Reports of Cases

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

1 June 2022 *

(Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Delegation of power – Right to be heard – Right to property – Obligation to state reasons – Articles 14, 18 and 20 of Regulation (EU) No 806/2014)

In Case T-628/17,

Aeris Invest Sàrl, established in Luxembourg (Luxembourg), represented by M. Roca Junyent, R. Vallina Hoset, G. Serrano Fenollosa, E. Galán Burgos and M. Varela Suárez, lawyers,

applicant,

v

European Commission, represented by L. Flynn and A. Steiblytė, acting as Agents,

and

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

defendants,

supported by

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

by

European Parliament, represented by P. López-Carceller, M. Martínez Iglesias, L. Visaggio, J. Etienne, M. Menegatti and M. Sammut, acting as Agents,

by

* Language of the case: Spanish.

Council of the European Union, represented by A. de Gregorio Merino, J. Bauerschmidt, H. Marcos Fraile and A. Westerhof Löfflerová, acting as Agents,

and by

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

interveners,

APPLICATION based on Article 263 TFEU for annulment of, first, Decision SRB/EES/2017/08 of the Single Resolution Board in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, SA and, secondly, Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español (OJ 2017 L 178, p. 15),

THE GENERAL COURT (Third Chamber, Extended Composition),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 17 June 2021,

gives the following

Judgment

I. Legal framework

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

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

3 Subsequently, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council (OJ 2014 L 173, p. 190) was adopted. Recital 1 thereof states as follows:

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

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

5 However, taking the view, first, that Directive 2014/59 did not lead to the centralisation of decision-making in the field of resolution, that it essentially provided for common resolution tools and resolution powers available for the national authorities of every Member State and left discretion to national authorities in the application of the tools and in the use of national financing arrangements in support of resolution procedures and, secondly, that that directive did not completely avoid the taking of separate and potentially inconsistent decisions by Member States regarding the resolution of cross-border groups, it was decided to establish a single resolution mechanism (SRM).

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

7 Recital 12 of Regulation No 806/2014 states:

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

ensure a neutral approach in dealing with failing banks and therefore increase stability of the banks of the participating Member States and prevent the spill-over of crises into non-participating Member States and will thus facilitate the functioning of the internal market as a whole. The mechanisms for cooperation regarding institutions established in both participating and non-participating Member States should be clear, and no Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for financial services.'

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

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

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

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

12 The second condition assumes that there is no reasonable prospect that alternative private sector measures or supervisory action would prevent the failure of that entity within a reasonable time frame.

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

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

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

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

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

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

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

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

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

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

23 Following the adoption of a resolution action, in accordance with Article 20(16) of Regulation No 806/2014, the SRB must ensure that a valuation is carried out by an independent person 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. That valuation may lead, pursuant to Article 76(1)(e) of Regulation No 806/2014, to paying compensation to shareholders or creditors if they have incurred greater losses in the resolution process than those they would have incurred in a winding up under normal insolvency proceedings.

II. Background to the dispute and events subsequent to the bringing of the action

24 The applicant, Aeris Invest Sàrl, is a legal person under Luxembourg law, which was a shareholder in Banco Popular Español, SA ('Banco Popular') before a resolution scheme was adopted in respect of Banco Popular.

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

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

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

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

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

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

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

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

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

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

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

35 On 12 May 2017, the liquidity coverage requirement of Banco Popular dropped below the minimum threshold of 80% set by Article 460(2)(c) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

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

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

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

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

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

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

42 On 31 May 2017, Reuters news agency published an article entitled 'EU warned of wind-down risk for Spain's Banco Popular'. That article states inter alia that, according to an EU official who remained anonymous, one of Europe's top bank watchdogs had warned EU officials that Banco Popular may need to be wound down if it failed to find a buyer. According to that article, that official also stated that the Chair of the SRB had recently issued an 'early warning' and had declared that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention.

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

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

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

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

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

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

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

49 On 3 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/06, addressed to the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring, Spain, 'the FROB'), concerning the marketing of Banco Popular ('the decision on marketing'). The SRB approved the immediate launching of the marketing of 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 offers in the context of the private sale process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Facts subsequent to the adoption of the resolution decision

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

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

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

III. Procedure and forms of order sought

84 By application lodged at the Registry of the General Court on 18 September 2017, the applicant brought the present action.

85 By document lodged at the Registry on 15 November 2017, the SRB requested the Court, pursuant to Article 92(3) of the Rules of Procedure of the General Court, to order measures of inquiry concerning the production of certain documents referred to in the annex. By decision of 30 November 2017, the Court decided not to grant that request for a measure of inquiry at that stage in the proceedings.

86 By documents lodged at the Registry of the General Court on 6 and 30 November 2017, and on 5 and 13 December 2017, respectively, Banco Santander, the Council, the Kingdom of Spain and the European Parliament applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission and the SRB. By decisions of 6 August 2018, the President of the Eighth Chamber of the General Court granted the Kingdom of Spain, the Parliament and the Council leave to intervene and, by order of 12 April 2019, granted Banco Santander leave to intervene. The Kingdom of Spain, the Parliament, the Council and Banco Santander submitted their statements in intervention, and the applicant and the SRB submitted their observations on those statements within the prescribed time limits.

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

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

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

90 By letter lodged at the Registry of the General Court on 21 January 2020, the applicant introduced a new plea in law pursuant to Article 84 of the Rules of Procedure. The Commission, the SRB, the Kingdom of Spain, the Parliament, the Council and Banco Santander lodged their observations within the prescribed time limits.

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

92 By letter lodged at the Registry of the General Court on 2 October 2020, the applicant produced a new offer of evidence pursuant to Article 85(3) of the Rules of Procedure. The Commission, the SRB, the Kingdom of Spain, the Parliament, the Council and Banco Santander lodged their observations within the prescribed time limit.

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

94 By letter lodged at the Registry of the General Court on 19 April 2021, the applicant filed a new offer of evidence and an application for measures of organisation of procedure. The Commission, the SRB, the Parliament, the Council and Banco Santander lodged their observations within the prescribed time limit.

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

96 By letter lodged at the Registry of the General Court on 17 May 2021, the applicant submitted an application for measures of organisation of procedure. The Commission, the SRB, the Kingdom of Spain, the Parliament, the Council and Banco Santander lodged their observations within the prescribed time limit.

97 By order of 9 June 2021, the Court removed from the file the confidential versions of the documents produced by the SRB pursuant to the order of 12 May 2021, and sent to the applicant, the Commission, the Kingdom of Spain, the Parliament, the Council and Banco Santander the letter of 6 June 2017 from Banco Popular to the ECB without the annex to that letter.

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

99 The parties presented oral argument and answered oral questions put to them by the Court at the hearing on 17 June 2021.

100 By document lodged at the Registry of the General Court on 30 July 2021, the applicant submitted a request that the oral part of the procedure be reopened under Article 113(2)(c) of the Rules of Procedure. By decision of 27 August 2021, the President of the Third Chamber (Extended Composition) of the Court rejected that request as, since none of the conditions laid down in Article 113(2) of the Rules of Procedure had been satisfied in the present case, the evidence on which the applicant based its request that the oral part of the procedure be reopened was not capable of having a decisive influence on the Court's decision.

101 The applicant claims that the Court should:

– annul the resolution scheme and Decision 2017/1246 (together, 'the contested decisions');

– order the SRB to pay the costs.

