Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 October 2024*

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(Appeal – Economic and monetary policy – Banking union – Regulation (EU) No 806/2014 – Single Resolution Mechanism for credit institutions and certain investment firms – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption of a resolution scheme in respect of Banco Popular Español SA – Article 14 – Resolution objectives – Article 18(1) – Conditions for the adoption of a resolution scheme – Obligations of the Single Resolution Board (SRB) and of the European Commission – Article 20 – Valuations for the purposes of resolution – Requirements – Articles 88 to 91 – Obligation of confidentiality – Right of access to the file – Statements to the press)

In Case C-541/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 August 2022,

Araceli García Fernández, residing in Villanueva de la Cañada (Spain),

Faustino González Parra, residing in Palma, Mallorca (Spain),

Fernando Luis Treviño de Las Cuevas, residing in Seville (Spain),

Juan Antonio Galán Alcázar, residing in Consuegra (Spain),

Lucía Palazuelo Vallejo-Nágera, residing in Madrid (Spain),

Macon SA, established in Barcelona (Spain),

Marta Espejel García, residing in Villanueva de la Cañada,

Memphis Investments Ltd, established in Road Town (British Virgin Islands),

Pedro Alcantara de la Herrán Matorras, residing in Madrid,

Pedro José de Jesús Benito Trebbau López, residing in Madrid,

Pedro Regalado Cuadrado Martínez, residing in Salas de los Infantes (Spain),

María Rosario Mari Juan Domingo, residing in Salas de los Infantes,

represented by S. Cajal Martín, B.M. Cremades Román, J.M. López Useros and P. Marrodán Lázaro, abogados,

appellants,

the other parties to the proceedings being:

Eleveté Invest Group SL, established in Madrid,

Antonio Bail Cajal, residing in Sant Cugat del Vallés (Spain),

Carlos Sobrini Marín, residing in Madrid,

Edificios 1326 de l'Hospitalet SL, established in Hospitalet de Llobregat (Spain),

Juan José Homs Tapias, residing in Manresa (Spain),

Anna María Torras Giro, residing in Manresa,

Marbore 2000 SL, established in Hospitalet de Llobregat,

Tristán González del Valle, residing in Madrid,

applicants at first instance,

European Commission, represented by L. Flynn, P. Němečková, A. Nijenhuis, A. Steiblytė and D. Triantafyllou, acting as Agents, and by A. Manzaneque Valverde and J. Rivas Andrés, abogados,

Single Resolution Board (SRB), represented by H. Ehlers, S. Fernández Rupérez, A.R. Lapresta Bienz and J.M. Rius Riu, acting as Agents, and by F.B. Fernández de Trocóniz Robles, abogado, and B. Meyring and S. Schelo, Rechtsanwälte,

defendants at first instance,

Kingdom of Spain, represented by L. Aguilera Ruiz and M.J. Ruiz Sánchez acting as Agents,

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

interveners at first instance,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz (Rapporteur), P.G. Xuereb, A. Kumin and I. Ziemele, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2024,

gives the following

Judgment

1 By their appeal, Ms Araceli García Fernández, Mr Faustino González Parra, Mr Fernando Luis Treviño de Las Cuevas, Mr Juan Antonio Galán Alcázar, Ms Lucía Palazuelo Vallejo-Nágera, Macon SA, Ms Marta Espejel García, Memphis Investments Ltd, Mr Pedro Alcántara de la Herrán Matorras, Mr Pedro José de Jesús Benito Trebbau López, Mr Pedro Regalado Cuadrado Martínez and Ms María Rosario Mari Juan Domingo ask the Court of Justice to set aside the judgment of the General Court of the European Union of 1 June 2022, *Eleveté Invest Group and Others* v *Commission and SRB* (T-523/17, EU:T:2022:313; 'the judgment under appeal'), by which the General Court dismissed their action seeking, first, annulment of Decision SRB/EES/2017/08 of the Executive Session of the Single Resolution Board (SRB) of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español SA ('the resolution scheme at issue') and Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español SA (OJ 2017 L 178, p. 15, and corrigendum OJ 2017 L 320, p. 31), second, to obtain compensation for the damage they sustained following those decisions and, third, to have the provisional valuation declared invalid and to obtain compensation.

I. Legal framework

A. Directive 2014/59/EU

2 Article 36 of 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), entitled 'Valuation for the purposes of resolution', provides in paragraphs 14 to 16 thereof that the European Banking Authority (EBA) is to develop draft regulatory technical standards to specify the criteria and conditions for carrying out the valuation of an institution or entity likely to be placed under resolution. That provision states that the EBA must submit those draft regulatory technical standards to the European Commission, which has the power to adopt them, in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12).

3 Articles 38 and 39 of that directive govern the application of the sale of business tool by national resolution authorities. Article 39 of that directive, entitled 'Sale of business tool: procedural requirements' provides:

'1. Subject to paragraph 3 of this Article, when applying the sale of business tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), a resolution authority shall market, or make arrangements for the marketing of the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer. Pools of rights, assets, and liabilities may be marketed separately.

2. Without prejudice to the [European] Union State aid framework, where applicable, the marketing referred to in paragraph 1 shall be carried out in accordance with the following criteria:

(a) it shall be as transparent as possible and shall not materially misrepresent the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer, having regard to the circumstances and in particular the need to maintain financial stability;

(b) it shall not unduly favour or discriminate between potential purchasers;

(c) it shall be free from any conflict of interest;

(d) it shall not confer any unfair advantage on a potential purchaser;

(e) it shall take account of the need to effect a rapid resolution action;

(f) it shall aim at maximising, as far as possible, the sale price for the shares or other instruments of ownership, assets, rights or liabilities involved.

Subject to point (b) of the first subparagraph, the principles referred to in this paragraph shall not prevent the resolution authority from soliciting particular potential purchasers.

…

3. The resolution authority may apply the sale of business tool without complying with the requirement to market as laid down in paragraph 1 when it determines that compliance with those requirements would be likely to undermine one or more of the resolution objectives and in particular if the following conditions are met:

(a) it considers that there is a material threat to financial stability arising from or aggravated by the failure or likely failure of the institution under resolution; and

(b) it considers that compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective referred to in point (b) of Article 31(2).

…’

B. The SRM Regulation

4 Recitals 7, 13 to 15, 24, 26, 52, 53, 58, 89 and 116 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) ('the SRM Regulation') read as follows:

'(7) As a first step towards a banking union, the single supervisory mechanism [("the SSM")] established 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)] is to ensure that the 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 the euro area Member States and those non-euro area Member States who choose to participate in the SSM … and that those credit institutions are subject to supervision of the highest quality.

…

(13) In order to restore trust and credibility in the banking sector, the European Central Bank (ECB) is currently conducting a comprehensive balance sheet assessment of all banks supervised directly. Such an assessment should assure all stakeholders that banks entering the SSM, and therefore falling within the scope of the [Single Resolution Mechanism (SRM)], are fundamentally sound and trustworthy.

(14) Following the establishment of the SSM by [Regulation No 1024/2013] pursuant to which banks in the participating Member States are supervised either centrally by the ECB or by the national competent authorities within the framework of the SSM, there is a misalignment between the Union supervision of such banks and the national treatment of those banks in the resolution proceedings pursuant to [Directive 2014/59] which will be addressed by the establishment of the SRM.

(15) This Regulation applies only in respect of 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]. The scope of application of this Regulation is linked to the scope of application of [Regulation No 1024/2013]. Indeed, bearing in mind the significant level to which the supervisory tasks attributed to the SSM and resolution action are interwoven, the establishment of a centralised system of supervision operated under Article 127(6) [TFEU] is fundamentally important to the process of harmonisation of resolution in participating Member States. The fact of being subject to supervision by the SSM constitutes a specific attribute that places the entities falling within the scope of application of [Regulation No 1024/2013] in an objectively and characterised distinct position for resolution purposes. It is necessary to adopt measures to create an SRM for all Member States participating in the SSM in order to facilitate the proper and stable functioning of the internal market.

…

(24) Since only institutions of the Union may establish the resolution policy of the Union and since a margin of discretion remains in the adoption of each specific resolution scheme, it is necessary to provide for the adequate involvement of the [European] Council and the Commission, as institutions which may exercise implementing powers, in accordance with Article 291 [TFEU]. The assessment of the discretionary aspects of the resolution decisions taken by the Board should be exercised by the Commission. Given the considerable impact of the resolution decisions on the financial stability of Member States and on the Union as such, as well as on the fiscal sovereignty of Member States, it is important that implementing power to take certain decisions relating to resolution be conferred on the Council. It should therefore be for the Council, on a proposal from the Commission, to exercise effective control on the assessment by the Board of the existence of a public interest and to assess any material change to the amount of the [Single Resolution Fund ("the Fund")] to be used in a specific resolution action. Moreover, the Commission should be empowered to adopt delegated acts to specify further criteria or conditions to be taken into account by the Board in the exercise of its different powers. Such a conferral of resolution tasks should not in any way hamper the functioning of the internal market for financial services. EBA should therefore maintain its role and retain its existing powers and tasks: it should develop and contribute to the consistent application of the Union legislation applicable to all Member States and enhance convergence of resolution practices across the Union as a whole.

…

(26) The ECB, as the supervisor within the SSM, and the Board, should be able to assess whether a credit institution is failing or is likely to fail and whether there is no reasonable prospect that any alternative private sector or supervisory action would prevent its failure within a reasonable timeframe. The Board, if it considers all the criteria relating to the triggering of resolutions to be met, should adopt the resolution scheme. The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union …

…

(52) The SRM should be based on the frameworks of [Regulation No 1024/2013] and of [Directive 2014/59]. Therefore, the Board should be empowered to intervene at an early stage where the financial situation or the solvency of an entity is deteriorating. The information that the Board receives from the national resolution authorities or the ECB at that stage is instrumental in making a determination on the action it might take in order to prepare for the resolution of the entity concerned.

(53) In order to ensure rapid resolution action when it becomes necessary, the Board should closely monitor, in cooperation with the ECB or with the relevant national competent authority, the situation of the entities concerned and the compliance of those entities with any early intervention measure taken in their respect. In determining whether a private sector action could prevent within a reasonable timeframe the failure of an entity, the appropriate authority should take into account the effectiveness of early intervention measures undertaken within a timeframe set by the competent authority.

…

(58) Liquidation of a failing entity under normal insolvency proceedings could jeopardise financial stability, interrupt the provision of essential services, and affect the protection of depositors. In such a case there is a public interest in applying resolution tools. The objectives of resolution should therefore be to ensure the continuity of essential financial services, to maintain the stability of the financial system, to reduce moral hazard by minimising reliance on public financial support to failing entities, and to protect depositors.

…

(89) In order to enhance the effectiveness of the SRM, the Board should closely cooperate with EBA in all circumstances. … Moreover, the Board should closely cooperate with the ECB and the other authorities empowered to supervise entities within the SSM, in particular for groups subject to the consolidated supervision by the ECB. To effectively manage the resolution process of failing banks, the Board should cooperate with the national resolution authorities at all stages of the resolution process. Thus, that cooperation is necessary not only for the implementation of resolution decisions taken by the Board, but also prior to the adoption of any resolution decision, at the stage of resolution planning or during the phase of early intervention. The Board should be able to cooperate with relevant resolution authorities and facilities financing direct or indirect public financial assistance.

…

(116) 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 Board, 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 Board 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.'

5 In accordance with the second subparagraph of Article 5(2) of the SRM Regulation, the SRB, like the Council and the Commission, is to be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Regulation No 1093/2010, and to the guidelines and recommendations issued by EBA under that regulation.

6 Article 14 of that regulation, entitled 'Resolution objectives', provides:

'1. When acting under the resolution procedure referred to in Article 18, the Board, the Council, the Commission, and, where relevant, the national resolution authorities, in respect of their respective responsibilities, shall take into account the resolution objectives, and choose the resolution tools and resolution powers which, in their view, best achieve the resolution objectives that are relevant in the circumstances of the case.

2. The resolution objectives referred to in paragraph 1 are the following:

(a) to ensure the continuity of critical functions;

(b) to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;

(c) to protect public funds by minimising reliance on extraordinary public financial support;

(d) to protect depositors covered by [Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149)] and investors covered by [Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ 1997 L 84, p. 22)];

(e) to protect client funds and client assets.

When pursuing the objectives referred to in the first subparagraph, the Board, 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.

3. Subject to different provisions of this Regulation, the resolution objectives are of equal significance, and shall be balanced, as appropriate, to the nature and circumstances of each case.'

7 Article 15 of the SRM Regulation, entitled 'General principles governing resolution' provides in paragraph 1 thereof:

'When acting under the resolution procedure referred to in Article 18, the Board, the Council, the Commission and, where relevant, the national resolution authorities, shall take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

(a) the shareholders of the institution under resolution bear first losses;

…'

8 Article 18 of that regulation, entitled 'Resolution procedure', provides:

'1. The Board shall adopt a resolution scheme pursuant to paragraph 6 in relation to entities and groups referred to in Article 7(2), and to the entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met, only when it assesses, in its executive session, on receiving a communication pursuant to the fourth subparagraph, or on its own initiative, 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 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 timeframe;

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

An assessment of the condition referred to in point (a) of the first subparagraph shall be made by the ECB, after consulting the Board. The Board, in its executive session, may make such an assessment only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.

Where the ECB assesses that the condition referred to in point (a) of the first subparagraph is met in relation to an entity or group referred to in the first subparagraph, it shall communicate that assessment without delay to the Commission and to the Board.

An assessment of the condition referred to in point (b) of the first subparagraph shall be made by the Board, in its executive session, or, where applicable, by the national resolution authorities, in close cooperation with the ECB. The ECB may also inform the Board or the national resolution authorities concerned that it considers the condition laid down in that point to be met.

2. Without prejudice to cases where the ECB has decided to exercise directly supervisory tasks relating to credit institutions pursuant to Article 6(5)(b) of [Regulation No 1024/2013], in the event of receipt of a communication pursuant to paragraph 1 or where the Board intends to make an assessment under paragraph 1 on its own initiative in relation to an entity or group referred to in Article 7(3), the Board shall communicate its assessment to the ECB without delay.

…

4. For the purposes of point (a) of paragraph 1, the entity shall be deemed to be failing or to be likely to fail in one or more of the following circumstances:

(a) the entity infringes, or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the ECB, including but not limited to the fact that the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;

(b) 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;

(c) 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;

(d) extraordinary public financial support is required except where, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, that extraordinary public financial support takes any of the following forms …

…

5. For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall 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 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

6. If the conditions laid down in paragraph 1 are met, the Board shall adopt a resolution scheme. The resolution scheme shall:

(a) place the entity under resolution;

(b) determine the application of the resolution tools to the institution under resolution referred to in Article 22(2), in particular any exclusions from the application of the bail-in in accordance with Article 27(5) and (14);

(c) determine the use of the Fund to support the resolution action in accordance with Article 76 and in accordance with a Commission decision taken in accordance with Article 19.

7. Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission.

Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall 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 of this paragraph.

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council:

(a) to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest referred to in paragraph 1(c);

(b) to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.

…

8. Where the Council objects to the placing of an institution under resolution on the ground that the public interest criterion referred to in paragraph 1(c) is not fulfilled, the relevant entity shall be wound up in an orderly manner in accordance with the applicable national law.

9. The Board shall ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme shall be addressed to the relevant national resolution authorities and shall instruct those authorities, which shall take all necessary measures to implement it in accordance with Article 29, by exercising resolution powers. Where State aid or Fund aid is present, the Board shall act in conformity with a decision on that aid taken by the Commission.

10. The Commission shall have the power to obtain from the Board any information which it deems to be relevant for performing its tasks under this Regulation. The Board shall have the power to obtain from any person, in accordance with Chapter 5 of this Title, any information necessary for it to prepare and decide upon a resolution action, including updates and supplements of information provided in the resolution plans.'

9 Under Article 19 of the SRM Regulation, entitled 'State aid and Fund aid':

'1. Where resolution action involves the granting of State aid pursuant to Article 107(1) TFEU or of Fund aid in accordance with paragraph 3 of this Article, the adoption of the resolution scheme under Article 18(6) of this Regulation shall not take place until such time as the Commission has adopted a positive or conditional decision concerning the compatibility of the use of such aid with the internal market.

…

3. To the extent that the resolution action as proposed by the Board involves the use of the Fund, the Board shall notify the Commission of the proposed use of the Fund. The Board's notification shall include all of the information necessary to enable the Commission to make its assessments pursuant to this paragraph.

…'

10 Article 20 of that regulation, entitled 'Valuation for the purposes of resolution', provides:

'1. Before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the Board 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 Board and the national resolution authority, and from the entity concerned.

2. Subject to paragraph 15, where all of the requirements laid down in paragraphs 1 and 4 to 9 are met, the valuation shall be considered to be definitive.

3. Where an independent valuation in accordance with paragraph 1 is not possible, the Board may carry out a provisional valuation of the assets and liabilities of the entity referred to in Article 2, in accordance with paragraph 10 of this Article.

4. The objective of the valuation shall be to assess the value of the assets and liabilities of an entity referred to in Article 2 that meets the conditions for resolution of Articles 16 and 18.

5. The purposes of the valuation shall be:

(a) to inform the determination of whether the conditions for resolution or the conditions for the write-down or conversion of capital instruments are met;

(b) if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in respect of an entity referred to in Article 2;

(c) when the power to write down or convert relevant capital instruments is applied, to inform the decision on the extent of the cancellation or dilution of instruments of ownership, and the extent of the write-down or conversion of relevant capital instruments;

(d) when the bail-in tool is applied, to inform the decision on the extent of the write-down or conversion of eligible liabilities;

(e) when the bridge institution tool or asset separation tool is applied, to inform the decision on the assets, rights, liabilities or instruments of ownership to be transferred and the decision on the value of any consideration to be paid to the institution under resolution or, as the case may be, to the owners of the instruments of ownership;

(f) 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 Board's understanding of what constitutes commercial terms for the purposes of Article 24(2)(b);

(g) in all cases, to ensure that any losses on the assets of an entity referred to in Article 2 are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised.

