry contained in the application and the reply. The Commission, the SRB, the Kingdom of Spain and Banco Santander submitted their observations on that application within the prescribed time limit.

92 By letter lodged at the Court Registry on 6 May 2019, the applicants offered further evidence pursuant to Article 85(3) of the Rules of Procedure. The Commission and the SRB submitted their observations on that further evidence within the prescribed time limit.

93 The Kingdom of Spain and Banco Santander submitted their statements in intervention on 4 July 2019 and the applicants and the SRB submitted their observations on those statements within the prescribed time limit.

94 Following a change in the composition of the Chambers of the General Court, in accordance with Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was, accordingly, allocated.

95 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

96 By letter lodged at the Court Registry on 9 October 2020, the applicants offered further evidence pursuant to Article 85(3) of the Rules of Procedure. The Commission, the SRB, the Kingdom of Spain and Banco Santander submitted observations on that further evidence within the prescribed time limits.

97 On 16 March 2021, the Court, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, invited the SRB to produce various documents. By letter of 30 March 2021, the SRB replied that the requested documents were in part confidential and that they could be produced if the Court adopted a measure of inquiry.

98 By order of 12 May 2021, the Court ordered the SRB, on the basis, first, of the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and, second, of Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, to produce the full versions of the resolution scheme, valuation 2, the ECB's assessment of 6 June 2017 that Banco Popular was failing or was likely to fail, and the ECB's letter of 18 May 2017 to Banco Popular. The Court also ordered the SRB to produce the non-confidential version of the ECB's letter of 18 May 2017 to Banco Popular.

99 By order of 9 June 2021, the Court removed from the file the confidential versions of the documents produced by the SRB pursuant to the order of 12 May 2021.

100 Since two members of the Third Chamber, Extended Composition were unable to sit, the President of the General Court designated two other Judges to complete the Chamber.

101 The parties presented oral argument and answered oral questions put to them by the Court at the hearing on 16 June 2021.

102 The applicants claim that the Court should:

– annul the resolution scheme and Decision 2017/1246 (together, 'the contested decisions') and, consequently, order the Commission and the SRB to return their investments in Banco Popular or, in the alternative, order the Commission and the SRB to pay them damages on grounds of non-contractual liability;

– order the Commission and the SRB to pay them damages on grounds of non-contractual liability;

– declare the invalidity of valuation 2 and order the Commission and the SRB to pay them compensation;

– order the Commission and the SRB to pay the costs;

– order that the sums awarded be increased by compensatory interest as of 23 May 2017 or, in the alternative, as of 7 June 2017, up to the date of the judgment and, additionally, by default interest as of the date of the judgment, except for the costs of the present proceedings, which are to accrue default interest only as of the date of the judgment;

– grant them any other additional relief deemed appropriate.

103 The Commission contends that the Court should:

– dismiss the action for annulment as unfounded;

– dismiss the action for non-contractual liability as inadmissible or, in the alternative, as unfounded;

– dismiss the action against valuation 2 as inadmissible;

– order the applicants to pay the costs.

104 The SRB contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

105 Banco Santander and the Kingdom of Spain contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

IV. Law

106 The action essentially comprises three heads of claim. The applicants' first head of claim seeks annulment of the contested decisions, the second head of claim contains claims for damages and the third head of claim seeks annulment of valuation 2 and the award of compensation.

A. The application for annulment of the contested decisions

107 In support of their application for annulment of the contested decisions, the applicants raise four pleas in law, alleging (i) infringement of Article 18 of Regulation No 806/2014, (ii) infringement of Article 20 of Regulation No 806/2014, (iii) infringement of the right to be heard and the right of access to the file, enshrined in Article 41(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), and (iv) breach of the duty to state reasons. In their observations on the statements in intervention, the applicants raise a new plea alleging infringement of Article 24 of Regulation No 806/2014.

108 As a preliminary point, it must be noted that, as regards the scope of the review carried out by the General Court, the SRB submits that, in accordance with the settled case-law of the Court of Justice, in the case of complex technical issues, the EU Courts must examine the findings of fact and law made by the authority, verify that the measure adopted is not vitiated by a manifest error or a misuse of powers, and verify that the authority has not manifestly exceeded the limits of its discretion.

109 The applicants submit that the judicial review limits relied on by the SRB do not apply in the present case.

110 In that regard, the case-law has defined the scope of the review carried out by the Court both in situations in which the contested measure is based on an assessment of highly complex scientific and technical facts and where there are complex economic assessments.

111 First, with regard to situations in which the EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which they adopt, review by the EU Courts is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU Courts cannot substitute their assessment of scientific and technical facts for that of the EU authorities on which alone the FEU Treaty has placed that task (judgments of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, paragraph 60, and of 7 March 2013, *Bilbaína de Alquitranes and Others* v *ECHA*, T-93/10, EU:T:2013:106, paragraph 76; see also judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 163 and the case-law cited).

112 Second, as regards the review by the EU Courts of the complex economic assessments made by the EU authorities, that review is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. When conducting such a review, the EU Courts must also not substitute their own economic assessment for that of the competent EU authority (see, to that effect, judgments of 11 July 1985, *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraph 34; of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 100 and the case-law cited; and of 16 January 2020, *Iberpotash* v *Commission*, T-257/18, EU:T:2020:1, paragraph 96 and the case-law cited).

113 Since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, it must be held that the principles resulting from the case-law referred to in paragraphs 111 and 112 above apply to the review which the Court is called upon to carry out.

114 However, although the SRB has discretion with regard to economic and technical matters, that does not mean that the EU Courts must refrain from reviewing the SRB's interpretation of information of an economic nature which forms the basis of its decision. As the Court of Justice has held, even in the case of complex assessments, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it (see judgments of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 57

and the case-law cited; of 26 March 2019, *Commission* v *Italy*, C-621/16 P, EU:C:2019:251, paragraph 104 and the case-law cited; and of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 115 and the case-law cited).

115 In that regard, in order to establish that the SRB committed a manifest error in assessing facts so as to justify the annulment of the resolution scheme, the evidence adduced by the applicants must be sufficient to render the factual assessments adopted in that scheme implausible (see, by analogy, judgments of 14 June 2018, *Lubrizol France* v *Council*, C-223/17 P, not published, EU:C:2018:442, paragraph 39; of 12 December 1996, *AIUFFASS and AKT* v *Commission*, T-380/94, EU:T:1996:195, paragraph 59; and of 13 December 2018, *Comune di Milano* v *Commission*, T-167/13, EU:T:2018:940, paragraph 108 and the case-law cited).

1. First plea in law, alleging infringement of Article 18 of Regulation No 806/2014

116 The applicants claim that the SRB infringed Article 18 of Regulation No 806/2014 in so far as the three conditions laid down in that article in order to adopt the resolution scheme were not satisfied. This plea is divided into three parts, alleging infringement of Article 18(1)(a) to (c) of Regulation No 806/2014.

117 Article 18(1) of Regulation No 806/2014 provides that the SRB is to adopt a resolution scheme only when it assesses that the following conditions are met:

‘(a) the entity is failing or is likely to fail;

(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an [institutional protection scheme (IPS)], or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with Article 21, taken in respect of the entity, would prevent its failure within a reasonable time frame;

(c) a resolution action is necessary in the public interest pursuant to paragraph 5.’

(a) The first part, alleging infringement of Article 18(1)(a) of Regulation No 806/2014

118 According to the applicants, the SRB found that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied on account of a problem of liquidity affecting Banco Popular, not a problem of solvency. In essence, the applicants put forward three complaints. They submit that the SRB and the Commission were not entitled to conclude that Banco Popular was failing or likely to fail since, first, owing to its liquidity problem, the bank required liquidity assistance as a matter of priority, second, that situation stemmed from the breach of the SRB’s duty of confidentiality and, third, that situation was the result of an infringement by the SRB and the Commission of the principle of good administration.

119 As a preliminary point, it is necessary to examine the application, in the present case, of the condition laid down in Article 18(1)(a) of Regulation No 806/2014 that the entity is failing or is likely to fail.

120 In that regard, first, on 6 June 2017 the ECB made a 'failing or likely to fail' assessment of Banco Popular, after consulting the SRB, in accordance with the second subparagraph of Article 18(1) of Regulation No 806/2014. In that assessment, the ECB, taking into account, in particular, the excessive deposit outflows, the speed at which liquidity had been lost from the bank and the inability of the bank to generate further liquidity, considered that there were objective elements indicating that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due. The ECB concluded that Banco Popular was deemed to be failing, or in any case likely to fail in the near future, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

121 Second, by letter of 6 June 2017, the Board of Directors of Banco Popular informed the ECB that it had reached the conclusion that the bank was likely to fail.

122 In its letter to the ECB of 6 June 2017, Banco Popular refers to the notification made to the ECB pursuant to Article 414 of Regulation No 575/2013 concerning the breach of the liquidity coverage ratio minimum requirement, and to the assessment carried out by its Board of Directors, set out in the annex, according to which Banco Popular was likely to fail, and to the information and analyses on which the Board of Directors relied in order to reach that conclusion.

123 That letter states:

'Pursuant to Article 21.4 of Law 11/2015 and Articles 45 and 46 of Commission Delegated Regulation (EU) 2016/1075 [of 23 March 2016 supplementing Directive 2014/59 with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (OJ 2016 L 184, p. 1)], Banco Popular hereby notifies that its board of directors has assessed that the institution is likely to fail.'

124 In that regard, the applicants claim that in the partial record of the minutes of 6 June 2017, annexed to that letter, the Board of Directors of Banco Popular stated that the bank was failing, but also that it would continue to do everything in its power to remedy that situation pending emergency liquidity assistance.

125 It must be observed that, in that partial record of the minutes of 6 June 2017, the Board of Directors of Banco Popular drew attention to the difficulties faced by the bank, namely capital ratios at group level lower than those of its main competitors, high exposure to non-performing assets and less coverage of those assets compared with the main Spanish institutions and, in particular, the publication of articles in the press over the preceding months on the group's financial health and their effects on its liquidity situation. It also referred to the rating downgrades by the rating agencies, the fall in the share price of Banco Popular in 2017 and the deterioration of the bank's liquidity and financing situation. The Board of Directors took the view that Banco Popular's liquidity situation was so serious as to be unsustainable and that non-compliance with the liquidity coverage requirement was no longer temporary and was significant for the purposes of assessing its failure. It therefore concluded that, on that date, Banco Popular was deemed to be failing.

126 That conclusion cannot be called into question by the fact that the Board of Directors added that, as long as the competent authorities had not taken a decision following notification of its conclusion to the ECB, it would continue to seek a private solution to the prevailing situation by way of a corporate transaction and to work on other action plans enabling the institution to raise capital.

127 Third, in Article 2 of the resolution scheme, the SRB referred to the conclusion of the ECB's assessment and stated, in Article 2.2, that, following the ECB's assessment, the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied.

128 Thus, in the present case, the finding that Banco Popular was failing or likely to fail was made on the basis of Article 18(4)(c) of Regulation No 806/2014, according to which, for the purposes of point (a) of paragraph 1 of that article, an entity is deemed to be failing or likely to fail in the following circumstance:

'the entity is, or there are objective elements to support a determination that the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due'.

129 In the first place, it must be observed that neither the ECB nor the SRB relied on the situation provided for in Article 18(4)(b) of Regulation No 806/2014, according to which an entity is deemed to be failing or likely to fail where 'the assets of the entity are, or there are objective elements to support a determination that the assets of the entity will, in the near future, be less than its liabilities'.

130 Thus, the insolvency of the entity is not a condition for a finding that it is failing or likely to fail on the basis of Article 18(4)(c) of Regulation No 806/2014 and, therefore, is not a condition for the adoption of a resolution action.

131 In that regard, as the SRB points out, according to recital 57 of Regulation No 806/2014:

'The decision to place an entity under resolution should be taken before a financial entity is balance sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated after the determination that an entity is failing or is likely to fail and that no alternative private sector measures would prevent such failure within a reasonable time frame.'

132 It follows that Banco Popular's insolvency was not the only scenario in which it could be regarded as failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014.

133 Since the situation provided for in Article 18(4)(c) of Regulation No 806/2014 does not require the entity concerned to be insolvent, the applicants' arguments that Banco Popular was solvent on the date of the resolution scheme are ineffective. The fact that an entity is balance sheet solvent does not mean that it has sufficient liquidity, that is to say that it has funds available to settle its debts or other liabilities as they fall due.

134 In the second place, the applicants concede that Banco Popular had liquidity problems on the date of the resolution scheme. Furthermore, they do not put forward any argument to dispute the fact that, on the date of the resolution scheme, Banco Popular was in the situation referred to in Article 18(4)(c) of Regulation No 806/2014, namely that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due.

135 In that regard, it must be observed that, in recital 23 of the resolution scheme, the SRB, referring to the assessment carried out by the ECB, found that Banco Popular's liquidity situation had significantly deteriorated since October 2016 as a result of withdrawals of deposits across all customer segments. The SRB inferred from this that the bank did not have sufficient options to restore its liquidity position in order to ensure that it would be in a stable position to meet its liabilities as they fell due.

136 In the resolution scheme, the SRB listed the various events which had led, since February 2017, to a rapid deterioration in Banco Popular's liquidity position. The SRB refers, inter alia, to the publication, in February 2017, of Banco Popular's annual report for 2016 in which it announced consolidated losses of EUR 3 485 billion, a need for extraordinary provisions amounting to EUR 5.7 billion and the appointment of a new chairman, and refers to the publication, in May 2017, of the financial report for the first quarter of 2017, in which it announced results which were worse than those expected by the market. The SRB mentioned the downgrading of Banco Popular by various rating agencies in February, April and June 2017. It also noted that the continuous negative press coverage of the financial results and the allegedly imminent risk of Banco Popular's insolvency or illiquidity had led to an increase in deposit outflows.

137 In addition, the SRB indicated that, on 12 May 2017, Banco Popular's liquidity coverage requirement had fallen below the minimum threshold of 80% set by Article 460(2)(c) of Regulation No 575/2013 and that Banco Popular had not succeeded in restoring its compliance with that limit on the date of the resolution scheme.

138 In its report of 5 June 2017 on Banco Popular's request for emergency liquidity assistance, the ECB also stated that, as a result of a run on deposits and a significant decrease in high-quality liquid assets, Banco Popular had, on 12 May 2017, fallen below the 80% liquidity coverage threshold and since then had not been able to restore compliance with the regulatory limits.

139 Article 412(1) of Regulation No 575/2013 defines the liquidity coverage requirement as follows:

'Institutions shall hold liquid assets, the sum of the values of which covers the liquidity outflows less the liquidity inflows under stressed conditions so as to ensure that institutions maintain levels of liquidity buffers which are adequate to face any possible imbalance between liquidity inflows and outflows under gravely stressed conditions over a period of thirty days. During times of stress, institutions may use their liquid assets to cover their net liquidity outflows.'

140 Those various elements are set out in the European Banking Authority (EBA) Guidelines of 6 August 2015 on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive [2014/59] (EBA/GL/2015/07) ('the EBA Guidelines').

141 The purpose of those guidelines, which have been applicable since 1 January 2016, is to provide a set of objective factors to determine whether an entity is failing or likely to fail, in accordance with the circumstances provided for in Article 32(4)(a) to (c) of Directive 2014/59. The wording of Article 32(4)(c) of Directive 2014/59 is identical to the wording of Article 18(4)(c) of Regulation No 806/2014.

142 The second subparagraph of Article 5(2) of Regulation No 806/2014 provides that the SRB, the Council and the Commission are to make every effort to comply with any guidelines and recommendations of the EBA which relate to tasks of a kind to be performed by those bodies.

143 According to the EBA Guidelines, an institution is to be deemed to be failing or likely to fail within the meaning of Article 32(4)(c) of Directive 2014/59 if it infringes the regulatory liquidity requirements, if it is unable to pay its debts or other liabilities as they fall due, or if there is objective evidence to support the conclusion that that will occur in the near future.

144 Among the factors to be taken into account, the EBA Guidelines mention, inter alia, first, significant adverse developments affecting the evolution of the institution's liquidity position and the sustainability of its funding profile, as well as its compliance with the minimum requirements for liquidity as stipulated in Regulation No 575/2013 and the additional requirements imposed under Article 105 of that regulation or under any national minimum requirements for liquidity; second, a significant adverse evolution of the institution's current and future obligations, the assessment of which should consider, where relevant, expected and exceptional outflows of liquidity, including emerging signs of potential bank runs; third, developments that would be likely to impair severely the institution's reputation, in particular significant rating downgrades by one or several rating agencies if they lead to substantial outflows or the inability to renew funding or to the activation of contractual triggers based on the external ratings.

145 It follows that, contrary to the applicants' submissions claim, a liquidity shortfall was sufficient to justify the resolution of Banco Popular, especially since that situation was no longer temporary.

146 The various factors taken into consideration by the ECB and the SRB, in accordance with the EBA Guidelines, which, moreover, are not disputed by the applicants, supported the conclusion that Banco Popular was failing or was likely to fail, within the meaning of Article 18(4)(c) of Regulation No 806/2014, on the date the resolution scheme was adopted.

147 Therefore, the SRB and the Commission did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied. That conclusion is not affected by the complaints put forward by the applicants.

(1) The first complaint, concerning the need for liquidity assistance

148 The applicants submit that, in accordance with recital 57 of Regulation No 806/2014, where it is possible for liquidity assistance to be granted, that solution should take precedence over a finding that the bank is failing. The need to provide liquidity is overriding where, as here, Banco Popular's liquidity shortfall was caused by the European institutions and the Spanish authorities. The applicants rely on the statement made by the Chair of the SRB on 23 May 2017 during an interview she gave to the television channel Bloomberg, the Reuters article of 31 May 2017 and the fact that the Spanish authorities withdrew billions of euro in deposits from Banco Popular, which led to a fall in Banco Popular's share price and a run on deposits. Thus, the applicants claim, in essence, that the SRB was not entitled to conclude that Banco Popular was failing or likely to fail since, owing to its liquidity problem, it required liquidity assistance as a matter of priority.

149 Their complaint is based on a misreading of the part of recital 57 of Regulation No 806/2014 which states that 'the need for emergency liquidity assistance from a central bank should not, per se, be a condition that sufficiently demonstrates that an entity is, or is likely in the near future to be, unable to pay its liabilities as they fall due'.

150 That recital must be interpreted as meaning that the fact that an entity requests and is granted emergency liquidity assistance by a national central bank does not automatically lead to the conclusion that it is failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014.

151 As the Commission points out, the finding that Banco Popular was failing did not hinge on the fact that the entity had received emergency liquidity assistance or needed additional emergency liquidity assistance.

152 Contrary to the applicants' submissions, it cannot be inferred from recital 57 of Regulation No 806/2014 that, where a bank encounters liquidity problems, emergency liquidity assistance should be given to it in preference to a finding that the bank is failing.

153 Moreover, in recital 26(c) of the resolution scheme, the SRB stated that Banco Popular had received initial emergency liquidity assistance on 5 June 2017, following the absence of any objection from the ECB, but that the Bank of Spain had not been in a position to grant Banco Popular further emergency liquidity assistance.

154 In that regard, it must be observed that, in a letter of 5 June 2017, the Bank of Spain asked the ECB for its agreement to grant Banco Popular emergency liquidity assistance in order to deal with the severe liquidity crisis from which Banco Popular was suffering. On the same day, the Bank of Spain sent a further letter to the ECB containing a request for an extension of the emergency liquidity assistance to Banco Popular, the latter having informed it of extremely substantial liquidity movements. Those two letters sent the same day to the ECB reveal the speed with which Banco Popular's liquidity situation had deteriorated.

155 As the applicants themselves point out, the massive and continuous withdrawal of deposits meant that the emergency liquidity assistance, which had been granted by the Bank of Spain, was exhausted in a single day.

156 It must also be observed that, on 6 June 2017, because of the scale and speed of the withdrawals of liquidity, the ECB and Banco Popular's Board of Directors concluded that the bank would no longer be in a position to pay its debts or other liabilities as they fell due on 7 June 2017. Thus, as Banco Popular was found to have failed, emergency liquidity assistance was no longer possible.

157 The SRB additionally found, in Article 3.2(d) of the resolution scheme, that emergency liquidity assistance would have been insufficient with regard to the timing of the deterioration of Banco Popular's liquidity position.

158 In that regard, it must be observed that the SRB plays no role in the provision of emergency liquidity assistance, which falls within the remit of the national central banks, as recognised by the applicants.

159 Therefore, in the resolution scheme, the SRB could only find, first, that the ECB, in its assessment that Banco Popular was failing or likely to fail, had taken the view that the emergency liquidity assistance which it had approved did not enable Banco Popular's liquidity crisis to be resolved and, second, that the Bank of Spain had not granted further emergency liquidity assistance to Banco Popular.

160 Accordingly, the first complaint must be dismissed.

(2) The second complaint, concerning breach of the duty of confidentiality

161 The applicants submit that Banco Popular's failure is the result of the SRB's breach of the duty of confidentiality laid down in Article 339 TFEU and Articles 88 and 89 of Regulation No 806/2014. Banco Popular's situation of illiquidity was caused by the statements by and information leaks from the SRB on 23 and 31 May 2017, which triggered a run on deposits and a fall in the bank's share price. The applicants maintain that the SRB was not entitled to conclude that Banco Popular was failing or likely to fail since that situation stemmed from the breach of the SRB's duty of confidentiality.

162 The Commission and the SRB contend that the validity of a resolution scheme and of its endorsement by the Commission requires only that the entity be failing and that the other conditions for resolution be satisfied when the resolution is adopted. The reasons which led to that situation are irrelevant.

163 It must be observed that, even if the applicants had established that the SRB had disclosed confidential information to the press, according to settled case-law, an irregularity of that kind may lead to the annulment of the decision at issue if it is established that the content of that decision would have differed if that irregularity had not occurred (see judgments of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 283 and the case-law cited; of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 416 and the case-law cited; and of 3 March 2011, *Siemens* v *Commission*, T-110/07, EU:T:2011:68, paragraph 402 and the case-law cited).

164 In that regard, as the Commission and the SRB submit, a resolution scheme is validly adopted where the conditions laid down in Article 18 of Regulation No 806/2014 are satisfied, irrespective of the reasons that caused the entity in question to fail or to be likely to fail.

165 Thus, the SRB, having taken the view that the conditions laid down in Article 18(1) of Regulation No 806/2014 were satisfied, adopted the resolution scheme and the Commission, having considered that the resolution scheme was consistent with the provisions of Regulation No 806/2014, endorsed that scheme. The circumstances that led to Banco Popular fulfilling the conditions justifying the adoption of the resolution scheme, in particular the condition that it was failing or was likely to fail, are irrelevant.

166 It follows that the applicants' claims that Banco Popular's liquidity crisis was brought about by the statement made by the Chair of the SRB on 23 May 2017 and the Reuters article of 31 May 2017, mentioned in paragraph 42 above, are not relevant for the purposes of determining whether the condition laid down in Article 18(1)(a) of Regulation No 806/2014 was satisfied and, therefore, for the purposes of assessing the validity of the resolution scheme.

167 In that regard, an alleged causal link between those disclosures and Banco Popular's liquidity crisis, pleaded by the applicants, is immaterial and cannot lead to the annulment of the resolution scheme. By contrast, in so far as the applicants claim that the statement made by the Chair of the SRB on 23 May 2017 and the Reuters article of 31 May 2017 constitute a breach by the SRB of its duty of confidentiality which caused the applicants damage, their content will be examined in the context of the second claim for damages.

168 The applicants dispute the argument that the reasons which led to the bank's failure are irrelevant. They maintain that, if that were the case, the SRB, the Commission and the FROB would have a discretion not provided for by Regulation No 806/2014 and that that would be contrary to the principle *nemo auditur propriam turpitudinem allegans*.

169 Concerning the applicants' reliance on that principle, under which a person may not plead his or her own misconduct vis-à-vis another in order to obtain an advantage, suffice it to state, as the SRB did, that that principle is not applicable in the present case. As the SRB points out, that principle applies where a party seeks to take unfair advantage of his or her own unlawful conduct. The applicants do not specify what advantage the SRB or the Commission purportedly derived from the adoption of the resolution scheme.

170 The second complaint must therefore be dismissed.

(3) The third complaint, relating to breach of the principle of good administration

171 The applicants submit that, since the SRB brought about Banco Popular's liquidity crisis, the SRB and the Commission were under an obligation to minimise the damage caused in accordance with the principle of good administration, enshrined in Article 41 of the Charter. They argue that the SRB and the Commission breached the principle of good administration by not examining Banco Popular's alleged failure carefully and impartially, by disregarding the fact that the SRB's statements and the massive withdrawal of deposits by the Spanish authorities had caused that failure, and by not taking account of the fact that the situation could have been resolved by emergency liquidity assistance. They also maintain that the SRB and the Commission breached the principle of diligence inasmuch as they knew that the SRB's statements had brought about Banco Popular's liquidity crisis and yet did nothing to remedy the situation and forestall resolution, in particular by granting emergency liquidity assistance.