102 The Commission and the SRB contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

103 The Kingdom of Spain, the Council and Banco Santander contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

104 The Parliament contends that the Court should:

– dismiss the action in so far as it is based on the pleas of illegality raised against Regulation No 806/2014;

– order the applicant to pay the costs.

IV. Law

A. The new offer of evidence of 19 April 2021

105 By document lodged at the Court on 19 April 2021, the applicant submitted a new offer of evidence on the basis of Article 85(3) of the Rules of Procedure. That evidence concerns a request for access to documents sent by the applicant to the SRB on 4 May 2018 seeking the *ex post* definitive valuation of Banco Popular and the SRB's reply of 19 June 2018.

106 The Commission, the SRB and Banco Santander submit that those documents are not relevant to the present dispute.

107 Under Article 85(3) of the Rules of Procedure, the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed, provided that the delay in the submission of such evidence is justified.

108 According to settled case-law, 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 (see judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 22 and the case-law cited). It follows that elements post-dating the adoption of the EU measure cannot be taken into account in assessing the legality of that measure (see judgment of 17 December 2014, *Si.mobil* v *Commission*, T-201/11, EU:T:2014:1096, paragraph 64 and the case-law cited).

109 It is sufficient to note that the new offer of evidence submitted by the applicant concerns an email exchange between itself and the SRB concerning a request for access to documents, dating from May and June 2018. Therefore, those documents are not capable of calling into question the legality of the contested decisions since they largely post-date the adoption of those decisions.

110 Moreover, the applicant does not explain what information contained in that exchange of emails would be relevant to the resolution of the dispute and does not identify which argument raised in the application or the reply that exchange is supposed to support.

111 It must therefore be held that the new offer of evidence submitted by the applicant on 19 April 2021 is irrelevant for the purposes of assessing the legality of the contested decisions, without it being necessary to examine whether the applicant has justified the late submission of those documents which, given their date, were already available to it before the reply was lodged.

B. Substance

112 In support of its action, the applicant raises 10 pleas in law in the application. The first plea alleges breach of the duty to state reasons and infringement of the rights of the defence, enshrined in Articles 15 and 296 TFEU and Articles 42 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The second plea alleges breach of the principle *nemo auditur propriam turpitudinem allegans* and of Article 88 of Regulation No 806/2014. The third plea alleges that Articles 21 and 24 of Regulation No 806/2014 are unlawful in so far as they breach the principles relating to the delegation of powers. The fourth plea alleges that Articles 15 and 22 of Regulation No 806/2014 are unlawful in so far as they infringe the right to property enshrined in Article 17 of the Charter and breach the principle of proportionality laid down in Article 5(4) TEU. The fifth plea alleges that Articles 18 and 20 of Regulation No 806/2014 are unlawful in so far as they infringe the right to be heard, enshrined in Articles 17 and 41 of the Charter. The sixth plea alleges infringement of the right to property, enshrined in Article 17 of the Charter and infringement of Article 5(4) TEU. The seventh plea alleges infringement of the right to be heard, enshrined in Articles 17 and 41 of the Charter. The eighth plea alleges infringement of Article 18 of Regulation No 806/2014, breach of the duty of care and infringement of Article 296 TFEU. The ninth plea alleges infringement of Articles 14 and 20 of Regulation No 806/2014, breach of the duty of care and infringement of Article 296 TFEU. The 10th plea alleges infringement of Article 14 of Regulation No 806/2014, breach of the duty of care and infringement of Article 296 TFEU.

113 In the reply, the applicant raises two new pleas in law. The 11th plea alleges infringement of Article 20(14) of Regulation No 806/2014, read in conjunction with Article 20(11) and (15) of that regulation, and infringement of essential procedural requirements. The 12th plea alleges infringement of Article 20(1) of Regulation No 806/2014, read in conjunction with Article 20(3) and (5) of that regulation.

114 As a preliminary point, it must be noted that the case-law has defined the scope of the review carried out by the Court both in situations in which the contested act is based on an assessment of highly complex scientific and technical facts and where there are complex economic assessments.

115 First, with regard to situations in which the EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which they adopt, review by the EU judicature is limited to verifying

whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU judicature cannot substitute its assessment of scientific and technical facts for that of the EU authorities on which alone the FEU Treaty has placed that task (judgments of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, paragraph 60, and of 7 March 2013, *Bilbaína de Alquitranes and Others* v *ECHA*, T-93/10, EU:T:2013:106, paragraph 76; see, also, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 163 and the case-law cited).

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

117 Since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, it must be held that the principles resulting from the case-law referred to in paragraphs 115 and 116 above apply to the review which the court is called upon to carry out.

118 However, although the SRB has discretion with regard to economic and technical matters, that does not mean that the EU Courts must refrain from reviewing the SRB's interpretation of information of an economic nature which forms the basis of its decision. As the Court of Justice has held, even in the case of complex assessments, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it (see judgments of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 57 and the case-law cited; of 26 March 2019, *Commission* v *Italy*, C-621/16 P, EU:C:2019:251, paragraph 104 and the case-law cited; and of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 115 and the case-law cited).

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

120 The Court considers it appropriate to examine, first of all, the pleas of illegality raised in the third, fourth and fifth pleas in law, then the eighth plea in law and, lastly, the other pleas in law.

1. The third plea in law, alleging that Articles 21 and 24 of Regulation No 806/2014 are unlawful in so far as they infringe the principles relating to the delegation of powers

121 The applicant submits that Articles 21 and 24 of Regulation No 806/2014 infringe the principles established by the judgments of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), and of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18) concerning the delegation of powers by the institutions. It states that the delegation to the SRB of the power to write down and convert capital instruments, provided for in Article 21 of Regulation No 806/2014 and the power to sell business, provided for in Article 24 of the same regulation, does not comply with the three conditions laid down in those judgments, namely the objectives have not been established precisely, the circumstances and conditions under which those powers may be exercised are not defined and compliance with the principle of proportionality is not ensured.

122 The Commission, the Parliament and the Council submit, in essence, that the EU legislature has not delegated discretionary powers to the SRB, since the SRB's resolution scheme produces binding legal effects only if it is endorsed by the Commission or the Council. The powers provided for in Articles 21 and 24 of Regulation No 806/2014 required the Commission's approval in accordance with the judgment of 13 June 1958, *Meroni* v *High Authority*, (9/56, EU:C:1958:7). Since the power to decide on matters involving discretionary assessments is reserved to the Commission or to the Council, those institutions thus assume legal and political responsibility for determining the European Union's resolution policy.

123 It should be noted that the Treaties do not contain any provision providing for the conferral of powers on an EU body, office or agency. Thus, no mention is made of agencies in either Article 290 TFEU, which provides for delegation of rule-making in legislative acts to the Commission, or Article 291 TFEU which confers implementing powers on the Member States, the Commission, and in some limited circumstances the Council (Opinion of Advocate General Jääskinen in *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2013:562, point 75).

124 It is therefore the case-law, and in particular the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), which laid down the principles governing the delegation of powers. Next, the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), applied those principles to cases where autonomous powers have been conferred on an agency by the EU legislature.

125 In paragraph 41 of the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), the Court of Justice stated that, in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), it had emphasised, in essence, that the consequences resulting from a delegation of powers were very different depending on whether it involved clearly defined executive powers the exercise of which could, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involved a 'discretionary power implying a wide margin of discretion which [could], according to the use which [was] made of it, make possible the execution of actual economic policy'.