6. Without prejudice to the Union State aid framework, where applicable, the valuation shall be based on prudent assumptions, including as to rates of default and severity of losses. The valuation shall not assume any potential future provision of any extraordinary public financial support, any central bank emergency liquidity assistance, or any central bank liquidity assistance provided under non-standard [terms] …

7. The valuation shall be supplemented by the following information as appearing in the accounting books and records of an entity referred to in Article 2:

(a) an updated balance sheet and a report on the financial position of an entity referred to in Article 2;

(b) an analysis and an estimate of the accounting value of the assets;

(c) the list of outstanding on-balance-sheet and off-balance-sheet liabilities shown in the books and records of an entity referred to in Article 2, with an indication of the respective credits and priority of claims referred to in Article 17.

…

9. The valuation shall indicate the subdivision of the creditors in classes in accordance with the priority of claims referred to in Article 17 and an estimate of the treatment that each class of

shareholders and creditors would have been expected to receive, if an entity referred to in Article 2 were wound up under normal insolvency proceedings. That estimate shall not affect the application of the "no creditor worse off" principle referred to in Article 15(1)(g).

10. Where, due to urgency in the circumstances of the case, either it is not possible to comply with the requirements laid down in paragraphs 7 and 9, or paragraph 3 applies, a provisional valuation shall be carried out. The provisional valuation shall 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.

The provisional valuation referred to in the first subparagraph shall include a buffer for additional losses, with appropriate justification.

11. A valuation that does not comply with all of the requirements laid down in paragraphs 1 and 4 to 9 shall be considered to be provisional until an independent person as referred to in paragraph 1 has carried out a valuation that is fully compliant with all of the requirements laid down in those paragraphs. That *ex post* definitive valuation shall be carried out as soon as practicable. It may be carried out either separately from the valuation referred to in paragraphs 16, 17 and 18, or simultaneously with and by the same independent person as that valuation, but shall be distinct from it.

The purposes of the *ex post* definitive valuation shall be:

(a) to ensure that any losses on the assets of an entity referred to in Article 2 are fully recognised in the books of accounts of that entity;

(b) to inform the decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 12 of this Article.

12. 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 Board 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.

13. Notwithstanding paragraph 1, a provisional valuation conducted in accordance with paragraphs 10 and 11 shall be a valid basis for the Board to decide on resolution actions, including instructing national resolution authorities to take control of a failing institution or on the exercise of the write-down or conversion power of relevant capital instruments.

…

15. 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 Board.

16. For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, the Board shall ensure that a valuation is carried out by an independent person as referred to in paragraph 1 as soon as possible after the resolution action or actions have been effected. That valuation shall be distinct from the valuation carried out under paragraphs 1 to 15.

…'

11 Article 21 of that regulation, entitled 'Write-down and conversion of capital instruments', provides:

'1. The Board shall exercise the power to write down or convert relevant capital instruments acting under the procedure laid down in Article 18, in relation to the entities and groups referred to in Article 7(2), and to the entities and groups referred to in Article 7(4)(b) and (5), where the conditions for the application of those paragraphs are met, only where it assesses, in its executive session, on receiving a communication pursuant to the second subparagraph or on its own initiative, that one or more of the following conditions are met:

(a) where the determination has been made that the conditions for resolution specified in Articles 16 and 18 have been met, before any resolution action is taken;

(b) the entity will no longer be viable unless the relevant capital instruments are written down or converted into equity;

(c) in the case of relevant capital instruments issued by a subsidiary and where those relevant capital instruments are recognised for the purposes of meeting own funds requirements on an individual basis and on a consolidated basis, unless the write-down or conversion power is exercised in relation to those instruments, the group will no longer be viable;

(d) in the case of relevant capital instruments issued at the level of the parent undertaking and where those relevant capital instruments are recognised for the purposes of meeting own funds requirements on an individual basis at the level of the parent undertaking or on a consolidated basis, unless the write-down or conversion power is exercised in relation to those instruments, the group will no longer be viable;

(e) extraordinary public financial support is required by the entity or group, except in any of the circumstances set out in point (d)(iii) of Article 18(4).

The assessment of the conditions referred to in points (a), (c) and (d) of the first subparagraph shall be made by the ECB, after consulting the Board. The Board, in its executive session, may also make such assessment.

2. Regarding the assessment of whether the entity or group is viable, the Board, in its executive session, may make such an assessment only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of such information, does not make such an assessment. The ECB shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.

3. For the purposes of paragraph 1 of this Article, an entity referred to in Article 2 or a group shall be deemed to be no longer viable only if both of the following conditions are met:

(a) that entity or group is failing or is likely to fail;

(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any action, including alternative private sector measures or supervisory action (including early intervention measures), other than the write-down or conversion of relevant capital instruments, independently or in combination with resolution action, would prevent the failure of that entity or group within a reasonable timeframe.

4. For the purposes of point (a) of paragraph 3 of this Article, that entity shall be deemed to be failing or to be likely to fail where one or more of the circumstances referred to in Article 18(4) occur.

5. For the purposes of point (a) of paragraph 3, a group shall be deemed to be failing or to be likely to fail where the group infringes, or there are objective elements to support a determination that the group, in the near future, will infringe its consolidated prudential requirements in a way that would justify action by the ECB or the national competent authority, including but not limited to the fact that the group has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds.

…

9. Where one or more of the conditions referred to in paragraph 1 are met, and the conditions referred to in Article 18(1) are also met, the procedure laid down in Article 18(6), (7) and (8) shall apply.

…’

12 Article 22 of that regulation, entitled ‘General principles of resolution tools’, provides:

‘1. Where the Board decides to apply a resolution tool to an entity or group referred to in Article 7(2) or to an entity or group referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met, and that resolution action would result in losses being borne by creditors or their claims being converted, the Board shall instruct the national resolution authorities to exercise the power to write down and convert relevant capital instruments in accordance with Article 21 immediately before or together with the application of the resolution tool.

2. The resolution tools referred to in point (b) of Article 18(6) are the following:

(a) the sale of business tool;

(b) the bridge institution tool;

(c) the asset separation tool;

(d) the bail-in tool.

3. When adopting the resolution scheme referred to in Article 18(6), the Board shall take into consideration the following factors:

(a) the assets and liabilities of the institution under resolution on the basis of the valuation pursuant to Article 20;

(b) the liquidity position of the institution under resolution;

(c) the marketability of the franchise value of the institution under resolution in the light of the competitive and economic conditions of the market;

(d) the time available.

4. The resolution tools shall be applied to meet the resolution objectives specified in Article 14, in accordance with the resolution principles specified in Article 15. They may be applied either individually or in any combination, except for the asset separation tool which may be applied only together with another resolution tool.

…'

13 Article 24 of the SRM Regulation, entitled 'Sale of business tool', provides:

'1. Within the resolution scheme, the sale of business tool shall consist of the transfer to a purchaser that is not a bridge institution of the following:

(a) instruments of ownership issued by an institution under resolution; or

(b) all or any assets, rights or liabilities of an institution under resolution.

2. Concerning the sale of business tool, the resolution scheme shall establish:

(a) the instruments, assets, rights and liabilities to be transferred by the national resolution authority in accordance with Article 38(1) and (7) to (11) of [Directive 2014/59];

(b) the commercial terms, having regard to the circumstances and the costs and expenses incurred in the resolution process, pursuant to which the national resolution authority shall make the transfer in accordance with Article 38(2), (3) and (4) of [Directive 2014/59];

(c) whether the transfer powers may be exercised by the national resolution authority more than once in accordance with Article 38(5) and (6) of [Directive 2014/59];

(d) the arrangements for the marketing by the national resolution authority of that entity or those instruments, assets, rights and liabilities in accordance with Article 39(1) and (2) of [Directive 2014/59];

(e) whether the compliance with the marketing requirements by the national resolution authority is likely to undermine the resolution objectives in accordance with paragraph 3 of this Article.

3. The Board shall apply the sale of business tool without complying with the marketing requirements laid down in point (e) of paragraph 2 when it determines that compliance with those requirements would be likely to undermine one or more of the resolution objectives and in particular where the following conditions are met:

(a) it considers that there is a material threat to financial stability arising from or aggravated by the failure or likely failure of the institution under resolution; and

(b) it considers that compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective specified in point (b) of Article 14(2).'

14 Article 29 of that regulation governs the implementation, by the national resolution authorities and the SRB, of decisions taken under that regulation and provides, in the first sentence of paragraph 5, that the SRB is to publish on its official website either a copy of the resolution scheme or a notice summarising the effects of the resolution action, and in particular the effects on retail customers.

15 Paragraph 2 of Article 30 of that regulation, entitled 'Obligation to cooperate and information exchange within the SRM', provides:

'In the exercise of their respective responsibilities under this Regulation, the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks.'

16 Article 76(1)(b) of the SRM Regulation provides that, within the resolution scheme, the SRB may use the Single Resolution Fund, to the extent necessary to ensure the effective application of the resolution tools, for the purpose of making loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle.

17 Under Article 88 of that regulation, entitled 'Professional secrecy and exchange of information':

'1. Members of the Board, the Vice-Chair, the members of the Board referred to in Article 43(1)(b), the staff of the Board 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.

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.

Those requirements shall also apply to potential purchasers contacted in order to prepare for the resolution of an entity pursuant to Article 13(3).

2. The Board shall ensure that individuals who provide any service, directly or indirectly, permanently or occasionally, relating to the discharge of its duties, including officials and other persons authorised by the Board or appointed by the national resolution authorities to conduct on-site inspections, are subject to the requirements of professional secrecy equivalent to those referred to in paragraph 1.

…

5. Before any information is disclosed, the Board 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.

…'

18 Article 90 of the SRM Regulation, entitled 'Access to documents', is worded as follows:

'1. [Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43)] shall apply to documents held by the Board.

…

4. Persons who are the subject of the Board's decisions shall be entitled to have access to the Board'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 Board.'

19 Article 91 of that regulation provides that, as regards classified and sensitive non-classified information, the SRB is to apply the security principles contained in the Commission's security rules for protecting such information.

C. The draft regulatory technical standards

20 On 23 May 2017, the EBA adopted, on the basis of Article 36(14) and (15) of Directive 2014/59, draft Regulatory Technical Standards EBA/RTS/2017/05 on valuation for the purposes of resolution ('the draft regulatory technical standards'), to specify the criteria on the basis of which valuations carried out during a resolution procedure must be conducted.

21 Under Article 2(3) of the draft regulatory technical standards:

'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.'

22 Article 8 of those draft regulatory technical standards, entitled 'Areas requiring particular attention in the valuation', is worded as follows:

'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, as laid down in Article 2(3). Those areas shall include:

(a) 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;

…'

II. Background to the dispute

23 Banco Popular Español SA ('Banco Popular') was a Spanish credit institution under direct prudential supervision by the ECB.

24 The appellants were shareholders in, or held Additional Tier 1 or Tier 2 capital instruments issued by, Banco Popular before a resolution scheme was adopted in respect of the latter.

A. The changes to Banco Popular's economic situation in 2016 and 2017

25 The facts concerning the changes to Banco Popular's economic situation in 2016 and 2017, which are set out in paragraphs 25 to 46 of the judgment under appeal, may be summarised as follows.

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 the SRM Regulation.

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 of the present judgment, 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 Following that announcement, DBRS Morningstar, 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.

32 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.

33 In April 2017, Banco Popular initiated a private sale process with a view to achieving its sale to a strong competitor, thus restoring its financial situation. The deadline for potential purchasers interested in acquiring Banco Popular to submit their bids was initially set at 10 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 (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 Ratings Ltd 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.

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

42 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.

B. The conduct of the resolution procedure

43 In paragraphs 47 to 67 of the judgment under appeal, the General Court set out the facts relating to the conduct of the resolution procedure, which may be summarised as follows.

44 On 23 May 2017, the SRB hired the auditing firm Deloitte ('Deloitte') as an independent expert to carry out a valuation of Banco Popular in accordance with Article 20 of the SRM Regulation.

45 On 24 May 2017, on the basis of Article 34 of the SRM Regulation, 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.

46 On 3 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/06, addressed to the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring, Spain ('the FROB')), 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.

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

48 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, signed a non-disclosure agreement and on 5 June 2017 were given access to the virtual data room.

49 On 5 June 2017, the SRB adopted a first valuation ('valuation 1'), pursuant to Article 20(5)(a) of the SRM Regulation, which had the objective of informing the determination whether the conditions for resolution, as defined in the first subparagraph of Article 18(1) of that regulation, were met.

50 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 that regulation.

51 It is apparent from paragraph 61 of the judgment under appeal that, following that assessment, taking into account the changes to Banco Popular's economic situation in 2016 and 2017, as summarised in paragraphs 26 to 42 of the present judgment, and 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 point (a) of the first subparagraph of Article 18(1) and point (c) of the first subparagraph of Article 18(4) of the SRM Regulation.

52 On the same day, Banco Popular informed the ECB that its Board of Directors had reached the conclusion that the bank was likely to fail.

53 The facts relating to the sale process, as set out in paragraphs 63 to 67 of the judgment under appeal, may be presented as follows.

54 By letter of 6 June 2017, the FROB provided information on the sale process and set the deadline for the submission of bids at midnight on 6 June 2017.

55 On the same day, Banco Bilbao Vizcaya Argentaria, one of the two potential buyers of Banco Popular, informed the FROB that it would not be making a bid.

56 Also on 6 June 2017, Deloitte submitted a second valuation ('valuation 2') to the SRB, drawn up pursuant to Article 20(10) of the SRM Regulation. 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.

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

58 By letter of 7 June 2017, the FROB informed the SRB that Banco Santander had submitted a bid at 03:12 on 7 June and that the price offered by Banco Santander for the purchase 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 at issue

59 On 7 June 2017, the SRB adopted the resolution scheme at issue in respect of Banco Popular, on the basis of the SRM Regulation.

60 In recitals 19, 21 to 25, 26(c), 36 and 46 of that scheme, the SRB observed:

– that, on 5 December 2016, the SRB adopted a resolution plan, determining a resolution strategy and identifying a preferred resolution tool (recitals 19, 21 and 22);

– that it was clear from the ECB's 'failing or likely to fail' assessment of Banco Popular that that bank's liquidity situation had significantly deteriorated since October 2016, as a result of withdrawals of deposits across all customer segments; that as a result, the bank did not have sufficient options to restore its liquidity position in order to ensure that it would be in a position to meet its liabilities as they fell due (recital 23);

– that various circumstances had led to the rapid deterioration in Banco Popular's liquidity position, namely:

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

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

– on 3 April 2017, Banco Popular released an ad hoc public statement reporting on the outcome of several internal audits with a potentially significant impact on the bank's financial statements, and confirmed that its CEO would be replaced after less than one year in office;

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

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

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

– on 6 June 2017, DBRS and Moody's had downgraded Banco Popular's rating (recital 24);

– that the above circumstances resulted in significant deposit outflows (recital 25);

– that Banco Popular had received initial emergency liquidity assistance on 5 June 2017, following the agreement given by the ECB, but that the Bank of Spain had not been in a position to grant Banco Popular further emergency liquidity assistance (recital 26(c));

– that on 6 June 2017, Banco Popular had informed the ECB that its Board of Directors had reached the conclusion that the bank was likely to fail (recital 36); and

– that the resolution tool contemplated in the 2016 resolution plan was not appropriate in view of the circumstances prevailing on the date of the resolution (recital 46).

61 In Article 1 of the resolution scheme at issue, given that the conditions provided for in the first subparagraph of Article 18(1) of the SRM Regulation had been met, the SRB decided to place Banco Popular under resolution as of the resolution date.

62 In that regard, it is apparent from Articles 2 to 4 of the resolution scheme at issue that the SRB considered, first of all, that Banco Popular was failing or was likely to fail, second, that there were no alternative measures which could prevent the failure of Banco Popular within a reasonable timeframe and, lastly, that resolution action in the form of a sale of business tool in respect of Banco Popular was necessary in order to achieve the continuity of the bank's critical functions and to avoid significant adverse effects on financial stability, particularly in Spain.

63 Consequently, in Article 5.1 of the resolution scheme at issue, the SRB decided that:

'The resolution tool to be applied to [Banco Popular] shall consist in the sale of business pursuant to Article 24 of [the SRM Regulation] 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.'

64 Article 6 of the resolution scheme at issue sets out the rules concerning the write-down and the sale of business. Thus, in Article 6.1 thereof, 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 at issue 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').

65 Article 6.3 of the resolution scheme at issue provides that those write-down and conversion measures are based on valuation 2, as supported by the results of an open and transparent sale process conducted by the FROB.

66 In Article 6.5 of the resolution scheme at issue, the SRB stated that it was exercising the powers conferred on it by Article 24(1)(a) of the SRM Regulation 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.

67 In Article 6.6 of that resolution scheme, the SRB stated that the ordering of the transfer was both necessary and adequate, specifying that, in order to arrive at that assessment, it determined, first, that the sale process for Banco Popular initiated by the FROB prior to the adoption of that scheme complied with the requirements of Article 24 of the SRM Regulation, read together with Article 39 of Directive 2014/59, second, that the FROB had ultimately invited two potential purchasers to make bids and, third, that in the end, only one valid offer had been received.

68 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.

69 The resolution scheme at issue was submitted to the Commission for endorsement on 7 June 2017.

70 On the same day, the Commission adopted Decision 2017/1246 endorsing the resolution scheme at issue and notified it to the SRB. Recital 4 of that decision 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 18(5) of [the SRM] Regulation.'

71 Also on 7 June 2017, the SRB notified the resolution scheme at issue to the FROB, publishing on its website an information notice regarding the adoption of that scheme, together with a document summarising the effects of the resolution.

72 Also on that date, the FROB adopted the necessary measures to implement the resolution scheme at issue in accordance with Article 29 of the SRM Regulation.

D. Facts subsequent to the adoption of the resolution scheme at issue

73 On 14 June 2018, Deloitte sent to the SRB the valuation of difference in treatment, provided for in Article 20(16) to (18) of the SRM Regulation, 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.

74 On 11 July 2017, the SRB published on its website a non-confidential version of the resolution scheme at issue. In that version, the SRB, inter alia, redacted some of the data from recitals 23 to 26 of that scheme, relating to Banco Popular's liquidity crisis, as well as substantial parts of Article 6.3 and 6.4 of the resolution scheme at issue concerning the exercise of the power to write down and convert capital instruments.

75 In July 2017, the ECB published on its website a non-confidential version of its assessment that Banco Popular was failing or likely to fail.