172 In the reply, the applicants explain that their argument under the third complaint is that, in accordance with the principle of good administration, the SRB and the Commission should have acted differently in connection with the resolution of Banco Popular, by mitigating the damage caused by the situation for which they were responsible.

173 It must be noted that the link which the applicants establish between the alleged breach of the principle of good administration and the infringement of the condition laid down in Article 18(1)(a) of Regulation No 806/2014 is not clear. Similarly, the reference to damage which the SRB and the Commission should have mitigated is difficult to understand in the context of the analysis of compliance with that condition.

174 Furthermore, it follows from the examination of the second complaint that the factors which caused Banco Popular to fail or to be likely to fail are not relevant for the purposes of determining whether the condition laid down in Article 18(1)(a) of Regulation No 806/2014 was satisfied and, therefore, for the purposes of assessing the lawfulness of the contested decisions. In that regard, the applicants do not elucidate the extent to which it would not have been possible, if the SRB and the Commission had taken account of those circumstances, to find that Banco Popular was failing or likely to fail based on its lack of liquidity or, therefore, to find that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 was satisfied. The applicants' arguments also do not reflect the fact that the finding that Banco Popular was failing or likely to fail follows from the ECB's assessment.

175 As regards the argument that the SRB and the Commission did not take account of the fact that Banco Popular's situation could be remedied by emergency liquidity assistance from the Bank of Spain, it is sufficient to refer to the examination of the first complaint and to recall that such a measure falls within the remit of the national central banks.

176 As regards the argument that the SRB and the Commission should have remedied Banco Popular's situation, in order to avoid resolution, by early intervention measures under Article 13 of Regulation No 806/2014, suffice it to note that the applicants do not specify what type of measures falling within the remit of the SRB or the Commission they are referring to. The adoption of early intervention measures provided for in Article 13 of Regulation No 806/2014 falls within the remit of the ECB and the competent national authorities.

177 Accordingly, the third complaint must be dismissed, as must, therefore, the first part of this plea in law.

(b) The second part, alleging infringement of Article 18(1)(b) of Regulation No 806/2014

178 The applicants claim infringement of Article 18(1)(b) of Regulation No 806/2014 on the ground that the SRB did not correctly assess the alternatives to resolution. They argue that there were several viable alternatives to resolution.

179 In the first place, the applicants submit that the grant of the full amount of emergency liquidity assistance initially authorised by the ECB together with Banco Popular's efforts to raise funds up to 16 June 2017 would have enabled it to remain in business until 21 June 2017 and made it possible to implement a private sale process or a capital increase.

180 It must be recalled that it follows from the analysis of the first complaint in the first part of this plea that the SRB found in the resolution scheme that the Bank of Spain, after providing initial emergency liquidity assistance to Banco Popular on 5 June 2017, was not in a position to provide it with additional emergency liquidity assistance. Since the grant of emergency liquidity assistance falls within the remit of the national central banks, the SRB could only take note of the unavailability of additional emergency liquidity assistance.

181 In that regard, the applicants submit that an extension of emergency liquidity assistance to Banco Popular was possible, despite the Bank of Spain's refusal to grant a further round of emergency liquidity assistance to Banco Popular. They maintain that a more realistic assessment of the guarantees would have made it possible to grant the emergency liquidity assistance requested by Banco Popular and that, even if Banco Popular's guarantees were insufficient, the Spanish State could have provided a guarantee. They assert that the FROB could also have provided liquidity to Banco Popular.

182 Suffice it to note that those arguments are based on pure conjecture concerning assistance which could have been provided by third parties, in particular the Spanish authorities, to Banco Popular.

183 It should also be pointed out that, under Article 6(6) of Regulation No 806/2014, 'decisions or actions of the [SRB], the Council or the Commission shall neither require Member States to provide extraordinary public financial support nor impinge on the budgetary sovereignty and fiscal responsibilities of the Member States'. It was therefore not open to either the SRB or the Commission to require the Spanish authorities to provide financial support, in the form of liquidity or guarantees, to Banco Popular.

184 In addition, it must be observed that, in its assessment that Banco Popular was failing or likely to fail, the ECB stated that, even with the recourse to the emergency liquidity assistance in respect of which the Governing Council of the ECB had not raised any objections on 5 June 2017, the liquidity situation on the date of the assessment did not suffice to ensure Banco Popular's ability to meet its liabilities by 7 June 2017 at the latest.

185 Thus, the premiss underpinning the applicants' arguments that Banco Popular could have been given the full amount of emergency liquidity assistance initially authorised by the ECB must be rejected. Therefore, the alternatives mentioned by the applicants were not feasible inasmuch as they were conditional on the grant of that emergency liquidity assistance. Furthermore, the applicants' assertion that the grant of the full amount of emergency liquidity assistance would have enabled Banco Popular to remain in business until 21 June 2017 is a mere assumption which does not take account of the consequences of the continual deposit outflows or their scale.

186 In the second place, the applicants submit, in essence, that the SRB failed to give sufficient reasons, in Article 3 of the resolution scheme, as to why other measures could not be envisaged.

187 In that regard, it must be noted that, in Article 3 of the resolution scheme, the SRB, taking into account the ECB's assessment, concluded that there was no alternative measure capable of preventing the failure of Banco Popular within a reasonable time frame and that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been met.

188 More specifically, in Article 3.2 of the resolution scheme, the SRB stated that there was no reasonable prospect that alternative private sector measures could prevent the failure of Banco Popular. The lack of such measures could be inferred, inter alia, from the following circumstances:

– the bank itself acknowledged in a letter sent to the ECB on 6 June 2017 that it was likely to fail;

– the private sale process had not led to a positive outcome within a time frame that would have allowed the bank to pay its debts or other liabilities as they fell due;

– it was unlikely that the bank would be in a position to mobilise sufficient additional liquidity within the necessary time frames through regular market transactions or central bank operations or through the measures foreseen in its contingency funding and recovery plans;

– emergency liquidity assistance would have been insufficient with regard to the timing of the deterioration of the liquidity position.

189 In Article 3.3 of the resolution scheme, the SRB took the view that there was no reasonable prospect that any supervisory action, including early intervention measures, could prevent the failure of Banco Popular. The SRB stated that, in the ECB's assessment that Banco Popular was failing or likely to fail, the ECB had confirmed that there were no available supervisory or early intervention measures that could restore the bank's liquidity position immediately and which would allow it to have sufficient time to implement a corporate transaction or other solution. The measures available to the ECB as competent authority, under the national transposition of Article 104 of Directive 2013/36 and Articles 27 to 29 of Directive 2014/59 or under Article 16 of Regulation No 1024/2013, could not ensure that the bank would be in a position to meet its liabilities and other debts as they fell due, in view of the extent and pace of the deterioration of the liquidity position observed.

190 In Article 3.4 of the resolution scheme, the SRB took the view that there was also no reasonable prospect that the exercise of the power to write down and convert capital instruments, in accordance with Article 21 of Regulation No 806/2014, would prevent Banco Popular from failing within a reasonable time frame. In particular, the SRB considered that, given that Banco Popular was failing or likely to fail due to its liquidity position, the write-down and conversion of capital would not be sufficient to restore the bank's liquidity situation.

191 Those provisions appear in full in the version of the resolution scheme published on the SRB's website on 2 February 2018, which is annexed to the reply. It follows that the applicants cannot claim that the SRB failed to state, in the resolution scheme, the reasons why alternative prudential measures, including early intervention or private measures, could not be envisaged.

192 In addition, as the Commission and the SRB point out, in the light of the wording of Article 18(1)(b) of Regulation No 806/2014, the SRB was entitled to confine itself to assessing the alternative measures capable of preventing the failure of Banco Popular within a reasonable time frame, having regard to the available time and the circumstances.

193 In the third place, the applicants submit that an increase in Banco Popular's capital was possible. On the assumption that Banco Popular's lack of liquidity was due to decapitalisation, they claim that Banco Popular needed EUR 2 to 5 billion. They state that, according to the press, investment banks were working on a capital increase of EUR 4 or 5 billion. According to expert analysts, that capital increase was viable for two reasons. First, approximately 31.5% of Banco Popular's share capital was held by major investors, who were prepared to agree to a capital increase in 2017. Second, in May 2017, prior to the statements by the Chair of the SRB, the analysts were of the view that Banco Popular's shares were underpriced and therefore had faith in their revaluation. They rely on a letter from Barclays Bank of 3 June 2017 and a letter from Deutsche Bank of 5 June 2017, addressed to Banco Popular, stating that those institutions were willing to participate in a capital increase.

194 It must be observed that, as the applicants themselves point out, that solution is based on the assumption that Banco Popular's lack of liquidity was due to decapitalisation. Suffice it to recall that Banco Popular's lack of liquidity was the result of a massive outflow of deposits caused by depositors' loss of confidence and that only a measure likely to generate with sufficient speed enough liquidity to enable Banco Popular to meet its maturities on 7 June 2017 could be regarded as a viable alternative. The applicants have not shown that that would have occurred with the capital increase they rely on, which, moreover, is purely hypothetical and, in any event, would have taken place after that date.

195 As regards the letter from Barclays Bank of 3 June 2017 and the letter from Deutsche Bank of 5 June 2017, the applicants produced extracts from those letters in an annex to the reply. By letter lodged at the Court Registry on 6 May 2019, the applicants offered further evidence pursuant to Article 85(3) of the Rules of Procedure by which they sought to produce the full version of those two letters following their publication on the website of *Diario 16* on 9 April 2019. In an article entitled 'The resolution and sale of Banco Popular fell short of the law', the website of *Diario 16* published a number of documents, including the letter from Barclays Bank of 3 June 2017 and the letter from Deutsche Bank of 5 June 2017 in full.

196 In that regard, Article 85(3) of the Rules of Procedure provides that the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed or before the Court's decision to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified.

197 The applicants state that, since they did not have access to the full version of those letters before their publication on the internet on 9 April 2019, they were unable to annex them to their earlier pleadings. That new evidence must therefore be regarded as admissible.

198 Concerning the content of those two letters, it should be noted that they do not contain any firm commitment on the part of Barclays Bank or Deutsche Bank to participate in an increase of Banco Popular's capital, but merely reflect discussions on a potential future capital increase. Those letters show that, on the date they were sent, the proposed increase in Banco Popular's capital was still only at a very early stage.

199 Thus, in its letter of 3 June 2017 to Banco Popular, Barclays Bank refers only to recent discussions concerning a capital increase, the aim of which was, for Banco Popular, to cover its additional provisioning needs and to reach significantly higher levels of capital, in order to mitigate the challenges it was facing as a result of a particular real estate exposure and other non-performing assets.

200 In that letter, Barclays Bank reaffirmed its support for Banco Popular and stated that it was in a position to assist it in that important transaction. Barclays Bank expressed its interest in acting as a global coordinator or bookrunner for 50% of the transaction under market conditions. It included legal reservations stating that 'any actual commitment or offer in connection with any such underwriting would be reflected in a separate agreement or agreements to be entered into between [Banco] Popular and [Barclays Bank], subject to satisfactory market conditions, completion of satisfactory due diligence, agreement on terms and pricing at the time … and completing all required internal approvals'. Finally, Barclays Bank stated that that letter did not constitute an offer to underwrite the transaction or any financing and was not intended to create a legal relationship between it and Banco Popular.

201 Thus, in that letter, first, there is nothing to indicate that Barclays Bank was willing to participate financially in that capital increase and, second, Barclays Bank does not refer to the liquidity crisis faced by Banco Popular and does not propose any solution to remedy that crisis.

202 In its letter of 5 June 2017 to Banco Popular, Deutsche Bank mentions only its interest in providing 50% of a possible capital increase of EUR 4 billion. Deutsche Bank merely states that 'there are clearly certain conditions, but [that] the letter is based on our conviction that, in circumstances which we believe can realistically be satisfied, a [capital] increase could be achieved which would stabilise the bank'. Deutsche Bank stated that it had contacted various investors and that it thought that, 'obviously without absolute certainty', a capital increase would be possible.

203 That letter cannot therefore be interpreted as containing a firm commitment from Deutsche Bank to participate in an increase of Banco Popular's capital and does not concern a solution aimed at resolving Banco Popular's liquidity crisis.

204 Furthermore, the applicants state that Banco Popular, in its own funds plan of April 2017, envisaged that the capital increase could be implemented in one month. Suffice it to note that, in that document, Banco Popular mentions a time frame of one to three months for implementation of the capital increase and states that the estimated time frame of one month is calculated from the date of signature of the underwriting agreement. Since no firm offer was made with a view to increasing Banco Popular's capital, that argument cannot succeed.

205 In addition, the prospect of a capital increase releasing enough liquidity to avoid the resolution of Banco Popular is at odds with the fact that the Board of Directors of Banco Popular concluded on 6 June 2017 that the bank was likely to fail.

206 Accordingly, the applicants do not explain how that capital increase could have materialised within a sufficiently short time frame to allow an injection of liquidity to be made that was capable of preventing the failure of Banco Popular, or how that capital increase would have been able to stem the deposit outflows and restore Banco Popular's long-term liquidity position. The applicants have therefore failed to demonstrate that a capital increase was a viable alternative to the resolution of Banco Popular.

207 In the fourth place, the applicants submit that the separation of Banco Popular's assets was possible. They claim that Banco Popular was working towards the sale of its real estate assets for EUR 6 billion and that it had stated, on 5 May 2017, that progress had been made to that effect. According to the applicants, subsequent events confirmed that it was possible to separate all or part of Banco Popular's non-performing assets. Banco Santander put 51% of Banco Popular's foreclosed assets and bad debts up for sale after its acquisition and international funds expressed an interest in purchasing those assets. Moreover, in May 2017, Banco Popular stated that it intended to sell its non-strategic assets and received firm offers for a number of those assets. The applicants contend that, even if there had been no immediate buyers for Banco Popular's non-performing assets and non-strategic assets, they could have been transferred to a bridge institution. The separate sale of assets would have given Banco Popular short-term liquidity enabling it to continue in business for several weeks and thus complete the private sale or a capital increase.

208 It must be pointed out that the applicants' arguments are based on mere assumptions that sales of assets were possible. They state that Banco Popular could have sold non-performing assets or non-strategic assets but do not explain which specific assets would have been involved, for how much they could have been sold, whether there were any interested buyers or whether any transactions were under way. In that regard, the applicants themselves rely on the assumption that there would not have been any immediate buyers for those assets. It follows that the applicants have not shown that any assets could actually have been sold within a sufficient time frame to enable Banco Popular to release enough liquidity to deal with the run on deposits and to avoid the situation of failing or being likely to fail on 6 June 2017.

209 As regards the possibility relied on by the applicants, if no immediate buyers were forthcoming, of transferring the non-performing assets or non-strategic assets to a bridge institution in order subsequently to sell them under Articles 25 and 26 of Regulation No 806/2014, suffice it to note that these are not alternatives to resolution for the purposes of Article 18(1)(b) of Regulation No 806/2014; they are other resolution tools, the use of which, by definition, presupposes that the entity is failing or likely to fail.

210 As regards the applicants' claim that, on 5 May 2017, Banco Popular reported that progress had been made in the sale of real estate assets, suffice it to note that the applicants have not established that that plan could have been completed prior to the finding of Banco Popular's failure.

211 As regards the applicants' contention that Banco Popular received firm offers for a number of its assets, it must be pointed out that that contention is not substantiated by any evidence. Relying solely on press articles, the applicants refer to the sale of Targo Bank to Crédit mutuel on 2 June 2017 and discussions with a view to the sale of TotalBank for EUR 500 million. Suffice it to note, first, that the sale of Targo Bank did not prevent the failure of Banco Popular and, second, that the applicants have not shown that the sale of TotalBank could have occurred within a reasonable time frame enabling Banco Popular to find enough liquidity to meet its liabilities on 7 June 2017.

212 As regards the applicants' claim that, following the sale of Banco Popular, Banco Santander completed a number of asset sales, suffice it to note that that claim is not relevant for the purposes of assessing the lawfulness of the resolution scheme.

213 Lastly, it must be pointed out, as the SRB did, that it is pure speculation to maintain that those asset sales could have been completed successfully, even if Banco Popular had had more time. In any event, the applicants do not explain how, even if those asset sales could have taken place within a sufficiently short time frame to enable a further injection of liquidity to be made, those measures would have been able to curb deposit outflows and restore market confidence and, accordingly, stem liquidity outflows and restore Banco Popular's long-term viability.

214 The applicants also submit that, on 5 June 2017, the ECB found that Banco Popular was planning a capital increase with a transfer of non-strategic assets and an asset transfer plan and that the ECB did not state that those solutions were impossible to implement.

215 By that argument, the applicants refer to the ECB's assessment of 5 June 2017 of Banco Popular's request for emergency liquidity assistance, in which the ECB described the objective elements relating to the evolution of Banco Popular's liquidity situation, such as the evolution of the liquidity coverage requirement, of its counterbalancing capacity and of the deposit outflows, as well as the implementation of ongoing liquidity generating measures adopted by the bank. In that regard, the ECB stated that, according to the information provided by Banco Popular, the mobilisation of additional liquidity was expected by mid-June by means of deleveraging and the sale of bonds and non-performing assets.

216 It must be noted that the ECB merely gave a factual description of the evolution of Banco Popular's liquidity position which, as the ECB states, was based on data provided by the bank itself. It did not involve the ECB taking a view on the feasibility of the measures envisaged by the bank. In addition, it is stated that those measures were to provide Banco Popular with further liquidity by mid-June, that is to say, after the resolution.

217 However, it must be observed that, on 6 June 2017, in its assessment that Banco Popular was failing or likely to fail, the ECB considered that, although Banco Popular had developed various additional liquidity generating measures over the preceding weeks and started to implement them, the magnitude of the realised and still expected inflows was insufficient to remedy the depletion of Banco Popular's liquidity position on the date of the assessment. It also stated that Banco Popular had only very limited options for obtaining funds through regular market

transactions or through national central bank operations and that it was not capable of mobilising sufficient additional liquidity through the measures foreseen in its contingency funding and recovery plans. The ECB observed that Banco Popular had already put in place various measures to correct its liquidity position, but that, nevertheless, those measures had ultimately not been sufficient to reverse the deterioration of its liquidity position.

218 In the fifth place, the applicants maintain that the private sale of Banco Popular to a third party could have been carried out. The SRB ruled out that course of action due to timing issues, given the lack of liquidity, not viability issues. Although a number of institutions submitted bids, thereby expressing their interest in acquiring Banco Popular, the European authorities invited only two potential purchasers to participate in the sale process at the beginning of June 2017. The applicants add that it is incorrect to state that the private sale process had failed in May 2017, since the entities interested in acquiring Banco Popular had until the end of June 2017 to submit a bid.

219 It must be held that that argument is based on a misunderstanding of the facts.

220 As stated in paragraph 59 above, the ECB found in its assessment that Banco Popular was failing or likely to fail that the negotiations in the context of the private sale process had not thus far led to a positive outcome and that the completion of that sale was not foreseeable within a time frame that would allow Banco Popular to be able to pay its debts or other liabilities as they fell due.

221 Furthermore, since the Board of Directors of Banco Popular acknowledged that the bank was failing or likely to fail on 6 June 2017, it therefore accepted that the private sale was no longer a feasible option on that date.

222 Thus, in recital 26 of the resolution scheme, the SRB described the measures that Banco Popular had taken in an attempt to remedy its liquidity problems, including a private sale process initiated in April 2017. The SRB noted that the deadline for the submission of bids by potential purchasers had initially been set at 10 June 2017 and that, at the beginning of June, it had been delayed until the end of June 2017. However, on the date of the resolution scheme, it found that that procedure had not been completed.

223 In Article 3.2 of the resolution scheme, the SRB stated that there was no reasonable prospect that alternative private sector measures could prevent the failure of Banco Popular and that the lack of such measures could be inferred, inter alia, from the fact that the private sale process had not led to a positive outcome within a time frame that would have allowed the bank to pay its debts or other liabilities as they fell due. In Article 6.6 of the resolution scheme, the SRB also noted that, during the period immediately preceding the resolution, Banco Popular had conducted a private sale process and that, in the week beginning 29 May 2017, it had become apparent that that process would be unsuccessful.

224 The SRB thus found that, on the date of the resolution scheme, the private sale process initiated by Banco Popular had been unsuccessful. Contrary to what the applicants claim, none of the potential purchasers participating in that process submitted a concrete bid for the acquisition of Banco Popular.

225 Since the private sale process initiated by the bank in April 2017 had not led to any concrete bids and had necessitated an extension of the deadline for submitting bids, its completion before Banco Popular was declared to be failing or likely to fail was not feasible. The fact that the potential purchasers had until the end of June to submit a bid does not affect that finding. The applicants have therefore not established that the private sale process was a viable alternative to resolution.

226 In the sixth place, the applicants submit that if none of the alternative measures referred to above were viable, the grant of State aid or funding from the SRF would have made it possible to avoid the collapse of Banco Popular. They assert that there was nothing to prevent the Spanish State from temporarily investing in Banco Popular's capital.

227 In that regard, it is sufficient to note, first, that under Article 76(1)(b) of Regulation No 806/2014, within the resolution scheme, when applying the resolution tools, the SRB may use the SRF only to the extent necessary to ensure the effective application of the resolution tools for the purpose, inter alia, of making loans to the institution under resolution. This makes it clear that that possibility can be envisaged only in the context of a resolution action and does not under any circumstances constitute an alternative to such an action.

228 Second, it follows from paragraph 183 above that only the competent national authorities may decide whether or not to grant aid and that neither the SRB nor the Commission is able to require a Member State to grant aid to an entity.

229 Furthermore, as the Commission points out, such an approach would be at variance with the objectives of resolution, which seeks to limit the costs borne by taxpayers. It should be recalled that, according to Article 14(2)(c) of Regulation No 806/2014, one of the objectives of resolution is to protect public funds by minimising reliance on extraordinary public financial support.

230 It follows from the foregoing that the applicants have not established the existence of viable alternatives which the SRB should have taken into account.

231 Therefore, the SRB and the Commission did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been satisfied, with the result that the second part of this plea in law must be rejected.

(c) The third part, alleging infringement of Article 18(1)(c) of Regulation No 806/2014

232 The applicants argue that the SRB infringed Article 18(1)(c) of Regulation No 806/2014 inasmuch as the public interest cannot contravene fundamental principles of Union law and the SRB should have weighed up a range of interests. The SRB should therefore have found that the public interest did not justify a breach of the principle of proportionality or a discriminatory and arbitrary intervention.

233 Article 18(5) of Regulation No 806/2014 provides that, for the purposes of point (c) of paragraph 1 of that article, a resolution action is to be treated as in the public interest if it is necessary for the achievement of, and is proportionate to, one or more of the resolution objectives referred to in Article 14 of that regulation, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

234 The resolution objectives, listed in the first subparagraph of Article 14(2) of Regulation No 806/2014, are as follows: to ensure the continuity of critical functions; to avoid significant adverse effects on financial stability, in particular by preventing contagion; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors and investors; and to protect client funds and client assets.

235 Compliance with the condition laid down in Article 18(1)(c) of Regulation No 806/2014 requires a determination that the objectives referred to in Article 14 of that regulation, in particular ensuring the continuity of critical functions and maintaining financial stability, will be better achieved by a resolution action than by the entity's winding up.

236 In the present case, in Article 4 of the resolution scheme, the SRB – balancing the resolution objectives specified in Article 14(2) of Regulation No 806/2014 against the nature and circumstances of the present case – concluded that the resolution in the form of the sale of business tool was necessary in the public interest within the meaning of Article 18(1)(c) and (5) of Regulation No 806/2014.

237 In Article 4.2 of the resolution scheme, the SRB found that the resolution was necessary and proportionate to the objectives set out in the first subparagraph of Article 14(2) of Regulation No 806/2014, namely to ensure the continuity of critical functions and to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline. It stated that winding up Banco Popular under normal insolvency proceedings would not achieve those objectives to the same extent. The SRB then carried out, in Article 4.4 of the resolution scheme, an analysis in the light of the resolution objectives having regard to the circumstances prevailing on that date.

238 Furthermore, it must be recalled that, in recital 4 of Decision 2017/1246 endorsing the resolution scheme, the Commission expressly stated that it agreed with the resolution scheme and in particular with the reasons put forward by the SRB as to why a resolution action was necessary in the public interest in accordance with Article 5 of Regulation No 806/2014.

239 The applicants' arguments cannot challenge the findings of the SRB and the Commission that the condition laid down in Article 18(1)(c) of Regulation No 806/2014 was satisfied.