126 The Court of Justice added that it had also stated in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7) that a delegation of the first kind could not appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaced the choices of the delegator by the choices of the delegate, brought about an 'actual transfer of responsibility' (judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 42).

127 As a preliminary point, it must be noted that the procedure for adopting resolution actions established by the legislature in Regulation No 806/2014 followed the observations made by the Council Legal Service in an opinion of 7 October 2013 on the Commission's proposal for a regulation, which sought to assess the compatibility of the procedure initially laid down in the proposal for a regulation with the principles governing the delegation of powers, as interpreted in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

128 Originally, in the proposal for a regulation examined in that opinion, the division of powers between the Commission and the SRB differed from that ultimately adopted in Regulation No 806/2014. In particular, the Commission had the power to place an entity under resolution, to establish a framework for the use of resolution tools and to decide whether and how the powers to write down or convert capital instruments were to be used, and the SRB, in accordance with the framework established by the Commission, was competent to adopt decisions addressed to the national resolution authorities.

129 In its opinion, the Council Legal Service stated that certain measures which the SRB could include in a resolution decision were not defined with sufficient precision. The Council Legal Service considered that the general economy and structure of the proposal for a regulation, whereby the Commission would be endowed with the power to adopt the basic resolution decisions and the SRB would be held to act within the criteria laid down by the Commission itself, is in conformity with EU law as interpreted in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). However, it considered that the powers of the SRB to implement resolution tools and decisions seem at certain instances to be of a rather discretionary nature, thus going beyond the exercise of purely technical powers. Therefore, it concluded that it would be necessary either to include in the regulation further specifications in order properly to frame the application by the SRB of resolution tools or to involve in the exercise of those powers an EU institution vested with executive competences.

130 The EU legislature, taking that opinion from the Council Legal Service into consideration, amended the mechanism for adopting resolution actions. Given that the adoption of a resolution action involves a margin of discretion, the legislature reserved that power to an institution and not to the SRB.

131 That is apparent, in particular, from recitals 24 and 26 of Regulation No 806/2014 which state:

> '(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 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 [SRB] 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 [SRB] of the existence of a public interest and to assess any material change to the amount of the [SRF] to be used in a specific resolution action. …

(26) … The [SRB], 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 [SRB] while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union … Therefore, this Regulation provides that the resolution scheme adopted by the [SRB] enters into force only if, within 24 hours after its adoption by the [SRB], there are no objections from the Council or the Commission or the resolution scheme is approved by the Commission. The grounds on which the Council is permitted to object, on a proposal by the Commission, to the [SRB's] resolution scheme should be strictly limited to the existence of a public interest and to material modifications by the Commission of the amount of the use of the [SRF] as proposed by the [SRB]. … As an observer to the meetings of the [SRB], the Commission should, on an ongoing basis, check that the resolution scheme adopted by the [SRB] complies fully with this Regulation, balances appropriately the different objectives and interests at stake, respects the public interest and that the integrity of the internal market is preserved. Considering that the resolution action requires a very speedy decision-making process, the Council and the Commission should cooperate closely and the Council should not duplicate the preparatory work already undertaken by the Commission. …'

132 Thus, as regards the resolution procedure, Article 18(7) of Regulation No 806/2014 provides that the Commission is either to endorse the resolution scheme or object to it with regard to the discretionary aspects of the scheme and that a resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB.

133 Therefore, under Article 18(7) of Regulation No 806/2014, it is necessary for an EU institution, namely the Commission or the Council, to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects. The EU legislature thus conferred on an institution the legal and political responsibility for determining the European Union's resolution policy, thereby avoiding an 'actual transfer of responsibility' within the meaning of the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

134 As the Commission, the Parliament and the Council submit, the EU legislature, by establishing the procedure for the adoption of a resolution action provided for in Regulation No 806/2014 and by expressly reserving the decision on the discretionary aspects of such an action to the EU institutions, did not delegate autonomous power to the SRB.

135 In the light of those considerations, it is necessary to examine the powers conferred on the SRB by Article 21 of Regulation No 806/2014 relating to the power to write down or convert capital instruments and by Article 24 of that regulation relating to the sale of business tool, referred to in the plea of illegality raised by the applicant.

136 First of all, it should be noted that the choice of the sale of business tool and the exercise of the power to write down and convert capital instruments in the context of a resolution action presuppose that the conditions for the adoption of a resolution scheme referred to in Article 18(1) of Regulation No 806/2014 are satisfied. In particular, they imply that the resolution action is necessary in the public interest within the meaning of Article 18(1)(c) of Regulation No 806/2014.

137 Under the third subparagraph of Article 18(7) of Regulation No 806/2014, the Commission, after the transmission of the resolution scheme by the SRB, may propose to the Council to object to the resolution scheme on the ground that the resolution scheme adopted by the SRB does not fulfil the criterion of public interest referred to in paragraph 1(c) of that article.

138 Compliance with the condition laid down in Article 18(1)(c) of Regulation No 806/2014 is a prerequisite for the decision to place an institution under a resolution procedure, and the review of the need for the action in the light of the public interest entails the exercise of a discretionary power involving a broad discretion. For that reason, the EU legislature expressly conferred on the Commission, and where necessary on the Council, and not on the SRB, the power to monitor compliance with that condition.

139 Under Article 18(5) of Regulation No 806/2014, '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'.

140 Article 14(1) of Regulation No 806/2014 states:

'When acting under the resolution procedure referred to in Article 18, the [SRB], 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'.

141 It follows that it is for the Commission, when assessing compliance with the public interest criterion, to assess whether the choice of the resolution tool and whether the exercise of the power to write down and convert capital instruments are appropriate and proportionate to the objectives of the resolution. It also follows that the Commission must assess whether the resolution scheme envisaged by the SRB is adapted to the specific circumstances of the entity concerned, having regard in particular to the reasons why that entity was considered to be failing or likely to fail.

142 Therefore, first, it must be held that the choice of the sale of business tool provided for in Article 24 of Regulation No 806/2014 as a resolution tool contributes to the proportionality of the action in the light of the public interest criterion and that Regulation No 806/2014 expressly provides that it is for the Commission either to endorse the action or raise objections. It must therefore be considered that that article does not confer any discretion on the SRB.

143 Secondly, with regard to the exercise of the power to write down or convert relevant capital instruments provided for in Article 21 of Regulation No 806/2014, it should be noted that that article makes numerous references to the procedure in Article 18 of the same regulation, in particular in Article 21(9) which provides that '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'. Accordingly, the decision to write down and convert the entity concerned's capital instruments is subject to the procedure for adopting the resolution scheme in Article 18 of Regulation No 806/2014 and, in particular, the Commission's approval.

144 Furthermore, the power to write down and convert capital instruments forms part of the resolution powers referred to in Article 14(1) of Regulation No 806/2014, the use of which must be proportionate to the resolution objectives and which fall within the scope of the Commission's assessment of compliance with the public interest criterion. It must therefore be held that Article 21 of Regulation No 806/2014 does not confer any discretionary power on the SRB.

145 Moreover, it should be borne in mind that the choice of the sale of business tool and the exercise of the power to write down and convert capital instruments, as essential elements of the resolution scheme, produce legal effects only if an EU institution, namely the Commission or the Council, has endorsed them.