76 On 2 February and 31 October 2018, the SRB published less redacted, non-confidential, versions of the resolution scheme at issue, in which some previously redacted data, referred to in paragraph 74 of the present judgment were now included, with the exception of certain figures. In that context, it also published non-confidential versions of valuations 1 and 2.

III. The procedure before the General Court and the judgment under appeal

77 By application lodged at the Registry of the General Court on 7 August 2017, the appellants brought an action seeking, first, the annulment of the resolution scheme at issue and of Decision 2017/1246, second, to obtain compensation for the damage they sustained following those decisions and, third, to have valuation 2 declared invalid and to obtain compensation.

A. The procedure before the General Court

78 By a document lodged at the Registry on 31 October 2017, the SRB requested the General 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 to that request. By decision of 28 November 2017, the General Court decided not to grant that request for measures of inquiry at that stage in the proceedings.

79 On 16 February 2018, in the context of measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, the General 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.

80 By decisions of 12 April 2019, the General Court granted the Kingdom of Spain and Banco Santander leave to intervene in support of the form of order sought by the Commission and the SRB and granted the requests for confidential treatment filed by the appellants in respect of them.

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

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

83 By letter lodged at the Registry of the General Court on 9 October 2020, the appellants, once more, offered further evidence pursuant to that same provision of its Rules of Procedure. The Commission, the SRB, the Kingdom of Spain and Banco Santander submitted observations on that further evidence within the prescribed time limit.

84 On 16 March 2021, the General Court, in the context of the measures of organisation of procedure provided for in Article 89 of its 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 General Court adopted a measure of inquiry to that effect.

85 By order of 12 May 2021, the General 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 its Rules of Procedure, to produce the full versions of the resolution scheme at issue, 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 General Court also ordered the SRB to produce the non-confidential version of the ECB's letter of 18 May 2017 to Banco Popular.

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

B. The judgment under appeal

87 In support of their first head of claim, seeking annulment of the resolution scheme at issue and of Decision 2017/1246, the appellants raised four pleas in law. The first plea alleged infringement of Article 18 of the SRM Regulation. The second plea alleged infringement of Article 20 of that regulation. The third plea alleged 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'). The fourth plea alleged infringement of the obligation to state reasons. In their observations on the statements in intervention, the appellants also raised a new plea alleging infringement of Article 24 of the SRM Regulation.

88 By their second head of claim, the appellants asked the General Court to order the SRB and the Commission to pay them damages on grounds of non-contractual liability. The appellants raised two separate claims for damages. The first was based on the annulment of the resolution scheme at issue and of Decision 2017/1246, and the second was independent of that annulment.

89 By their third head of claim, the appellants sought the annulment of valuation 2 and claimed that they were entitled to compensation.

90 By the judgment under appeal, the General Court dismissed the action in its entirety.

91 In that judgment, it also refused the appellants' requests for measures of organisation of procedure and measures of inquiry.

IV. Forms of order sought by the parties to the appeal

92 The appellants claim that the Court of Justice should:

– set aside the judgment under appeal;

– grant the form of order sought by them before the General Court, seeking the annulment of the resolution scheme at issue and of Decision 2017/1246 and, consequently, order the Commission and the SRB to reimburse their investments in Banco Popular or, alternatively, order the Commission and the SRB to pay them compensation based on their non-contractual liability;

– order the Commission and the SRB to pay them compensation based on their non-contractual liability, irrespective of whether or not the resolution scheme at issue and Decision 2017/1246 are annulled;

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

– order the Commission and the SRB to pay the costs at first instance and on appeal;

– order that compensatory interest be added to the sums awarded from 23 May 2017 or, in the alternative, from 7 June 2017 until the date of delivery of the present judgment, together with default interest from the date of the present judgment, with the exception of the costs of the present proceedings, which will only accrue default interest from the date of the present judgment;

– grant them any other additional compensation deemed appropriate.

93 The Commission, the SRB, the Kingdom of Spain and Banco Santander contend that the Court should dismiss the appeal and order the appellants to pay the costs.

94 Should the Court uphold the appeal and decide, in accordance with Article 61 of the Statute of the Court of Justice of the European Union, to give judgment itself on the action for annulment, Banco Santander contends that it should, in accordance with the second paragraph of Article 264 TFEU, limit the scope of its judgment by upholding the effects of the sale of Banco Popular to Banco Santander.

V. The appeal

95 In support of their appeal, the appellants raise four grounds of appeal. The first and second grounds of appeal allege infringements of Article 18 of the SRM Regulation and of Article 20 of that regulation respectively. By the third and fourth grounds of appeal, the appellants challenge the validity of the General Court's rejection of their claims for compensation.

A. Preliminary observations

96 As a preliminary point, it should be noted that, by the action giving rise to the present appeal, the appellants seek the annulment of both the resolution scheme at issue and Decision 2017/1246.

97 Although the Court has already held, in its judgment of 18 June 2024, *Commission* v *SRB* (C-551/22 P, EU:C:2024:520, paragraphs 102 and 103), that the resolution scheme at issue does not constitute a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU, with the result that an action is inadmissible in so far as it relates to that scheme, Decision 2017/1246, by which the Commission endorsed that scheme, displays the features of an act against which an action for annulment may be brought under the fourth paragraph of Article 263 TFEU.

98 That said, the Court has stated that, in an action for annulment brought against a Commission decision such as Decision 2017/1246, it is open to the natural or legal persons concerned to plead the illegality of the resolution scheme approved by that institution, thereby giving it binding legal effect, which is capable of guaranteeing them sufficient judicial protection. Furthermore, the Commission is, by that approval, deemed to endorse the information and grounds contained in that scheme, with the result that it must, if necessary, answer to the EU judicature (judgment of 18 June 2024, *Commission* v *SRB*, C-551/22 P, EU:C:2024:520, paragraph 96 and the case-law cited).

99 It is against that background that it is necessary, therefore, to examine the grounds of appeal challenging the legality of the resolution scheme at issue.

B. The fifth part of the second ground of appeal, alleging infringement of Article 90 of the SRM Regulation, and Articles 17, 41 and 52 of the Charter, read together with Article 1 of Protocol No 1 to the ECHR, and the sixth part of that ground of appeal, alleging breach of the obligation to state reasons referred to in Article 296 TFEU

100 By the fifth and sixth parts of the second ground of appeal, which it is appropriate to examine in the first place, the appellants submit, in essence, that access to the full version, in particular, of the resolution scheme at issue and of valuations 1 and 2 was necessary in order to exercise their right

to an effective remedy (fifth part of that ground of appeal), and that the statement of reasons for the resolution scheme at issue, valuation 2 and Decision 2017/1246 was inadequate because of the information redacted from those documents (sixth part of that ground of appeal).

1. The fifth part of the second ground of appeal

101 By the fifth part of the second ground of appeal, the appellants allege an infringement of their right of access to the file under Article 90 of the SRM Regulation and Articles 17, 41 and 52 of the Charter, read together with Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952 ('Protocol No 1 to the ECHR'). That part is divided into four complaints.

(a) Arguments of the parties

102 In the first place, the appellants submit that, in paragraphs 503 and 504 of the judgment under appeal, the General Court relied on a misinterpretation of Article 90 of the SRM Regulation, in so far as it held that the right of access to the file guaranteed by that article concerns only the entity which is the subject of the resolution decision. The Spanish ('*personas sujetas a las decisiones*'), English ('*persons who are the subject of*') and Portuguese ('*pessoas sujeitas às decisões*') versions of that provision do not refer to the subject of the resolution decision, but refer to persons who are subject to such a decision. In addition, Article 41(2)(b) of the Charter also guarantees the right of every person to have access to his or her file.

103 In the second place, an infringement of the right of access to the file during the administrative procedure prior to the adoption of a decision cannot be remedied during the judicial proceedings and may cause that decision to be annulled if the rights of defence have been infringed. The fact that they had to initiate legal proceedings without being able to access the file infringed the appellants' rights of defence, particularly since they still did not have access to the complete file.

104 In the third place, in paragraphs 505 and 515 of the judgment under appeal, the General Court refused, relying inter alia on Article 41(2)(b) of the Charter and Article 90(4) of the SRM Regulation, to grant access to certain information contained in the resolution scheme at issue, valuation 2 and other preparatory documents, on the ground that it was confidential. However, observance of the right of access to the file is required even where the applicable legislation does not expressly provide for such a procedural requirement.

105 In the fourth and last place, according to the case-law referred to in paragraph 475 of that judgment, a limitation of the right to be heard of the persons concerned would constitute a disproportionate and intolerable intervention only if the interested parties were given no opportunity to contest those measures in subsequent proceedings and to make their views known effectively at that stage. Contrary to what the General Court held in that paragraph, such an opportunity would arise only if the parties have full access to the file. Furthermore, it follows from the case-law of the European Court of Human Rights that, under Article 1 of Protocol No 1 to the ECHR, there is a requirement for adversarial proceedings that comply with the principle of equality of arms in all procedures requiring a renunciation of the right to property.

106 The Commission contends that the fifth part of the second ground of appeal is inadmissible on the ground that the arguments put forward in the appeal are not sufficiently clear and precise. The SRB considers that the argument alleging that there is a discrepancy between the language versions of Article 90(4) of the SRM Regulation is inadmissible. In any event, the fifth part of the second ground of appeal is unfounded.

107 The SRB, the Kingdom of Spain and Banco Santander contend that that part is unfounded.

(b) Findings of the Court

108 As regards the admissibility of the fifth part of the second ground of appeal, it must be observed that, notwithstanding a certain degree of imprecision, the arguments put forward make it possible to understand that the appellants rely, under Article 90(4) of the SRM Regulation and Articles 17, 41 and 52 of the Charter, read together with Article 1 of Protocol No 1 to the ECHR, on the right to access the full versions of the resolution scheme at issue, of valuation 2 and of other preparatory documents.

109 More specifically, they criticise, first, the findings in paragraphs 497 to 504 of the judgment under appeal, by which the General Court rejected their argument that they had been denied a right of access to Banco Popular's resolution file and, second, the findings in paragraphs 505 and 515 of that judgment, by which the General Court held that, contrary to what the appellants submitted, the fact that the file contained confidential information meant that they could not be granted full access to that file.

110 The argument alleging that there is a discrepancy between the language versions of Article 90(4) of the SRM Regulation refers specifically to paragraphs 503 and 504 of the judgment under appeal and must be regarded as a criticism of the General Court's assessment in those paragraphs. An appellant is entitled to lodge an appeal relying on grounds which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgment of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 77 and the case-law cited).

111 The objection of admissibility raised by the Commission and the SRB against the fifth part of the second ground of appeal must therefore be rejected.

112 As regards the substance, it is apparent from the findings in paragraphs 497 to 504 of the judgment under appeal that, in order to reject the argument alleging infringement of the right of access to all the information in the file, the General Court relied both on the inapplicability *ratione personae* of Article 90(4) of the SRM Regulation and on the presence, in the file, of confidential information. It must be held that each of those considerations is, in itself, capable of justifying the decision of the General Court.

113 In the first place, as regards the question whether the General Court was fully entitled to hold that the obligation of confidentiality may preclude access to the full versions of the resolution scheme at issue, of valuation 2 and of other preparatory documents, it must be recalled that Article 90(4) of the SRM Regulation provides that persons who are the subject of the SRB's decisions are entitled to have access to the SRB's file, while specifying, first, that their right is subject to the legitimate interest of other persons in the protection of their business secrets and, second, that that right does not extend to confidential information or internal preparatory documents of the SRB. In addition, it is important to note that all the institutions are under a duty to exercise their

powers in accordance with the general principles of EU law, in particular the principle of good administration, which is now expressly enshrined in Article 41 of the Charter, paragraph (2)(b) of which guarantees the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy (see, to that effect, judgment of 12 May 2022, *Klein* v *Commission*, C-430/20 P, EU:C:2022:377, paragraph 87).

114 It is apparent from the very wording of those provisions that the right of access to the file is limited by the need to protect confidential information. The limitation of that right reflects the obligation of confidentiality enshrined in Article 339 TFEU. In that regard, the Court has already held that EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given inter alia in Article 339 TFEU, not to disclose to the competitors of a private operator confidential information which that operator has provided (judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 109 and the case-law cited).

115 However, under the system put in place by the SRM Regulation, compliance with the requirements of professional secrecy provided for in Article 339 TFEU is clarified not only by the caveat expressed in Article 90(4) of the SRM Regulation, but also by the second subparagraph of Article 88(1) thereof, which prohibits the SRB from disclosing information which is subject to those requirements to another public or private entity, except where such disclosure is due for the purpose of legal proceedings. As stated in Article 88(5) of the regulation, before any information is disclosed, the SRB is required to ensure that it does not contain confidential information.

116 In the present case, the General Court found in paragraph 525 of the judgment under appeal, which has not been challenged in the appeal, that where the General Court orders the production of documents, that does not guarantee applicants access to all of those documents if they contain confidential information.

117 In those circumstances, it must be held that the General Court did not err in law, in paragraphs 505, 506, 515 and 527 of the judgment under appeal, in holding that the appellants could not rely on a right of access to the full versions of the resolution scheme at issue, valuation 2 and other preparatory documents, in so far as those full versions contained confidential information.

118 Contrary to the appellants' submissions, the right to an effective remedy does not require full access to the file if the file contains confidential information.

119 In that regard, admittedly, it is settled case-law that if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information, so as to make it possible for him or her to defend his or her rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the decision in question (see, to that effect, judgments of

4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 53 and the case-law cited, and of 24 November 2020, *Minister van Buitenlandse Zaken*, C-225/19 and C-226/19, EU:C:2020:951, paragraph 43).

120 However, the Court has also held, in several fields of EU law, that the statement of reasons for an act adversely affecting an individual, which is premissed on a balancing of the relative position of private operators, may, to a certain extent, be limited in order to protect information relating to the operators which may be regarded as a business secret. That said, the obligation to respect business secrecy must not deprive the obligation to state reasons of its essence. Therefore, although such a measure may, in the light of the obligation to respect business secrecy, be sufficiently reasoned without including, inter alia, all the figures on which the reasoning is based, the statement of reasons must nevertheless disclose in a clear and unequivocal fashion that reasoning and the methodology used (see, to that effect, judgments 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; of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 48; and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraphs 110, 111 and 120).

121 Accordingly, where confidential information is involved, Article 47 of the Charter does not confer on the person concerned a right of access to the entire file, provided that the conditions referred to in paragraphs 119 and 120 of the present judgment are met.

122 In paragraph 526 of the judgment under appeal, the General Court stated, without being contradicted in the appeal, that the information which remained redacted in the non-confidential versions of the resolution scheme, valuation 2 and other preparatory documents was not relevant to the outcome of the dispute.

123 As regards, lastly, Articles 17 and 52 of the Charter and Article 1 of Protocol No 1 to the ECHR, it should be recalled that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, constitute general principles of EU law and whilst Article 52(3) of the Charter provides that rights contained in the Charter which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms are to have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law. Thus, the review of the legality of EU measures must be carried out solely in the light of the fundamental rights guaranteed by the Charter, in particular Article 17 thereof (see, to that effect, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraphs 45 and 46 and the case-law cited).

124 The right to property enshrined in Article 17 of the Charter, read together with Article 51(1) thereof, cannot be interpreted as granting the person concerned access to information in the file which goes beyond the requirements arising from the case-law referred to in paragraphs 119 and 120 of the present judgment.

125 In the light of the foregoing considerations, it must be held that the General Court was fully entitled to hold that the appellants did not have a right of access to the full versions of the resolution scheme at issue, valuation 2 and other preparatory documents.

126 As is apparent from paragraph 112 of the present judgment, even if the appellants' argument that, as shareholders of the entity under resolution, they could claim the right guaranteed by Article 90(4) of the SRM Regulation were well founded, it cannot call into question the legality of the decision of the General Court referred to in the previous paragraph, with the result that that argument must be rejected as ineffective.

127 It follows that the fifth part of the second ground of appeal is in part unfounded and in part ineffective.

2. The sixth part of the second ground of appeal

128 By the sixth part of the second ground of appeal, the appellants submit that the General Court erred in law in its examination of whether the resolution scheme at issue, valuation 2 and Decision 2017/1246 complied with the obligation to state reasons laid down in Article 296 TFEU.

(a) Arguments of the parties

129 In the first place, the appellants claim that the statement of reasons contained in the resolution scheme at issue is inadequate.

130 First of all, they argue that, in paragraphs 543 and 545 of the judgment under appeal, the General Court wrongly considered that the statement of reasons for that the scheme gave sufficient reasons for the finding that Banco Popular was failing or likely to fail, although the SRB had not examined other viable solutions. In addition, the SRB simply stated, without further explanation, that other solutions would not solve Banco Popular's liquidity problems. Furthermore, the SRB did not provide any reasons for choosing the sale of business tool, nor did it explain why this tool would be the best solution. In that context, they also submit that, contrary to the General Court's findings in paragraphs 556 and 557 of the judgment under appeal, the SRB should have stated the reasons why it considered that the remaining balance of the emergency liquidity assistance referred to in those paragraphs would no longer be paid.

131 Next, they assert that the General Court wrongly held, in paragraphs 536 to 540 of the judgment under appeal, that the facts set out in Article 6.6 of that scheme justified launching the public sale procedure in respect of Banco Popular. In that regard, they criticise, in essence, the lack of any indication as to why all the interested parties, with the exception of Banco Santander, had refrained from submitting a bid. In addition, the SRB should have specified in the resolution scheme at issue the reason why the FROB had not granted one of those parties additional time to submit its bid. Moreover, there is no explanation of how Banco Popular's sale price was set.

132 Furthermore, contrary to what the General Court held in paragraph 553 of the judgment under appeal, the statement of reasons relating to the 2016 resolution plan, contained in recitals 44 to 46 of the resolution scheme at issue, was insufficient. Those recitals do not address that plan's provisions concerning a contingency plan which would generate liquidity rapidly and create a scenario in which the bank could survive a liquidity crisis for four months, whereas, according to the appellants, those provisions could have addressed liquidity problems.

133 Lastly, the resolution scheme at issue should also have explained, contrary to the findings in paragraph 551 of the judgment under appeal, the reasons why Deloitte satisfied the requirements of independence and impartiality.