240 The applicants do not claim that the resolution scheme fails to meet the public interest objectives listed in the first subparagraph of Article 14(2) of Regulation No 806/2014, seeking to protect the critical functions of Banco Popular and to maintain financial stability. Moreover, they do not put forward any argument capable of establishing that those objectives would have been achieved if Banco Popular had been wound up under normal insolvency proceedings.

241 In the first place, the applicants submit that the resolution scheme is contrary to the principle of proportionality. They contend that the limitations on the right to property provided for in Article 17 of the Charter, as in the case of resolution, should be necessary and proportionate to the aim pursued. The requirements of proportionality are laid down in Article 18(5) of Regulation No 806/2014. The applicants rely on the second subparagraph of Article 14(2) of Regulation No 806/2014, according to which the resolution action must avoid the destruction of value.

242 They argue, in essence, that the resolution action does not comply with the public interest criterion set out in Article 18(1)(c) of Regulation No 806/2014, since it results in a disproportionate interference with their right to property and the unnecessary destruction of value.

243 It must be held that, contrary to what the applicants claim, compliance with the condition laid down in Article 18(1)(c) of Regulation No 806/2014 does not require the SRB to weigh up the various interests they invoke, namely, on the one hand, the public interest in resolution of the bank and, on the other, the private interests of the shareholders.

244 The applicants misinterpret the second subparagraph of Article 14(2) of Regulation No 806/2014, which provides that, 'when pursuing the objectives referred to in the first subparagraph, the [SRB], the Council, the Commission and, where relevant, the national resolution authorities, shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives'.

245 It follows from that provision that the resolution objectives referred to in the first subparagraph of Article 14(2) of Regulation No 806/2014 must be achieved, so far as possible, by a resolution tool causing the least destruction of value. However, as that provision makes clear, where the destruction of value caused by the chosen resolution tool is necessary to achieve those objectives and therefore in the public interest, the resolution cannot be regarded as disproportionate.

246 Furthermore, as the Commission points out, the destruction of value within the meaning of the second subparagraph of Article 14(2) of Regulation No 806/2014 does not relate solely to the proprietary interests of the entity's shareholders and holders of capital instruments; it also covers the proprietary interests of the entity's depositors, employees and other creditors.

247 In addition, it must be observed that, in Article 4.5 of the resolution scheme, the SRB concluded that the resolution also contributed to the minimisation of the destruction of value, bearing in mind the fact that the winding up of Banco Popular would have led to higher losses for creditors than the resolution. The SRB also took the view, in Article 4.6 of the resolution scheme, that the disadvantages and costs associated with the adoption of the resolution action, mainly the losses sustained by shareholders and subordinated creditors, would be offset by the resulting benefits, namely the maintenance of critical functions, the limitation of the adverse effects on the economy and financial stability, and the avoidance of losses that could be sustained by other creditors.

248 Moreover, the applicants submit that, under Article 6(3) and Article 15(2) of Regulation No 806/2014, resolution tools are applied in such a way as to minimise the impact on the group as a whole.

249 In that regard, suffice it to note that, in Article 4.7 of the resolution scheme, the SRB, in accordance with Article 6(3) and (5) of Regulation No 806/2014, taking account of the fact that Banco Popular had a subsidiary in Portugal, considered that the application of the sale of business tool would have no impact on the Portuguese subsidiary, whereas the winding up of Banco Popular would have affected it adversely.

250 The applicants also submit that, even if Banco Popular's resolution was necessary, one or more of the alternative measures mentioned in the second part of this plea could have been used, in lieu of the write-down of capital instruments and the sale of Banco Popular, which would have avoided the destruction of value sustained by investors and the interference with their right to property.

251 Suffice it to note that it follows from the analysis of the second part of this plea that the alternative measures invoked by the applicants were not feasible. In any event, those arguments, by which the applicants actually seek to dispute the proportionality of the resolution action compared with the alternative measures they invoke in the light of the interference with their right to property, are not such as to call into question the assessment of the SRB and the Commission concerning compliance with the condition laid down in Article 18(1)(c) of Regulation No 806/2014.

252 In the second place, the applicants claim that the resolution scheme is discriminatory and arbitrary. The prohibition of discrimination is laid down in recital 46 and Article 6(1) of Regulation No 806/2014 and enshrined in Article 21(1) of the Charter and Article 18 TFEU. The applicants maintain that the actions of the SRB and the Spanish authorities were discriminatory and arbitrary with regard to Banco Popular, inasmuch as they turned their backs on the bank because its share capital was owned by private interests, including a high percentage of foreign investors.

253 It must be observed that those claims by the applicants cannot be construed as seeking to establish an infringement of the condition laid down in Article 18(1)(c) of Regulation No 806/2014. They are purely speculative assertions unrelated to the issue of compliance with the public interest criterion.

254 In any event, as regards the arguments criticising the Spanish authorities for not granting aid to Banco Popular despite having done so in other situations, suffice it to state that those arguments are ineffective in so far as they are not directed at either the SRB or the Commission. As for the argument that the Commission approved the grant of State aid to Italian banks and that the SRB, in those cases, did not apply Regulation No 806/2014, it must be found, first, that the situations in which a Member State has had recourse to public funds to rescue a distressed institution are closely linked to the individual circumstances and are not comparable to the situation in the present case, and, second, that as the applicants themselves point out, the SRB considered that the resolution of those Italian banks was not justified in the public interest in so far as they did not perform critical functions and their winding up would not have significant adverse effects on financial stability. Furthermore, as the Commission pointed out, since this is the first case involving the resolution of an entity, there can therefore be no discrimination compared with other cases as regards the application of Regulation No 806/2014.

255 It is apparent from the foregoing that the SRB and the Commission did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(c) of Regulation No 806/2014 had been satisfied, with the result that the third part of this plea in law must be rejected.

256 It follows from all of the above that the first plea must be dismissed as unfounded.

257 Moreover, first, in the context of the third part of the first plea, the applicants raise for the first time, in paragraphs 47 and 48 of the reply, arguments seeking to challenge the sale process for Banco Popular, on the ground that it failed to comply with the provisions of Article 24(2) of Regulation No 806/2014 and Articles 38 and 39 of Directive 2014/59. Second, in their

observations on the statements in intervention, the applicants raise a new plea alleging infringement of Article 24 of Regulation No 806/2014, in which they expressly state that they reproduce the arguments raised in paragraphs 47 and 48 of the reply.

258 In their observations on the statements in intervention, the applicants state that, in their earlier pleadings, they pleaded the unlawfulness of the sale process as an alternative ground of breach of the principle of proportionality. It must be noted that, in the section of the application arguing that the resolution action is contrary to the principle of proportionality and, more generally, in the part relating to infringement of Article 18(1)(c) of Regulation No 806/2014, the applicants have not raised any argument seeking to challenge the sale process. In that regard, although the applicants refer expressly to certain paragraphs in the reply, they do not mention any paragraph in the application in which that argument has already been raised.

259 Furthermore, it must be noted that the link drawn by the applicants between those arguments challenging the sale process and breach of the principle of proportionality in the context of the application of Article 18(1)(c) of Regulation No 806/2014 is not an intelligible one. Those arguments must therefore be regarded as a new plea alleging infringement of Article 24 of Regulation No 806/2014.

260 In that connection, it must be observed that Article 84 of the Rules of Procedure provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact that come to light in the course of the procedure.

261 The plea in question was raised for the first time in the reply and reproduced in the observations on the statements in intervention, without the applicants explaining why they did not challenge the lawfulness of the sale process in the application. That new plea is not based on matters of fact or of law which the applicants were unaware of when the action was brought and the applicants' wish to address the arguments put forward in a statement in intervention cannot be regarded as justification for the late submission of that plea.

262 Accordingly, the applicants' arguments relating to the lawfulness of the sale process set out in the reply and the new plea, alleging infringement of Article 24 of Regulation No 806/2014, raised for the first time in the observations on the statements in intervention, must be dismissed as inadmissible.

2. Second plea in law, alleging infringement of Article 20 of Regulation No 806/2014

263 The applicants argue that the SRB infringed Article 20 of Regulation No 806/2014. This plea is divided into five parts, alleging (i) infringement of Article 20(11) of Regulation No 806/2014, (ii) infringement of Article 20(5)(a) to (c) and (f) of that regulation, (iii) lack of independence on the part of Deloitte, (iv) infringement of Article 20(1) of Regulation No 806/2014 on the ground that valuation 2 was not 'fair, prudent and realistic', and (v) infringement of Article 20(7) and (9) of that regulation.

264 Article 20(1) of Regulation No 806/2014 provides:

'Before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the [SRB] shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity referred to in Article 2 is carried out by a person independent from any public authority, including the [SRB] and the national resolution authority, and from the entity concerned.'

265 In the present case, it must be observed that the valuation of Banco Popular, carried out before the adoption of the resolution scheme, comprises two reports which are annexed to the resolution scheme.

266 Valuation 1, dated 5 June 2017, was prepared by the SRB under Article 20(5)(a) of Regulation No 806/2014 and had the objective of informing the determination of whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met.

267 Valuation 2, dated 6 June 2017, was drawn up by Deloitte as an independent expert, in accordance with Article 20(10) of Regulation No 806/2014.

268 The resolution scheme states that, given the urgency, valuation 2 was carried out, in accordance with Article 20(10) of Regulation No 806/2014, with the purpose of assessing the value of the assets and liabilities of Banco Popular, providing an evaluation of the treatment that the shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings and informing the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of commercial terms for the purposes of the sale of business tool.

269 In valuation 2, Deloitte stated that it had relied on the requirements of Article 36 of Directive 2014/59 (corresponding to Article 20 of Regulation No 806/2014) and on Chapter 3 of the final draft of the Regulatory Technical Standards of the EBA No 2017/05 and No 2017/06 of 23 May 2017 on valuation for the purposes of resolution and on valuation to determine difference in treatment following resolution under Directive 2014/59 ('the technical standards of the EBA').

270 Article 36(15) of Directive 2014/59 authorises the EBA to develop draft regulatory technical standards to specify the criteria on the basis of which valuations carried out during a resolution procedure must be conducted.

271 Chapter 3 of the technical standards of the EBA relates to draft Regulatory Technical Standards No 2017/05 on valuation for the purposes of resolution ('the regulatory technical standards') and contains, inter alia, in accordance with Article 36(15) of Directive 2014/59, a draft Commission Delegated Regulation supplementing Directive 2014/59 with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities.

272 It should also be noted that, at the date of the adoption of the resolution scheme, those regulatory technical standards were not binding, since the second subparagraph of Article 5(2) of Regulation No 806/2014 provides that the SRB, the Council and the Commission are to be subject to the binding regulatory technical and implementing standards drawn up by the EBA when they have been adopted by the Commission. Those regulatory technical standards were incorporated into Commission Delegated Regulation (EU) 2018/345 of 14 November 2017 supplementing Directive 2014/59 with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities (OJ 2018 L 67, p. 8).

273 In Article 6.3 of the resolution scheme, the SRB stated that, in order to decide on the write-down and conversion of Banco Popular's capital instruments, it had relied on valuation 2, as supplemented and corroborated by the results of the sale process conducted by the FROB.

274 Since valuation 2 contains complex technical and economic assessments, it was necessary for the SRB to be allowed a broad discretion when it considered that valuation 2 constituted a valid basis for deciding on resolution actions.

275 Consequently, in accordance with the case-law cited in paragraphs 110 to 115 above, the review carried out by the Court is a limited review which is confined to verifying that there was no manifest error of assessment by the SRB when it considered that valuation 2 complied with the requirements of Article 20 of Regulation No 806/2014. It is for the applicants to adduce sufficient evidence to render valuation 2 implausible.

(a) The first part, alleging infringement of Article 20(11) of Regulation No 806/2014

276 The applicants claim infringement of Article 20(11) of Regulation No 806/2014 in so far as the SRB refused to provide the definitive versions of valuations 1 and 2. According to the applicants, the SRB stated, in its response of 30 July 2018 to the Court's measure of organisation of procedure of 6 July 2018, that it would not publish definitive versions of those valuations. Deloitte acknowledged that definitive versions of the valuations were necessary and that it was responsible for preparing them. The applicants refer to their observations of 21 September 2018 on the SRB's response to that measure of organisation of procedure and submit that, under recital 64 and Article 20(11) of Regulation No 806/2014, the SRB is required to submit definitive versions of valuations 1 and 2.

277 As regards valuation 1, in the light of its objective as defined in paragraph 266 above and the fact that its aim was to inform the determination of whether Banco Popular was failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014, the applicants do not explain what purpose would be served by carrying out such a valuation after the adoption of the resolution scheme. Furthermore, it must be stated that valuation 1, which was aimed at determining whether Banco Popular was failing or likely to fail, became obsolete following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or likely to fail.

278 Concerning valuation 2, on 30 July 2018, in response to the questions put by the Court in connection with a measure of organisation of procedure, the SRB stated that valuation 2 would not be followed by an *ex post* definitive valuation. The SRB took the view that, because of the particular features of the present case, it had come to the conclusion that an *ex post* definitive valuation would serve no practical purpose in the context of Article 20(11) of Regulation No 806/2014, nor would it lead to a compensatory decision provided for in Article 20(12) of that regulation.

279 It must be observed that the *ex post* definitive valuation provided for in Article 20(11) of Regulation No 806/2014 is, by definition, subsequent to the adoption of the resolution scheme and the Commission decision.

280 Furthermore, under Article 20(13) of Regulation No 806/2014, a provisional valuation such as valuation 2 is a valid basis for adopting a resolution scheme. In that regard, the applicants do not dispute that, given the urgency, recourse to a provisional valuation within the meaning of Article 20(10) of Regulation No 806/2014 was justified.

281 It is sufficient to note that, according to settled case-law, the legality of an EU measure is assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P,

EU:C:2015:535, paragraph 22 and the case-law cited). It follows that elements post-dating the adoption of the EU measure cannot be taken into account in assessing the legality of that measure (see judgment of 17 December 2014, *Si.mobil* v *Commission*, T-201/11, EU:T:2014:1096, paragraph 64 and the case-law cited).

282 Accordingly, the issue of whether or not an *ex post* definitive valuation was carried out after the adoption of the resolution scheme cannot affect the validity of the contested decisions and the applicants' arguments are ineffective.

283 Furthermore, as regards the applicants' claim that the SRB's refusal to provide the definitive versions of valuations 1 and 2 demonstrates that the provisional versions were inaccurate and that the resolution of Banco Popular should not have been carried out, suffice it note that that claim is purely speculative and devoid of foundation.

284 Finally, contrary to the applicants' submissions, Article 20(15) of Regulation No 806/2014, which provides that 'the valuation shall be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments', cannot be construed as meaning that the *ex post* definitive valuation is an integral part of the resolution decision. The valuation referred to in that provision is the valuation on which the SRB relied in order to adopt the resolution scheme, namely, in the present case, valuation 2.

285 Accordingly, the first part of this plea in law must be dismissed.

(b) The second part, alleging infringement of Article 20(5)(a) to (c) and (f) of Regulation No 806/2014

286 The applicants claim infringement of Article 20(5) of Regulation No 806/2014 in so far as the independent expert, in valuation 2, did not analyse the objectives set out in points (a) to (c) and (f) of that provision. The adoption of the resolution scheme without having regard to the guidance contained in Article 20(5) of Regulation No 806/2014 is contrary to the principle of legal certainty. The applicants maintain that it is for the independent expert and not the SRB to assess whether the conditions laid down in Article 18(1) of Regulation No 806/2014 are satisfied and to inform the decision on the most appropriate resolution action and its scope. That is what was stipulated in the 2016 resolution plan, which also provided that valuations 1 and 2 should be carried out by the independent expert.

287 According to the applicants, in recitals 42 and 43 of the resolution scheme, the SRB does not refer to Deloitte having achieved, in valuation 2, the objectives set out in Article 20(5)(a) to (c) and (f) of Regulation No 806/2014. Deloitte confirmed that it did not carry out the analysis required by those provisions, an analysis which is also absent from valuation 1. The SRB did not rely on a valuation when it set the minimum sale price for Banco Popular. According to the applicants, valuation 1 merely concluded that Banco Popular was solvent without analysing its liquidity. The SRB referred to the ECB's analysis that Banco Popular was failing or likely to fail. However, the analysis under Article 20(5) of Regulation No 806/2014 could not be delegated to a third party such as the ECB.

288 First of all, it must be observed that, contrary to what is claimed by the applicants, the first subparagraph of Article 18(1) of Regulation No 806/2014 expressly provides that it is for the SRB, and not the independent valuer, to assess, in its executive session, whether the conditions laid down in that provision are satisfied.

289 Moreover, the fact that the 2016 resolution plan stated that the independent valuer was to carry out valuations 1 and 2 is irrelevant, since that plan was not applied in the present case.

290 The applicants submit that the independent expert did not analyse, in valuation 2, the objectives set out in Article 20(5)(a) to (c) and (f) of Regulation No 806/2014.

291 First, Article 20(5)(a) of Regulation No 806/2014 provides that the objective of the valuation is 'to inform the determination of whether the conditions for resolution or the conditions for the write-down or conversion of capital instruments are met'.

292 It should be recalled that, on 5 June 2017, the SRB adopted valuation 1, the objective of which was to determine whether Banco Popular met the conditions for resolution or for the write-down or conversion of its capital instruments, pursuant to Article 20(5)(a) of Regulation No 806/2014. In particular, the SRB stated that the purpose of valuation 1 was to inform the determination of whether Banco Popular was failing or likely to fail, within the meaning of Article 18(1)(a) of Regulation No 806/2014.

293 It follows that, in valuation 1, the SRB analysed the objective set out in Article 20(5)(a) of Regulation No 806/2014. The applicants are wrong to claim that that analysis should have been carried out by the independent expert, since Article 20(3) of Regulation No 806/2014 empowers the SRB to carry out valuation 1. In addition, since the SRB had carried out that analysis, Deloitte was able to state in its report that it would not include it in valuation 2.

294 In any event, it must be stated that valuation 1, which was aimed at determining whether Banco Popular was failing or likely to fail, became obsolete following the assessment carried out by the ECB on 6 June 2017. Indeed, in valuation 1, the SRB stated that as of the reference date for its assessment, namely 31 March 2017, Banco Popular was solvent. By contrast, the ECB relied on the significant withdrawals of deposits from Banco Popular from April and May 2017 and on its inability to generate further liquidity in order to conclude that, on 6 June 2017, Banco Popular was failing or likely to fail. The arguments seeking to challenge valuation 1 are therefore ineffective.

295 In addition, the second subparagraph of Article 18(1) of Regulation No 806/2014 states that the assessment of the condition referred to in point (a) of the first subparagraph, namely whether the entity is failing or likely to fail, is to be carried out by the ECB, after consulting the SRB.

296 In that regard, the Court of Justice has held that the second subparagraph of Article 18(1) of Regulation No 806/2014 gives the ECB a primary – albeit not exclusive – role, since it is the ECB which, as a general rule, is required to carry out 'failing or likely to fail' assessments. While the SRB may also carry out such an assessment, it may do so only after informing the ECB of its intention to do so and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB is therefore recognised as having primary power to carry out such an assessment, based on its expertise as supervisory authority, since, having access in that capacity to all supervisory information regarding the entity concerned, it is best placed to determine, in the light of the definition of failing or likely to fail in Article 18(4) of that

regulation, which refers, in particular, to matters related to the prudential situation such as the requirements for authorisation, the amount of assets compared to liabilities or the present or future indebtedness, whether that condition is satisfied (judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 62).

297 The applicants are therefore wrong to claim that the analysis of the objective set out in Article 20(5)(a) of Regulation No 806/2014 should have been included in valuation 2 and could not be carried out by the ECB.

298 Furthermore, it must be observed that, in the application and the reply, the applicants mention the objective referred to in Article 20(5)(a) of Regulation No 806/2014 as if it corresponded to the objectives set out in Article 20(5)(a) and (c), without putting forward any specific argument concerning the objective referred to in point (c).

299 Second, Article 20(5)(f) of Regulation No 806/2014 provides that the objective of the valuation is, 'when the sale of business tool is applied, to inform the decision on the assets, rights, liabilities or instruments of ownership to be transferred and to inform the [SRB]'s understanding of what constitutes commercial terms for the purposes of Article 24(2)(b)'.

300 Contrary to what is claimed by the applicants, recital 42(c) of the resolution scheme expressly states that the provisional valuation was carried out with a view to informing the decision on the shares or instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool.

301 In addition, Deloitte states that its report was prepared with a view to providing an independent valuation in accordance with the objectives set out in Article 36(4)(b), (f) and (g) of Directive 2014/59. Those provisions of Directive 2014/59 correspond to Article 20(5)(b), (f) and (g) of Regulation No 806/2014.

302 In any event, it must be observed that, under Article 20(10) of Regulation No 806/2014, where, due to urgency in the circumstances of the case, it is not possible to comply with the requirements laid down in paragraphs 7 and 9, a provisional valuation is to be carried out. That article expressly states that that provisional valuation is to comply with the requirements laid down in paragraph 4 and, in so far as reasonably practicable in the circumstances, with the requirements laid down in paragraphs 1, 7 and 9. In addition, Article 20(11) of Regulation No 806/2014 states that a valuation that does not comply with all of the requirements laid down in paragraphs 1 and 4 to 9 is to be considered to be provisional.

303 It follows that, in situations like the present one where the valuation must be carried out as a matter of urgency, it is a provisional valuation that does not have to meet all the objectives set out in Article 20(5) of Regulation No 806/2014.

304 Accordingly, the second part of this plea in law must be dismissed.

(c) Third part, alleging lack of independence on the part of Deloitte

305 The applicants claim that the SRB infringed Article 20(1) and Article 44 of Regulation No 806/2014, read in conjunction with Articles 38 to 41 of Delegated Regulation 2016/1075, on account of Deloitte's lack of independence.

306 Under Article 20(1) of Regulation No 806/2014, the valuation is to be carried out by a person independent from any public authority, including the SRB and the national resolution authority, and from the entity concerned.

307 The requirements concerning the independence of valuers are laid down in Articles 37 to 41 of Delegated Regulation 2016/1075. Article 38 of Delegated Regulation 2016/1075 establishes three cumulative conditions which must be met for the valuer to be deemed to be independent from any relevant public authority and the relevant entity. First, the valuer must possess the qualifications, experience, ability, knowledge and resources required and be able to carry out the valuation effectively without undue reliance on any relevant public authority or the relevant entity. Second, the valuer must be legally separated from the relevant public authorities and the relevant entity. Third, the valuer must have no material common or conflicting interest within the meaning of Article 41 of that delegated regulation.

308 It should be noted that the applicants do not claim that Deloitte did not possess the qualifications, experience, ability, knowledge and resources required to carry out the valuation effectively, within the meaning of the first condition laid down in Article 38 of Delegated Regulation 2016/1075. Nor do they claim that Deloitte was not legally separated from the relevant public authorities, namely the SRB and the FROB, and from Banco Popular, within the meaning of the second condition laid down in Article 38 of Delegated Regulation 2016/1075.

309 In the first place, the applicants claim that the SRB exercised improper influence over Deloitte, in breach of Article 39(3)(a) of Delegated Regulation 2016/1075, by directing it not to give an opinion on Article 20(5)(a) to (c) and (f) of Regulation No 806/2014 and thus to disregard its obligations as independent expert. They contend that Deloitte, acting on instructions from the SRB, proceeded on the basis that the sale of business tool would be applied, rather than informing the decision on the choice of resolution tool. The SRB allegedly instructed Deloitte not to draw up a definitive valuation. Although the resolution authority can consult the expert, it cannot give the expert instructions.

310 Article 39(3)(a) of Delegated Regulation 2016/1075 provides that, in relation to the conduct of the valuation, the independent valuer is not to seek or take instructions or guidance from any relevant public authority or the relevant entity.

311 It should also be pointed out that Article 39(4)(a) of Delegated Regulation 2016/1075 provides that 'paragraph 3 shall not prevent … the provision of instructions, guidance, premises, technical equipment or other forms of support where, in the assessment of the appointing authority, or such other authority as may be empowered to conduct this task in the Member State concerned, this is considered necessary for achieving the goals of the valuation'.

312 Recital 35 of Delegated Regulation 2016/1075 contains clarification in that regard:

'Furthermore it should be ensured that the independent valuer is also capable of carrying out the valuation effectively without undue reliance on any relevant public authority, including the resolution authority, and the institution or entity referred to in point (b), (c) or (d) or Article 1(1) of Directive [2014/59]. However, the provision of instructions or guidance necessary to support the conduct of the valuation, for example in relation to the methodology provided pursuant to the Union legislation in the field of valuation for purposes relating to resolution, should not be seen as constituting undue reliance where such instructions are, or guidance is, considered necessary to support the conduct of the valuation. …'

313 It follows that, contrary to what is claimed by the applicants, Article 39 of Delegated Regulation 2016/1075 cannot be interpreted as prohibiting the resolution authority from giving instructions of any kind to the independent valuer.