146 Accordingly, it must be held that Articles 21 and 24 of Regulation No 806/2014 do not contain a delegation of autonomous powers to the SRB in accordance with the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

147 By its arguments, the applicant submits, in essence, that the delegation of powers conferred on the SRB by Articles 21 and 24 of Regulation No 806/2014 does not comply with the conditions laid down in the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), mentioned in paragraph 121 above.

148 In so far as it has been found that Articles 21 and 24 of Regulation No 806/2014 did not lead to a delegation of powers to the SRB, the conditions laid down by the Court of Justice in the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), aimed at assessing whether a delegation of autonomous powers conferred on an agency was consistent with the principles laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), are therefore not applicable in the present case. Accordingly, the arguments raised by the applicant which seek to establish that the conditions laid down in that judgment were not satisfied are irrelevant.

149 It follows from all of the foregoing that the plea of illegality in respect of Articles 21 and 24 of Regulation No 806/2014 must be rejected.

2. The fourth plea in law, alleging that Articles 15 and 22 of Regulation No 806/2014 are unlawful in so far as they infringe the right to property enshrined in Article 17 of the Charter and the principle of proportionality laid down in Article 5(4) TEU

150 The applicant raises a plea of illegality in respect of Articles 15 and 22 of Regulation No 806/2014 on the basis of Article 277 TFEU. It claims, in essence, that those provisions, in so far as they require shareholders to bear first losses in all circumstances, infringe, first, the right to property guaranteed by Article 17 of the Charter, without that restriction being regarded as justified in accordance with Article 52(1) of the Charter and, secondly, the principle of proportionality guaranteed by Article 5(4) TEU.

151 The applicant submits that Articles 15 and 22 of Regulation No 806/2014 restrict shareholders' right to property since they are required to bear the losses arising from the resolution. Those articles are said to prevent less restrictive solutions from being sought and therefore do not satisfy the conditions laid down in Article 52(1) of the Charter. In that regard, it submits that it is not possible to establish a general presumption that there is a public interest in the losses being borne primarily by the shareholders, without the possibility of examining other measures. The

applicant considers that the public authority should be able to assess the public interest in not using public funds or in not using the SRF on a case-by-case basis, having regard to the public finance position, the market situation, the economic context and the solvency of the institution.

152 The applicant also claims that Articles 15 and 22 of Regulation No 806/2014 infringe the principle of proportionality guaranteed by Article 5(4) TEU since the SRB should be able to ascertain on a case-by-case basis whether there is a public interest in losses being borne by the shareholders or whether the right to property must prevail depending on the circumstances of each individual case. Those articles are also said to discriminate between different categories of creditors, in particular in the light of Article 27(3) of Regulation No 806/2014.

153 As a preliminary point, it should be recalled that the provisions the legality of which the applicant challenges contain general principles governing resolution or resolution tools.

154 Article 15(1) of Regulation No 806/2014 provides:

'When acting under the resolution procedure referred to in Article 18, the [SRB], 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;

…'

155 Article 22(1) of Regulation No 806/2014 provides:

'Where the [SRB] 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 [SRB] 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.'

156 It must be held that the write-down and conversion of capital instruments provided for in Article 22 of Regulation No 806/2014 are an application of the principle that shareholders are to bear first losses, provided for in Article 15 of that regulation.

157 Article 17(1) of the Charter provides:

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

158 Article 52(1) of the Charter states:

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

159 It should be recalled that, according to settled case-law, the right to property guaranteed by Article 17(1) of the Charter is not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Consequently, as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to property, provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited; judgments of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 85; and of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraph 100).

160 It follows that the right to property is not an absolute right, but it may be subject to limitations if they are provided for in the applicable texts, are necessary for the pursuit of a general objective and are proportionate to that objective.

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

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

163 The Court of Justice has already held that, in view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the banks concerned would have been exposed if the latter had failed, certain restrictions on the right to property could be justified (see, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 74).

164 The Court of Justice has also held that, although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 91, and of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 54).

165 In that regard, recital 61 of Regulation No 806/2014 provides that the limitations on the rights of shareholders and creditors should comply with Article 52 of the Charter and that the resolution tools should therefore be applied only to those entities that are failing or likely to fail, and only where necessary to pursue the objective of financial stability in the general interest.

166 It should be noted that Article 15(1) and Article 22(1) of Regulation No 806/2014 expressly provide that they are to be implemented in the context of a resolution action, which means that they meet the objectives of a resolution.

167 In that regard, Article 14(2) of Regulation No 806/2014 provides that the resolution objectives are the following: to ensure the continuity of critical functions, to avoid significant adverse effects on financial stability, in particular by preventing contagion, to protect public funds by minimising reliance on extraordinary public financial support, to protect depositors and to protect client funds and client assets.

168 Accordingly, it must be held that the objective pursued by a resolution action of ensuring the stability of the financial system is an objective of general interest which, in accordance with the case-law cited in paragraphs 162 to 164 above, may justify certain restrictions on the right to property. The limitations on the right to property of the shareholders to which Articles 15 and 22 of Regulation No 806/2014 may lead meet that same objective of general interest recognised by the European Union and are therefore capable of being justified, in accordance with the requirements of Article 52(1) of the Charter.

169 In the second place, it should be recalled that the application of Articles 15 and 22 of Regulation No 806/2014 presupposes that the conditions for the adoption of a resolution action are met.

170 As regards the conditions for the adoption of a resolution action, Article 18(1) of Regulation No 806/2014 provides that the entity covered by the resolution action must be failing or likely to fail, that there is no reasonable prospect that any alternative private sector or early intervention measures would prevent its failure within a reasonable time frame and that the action must be necessary in the public interest.

171 It should also be noted, as is apparent inter alia from Article 18(8) of Regulation No 806/2014, that a resolution action is an alternative solution to normal insolvency proceedings.

172 The Court of Justice has held, as regards the shareholders of the banks, that, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, they must fully bear the risk of their investments (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 73).

173 The Court of Justice has held, in the field of State aid, that, since shareholders are liable for the debts of the bank up to the amount of its share capital, the fact that points 40 to 46 of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013 C 216, p. 1) require that, in order to overcome a bank's capital shortfall, prior to the grant of State aid, those shareholders should contribute to the absorption of the losses suffered by that bank to the same extent as if there were no State aid, cannot be regarded as adversely affecting their right to property (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 74).

174 It must be held, by analogy, that, in the case of an entity which is the subject of a resolution action, the application of the principle that the shareholders are to bear first losses, provided for in Article 15 of Regulation No 806/2014, and the exercise of the power to write down and convert capital instruments, provided for in Article 22 of the same regulation, are the consequence of the

fact that the shareholders of an entity must bear the risks inherent in their investments and of the fact that, since that entity is the subject of a resolution action because of its failure, those shareholders must bear the economic consequences of that failure.

175 The applicant puts forward a number of arguments to support its view that Articles 15 and 22 of Regulation No 806/2014 infringe the principle of proportionality in so far as they do not allow a case-by-case analysis or the examination of alternative solutions.

176 According to settled case-law, the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 55 and the case-law cited, and of 6 May 2021, *Bayer CropScience and Bayer* v *Commission*, C-499/18 P, EU:C:2021:367, paragraph 166 and the case-law cited). That principle is stated in Article 5(4) TEU and in Article 1 of the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and the FEU Treaty.

177 First, the applicant submits that Articles 15 and 22 of Regulation No 806/2014 apply in all circumstances, without account being taken of the circumstances of each individual case.