134 In the second place, the appellants claim that valuation 2 does not comply with the requirements of Article 296 TFEU. They argue that, contrary to what the General Court found in paragraph 558 of the judgment under appeal, it is apparent from paragraph 82(iv) and (viii) of their reply at first instance that they had already called into question specific redactions concerning the valuation of provisions for legal contingencies and synergies.

135 In the non-confidential version of valuation 2, passages which were key to understanding Banco Popular's valuation were redacted, namely, in the first part, certain calculations and the total value of the assets relating to provisions for legal contingencies, to joint ventures and to synergies, in the second part, the subtotal of each asset valued and the total recovery amounts for creditors in the best and worst case scenarios in the event of insolvency, as well as significant parts of the annexes. According to the appellants, those redactions far exceeded what was permissible in view of the obligation to state reasons, as follows from the case-law referred to in paragraph 565 of the judgment under appeal, and cannot be justified by the obligation of confidentiality referred to in paragraph 566 of that judgment.

136 In the third place, Commission Decision 2017/1246 also fails to comply with the obligation to state reasons. First, the General Court wrongly held, in paragraphs 576 and 577 of the judgment under appeal, that a decision, such as that in the present case, by which the Commission merely endorses the content of the SRB decision, is sufficiently reasoned, having regard to the very short period of time available to it.

137 Second, the appellants criticise paragraphs 580 to 583 of the judgment under appeal, by which the General Court held that their argument alleging 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), constituted a new plea which had to be rejected as inadmissible. In paragraph 153 of their application at first instance, they relied on that case-law in relation to the Commission's duty of review and the absence of a statement of reasons for a purely tacit decision of the Commission.

138 The Commission and Banco Santander contend that the sixth part of the second ground of appeal is inadmissible on the ground that the appellants merely repeat the arguments relied on at first instance and that they do not identify precisely which paragraphs of the judgment under appeal are being contested. In any event, that sixth part is unfounded.

139 The SRB and the Kingdom of Spain contend that that part is unfounded.

(b) Findings of the Court

(1) Admissibility

140 As regards, first of all, the objection of admissibility raised by the Commission and the SRB, it should be recalled that, in accordance with settled case-law, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of that appeal, failing which the appeal or ground of appeal concerned will be inadmissible. An appeal which, without even including an argument

specifically identifying the error of law allegedly vitiating the judgment or order under appeal, merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by the General Court, does not satisfy the requirement to state reasons under those provisions. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (judgment of 11 January 2024, *Planistat Europe and Charlot* v *Commission*, C-363/22 P, EU:C:2024:20, paragraphs 40 and 41 and the case-law cited).

141 However, provided that an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. If an appellant could not thus base his or her appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (judgments of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 51, and of 9 July 2020, *Haswani* v *Council*, C-241/19 P, EU:C:2020:545, paragraph 50 and the case-law cited).

142 In the present case, the sixth part of the second ground of appeal seeks, in essence, to call into question the General Court's decision on the questions of law which were submitted to it at first instance as regards, inter alia, the obligation to state reasons on the part of institutions under Article 296 TFEU. Furthermore, in so far as the sixth part of that ground of appeal contains precise indications regarding the contested paragraphs of the judgment under appeal and the arguments upon which it is based, it cannot be declared inadmissible in its entirety.

143 That said, the first complaint is inadmissible in part, in so far as the appellants dispute the adequacy of the statement of reasons relating to the 2016 resolution plan. Although the appellants had, as is apparent from paragraph 552 of the judgment under appeal, claimed that there was a failure to state reasons, first, as regards the resolution strategy and resolution tool envisaged in that plan and, second, as to why that plan was not followed, they now submit that that plan provided for mechanisms that would have prevented the failure of Banco Popular. In so doing, they are putting forward a new argument which must, on that basis, be declared inadmissible at the appeal stage.

144 As regards the second complaint, as stated by Advocate General Ćapeta in point 61 of her Opinion in *Aeris Invest* v *Commission and SRB* (C-535/22 P, EU:C:2024:233) which, in accordance with point 4 thereof, must be read together with her Opinion in the present case, the appellants' claims in relation to valuation 2 constitute a new argument raised at the appeal stage, in so far as the General Court found, in paragraph 558 of the judgment under appeal, that the appellants had failed to specify which parts of valuation 2 they are unable to understand.

145 Although the appellants dispute that finding on the ground that they had referred, in paragraph 82(iv) and (viii) of their reply at first instance, to redactions concerning the valuation of provisions for legal contingencies and synergies, it should nevertheless be noted that, by the arguments put forward in paragraph 82 of the reply at first instance, the appellants alleged an infringement of Article 20 of the SRM Regulation, and not a breach of the obligation to state reasons. That is supported by the fact that that argument shows that they were able to understand and to challenge valuation 2. However, in paragraph 558 of the judgment under appeal, the General Court examined the appellants' arguments alleging a breach of the obligation to state reasons.

146 Accordingly, the second complaint in the sixth part of the second ground of appeal constitutes a new plea in so far as it calls into question the statement of reasons for valuation 2 and must therefore be rejected as inadmissible.

(2) Substance

147 By the first and third complaints in the sixth part of the second ground of appeal, the appellants complain that the General Court failed to have regard to the requirements of Article 296 TFEU as regards the examination of the statement of reasons contained in the resolution scheme at issue and in Decision 2017/1246.

148 In that regard, it should be borne in mind that the obligation to state reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (judgment of 18 January 2024, *Jenkinson* v *Council and Others*, C-46/22 P, EU:C:2024:50, paragraph 130 and the case-law cited).

149 Furthermore, it is settled case-law that, while the statement of reasons required by Article 296 TFEU 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 person concerned to ascertain the reasons for the measures and to enable the court having jurisdiction to exercise its power of review, that statement of reasons must, however, be adapted to the nature of the act at issue and to the context in which it was adopted. From that point of view, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient 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 and, in particular, in the light of the interest which the addressees of the measure may have in obtaining explanations (see, to that effect, judgments of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraphs 85 and 87, and of 29 September 2022, *ABLV Bank* v *SRB*, C-202/21 P, EU:C:2022:734, paragraph 193 and the case-law cited).

150 Furthermore, the Court has already held that the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision. Thus, when a measure is drafted, the institutions of the European Union are not obliged to define their position on matters which are plainly of secondary importance or to anticipate potential objections (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 167 and the case-law cited, and of 6 November 2012, *Éditions Odile Jacob* v *Commission*, C-551/10 P, EU:C:2012:681, paragraph 48).

151 That said, as has been noted, in paragraphs 114 and 115 of the present judgment, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, to which concrete expression is given inter alia in Article 339 TFEU, as well as in the second subparagraph of Article 88(1) and Article 90(4) of the SRM Regulation, read in the light of recital 116 of that regulation, not to disclose confidential information subject to the requirements of professional secrecy.

152 According to the settled case-law referred to in paragraph 120 of the present judgment, the statement of reasons for an act adversely affecting an individual, which is premissed on a balancing of the relative position of private operators, may, to a certain extent, be limited in

order to protect information relating to the operators which may be regarded as a business secret. That said, the obligation to respect business secrecy must not deprive the obligation to state reasons of its essence. Therefore, although such a measure may, in the light of the obligation to respect business secrecy, be sufficiently reasoned without including, inter alia, all the figures on which the reasoning is based, the statement of reasons must nevertheless disclose in a clear and unequivocal fashion that reasoning and the methodology used.

(i) The statement of reasons for the resolution scheme at issue

153 In the first place, the appellants claim that the statement of reasons relating to the conditions for resolution laid down in points (a) and (b) of the first subparagraph of Article 18(1) of the SRM Regulation was not sufficient.

154 As regards the condition laid down in point (a) of the first subparagraph of Article 18(1) of that regulation, the criticism levelled at paragraph 543 of the judgment under appeal is based on the premiss that the SRB should have examined whether there were other viable alternatives before concluding that Banco Popular was failing or was likely to fail.

155 However, there is no such requirement under point (a) of the first subparagraph of Article 18(1) and Article 18(4)(c) of the SRM Regulation, according to which an entity is to be deemed to be failing or to be likely to fail if 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. In those circumstances, the General Court was fully entitled to hold, in paragraphs 542 to 544 of the judgment under appeal, that the factors indicating that Banco Popular's liquidity situation had deteriorated, set out in recitals 23 and 24 of the resolution scheme at issue, constituted an adequate statement of the reasons why Banco Popular was failing or likely to fail.

156 As regards the condition laid down in point (b) of the first subparagraph of Article 18(1) of the SRM Regulation, the appellants submit that the SRB simply stated, without further explanation, that other solutions would not solve Banco Popular's liquidity problems.

157 However, it must be held that that line of argument is based on a manifestly incorrect reading of the judgment under appeal and of the resolution scheme at issue. In paragraph 545 of the judgment under appeal, the General Court relied on the findings set out in paragraphs 188 to 192 of that judgment, from which it follows that Article 3 of the resolution scheme at issue sets out in detail the reasons which led the SRB to conclude that there were no alternative measures that would solve Banco Popular's liquidity problems.

158 As regards, in that context, emergency liquidity assistance, it is apparent from paragraph 153 of the judgment under appeal that the SRB had found, in recital 26(c) of the resolution scheme at issue, that such assistance was unavailable at the time of the resolution. On the basis of that finding, the General Court held, without committing an error of law, in paragraphs 556 and 557 of the judgment under appeal, that the SRB was not required to specify the reasons why emergency liquidity assistance was unavailable.

159 In the second place, the appellants call into question the statement of reasons relating to the determination and application of the sale of business tool as a resolution tool.

160 As regards paragraph 545 of the judgment under appeal, in so far as the appellants claim that the SRB did not explain the reasons for choosing the sale of business tool as the resolution tool, it should be held that the General Court found, on the contrary, in that paragraph, that Article 5 of the resolution scheme at issue contained the reasons for choosing that tool and explained why the SRB had considered that the other tools listed in Article 22(2) of the SRM Regulation would not meet the resolution objectives to the same extent. In the light of those findings of the General Court, the argument alleging a failure to state reasons cannot succeed.

161 As regards the public sale procedure in respect of Banco Popular, the General Court noted, in paragraphs 536 and 537 of the judgment under appeal, that the information contained in Article 6.6 of the resolution scheme at issue made it possible to ascertain how that process was conducted and that, at the end of the process, only one valid bid had been made, which the SRB had considered it prudent to accept in order to avoid the uncontrolled insolvency of Banco Popular.

162 In the light of that information, the General Court was fully entitled to hold that the SRB was not required to specify the reasons why all the interested parties, with the exception of Banco Santander, had refrained from submitting a bid. Similarly, it is clear from paragraph 540 of the judgment under appeal that the sale price had not been set by the SRB but stemmed from the competitive sale process conducted by the FROB and the price offered by Banco Santander.

163 In addition, the appellants wrongly submit that the SRB should have given a specific reason in the resolution scheme at issue explaining why the FROB had not granted one of the interested parties extra time. As the General Court pointed out in paragraph 540 of that judgment, since that interested party had informed the FROB, on 6 June 2017, that it had decided not to submit a bid, there was no need for such clarification.

164 In the third and last place, as regards the appellants' argument that the resolution scheme at issue should also have explained how the independent valuer, engaged to carry out valuation 2, met the requirements of independence and impartiality, the General Court rightly held, in paragraph 551 of the judgment under appeal, that such an explanation was not necessary in order to understand the resolution action adopted by the SRB.

165 It follows that the first complaint, alleging infringement of Article 296 TFEU as regards the resolution scheme at issue, must be rejected.

(ii) The statement of reasons for Decision 2017/1246

166 In the first place, the appellants submit that the General Court wrongly held, in paragraphs 576 and 577 of the judgment under appeal, that Decision 2017/1246, by which the Commission merely endorsed the content of the resolution scheme at issue, complies with the requirements of Article 296 TFEU on account of the very short period of time available to the Commission.

167 In that regard, it should be noted that recitals 2 to 5 of Decision 2017/1246 set out the reasons which led the Commission to that decision. After noting, in essence, in recitals 2 and 3 of that decision, that, according to the information contained in the resolution scheme at issue, all the conditions for resolution set out in the first subparagraph of Article 18(1) of the SRM Regulation were met with regard to Banco Popular, and that that scheme placed that bank under resolution and determined the application of the sale of business tool, the Commission states in recital 4 that it 'agrees with the resolution scheme', and 'in particular … with the reasons provided by the

SRB of why resolution is necessary in the public interest in accordance with Article 18(5) of [the SRM] Regulation'. The Commission concluded, in recital 5 of Decision 2017/1246, that the resolution scheme at issue should be endorsed, and it did so in Article 1 of that decision.

168 The Court has already held that, by that endorsement, the Commission is deemed to agree with the information and grounds contained in the resolution scheme at issue, with the result that it must, if necessary, answer to the EU judicature (judgment of 18 June 2024, *Commission* v *SRB*, C-551/22 P, EU:C:2024:520, paragraph 96). In those circumstances, the reasons which led the SRB to adopt that scheme must be regarded as forming an integral part of the endorsement decision and therefore, also constitute the reasons for that endorsement decision.

169 Therefore, the General Court was fully entitled to hold, in paragraph 576 of the judgment under appeal, that the Commission cannot be required to provide additional justification for its endorsement, since that justification may consist only of a repetition of the elements already contained in the resolution scheme at issue. Furthermore, under Article 18(7) of the SRM Regulation, the Commission is required not to carry out a second analysis in addition to that of the SRB, but only to endorse, or not to endorse, the SRB's decision.

170 It is also without erring in the law that the General Court took into account, in paragraph 577 of the judgment under appeal, the very short period of time within which the Commission was asked to endorse the resolution scheme. As noted in paragraph 150 of the present judgment, it is settled case-law that he degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision. The circumstances in which the resolution scheme at issue was adopted and endorsed were characterised by a certain urgency.

171 It follows that the General Court was fully entitled to hold, in paragraph 578 of the judgment under appeal, that the statement of reasons for Decision 2017/1246 complies with the requirements of Article 296 TFEU.

172 In the second place, the appellants submit that, in paragraphs 580 to 583 of that judgment, the General Court wrongly rejected as a new argument their argument alleging 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). In that regard, they submit that, in paragraph 153 of their application at first instance, they had already raised that argument.

173 However, it is apparent from that paragraph of their application at first instance, that they did not allege a breach of those principles governing the delegation of powers, but merely claimed that the Commission had failed to give reasons for its review of the discretionary aspects of the resolution scheme at issue.

174 In those circumstances, it must be held that the General Court did not err in law in finding that that was a new argument. That complaint must therefore be rejected as unfounded.

175 In the light of the foregoing, the sixth part of the second ground of appeal must be rejected in its entirety.

C. The first part of the first ground of appeal, alleging infringement of point (a) of the first subparagraph of Article 18(1) of the SRM Regulation

176 By the first part of the first ground of appeal, the appellants allege infringement of the point (a) of the first subparagraph of Article 18(1) of the SRM Regulation. That part is divided into three complaints.

1. Arguments of the parties

177 In the first place, the appellants submit that the General Court erred in law in holding, in paragraphs 133 and 145 of the judgment under appeal, that the liquidity crisis faced by Banco Popular was sufficient to justify the resolution of that bank, without having to verify whether the failure of the bank could have been prevented by emergency liquidity assistance.

178 They claim that, contrary to what the General Court held, in paragraphs 152, 158 and 165 of that judgment, it follows from point (a) of the first subparagraph of Article 18(1) and Article 18(4)(c) of the SRM Regulation, read together with paragraph 20 of the EBA Guidelines of 6 August 2015 on the interpretation of the different circumstances in which an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59 (EBA/GL/2015/07) and with Article 41 of the Charter, that emergency liquidity assistance should be granted as a priority where there is a finding that it is failing or likely to fail. From April 2017, the SRB was therefore required to promote the granting of emergency liquidity assistance by the Bank of Spain or the ECB.

179 In the second place, the appellants submit that the General Court wrongly held, in paragraphs 163 to 169 of the judgment under appeal, that the alleged breach by the SRB of its obligation of confidentiality prior to the adoption of the resolution scheme at issue is irrelevant for the purposes of the application of point (a) of the first subparagraph of Article 18(1) of the SRM Regulation. First of all, the General Court should have ascertained how the situation would have changed if that irregularity had not occurred. Next, the judgment under appeal contains contradictory reasoning in that it states, on the one hand, that the contested decision must be annulled if it is established that the irregularity has had a sufficient impact, while holding, on the other hand, that the reasons which led to the resolution are irrelevant in that regard. Furthermore, in paragraphs 168 and 169 of that judgment, the General Court wrongly concluded that the principle *nemo auditur propriam turpitudinem allegans* did not apply, on the ground that the SRB and the Commission had not taken unfair advantage of their unlawful conduct. In the appellants' view, the SRB's advantage, in the present case, lies in the fact that the statements made by its Chair and the information leaks were ignored and disregarded. Lastly, recital 116 of the SRM Regulation establishes a rebuttable presumption that the breach of the obligation of confidentiality was the cause of the failure.

180 In the third place, contrary to what the General Court held, in paragraphs 173 to 176 of the judgment under appeal, on account of the alleged breach of the obligation of confidentiality, the SRB and the Commission were obliged, under Article 41 of the Charter, to take action in order to prevent the damage caused by that breach of the obligation of confidentiality and, accordingly, to ascertain whether it was possible to grant emergency liquidity assistance at a sufficiently early stage, or to propose other less intrusive solutions.

181 The SRB and Banco Santander contend that the first part of the first ground of appeal is inadmissible in so far as the appellants merely repeat or reproduce verbatim the pleas in law and arguments which they submitted to the General Court. The SRB adds that, as regards the advantage required in order for the principle *nemo auditur propriam turpitudinem allegans* to apply, the appellants raise a new argument. In any event, that first part is unfounded.

182 The Commission and the Kingdom of Spain contend that the first part of the first ground of appeal is unfounded.

2. Findings of the Court

(a) Admissibility

183 As regards the objection of inadmissibility alleging a repetition of the arguments submitted to the General Court, it must be observed that, by the first part of the first ground of appeal, the appellants seek to call into question the interpretation of point (a) of subparagraph 1 of Article 18(1) of the SRM Regulation, specifying the paragraphs of the judgment under appeal that are contested and the arguments relied on in support of their criticisms. Therefore, the first part of that ground of appeal cannot be declared inadmissible in its entirety.