314 In addition, it must be observed that Article 20(5) of Regulation No 806/2014 defines the objectives of the valuation depending on the resolution tool applied. In particular, Article 20(5)(f) of Regulation No 806/2014 defines the objectives of the valuation where the sale of business tool is applied; those objectives differ from the objectives referred to in Article 20(5)(d) and (e) of that regulation, relating to cases where either the bail-in tool, the bridge institution tool or the asset separation tool is applied.

315 Article 20(5)(b) of Regulation No 806/2014, which provides that, if the conditions for resolution are met, the purpose of the valuation is to inform the decision on the appropriate resolution action to be taken in respect of an entity, must be interpreted as meaning that the valuation must provide the SRB with the technical and economic information necessary to implement the resolution tool chosen by the SRB.

316 It does not follow from that provision that it is for the valuer to determine himself or herself which is the most appropriate resolution tool. The decision on the choice of the resolution tool to be applied is taken by the resolution authority and not by the independent valuer.

317 Requesting the independent valuer to carry out a valuation for the purposes of applying a specific tool, where that is necessary to achieve the resolution objectives, cannot constitute undue reliance of that valuer on the resolution authority. Therefore, the fact that the SRB took the view that the sale of business tool was best able to fulfil the objectives of the resolution and that the SRB commissioned Deloitte to carry out a valuation meeting the objectives of that tool must be regarded as a form of instruction that is consistent with Article 39(4)(a) of Delegated Regulation 2016/1075 and as not undermining the independence of the valuer.

318 As regards the argument that the SRB directed Deloitte not to give an opinion on Article 20(5)(a) to (c) and (f) of Regulation No 806/2014, the Court refers to the analysis of the second part of the present plea.

319 As regards the argument that the SRB instructed Deloitte not to draw up a definitive valuation, suffice it to recall that that fact, after the adoption of the resolution scheme, cannot, on any view, call into question the lawfulness of the scheme.

320 It follows from the foregoing that the applicants have not shown that the SRB gave instructions to Deloitte in breach of Article 39(3)(a) of Delegated Regulation 2016/1075.

321 In the second place, the applicants submit that, as a result of the SRB's influence over Deloitte, the valuer had a material common or conflicting interest with a public authority within the meaning of Article 41(1) of Delegated Regulation 2016/1075, in breach of Article 38 of that delegated regulation. The applicants also maintain that Deloitte infringed Article 39(3)(b) of Delegated Regulation 2016/1075 inasmuch as it steered Banco Popular's integration into Banco Santander after the resolution.

322 First of all, as is apparent from paragraphs 310 to 320 above, that argument must be rejected in so far as it infers a material common or conflicting interest from the fact that the SRB exercised improper influence over Deloitte, in breach of Article 39(3)(a) of Delegated Regulation 2016/1075.

323 Furthermore, as regards the infringement of the third condition laid down in Article 38 of Delegated Regulation 2016/1075, Article 41(1) of that delegated regulation provides that the independent valuer must not have an actual or potential material interest in common or in conflict with any relevant public authority or the relevant entity.

324 Under Article 41(2) of Delegated Regulation 2016/1075, for the purposes of paragraph 1, an actual or potential interest is to be deemed material whenever, in the assessment of the appointing authority or such other authority as may be empowered to perform that task in the Member State concerned, it could influence, or be reasonably perceived to influence, the independent valuer's judgment in carrying out the valuation. Paragraph 3 of that article makes clear that interests in common or in conflict with members of the entity or its creditors are relevant.

325 Suffice it to note that the applicants do not state what that actual or potential material interest in common or in conflict would be in the present case between Deloitte and the SRB or between Deloitte and Banco Popular.

326 Lastly, Article 39(3)(b) of Delegated Regulation 2016/1075 provides that, in relation to the conduct of the valuation, the independent valuer is not to seek or accept financial or other advantages from any relevant public authority or the relevant entity.

327 It must be pointed out, as the Commission and the SRB did, that any business commitments entered into between Deloitte and Banco Santander after the resolution are not relevant and cannot establish that Deloitte had a conflict of interest when it carried out valuation 2.

328 It follows that none of the applicants' arguments is capable of establishing that Deloitte lacked independence.

329 Accordingly, the third part of this plea in law must be dismissed.

(d) Fourth part, alleging infringement of Article 20(1) of Regulation No 806/2014 on the ground that valuation 2 was not 'fair, prudent and realistic'

330 The applicants submit that the SRB infringed Article 20(1) of Regulation No 806/2014 requiring it to ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity is carried out. They claim that that provision does not confer any significant discretion on the SRB and that it is for the SRB to show that the valuations comply with the applicable rules. This plea is essentially divided into three complaints.

(1) The first complaint, alleging that valuation 2 was based on incorrect criteria

331 The applicants submit that valuation 2 refers only to Directive 2014/59 and Law 11/2015 and that it therefore does not comply with Regulation No 806/2014. According to the applicants, Deloitte acknowledges that valuation 2 was not based on the assumption of business continuity, but that it carried out the valuation in the context of a liquidation. Deloitte did not therefore take into account the value of the assets that a purchaser would have taken into consideration if it had intended to continue Banco Popular's business, as in fact occurred. The applicants contend that it would be wrong to equate their loss with what they would have received under normal insolvency proceedings. Deloitte should have calculated a value based on business continuity. By using the liquidation value, Deloitte underestimated the value of Banco Popular's assets.

332 It must be pointed out that Directive 2014/59 cited in valuation 2 contains provisions equivalent to those of Regulation No 806/2014.

333 It should also be noted that those arguments are based on a misreading of the methodology used in valuation 2. Valuation 2 consists of two parts, one containing the provisional valuation of Banco Popular and the other comprising a simulated liquidation scenario. The first part seeks to determine the economic value of Banco Popular in the context of the application of the sale of business tool. The purpose of the second part is to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings in accordance with Spanish law.

334 In adopting the resolution scheme, the SRB took account of the first part of valuation 2, containing the valuation proper of the assets and liabilities of Banco Popular. By contrast, since Deloitte stated that it did not have all the necessary information or sufficient time to provide anything more than a merely indicative estimate at that stage, the second part of valuation 2 corresponds to an initial simulation, in accordance with Article 20(9) of Regulation No 806/2014. Valuation 3, which is the definitive valuation seeking to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings, under Article 20(16) of Regulation No 806/2014, was carried out after the resolution.

335 The liquidation value, Deloitte's use of which is disputed by the applicants, corresponds to the second part of valuation 2.

336 If, by means of their argument, the applicants seek to challenge the second part of valuation 2, suffice it to state that that argument is ineffective. The determination of the difference between the treatment received by the shareholders of Banco Popular in the context of the resolution and the treatment they would have received in the context of normal insolvency proceedings falls under valuation 3 and the definitive assessment of the loss sustained by the shareholders falls under the decision of the SRB of 17 March 2020 adopted on the basis of valuation 3.

337 If, by means of their argument, the applicants seek to dispute Deloitte's use of the liquidation value in the first part of valuation 2 to assess Banco Popular's assets, suffice it to note that, in the first part of that valuation, Deloitte took into account the disposal value of Banco Popular and not its liquidation value.

338 As regards the methodology used, Deloitte stated in valuation 2 that the scenario used to determine the economic value was the sale of the bank under the sale of business tool. In accordance with Article 20(5)(f) of Regulation No 806/2014, the purpose of the valuation was to inform the decision to be taken in respect of the assets, rights, liabilities or instruments of ownership to be transferred and the SRB's understanding of what constituted commercial terms for the purposes of Article 24(2)(b) of that regulation.

339 Deloitte explained that '[its] economic valuation [sought] to provide an estimate of the value which may be offered for the whole bank by a potential purchaser, following an open, fair, and competitive auction process (a "disposal value", as required by article 11 of the … Regulatory Technical Standards …)'.

340 It is apparent from recital 6 of the regulatory technical standards that the choice of the most appropriate measurement basis (the hold value or the disposal value) should be made for the particular resolution actions being considered by the resolution authority.

341 As regards the choice of the measurement basis, Article 11(4) of the regulatory technical standards, reproduced in Article 11(4) of Delegated Regulation 2018/345, states:

'Where the resolution actions referred to in Article 10(1) require that assets and liabilities are to be retained by an entity that continues to be a going concern institution, the valuer shall use the hold value as the appropriate measurement basis. The hold value may, if considered fair, prudent and realistic, anticipate a normalisation of market conditions.

The hold value shall not be used as the measurement basis where assets are transferred to an asset management vehicle pursuant to Article 42 of Directive 2014/59/EU or to a bridge institution pursuant to Article 40 of that Directive, or where a sale of business tool pursuant to Article 38 of Directive 2014/59/EU is used.'

342 Under Article 12(4) of the regulatory technical standards, reproduced in Article 12(4) of Delegated Regulation 2018/345, 'where an entity's situation prevents it from holding an asset or continuing a business, or where the sale is otherwise considered necessary by the resolution authority to achieve the resolution objectives, the expected cash flows shall be referenced to disposal values expected within a given disposal period'.

343 The factors to be taken into account in determining the disposal value for the purposes of the sale of business tool are defined in Article 12(5) to (7) of the regulatory technical standards, reproduced in Article 12(5) to (7) of Delegated Regulation 2018/345.

344 It follows that the applicants cannot maintain that the disposal value was not the correct methodology for assessing Banco Popular's value in the context of valuation 2.

345 Accordingly, the first complaint must be dismissed.

(2) The second complaint, alleging that valuations 1 and 2 are highly speculative

346 In the first place, the applicants claim that the SRB stated that valuation 1 gave no assurance as to the accuracy of the results contained in the report and that Deloitte, in valuation 2, expressed numerous reservations as to its reliability and the sufficiency of the verified information.

347 It must be borne in mind that, for the same reason as that set out in paragraph 294 above, the arguments challenging valuation 1 are ineffective.

348 As regards valuation 2, in the letter accompanying the communication of that valuation to the SRB, Deloitte stated that, given Banco Popular's difficult liquidity position, it had been asked to carry out its valuation within an extremely short period. The main work was limited to 12 days from the day on which it had access to the documentation, whereas normally such a project would take six weeks. Deloitte stated that there were a number of gaps and inconsistencies in the available information. Deloitte mentioned that the valuation had to be regarded as highly uncertain and provisional under Article 36 of Directive 2014/59 and that a buffer for additional losses had been included in the valuation in accordance with Article 36(9) of Directive 2014/59, which corresponds to Article 20(10) of Regulation No 806/2014.

349 As the applicants point out, Deloitte also mentioned the constraints as to the time and information available in the part of the annex to valuation 2 entitled 'Scope, basis of work and limitations', which provides an overview of the circumstances under which it had to carry out valuation 2.

350 Article 20(10) of Regulation No 806/2014 expressly provides for the situation in which, in view of the urgency of the situation, it is not possible to comply with the requirements laid down in paragraphs 7 and 9 of that article, namely, in particular, where it is not possible to supplement the valuation with certain information contained in the accounting books and records. In addition, that provision recognises the existence of uncertainties inherent in any provisional valuation by providing, in its second subparagraph, that that valuation should include a buffer for additional losses.

351 Thus, in accordance with that provision, Deloitte merely indicated that, given the limited time available to carry out the valuation, it had had to rely on incomplete information and stated that the valuation which it had carried out had to be regarded as a provisional valuation under Article 36(9) of Directive 2014/59.

352 Furthermore, it is apparent from Article 20(13) of Regulation No 806/2014 that, in view of the urgency of the situation, the SRB could rely on valuation 2, carried out under Article 20(10) of Regulation No 806/2014, in order to adopt the resolution scheme.

353 Moreover, the uncertainties inherent in valuation 2 are highlighted in the regulatory technical standards from which it is apparent that, when assessing and updating the cash flows which the entity can expect from existing assets and liabilities, the valuer must rely on fair, prudent and realistic assumptions and take various factors and circumstances into account.

354 In particular, as regards estimates concerning the disposal value, Article 12(5) of the regulatory technical standards, reproduced in Article 12(5) of Delegated Regulation 2018/345, provides:

'The disposal value shall be determined by the valuer on the basis of the cash flows, net of disposal costs and net of the expected value of any guarantees given, that the entity can reasonably expect in the currently prevailing market conditions through an orderly sale or transfer of assets or liabilities. Where appropriate, having regard to the actions to be taken under the resolution scheme, the valuer may determine the disposal value by applying a reduction for a potential accelerated sale discount to the observable market price of that sale or transfer. To determine the disposal value of assets which do not have a liquid market, the valuer shall consider observable prices on markets where similar assets are traded or model calculations using observable market parameters, with discounts for illiquidity reflected as appropriate.'

355 Article 12(6) of the regulatory technical standards, reproduced in Article 12(6) of Delegated Regulation 2018/345, sets out various factors which the valuer is to take into account and which may affect the disposal values and disposal periods.

356 It follows that valuation 2 was based on assumptions and depended on multiple factors. Thus, in accordance with the regulatory technical standards, in order to determine Banco Popular's disposal value at the date of resolution, Deloitte, in valuation 2, relied on prospective estimates and assessments and presented its result in the form of a range of values.

357 Accordingly, it must be concluded that, given the time constraints and the information available, some uncertainties and approximations are inherent in any provisional valuation carried out under Article 20(10) of Regulation No 806/2014 and that the reservations expressed by Deloitte cannot mean that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014.

358 In the second place, the applicants claim that Article 20(1), (4) and (12) of Regulation No 806/2014 requires the valuation to cover all of the assets and liabilities of the entity concerned. However, Deloitte stated that it had focused on certain categories of assets the valuation of which was highly uncertain.

359 The applicants refer to Deloitte's statement in the cover letter to the report on valuation 2 to the effect that, in view of the short period of time it had to draw up valuation 2, it had had to strictly prioritise the review of the available information, focusing only on key assets and liabilities the valuation of which was highly uncertain.

360 Suffice it to note that that approach is consistent with the provisions of Article 8 of the regulatory technical standards, according to which:

'The valuer shall particularly focus on areas subject to significant valuation uncertainty which have a significant impact on the overall valuation. For those areas the valuer shall provide the results of the valuation in the form of best point estimates and, where appropriate, value ranges …'

361 In the third place, the applicants claim that the assessment of the categories of assets in valuation 2 does not satisfy the minimum requirements of Article 20(4) and (6) of Regulation No 806/2014. They challenge the assessment carried out by Deloitte in valuation 2 for different categories of assets.

362 The applicants argue, in respect of several categories of assets, that Deloitte did not have sufficient information and that the outcome of its assessment differs from that of valuation 1.

363 In that regard, first, it follows from the foregoing that, by definition, uncertainties are inherent in any provisional valuation and that, in view of the very short period available to Deloitte, it was unable to access some information. Those uncertainties are reflected in particular by the fact that Deloitte stated, in valuation 2, in accordance with the regulatory technical standards, that the results of the valuation were provided in the form of value ranges covering the best case, the worst case and the best estimate.

364 Second, the fact that the assessment of those assets in valuation 2 differs from that contained valuation 1 is irrelevant, as those two valuations had different objectives and were based on different calculation methods. The purpose of valuation 2 was to establish the disposal value of the assets for a potential purchaser, which required some adjustments to their book value. In that regard, it should be pointed out that, in valuation 2, Deloitte made adjustments to the value of each category of assets based on Banco Popular's consolidated balance sheet as at 31 March 2017.

365 Thus, the comparisons drawn by the applicants between the value of the adjustments calculated in valuation 2 concerning loans and receivables, real estate assets and tax assets and the value of those categories of assets in valuation 1 are irrelevant.

366 It is necessary to examine the applicants' other arguments specific to each category of assets.

367 As regards the valuation of loans and receivables, the applicants claim that, since Deloitte was not in a position to carry out an analysis of the discounted cash flows, it carried out highly speculative valuations, which resulted in an undervaluation of those assets with an adjustment of EUR 3.5 billion in the baseline scenario, compared with an adjustment of between EUR 501 million and EUR 774 million in valuation 1.

368 In valuation 2, Deloitte stated that its method for calculating the economic value of loans and receivables consisted of estimating the expected loss of credit. It thus arrived at an adjustment range of between EUR 2.7 billion in the best-case scenario and EUR 6.9 billion in the worst-case scenario and at a best estimate of EUR 3.5 billion.

369 It must be observed that that method complies with the regulatory technical standards.

370 In that regard, it should be noted that loans and receivables are among the areas subject to significant valuation uncertainty and to which the valuer is to pay special attention in accordance with Article 8(a) of the regulatory technical standards, which provides as follows:

'loans or loan portfolios, the expected cash flows of which depend on a counterparty's ability, willingness or incentive to perform on its obligation, where those expectations are driven by assumptions relating to delinquency rates, probabilities of default, loss given default, or instrument characteristics, especially where evidenced by loss patterns for a portfolio of loans'.

371 In addition, on pages 4 to 11 of the annex to valuation 2, Deloitte explained the adjustments which it had made concerning the valuation of loans and receivables, in particular in the light of the risks of non-payment. The applicants do not put forward any argument to challenge those adjustments. Besides their reference to valuation 1, the applicants do not explain why Deloitte's valuation of the adjustments in its best estimate constitutes an undervaluation.

372 As regards the valuation of real estate assets, the applicants submit that Deloitte confined itself to examining a sample of 112 appraisals, that it did not take account of the liquidity of the portfolio and that it also did not take account of other real estate assets with a value of EUR 1.043 billion, which led to a significant undervaluation.

373 It must be observed that those arguments are the result of a misreading of valuation 2.

374 In that regard, on page 5 of the report on valuation 2, Deloitte stated that its valuation was based on information covering 93% of Banco Popular's real estate portfolio, extrapolated to cover all assets. It mentions the fact that it used its own valuation methodology and that, in order to verify the results obtained, it used a second methodology whereby it cross-checked the most significant real estate assets against a sample of 112 third-party appraisals in order to fine-tune its assumptions and deliver a more accurate top-down valuation. The applicants cannot therefore maintain that the valuation of real estate assets in valuation 2 was based solely on those 112 appraisals.

375 Furthermore, the fact that Deloitte stated that the liquidity of the real estate portfolio analysed was limited does not mean, as the applicants claim, that it did not examine that liquidity. By way of example, on pages 15 and 16 of the annex to valuation 2, Deloitte, in its assessment of Banco Popular's real estate portfolio by type of asset, mentions their limited liquidity on several occasions.

376 Furthermore, it is apparent from the table on page 26 of the annex to valuation 2, entitled 'Valuation outcome (Balance sheet structure)', that Deloitte took into account real estate assets classified as 'other' in Banco Popular's balance sheet for a value of EUR 1.043 billion. By stating, on page 12 of the annex to valuation 2, that those real estate assets classified as 'other' were not assessed, Deloitte was merely indicating that it had not applied any adjustment to them. Therefore, contrary to what the applicants claim, this could not result in an undervaluation.

377 As regards the valuation of tax assets, the applicants rely on Banco Santander's calculation following the resolution to argue that Deloitte undervalued those assets.

378 In that regard, suffice it to recall that the purpose of the analysis carried out by Deloitte was to determine the value of the various categories of assets for any potential buyer. The value assigned to those assets by Banco Santander after the acquisition of Banco Popular, which was dependent on the synergies between those two entities, is therefore irrelevant for the purposes of assessing the validity of valuation 2.

379 In addition, in the report on valuation 2, Deloitte mentioned that the assessment of non-protected deferred tax assets depended on the purchaser's anticipated taxable profits (business plan) and existing levels of tax credits. It stated, inter alia, on page 32 of the annex to valuation 2, that the valuation of non-protected deferred tax assets depended on the purchaser, and in particular on whether it is a Spanish or a foreign entity and that, in the case where the purchaser is a Spanish bank, their recoverability and their recognition in the balance sheet would depend on Banco Popular's business plan and that of the purchaser. The report on the valuation mentions that Deloitte's assessment takes account of those different situations.

380 As regards the valuation of provisions for legal contingencies, the applicants submit that Deloitte did not examine a legal opinion on the merits of the claims giving rise to those provisions.

381 In valuation 2, Deloitte stated that it had relied on the calculations of Banco Popular's management and had made adjustments based on its own experience and industry trends. It must be held that that method results in a 'fair, prudent and realistic' valuation within the meaning of Article 20(1) of Regulation No 806/2014.

382 As regards the valuation of joint ventures, subsidiaries and associates, the applicants submit that Deloitte applied a method based on the market value and did not confirm the result by means of an assessment based on other methods. Moreover, the result of valuation 2 is contradicted by valuation 3, by assessments carried out by other market analysts and by the subsequent disposal of some of those assets.

383 First, it should be recalled that Deloitte was right to use a method based on Banco Popular's disposal value, which, in accordance with the regulatory technical standards, corresponds to the price that could be obtained on the market for a given asset or group of assets reflecting an appropriate discount. The fact that Deloitte stated that it was unable to perform a cross-check using other methods is not such as to call into question the outcome of valuation 2 based on the appropriate method of analysis.

384 Second, the assessments carried out after the resolution are not relevant. Moreover, the applicants wrongly compare the value of EUR 1.9 billion taken into account in valuation 2 and the figure of EUR 7.496 billion appearing in valuation 3. In valuation 2, Deloitte stated that its analysis was carried out on a consolidated basis and that that part of its assessment was limited to joint ventures and associates, whereas valuation 3 included subsidiaries.

385 As regards the valuation of intangible assets, the applicants submit that Deloitte assigned a value of zero to Banco Popular's goodwill and a limited value to the Banco Pastor trade mark, which did not reflect the true picture. According to the applicants, Deloitte stated that it did not have impairment tests, so that it could not confirm the real value of the intangible assets.

386 It must be observed that, in the report on valuation 2, Deloitte explained, on the issue of goodwill, that a potential buyer would not attribute any value to pre-existing goodwill since it was not an identifiable asset in the context of a business combination. It stated that, given the strong presence of the Banco Pastor trade mark in Galicia, Spain, that trade mark would be of value for a third party and that it had estimated the value range by applying the relief from royalty method, which is the most commonly used trade mark valuation method. The applicants do not put forward any specific argument capable of calling those explanations into question.

387 In the report on valuation 2, Deloitte stated that it had not been provided with impairment tests, so that it had not been able to analyse the support used by Banco Popular for those assets, but that Banco Popular's poor performance in recent years was an indication of potential impairments to intangible assets. It follows that the provision of that information by Banco Popular would necessarily have resulted in a lower value compared with that of the consolidated balance sheet of March 2017 taken into account by Deloitte.

388 As regards equity and fixed income, the applicants submit that Deloitte made its own estimates, in the absence of sufficient information concerning the characteristics of the level 3 securities.

389 By that argument, the applicants again confine themselves to pointing to the sentences in the report on valuation 2 in which Deloitte identified the sources of uncertainty in its assessment, which are inherent in a provisional valuation. However, they do not put forward any argument seeking to challenge those estimates.

390 Finally, as regards synergies and other critical factors, the applicants submit that, since Deloitte's calculation was redacted, it is not possible to ascertain whether its estimate corresponds to the profitability reported by Banco Santander following the acquisition of Banco Popular.

391 In that regard, in the report on valuation 2, Deloitte stated that it had reached its estimate by taking into account publicly available information on mergers and acquisitions in the banking industry in Spain, that 'synergies [could] vary depending on the acquirer and in particular, they [would] depend on the branch overlap' and that, 'the greater branch overlap the higher synergies could be obtained'. It stated that synergies were heavily dependent on the buyer. Deloitte had to carry out its assessment having regard to any potential buyer. The outcome of that valuation cannot be compared with the synergies achieved by Banco Santander following the acquisition of Banco Popular.

392 It follows from the foregoing that the applicants have not put forward any argument capable of challenging Deloitte's valuation of Banco Popular's assets in valuation 2.

393 Consequently, the second complaint must be dismissed.

(3) The third complaint, alleging that valuation 2 is not 'fair, prudent and realistic'

394 First, the applicants submit that Deloitte's estimated range in respect of the value of Banco Popular cannot be accepted because of the considerable difference between the various case scenarios.

395 In valuation 2, Deloitte stated that the outcome of its assessment was in a range of between EUR 1.3 billion and minus EUR 8.2 billion, with the best estimate within that range being minus EUR 2 billion.

396 First, it must be observed that the applicants merely dispute the plausibility of that range, without putting forward any specific argument. Second, it must be observed that the breadth of the range is justified by the method used in valuation 2.

397 In that respect, with regard to the methodology used in valuation 2, Deloitte stated that it had adopted a category-by-category approach, adjusting the book values of each class of assets and liabilities in order to estimate profits and losses, and other adjustments that any purchaser would apply to the value. It produced a valuation range for each class of assets and liabilities.