178 It is true that Article 15 of Regulation No 806/2014 contains a principle which must guide any resolution action, in so far as shareholders must bear the risks associated with their investments. In that regard, it should be recalled that, in accordance with the case-law cited in paragraph 173 above, the contribution of shareholders to the bank's losses cannot constitute an infringement of their right to property.

179 However, contrary to what the applicant appears to claim, the application of that principle does not automatically result in the exercise of the power to write down and convert capital instruments, provided for in Article 22 of Regulation No 806/2014, in every case where an entity is subject to a resolution action.

180 Thus, as regards the involvement of shareholders and creditors, Article 21 of Regulation No 806/2014 sets out the conditions under which the power to write down or convert capital instruments is exercised.

181 Moreover, it must be observed that Article 22 of Regulation No 806/2014 does not require the application of a specific resolution tool. It is for the SRB and the Commission to decide, on the basis of the circumstances of the case, which resolution tool is the most appropriate.

182 Secondly, the applicant submits that Articles 15 and 22 of Regulation No 806/2014 prevent less restrictive solutions from being sought, such as using the SRF, public funds or loans, depending on the circumstances. It must be held that that argument is based on a misunderstanding of the resolution mechanism.

183 First, in accordance with Article 18(1)(b) of Regulation No 806/2014, the adoption of a resolution action and, therefore, the exercise, in that context, of the power to write down and convert capital instruments presuppose the absence of an alternative private sector measure or supervisory action.

184 The less restrictive solutions envisaged by the applicant cannot therefore be regarded as alternative measures to the participation of shareholders and creditors in the context of a resolution action.

185 Moreover, the applicant appears to disregard the fact that the resolution action constitutes an alternative to a situation in which the entity is wound up under normal insolvency proceedings. If the difficulties faced by a bank could be resolved by means of loans, whether public or private, a resolution procedure could not be initiated in so far as the condition laid down in Article 18(1)(b) of Regulation No 806/2014 would not be met.

186 Secondly, it should be noted that the granting of State aid or aid from the SRF is not precluded in the context of a resolution action under Article 19 of Regulation No 806/2014. Thus, contrary to the applicant's submissions, depending on the circumstances of the case, the SRB and the Commission may decide to authorise the use of public funds or of the SRF.

187 Thirdly, the applicant adds in the reply that Articles 15 and 22 of Regulation No 806/2014 do not allow for more flexible solutions, in particular in the event of a liquidity crisis, which is not the most serious problem a bank may face, such as loans from public authorities or liquidity assistance from the ECB.

188 By that argument, the applicant appears to criticise the legislature for not having envisaged in Article 22 of Regulation No 806/2014 any solution other than a resolution action in order to resolve difficulties which a bank may encounter. It is sufficient to note that that argument is ineffective since, if a bank is not in a position where it meets the conditions for being subject to a resolution action, it does not fall within the scope of Regulation No 806/2014.

189 In any event, contrary to the applicant's submissions, a liquidity crisis is likely to lead a bank to a situation in which it is unable to pay its debts or other liabilities as they fall due, or in which there are objective elements to support a determination that that will occur in the near future, which is one of the situations, provided for in Article 18(4)(c) of Regulation No 806/2014, in which an entity will be deemed to be failing or likely to fail.

190 Fourthly, the applicant submits that Articles 15 and 22 of Regulation No 806/2014 also breach the principle of proportionality in that they discriminate between the different categories of creditors and unjustified preferential treatment is granted to deposit holders.

191 It should be recalled that the principle of equal treatment is a general principle of EU law, now enshrined in Articles 20 and 21 of the Charter, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgments of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 55; of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 191; and of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 98).

192 In that regard, it is sufficient to note, first, that Article 15(1)(b) of Regulation No 806/2014 provides that 'creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims pursuant to Article 17, save as expressly provided otherwise in this Regulation'. Article 15(1)(f) of Regulation No 806/2014 provides that creditors of the same class are to be treated in an equitable manner.

193 Moreover, Article 21(10) of Regulation No 806/2014 also states that 'the [SRB] shall ensure that the national resolution authorities exercise the write-down or conversion powers without delay, in accordance with the priority of claims pursuant to Article 17'. That provision lays down an order of priority for claims and distinguishes in that regard between different categories of creditors, the holders of Common Equity Tier 1 items, the holders of Additional Tier 1 instruments and the holders of Tier 2 instruments.

194 Shareholders and creditors holding subordinated instruments, depending on whether they belong to one of those categories, are not in a comparable situation and may receive different treatment depending on the order of priority of their claims. Moreover, compliance with the principle of non-discrimination between creditors is guaranteed by Article 15(1)(f) of Regulation No 806/2014.

195 Secondly, the shareholders of a bank are not in a comparable situation to depositors. Unlike shareholders, depositors cannot be regarded as investors who must bear the economic risks of an investment in the bank's share capital.

196 Moreover, the protection of depositors forms part of the resolution objectives under Article 14(2)(d) of Regulation No 806/2014 and is recalled in Article 15(1)(h) of the same regulation. Regulation No 806/2014 thus ensures that a resolution action complies with the principles laid down 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).

197 It follows from the foregoing that the applicant has not established that Articles 15 and 22 of Regulation No 806/2014 led to a disproportionate restriction of the right to property.

198 Moreover, contrary to the applicant's submissions, account must be taken of the fact that Regulation No 806/2014 provided for a mechanism intended to ensure that interference with shareholders' right to property which may arise from the resolution action is not disproportionate.

199 In that regard, recital 62 of Regulation No 806/2014 provides that interference with property rights should not be disproportionate and that affected shareholders and creditors should not incur greater losses than those which they would have incurred had the entity been wound up at the time that the resolution decision is taken.

200 Among the general principles governing resolution, Article 15(1)(g) of Regulation No 806/2014 establishes the no creditor worse off principle, namely:

'no creditor shall incur greater losses than would have been incurred if an entity referred to in Article 2 had been wound up under normal insolvency proceedings in accordance with the safeguards provided for in Article 29.'

201 In order to determine whether the shareholders and the creditors would have received better treatment if the entity concerned had entered into normal insolvency proceedings, Article 20(16) of Regulation No 806/2014 provides that a valuation is to be carried out after the resolution.

According to Article 20(17) of Regulation No 806/2014, that valuation establishes whether there is a difference between the treatment which the shareholders and creditors would have received if the institution had entered into normal insolvency proceedings at the time when the decision on the resolution action was taken and the actual treatment that they received in the resolution.

202 If, following that valuation, it is established that the shareholders or creditors suffered greater losses in the resolution than the losses they would have incurred during a winding-up under normal insolvency proceedings, Article 76(1) of Regulation No 806/2014 provides that the SRB may use the SRF in order to compensate them.

203 Thus, Regulation No 806/2014 ensures that shareholders and creditors will not be treated less favourably, as a result of the resolution, than they would have been in the context of normal insolvency proceedings, by providing, where appropriate, for a compensation mechanism. In accordance with the right to property enshrined in Article 17(1) of the Charter, in the event that a resolution scheme leads to an infringement of the right to property of the shareholders and creditors, Regulation No 806/2014 establishes a mechanism ensuring fair compensation for their loss.