184 In so far as the SRB contends that the appellants raise a new argument in relation to the application of the principle *nemo auditur propriam turpitudinem allegans*, in that they specify what constitutes, in their view, the advantage derived by the SRB and the Commission, it is sufficient to note that, in their appeal, the appellants put forward, in essence, the same argument as in the application and reply at first instance.

185 Consequently, the first part of the first ground of appeal is admissible.

(b) Substance

186 By the first part of the first ground of appeal, the appellants submit, in essence, that the causes of Banco Popular's liquidity crisis are relevant for the purposes of assessing the legality of the resolution scheme at issue in the light of point (a) of the first subparagraph of Article 18(1) of the SRM Regulation. They submit that it is apparent from paragraphs 133, 145, 152, 158, 163 to 169 and 173 to 176 of the judgment under appeal that the SRB infringed both its obligation of confidentiality and its duty to seek to prevent Banco Popular's failure, in particular by promoting the granting of emergency liquidity assistance to that bank.

187 In that regard, it must be borne in mind that, under points (a) to (c) of the first subparagraph of Article 18(1) of the SRM Regulation, the adoption of a resolution scheme is subject to three conditions being met, namely, first, that the entity concerned is failing or is likely to fail; second, that, having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures taken in respect of the entity would prevent its failure within a reasonable timeframe; and, third, that a resolution action is necessary in the public interest.

188 The first part of the first ground of appeal concerns only the first of those conditions, namely that the entity concerned must be failing or likely to fail. As regards that condition, point (c) of the first subparagraph of Article 18(4) of the SRM Regulation states that an entity is to be deemed to be

failing or to be likely to fail if 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.

189 First, since point (a) of the first subparagraph of Article 18(1) and point (c) of the first subparagraph of Article 18(4) of the SRM Regulation make no reference to the circumstances leading to the failure of an entity, it should be concluded that, under those provisions, it is permissible to make a finding that the entity concerned is failing irrespective of those circumstances.

190 Taking those circumstances into account would also be incompatible with the objectives of the SRM Regulation, which seeks, as is apparent in particular from recital 58 thereof, to maintain financial stability, to ensure the continuity of essential financial services and to protect depositors. Any circumstances which may have caused the failure of the bank concerned cannot prevent the SRB from adopting a resolution action, when all the conditions laid down in the first subparagraph of Article 18(1) of that regulation are met, in that that bank is failing, there are no alternative solutions and, in particular, resolution is necessary in the public interest.

191 In those circumstances, it is without erring in the law that the General Court held, in paragraphs 163 to 166 of the judgment under appeal, that a resolution scheme is validly adopted where the conditions laid down in Article 18 of the SRM Regulation are satisfied, irrespective of the reasons that caused the entity in question to fail or to be likely to fail.

192 It also follows that the General Court was entitled to find, without contradicting itself, that the resolution scheme at issue would have been adopted even if it had been established that the alleged breach of the obligation of confidentiality had led to the entity failing or being likely to fail. It follows, moreover, that the appellants' argument alleging an alleged breach by the General Court of the principle *nemo auditur propriam turpitudinem allegans*, even assuming that it could be held that the SRB obtained or sought to obtain an 'advantage', for the purposes of that principle, by adopting the resolution scheme at issue, must be rejected as ineffective.

193 Second, point (a) of the first subparagraph of Article 18(1) and point (c) of the first subparagraph of Article 18(4) of the SRM Regulation make no reference to the existence (or otherwise) of alternatives to resolution.

194 As the General Court pointed out, in essence, in paragraphs 133, 145 and 147 of the judgment under appeal, in order to conclude that an entity is failing or is likely to fail within the meaning of point (a) of the first subparagraph of Article 18(1) of the SRM regulation, it is sufficient for the SRB and the Commission to find that there is a liquidity shortfall, as referred to in point (c) of the first subparagraph of Article 18(4) of that regulation. However, having regard to the considerations set out in paragraphs 189 to 191 of the present judgment, the mere fact that it may have been possible to prevent the failure of the entity in the past cannot constitute a reason for the SRB and the Commission not to make such a finding.

195 Moreover, as regards the alleged obligation on the SRB and the Commission, when envisaging the adoption of a resolution scheme in respect of the entity concerned, to check whether there are any alternatives to taking resolution action in order to prevent the failure of the entity, it is apparent from the very wording of point (b) of the first subparagraph of Article 18(1) of the SRM Regulation that that check is required as part of the second condition for the adoption of a

resolution scheme. Thus, the possible existence of alternatives cannot call into question the legality of such a scheme in the light of the first condition laid down in point (a) of the first subparagraph of Article 18(1) thereof.

196 In those circumstances, the argument alleging that the Commission and the SRB were required, under point (a) of the first subparagraph of Article 18(1) and point (c) of the first subparagraph of Article 18(4) of the SRM Regulation, to examine whether there were alternatives to adopting the resolution scheme at issue and, as an extension of that obligation, to promote the granting of emergency liquidity assistance to Banco Popular, is unfounded.

197 It follows that the first part of the first ground of appeal is unfounded.

D. The second part of the first ground of appeal, alleging infringement of point (b) of the first subparagraph of Article 18(1) of the SRM Regulation

198 By the second part of the first ground of appeal, the appellants criticise the General Court's assessment, in paragraphs 180 to 229 of the judgment under appeal, concerning the second condition for the adoption of a resolution scheme, laid down in point (b) of the first subparagraph of Article 18(1) of the SRM Regulation.

1. Arguments of the parties

199 In the first place, the appellants submit that the General Court failed to fulfil its obligation to state reasons in so far as it stated in paragraphs 182 to 184 of the judgment under appeal that their arguments concerning the granting of emergency liquidity assistance to Banco Popular were based on pure conjecture or were mere assumptions. According to the appellants, if the EUR 6 billion of emergency liquidity assistance had been paid to Banco Popular, it would have been able to remain in business at least until 21 June 2017.

200 In the second place, the judgment under appeal is vitiated by an inadequate statement of reasons in that, in paragraph 194 of that judgment, the General Court assumed that there was insufficient time to remedy the lack of liquidity by means of a capital increase. According to Banco Popular's internal calculations, a capital increase could be carried out in one month and was envisaged to be implemented before June 2017.

201 In addition, contrary to the General Court's findings in paragraphs 200 to 203 of the judgment under appeal, the appellants have proved that the capital increase in Banco Popular was feasible and capable of resolving its liquidity problems. In that regard, the appellants submit that the General Court manifestly erred in its assessment of the letters from Barclays and Deutsche Bank of 3 and 5 June 2017, respectively, and distorted the content thereof. In their view, it was clear from those letters that the banks had shown a real commitment to implement a capital increase. They submit that a capital increase would have restored shareholders' confidence in Banco Popular and, therefore, reduced or virtually eliminated deposit outflows.

202 In the third place, the General Court distorted the evidence by stating, in paragraph 208 of the judgment under appeal, that the appellants' arguments concerning the separation of assets are based on mere assumptions. The appellants have established that Banco Popular had been working for a long time on the sale of non-performing real estate assets worth EUR 6 billion as

part of the 'Sunrise' project. In addition, following the resolution, several funds submitted bids for non-performing assets as part of the 'New Sunrise' project, which shows that there was actual interest in those assets.

203 That interest is supported by the firm offers that Banco Popular received for its non-strategic assets. In paragraph 211 of the judgment under appeal, the General Court rejected their claims in that regard on the ground that they were based solely on press articles. However, there is no legal basis for rejecting evidence on the ground that it comes from a press article.

204 In the fourth place, the appellants claim that the judgment under appeal is vitiated by an inadequate statement of reasons and is based on a substantially incorrect assessment of the facts, in that the General Court found, in paragraphs 223 and 224 of that judgment, that a private sale to a third party was not an alternative to the adoption of the resolution scheme at issue. They claim, contrary to what the General Court found, that the bids mentioned in the application at first instance showed that there was genuine interest in the potential acquisition of Banco Popular. Moreover, the private sale failed not on 29 May 2017, but on 6 June 2017, in so far as the SRB required interested parties to submit bids within six hours.

205 In the fifth place, the General Court erred in law in finding, in paragraph 229 of the judgment under appeal, that State aid and the use of the Single Resolution Fund are contrary to the objectives of resolution and that the SRB cannot require a Member State to grant aid to an entity. That aid is expressly provided for in point (d)(iii) of the first subparagraph of Article 18(4), Article 18(6)(c) and Article 19(1) and (3) of the SRM Regulation. In addition, although the SRB cannot require Member States to grant aid to an entity, it is apparent from recital 52 of that regulation that it could, however, have proposed the granting of aid or promoted the use of the Single Resolution Fund (SRF), in combination with any other solution.

206 The Commission, the SRB, the Kingdom of Spain and Banco Santander contend that that argument is inadmissible, in that the appellants merely repeat or reproduce verbatim the pleas in law and arguments raised at first instance, without explaining how the General Court erred in law.

207 As regards the substance, they contend, in essence, that the arguments relied on in support of the second part of the first ground of appeal are not such as to establish that the General Court, in paragraphs 182 to 229 of the judgment under appeal, erred in law in its examination of the five alternative measures invoked by the appellants.

2. Findings of the Court

208 By the second part of the first ground of appeal, the appellants submit, in essence, that the General Court failed to fulfil its obligation to state reasons and/or distorted the evidence in rejecting, in paragraphs 179 to 229 of the judgment under appeal, their argument that the SRB had infringed point (b) of the first paragraph of Article 18(1) of the SRM Regulation.

209 In that regard, it should be noted that, before the General Court, the appellants argued that, contrary to what the SRB had found in the resolution scheme at issue, there were at least six viable alternatives to resolution. By the five complaints relied on in support of the second part of the first ground of appeal, they dispute the General Court's assessment of five of those measures, namely, first, additional emergency liquidity assistance, second, a capital increase, third, a separation of assets, fourth, a private sale to a third party and, fifth, funding from the SRF or State aid.

210 As regards the first to fourth complaints relied on in support of the second part of the first ground of appeal, it must be observed that, by the arguments summarised in paragraphs 199, 200 and 204 of the present judgment, the appellants do not specify how the grounds set out in paragraphs 182 to 184, 194, 223 and 224 of the judgment under appeal are insufficient to make it possible to understand the General Court's reasoning, but in fact challenge the merits of that reasoning, and therefore call on the Court of Justice to re-examine the facts which they have already relied on before the General Court.

211 According to settled case-law, it is clear from Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal is to be limited to points of law and that the General Court therefore has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The assessment of the facts and evidence does not, save where the facts or evidence are distorted, constitute a point of law, which is subject, as such, to review by the Court of Justice on appeal (judgment of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 71 and the case-law cited).

212 In so far as the appellants allege distortion, it should be noted that, by the arguments summarised in paragraphs 201 and 202 of the present judgment, they make that complaint only in respect of the findings in paragraphs 200 to 203 and 208 of the judgment under appeal. However, it is settled case-law that an appellant who alleges distortion of the evidence must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that party's view, led to such distortion. In addition, that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (see, in that regard, judgment of 10 November 2022, *Commission* v *Valencia Club de Fútbol*, C-211/20 P, EU:C:2022:862, paragraph 55 and the case-law cited).

213 It must be stated that, as regards paragraphs 200 to 203 and 208 of the judgment under appeal, the appellants allege distortion merely by referring to a large number of documents annexed to the appeal, without in any way specifying the errors of appraisal that the General Court allegedly committed in its assessment. Furthermore, as regards the extracts from documents cited in paragraphs 200 to 203 of that judgment, it must be held that, far from highlighting a manifest distortion, they confirm, on the contrary, the General Court's assessment that there was no firm commitment on the part of the banks concerned. It is thus apparent that the appellants are seeking, in essence, a new assessment of the facts and the evidence from the Court of Justice. Those arguments must therefore be rejected as inadmissible.

214 Moreover, as regards the line of argument summarised in paragraph 203 of the present judgment, the criticism of paragraph 211 of the judgment under appeal is based on a manifestly incorrect reading of that paragraph. It is clear that, in that paragraph, the General Court explained why it considered that the sale of assets mentioned in those press articles could not, in its view, prevent the failure of Banco Popular, and did not hold that, as a matter of principle, press articles cannot be taken into account as evidence.

215 As regards the fifth complaint, directed against paragraph 229 of the judgment under appeal, the appellants submit, first, that funding from the SRF constituted an alternative measure, for the purposes of point (b) of the first subparagraph of Article 18(1) of the SRM Regulation. However, it is not in paragraph 229 of the judgment under appeal, but in paragraph 227 thereof that the

General Court rejected that argument, on the ground – which has not been criticised by the appellants in the context of their appeal – that, under Article 76(1)(b) thereof, the SRB may use funding from the SRF only in the context of a resolution action. That interpretation is supported by Article 18(6)(c) and Article 19(3) of that regulation, which set out the conditions governing the use of the SRF in a resolution scheme and therefore presuppose that the condition laid down in point (b) of the first subparagraph of Article 18(1) is satisfied. Consequently, funding from the SRF cannot be regarded as an alternative to resolution for the purposes of the latter provision. Those findings are not vitiated by any error of law.

216 Second, the appellants argue that the SRB could have 'proposed' to the Kingdom of Spain to grant State aid to Banco Popular. However, such an argument does not call into question the General Court's assessment, in paragraph 228 of the judgment under appeal, that neither the SRB nor the Commission were able to require a Member State to grant aid to an entity.

217 Furthermore, as the General Court rightly held, in essence, in paragraph 229 of the judgment under appeal, the appellants' argument that the grant of State aid could be an 'alternative' to resolution, for the purposes of point (b) of the first subparagraph of Article 18(1) of the SRM Regulation, is contrary to the objective of resolution referred to in Article 14(2)(c) thereof, which states that it is necessary to protect public funds by minimising reliance on extraordinary public financial support. Such an 'alternative' is also incompatible with the fact that, according to point (d) of the first subparagraph of Article 18(4) of that regulation, the provision of extraordinary public financial support, in principle, means that the entity concerned is deemed to be failing or to be likely to fail.

218 Consequently, the fifth complaint in the second part of the first ground of appeal must be rejected as unfounded.

219 It follows that the second part of the first ground of appeal is in part inadmissible and in part unfounded.

E. The third part of the first ground of appeal, alleging infringement of point (c) of the first subparagraph of Article 18(1) of the SRM Regulation

220 By the third part of the first ground of appeal, the appellants allege infringement of point (c) of the first subparagraph of Article 18(1) of the SRM Regulation. It is divided into three complaints.

1. Arguments of the parties

221 In the first place, the appellants submit that, contrary to the General Court's findings in paragraphs 243 to 245 and 247 of the judgment under appeal, the interests of shareholders and creditors must be weighed against the public interest in order to minimise the cost of resolution and avoid unnecessary 'destruction of value', within the meaning of the second subparagraph of Article 14(2) of the SRM Regulation. They consider that that requirement of proportionality follows both from the provisions of the SRM Regulation, namely point (c) of the first subparagraph of Article 18(1), read together with Article 18(5), Article 6(3)(b), Article 14 and Article 15(2) of that regulation, read in the light of recitals 45 and 46 thereof, and from Articles 17 and 52 of the Charter and Article 1 of Protocol No 1 to the ECHR.

222 According to the appellants, the weighing up of interests thus required must be carried out not only in relation to the liquidation scenario, but also in relation to other solutions. The General Court failed to have regard to those requirements in concluding that the sale of Banco Popular was the best solution, without having analysed other solutions.

223 In the second place, they consider that the General Court wrongly held, in paragraphs 253 and 254 of the judgment under appeal, that Banco Popular had not been discriminated against in comparison with the Italian credit institutions in respect of which, first, the Commission had approved the grant of State aid and, second, the SRB had refused to adopt a resolution scheme. Contrary to the General Court's findings in paragraphs 253 and 254 of the judgment under appeal, the grant of such aid is relevant for the purposes of the application of point (c) of the first subparagraph of Article 18(1) of the SRM Regulation. Furthermore, the difference in treatment cannot be justified by the fact that those establishments, unlike Banco popular, did not perform critical functions.

224 In the third place, in paragraph 261 of the judgment under appeal, the General Court wrongly rejected their argument that the sale process was disproportionate as being out of time and inadmissible. In their reply at first instance, they justified the introduction of that argument on the basis of the fact that new documentation on that process was published after the application initiating proceedings had been lodged.

225 The Commission, the SRB and Banco Santander contend that the third part of the first ground of appeal is inadmissible in that the appellants merely repeat or reproduce verbatim the pleas in law and arguments that they submitted to the General Court. In any event, that third part is unfounded.

226 The Kingdom of Spain contends that that part is unfounded.

2. Findings of the Court

227 As regards the admissibility of the third part of the first ground of appeal, the Commission, the SRB and Banco Santander are wrong to contend that the appellants merely reiterate the arguments already relied on before the General Court. By the three complaints in that part, the appellants dispute, inter alia, the General Court's interpretation and application of point (c) of the first subparagraph of Article 18(1) of the SRM Regulation and the principle of proportionality, specifying the paragraphs of the judgment under appeal that are contested and the arguments relied on.

228 As to the substance, the appellants criticise, in the first place, paragraphs 243 to 245 and 247 of the judgment under appeal. They submit, in essence, that in the context of the application of point (c) of the first subparagraph of Article 18(1) of the SRM Regulation, the SRB is required to weigh the interests of shareholders and creditors against the public interest in order to minimise the cost of resolution and avoid unnecessary destruction of value. According to the appellants, the weighing up of interests thus required must be carried out not only in relation to the liquidation scenario, but also in relation to other solutions.

229 That argument cannot succeed.

230 Point (c) of the first subparagraph of Article 18(1) of the SRM Regulation provides that the adoption of a resolution action must be necessary in the public interest, which, pursuant to paragraph 5 of that article, is the case if that action 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. It follows clearly from the wording of point (c) of the first subparagraph of Article 18(1) that it is not necessary to take into account alternatives to resolution and to liquidation of the entity concerned, and this is supported by the context of that provision.

231 As recalled in paragraph 187 of the present judgment, under points (a) to (c) of the first subparagraph of Article 18(1) of the SRM Regulation, the adoption of a resolution scheme is subject to three conditions being met, the last of which relates to the resolution action being necessary in the public interest, while the second specifically concerns the fact there must be no alternative to resolution and to liquidation. Accordingly, it is in the context of determining whether the second condition, laid down in point (b) of the first subparagraph of Article 18(1) of that regulation, is met that it is necessary to examine whether there is any alternative to resolution and to liquidation.