398 That method complies with Article 2(3) of the regulatory technical standards, reproduced in Article 2(3) of Delegated Regulation 2018/345, according to which:

'The valuer shall provide the best point estimate of the value of a given asset, liability, or combinations thereof. Where appropriate, the results of the valuation shall also be provided in the form of value ranges.'

399 Thus, the addition of the lowest values for each class of assets and liabilities provided the low estimate of the range and the addition of the highest values provided the high estimate of the range. That method therefore explains the breadth of the range used in valuation 2.

400 Moreover, as the SRB submits, given the size of Banco Popular's balance sheet, with a figure exceeding EUR 130 billion, the difference between the two values in the range represents only approximately 7% of the balance sheet. That difference thus reflects the degree of uncertainty inherent in the valuation process.

401 Second, the applicants submit that the negative valuation of Banco Popular in valuation 2 is incompatible with the estimates of the ECB, the SRB and the Spanish authorities which considered that the bank was solvent. Valuation 2 is incompatible with valuation 1, in which the SRB took the view that, even with adjustments, Banco Popular was still solvent. According to the applicants, the reasons given in valuations 1 and 2 are contradictory as regards Banco Popular's failure or likely failure.

402 In the executive summary, the technical standards of the EBA draw attention to the need to distinguish between two types of valuation prior to the resolution, namely, on the one hand, valuation 1, carried out under Article 36(4)(a) of Directive 2014/59, which is the equivalent of Article 20(5)(a) of Regulation No 806/2014, and, on the other hand, valuation 2, carried out under Article 36(4)(b) to (g) of Directive 2014/59, which corresponds to Article 20(5)(b) to (g) of Regulation No 806/2014.

403 Recital 1 of the regulatory technical standards, which is reproduced in recital 1 of Delegated Regulation 2018/345, recalls that distinction between, on the one hand, an initial valuation assessing whether the conditions for the write-down and conversion of capital instruments or the conditions for resolution have been met, and, on the other hand, a subsequent valuation forming the basis for the decision to apply one or more resolution tools. The technical regulatory standards lay down different criteria for carrying out valuation 1 and valuation 2.

404 As regards valuation 1, the regulatory technical standards state that the relevant criterion is whether the entity is failing or likely to fail.

405 Contrary to the applicants' submissions, the purpose of valuation 2 was not to establish whether Banco Popular was failing or likely to fail and they cannot therefore rely on a contradiction with valuation 1 in that regard.

406 Furthermore, it must be observed that differences between the conclusions reached in valuation 1 and those reached in valuation 2 are due to the fact that, since the valuations pursued different objectives, they were based on different assessment criteria defined in the technical standards of the EBA. Thus, in accordance with the technical standards of the EBA, the main purpose of valuation 1 was to determine whether the total value of the entity's assets exceeded that of its liabilities, in other words, whether the entity was balance sheet solvent, whereas valuation 2 had to be based on the economic value and not on the book value of the entity.

407 In any event, as regards the applicants' argument that the conclusions of valuations 1 and 2 were contradictory, it is sufficient to note that that argument is ineffective, since the conclusions of valuation 1 were no longer relevant following the ECB's assessment of 6 June 2017 for the reason set out in paragraph 294 above.

408 Furthermore, it must be observed that the ECB, in its assessment, did not rely on Banco Popular's insolvency in order to conclude that Banco Popular was failing or likely to fail. The ECB's conclusion that Banco Popular, because of its liquidity position and its inability to generate further liquidity, would be unable in the near future to pay its debts or other liabilities as they fell due is not at odds with the fact that Banco Popular was solvent from an accounting standpoint.

409 Since valuation 2 had to take account of the economic value and not the book value of Banco Popular, the applicants cannot claim a contradiction between the finding that Banco Popular was solvent, made in valuation 1, in the assessment of the ECB or by the Bank of Spain, and the conclusion in valuation 2.

410 Therefore, their arguments relating to the calculation of the value of Banco Popular's net assets taking account of the adjustments in respect of non-performing assets, envisaged by the ECB and Banco Popular, are also irrelevant for the purposes of assessing the validity of valuation 2, in so far as they are concerned only with the book value of Banco Popular.

411 It follows from the foregoing that the third complaint must be dismissed, as must, therefore, the fourth part of this plea in law.

(e) The fifth part, alleging infringement of Article 20(7) and (9) of Regulation No 806/2014

412 The applicants allege infringement of Article 20(7) of Regulation No 806/2014, which provides that the valuation is to be supplemented by, inter alia, an updated balance sheet and a report on the financial position of the entity. They claim that Deloitte acknowledged that it had not carried out an analysis of the structure of the undertaking and of the balance sheets of the individual entities. In the absence of a balance sheet for each entity in the Banco Popular group, Deloitte conducted its assessment on a consolidated basis, despite stating that an entity-by-entity analysis was of crucial importance.

413 The applicants also claim infringement of Article 20(9) of Regulation No 806/2014, in so far as Deloitte acknowledged that it had been unable to reflect the subdivision of creditors in classes in accordance with the priority of claims. Nonetheless, Deloitte included a creditor hierarchy in valuation 3, using information available on 6 June 2017.

414 It must be recalled that, in the present case, since valuation 2 was a provisional valuation carried out on the basis of Article 20(10) of Regulation No 806/2014, it is clearly apparent from that provision, referred to in paragraph 302 above, that the valuation had to comply with the requirements of Article 20(7) and (9) of that regulation only in so far as reasonably practicable in the circumstances.

415 Furthermore, contrary to what the applicants claim, Article 20(7) of Regulation No 806/2014 does not require the valuation to be supplemented by an updated balance sheet and a report on the financial position of each entity comprising the group placed under resolution. The concept of 'entity' mentioned in that article refers to the concept defined in Article 2 of Regulation No 806/2014. Valuation 2 was based on the consolidated balance sheet of the Banco Popular group.

416 The applicants also rely on extracts from valuation 2 which are irrelevant.

417 In one extract from the annex to valuation 2, cited by the applicants, Deloitte stated that, since it had not been provided with the entity's corporate structure and the balance sheets of the individual entities, its liquidation scenario had been prepared on a consolidated basis for illustrative purposes and that that was contrary to Spanish law. In another extract from that annex, to which the applicants also refer, Deloitte stated that the entity-by-entity analysis was crucial for the liquidation scenario simulation. The applicants also refer to extracts in which Deloitte states that it did not have sufficient data or time to be able to classify the creditors according to their ranking and that the fact that its calculations were performed at the level of the Banco Popular group could have material value implications with creditors of some entities receiving 100% recovery to the detriment of creditors of other entities.

418 Those extracts, which appear in the second part of the annex to valuation 2 relating to the liquidation scenario simulation and not in the first part of that annex relating to the provisional valuation of Banco Popular, are irrelevant. It must be borne in mind that the resolution scheme was adopted taking into account the first part of the annex to valuation 2 containing the provisional valuation of Banco Popular, which was prepared with a view to applying the sale of business tool.

419 As stated in Section 3 of the report on valuation 2, the purpose of the liquidation scenario simulation was to determine whether the shareholders and creditors of Banco Popular would have received better treatment if Banco Popular had been wound up in normal insolvency proceedings in accordance with Spanish law.

420 In the second part of the annex to valuation 2 containing that simulation, Deloitte explained that, with further data concerning the balance sheet of each entity and more time, it would have been able to refine its liquidation assumptions and prepare a liquidation scenario strategy. It thus stated that the liquidation scenario simulation in the annex to valuation 2 was provided for illustrative purposes.

421 Thus, in accordance with Article 20(10) of Regulation No 806/2014, Deloitte made the estimate provided for in Article 20(9) of that regulation only in so far as reasonably practicable in the circumstances.

422 In addition, the question of the treatment of shareholders and creditors in the liquidation scenario falls under valuation 3, the purpose of which is, according Article 20(16) of Regulation No 806/2014, to determine whether the shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings. In that regard, it must be borne in mind that Deloitte forwarded valuation 3 to the SRB on 14 June 2018, after the adoption of the resolution scheme.

423 Furthermore, the applicants' assertion that Deloitte included a creditor hierarchy in valuation 3 based solely on information available on 6 June 2017 is not relevant for the purposes of assessing the lawfulness of the resolution scheme. In any event, that assertion is incorrect as, although valuation 3 indicates that it is based on the financial information available on 6 June 2017, it also makes clear that it is based on extensive information obtained after the adoption of the resolution scheme and which was therefore not available when valuation 2 was drawn up.

424 Accordingly, the fifth part of this plea in law must be dismissed.

425 It follows from all the foregoing that the SRB did not make a manifest error of assessment in finding that valuation 2 complied with Article 20 of Regulation No 806/2014. The second plea in law must therefore be dismissed in its entirety.

3. Third plea in law, alleging infringement of the right to be heard and the right of access to the file, enshrined in Article 41(2) of the Charter

426 The applicants claim that the SRB infringed the right to be heard, enshrined in Article 41(2)(a) of the Charter, in so far as they were not heard and did not have access to the file before the adoption of the resolution scheme. In essence, this plea is divided into two parts.

(a) The first part, alleging infringement of the right to be heard

427 The applicants argue that the right to be heard, enshrined in Article 41(2)(a) of the Charter, applies to any measure liable to affect a person and, in particular, to the resolution of an institution in which that person owns shares. The contested decisions concern the resolution of a

single bank and the persons concerned are its shareholders and creditors. The applicants maintain that the holders of capital instruments in a bank must be heard before they are deprived of their property.

428 The Commission contends that the resolution decision, in so far as it concerns the applicants, is not an individual measure but a measure of general application and that Article 41 of the Charter does not apply. It argues that, even if the applicants had a right to be heard before the adoption of the resolution scheme, that right could be subject to restrictions.

429 The SRB submits that the limitation of the right to be heard, to the extent that it is applicable, is justified by the need to ensure the effectiveness of resolution decisions and the stability of the financial markets.

430 It must be borne in mind that Article 41(2)(a) of the Charter provides that the right to good administration includes the right of every person to be heard, before any individual measure which would adversely affect him or her is adopted.

431 The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely. In addition, it must be stated that the right to be heard pursues a dual objective. First, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible, and, second, to ensure that the person concerned is in fact protected. The right to be heard is intended, inter alia, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (see judgment of 4 June 2020, *EEAS* v *De Loecker*, C-187/19 P, EU:C:2020:444, paragraphs 68 and 69 and the case-law cited).

432 It must be observed that the Court of Justice has affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person. In accordance with the case-law of the Court of Justice, observance of the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement (see judgments of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 85 and 86 and the case-law cited; of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited; and of 7 November 2019, *ADDE* v *Parliament*, T-48/17, EU:T:2019:780, paragraph 89 and the case-law cited).

433 Therefore, in the light of its character as a fundamental general principle of EU law, the application of the principle of the rights of the defence, which include the right to be heard, cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle (see judgment of 18 June 2014, *Spain* v *Commission*, T-260/11, EU:T:2014:555, paragraph 62 and the case-law cited).

434 First of all, it should be noted that the resolution scheme adopted by the SRB has as its purpose the resolution of Banco Popular which must therefore be regarded as the person with regard to whom an individual measure is adopted and to whom the right to be heard is guaranteed by Article 41(2)(a) of the Charter.

435 Thus, it should be borne in mind that the applicants are not addressees of the resolution scheme, which is not an individual decision taken against them, or of Decision 2017/1246 endorsing that resolution scheme.

436 However, it must be observed that, in accordance with Article 21(1) of Regulation No 806/2014, the SRB exercised the power to write down or convert Banco Popular's capital instruments.

437 Therefore, the procedure followed by the SRB to adopt the resolution scheme, even though it does not constitute an individual procedure initiated against the applicants, may lead to the adoption of a measure liable to have an adverse effect on their interests in their capacity as shareholders or holders of capital instruments in Banco Popular.

438 The case-law of the Court of Justice cited in paragraph 432 above adopted a broad interpretation of the right to be heard as being guaranteed to every person during the procedure which may result in a measure adversely affecting that person.

439 In addition, first, according to recital 121 of Regulation No 806/2014, that regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, including the right of defence, and should be implemented in accordance with those rights and principles. Second, although Article 18 of Regulation No 806/2014 does not require the SRB to hear the shareholders or holders of capital instruments in the entity concerned during the resolution procedure, no provision of Regulation No 806/2014 expressly precludes such a hearing.

440 In that regard, it should be noted that the applicants do not raise a plea of illegality against Regulation No 806/2014 in that it does not provide for the shareholders or holders of capital instruments to be given a prior hearing before a resolution scheme is adopted. They submit that they should be recognised as having the right to be heard in the resolution procedure for Banco Popular pursuant to Article 41(2)(a) of the Charter, even though the applicable legislation does not provide for such a right.

441 However, if the shareholders and creditors of the entity covered by the resolution action can rely on the right to be heard as part of the resolution procedure, that right may be subject to limitations, in accordance with Article 52(1) of the Charter.

442 Article 52(1) of the Charter provides as follows:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

443 The Court of Justice has held that fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the

rights guaranteed (see judgments of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33 and the case-law cited, and of 20 December 2017, *Prequ'Italia*, C-276/16, EU:C:2017:1010, paragraph 50 and the case-law cited).

444 It follows that the failure to hear the applicants in their capacity as shareholders or holders of capital instruments in Banco Popular, in the context of the resolution procedure, whether that failure was due to the SRB or the Commission, could be justified.

445 It should be recalled that, in Article 4.2 of the resolution scheme, the SRB took the view that the resolution of Banco Popular was in the public interest in so far as it was necessary for and proportionate to the achievement of two objectives referred to in Article 14(2) of Regulation No 806/2014, namely to avoid significant negative effects on financial stability and to ensure the continuity of Banco Popular's critical functions. In Decision 2017/1246, the Commission expressly endorsed the reasons put forward by the SRB to justify the need for a resolution action in the public interest.

446 In the present case, the restriction of the applicants' right to be heard may be justified, first, by the pursuit of the objectives referred to in Article 14 of Regulation No 806/2014 and, second, by the need to ensure the effectiveness of the resolution of Banco Popular, which had to be carried out speedily.

447 In the first place, it should be noted that several recitals of Regulation No 806/2014, in particular recitals 12, 58 and 61, state that the stability of financial markets is one of the objectives pursued by the resolution mechanisms established by that regulation.

448 Furthermore, in accordance with Article 18(5) of Regulation No 806/2014, a resolution action is to be treated as in the public interest if it is necessary for the achievement of, and is proportionate to, one or more of the resolution objectives referred to in Article 14 of that regulation, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent. The resolution objectives referred to in Article 14 of Regulation No 806/2014 include, inter alia, the objective of '[avoiding] significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline', and that of '[protecting] public funds by minimising reliance on extraordinary public financial support'.

449 In that regard, the Court of Justice has stated that financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is likely, in turn, to produce negative spill-over effects in other sectors of the economy (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 50; of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 72; and of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 108).

450 The Court of Justice has held that the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constitutes an overriding public interest (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 69).

451 In addition, the European Court of Human Rights ('the ECtHR') held, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799, § 6), that, in delicate economic areas such as the stability of the banking system, the States enjoyed a wider margin of appreciation and that, therefore, the impossibility for a shareholder to participate in the proceedings leading to the sale of the bank was not disproportionate to the legitimate aims of protecting the rights of creditors and safeguarding the proper administration of the bank's bankruptcy estate.

452 Reference should also be made to the judgment of 8 November 2016, *Dowling and Others* (C-41/15, EU:C:2016:836), delivered in response to a request for a preliminary ruling concerning the interpretation of Articles 8, 25 and 29 of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of [the second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1). That case concerned an exceptional measure by the national authorities aimed at preventing, by means of an increase in capital, the failure of a company which, according to the referring court, threatened the financial stability of the European Union. The Court of Justice held that the protection conferred by Second Directive 77/91 on the shareholders and creditors of a public limited liability company, with respect to its share capital, did not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned (judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 50). The Court of Justice added that the provisions of Second Directive 77/91 did not therefore preclude an exceptional measure affecting the share capital of a public limited liability company taken by the national authorities where there was a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 51 and the case-law cited).

453 Those considerations apply, by analogy, to the situation of former shareholders or holders of capital instruments in a bank which has been placed under resolution pursuant to Regulation No 806/2014, such as the applicants.

454 It follows from the foregoing that the resolution procedure established by Regulation No 806/2014 and described in Article 18 of that regulation pursues an objective of general interest, within the meaning of Article 52(1) of the Charter, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard.

455 In the present case, it should be noted that the applicants do not dispute that the procedure for the resolution of Banco Popular complied with the objective of ensuring financial stability referred to in Article 14 of Regulation No 806/2014.

456 In that regard, in Article 4.4.2 of the resolution scheme, the SRB explained that it had concluded that Banco Popular's situation entailed an increased risk of significant adverse effects on financial stability in Spain, on the basis of various elements. Those elements included, first, the size and relevance of Banco Popular, which was the parent company of the sixth largest banking group in Spain, with total assets of EUR 147 billion, and which was classified by the Bank of Spain in 2017 as

a significant institution of a systemic nature. The SRB noted, inter alia, that Banco Popular was one of the main market participants in Spain, with a significant market share in the segment of small and medium-sized enterprises (SMEs), and that it had a relatively high market share of deposits (almost 6%) and a large number of retail clients (approximately 1.4 million) throughout Spain. Second, the SRB took into account the nature of Banco Popular's business, which was structured around commercial banking activities and focused primarily on offering financing, savings management and financial services to individuals, families and companies (particularly SMEs). According to the SRB, the similarity between Banco Popular's business model and that of other Spanish commercial banks contributed to the potential for indirect contagion to those banks which might have been perceived as facing the same difficulties.

457 Furthermore, it should be noted that the second objective pursued by the resolution scheme, namely to ensure the continuity of the critical functions of Banco Popular, also contributes to the general interest objective of protecting the stability of the financial markets.

458 Under Article 2(1)(35) of Directive 2014/59, the critical functions of an institution are defined as 'activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations'.

459 In that regard, Article 6(1) of Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59 with regard to the circumstances and conditions under which the payment of extraordinary *ex post* contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines (OJ 2016 L 131, p. 41), lays down the criteria for determining critical functions. It is a function provided by an institution to third parties who are not affiliated to the institution or group, the sudden disruption of which would likely have a material negative impact on those third parties, would give rise to contagion or would undermine the general confidence of market participants due to the systemic relevance of the function for third parties and the systemic relevance of the institution or group in providing that function.

460 Thus, the objective of ensuring the continuity of the critical functions of the entity concerned by a resolution action, provided for in Article 14(2)(a) of Regulation No 806/2014, is intended to prevent a break in those functions which could lead to disruption, not only on the market concerned, but also for the overall financial stability of the European Union.

461 Accordingly, since resolution action is intended to preserve or restore the financial situation of a credit institution, in particular in so far as it constitutes an alternative to its liquidation, it must be regarded as effectively meeting an objective of general interest recognised by the European Union (see, by analogy, judgment of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 108).

462 In that regard, in Article 4.2 of the resolution scheme, the SRB stated that the resolution of Banco Popular was necessary and proportionate to achieving, inter alia, the objective set out in Article 14(2) of Regulation No 806/2014 of ensuring the continuity of the critical functions of Banco Popular.

463 In Article 4.4 of the resolution scheme, the SRB identified three critical functions of Banco Popular, within the meaning of Article 6 of Delegated Regulation 2016/778, namely deposit taking from households and non-financial corporations, lending to SMEs, and payment and cash services.

464 The applicants have not put forward any argument to dispute those findings.

465 It follows from the foregoing that the resolution procedure for Banco Popular pursued an objective of general interest, within the meaning of Article 52(1) of the Charter, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard.

466 In the second place, the general interest of the European Union, in particular the pursuit of the objectives of maintaining the stability of the financial markets and ensuring the continuity of the critical functions of Banco Popular, requires that, once the conditions laid down in Article 18(1) of Regulation No 806/2014 have been fulfilled, a resolution action must be adopted as soon as possible.

467 It should be pointed out that a number of recitals in Regulation No 806/2014 imply that, when a resolution action becomes necessary, it must be adopted quickly. Those are, inter alia, recitals 26, 31 and 53, and especially recital 56 of that regulation which states that, in order to minimise disruption to the financial market and to the economy, the resolution process should be accomplished in a short time.

468 In that regard, the Court of Justice has held that the objective of Regulation No 806/2014 is to establish, in accordance with recital 8, more efficient resolution mechanisms, which must be an essential instrument to avoid damage that has resulted from failures of banks in the past and that that objective presupposes a speedy decision-making process, as the short time limits laid down in Article 18 of that regulation illustrate, so that financial stability is not jeopardised (judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 55).

469 Thus, Article 18(1) of Regulation No 806/2014 states, inter alia, that, where the ECB considers that an entity is failing or is likely to fail, it is to communicate that assessment without delay to the Commission and the SRB. According to paragraph 2 of that article, where the SRB itself carries out an assessment, it is to be communicated to the ECB without delay. If the conditions laid down in paragraph 1 are met, the SRB must adopt a resolution scheme which, pursuant to Article 18(7) of Regulation No 806/2014, is to be transmitted to the Commission immediately after its adoption. The Commission then has 24 hours in which to endorse a resolution scheme or raise objections.

470 It follows that once the entity satisfies the conditions for the adoption of a resolution action, that is to say, first, that it is failing or is likely to fail, second, that there is no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame and, third, that its resolution is necessary to achieve one or more of the objectives referred to in Article 14 of Regulation No 806/2014, Article 18 thereof provides that a decision must be adopted within a very short time frame.

471 Thus, in the present case, once the ECB found that Banco Popular was failing or likely to fail and once the SRB considered that the conditions laid down in Article 18 of Regulation No 806/2014 had been met, the resolution scheme had to be adopted as quickly as possible.

472 That rapid decision was justified by the need to ensure the continuity of Banco Popular's critical functions and the need to avoid the significant adverse effects of Banco Popular's situation on the financial markets, by preventing, inter alia, the risks of contagion. In the present case, as Banco Popular's failure occurred on a weekday, it was necessary to complete the procedure and to adopt the decision before the opening of the markets on the morning of 7 June 2017.

473 As Advocate General Campos Sánchez-Bordona emphasised in point 80 of his Opinion in Joined Cases *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:16), the speed with which those institutions and agencies of the European Union must take their decisions is in order to ensure that the resolution of the banking institution does not have an adverse impact on the financial markets and that need for speed also requires them, *de facto*, to have the decision 'prepared' before they launch the procedure, in order to take advantage of the financial markets being closed.

474 Speed in taking a decision was therefore a condition of its effectiveness.

475 Thus, the Court of Justice has already ruled that the urgency requiring immediate action by the competent authority justified a limitation of the right to be heard of the persons concerned by measures adopted in the field of environmental liability (see, to that effect, judgment of 9 March 2010, *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 67) and in the field of agriculture (see, to that effect, judgment of 15 June 2006, *Dokter and Others*, C-28/05, EU:C:2006:408, paragraph 76).

476 Moreover, in the field of fund-freezing measures, the Court of Justice has held that the communication of the grounds on which the initial inclusion of the name of a person or entity in the list of persons subject to restrictive measures is based, prior to that inclusion, would be liable to jeopardise the effectiveness of the freezing of funds and economic resources imposed by EU law. In order to attain the objective pursued by the applicable regulation, such measures must, by their very nature, take advantage of a surprise effect and apply with immediate effect (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 338 to 340; of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 61; and of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraph 51).

477 Nor are the EU authorities bound to hear the applicants before their names are included for the first time in the list of persons subject to restrictive measures, for reasons also connected to the objective pursued by EU law and to the effectiveness of the measures provided by that law (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 341, and of 25 April 2013, *Gbagbo* v *Council*, T-119/11, not published, EU:T:2013:216, paragraph 103).

478 That is all the more true in cases such as the present one where the restriction on the right to be heard concerns not the entity covered by the resolution procedure, namely Banco Popular, but the applicants in their capacity as shareholders or holders of capital instruments in that institution.

479 It must also be observed that, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799), the ECtHR found that the sale of the bankrupt bank as a going concern had been effected in order to achieve the prompt and more certain satisfaction of its creditors, who had been waiting for years to receive their dues, and the quick completion of the bankruptcy proceedings. Therefore, the need for simplicity and speed in the procedure leading to the sale of the bank was of paramount importance. If the law had provided that the bankruptcy court was under an obligation to consult with all shareholders and creditors of the bank, that would have led to a substantial slowing down of the proceedings and, consequently, to a further delay in the payment of the creditors' dues and in the completion of the bankruptcy proceedings.

480 In the judgment of 24 November 2005, *Capital Bank AD v. Bulgaria* (CE:ECHR:2005:1124JUD004942999, § 136), the ECtHR held that, in such a sensitive economic area as the stability of the banking system and in certain situations, there may be a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole.