204 Contrary to the applicant's submissions, insolvency proceedings are the only alternative to resolution. It is sufficient to recall that, in accordance with Article 18(1) of Regulation No 806/2014, the fact that the entity is failing or is likely to fail and there is no reasonable prospect that any alternative private sector measures or supervisory action could prevent that failure are conditions for the adoption of a resolution action.

205 In that regard, it must be observed that, in the field of State aid, the Court of Justice has held that the scale of losses suffered by shareholders of distressed banks will, in any event, be the same, regardless of whether those losses are caused by a court insolvency order because no State aid is granted or by a procedure for the granting of State aid which is subject to the prerequisite of burden-sharing (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 75).

206 The Court of Justice has stated that paragraph 46 of the Banking Communication provides that 'the "no creditor worse off principle" should be adhered to' and that 'subordinated creditors should therefore not receive less, in economic terms, than what their instrument would have been worth if no State aid were to be granted' (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 77).

207 According to the Court of Justice, it follows from that paragraph that the burden-sharing measures on which the grant of State aid in favour of a bank showing a shortfall is dependent cannot cause any detriment to the right to property of subordinated creditors that those creditors would not have suffered within insolvency proceedings that followed such aid not being granted. That being the case, it cannot reasonably be maintained that the burden-sharing measures, such as those laid down by the Banking Communication, constitute interference in the right to property of the shareholders and the subordinated creditors (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 78 and 79).

208 It must therefore be held, by analogy, that the application of the no creditor worse off principle, laid down in Article 15(1)(g) of Regulation No 806/2014, guarantees the shareholders of an entity which is the subject of a resolution action fair compensation in accordance with the requirements of Article 17(1) of the Charter.

209 Moreover, by document lodged at the Registry of the General Court on 21 January 2020, the applicant introduced a new plea in law on the basis of Article 84(2) of the Rules of Procedure. It submits that the order of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, appeal pending, EU:T:2019:740) has a direct impact on the plea of illegality in respect of Articles 15 and 22 of Regulation No 806/2014 and that the allegations made in the fourth plea must be supplemented in the light of that order.

210 The Commission, the SRB, the Kingdom of Spain, the Council and Banco Santander submit that the arguments put forward by the applicant on 21 January 2020 constitute a new plea in law which is inadmissible.

211 Since the applicant confirmed at the hearing that this was not a new plea in law but an amplification of the fourth plea, the Court will confine itself to examining the new arguments raised on 21 January 2020 in so far as they support the plea of illegality raised in the fourth plea in law.

212 The applicant submits that it is apparent from paragraphs 48 and 49 of the order of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, appeal pending, EU:T:2019:740), against which it has lodged an appeal, that Regulation No 806/2014 does not provide for compensation for shareholders who are deprived of their right to property in cases such as that of Banco Popular. According to that order, the shareholders of Banco Popular were not entitled to compensation, even though the actual value of Banco Popular was higher than that attributed to it in valuation 2. The applicant infers from that that Regulation No 806/2014 does not provide for an appropriate compensation scheme for shareholders who are deprived of their right to property and that the plea of illegality must therefore be upheld. It adds that the compensation provided for in Article 20(16) of Regulation No 806/2014 would not be appropriate and sufficient.

213 It must be recalled that, in its order of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, appeal pending, EU:T:2019:740), the Court dismissed the action for annulment brought by the applicant against the decision of the SRB not to carry out an *ex post* definitive valuation of Banco Popular. In paragraph 47 of that order, the Court found that the sale of business tool applied to Banco Popular was not one of the situations referred to in Article 20(12) of Regulation No 806/2014 in which compensation could be paid following an *ex post* definitive valuation. The Court therefore held, in paragraphs 48 and 49 of its order, to which the applicant refers:

> ‘48 Moreover, it must be noted that Article 20(12) of Regulation No 806/2014 does not allow compensation for former shareholders and creditors of an entity whose capital instruments had been fully converted, written down and transferred to a third party.
>
> 49 In that regard, the applicant is wrong to claim that the *ex post* definitive valuation directly affects the legal situation of Banco Popular’s former shareholders and that if the estimate of that bank’s market value were higher than that resulting from valuation 2, those shareholders would be entitled to compensation under Article 20 of Regulation No 806/2014.’

214 It is sufficient to note that, in the order of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, appeal pending, EU:T:2019:740), the Court ruled solely on the applicant’s situation in the context of the resolution of Banco Popular and held that the compensation provided for in Article 20(12) of Regulation No 806/2014 was not applicable in that case.

215 It follows that the considerations limited to the case in question made by the Court in the order of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, appeal pending, EU:T:2019:740) are not relevant for the purposes of assessing the legality of Regulation No 806/2014. Moreover, in its document lodged on 21 January 2020, the applicant does not establish any link between that order and Articles 15 and 22 of Regulation No 806/2014 the illegality of which is raised in the fourth plea in law.

216 Furthermore, it must be noted that, since the applicant brought an appeal against the order of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, appeal pending, EU:T:2019:740), that order is not final.

217 It follows that the new arguments raised by the applicant on 21 January 2020 are not relevant for the purposes of assessing the plea of illegality raised in the fourth plea in law.

218 It follows from all of the foregoing that Articles 15 and 22 of Regulation No 806/2014 do not constitute a disproportionate and intolerable interference impairing the very substance of the right to property of the shareholders of the entity concerned by a resolution action, but must be regarded as a justified and proportionate restriction of their right to property, in accordance with the provisions of Article 17(1) and Article 52(1) of the Charter and Article 5(4) TEU.

219 Accordingly, the plea of illegality raised in the fourth plea in law must be dismissed.

3. The fifth plea in law, alleging that Articles 18 and 20 of Regulation No 806/2014 are unlawful in so far as they infringe the right to be heard, enshrined in Articles 17 and 41 of the Charter

220 The applicant, on the basis of Article 277 TFEU, raises a plea of illegality in respect of Articles 18 and 20 of Regulation No 806/2014 in that those provisions infringe the right to be heard, enshrined in Article 41(2)(a) of the Charter, in so far as they do not provide for the shareholders of the entity subject to a resolution action to be heard. That failure to hear the shareholders is also said to be incompatible with the procedural guarantees of the right to property laid down in Article 17 of the Charter, read in conjunction with Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, in accordance with which, in the event of an interference with a person's right to property, that person must be offered a reasonable opportunity of putting his or her case to the competent authorities.

221 The Commission, the SRB and the Parliament submit that, if the shareholders of an institution subject to a resolution procedure have a right to be heard enshrined in Article 41(2)(a) of the Charter, that right is recognised even in the absence of any express provision in Regulation No 806/2014. The absence of an express provision in Article 18 of Regulation No 806/2014 providing for a hearing of shareholders does not render that regulation unlawful, since there is no provision prohibiting such a hearing.

222 As a preliminary point, it should be noted that the applicant contests the failure to hear the shareholders of the entity subject to a resolution action during the procedure leading to the adoption of that action, but does not put forward any argument concerning Article 20 of Regulation No 806/2014 which relates to valuation. Accordingly, it must be held that, by its plea of illegality raised in the context of the fifth plea in law, the applicant challenges the validity of

Article 18 of Regulation No 806/2014, relating to the resolution procedure, in so far as that provision, by not providing for a hearing of the shareholders by the SRB, prior to the adoption of a resolution action, infringes their right to be heard, guaranteed by Article 41(2)(a) of the Charter.