232 As regards taking into account the interests of shareholders and creditors, it must be observed that, although the examination of the third condition relating to public interest must, pursuant to point (c) of the first subparagraph of Article 18(1) and Article 18(5) of that regulation, take into consideration the resolution objectives referred to in the first subparagraph of Article 14(2) thereof, it must be held that those objectives do not include protecting the interests of shareholders and creditors, or, moreover, minimising the cost of resolution or avoiding destruction of value. Whilst, in accordance with the second subparagraph of that provision, the SRB, the Council, the Commission, and, where relevant, the national resolution authorities, are to endeavour to take into consideration the latter two aspects when pursuing the resolution objectives referred to in the first subparagraph of Article 14(1) of that regulation, they are not bound by such an obligation of means as regards the protection of the interests of shareholders and creditors.

233 Furthermore, the General Court rightly pointed out, in paragraph 246 of the judgment under appeal, that the 'destruction of value' within the meaning of the second subparagraph of Article 14(2) of the SRM Regulation does not relate solely to the proprietary interests of the entity's shareholders and holders of capital instruments, but it also covers the proprietary interests of the entity's depositors, employees and other creditors. In particular, it is clear from the very wording of that second subparagraph that the SRB and the Commission must only seek to minimise the cost of resolution and avoid destruction of value, unless necessary to achieve the resolution objectives.

234 In those circumstances, the General Court did not err in law in holding, in paragraph 243 of the judgment under appeal, that compliance with the condition for resolution laid down in point (c) of the first subparagraph of Article 18(1) of that regulation does not specifically require that the public interest in resolution of the entity concerned be weighed against the rights of shareholders and creditors.

235 Contrary to the appellants' submissions, there is also no need to take into account only the private interests of shareholders and creditors under the principle of proportionality, as enshrined in the provisions of the SRM Regulation referred to in paragraph 221 of the present judgment, or under Article 17 and Article 52(1) of the Charter.

236 As regards observance of the principle of proportionality, it is clear from the settled case-law of the Court that an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue (see, to that effect, judgments of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, paragraph 41 and the case-law cited, and of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle* ne bis in idem), C-365/21, EU:C:2023:236, paragraph 59). As pointed out in paragraph 233 of the present judgment, the rights of shareholders and creditors are not the only rights which must be taken into account in the context of resolution.

237 Accordingly, the first complaint raised in support of the third part of the first ground of appeal must be rejected as unfounded.

238 As regards the second complaint, alleging discrimination against Banco Popular as compared with Italian credit institutions which received State aid, although they did not perform critical functions, it is apparent, first, from the considerations set out in paragraphs 230 and 231 of the present judgment, that the existence of potential alternatives is irrelevant for the purposes of assessing the condition laid down in point (c) of the first subparagraph of Article 18(1) of the SRM Regulation, but falls within point (b) of the first subparagraph of Article 18(1) thereof. Thus, the General Court was fully entitled to hold, in paragraph 253 of the judgment under appeal, that the claims regarding alternative measures were unrelated to the issue of compliance with the public interest criterion.

239 Second, in so far as the appellants claim that the discrimination against Banco Popular in comparison with Italian credit institutions cannot be justified by the fact that those credit institutions did not perform critical functions, their arguments are based on a manifestly incorrect reading of paragraph 254 of the judgment under appeal. According to the statements in that paragraph, the SRB based its decision not only on the consideration that the credit institutions in question did not perform critical functions, but also on the consideration that their winding up would not have significant adverse effects on financial stability. It thus appears that the SRB relied precisely on the criterion laid down in point (c) of the first subparagraph of Article 18(1) and Article 18(5) of that regulation, which is capable of justifying a difference in treatment.

240 By their third complaint, the appellants submit that, in paragraph 261 of that judgment, the General Court wrongly rejected as being out of time their argument alleging that the sale process was disproportionate, whereas, in their reply at first instance, they had justified the introduction of that argument on the basis of the fact that new documentation on that process had been published.

241 It is true, in that regard, from a combined reading of paragraphs 1, 47 and 48 of the reply at first instance, that the argument alleging an irregularity in the sale process was based, in part, on documents which were not available when the action was brought at first instance.

242 However, that fact alone is not, in itself, capable of establishing that the General Court erred in finding, in paragraph 261 of the judgment under appeal, that the appellants had failed to explain why they had not challenged the lawfulness of the sale process in the application initiating proceedings.

243 In so far as that argument was also based on documents which were available when that application was lodged, it was for the appellants to explain why the fact that those documents which had not yet been published were not available to them prevented them from challenging the lawfulness of the sale process at that time, even if this meant developing that line or argument at a later stage by means of those documents.

244 It must be stated that it remains the case, at the stage of this appeal, that the appellants have not provided such evidence.

245 It follows that the third complaint in the third part of the first ground of appeal must be rejected as unfounded and, consequently, that that part must be rejected in its entirety.

F. The first to fourth parts of the second ground of appeal, alleging infringement of Article 20 of the SRM Regulation

246 By the first to fourth parts of the second ground of appeal, the appellants allege that the General Court erred in law in its interpretation and application of Article 20 of the SRM Regulation in relation to valuations 1 and 2.

247 As a preliminary point, it must be recalled that, pursuant to Article 20(1) of the SRM Regulation, the SRB is to ensure that a fair, prudent and realistic valuation of the assets and liabilities of the entity concerned is carried out by an independent person before deciding on a resolution action or the exercise of the power to write down or convert relevant capital instruments.

248 As regards that valuation, paragraphs 2, 3, 10 and 11 of Article 20 distinguish between definitive valuations, namely those that satisfy all the requirements laid down in Article 20(1) and (4) to (9) of that regulation, and provisional valuations that do not comply with all those requirements. However, under Article 20(13) of the SRM Regulation, a provisional valuation conducted in accordance with Article 20(10) and (11) thereof is a valid basis for the SRB to decide on resolution actions or on the exercise of the power to write-down or convert relevant capital instruments.

249 In the present case, valuations 1 and 2 were adopted as provisional valuations. Valuation 1, adopted on 5 June 2017 by the SRB on the basis of Article 20(5)(a) of that regulation, had the objective of informing the SRB's determination whether the conditions for resolution, set out in the first paragraph of Article 18(1) of that regulation, were met.

250 On 6 June 2017, Deloitte submitted valuation 2 to the SRB. The purpose of that valuation was to carry out the assessments provided for in Article 20(4), (5)(f) and (9) of that regulation.

251 On the same day, the ECB, after consulting the SRB, carried out an assessment of the first resolution condition, relating to whether Banco Popular was failing or was likely fail, in accordance with the first subparagraph of Article 18(1) of that regulation.

252 By the first to third parts of the second ground of appeal, the appellants claim, in essence, that valuations 1 and 2 do not comply with the requirements laid down in Article 20(1), (4), (5), (7) and (9) of the SRM Regulation, contrary to the General Court's findings in the judgment under appeal. By the fourth part of that ground of appeal, which alleges infringement of Article 20(10)

and (11) of that regulation, the appellants submit, in essence, that provisional valuations can constitute a valid basis for the purposes of adopting a resolution action only if they are followed by an *ex post* definitive valuation.

1. The first part of the second ground of appeal

253 By the first part of the second ground of appeal, the appellants claim that, contrary to what the General Court held, valuations 1 and 2 did not comply with the requirements of Article 20(1) and (4) of the SRM Regulation.

(a) Arguments of the parties

254 By the first complaint, the appellants submit that, in view of the reservations expressed in valuations 1 and 2, those valuations cannot be regarded as realistic, prudent and fair. They claim that the General Court was wrong to hold, in paragraphs 347 and 294 of the judgment under appeal, that, following the ECB's assessment that Banco Popular was failing or likely to fail, valuation 1 had become obsolete. The SRB cannot delegate that valuation to the ECB. As regards valuation 2, they claim that there is a contradiction between, on the one hand, the General Court's reminder, in paragraph 353 of that judgment, that the valuation must be based on fair, prudent and realistic assumptions, and, on the other hand, its conclusion, in paragraph 357 thereof, that those requirements were met notwithstanding the reservations expressed by Deloitte.

255 The second complaint alleges infringement of Article 20(1) and (4) of the SRM Regulation read in the light of the clarification provided in Article 8 of the regulatory technical standards. Contrary to what the General Court held in paragraphs 359 and 360 of the judgment under appeal, it follows from those provisions of the SRM Regulation that, even in the case of provisional valuations, all the assets and liabilities of the entity concerned should be assessed.

256 By their third complaint, the appellants claim that the General Court wrongly held, in paragraph 392 of that judgment, that the valuation of certain assets in valuation 2 did not constitute an undervaluation contrary to Article 20(1) of that regulation. As regards the loans and receivables referred to in paragraphs 370 and 371 of that judgment, the appellants claim that Article 8 of the regulatory technical standards applies only to assets requiring special attention in the valuation. As regards paragraphs 378 and 379 of that judgment, the appellants submit that the difference between the value of the tax assets used, on the one hand, in valuation 2 and, on the other, in Banco Santander's calculations after the resolution, cannot be justified by negative tax bases. In paragraphs 386 and 387 of the judgment under appeal, the General Court wrongly held that the attribution of a value of zero to Banco Popular's goodwill was justified, although Banco Popular remained in business as an entity separate from Banco Santander until 4 October 2018. Furthermore, as regards the impact of Banco Popular's poor performance on the value of the intangible assets, the reasoning in the judgment under appeal is purely speculative.

257 By their fourth complaint, the appellants submit that the broad range of values used by Deloitte in valuation 2 is not prudent, fair or realistic. In that regard, the General Court wrongly held, in paragraph 396 of the judgment under appeal, that the appellants had disputed the plausibility of that range without putting forward any specific argument. Furthermore, although Article 2(3) of the regulatory technical standards allows the valuation to be presented in the form of value ranges, Deloitte's broad value range cannot satisfy the criterion of a prudent, fair and realistic valuation.

258 By their fifth complaint, the appellants claim that, in paragraphs 404 to 409 of the judgment under appeal, the General Court wrongly rejected their arguments calling into question the calculation of the value of the net assets in valuations 1 and 2 and the ECB's assessment that Banco Popular was failing or likely to fail. In so far as those two valuations provided an estimate of Banco Popular's value, they are comparable, irrespective of the difference in their objectives and legal bases. In addition, for the reasons put forward in the context of their first complaint, summarised in paragraph 254 of the present judgment, the General Court wrongly held that valuation 1 had been rendered obsolete by the ECB's assessment. As regards the contradictions between valuation 2 and the ECB's assessment, it is irrelevant whether the economic value or the book value is used, since valuation 2 contains calculations relating to non-performing assets which are contrary to those contained in the ECB's assessment that Banco Popular was failing or likely to fail. In any event, the negative value used in valuation 2 means that Banco Popular was insolvent, which clearly contradicts the ECB's assessment.

259 According to the Commission and Banco Santander, the first part of the second ground of appeal is inadmissible in that the appellants merely reproduce the arguments they have already put forward before the General Court. In any event, that first part is unfounded.

260 The SRB and the Kingdom of Spain contend that that part is unfounded.

(b) Findings of the Court

261 As regards the objection of inadmissibility raised by the Commission and Banco Santander, it should be noted that, by the first part of the second ground of appeal, the appellants seek, in essence, to call into question the General Court's interpretation of Article 20(1) and (4) of the SRM Regulation. Furthermore, the appeal contains precise indications regarding the contested paragraphs of the judgment under appeal and the arguments on which the appellants' criticism is based. In those circumstances, the first part of that ground of appeal cannot be declared inadmissible.

262 As regards the substance, the appellants raise five complaints in support of the first part of the second ground of appeal.

(1) The first complaint

263 By the first complaint, the appellants criticise paragraphs 347 and 357 of the judgment under appeal on the ground that the reservations expressed in valuations 1 and 2 as to their reliability, the sufficiency of the verified information and the accuracy of the results therein, were capable of calling into question the fair, prudent and realistic nature of those valuations.

264 As regards valuation 1, it is apparent from paragraphs 296 and 347 of that judgment that the General Court held that that line of argument was ineffective, in so far as the valuation had been rendered obsolete by the ECB's assessment that Banco Popular was failing or likely to fail. Although the appellants submit that the SRB cannot 'delegate' that valuation to the ECB, they fail to recognise that, as the Court has already held, the second subparagraph of Article 18(1) of the SRM Regulation recognises the ECB as having primary power to carry out that assessment, in view of its expertise as supervisory authority. Having access, in that capacity, to all supervisory information regarding the entity concerned, the ECB is best placed to determine, in the light of the definition of 'failing or likely to fail' in the first subparagraph of 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). In the present case, it is important to add that the ECB's assessment that Banco Popular was failing or likely to fail was also based on more recent data than valuation 1.

265 It follows that it is without erring in the law that the General Court decided, in paragraphs 294 to 296 and 347 of the judgment under appeal, that following the ECB's assessment that Banco Popular was failing or likely to fail, valuation 1, which assessed that same situation, had become obsolete.

266 As regards valuation 2, it must be held that the appellants' arguments are based on a manifestly incorrect reading of paragraph 353 of the judgment under appeal. Contrary to their submissions, the General Court did not confine itself to noting that the valuation had to be based on fair, prudent and realistic assumptions, but pointed out that the valuer also had to take various factors and circumstances into account. According to the findings of fact made by the General Court in paragraph 356 of that judgment, valuation 2 was based on assumptions and had taken multiple factors into consideration, while relying on prospective estimates and assessments. In addition, it rightly found, in paragraph 357 of that judgment, also taking into account the time constraints and the information available, that some uncertainties and approximations are inherent in any provisional valuation carried out pursuant to Article 20(10) of the SRM Regulation.

267 In those circumstances, it must be held that, in paragraph 357 of that judgment, the General Court was fully entitled to hold, without contradicting the finding in paragraph 353 thereof, that the reservations expressed by Deloitte were not capable of calling into question the fair, prudent and realistic nature of valuation 2.

268 Consequently, the first complaint must be rejected as unfounded.

(2) The second complaint

269 The appellants submit that, contrary to what the General Court of held in paragraphs 359 and 360 of the judgment under appeal, it follows from Article 20(1) and (4) of the SRM Regulation and Article 8 of the regulatory technical standards that even provisional valuations must include an assessment of all assets and liabilities, and not just some of them.

270 In that regard, it must be observed that Article 20(1) of that regulation provides that the valuation of assets and liabilities must be 'fair, prudent and realistic', but does not require all the assets and liabilities to be set out exhaustively. Nor is there any such requirement under Article 20(4) of that regulation, which merely states that the 'objective of the valuation shall be to assess the value of the assets and liabilities'.

271 However, as stated in the second sentence of Article 20(10) of the SRM Regulation, although, in an urgent situation, the provisional valuation must include an estimate of the assets and liabilities, it need only comply with the requirement to be fair, prudent and realistic in so far as is reasonably practicable in the circumstances. It may prove impossible to set out all the assets and liabilities exhaustively in an urgent situation such as one in which provisional valuations are carried out.

272 In the same vein, Article 8 of the regulatory technical standards provides that the valuer must particularly focus on areas subject to significant valuation uncertainty which have a significant impact on the overall valuation.

273 In those circumstances, the General Court was fully entitled to hold, in paragraphs 359 and 360 of the judgment under appeal, that, in view of the short period of time it had, Deloitte had had to strictly prioritise the review of the available information, focusing only on Banco Popular's key assets and liabilities the valuation of which was highly uncertain.

274 It follows that the second complaint must be rejected.

(3) The third complaint

275 As regards the third complaint, it should be borne in mind that, in so far as the SRB and the Commission are called upon to make technical choices and complex forecasts and appraisals when adopting a resolution scheme, they must be allowed a certain margin of discretion. Given that margin of discretion, the judicial review which the Courts of the European Union must carry out of the merits of the grounds of a resolution scheme must not lead it to substitute its own assessment for that of the SRB and the Commission, but seeks to ascertain that that decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers (see, by analogy, judgment of 4 May 2023, *ECB* v *Crédit lyonnais*, C-389/21 P, EU:C:2023:368, paragraph 55 and the case-law cited). Those principles apply to the valuation of a banking institution's liabilities and assets provided for in Article 20(1), (3), (10), (11) and (13) of the SRM Regulation, whether it is carried out by the SRB or at its request by an independent expert.

276 As regards the loans and receivables referred to in paragraphs 370 and 371 of that judgment, the appellants merely state that, according to them, Article 8 of the draft regulatory technical standards applies only to assets requiring special attention in the valuation. However, in paragraph 370 of that judgment, the General Court found that loans and receivables are among the areas referred to in that provision, which are subject to significant valuation uncertainty and to which the valuer is to pay special attention. Yet in their appeal, the appellants do not put forward any argument specifically calling that assessment into question, but ask the Court, in essence, to carry out a new assessment of the facts, which it is not empowered to do in the context of an appeal. That argument is therefore inadmissible.

277 As regards paragraphs 378 and 379 of the judgment under appeal, the General Court held that Banco Santander's valuation of the tax assets following Banco Popular's resolution is not such as to establish that Deloitte had undervalued those assets. In that regard, it noted, in particular, that the value assigned to those assets by Banco Santander was dependent, inter alia, on the synergies between Banco Santander and Banco Popular, whereas Deloitte's aim was to determine the value of the various categories of assets not for a specific purchaser, but for any potential purchaser. The appellants dispute the validity of those assessments of a factual nature and are therefore asking the Court of Justice to carry out a new assessment of the facts, with the result that their request in that regard must be declared inadmissible.

278 Lastly, in paragraphs 386 and 387 of that judgment, the General Court set out the explanations provided by Deloitte concerning the method of valuing the intangible assets, in which Deloitte expressed its view that Banco Popular's poor performance was an indication of potential impairments to intangible assets. In their appeal, the appellants dispute those assessments and

claim that the latter observation is speculative, as it is based on facts subsequent to the resolution. It follows that the appellants are once again asking the Court of Justice to carry out a new assessment of the facts, which is inadmissible at the appeal stage.