481 Furthermore, the fact that the resolution scheme may lead to an interference with the applicants' right to property cannot justify an obligation to grant them a right to be heard before it is adopted.

482 In that regard, the General Court has already highlighted in paragraph 282 of the judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others* (T-680/13, EU:T:2018:486), that the applicable provisions must offer the person concerned a reasonable opportunity of putting his or her case to the competent authorities. In order to ensure compliance with that requirement, which constitutes a requirement inherent in Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, a comprehensive view must be taken of the applicable procedures (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 368 and the case-law cited; of 25 April 2013, *Gbagbo* v *Council*, T-119/11, not published, EU:T:2013:216, paragraph 119; and ECtHR, 20 July 2004, *Bäck v. Finland*, CE:ECHR:2004:0720JUD003759897, § 56). Therefore, that requirement cannot be interpreted as meaning that the interested person must, in all circumstances, be able to make his or her views known to the competent authorities prior to the adoption of measures infringing his or her right to property (see, to that effect, ECtHR, 19 September 2006, *Maupas and Others v. France*, CE:ECHR:2006:0919JUD001384402, §§ 20 and 21).

483 The General Court considered that that was the case in particular where, as in the present case, the measures at issue did not constitute a penalty and were implemented in a context of particular urgency. On that last point, the General Court noted that it concerned prevention of an imminent risk of collapse of the banks concerned in order to protect the stability of the financial system of a Member State and, therefore, to prevent contagion to other Member States of the euro area. The establishment of a prior consultation procedure, in the context of which the thousands of depositors and shareholders of the banks concerned could have usefully made their views known prior to the adoption of the harmful provisions, would inevitably have delayed the application of measures seeking to prevent such a collapse. The achievement of the objective consisting in protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 282 and the case-law cited).

484 That assessment was confirmed by the Court of Justice which held that the General Court had correctly based its reasoning on the judgment of the ECtHR of 21 July 2016, *Mamatas and Others v. Greece* (CE:ECHR:2016:0721JUD006306614), from which it is clear that the requirement that any restriction on the right to property must be provided for by law cannot be interpreted as meaning that the persons concerned should have been consulted before the adoption of that law, in particular where such prior consultation would inevitably have delayed the application of the measures designed to prevent the collapse of the banks concerned (judgment of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 159).

485 Furthermore, it must be concluded that the need to act swiftly without informing the shareholders and creditors of an entity that a resolution procedure concerning that entity is imminent, is intended to avoid the worsening of that entity's situation which would undermine the effectiveness of the resolution action. Informing the shareholders or bondholders of the bank that it might be under resolution, and therefore that it was considered to be failing or likely to fail, could encourage them to sell their securities on the markets and also lead to a massive withdrawal of deposits, which would have the effect of exacerbating the bank's financial situation and making it more difficult, or even impossible, to adopt a solution likely to prevent its liquidation.

486 In that regard, as is apparent from recital 116 of Regulation No 806/2014, any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or on any action in the course of the proceedings, must be presumed to have effects on the public and private interests concerned by the action.

487 It must therefore be held that hearing the applicants, in their capacity as shareholders and bondholders of Banco Popular, before the adoption of the resolution scheme or before the adoption of Decision 2017/1246 would have entailed a substantial slowdown in the procedure and, therefore, would have compromised both the attainment of the objectives of the action and its effectiveness.

488 It follows from the foregoing, first, that a prior hearing of the applicants, informing them of the existence of a potential resolution action, would have led to a risk of them adopting conduct on the market that exacerbated the financial situation of Banco Popular. Such a hearing could thus have undermined the effectiveness of the planned resolution.

489 Second, in view of the urgent need to adopt the resolution scheme, it was not possible to consult the applicants beforehand in the same way as the other shareholders or holders of capital instruments in Banco Popular, not only because of the difficulties associated with identifying them, but also because it was impossible to analyse effectively their observations before the adoption of the resolution scheme.

490 The applicants submit that if they had been heard before the adoption of the resolution scheme, either Banco Popular would not have been placed under resolution, as they would have explained that the conditions were not satisfied, or the resolution would have taken place on different terms, as they would have been able to invoke the need to wait for emergency liquidity assistance, to propose the application of an alternative measure or to suggest the application of another resolution tool.

491 In that regard, suffice it to note that it is clear from the analysis of the first plea, first, that the applicants have not demonstrated that the conditions laid down in Article 18 of Regulation No 806/2014 were not satisfied. Second, it has been found that, since the Bank of Spain refused to grant additional emergency liquidity assistance, the SRB had no reason to wait for such assistance to be granted and that the alternatives relied on by the applicants were not feasible in the short term. The applicants have therefore not shown that hearing them in the context of the resolution procedure would have altered the content of the resolution scheme.

492 It follows from all the foregoing that hearing the applicants before the adoption of the resolution scheme would have undermined the objectives of protecting the stability of the financial markets and the continuity of the entity's critical functions, and the requirements of speed and effectiveness of the resolution procedure.

493 Therefore, the failure to hear the applicants in the context of the resolution procedure for Banco Popular constitutes a limitation on the right to be heard which was justified and necessary in order to meet an objective of general interest and respected the principle of proportionality, in accordance with Article 52(1) of the Charter.

494 Accordingly, the first part of this plea in law must be dismissed.

(b) The second part, alleging infringement of the right of access to the file

495 The applicants claim that, as persons subject to the SRB's decision, they have a right of access to the file pursuant to Article 90(4) of Regulation No 806/2014 and Article 41(2) of the Charter.

496 In the first place, they submit that, before adopting an act adversely affecting a person, the institution cannot take account of information or documents without first giving the addressee of the act the opportunity to express his or her point of view, which requires access to the administrative file. The applicants maintain that the resolution scheme should be annulled in so far as it was based on a provisional valuation which was not made available to the applicants.

497 The right of access to the file is provided for in Article 90(4) of Regulation No 806/2014, according to which:

'Persons who are the subject of the [SRB]'s decisions shall be entitled to have access to the [SRB]'s file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the [SRB].'

498 In that regard, first, it must be observed that access to the file in competition cases is intended in particular to enable the addressees of the statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively on the conclusions reached by the Commission in its statement of objections, on the basis of that evidence. That right of access to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for that undertaking's defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (see judgment of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, not published, EU:C:2020:385, paragraphs 261 and 262 and the case-law cited).

499 Second, according to settled case-law of the Court of Justice, observance of the rights of the defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of competition rules, requires that the undertaking concerned must have been afforded the opportunity to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been an infringement. Those rights are referred to in Article 41(2)(a) and (b) of the Charter (see judgment of 28 November 2019, *Brugg Kabel and KabelwerkeBrugg* v *Commission*, C-591/18 P, not published, EU:C:2019:1026, paragraph 26 and the case-law cited).

500 Third, as regards, more generally, observance of the rights of the defence as enshrined in Article 41(2) of the Charter, that includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality (see judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 99 and the case-law cited; judgment of 2 December 2020, *Kalai* v *Council*, T-178/19, not published, EU:T:2020:580, paragraph 73).

501 Fourth, it must be observed that infringement of the right of access to the Commission's file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (see judgments of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 55 and the case-law cited, and of 15 July 2015, *Akzo Nobel and Others* v *Commission*, T-47/10, EU:T:2015:506, paragraph 349 (not published) and the case-law cited).

502 It follows from the case-law cited in paragraphs 498 to 501 that both the right of access to the file enshrined in Article 41(2)(b) of the Charter and, more specifically, access to the file in competition cases, concern persons or undertakings subject to proceedings opened or decisions taken against them.

503 In the present case, it follows from Article 90(4) of Regulation No 806/2014 that the right of access to the file concerns the entity that is the subject of the resolution scheme, namely Banco Popular, and not its shareholders or creditors.

504 Accordingly, the applicants cannot claim a right of access to the file.

505 Furthermore, both Article 41(2)(b) of the Charter and Article 90(4) of Regulation No 806/2014 provide that certain information may be protected if it is confidential.

506 It follows that the applicants cannot claim that the fact that the SRB did not disclose valuation 2 during the administrative procedure which led to the adoption of the resolution scheme constitutes an infringement of the right of access to the file.

507 In the second place, the applicants submit, in the reply, that there is no duty of confidentiality vis-à-vis shareholders and creditors following a resolution, since a resolution action affects their assets and they must be able to ascertain the grounds of the resolution. Furthermore, Article 88 of Regulation No 806/2014 provides for an exception to professional secrecy where disclosure is necessary for the purpose of legal proceedings. The applicants state that, according to recital 116 of Regulation No 806/2014, the disclosure of information before the adoption of the resolution scheme could affect the resolution procedure, whereas, after the adoption of the resolution decision, the objective of the resolution would no longer be compromised by that disclosure.

508 It must be held that those arguments are not concerned with the right of access to the file during the administrative procedure, within the meaning of Article 90(4) of Regulation No 806/2014, but with the right of access to the documents on which the SRB relied in order to adopt the resolution scheme, after the scheme's adoption.

509 Furthermore, it should be pointed out that the SRB is under an obligation to protect the confidential data of all entities, including business secrets, under Article 339 TFEU, Article 41(2)(b) of the Charter and Article 88(5) of Regulation No 806/2014.

510 In that regard, according to Article 34(1) of Regulation No 806/2014, for the purpose of performing its tasks under that regulation, the SRB may, through the national resolution authorities or directly, after informing them, making full use of all of the information available to the ECB or to the national competent authorities, require, inter alia, the entities covered by a resolution action to provide all of the information necessary to perform the tasks conferred on it by that regulation. Paragraph 2 of that article states that the requirements of professional secrecy do not exempt those entities from the duty to supply that information. Article 34(4) of Regulation No 806/2014 provides that the SRB is to be able to obtain, including on a continuous basis, any information necessary for the exercise of its functions under that regulation, in particular on capital, liquidity, assets and liabilities concerning any institution subject to its resolution powers.

511 Article 88(5) of Regulation No 806/2014 provides:

'Before any information is disclosed, the [SRB] shall ensure that it does not contain confidential information, in particular, by assessing the effects that the disclosure could have on the public interest as regards financial, monetary or economic policy, on the commercial interests of natural and legal persons, on the purpose of inspections, on investigations and on audits. The procedure for checking the effects of disclosing information shall include a specific assessment of the effects of any disclosure of the contents and details of resolution plans as referred to in Articles 8 and 9, the result of any assessment carried out under Article 10 or the resolution scheme referred to in Article 18.'

512 That provision expressly lays down an obligation on the SRB to ensure, prior to the publication or communication of the resolution scheme to a third party, that that scheme does not contain confidential information, which it may have obtained in particular under Article 34 of Regulation No 806/2014. That obligation also applies to valuation 2, which is an annex to the resolution scheme and forms an integral part of it, pursuant to Article 12.2 of that scheme.

513 The applicants submit that, according to recital 116 of Regulation No 806/2014, professional secrecy applies only during the resolution procedure, before the resolution decision is made public.

514 Recital 116 of Regulation No 806/2014 provides:

'Resolution actions should be properly notified and, subject to the limited exceptions laid down in this Regulation, made public. However, as information obtained by the [SRB], the national resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, that information should be subject to the requirements of professional secrecy. The fact that information on the contents and details of resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed

to have effects on the public and private interests concerned by the action. However, information that the [SRB] and the national resolution authorities are examining a specific entity could be enough to have negative effects on that entity. It is therefore necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of resolution plans and the result of any assessment carried out in that context.'

515 First, it is apparent from that recital that some of the information held by the SRB, contained in the resolution scheme, in valuation 2 and in the documents on which it relied, is covered by professional secrecy and is confidential.

516 In that regard, the Court of Justice has held, with regard to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), that the effective monitoring of the activities of investment firms, through supervision within a Member State and the exchanging of information by the competent authorities of several Member States, requires that both the supervised entities and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 31 and the case-law cited).

517 The Court of Justice has considered that the absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for monitoring. Therefore, in order to protect not only the specific interests of the firms directly concerned, but also the public interest in the normal functioning of the markets in financial instruments of the European Union, Article 54(1) of Directive 2004/39 imposes, as a general rule, the obligation to maintain professional secrecy (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraphs 32 and 33 and the case-law cited).

518 It must be observed that Article 88(1) of Regulation No 806/2014, on the requirements of professional secrecy of members of the SRB, contains a provision equivalent to that of Article 54(1) of Directive 2004/39.

519 Second, it is true that recital 116 of Regulation No 806/2014 mentions the SRB's obligations of professional secrecy before a resolution decision is adopted. It states that, in so far as certain information held by the SRB is sensitive and is covered by business secrecy, it must not be disclosed to the public prior to the adoption of a resolution action. Indeed, the disclosure of information concerning the fact that an entity is failing or likely to fail and may be the subject of a resolution action could, among other things, encourage shareholders to sell their securities on the markets and also lead to a massive withdrawal of deposits, which would have the effect of exacerbating the bank's financial situation and, therefore, undermining the effectiveness of action by the SRB and the functioning of the market.

520 However, that recital also expressly states that resolution actions 'should be properly notified and, subject to the limited exceptions laid down in this Regulation, made public'. It must be recalled that Article 88(5) of Regulation No 806/2014, cited in paragraph 511 above, expressly requires the SRB to ensure, before the resolution scheme is disclosed, that it does not contain confidential information.

521 Accordingly, recital 116 of Regulation No 806/2014 cannot be interpreted, in the manner proposed by the applicants, as meaning that the rules on confidentiality and professional secrecy apply only until the resolution decision has been adopted.

522 The applicants also refer to the second subparagraph of Article 88(1) of Regulation No 806/2014, according to which 'information subject to the requirements of professional secrecy shall not be disclosed to another public or private entity except where such disclosure is due for the purpose of legal proceedings'.

523 That provision does not mean that the SRB is under an obligation to disclose the resolution decision in full as soon as legal proceedings are initiated. That provision refers to the possibility for a court to order the production of documents, including documents containing confidential information.

524 In that regard, the Court has the power to order the SRB to produce any document which the Court considers relevant for the purpose of ruling on the dispute, by way of a measure of inquiry, pursuant to Article 91(b) and Article 92(3) of the Rules of Procedure. However, in accordance with Article 103(1) thereof, the Court may consider that certain information contained in those documents is confidential and thus decide that it is not to be communicated to the other parties, in particular the applicants.

525 It follows that a decision by the Court to order the production of documents does not guarantee the applicants access to all of those documents if the Court considers that they contain confidential information.

526 In addition, in the present proceedings, the Court, on 12 May 2021, by way of a measure of inquiry, ordered the SRB to produce certain documents, including the confidential versions of the resolution scheme, valuation 2 and the ECB's assessment that Banco Popular was failing or likely to fail. In accordance with Article 103 of the Rules of Procedure, after examining their content, the Court considered that the information remaining redacted in the versions of those documents published on the websites of the SRB and ECB was not relevant to the outcome of the present dispute. Accordingly, by order of 9 June 2021, the Court removed the confidential versions of those documents from the file.

527 It follows from the foregoing that the applicants cannot claim that, after the adoption of the resolution scheme, there is no duty of confidentiality with respect to them, or that they have a right to receive the entire file on which the SRB relied.

528 Accordingly, the second part of this plea must be dismissed, as must, therefore, the third plea in its entirety.

4. The fourth plea in law, alleging breach of the obligation to state reasons

529 The applicants argue that the contested decisions do not contain an adequate statement of reasons.

530 According to settled case-law of the Court of Justice, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue, and must disclose in a clear and unequivocal 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 court having jurisdiction to exercise its power of review. It is not necessary for the reasoning to specify 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 judgments of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraphs 85 and 87 and the case-law cited, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 41 and the case-law cited).

531 Furthermore, the degree of precision of the statement of the reasons for a measure must be weighed against practical realities and the time and technical facilities available for making the decision (see judgments of 6 November 2012, *Éditions Odile Jacob* v *Commission*, C-551/10 P, EU:C:2012:681, paragraph 48 and the case-law cited, and of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 139 and the case-law cited; judgment of 27 January 2021, *KPN* v *Commission*, T-691/18, not published, EU:T:2021:43, paragraph 162).

532 In the first place, the applicants claim that there are several shortcomings in the statement of reasons for the resolution scheme.

533 As a preliminary point, it should be borne in mind that, in the present case, on 7 June 2017, the SRB published on its website a notice regarding the adoption of the resolution scheme, together with a document summarising the effects of the resolution in accordance with Article 29(5) of Regulation No 806/2014. On 11 July 2017, the SRB published a non-confidential version of the resolution scheme. The SRB also published on its website, on 2 February 2018 and then on 31 October 2018, in other words before the reply was lodged, less redacted non-confidential versions of the resolution scheme and valuation 2.

534 First, a number of the applicants' arguments concern the sale process for Banco Popular. The applicants submit that the resolution scheme does not explain why only two potential buyers were invited to sign non-disclosure agreements and why only one of them submitted a bid. They claim that that is important for determining whether Banco Popular was sold in accordance with the provisions of Regulation No 806/2014.

535 It must be recalled that the sale process for Banco Popular was handled by the FROB. In the process letter issued on 6 June 2017, in the context of the possible resolution of Banco Popular, the FROB invited potential buyers to participate in the sale process and to submit a bid for the acquisition of 100% of Banco Popular's capital, in accordance with the terms and conditions set out in that letter.

536 In Article 6.6 of the resolution scheme, the SRB took the view that the FROB's marketing efforts Banco Popular prior to the adoption of that scheme had satisfied the requirements set out in Article 24 of Regulation No 806/2014, read together with Article 39 of Directive 2014/59. The SRB noted that, during the period immediately preceding the resolution, Banco Popular had conducted a private sale process and that, in the week beginning 29 May 2017, it had become clear that that process would be unsuccessful. It stated that the decision to limit the marketing efforts to banks which had already expressed a general interest in the acquisition of Banco Popular in the context of the private sale process complied with the requirements of Article 39 of Directive 2014/59. The SRB stated that, following the implementation of the sale process by the FROB, ultimately, two banks were invited to participate in that process. It mentioned that all potential buyers had been approached on the same date, that they had had access to the same

virtual data room and that their bids had been subject to the same conditions and deadline. The SRB also noted that, of the two potential buyers, one valid bid had been received and that, given that the buyer was the only bidder, it was prudent to accept its terms and thus avoid the uncontrolled insolvency of Banco Popular which, among other things, could have undermined its critical functions.

537 Those different factors, set out in the version of the resolution scheme annexed to the reply, are sufficient to ascertain how the marketing process for Banco Popular was conducted. Since it had been handled by the FROB, the SRB could simply note that only one bid had been submitted and take into account the outcome of that process. In addition, the reasons why the other potential buyers did not submit bids are irrelevant.

538 The applicants further submit that no explanation was provided as to why the sale price of Banco Popular was set at EUR 1 or whether that price reflected the market value of Banco Popular. They state that they do not know why BBVA was not given additional time to submit a bid.

539 To the extent that those arguments concern the marketing process conducted by the FROB, the applicants do not explain why that information should appear in the resolution scheme or why it is crucial to understanding that scheme.

540 Furthermore, those arguments are based on a misunderstanding of the facts. It must be recalled that the sale price of EUR 1 was not set by the SRB. In the process letter, the FROB stated that the price offered in the bids had to be equal to or greater than EUR 1. The sale price of EUR 1, referred to in the resolution scheme, stems from the competitive sale process conducted by the FROB and the price offered by Banco Santander. Accordingly, that price reflects, by definition, the market value of Banco Popular. Furthermore, since BBVA informed the FROB on 6 June 2017 that it had decided not to submit a bid, there was no need to give a specific reason in the resolution scheme explaining why the FROB had not granted it extra time.

541 Second, a number of the applicants' arguments concern the statement of reasons regarding compliance with the conditions for resolution. The applicants claim that no reasons were given for the finding, in Article 2.1 of the resolution scheme, that Banco Popular would not, in the near future, be able to pay its debts or other liabilities as they fell due. In particular, there is no indication whether the origin of that finding lies in the statements made by the Spanish authorities and in the outflows or withdrawals of their deposits, or in the lack of emergency liquidity assistance. According to the applicants, the SRB concluded, in Article 3.1 of the resolution scheme, that there were no alternative measures capable of preventing the failure of Banco Popular within a reasonable time frame, without having examined the alternatives mentioned in the second part of the first plea. The reasons why the sale of business tool was selected from among those other measures were not explained.

542 It must be observed that, in Article 2 of the resolution scheme, the SRB stated that the ECB had found that Banco Popular was failing or likely to fail, in accordance with the provisions of Article 18(1)(a) and (4)(c) of Regulation No 806/2014. It pointed out that there were a number of factors indicating that Banco Popular would not be able, in the near future, to pay its debts or other liabilities as they fell due.

543 In recital 23 of the resolution scheme, the SRB stated that, as the ECB had explained in its assessment, Banco Popular's liquidity situation had deteriorated significantly and, in recital 24, it listed the circumstances that had led to that situation. In addition, it should be borne in mind that

the reasons for the ECB's finding that Banco Popular was failing or likely to fail are clearly set out in its assessment, which forms part of the context in which the resolution scheme was adopted. A non-confidential version of the ECB's assessment was published on its website on 14 August 2017.

544 Accordingly, the applicants cannot claim that the SRB did not provide an adequate statement of the reasons why Banco Popular was failing or likely to fail.

545 Furthermore, it follows from the analysis of the second part of the first plea (see paragraphs 188 to 192 above) that the SRB gave sufficient reasons, in Article 3 of the resolution scheme, for the lack of alternative private sector measures or supervisory action capable of preventing the failure of Banco Popular. In addition, in Article 5 of the resolution scheme, particularly in Article 5.3 thereof, the SRB stated its reasons for choosing the sale of business tool as the resolution tool and explained why the other tools listed in Article 22(2) of Regulation No 806/2014 would not meet the resolution objectives to the same extent.

546 The applicants do not claim that those provisions of the resolution scheme are insufficient to enable their scope to be understood; they merely complain that the SRB failed to examine the alternative measures on which they rely in the first plea.

547 In that regard, suffice it to note that the SRB was not required to examine the measures relied on by the applicants which were not viable, as is apparent from paragraphs 193 to 230 above.

548 Third, in the reply, the applicants raise arguments concerning the statement of reasons for valuation 2. They claim not know why valuation 2 was used when that valuation stated that it was purely illustrative and should not be used in order to adopt a decision, why the valuation reports did not carry out the analysis required by Article 20(5)(a) to (c) and (f) of Regulation No 806/2014, why valuations 1 and 2 are inconsistent on the issue of Banco Popular's solvency, or why the ECB's valuation of Banco Popular's non-performing assets was not used even though the SRB had stated that it was the best estimate.

549 It must be held that those arguments merely repeat the arguments raised by the applicants in the second plea, alleging infringement of Article 20 of Regulation No 806/2014. The applicants do not explain why the resolution scheme should include explanations on matters raised solely in their own pleas. Nor do they specify the extent to which those explanations are necessary in order to understand that scheme.

550 Fourth, the applicants criticise the SRB for failing to explain, in the resolution scheme, whether Deloitte satisfied the conditions of independence laid down in Articles 37 to 41 of Delegated Regulation 2016/1075.

551 In that regard, the SRB stated, in recital 41 of the resolution scheme, that it had hired an independent valuer to carry out valuation 2. Suffice it to note that the purpose of the resolution scheme is not to explain the reasons why that valuer satisfied the requirements of Delegated Regulation 2016/1075 and the applicants do not specify the extent to which those explanations are necessary in order to understand the resolution action adopted by the SRB.

552 Fifth, the applicants submit that the SRB did not identify the resolution strategy or the resolution tool contained the 2016 resolution plan and that it did not state the reasons why that plan was not followed.

553 Suffice it to note that, in recitals 44 to 46 of the resolution scheme, which appear in their entirety in the version of the resolution scheme published on the SRB's website on 2 February 2018 and annexed to the reply, the SRB explained why the resolution tool contemplated in the 2016 resolution plan was not appropriate in view of the circumstances prevailing on the date of the resolution. Thus, it noted that the 2016 resolution plan was based on the assumption that Banco Popular's failure would be related to a deterioration in its capital position. Since Banco Popular's failure was the result of the deterioration in its liquidity position, the SRB stated that it could not be guaranteed that the bail-in tool envisaged in that plan would immediately and effectively remedy Banco Popular's liquidity crisis.

554 Those explanations are sufficient to demonstrate why the 2016 resolution plan was not applied in the resolution scheme.

555 Sixth, the applicants claim that they do not know why the SRB, before placing Banco Popular under resolution, did not wait for the full amount of emergency liquidity assistance already approved by the ECB to be granted.

556 Suffice it recall that it follows from the analysis of the first complaint in the first part of the first plea that the SRB found in the resolution scheme that the Bank of Spain, after providing initial emergency liquidity assistance to Banco Popular on 5 June 2017, was not in a position to provide it with additional emergency liquidity assistance. Since the grant of emergency liquidity assistance falls within the remit of the national central banks, the SRB could only take note of the unavailability of additional emergency liquidity assistance.