223 It must be noted that Article 41(2)(a) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.

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

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

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

227 The scope of the right to be heard, as a principle and fundamental right of the EU legal order, is afforded when the administration plans to adopt a measure adversely affecting a person, that is, a measure which may have a negative effect on the interests of the individual or Member State concerned, since its application does not depend on the existence of an express rule to that effect laid down by subordinate legislation (judgment of 18 June 2014, *Spain* v *Commission*, T-260/11, EU:T:2014:555, paragraph 64).

228 In that regard, it must be observed, first, that, according to recital 121 of Regulation No 806/2014, that regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, including the right of defence, and should be

implemented in accordance with those rights and principles. Second, no provision of Regulation No 806/2014 expressly excludes or restricts the right of the shareholders and creditors of the entity concerned to be heard during the resolution procedure.

229 In addition, it should be noted, as the Commission and the Council have submitted, that a resolution action adopted by the SRB following the procedure laid down in Article 18 of Regulation No 806/2014 concerns the resolution of an entity. The entity subject to resolution must be regarded as the person in respect of whom an individual measure is adopted and to whom the right to be heard is guaranteed by Article 41(2)(a) of the Charter.

230 Thus, account should be taken of the fact that the shareholders and creditors of that entity are not addressees of a resolution action, which is not an individual decision taken against them.

231 However, it must be observed that, according to Article 21(1) of Regulation No 806/2014, the SRB may exercise the power to write down or convert the capital instruments of the entity covered by a resolution action by acting under the procedure laid down in Article 18 of that regulation.

232 Thus, even if the procedure laid down in Article 18 of Regulation No 806/2014 does not constitute an individual procedure initiated against the shareholders and creditors of the entity concerned, it may lead to the adoption of a resolution action liable to affect their interests adversely.

233 The case-law of the Court of Justice cited in paragraph 225 above adopted a broad interpretation of the right to be heard as being guaranteed to every person during proceedings which are liable to culminate in a measure adversely affecting that person. Therefore, it cannot be ruled out that the shareholders of an institution which is the subject of a resolution action may rely on the right to be heard in a resolution procedure.

234 However, the exercise of the right to be heard may be subject to limitations in accordance with Article 52(1) of the Charter, cited in paragraph 158 above.

235 It is therefore necessary to examine whether the absence, in Regulation No 806/2014, of a provision expressly providing for a hearing of the shareholders and creditors of the entity concerned in the context of the procedure referred to in Article 18 of that regulation constitutes a limitation on the exercise of the right to be heard that complies with Article 52(1) of the Charter.

236 The Court of Justice has held that fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see judgments of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33 and the case-law cited, and of 20 December 2017, *Prequ'Italia*, C-276/16, EU:C:2017:1010, paragraph 50 and the case-law cited).

237 In that regard, the SRB, the Kingdom of Spain, the Parliament and the Council submit that the limitation of the right of shareholders to be heard is justified, first, by the objective of ensuring the stability of the financial markets and, second, by the need to ensure the effectiveness of resolution decisions, which must be adopted quickly.

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

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

240 In that regard, it must be recalled that it follows from the case-law cited in paragraph 161 above that financial services play a central role in the economy of the European Union and the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. Moreover, according to the case-law cited in paragraph 162 above, the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constitutes an overriding public interest.

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

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

approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 51 and the case-law cited).

243 Those considerations apply, by analogy, to the situation of former shareholders of a bank which has been placed under resolution pursuant to Regulation No 806/2014.

244 Furthermore, it must be observed that another objective of the resolution, referred to in Article 14(2)(a) of Regulation No 806/2014, namely to ensure the continuity of the critical functions of the entity concerned by a resolution action, also contributes to the public interest objective of protecting the stability of the financial markets.

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

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

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

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

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

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

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

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

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

254 That rapid decision is aimed, in particular, at ensuring the continuity of the critical functions of the entity concerned and at avoiding the effects of the entity's failure on financial stability. Speed in taking a decision is therefore a condition for its effectiveness.

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

256 Moreover, in the field of fund-freezing measures, the Court of Justice has held that the communication of the grounds on which the initial inclusion of the name of a person or entity in the list of persons subject to restrictive measures is based, prior to that inclusion, would be liable to jeopardise the effectiveness of the freezing of funds and economic resources imposed by EU law. In order to attain the objective pursued by the applicable regulation, such measures must, by their very nature, take advantage of a surprise effect and apply with immediate effect (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 338 to 340; of

21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 61; and of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraph 51).

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

258 That is all the more true in cases where the restriction on the right to be heard concerns not the entity covered by the resolution procedure, but its shareholders or creditors.

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

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

261 Furthermore, the fact that the resolution action may lead to an interference with the right to property of the shareholders and creditors of the entity concerned cannot justify an obligation to grant them a right to be heard before it is adopted.

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

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

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

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

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

267 It must therefore be held that the establishment, in Regulation No 806/2014, of a consultation of the shareholders and creditors of the entity concerned before the adoption of a resolution action would result in a substantial slowdown in the procedure and would compromise both the attainment of the objectives of the action and its effectiveness.

268 Moreover, in view of the urgency of the adoption of a resolution action, it would not be possible to consult the shareholders beforehand on account, inter alia, of the difficulties associated with identifying them. As the Kingdom of Spain and the Council point out, given that shares and bonds are traded continuously on the markets, it is impossible, in practice, to know which individual and institutional investors must be contacted.

269 As regards the applicant's argument that Regulation No 806/2014 could provide for a hearing of shareholders after the adoption of the resolution action, it is sufficient to note, as the Parliament has done, that such a hearing would not be capable of altering the content of that action and that therefore it could not lead to its annulment.

270 It follows from all of the foregoing that hearing the shareholders and creditors of the entity which is the subject of a resolution action, before the adoption of that action, would undermine the objectives of the stability of the financial markets and the continuity of the entity's critical functions, and the requirements of speed and effectiveness of the resolution procedure.

271 Therefore, the absence of any provision requiring the shareholders and creditors of the entity concerned to be heard in the context of the procedure laid down in Article 18 of Regulation No 806/2014 constitutes a limitation on the right to be heard which is justified and necessary in order to meet an objective of general interest, respects the principle of proportionality, in accordance with Article 52(1) of the Charter and does not infringe any of the procedural guarantees of the right to property which are laid down in Article 17 of the Charter.

272 Accordingly, the plea of illegality in respect of Article 18 of Regulation No 806/2014 must be rejected.

4. The eighth plea in law, alleging infringement of Article 18 of Regulation No 806/2014, of the duty of care and of Article 296 TFEU

273 The applicant claims that the SRB, by adopting the resolution scheme, has infringed Article 18 of Regulation No 806/2014, its duty of care and Article 296 TFEU, in so far as it has not proved that the conditions for the resolution were met. In its observations on the Kingdom of Spain's statement in intervention, the applicant states that, by that plea, it does not claim an error of assessment, but infringement of the duty of care and of the obligation to state reasons when applying Article 18 of Regulation No 806/2014.