279 It follows that the third complaint must be rejected as inadmissible.

(4) The fourth complaint

280 As regards the range of values used in valuation 2, it is apparent from paragraphs 395 to 400 of the judgment under appeal that, according to the information provided by Deloitte, the difference between the values used for the various case scenarios was justified by the method used in that valuation, in accordance with Article 2(3) of the regulatory technical standards.

281 Although the appellants submit, in their appeal, that the range used was too broad to be regarded as prudent, fair and realistic, they acknowledge that the valuation method chosen was consistent with that provision. Accordingly, they again ask the Court to carry out a new assessment of the facts, which is inadmissible at the appeal stage.

282 The fourth complaint is therefore inadmissible.

(5) The fifth complaint

283 By their fifth complaint, the appellants claim that, in paragraphs 404 to 409 of the judgment under appeal, the General Court wrongly rejected their argument that there was a contradiction between the asset value used in valuation 2, which was in a range of between EUR 1.3 billion and minus EUR 8.2 billion, and valuation 1, and the ECB's assessment of whether Banco Popular was failing or likely to fail, which concluded that Banco Popular was solvent.

284 In the first place, they submit, in essence, that the fact that SRB and Deloitte both carried out a valuation of Banco Popular is sufficient, in itself, to make valuations 1 and 2 comparable, irrespective of the difference in the objective pursued by those valuations and the legal bases thereof.

285 However, in paragraph 406 of the judgment under appeal, the General Court was fully entitled to hold that, since valuations 1 and 2 pursued different objectives, they had to be based on different assessment criteria, defined in the draft regulatory technical standards of the EBA. The General Court noted that, in accordance with those draft regulatory technical standards, the main purpose of valuation 1 was to determine whether the total value of the entity's assets exceeded that of its liabilities, that is, whether the entity was balance sheet solvent, whereas valuation 2 had to be based not on the book value, but on the economic value of the entity.

286 In view of those differences, the General Court was entitled, without erring in law, to reject the argument alleging a contradiction between those valuations.

287 In the second place, having regard to the considerations set out in paragraph 264 of the present judgment, the General Court correctly held that the ECB's assessment that Banco Popular was failing or likely to fail had rendered valuation 1 obsolete, in so far as it assessed that same situation.

288 As regards, in the third place, the alleged contradictions between valuation 2 and the ECB's assessment, the appellants do not dispute the finding, in paragraph 409 of the judgment under appeal, that valuation 2 had to take account of Banco Popular's economic value and not its book value, which rules out the existence of a clear contradiction between the negative economic value used in that valuation and the finding, made inter alia in the ECB's assessment, that Banco Popular was solvent.

289 Moreover, in the absence of any clarification as to the alleged contradictions concerning the calculation of non-performing assets, the argument alleging such contradictions is not sufficient to establish that the General Court erred in law.

290 It follows that the fifth complaint and, therefore, the first part of the second ground of appeal in its entirety must be rejected as unfounded.

2. The second part of the second ground of appeal, alleging infringement of Article 20(5) of the SRM Regulation

291 By the second part of the second ground of appeal, the appellants claim that the General Court committed a number of errors of law in examining whether valuations 1 and 2 comply with Article 20(5) of the SRM Regulation.

(a) Arguments of the parties

292 First, the appellants submit that, contrary to the General Court's findings in paragraphs 292 and 293 of the judgment under appeal, the analysis provided for in Article 20(5)(a) of the SRM Regulation must be carried out by an independent person and not by the SRB. Second, in paragraph 298 of the judgment under appeal, the General Court wrongly held that the appellants had not raised arguments concerning Article 20(5)(c) of that regulation, even though they submitted in their reply at first instance that those valuations had not analysed the objective referred to in that provision. Third, the General Court held, without any evidence or reasoning, in paragraphs 299 and 301 of the judgment under appeal, that valuation 2 included the analysis provided for in Article 20(5)(b), (f) and (g) of that regulation.

293 Banco Santander contends that the second part of the second ground of appeal is inadmissible on the ground that the appellants merely reproduce the arguments they have already put forward before the General Court. In any event, that part is unfounded.

294 The Commission, the SRB and the Kingdom of Spain contend that the second part of that ground of appeal is unfounded.

(b) Findings of the Court

(1) Admissibility

295 As regards the objection of inadmissibility raised by Banco Santander, it must be observed that, by the second part of the second ground of appeal, the appellants seek to challenge the General Court's interpretation of Article 20(5) of the SRM Regulation, specifying the paragraphs of the

judgment under appeal that are contested and the arguments relied on in support of their criticisms. Therefore, the second part of that ground of appeal cannot be declared inadmissible in its entirety.

296 That said, as regards the third complaint relied on in support of that part, the General Court found, on the basis of the resolution scheme at issue and Deloitte's report, that the latter had taken into account the objectives laid down in Article 20(5) (b), (f) and (g) of that regulation for the purposes of its analysis. Although the appellants now claim that there was no analysis of those objectives in valuation 2, they call into question the General Court's findings of fact without, however, alleging distortion. Therefore, the third complaint in the second part of the second ground of appeal is inadmissible.

(2) Substance

297 As regards the first complaint, it should be recalled that Article 20(5) of the SRM Regulation sets out the objectives that the valuation of assets and liabilities provided for in Article 20(1) thereof must pursue. While the latter provision stipulates that that valuation must be carried out by a person independent from any public authority, including the SRB and the national resolution authority, and from the entity concerned, Article 20(3) of that regulation expressly provides that the SRB may carry out a provisional valuation of the assets and liabilities where an independent valuation is not possible.

298 Accordingly, the General Court rightly held, in paragraphs 292 and 293 of the judgment under appeal, that the analysis of the objective referred to in Article 20(5)(a) of the SRM Regulation does not always need be carried out by an independent expert.

299 The first complaint in the second part of the second ground of appeal is therefore unfounded.

300 As regards the second complaint, it is true that the appellants rightly dispute the accuracy of the finding, in paragraph 298 of the judgment under appeal, that they did not put forward any specific argument in relation to the objective referred to in Article 20(5)(c) of the SRM Regulation in the application and the reply at first instance. In their reply at first instance, they had in fact claimed that there was no analysis of that objective.

301 The fact remains that, as the Advocate General noted in point 48 of her Opinion, the General Court was nevertheless entitled, without erring in law, to conclude in paragraphs 302 and 303 of the judgment under appeal, that valuation 1 complied with the provisions of the SRM Regulation, based on Article 20(10) and (11) of that regulation.

302 In that regard, it must be observed that Article 20(10) of the SRM Regulation specifies that, in urgent cases, although some of the valuation requirements must be met, others need only be complied with in so far as practicable. In respect of those two types of requirements, that provision does not mention analysing the objectives of the valuation referred to in Article 20(5) of that regulation.

303 In addition, Article 20(11) of the SRM Regulation expressly provides that a valuation that does not comply with all of the requirements laid down in Article 20(1) and (4) to (9) thereof is to be considered as provisional until an independent person has carried out a valuation that is fully compliant with all of the requirements laid down in those paragraphs. In accordance with Article 20(13) of that regulation, such a provisional valuation is a valid basis for the SRB to decide

on resolution actions. Thus, the alleged failure to take into account the objective referred to in Article 20(5)(c) of that regulation does not make the valuation unlawful, but simply means that it is a provisional valuation.

304 The second complaint in the second part of the second ground of appeal is therefore ineffective.

305 It follows that the second part of the second ground of appeal is in part inadmissible and in part unfounded.

3. The third part of the second ground of appeal, alleging infringement of Article 20(7) and (9) of the SRM Regulation

306 By the third part of the second ground of appeal, the appellants allege infringement of Article 20(7) and (9) of the SRM Regulation. That part is divided into two complaints.

(a) Arguments of the parties

307 By the first complaint, the appellants submit that, in paragraphs 417 and 418 of the judgment under appeal, the General Court infringed Article 20(7) of the SRM Regulation by holding that the deficiencies in the accounting records referred to in valuation 2 were irrelevant, because they appeared in the part of the report which analyses the liquidation scenario. However, on the basis of that same provision, valuation 2 specifically assessed whether the investors would have received better or worse treatment in a liquidation scenario.

308 By their second complaint, alleging infringement of Article 20(9) of that regulation, the appellants claim that the General Court misconstrued the actual wording of that provision by holding, in paragraphs 421 to 423 of that judgment, that the question of the treatment of the various categories of shareholders and creditors in a liquidation scenario fell not under valuation 2, but under valuation 3.

309 According to Banco Santander, the third part of the second ground of appeal is inadmissible on the ground that the appellants merely reproduce the arguments they have already put forward before the General Court. In any event, that part of the second ground of appeal is unfounded.

310 The Commission, the SRB and the Kingdom of Spain consider that the third part of that ground of appeal is unfounded.

(b) Findings of the Court

311 As regards the objection of inadmissibility, it should be noted that, by the third part of the second ground of appeal, the appellants claim that, in paragraphs 417 and 418 and in paragraphs 421 to 423 of the judgment under appeal, the General Court wrongly rejected a number of complaints calling into question the compliance of valuation 2 with Article 20(7) and (9) of the SRM Regulation.

312 Thus, contrary to what Banco Santander contends, the appellants do not merely reiterate the arguments they had advanced at first instance, and therefore those arguments are admissible.

313 That said, the third part of the second ground of appeal must be rejected as ineffective.

314 As regards the first complaint in that part, alleging infringement of Article 20(7) of the SRM Regulation, it should be noted that the paragraphs of the judgment under appeal that are contested form part of the General Court's examination of the appellants' argument that valuation 2 had to be supplemented by an updated balance sheet and a report on the financial position of each entity making up the Banco Popular group.

315 However, it was only for the sake of completeness that, in paragraphs 416 to 419 of the judgment under appeal, the General Court relied on the irrelevance of the documents produced before it in order to reject that argument. In paragraph 415 of that judgment, the General Court had already pointed out that there is no such requirement under Article 20(7) of that regulation. Furthermore, in paragraph 414 of that judgment, it recalled that, under Article 20(10) of that regulation, a provisional valuation, such as valuation 2, had to comply with the requirements of Article 20(7) and (9) thereof only in so far as reasonably practicable in the circumstances.

316 Those considerations, which the appellants do not dispute in the appeal, provide sufficient grounds for rejecting their argument alleging infringement of Article 20(7) of the SRM Regulation.

317 As regards the second complaint in the third part of the second ground of appeal, alleging infringement of Article 20(9) of the SRM Regulation, the appellants merely criticise paragraphs 421 to 423 of the judgment under appeal, in so far as the General Court held that question of the treatment of different classes of shareholders and creditors in the liquidation scenario fell not under valuation 2, but under valuation 3.

318 However, it is apparent from paragraphs 420, 421 and 423 *in fine* of that judgment that, in order to reject their argument alleging infringement of Article 20(9) of the SRM Regulation, the General Court also relied on the finding that valuation 2 had complied with the requirements of that provision in so far as reasonably practicable in the circumstances, in accordance with Article 20(10) of that regulation. The appellants do not dispute that finding, and the second complaint is therefore also ineffective.

319 The third part of the second ground of appeal must therefore be rejected.

4. The fourth part of the second ground of appeal, alleging infringement of Article 20(10) and (11) of the SRM Regulation

(a) Arguments of the parties

320 By the fourth part of the second ground of appeal, the appellants submit that the General Court infringed Article 20(10) and (11) of the SRM Regulation, in so far as it held, in paragraphs 277 to 284 of the judgment under appeal, that the lack of an *ex post* definitive valuation was not such as to affect the validity of the resolution scheme at issue.

321 Under Article 20(13) of that regulation, a provisional valuation is to be carried out, prior to resolution, in accordance with paragraphs 10 and 11 of that article in order to constitute a valid basis for the SRB to decide on resolution actions. It is apparent from Article 20(11) of that regulation that a provisional valuation must be followed by an *ex post* definitive valuation. Otherwise, the obligation to conduct definitive valuations would be irrelevant.

322 Furthermore, although, under Article 20(10) of the SRM Regulation, valuations must comply the requirements set out in paragraphs 1, 7 and 9 of that article only in so far as reasonably practicable in the circumstances, that provision does not expressly exempt the SRB from complying with the requirements set out in Article 20(5) of that regulation. In that context, the appellants add that, in paragraphs 283 and 284 of the judgment under appeal, the General Court wrongly rejected their claim that the refusal to carry out definitive valuations confirms that the provisional versions were inaccurate.

323 The Commission, the SRB, the Kingdom of Spain and Banco Santander dispute the merits of that line of argument.

(b) Findings of the Court

324 By the fourth part of the second ground of appeal, the appellants criticise paragraphs 277 to 284 of the judgment under appeal on the ground that, in their view, a provisional valuation can be a valid basis for the SRB to decide on resolution actions only if it is followed by an *ex post* definitive valuation.

325 In that regard, it is admittedly true that Article 20(13) of the SRM Regulation refers to provisional valuations conducted 'in accordance with paragraphs 10 and 11 [of that article]', which suggests that a provisional valuation must comply with the conditions laid down in paragraphs 10 and 11 of that article in order to be a valid basis for the adoption of a resolution action. However, Article 20(11) of that regulation provides that a valuation that does not comply with all of the requirements laid down in paragraphs 1 and 4 to 9 of Article 20 is to be considered to be provisional 'until an independent person … has carried out … [an] *ex post* definitive valuation … as soon as practicable'. It follows from that very wording, in particular from the preposition 'until', that the carrying out of an *ex post* definitive valuation is not a condition which must be met in order for a valuation to be considered to be provisional.

326 The appellants are wrong to claim that that interpretation is such as to render the *ex post* definitive valuation provided for in Article 20(11) of the SRM Regulation redundant. As set out in that provision, the purpose of the *ex post* definitive valuation is, first, to ensure that any losses suffered by the entity concerned are fully recognised in the books of accounts of that entity and, second, to inform the decision to write back creditors' claims or to increase the value of the consideration paid, pursuant to Article 20(12) of that regulation.

327 Moreover, since the *ex post* definitive valuation necessarily takes place, having regard to that purpose, after the adoption of a resolution scheme, it must be recalled that it is settled case-law that the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (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).

328 Accordingly, the General Court did not err in law in holding, in paragraphs 277 to 284 of the judgment under appeal, that the lack of an *ex post* definitive valuation was not such as to affect the validity of the resolution scheme at issue.

329 As regards the claim that the refusal to carry out an *ex post* definitive valuation confirms that the provisional versions were inaccurate, the General Court rightly noted that that claim is purely speculative and, in any event, calls into question not the lack of an *ex post* definitive valuation, but valuation 2.

330 Furthermore, while the appellants observe that Article 20(10) of the SRM Regulation does not refer to the requirements set out in paragraph 5 of that article, it must be observed that that argument relates to the errors of law relied on in support of the second complaint in the second part of the second ground of appeal, and must be rejected for the same reasons as those set out in paragraphs 300 to 303 of the present judgment.

331 It follows that the fourth part of that ground of appeal is unfounded.

G. The third ground of appeal, concerning the claim for damages made in connection with the annulment of the resolution scheme at issue and of Decision 2017/1246

332 By their third ground of appeal, the appellants submit that, in paragraphs 590 and 591 of the judgment under appeal, the General Court wrongly rejected their claim for damages made in connection with the annulment of the resolution scheme at issue and of Decision 2017/1246.

333 As the Advocate General observed, in point 60 of her Opinion, the appellants merely identify the contested paragraphs of the judgment under appeal and state that they maintain both their arguments as to the illegality of those decisions and their claim for damages based on that illegality, without, however, specifying the error of law allegedly committed by the General Court.

334 However, in accordance with the settled case-law of the Court recalled in paragraph 140 of the present judgment, an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of that appeal, failing which the appeal or ground of appeal concerned will be inadmissible.

335 In those circumstances, the third ground of appeal must be declared inadmissible.

H. The first part of the fourth ground of appeal, alleging breach of the obligation of confidentiality

336 By the first part of the fourth ground of appeal, the appellants submit that, in its examination of their action for non-contractual liability arising from a breach of the obligation of confidentiality, the General Court erred in law in its interpretation of Article 339 TFEU and of Articles 88 and 91 of the SRM Regulation, read together with recital 116 thereof. That part is divided into eight complaints.

1. Arguments of the parties

337 First, the appellants submit that the General Court disregarded the requirements of due diligence and care set out in Articles 88 and 91 of the SRM Regulation, read together with recital 116 thereof, and in Article 339 TFEU, in holding, in paragraphs 613 and 616 to 618 of the judgment under appeal, that the Chair of the SRB had not acted in breach of the principle of confidentiality

or the obligation of professional secrecy in the interview which she had given to the television channel Bloomberg. During the interview, she confirmed that Banco Popular was being watched by the SRB, which is contrary to what an administrative authority exercising ordinary care and diligence would have done.

338 Having regard to recital 116 of the SRM Regulation, information that the SRB is examining a specific entity must be presumed to have a negative impact on that entity. In that regard, the appellants consider that the prior existence of negative press reports about Banco Popular, far from exempting the SRB from liability, should have led it to exercise extreme caution regarding any mention of Banco Popular. Moreover, the market interpreted the comments made in that interview as an indication that a resolution action could be adopted.

339 In the second place, they rely, in essence, on the application of different legal criteria. When conducting its assessment of the SRB's liability, the General Court, in paragraphs 615 and 616 of the judgment under appeal, limited the scope of recital 116 of the SRM Regulation to situations in which it has been specifically disclosed that a bank is to be placed under resolution. By contrast, in its assessment relating to the right to be heard, set out in paragraphs 485 to 488 of that judgment, the General Court held that disclosing information in relation to the fact that an entity is failing or is likely to fail may have negative effects.

340 In the third place, they claim that, in paragraphs 613 and 616 of that judgment, the General Court downplayed the significance of the impact of the statements made by the Chair of the SRB on the situation of Banco Popular by comparing those statements with an earlier article in the newspaper *El Confidencial* of 15 May 2017, which reported that Banco Popular was the subject of an inspection by the ECB. However, the inspection carried out by the ECB, as banking supervisor, which was reported in that newspaper article, is in no way comparable to being watched by the SRB. Furthermore, the publication of an article in the non-financial press is not comparable to the statements made by the Chair of the SRB being broadcast on the television channel Bloomberg. Moreover, unlike the date of those statements, the date of the appearance of the newspaper article of 15 May 2017 was not given in any official document as a date on which deposit outflows or price collapses were observed.