557 Thus, since there was no reason for the SRB to wait for the grant of that emergency liquidity assistance, it did not have to provide any justification in that regard in the resolution scheme.

558 As for the argument that numerous passages in the resolution scheme and in the valuations were redacted, preventing the applicants from understanding them, it is sufficient to note that this is merely a general consideration which, in the absence of details on the parts of the resolution scheme or of valuation 2 that the applicants are unable to understand, does not prove that there was a breach of the obligation to state reasons.

559 It follows from the foregoing that none of the applicants' arguments is capable of establishing that the SRB breached its obligation to state reasons.

560 In the second place, the applicants submit that they received only a partial 'non-confidential' copy of the resolution scheme and that they did not have access to the annexes thereto or to the administrative file. They argue that they were therefore not aware of the reasons for the contested decisions. They add, in the reply, that the obligation to state reasons protects any person concerned by the measure, not just its addressee, and that they are therefore entitled to receive a full statement of reasons for the contested decisions. Moreover, in the reply, the applicants state that they are not seeking general publication of the documents, since that appears to be precluded by Article 88(5) of Regulation No 806/2014, but rather the communication of a reasoned decision and authorisation to have confidential access to the file during the present proceedings.

561 It must be stated that, by that argument, the applicants essentially take issue with the SRB for failing to provide them with the full text of the resolution scheme and valuation 2.

562 In that regard, it follows from the examination of the second part of the third plea that, after the adoption of the resolution scheme, the applicants are not entitled to receive the entire file on which the SRB relied, since the SRB is under an obligation to protect the confidential information contained in that file. That reasoning also applies to the resolution scheme and valuation 2, which contain confidential data.

563 Furthermore, it must be borne in mind that the applicants are not the addressees of the resolution scheme, which is addressed to the FROB. The applicants must be regarded as third parties and therefore do not have the right to be notified of the full text of the resolution scheme.

564 It must be observed that the Court of Justice has already held that a Commission decision finding that there is no State aid alleged by a complainant may, in the light of the obligation to respect business secrecy, be sufficiently reasoned without including all the figures on which that institution's reasoning is based (see, to that effect, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 108 to 111). Accordingly, where a non-confidential version of such a decision discloses in a clear and unequivocal fashion the reasoning followed by that institution and the methodology used by it, in such a way as to enable the persons concerned to ascertain those reasons and the General Court to exercise its power of review in respect of them, that is sufficient to satisfy that institution's obligation to state reasons (see, to that effect, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 55).

565 Moreover, as regards the economic elements used by Deloitte in valuation 2 and taken into account by the SRB in the resolution scheme, they undeniably concern complex technical appraisals. Since the resolution scheme clearly disclosed the SRB's reasoning, enabling the substance of that scheme to be challenged subsequently before the competent court, it would be excessive to require a specific statement of reasons for each of the technical choices or each of the figures on which that reasoning is based (see, by analogy, judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 108 and the case-law cited).

566 The applicants accept that Article 88(5) of Regulation No 806/2014 is an impediment to publication of the full text of the resolution scheme. By providing that the SRB must ensure that information does not contain confidential material before disclosing it, that provision, cited in paragraph 511 above, covers not only the publication of that information but also its disclosure to third parties.

567 Furthermore, the applicants have not explained to what extent the data which remained redacted in the non-confidential versions of the resolution scheme and valuation 2 were necessary in order to understand the resolution scheme.

568 The applicants have therefore not established that the SRB breached its obligation to state reasons by redacting the economic data in the non-confidential versions of the resolution scheme and valuation 2.

569 It must therefore be held that the applicants cannot claim that they are entitled to be provided with the full text of the resolution scheme and valuation 2.

570 In the third place, the applicants claim that, in accordance with the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), only the Commission can review the discretionary aspects of the resolution scheme. They argue that Decision 2017/1246 is a merely tacit decision and contains no reasoning.

571 It should be noted that recital 4 of Decision 2017/1246 states:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation (EU) No 806/2014.'

572 In addition, first, in recital 2 of Decision 2017/1246, the Commission referred to the fact that the SRB, in the resolution scheme, had stated that all conditions for resolution set out in the first subparagraph of Article 18(1) of Regulation No 806/2014 had been met with respect to Banco Popular and that the SRB had assessed why resolution action was necessary in the public interest. Second, in recital 3 of Decision 2017/1246 endorsing the resolution scheme, the Commission stated that the resolution scheme, in accordance with Article 18(6) of Regulation No 806/2014, placed Banco Popular under resolution and determined the application of the sale of business tool and that the resolution scheme also provided reasons why all those elements were adequate.

573 It follows that the Commission, in Decision 2017/1246, expressly referred to the grounds on which the SRB had considered that the conditions for the adoption of the resolution scheme had been met and that the sale of business tool should be applied. Thus, the endorsement of the resolution scheme in recital 4 of Decision 2017/1246 must be read in the light of the other recitals of that decision and concerns all of those grounds. In that recital, the Commission expressly stated that it agreed with the reasons set out in the resolution scheme justifying the adoption of a resolution action in respect of Banco Popular, in particular as regards the public interest criterion.

574 Thus, it must be held that the resolution scheme and the statement of reasons for it form part of the context in which Decision 2017/1246 was adopted, within the meaning of the case-law cited in paragraph 530 above.

575 In addition, it should be noted that, under Article 18(7) of Regulation No 806/2014, the Commission must either endorse the resolution scheme or object to it with regard to its discretionary aspects.

576 It follows that, where, as in the present case, the Commission endorses the resolution scheme, the statement of reasons for its decision may be limited to indicating that it agrees with the reasons contained in the scheme. Any other additional justification for its endorsement may consist only of a repetition of the elements already contained in the resolution scheme. According to Article 18(7) of Regulation No 806/2014, the Commission must not repeat the SRB's analysis in its decision, but only endorse it.

577 Furthermore, in accordance with the case-law cited in paragraph 531 above, account must be taken of the very short period of time that was available to the Commission, under Article 18(7) of Regulation No 806/2014, to adopt its decision once the SRB had transmitted the resolution scheme.

578 It follows that a statement of reasons by which the Commission indicates that it agrees with the content of the resolution scheme and with the reasons put forward by the SRB in the resolution scheme to justify its adoption must be considered sufficient to justify an endorsement.

579 In the reply, the applicants submit that none of the documents which the Commission claims are part of its administrative file supports the Commission's participation in the procedure, beyond the adoption of its decision. The applicants state that that argument seeks to establish that the Commission failed to fulfil its obligations under Article 291 TFEU and the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

580 By that argument, the applicants do not claim that the Commission breached its obligation to state reasons, but plead breach of the principles governing the delegation of powers laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). The applicants state, in the reply, that that argument refers to paragraph 153 of the application. However, in that paragraph of the application, the applicants mentioned only that the Commission had not given reasons for its review of the discretionary aspects of the resolution scheme and had merely endorsed it.

581 It must therefore be held that that argument was raised for the first time in the reply and must be construed as constituting a new plea in law.

582 Under Article 84 of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

583 The applicants do not claim that that new argument is based on factual circumstances which were unknown to them at the time when the action was brought, with the result that the argument must be rejected as inadmissible.

584 It follows from all the foregoing that the fourth plea in law must be dismissed.

585 As all the pleas have been dismissed, the application for annulment of the contested decisions must be dismissed.

586 Therefore, it is also necessary to dismiss the applicants' request in the first head of claim that the Court should, as a result of the annulment of the contested decisions, 'order the SRB and the Commission to return their investments in Banco Popular', without there being any need to rule on the admissibility of that request. As regards the alternative request in the first head of claim that the Court should order the SRB and the Commission 'to pay [the applicants] damages on grounds of non-contractual liability', it must be considered to be indissociable from the first claim for damages examined below.

B. The claims for damages

587 By their second head of claim, the applicants ask the Court to order the SRB and the Commission to pay them damages on grounds of non-contractual liability. The applicants raise two separate claims for damages. The first is based on the annulment of the contested decisions and the second is independent of that annulment.

1. The first claim for damages

588 Concerning the first claim for damages, in the event that the Court annuls the contested decisions, the applicants seek damages on grounds of non-contractual liability and confirmation of the effects of those decisions under Article 264 TFEU.

589 They submit that, under Article 264 TFEU, the Court may state that certain effects of the contested decision, which it has declared void, are to be regarded as definitive, in which case they ask the Court, in the alternative to their application for annulment, to order the SRB and the Commission to pay them damages on account of the non-contractual liability incurred by the SRB and the Commission. As regards compensation for the damage sustained in the event of annulment of the contested decisions, the applicants state that the second paragraph of Article 266 TFEU provides that the obligation to take all necessary measures to restore the applicants to their previous position is not to affect any obligation which may result from the application of the second paragraph of Article 340 TFEU.

590 According to settled case-law, a claim for compensation for material or non-material damage must be rejected where it is closely related to a claim for annulment which has itself been rejected as inadmissible or unfounded (see judgment of 29 April 2020, *Tilly-Sabco* v *Council and Commission*, T-707/18, not published, EU:T:2020:160, paragraph 115 and the case-law cited).

591 In that regard, it is sufficient to note that the applicants' first claim for damages is contingent on a finding that the contested decisions are unlawful. Since the application for annulment of the contested decisions has been dismissed, the applicants' first claim for damages must be dismissed.

2. The second claim for damages

592 The applicants claim damages in respect of the non-contractual liability of the SRB and the Commission under Article 87 of Regulation No 806/2014, which provides for the liability of the SRB in the performance of its resolution functions, and under Articles 266, 268 and 340 TFEU, which apply both to the SRB and the Commission.

593 The applicants claim that, irrespective of whether or not the contested decisions are annulled, the SRB and the Commission should be ordered to pay them damages on grounds of non-contractual liability owing to the SRB and the Commission's unlawful conduct as described in the pleas for annulment, namely the statements and disclosures by the SRB which led to the resolution of Banco Popular, the indifference of the European institutions to Banco Popular's collapse, the lack of sound administration and early intervention, and the unlawfulness of the resolution procedure. They submit that if none of those unlawful actions on the part of the SRB had taken place, Banco Popular would not have been placed under resolution or, at least, not under the same terms.

594 It must be recalled that, as provided for in the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the European Union is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.

595 It is settled case-law that the European Union may incur non-contractual liability under the second paragraph of Article 340 TFEU only if a number of conditions are fulfilled, namely the unlawfulness of the conduct alleged against the EU institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of

(see judgments of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 64 and the case-law cited; of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 79 and the case-law cited; and of 25 February 2021, *Dalli* v *Commission*, C-615/19 P, EU:C:2021:133, paragraph 41 and the case-law cited).

596 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability on the part of the European Union. Furthermore, the EU judicature is not required to examine those conditions in any particular order (see judgments of 5 September 2019, *European Union* v *Guardian Europe* and *Guardian Europe* v *European Union*, C-447/17 P and C-479/17 P, EU:C:2019:672, paragraph 148 and the case-law cited, and of 10 March 2021, *AM* v *EIB*, T-134/19, EU:T:2021:119, paragraph 84 and the case-law cited).

597 According to settled case-law, as regards the first condition relating to the unlawfulness of the alleged conduct of the institutions, a sufficiently serious breach of a rule of law intended to confer rights on individuals must be established (see judgments of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 65 and the case-law cited, and of 25 February 2021, *Dalli* v *Commission*, C-615/19 P, EU:C:2021:133, paragraph 55 and the case-law cited, and order of 24 October 2019, *Liaño Reig* v *SRB*, T-557/17, not published, EU:T:2019:771, paragraph 62 and the case-law cited).

598 The requirement of a sufficiently serious breach of a rule of law intended to confer rights on individuals seeks, whatever the nature of the unlawful measure in question, to avoid the situation where the risk of having to bear the losses alleged by the persons concerned hinders the ability of the institution concerned to fully exercise its powers in the general interest, both in the context of its activities that are regulatory or involve economic policy choices and in the sphere of its administrative competence, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct (see judgments of 3 March 2010, *Artegodan* v *Commission*, T-429/05, EU:T:2010:60, paragraph 55 and the case-law cited; of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 34 and the case-law cited; and of 14 December 2018, *East West Consulting* v *Commission*, T-298/16, EU:T:2018:967, paragraph 124 and the case-law cited).

599 Such a breach is established where it is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the complexity of the situations to be regulated, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU institution (see judgments of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 33 and the case-law cited, and of 18 November 2020, *H* v *Council*, T-271/10 RENV II, EU:T:2020:548, paragraph 101 and the case-law cited). It is solely where that institution has only considerably reduced, or even no, discretion that the mere infringement of EU law may suffice to establish the existence of a sufficiently serious breach (see judgments of 20 January 2021, *Commission* v *Printeos*, C-301/19 P, EU:C:2021:39, paragraph 103 and the case-law cited, and of 20 September 2019, *Dehousse* v *Court of Justice of the European Union*, T-433/17, EU:T:2019:632, paragraph 165 and the case-law cited).

(a) The alleged unlawfulness

600 As regards the conduct of the Commission and the SRB, the applicants claim that the statements and disclosures by the SRB on 23 and 31 May 2017 and on subsequent days caused widespread panic which led to a fall in Banco Popular's share price and a run on its customers' deposits. The SRB breached its duty of confidentiality. When the information leaked, the SRB and the Commission adopted a passive attitude to the right to good administration and the right to early intervention, instead of taking steps to mitigate the damage. According to the applicants, when the SRB found that Banco Popular was failing or likely to fail, it adopted the resolution scheme without considering measures that would be less onerous on them, contrary to Regulation No 806/2014 and of fundamental principles, such as the principle of proportionality, the prohibition of discrimination and arbitrariness, the right to be heard and the right to a statement of reasons for a decision.

601 The applicants submit that the infringement of EU law by the SRB and the Commission is clearly substantiated, which is enough to establish the existence of a sufficiently serious breach. The SRB committed an inexcusable error giving rise to its non-contractual liability. The applicants assert that the SRB should not have made statements or disclosed information and, since harm was caused to Banco Popular, the SRB and the Commission should have attempted to mitigate that harm and, if Banco Popular's failure was irreversible, they should have decided on a resolution scheme in accordance with the law and fundamental principles.

602 The applicants' arguments relating to the conduct of the Commission and the SRB can be divided into two complaints, concerning, first, breach of the duty of confidentiality and, second, the passive attitude of the SRB and the Commission.

(1) The first complaint, concerning breach of the duty of confidentiality

603 The applicants submit that it follows from recital 116 and Articles 88 and 90 of Regulation No 806/2014 and from Article 339 TFEU that the required standard of diligence and care is extremely high. They argue that it is incorrect to state that the public would not have inferred from the interview which the Chair of the SRB gave to the television channel Bloomberg on 23 May 2017 that Banco Popular was being examined as provided for in recital 116 of Regulation No 806/2014.

604 The applicants submit that the statements and information leaks of 23 and 31 May 2017 are attributable to the SRB or, at least, to EU officials who participated in the resolution procedure. The SRB did not deny that the press article published by Reuters on 31 May 2017 originated from leaks. The Commission and the SRB did not deny the existence of deposit withdrawals by the Spanish authorities, in particular the FROB. The SRB and the Commission did not conduct any internal investigation establishing that they were not the source of the leaks. According to the applicants, the SRB did not implement the procedure for checking the effects of disclosing information referred to in Article 88(5) of Regulation No 806/2014, which constitutes a sufficiently serious breach.

605 Article 339 TFEU states:

'The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information

of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.'

606 According to the case-law, while that provision is mainly aimed at information collected from undertakings, the words 'in particular' show that it is a general principle which applies also to other confidential information (see, by analogy, judgment of 3 March 2011, *Siemens* v *Commission*, T-110/07, EU:T:2011:68, paragraph 400 and the case-law cited).

607 Article 88(1) of Regulation No 806/2014 provides:

'Members of the [SRB], the Vice-Chair, the members of the [SRB] referred to in Article 43(1)(b), the staff of the [SRB] and staff exchanged with or seconded by participating Member States carrying out resolution duties shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased. They shall in particular be prohibited from disclosing confidential information received during the course of their professional activities or from a competent authority or resolution authority in connection with their functions under this Regulation, to any person or authority, unless it is in the exercise of their functions under this Regulation or in summary or collective form such that entities referred to in Article 2 cannot be identified or with the express and prior consent of the authority or the entity which provided the information.'

608 Reference should also be made to recital 116 of that regulation, cited in paragraph 514 above, relating to the confidentiality of information held by the SRB prior to the adoption of a resolution decision.

609 In the present case, it must be observed that, in the application, the applicants mention the 'statements and disclosures by the SRB on 23 and 31 May 2017 and on subsequent days'. In the reply, the applicants refer only to the interview given by the Chair of the SRB on 23 May 2017 and to the article published by Reuters on 31 May 2017.

610 Since the applicants do not identify the other alleged statements by the SRB, the Court will confine itself to examining the content of the remarks made by the Chair of the SRB on 23 May 2017 and the content of the Reuters article of 31 May 2017 on which the applicants rely to claim breach of the duty of confidentiality.

611 In the first place, as regards the interview given by the Chair of the SRB to the television channel Bloomberg on 23 May 2017, the journalist asked:

'Can I take you to Spain? I want to show our audience something that is very much on our radar screen here at Bloomberg and that is Banco Popular and the CoCos [Contingent Convertibles] which are under a little bit of pressure right now. This is an institution with a CET 1 just north of 7 per cent. Is it on your radar screen as well?'

612 The Chair of the SRB replied:

'Well, I am never talking about individual banks. There are more banks than just one on our radar screen and of course, Banco Popular is also a case we are watching but it is not the only one we are watching.'

613 First, it must be noted, as the SRB points out, that those remarks are general in scope, since the supervision of institutions is one of the SRB's tasks in cooperation with the ECB. The information that Banco Popular, as a credit institution covered by the single supervisory mechanism, was being 'watched' was not confidential.

614 In addition, it is apparent from the article of 15 May 2017 published by *elconfidencial.com*, referred to in paragraph 41 above, that the information that Banco Popular had been the subject of an inspection by the ECB was already public.

615 Second, during that interview, the Chair of the SRB did not mention the possible resolution of Banco Popular. No conclusion can be drawn from those remarks as regards the imminent resolution of Banco Popular, far less as regards the resolution tool that might be used by the SRB.

616 Furthermore, since those remarks cannot be construed as meaning that Banco Popular would be placed under resolution, they do not fall within the situations contemplated by recital 116 of Regulation No 806/2014 concerning the transmission of information in respect of a resolution decision before that decision is adopted.

617 Moreover, as regards another extract from that interview, cited in paragraph 16 of the application, it is sufficient to note that the remarks made by the Chair of the SRB are of a general nature and do not concern the individual situation of Banco Popular. In the extract in question, the Chair of the SRB gave the following answer to a question concerning the future of institutions, like Banco Popular, which had recently raised money on the market and would struggle to do so again:

'Well, again, I won't talk about Banco Popular. As you understand, I think dealing with the topic is exactly going back to considering what is the root cause, and it's an individual and idiosyncratic case-by-case to see, can you offload NPL portfolio in a bad bank? Can you try to sell it? How can you restructure? Merger is always one option. … I think my clear message would be, we have worked hard over the last two years in trying to set up resolution plans which hopefully also offer more private solutions. So before you come to the point of being non-viable … and going into resolution to say, is the bank structured in a way that you can find alternative, private solutions? They are always, I would say, even from our perspective, the preferred solution. And there is no "one size fits all".'

618 Accordingly, it must be held that the remarks made by the Chair of the SRB during the interview of 23 May 2017 do not contain confidential information and do not constitute a breach of the principle of confidentiality or the obligation of professional secrecy laid down in Article 88 of Regulation No 806/2014 and Article 339 TFEU.

619 In the second place, as regards the article published by Reuters on 31 May 2017, entitled 'EU warned of resolution risk for Banco Popular' (*La UE, advertida de riesgo de una resolución ordenada en Banco Popular*), that article states that, according to an anonymous high-ranking EU official, one of Europe's top bank watchdogs had warned EU officials that Banco Popular might need to be placed under resolution if it failed to find a buyer and that the Chair of the SRB had recently issued an 'early warning'. According to that article, the high-ranking official in question also stated that the Chair of the SRB had declared that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention, adding that the bank's merger bid may be fruitless.

620 That Reuters article also states that, according to another source, also anonymous, general preparations were under way, although concrete steps had still not been taken. According to that article, a spokesperson for Banco Popular had stated that the bank was working on several plans, including a merger, a capital increase and asset sales.

621 It must also be observed that that article mentions the SRB's press release of the same day in which the SRB stated that it was not commenting on the specific difficulties of a bank, that it could not confirm the interpretations regarding alleged quotes made by its Chair and that it never issued warnings about banks.

622 The applicants refer to the extract from that article stating that 'general preparations were under way'. Suffice it to note that, according to the article, those remarks were made by 'a second source', also anonymous, who is not identified as being an EU official. They cannot therefore be attributed to a Commission official or to a member of the SRB's staff. Moreover, the reference to 'general preparations' is very vague in scope and gives no indication as to whether they related to a resolution procedure concerning Banco Popular or whether they referred to the plans envisaged by the bank itself, also mentioned in that article.

623 In addition, it must be observed that the applicants fail to specify which items of information contained in that article are confidential, or to what extent their disclosure would constitute a breach of the requirements of professional secrecy of the SRB or the Commission. In any event, the remarks of that EU official, reported in that article, did not relate to confidential information which could be known only to members of the SRB or the Commission and are not capable of proving the existence of the alleged leaks relied on by the applicants.

624 Thus, first, the official mentioned an 'early warning' allegedly issued by the Chair of the SRB. It must be observed that it is not for the SRB to make such a statement, a point which the SRB recalled, moreover, in its press release of 31 May 2017.

625 Second, as regards that official's assertion that 'the Chair of the SRB had declared that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention', suffice it to observe that those remarks repeat the substance of what the Chair of the SRB had stated publicly during her interview on the television channel Bloomberg on 23 May 2017, that is to say that Banco Popular was being 'watched'. Moreover, the broad interpretation given to those remarks was contradicted by the SRB in its press release.

626 Furthermore, the fact that that article claims to reproduce the words of the Chair of the SRB is not sufficient to establish their authenticity, particularly since the person who was supposed to have reported them is not identified.

627 Third, as regards that official's assertion that the bank's merger offer might be unfruitful, it is apparent from that article that Banco Popular itself had stated that the deadline initially set for 10 June 2017 to submit bids in the private sale process was a flexible one.

628 In that regard, the applicants produced as an annex to the application an article from *El País* of 31 May 2017, entitled 'Banco Popular extends the deadline for bids until the end of June' (*El Popular amplía el plazo para presentar ofertas hasta fin de junio*), which confirms that the bank postponed the deadline for the submission of bids from 10 June to the last week of that month.

629 Thus, the possibility that the private sale process launched in April 2017 might be unfruitful cannot be regarded as confidential information, but as a simple deduction from the circumstances, that is to say that, on 31 May 2017, Banco Popular still had not found a buyer in that process and that the date for the closure of the process had been postponed.

630 Fourth, as regards the assertion that, according to an anonymous high-ranking EU official, one of Europe's top bank watchdogs had warned EU officials that Banco Popular might need to be placed under resolution if it failed to find a buyer, it must be observed that several press articles had already reported in May that Banco Popular was in distress and had initiated a private sale process.

631 Consequently, it is apparent from an article of 11 May 2017, published on the website *elconfidencial.com*, mentioned in paragraph 40 above, that the Chairman of Banco Popular had ordered the urgent sale of the bank because of a risk of insolvency. The reference in the Reuters article of 31 May 2017 to the fact that the EU officials were informed by 'one of Europe's top bank watchdogs' seems to correspond to the information given in the article of 11 May 2017, according to which, as a result of a serious risk of insolvency due, in particular, to the continued outflow of deposits, the Chairman of Banco Popular had been forced to implement the sale process in order to meet the ECB's requirements. In addition, an article of 15 May 2017, published on the website *elconfidencial.com*, mentioned in paragraph 41 above, stated that the plan to sell Banco Popular had been implemented by its Chairman after the ECB's inspection.

632 Thus, the fact that Banco Popular faced a risk of insolvency if it did not find a buyer at the end of the sale process it had initiated had been public knowledge since mid-May 2017.

633 It follows that, contrary to the applicants' claim, the remarks of the anonymous EU official, reported in that article, do not contain confidential information relating to the implementation of a resolution procedure concerning Banco Popular, such as the information referred to in recital 116 of Regulation No 806/2014, which could be known only to Commission officials or members of the SRB.

634 Moreover, that Reuters article is based on the comments of an alleged anonymous EU official, whose home EU institution or body is not identified.