341 As regards, in the fourth place, the press article published by Reuters on 31 May 2017, the appellants submit that, contrary to what the General Court found in paragraph 625 of the judgment under appeal, the leak of internal information reported in that article suggested to the market that Banco Popular was going to be placed under resolution, notwithstanding the fact that this was contradicted by the SRB in a subsequent press release. As regards the considerations set out in paragraphs 627 to 632 of that judgment, they submit that although other press articles, published on 11 and 15 May 2017 in *El Confidencial*, had already referred to a risk of insolvency in respect of Banco Popular, none of those articles had mentioned EU sources, unlike that article published by Reuters. In any event, the General Court disregarded the fact that a link had been established between the Reuters article of 31 May 2017 and the statements made on 23 May 2017 by the Chair of the SRB, which, according to the appellants, caused widespread panic in the market.

342 In the fifth place, the appellants claim that recital 116 and Article 88 of the SRM Regulation give rise to a rebuttable presumption as to the existence of a causal link between, on the one hand, statements, leaks and other disclosures to the public made in breach of the obligation of confidentiality and, on the other hand, the damage caused. Thus, in the event of a breach of that

obligation, the burden of proof is reversed, and it is for the EU bodies to prove the absence of such a link. In paragraphs 636 to 641 of the judgment under appeal, the General Court committed an error of law in failing to take that presumption into account.

343 In the sixth place, the appellants submit that the two internal emails concerning a potential leak of information, dated 10 and 18 August 2017, which they produced before the General Court, demonstrate that the SRB had not put in place any effective automatic monitoring or alert mechanisms in respect of such leaks and the statements made by its Chair. Contrary to what the General Court held, in paragraphs 644 and 645 of the judgment under appeal, the absence of such a mechanism was relevant for the purposes of assessing whether there had been a breach of the obligation of confidentiality.

344 In the seventh place, in paragraphs 609 and 610 of the judgment under appeal, the General Court wrongly declined to rule on their arguments concerning the leak of information to the Spanish administrative authorities, a member of which was also a member of the SRB.

345 In the eighth and last place, the appellants criticise the General Court for rejecting, in paragraphs 647 to 651 of the judgment under appeal, their complaint regarding the alleged passive attitude of the SRB and the Commission, on the ground that they had not explained the nature of their complaints against the Commission and the SRB, or identified the provision they were relying on, and that, in so far as they referred to the arguments put forward in the action for annulment, those arguments had already been rejected.

346 However, in paragraph 169(ii) and (iii) of the application at first instance, they relied, in relation to the statements and leaks from the SRB and the decision-making process, on a breach of the principles of sound administration and diligence, the principle *nemo auditur*, the obligation to state reasons, the principle of proportionality in relation to Article 17 of the Charter and the principle of non-discrimination. Those principles and fundamental rights are capable of giving rise to non-contractual liability on the part of the SRB and the Commission for infringement of Article 88 of the SRM Regulation and for failing to act with care and caution in the application of Article 18 of that regulation, in that they adopted a resolution action in respect of Banco Popular hastily, committing a series of omissions and unlawful acts which caused damage to the appellants. The appellants state that they maintain those complaints, relying on the errors of law put forward in the context of the first and second grounds of appeal.

347 The SRB contends that the first part of the fourth ground of appeal is inadmissible on the ground that, in that part, the appeal merely reiterates the arguments already submitted at first instance. For the same reasons, the Commission contends that the eighth complaint relied on in support of that part is inadmissible, maintaining that the claims made are general and imprecise, which prevents the opposing party from defending itself properly.

2. Findings of the Court

348 As a preliminary point, while the SRB contends that the first part of the fourth ground of appeal merely reiterates the arguments submitted at first instance, it must be observed that, by that part, the appeal seeks, in essence, to challenge the merits of the reasoning of the General Court with regard to a number of questions of law submitted to it concerning the breach of the obligation of confidentiality by the SRB and/or by the Commission. Furthermore, in so far as that part contains precise indications regarding the contested paragraphs the judgment under appeal, it cannot be declared inadmissible in its entirety.

349 The objections of inadmissibility are otherwise limited to certain complaints raised in support of the first part of the fourth ground of appeal. Those objections should be assessed in the context of the analysis of the complaint in question.

(a) The first to third complaints, alleging a breach of the obligation of confidentiality

350 By the first to third complaints in the first part of the fourth ground of appeal, the appellants submit, in essence, that paragraphs 611 to 618 of the judgment under appeal are vitiated by a misinterpretation and misapplication of the obligation of confidentiality arising from Article 339 TFEU and from Articles 88 and 91 of the SRM Regulation, read together with recital 116 thereof, having regard to the remarks made by the Chair of the SRB in the interview she gave to the television channel Bloomberg on 23 May 2017.

351 As regards, in the first place, the interpretation of that obligation, the appellants criticise the General Court for not having considered that information that the SRB is watching a specific entity may breach that obligation.

352 Under Article 339 TFEU, the members of the institutions of the European Union and the officials and other servants of the European Union are 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.

353 As regards the SRB, Article 88(1) of the SRM Regulation provides that the members of the SRB and, in particular, the staff of the SRB are to be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and in the relevant provisions of EU law. To that end, they are to be, in particular, prohibited from disclosing confidential information received during the course of their professional activities, unless, inter alia, it is in the exercise of their functions or in summary or collective form such that the entity concerned cannot be identified. However, Article 88(1) of the SRM Regulation does not itself specify what constitutes confidential information.

354 In that regard, recital 116 of that regulation states, first of all, 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' and that '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'.

355 Next, that recital states that 'information that the Board and the national resolution authorities are examining a specific entity could be enough to have negative effects on that entity' and that 'it is therefore necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information'.

356 Lastly, that recital specifies the information referred to, namely 'the content and details of resolution plans and the result of any assessment carried out in that context'. That information, like the information referred to in paragraph 354 of the present judgment, relates to a resolution action.

357 It follows that information that the SRB and the national resolution authorities are examining a specific entity in the context of – or with a view to carrying out – a resolution procedure or action could be enough to have negative effects on that entity, and must therefore be considered to be covered by the obligation of confidentiality provided for in Article 88(1) of the SRM Regulation.

358 On the other hand, recitals 15 and 89 of that regulation highlight the significant level to which, in the context of the SSM, the supervisory tasks attributed to, inter alia, the ECB, and the mission conferred on the SRB by the SRM Regulation are interwoven. It follows that, in order to enhance the effectiveness of the SRM, the SRB must cooperate closely with the ECB and the other authorities empowered to supervise entities within the SSM, in particular for groups subject to the consolidated supervision by the ECB. In those circumstances, Article 30(2) of the SRM Regulation provides that – in particular, but not exclusively, in the resolution planning, early intervention and resolution phases – the SRB and the ECB are required to cooperate closely and to provide each other with all information necessary for the performance of their tasks.

359 Thus, the SRB is subject to the requirement to monitor developments in the financial markets and, in particular, to supervise the institutions covered by that regulation, to the same extent as the ECB is, in order to be able to intervene effectively and rapidly where a credit institution is failing or is likely to fail.

360 Consequently, where information is restricted to the fact that the SRB is supervising, alongside the ECB, a credit institution, among other institutions covered by the SRM Regulation, that information cannot generally be considered to fall within the scope of the obligation of confidentiality, provided for in Article 88(1) of the SRM Regulation, in the absence of additional information capable of indicating that the SRB is acting in the context of – or with a view to carrying out – a resolution procedure or action.

361 In the present case, it is apparent from the considerations set out in paragraphs 613 and 615 to 617 of the judgment under appeal that the General Court specifically relied on the consideration that the information at issue did not concern the individual situation of the entity concerned and/or did not suggest that that entity was involved in a resolution procedure or action.

362 As regards the extract from the interview quoted in paragraph 612 of that judgment, the General Court noted, in paragraphs 613, 615 and 616 thereof, that the remarks were general in scope, did not mention the possible resolution of Banco Popular and, in particular, did not allow a conclusion to be drawn as regards the imminent resolution of Banco Popular, far less as regards the resolution tool that might be used by the SRB. As to the other extract quoted in paragraph 617 of that judgment, the General Court merely noted that that extract did not concern the individual situation of Banco Popular.

363 In those circumstances, the appellants are wrong to submit, in the context of the first and third complaints, that the General Court relied on a misinterpretation of Article 88(1) of the SRM Regulation, read in the light of recital 116 thereof.

364 Furthermore, the second complaint, relating to the alleged contradictory reasoning, must be rejected. Both in paragraphs 615 and 616 and in paragraphs 485 to 488 of the judgment under appeal, the General Court considered, in almost identical terms, whether the information in

question was capable of indicating that Banco Popular could be placed under resolution. The General Court therefore relied on the same legal criterion in order to examine a possible breach of the obligation of confidentiality.

365 In the second place, as regards the application of Article 88(1) of the SRM Regulation, read in the light of recital 116 thereof, the appellants essentially criticise the assessment of the extract from the interview quoted in paragraph 612 of the judgment under appeal. In that extract, the Chair of the SRB had answered a question relating specifically to Banco Popular's situation as follows:

'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.'

366 The appellants claim, in essence, that the Chair of the SRB implicitly indicated that Banco Popular may be placed under resolution, by stating that the SRB was supervising the bank.

367 In that regard, it should be noted that, in paragraph 613 of the judgment under appeal, the General Court relied on the finding that the remarks quoted in paragraph 612 of that judgment, and reproduced in paragraph 365 of the present judgment, referred not to the SRB examining Banco Popular individually, with a view to carrying out a resolution procedure or action, but to the supervision of institutions in general, namely all of those which are supervised by the SRB, in cooperation with the ECB, in the context of the SSM.

368 In so far as the appellants do not allege any distortion in that regard, the examination, by the Court of Justice, in the context of the present appeal must be based on that finding of the General Court.

369 It follows that, in the light of the findings set out in paragraphs 358 to 360 of the present judgment, the General Court did not err in law in holding, in paragraph 613 of the judgment under appeal, that the fact that Banco Popular, as a credit institution covered by the SSM, is being supervised by the SRB in cooperation with the ECB is not confidential information for the purposes of Article 339 TFEU and of Articles 88 and 91 of the SRM Regulation, read together with recital 116 thereof.

370 In that context, the appellants further claim that, first, the Chair of the SRB should have exercised extreme caution in view of the negative press coverage of Banco Popular and, second, the market construed the remarks made in the interview given to the television channel Bloomberg on 23 May 2017 as meaning that Banco Popular could possibly be placed under resolution.

371 In that regard, it is sufficient to note that, in the absence of any disclosure of confidential information in that interview, those circumstances do not permit the conclusion that the Chair of the SRB breached the obligation of confidentiality.

372 The first to third complaints in the first part of the fourth ground of appeal must therefore be rejected as unfounded.

(b) The fourth complaint, relating to the alleged leak of internal information

373 By the fourth complaint in the first part of the fourth ground of appeal, the appellants submit that the General Court wrongly held that the press article published by Reuters on 31 May 2017 was not capable of establishing a leak of confidential information constituting a breach of the obligation of confidentiality by the SRB and the Commission.

374 In that regard, it is apparent from paragraphs 619 to 633 of the judgment under appeal that the General Court rejected the argument that there had been a breach of that obligation on the ground, first, that the information leaks reported in that article contained information which was either denied by the SRB or was already public knowledge. Second, in paragraphs 634 to 643 of that judgment, the General Court held that it had not been proved before it that either the SRB or the Commission was the source of the leaks which gave rise to that information.

375 However, in the context of the fourth complaint in the first part of the fourth ground of appeal, the appellants merely criticise paragraphs 625 and 627 to 632 of the judgment under appeal. They submit that, contrary to the General Court's findings in those paragraphs, the internal leak reported in the press article published by Reuters on 31 May 2017 suggested that Banco Popular was going to be placed under resolution, and that that information was not public notwithstanding the fact that other articles had previously reported the same information, on the ground that those other articles had not mentioned internal EU sources.

376 On the other hand, the appellants do not dispute the findings in paragraphs 634 to 639 of the judgment under appeal, according to which they had not established before the General Court that the alleged internal leak of information was attributable to a Commission official or a member of staff of the SRB.

377 In so far as, on the basis of the latter findings, the General Court was entitled, without erring in law, to conclude that a breach of the obligation of confidentiality by the Commission or the SRB had not been established, the fourth complaint is ineffective.

(c) The fifth to eighth complaints in the first part of the fourth ground of appeal

378 The fifth and sixth complaints in the first part of the fourth ground of appeal are based on a manifestly incorrect reading of the judgment under appeal.

379 As regards the fifth complaint, it must be observed that, in paragraphs 637 to 641 of that judgment, the General Court made no ruling whatsoever on the existence of a causal link between the breach of the obligation of confidentiality and the damage caused, but examined the preliminary question of whether the breach of that obligation, assuming it were established, could be attributed to the Commission or to the SRB.

380 As regards the sixth complaint, it is sufficient to note that the General Court held, in paragraphs 643 to 645 of that judgment, that an internal investigation was irrelevant for the purposes of assessing whether unlawful conduct is the cause of the damage claimed under the resolution scheme at issue, where it is carried out after the adoption of that scheme. On the other hand, the General Court did not take a view on the relevance of monitoring or alert mechanisms capable of preventing such damage from occurring.

381 The seventh complaint challenges paragraphs 609 and 610 of the judgment under appeal. In those paragraphs, the General Court found that, other than the interview given by the Chair of the SRB on 23 May 2017 and the article published by Reuters on 31 May 2017, the appellants had not identified other alleged statements by the SRB which, in their view, breached the obligation of confidentiality.

382 In their appeal, the appellants allege 'information leaks' to the Spanish administrative authorities, a member of which was alleged also to be a member of the SRB, and merely refer to paragraphs in their application and reply at first instance. However, in their appeal, they have not shown that the General Court distorted the information relating to those leaks contained in the application and the reply, in failing to take into account those 'information leaks' as statements by the SRB.

383 The seventh complaint is therefore inadmissible.

384 Lastly, as regards the eighth complaint, the General Court rejected, in paragraphs 647 to 650 of the judgment under appeal, the complaint relating to the alleged passive attitude of the SRB and the Commission, on the ground that the appellants had not explained the nature of their complaints against the Commission and the SRB, or what measures the Commission and the SRB should have taken, and had not identified the provisions which require them to act.

385 Although the appellants dispute the validity of those findings, it must be held that their line of argument, as summarised in paragraph 346 of the present judgment, is not capable of demonstrating that the General Court distorted their application initiating proceedings.

386 In the light of the foregoing considerations, the first part of the fourth ground of appeal is in part inadmissible and in part unfounded.

I. The second part of the fourth ground of appeal, relating to the existence of a causal link

387 By the second part of the fourth ground of appeal, the appellants claim that the General Court wrongly held, in paragraphs 653 to 674 of the judgment under appeal, that there was no causal link between the alleged breach of the obligation of confidentiality and Banco Popular's liquidity crisis.

388 In that regard, it is sufficient to note that the General Court examined the alleged existence of a causal link only in the alternative, after concluding that there had been no breach of the obligation of confidentiality. Furthermore, it is apparent from the analysis of the first part of the fourth ground of appeal that all the arguments disputing that finding of the General Court must be rejected.

389 The second part of the fourth ground of appeal is therefore ineffective.

J. The third part of the fourth ground of appeal, relating to a claim for damages

390 By the third part of the fourth ground of appeal, the appellants submit that the General Court was wrong to reject, in paragraphs 678 to 698 of the judgment under appeal, their claim for damages made in connection with the annulment of valuation 2, on the ground that that claim was inadmissible.

391 In that regard, it must be observed that the appellants sought, first, the annulment of valuation 2, independently of the potential annulment of the resolution scheme at issue and of Decision 2017/1246, and, second, to be awarded compensation in connection with valuation 2.

392 As regards the first head of claim, it must be recalled that Article 20(15) of the SRM Regulation provides that a valuation such as valuation 2 is to be an integral part of the resolution scheme, while expressly stating that such a valuation cannot be subject to a separate right of appeal, but may be subject to an appeal together with the decision of the SRB. That provision reflects the settled case-law concerning the scope of Article 263 TFEU, according to which intermediate measures whose aim is to prepare the final decision do not, in themselves, have legal effects and therefore cannot form the subject matter of an action for annulment which is separate from the action for annulment of the final decision (see, to that effect, 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 39 and the case-law cited).

393 Thus, the General Court did not err in law in rejecting that first head of claim as inadmissible.

394 As regards the second head of claim, as the Advocate General noted in point 86 of her Opinion, the General Court was fully entitled to reject it as inadmissible. It is apparent from paragraphs 689 to 698 of the judgment under appeal that the General Court held that it was not possible to understand, from the application at first instance, the legal basis for that claim for damages raised in the context of the challenge to valuation 2, in the absence of any intelligible link between the provisions of EU law relied on and the compensation claimed.

395 Nor is it possible to ascertain from the arguments put forward in support of the appeal what the legal basis for that claim is.

396 The General Court therefore rightly rejected the second head of claim as inadmissible.

397 It follows that the third part of the fourth ground of appeal must be rejected.

398 Since all the grounds relied on by the appellants in support of their appeal must be rejected, that appeal must be dismissed in its entirety.

Costs

399 In accordance with Article 184(2) of the Rules of Procedure, where an appeal is unfounded, the Court is to make a decision as to costs.

400 Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

401 In the present case, since the appellants have been unsuccessful, they must, having regard to the forms of order sought by the Commission, the SRB and Banco Santander, be ordered to bear their own costs and to pay those incurred by the Commission, the SRB and Banco Santander.

402 Under Article 140(1) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, Member States and institutions which have intervened in the proceedings are to bear their own costs.

403 Consequently, the Kingdom of Spain must bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Ms Araceli García Fernández, Mr Faustino González Parra, Mr Fernando Luis Treviño de Las Cuevas, Mr Juan Antonio Galán Alcázar, Ms Lucía Palazuelo Vallejo-Nágera, Macon SA, Ms Marta Espejel García, Memphis Investments Ltd, Mr Pedro Alcántara de la Herrán Matorras, Mr Pedro José de Jesús Benito Trebbau López, Mr Pedro Regalado Cuadrado Martínez and Ms María Rosario Mari Juan Domingo to bear their own costs and to pay those 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.**

[Signatures]