635 As the SRB maintains, many people other than members of the SRB or officials of the Commission were likely to make such comments, having regard, in particular, to the possibilities of exchanging information provided for, inter alia, in Article 88(6) of Regulation No 806/2014.

636 According to the case-law, it is for the applicant, in an action for damages, to establish that the conditions on which the Union incurs non-contractual liability under Article 340 TFEU are satisfied. Thus, in so far as the applicants have not established in the present case that the publication of information in the press resulted from the disclosure of information attributable to the Commission or the SRB, they cannot, in principle, be accused of such publication (see, to that effect, judgment of 8 July 2008, *Franchet and Byk* v *Commission*, T-48/05, EU:T:2008:257, paragraph 182 and the case-law cited).

637 In that regard, it must be observed that the applicants have adduced no evidence to show that the official referred to in that article is a Commission official or a member of the SRB's staff.

638 The applicants merely assert that that article proves the existence of leaks and that the SRB did not deny that leaks occurred. They submit that the SRB and the Commission did not provide any report or conduct any internal investigation establishing that they were not the source of the information leaks contained in the Reuters article. They maintain that, since no such internal investigation took place, the SRB and the Commission cannot adduce any evidence enabling them to reverse the presumption arising from recital 116 and Articles 88 and 91 of Regulation No 806/2014.

639 Even if the comments reported in that article came from a leak by an EU official, since it has not been established that the Commission's departments or the SRB are responsible for the leak of information shown by the press articles to which the applicants refer, it is clear from the case-law that such a source of the leak cannot be presumed (see, to that effect, judgment of 15 March 2006, *BASF* v *Commission*, T-15/02, EU:T:2006:74, paragraph 605).

640 Furthermore, it must be stated that even if it is likely that the Commission or the SRB may have been the source of that leak, that mere possibility is not sufficient, as the applicants claim, to place on them the burden of proving the contrary (see, to that effect, judgment of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 412).

641 Contrary to the applicants' submissions, neither recital 116 nor Article 88 of Regulation No 806/2014, prohibiting the disclosure of confidential information to any person or authority, can be interpreted as containing a presumption that any leak concerning the resolution of an entity originates from a member of staff of the SRB, entailing the reversal of the burden of proof.

642 In the present case, since there is no presumption that the Commission or the SRB was the source of the alleged leak of information, the onus is not on them to demonstrate that they were not.

643 Moreover, it cannot in any way be inferred from the absence of an internal investigation that the SRB or the Commission breached their duty of confidentiality. Thus, it must be held that the fact that the SRB and the Commission did not carry out an internal investigation in order to determine the origin of potential leaks of information, after the resolution decision was adopted, is irrelevant for the purposes of assessing whether unlawful conduct is the cause of the damage relied on by the applicants.

644 In that regard, by letter lodged at the Court Registry on 9 October 2020, the applicants offered further evidence pursuant to Article 85(3) of the Rules of Procedure. That evidence concerned two internal emails of the SRB of 10 and 18 August 2017 concerning a potential leak of information giving rise to the Reuters article of 31 May 2017. The applicants state that they had access to those documents following the decision of the Appeal Panel of the SRB of 15 April 2020, concerning their request for access to documents made under Article 90 of Regulation No 806/2014, and that the SRB sent them those two emails on 27 August 2020. They submit that those emails show that the SRB did not carry out an internal investigation into the alleged leak of information giving rise to the article of 31 May 2017.

645 Suffice it to state that the applicants have failed to establish that the comments reported in the Reuters article of 31 May 2017 originated from a leak of information from a member of the SRB, and that the fact that the SRB did not conduct an internal investigation is irrelevant for the purposes of assessing whether the SRB breached its duty of confidentiality. Therefore, it must be

held that that further evidence seeking to establish that the SRB did not carry out an internal investigation into the alleged leak of information giving rise to the article of 31 May 2017 is irrelevant.

646 It follows from all the foregoing that the applicants have failed to establish that the SRB or the Commission breached the principle of confidentiality and the obligation of professional secrecy.

(2) The second complaint, concerning the passive attitude of the SRB and the Commission

647 The applicants submit that, when the leaks of information began, the SRB and the Commission adopted a passive attitude to the right to good administration and the right to early intervention, instead of taking steps to mitigate the damage. When the SRB found that Banco Popular was failing or likely to fail, it adopted the resolution scheme without considering measures that would be less onerous on the applicants, contrary to Regulation No 806/2014 and of fundamental principles, such as the principle of proportionality, the prohibition of discrimination and arbitrariness, the right to be heard, and the right to a statement of reasons for a decision. The applicants submit that since the SRB and the Commission created the climate of uncertainty which led to the insolvency of Banco Popular, they were required to act in order to minimise the damage caused.

648 It must be observed that the applicants do not explain the exact nature of their complaints against the Commission and the SRB when they refer to the 'passive attitude' of the latter or what measures the Commission and the SRB should have taken to 'mitigate the damage'.

649 As the Commission points out, it is settled case-law that omissions by the EU institutions give rise to liability on the part of the Union only when the institutions have infringed a legal obligation to act under a provision of EU law (judgment of 15 September 1994, *KYDEP* v *Council and Commission*, C-146/91, EU:C:1994:329, paragraph 58; see also judgments of 14 December 2005, *Beamglow* v *Parliament and Others*, T-383/00, EU:T:2005:453, paragraph 166 and the case-law cited, and of 16 November 2017, *Acquafarm* v *Commission*, T-458/16, not published, EU:T:2017:810, paragraph 47 and the case-law cited). The applicants do not identify the provisions which purportedly require the SRB and the Commission to act in order to avoid adopting a resolution decision.

650 In so far as the applicants refer to the arguments already raised in the application for annulment, suffice it to note that those arguments were rejected in the analysis of the first plea. In particular, the arguments relating to the passive attitude of the SRB and the Commission in breach of the principle of good administration were dismissed in the analysis of the third complaint in the first part of the first plea, in paragraphs 173 to 176 above, and the arguments relating to the failure to consider measures that would be less onerous on the applicants were dismissed in the second and third parts of the first plea.

651 It follows from the foregoing that the applicants have failed to establish the existence of unlawful conduct on the part of the SRB or the Commission and, therefore, they have failed to establish the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. In accordance with the case-law cited in paragraph 596 above, since the first condition required for the SRB or the Commission to incur non-contractual liability is not satisfied, the second claim for damages must be dismissed, without there being any need to examine the other conditions.

652 Nonetheless, the Court considers it appropriate, in the interests of the sound administration of justice, also to examine the applicants' arguments relating to the existence of a causal link between the alleged unlawful conduct of the SRB and the Commission and the damage which they claim to have sustained.

(b) The causal link

653 The applicants claim that the causal link relating to disclosures of confidential information is mentioned in recital 116 of Regulation No 806/2014, in that such disclosures could result in a banking institution being placed under resolution. The use of the words 'must be presumed' in recital 116 means, according to the applicants, that in the event of breach of the duty of confidentiality, it is for the EU institutions to prove that there is no causal link.

654 The applicants recall that the statement made by the Chair of the SRB on 23 May 2017, according to which the SRB was in the process of examining Banco Popular, and the Reuters article of 31 May 2017, reporting that the SRB was going to initiate a resolution procedure, caused widespread panic which led to a fall in Banco Popular's share price and a run on its deposits. Following those information leaks, the SRB and the Commission did nothing to remedy the situation and, in consequence, the SRB reached the view that Banco Popular was failing and initiated a resolution procedure. The applicants also claim that the SRB committed several infringements when it adopted the resolution scheme. All those infringements are the cause of the damage sustained by the applicants. The applicants submit that the SRB and the Commission should not have adopted a resolution action in respect of Banco Popular, in which case the applicants would still have their investments, or that the SRB and the Commission should have adopted it on different terms, in which case the applicants might not have sustained economic loss.

655 As regards the condition that there must be a causal link between the conduct alleged and the damage claimed, that damage must be a sufficiently direct consequence of the conduct complained of, which must be the decisive cause of the damage, although there is no obligation to make good every harmful consequence, even a remote one, of an unlawful situation. It is for the applicant to adduce evidence of a causal link between the conduct complained of and the damage pleaded (see judgment of 11 July 2019, *BP* v *FRA*, T-838/16, not published, EU:T:2019:494, paragraph 217 and the case-law cited).

656 The applicants submit that the statement made by the Chair of the SRB on 23 May 2017 and the Reuters article of 31 May 2017 brought about Banco Popular's liquidity crisis.

657 Those arguments are based on a partial and erroneous presentation of the facts giving rise to Banco Popular's liquidity crisis and the causes that led to the situation in which it was failing or likely to fail.

658 Thus, it must be borne in mind that, in its assessment that Banco Popular was failing or likely to fail, the ECB stated that Banco Popular had attracted attention because of its low profitability, the poor quality of its assets and its low coverage compared with its peers and that, since January 2017, it had been the subject of negative media coverage. The ECB noted that, in February 2017, when it presented its annual accounts for 2016, Banco Popular disclosed the need for extraordinary provisions and the replacement of its Chairman. The ECB found that those announcements had led DBRS to downgrade Banco Popular's rating and had caused significant concerns to Banco Popular's customer base, which was reflected by unexpected deposit withdrawals.

659 The ECB also noted that a further wave of deposit outflows had been triggered by the publication by Banco Popular, on 3 April 2017, of an ad hoc disclosure on the outcome of several internal audits and had been fuelled by other events mentioned in paragraph 56 above.

660 In recital 24 of the resolution scheme, the SRB cited several circumstances which had led to the rapid deterioration of Banco Popular's liquidity situation, namely:

– in February 2017, Banco Popular disclosed the need for extraordinary provisions amounting to EUR 5.7 billion, leading to consolidated losses of EUR 3.485 billion, and appointed a new chairman;

– on 10 February 2017, DBRS downgraded Banco Popular's rating;

– on 3 April 2017, Banco Popular published an ad hoc disclosure on the outcome of internal audits potentially having a significant impact on its financial statements and confirmed the replacement of its CEO less than one year after he took office;

– on 7 April 2017, Standard & Poor's and, on 21 April, Moody's, downgraded Banco Popular's rating;

– on 12 May 2017, Banco Popular breached the liquidity coverage requirement of 80% and was unable to re-establish compliance with the regulatory limit thereafter;

– continuous negative press coverage of Banco Popular's financial results and of the alleged imminent risk of bankruptcy or illiquidity resulted in an increase of deposit outflows;

– on 6 June 2017, DBRS and Moody's downgraded Banco Popular's rating.

661 The SRB stated that all those circumstances had resulted in significant withdrawals of deposits.

662 It must also be observed that the Board of Directors of Banco Popular, in the minutes of the meeting of 6 June 2017 at the end of which it declared that the bank was failing, mentioned the reasons which had led to Banco Popular's situation, including press articles published over the preceding months on the financial situation of the group in general and of Banco Popular in particular and their effects on the liquidity situation. The Board of Directors stated that the period of extreme financial stress that Banco Popular was experiencing was due to several factors, including its diminished solvency, the quality of its assets and their coverage compared with the peer group, and the continuous and extremely negative media coverage of the group by certain media outlets. It follows that, although the Board of Directors acknowledged that the information relating to the group's financial difficulties published in the press over several months had contributed to Banco Popular's situation, it cites them only as one factor among others and does not refer to the statement made by the Chair of the SRB on 23 May 2017 or the Reuters article of 31 May 2017.

663 It is clear from those facts, which are not disputed by the applicants, that Banco Popular's situation had already deteriorated well before 23 May 2017 and that its liquidity crisis was caused by multiple factors which originated in the bank's poor results announced in February and April 2017. In particular, the liquidity coverage requirement for Banco Popular had not been in compliance with the legal requirements since 12 May 2017.

664 It must be observed that the applicants cannot ignore all the objective factors that caused Banco Popular's liquidity problems, particularly since April 2017. They cannot reasonably argue that the statement of 23 May 2017 and the article of 31 May 2017, even if they involved a breach of the principle of confidentiality on the part of the SRB or the Commission, were the cause of Banco Popular's liquidity crisis and, therefore, of the damage sustained by them.

665 Consequently, it follows that the applicants have failed to establish a causal link between the alleged unlawful acts committed by the SRB and the Commission and Banco Popular's liquidity crisis, and thus between those acts and the damage claimed.

666 That finding is not called into question by the applicants' other arguments.

667 The applicants claim that the ECB, in its assessment that Banco Popular was failing or likely to fail, noted that the deposits losses since 31 May 2017 were particularly significant, after the media reported that the bank could face wind-down if the private sale process then under way was not successful within a very short period.

668 It follows from its assessment that, according to the ECB, the announcement of the failure of the private sale process and the risk of insolvency of the undertaking exacerbated Banco Popular's deposit losses. However, that was only one factor among the many others cited by the ECB which caused those deposit outflows. The applicants cannot assert that the ECB acknowledged that the Reuters article had brought about Banco Popular's liquidity crisis.

669 The ECB noted that Banco Popular had received significant negative media coverage during that period and even cited examples of articles published on 11 and 15 May 2017, referred to in paragraphs 40 and 41 above. The applicants cannot handpick from all those press articles the only article mentioning an EU official in order to claim that that article alone caused Banco Popular's liquidity outflow.

670 The applicants also claim that the SRB, in valuation 1, and the ECB, in its assessment of 5 June 2017 concerning Banco Popular's request for emergency liquidity assistance, stated that 23 and 31 May 2017 were important dates in Banco Popular's liquidity crisis.

671 In that regard, in its assessment of 5 June 2017 relating to Banco Popular's request for emergency liquidity assistance, the ECB stated:

> 'The bank has been confronted with significant cash outflows across all customer segments between 31 March and 1 June 2017 which have led to severe deterioration of both the deposit base … and the counterbalancing capacity (CBC …). Sparked by a deterioration of the reputation of the institution as a result of media coverage and of the announcement made by the bank on the need to proceed to either a capital increase or an M&A transaction due to the deteriorated financial situation, together with the impact of subsequent rating downgrades, deposit outflows exceeded €500M in a single day repeatedly over the course of the past weeks (12.05, 16.05, 22.05, 23.05, 31.05 and 01.06) in the context of a steady reduction of funding with a limited liquidity buffer.'

672 The SRB reproduced that same analysis in valuation 1, stating that it had relied on the information provided by the ECB.

673 It follows that the dates of 23 and 31 May 2017 are mentioned by the ECB and the SRB only in the context of other dates on which deposit outflows exceeded EUR 500 million and have no connection with the statement made by the Chair of the SRB and the Reuters article. Contrary to what the applicants claim, the ECB and the SRB did not state that the dates of 23 and 31 May were more important than the other dates mentioned. In addition, they made clear that there were many reasons for the deposit outflows and it cannot be inferred from this, as the applicants do, that the statement of 23 May and the article of 31 May brought about Banco Popular's liquidity crisis.

674 Furthermore, the evolution in Banco Popular's share price showed a steady fall between June 2016 and June 2017. Contrary to the applicants' assertions, that evolution does not disclose any link between, on the one hand, the statement of 23 May and the article of 31 May 2017 and, on the other, the share price of Banco Popular. The fall in Banco Popular's share price was due to the bank's poor financial situation and must be viewed in the context of the successive downgrades of its rating by the rating agencies, mentioned in paragraphs 32, 38 and 46 above.

675 It follows from all the foregoing that the applicants' claims for damages must be dismissed.

C. The applications for annulment of valuation 2 and for compensation

676 By their third head of claim, the applicants dispute valuation 2 under Article 20(15) and Articles 86 and 87 of Regulation No 806/2014 and submit that they are entitled to compensation.

677 The Commission maintains that the challenge to valuation 2 is inadmissible. The SRB contends that valuation 2 cannot be challenged separately from the resolution decision.

678 In the first place, the applicants seek the annulment of valuation 2 independently of the annulment of the contested decisions. They expressly state, in the application, that the right to challenge the valuation under Article 20(15) of Regulation No 806/2014 constitutes an application for partial annulment of the resolution decision, specifically the expert report used by the SRB for the purposes of the resolution. They assert that their application for partial annulment of the resolution decision, brought under Article 20(15) of Regulation No 806/2014, is wholly separate from the action for annulment of the contested decisions and from their claims for damages. That application would be admissible even if their other heads of claim were dismissed.

679 Furthermore, in their letter lodged at the Court Registry on 16 April 2019 concerning an application for modification of the measures of inquiry, the applicants themselves framed the application for annulment of the contested decisions, the action for non-contractual liability and the challenge to valuation 2, together with a claim for compensation, as three autonomous actions.

680 In that respect, it must be observed that Article 20(15) of Regulation No 806/2014 provides:

'The valuation shall be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments. The valuation itself shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision of the [SRB].'

681 In that regard, the applicants rely on a misinterpretation of that provision and of recital 63 of Regulation No 806/2014, according to which 'such valuation should be subject to a right of appeal only together with the resolution decision'. Contrary to the applicants' claims, the

possibility of bringing a 'joint' action against the valuation and the resolution scheme does not mean that it is possible to challenge the valuation in an action which is separate from that seeking annulment of the resolution scheme, even if it is brought at the same time and by means of a single application.

682 It is clear from the wording used in Article 20(15) of Regulation No 806/2014 that valuation 2, as an integral part of the resolution scheme, can be challenged only in the context of an action for annulment of that scheme, but cannot be the subject of a separate appeal.

683 Thus, it must be held that the applicants' application for annulment only of valuation 2, which is independent of their application for annulment of the contested decisions, must be construed as a separate action from that seeking annulment of the resolution scheme. Article 20(15) of Regulation No 806/2014, on which the applicants base their application for annulment of valuation 2, expressly rules out the possibility of bringing such an action.

684 The application for annulment of valuation 2 must therefore be dismissed as inadmissible.

685 In the second place, the applicants claim a right to compensation flowing directly from Article 17 of the Charter, even though Regulation No 806/2014 does not make provision for compensation. The applicants submit that the shareholders and bondholders of Banco Popular should have received compensation after the resolution equivalent to the net asset value, in accordance with Article 20(12) of Regulation No 806/2014, not the liquidation value. They maintain that that claim is admissible even though they have not specified the exact extent of the damage sustained or the exact amount of the compensation sought.

686 The applicants also state that 'the action referred to in Article 20(15) of Regulation No 806/2014 is separate from the action for annulment and the action for non-contractual liability' and that the valuation used for the purposes of that provision is 'different from the calculation of damage in the event of annulment with confirmation of the effects or the calculation in the event of non-contractual liability'. In the reply, they maintain that they are entitled to compensation equivalent to the net asset value of Banco Popular on the date of the resolution in accordance with Article 20(12) and (16) of Regulation No 806/2014, read in conjunction with Article 20(15) and Articles 86 and 87 thereof.

687 In the reply, the applicants submit that, if valuation 2 had reflected the net asset value of Banco Popular on the date of the resolution, Banco Popular would not have been placed under resolution or it would have been necessary to set a higher minimum price bid, which would have benefited shareholders and holders of capital instruments. They argue that, in view of the estimates of the ECB and Banco Popular, Banco Popular's net asset value was positive and stood at EUR 7 billion, and that the shareholders and holders of capital instruments should receive an amount of compensation calculated on the basis of that value, namely EUR 1.67 per share.

688 It must also be observed that, by their letter lodged at the Court Registry on 16 April 2019, the applicants withdrew their request, set out in the application, for the appointment of an expert to carry out a fair, prudent and realistic valuation in order to calculate the net asset value of Banco Popular.

689 It must be stated that it is not possible to ascertain from the applicants' arguments what the legal basis is for that claim for compensation raised in the context of their challenge to valuation 2.

690 First, the references made by the applicants to Article 20(15) of Regulation No 806/2014 as the basis for their claim for compensation are not intelligible. That provision, mentioned in paragraph 680 above, merely states that the valuation on which the SRB relied is an integral part of the resolution scheme and cannot be the subject of a separate appeal.

691 Second, as regards the assertion that the right to compensation flows directly from the infringement of the right to property enshrined in Article 17(1) of the Charter, it must be observed that, even if the resolution of Banco Popular resulted in an infringement of the applicants' right to property, that infringement is not a consequence of valuation 2.

692 It must be observed that the purpose of valuation 2, carried out by an independent expert, is to inform the SRB's decision on the adoption of the resolution scheme and, as the Commission points out, that valuation does not in itself produce binding legal effects such as to affect the applicants' interests. Only the resolution scheme and Decision 2017/1246 produce binding legal effects. Therefore, the applicants cannot claim compensation on the basis of a challenge to valuation 2 that is wholly separate from the challenge to the contested decisions.

693 Third, as regards the applicants' reference to Article 20(12) of Regulation No 806/2014, suffice it to note that that provision is not relevant in the present case.

694 Article 20(12) of Regulation No 806/2014 provides:

'In the event that the *ex post* definitive valuation's estimate of the net asset value of an entity referred to in Article 2 is higher than the provisional valuation's estimate of the net asset value of that entity, the [SRB] may request the national resolution authority to:

(a) exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool;

(b) instruct a bridge institution or asset management vehicle to make a further payment of consideration in respect of the assets, rights or liabilities to an institution under resolution, or as the case may be, in respect of the instruments of ownership to the owners of those instruments of ownership.'

695 Suffice it to note that, in the present case, the SRB did not carry out an *ex post* definitive valuation on the basis of that provision. In any event, contrary to what the applicants claim, that provision does not give the SRB or the Commission the option to award them compensation.

696 Fourth, the applicants' reference to Article 20(16) of Regulation No 806/2014, as the basis for their right to compensation equivalent to Banco Popular's net asset value on the date of the resolution, is not intelligible inasmuch as that provision provides only that the SRB is to ensure that a valuation is carried out after the resolution, in order to determine whether the shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings.

697 Moreover, in so far as that claim for damages should be construed as seeking to establish the non-contractual liability of the SRB or the Commission on the basis of Article 87(3) of Regulation No 806/2014, suffice it to state that that claim does not address any of the conditions which must be met in order for the institutions to incur liability under Article 340 TFEU, referred to in the

case-law cited in paragraph 595 above. Indeed, the applicants do not identify the infringement allegedly committed by the SRB or the Commission or the conduct in which they allegedly engaged.

698 In the light of the foregoing, the claim for compensation based on the challenge to valuation 2 must be dismissed.

699 Accordingly, the applicants' third head of claim must be dismissed.

D. The applications for measures of organisation of procedure and measures of inquiry

700 The applicants have requested the Court to order various measures of organisation of procedure and measures of inquiry.

701 In the application, the applicants requested the Court, first, to order the SRB, the Commission, the ECB, the Kingdom of Spain, the Bank of Spain and the FROB to produce various documents. Second, they requested the Court to order the examination of several persons as witnesses and the preparation of expert reports, under Article 91(d) and (e) of the Rules of Procedure.

702 By letter lodged at the Court Registry on 16 April 2019, the applicants submitted a modification of the measures of inquiry contained in the application and the reply. In that letter, they stated that they withdrew their request for expert reports and confined their request for the examination of witnesses to the Chair of the SRB.

703 As regards applications made by a party for measures of organisation of procedure or measures of inquiry, it must be recalled that the Court is the sole judge of any need to supplement the information available to it in respect of the cases before it (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 117 and the case-law cited; judgment of 12 November 2020, *Fleig* v *EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 53).

704 It is clear from the case-law of the Court of Justice that, even where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it falls to the General Court to assess the relevance of the application to the subject matter of the dispute and the need to examine the witnesses named (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 118 and the case-law cited; judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission*, C-702/19 P, EU:C:2020:857, paragraph 29).

705 It must be recalled that, by its order for a measure of inquiry of 12 May 2021, pursuant to Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, the Court ordered the SRB to produce certain documents referred to in paragraph 98 above. By order of 9 June 2021, the Court held that the documents produced by the SRB in their confidential version were not relevant to the resolution of the dispute.

706 In the present case, it must be noted that the information contained in the file and the explanations provided during the hearing are sufficient to enable the Court to give judgment, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings and in the light of the documents lodged by the parties.

707 It follows that the applicants' applications for measures of organisation of procedure and measures of inquiry must be rejected, without it being necessary to rule on the admissibility of some of those applications.

708 It follows from all the foregoing that the action must be dismissed in its entirety.

V. Costs

709 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 applicants have been unsuccessful, they must be ordered to bear their own costs and to pay the costs incurred by the Commission, the SRB and Banco Santander, in accordance with the forms of order sought by the latter three parties.

710 Under Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition),

hereby:

1. **Dismisses the action;**

2. **Orders Eleveté Invest Group, SL and the other applicants whose names are listed in the annex to bear their own costs and pay the costs incurred by the European Commission, the Single Resolution Board (SRB) and Banco Santander, SA;**

3. **Orders the Kingdom of Spain to bear its own costs.**

Van der Woude Jaeger Kreuschitz

De Baere Steinfatt

Delivered in open court in Luxembourg on 1 June 2022.

[Signatures]

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