274 The applicant submits that, when it adopted the resolution scheme, the SRB failed to examine carefully and impartially all the relevant elements of the situation in order to apply Article 18 of Regulation No 806/2014 in accordance with the duty of care and it did not provide sufficient reasons for its decision. By the first part, the applicant claims, in essence, that the SRB has not demonstrated that the condition laid down in Article 18(1)(a) of Regulation No 806/2014, that the entity is failing or is likely to fail, was met. It submits, first, that the SRB failed to take account of the fact that Banco Popular was solvent and that its failure was therefore not proven and, secondly, that it did not justify that a one-off liquidity problem indicated a failure of Banco Popular. By the second part, the applicant criticises the SRB for failing to prove that the condition laid down in Article 18(1)(b) of Regulation No 806/2014, in accordance with which, having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures or supervisory action taken in respect of the entity would prevent its failure within a reasonable time frame, has been met. It states that the SRB failed to examine the existence of other supervisory measures which could have resolved Banco Popular's liquidity problems.

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

275 In the first place, the applicant claims that the SRB breached its duty of care or, at the very least, its obligation to state reasons by failing to take account of a number of elements demonstrating Banco Popular's solvency.

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

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

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

279 That letter states:

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

280 In that letter, Banco Popular's Board of Directors acknowledged that the bank was facing serious liquidity problems and that it was likely to fail. It must be held that, contrary to what the applicant claims, that letter cannot be dismissed as irrelevant.

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

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

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

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

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

285 In that regard, according to recital 57 of Regulation No 806/2014:

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

286 Therefore, contrary to what the applicant submits, Banco Popular's insolvency was not the only situation in which it could be regarded as failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014. The fact that an entity is balance sheet solvent does not mean that it has sufficient liquidity, that is to say that it has funds available to settle its debts or other liabilities as they fall due.

287 In that regard, it is apparent from the extract from the letter from the President of the Supervisory Board of the ECB of 25 July 2017 to a Member of the European Parliament, cited by the applicant, that:

'The aforementioned ECB decision that the bank was failing or likely to fail was taken on the basis of insufficient liquidity. At this time, the objective elements were not sufficient for the ECB to determine that the institution was failing or likely to fail on the basis of its capital position. Of course, the ECB had been closely monitoring not only the liquidity but also the capital position of the bank. Its structural problems (high level of non-performing assets, low coverage, poor profitability) were reflected in commensurate capital requirements established by the ECB.'

288 Since the situation provided for in Article 18(4)(c) of Regulation No 806/2014 does not require the entity concerned to be insolvent, the evidence relied on by the applicant to demonstrate Banco Popular's solvency is ineffective and the applicant is wrong to claim that the SRB breached its duty of care or its obligation to state reasons by failing to take those elements into account.

289 In the second place, the applicant notes that the SRB concluded that Banco Popular was failing due to liquidity problems, in accordance with Article 18 of Regulation No 806/2014, whereas liquidity problems do not form part of any of the situations envisaged in Article 18(4) of

Regulation No 806/2014. In the alternative, the SRB is said to have breached its duty to state reasons in so far as it did not explain why a liquidity problem falls within the cases referred to in Article 18(4) of Regulation No 806/2014.

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

291 In the resolution scheme, the SRB listed the various events which had led, since February 2017, to a rapid deterioration in Banco Popular's liquidity position. The SRB refers, inter alia, to the publication, in February 2017, of Banco Popular's annual report for 2016 in which it announced a consolidated loss of EUR 3.485 billion, a need for extraordinary provisions amounting to EUR 5.7 billion, and the appointment of a new chairman, and refers to the publication, in May 2017, of the financial report for the first quarter of 2017, in which it announced results which were worse than those expected by the market. The SRB mentioned the downgrading of Banco Popular by various ratings agencies in February, April and June 2017. It also noted that the continuous negative press coverage on the financial results and the allegedly imminent risk of Banco Popular's insolvency or illiquidity had led to an increase in deposit outflows.

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

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

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

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

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

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

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

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

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

300 Accordingly, the applicant is wrong to claim that the SRB relied on an incomplete analysis of the ECB's assessment that Banco Popular was failing or likely to fail by relying on circumstances which do not demonstrate a liquidity problem.

301 The applicant is also wrong to submit that the liquidity problems are not among the situations in which an entity is failing or likely to fail provided for in Article 18 of Regulation No 806/2014. Finally, since the resolution scheme expressly refers to the ECB's assessment that Banco Popular was failing or likely to fail on the basis of Article 18(4)(c) of Regulation No 806/2014, the applicant cannot claim that the SRB breached its duty to state reasons by failing to explain why a liquidity problem falls within the cases referred to in Article 18(4) thereof.

302 Moreover, it is also apparent from those elements that, contrary to the applicant's submissions, Banco Popular's liquidity problems could not be regarded as merely temporary. That is confirmed, moreover, by the fact that the bank itself informed the ECB that it was failing due to liquidity problems.

303 Finally, the applicant's argument that Banco Popular's liquidity problems were the result of events arising from the statements made by the Chair of the SRB and were therefore not attributable to Banco Popular is not relevant for the purpose of assessing the legality of the contested decisions. Pursuant to Article 18(1)(a) of Regulation No 806/2014, the ECB found, in Article 2 of the resolution scheme, that Banco Popular was failing or likely to fail, on the basis of the ECB's assessment. The circumstances and reasons which led the ECB to conclude that Banco Popular was failing were irrelevant.

304 Accordingly, the applicant has not established that the SRB had failed to demonstrate that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 was met and the first part must therefore be dismissed.

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

305 The applicant submits that the SRB failed in its duty of care and exceeded the limits of its discretion by not examining the other supervisory measures available to resolve Banco Popular's liquidity problems and, in the alternative, it breached its obligation to state reasons.

306 First, the applicant claims that a set of factors demonstrates that it was possible for Banco Popular to obtain emergency liquidity assistance and that it is not apparent from the resolution scheme that the SRB examined those factors. Secondly, the SRB is said to have ignored the fact that a capital increase had to be announced and that Barclays Bank and Deutsche Bank had underwritten the entire increase.

307 First, the applicant claims that emergency liquidity assistance had been approved since Banco Popular had offered sufficient guarantees and, as Banco Popular had received only part of the amount of that assistance, additional assistance was still available. That amount was considered sufficient to overcome Banco Popular's liquidity crisis. It submits that sufficient guarantees had been provided by Banco Popular and that those guarantees, according to the press, amounted to EUR 40 billion, which is a sufficient amount in the light of the regulatory criteria.

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

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

310 In that regard, it must be observed that, in a letter of 5 June 2017, the Bank of Spain asked the ECB for its agreement to grant Banco Popular emergency liquidity assistance with a due date of 14 June 2017 in order to deal with the severe liquidity crisis from which Banco Popular was suffering. On the same day, the Bank of Spain sent a further letter to the ECB containing a request for an extension of the emergency liquidity assistance to Banco Popular, the latter having informed it of extremely substantial liquidity movements, falling due on 21 June. Those two letters sent the same day to the ECB reveal the speed with which Banco Popular's liquidity situation had deteriorated.

311 The SRB thus found, in Article 3.2(d) of the resolution scheme, that emergency liquidity assistance would have been insufficient in the light of the rapidity of the deterioration of Banco Popular's liquidity position.

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

313 In addition, it should be noted that the SRB plays no role in the provision of emergency liquidity assistance which falls within the remit of the national central banks. Therefore, as the SRB maintains, it is not obliged to provide justifications for the unavailability of emergency liquidity assistance or the fact that further emergency liquidity assistance was not available within the required time frame.

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

315 The applicant cannot therefore criticise the SRB for failing to examine, in the resolution scheme, whether it was possible for Banco Popular to obtain further emergency liquidity assistance.

316 Secondly, the applicant criticises the SRB for having ignored the fact that a capital increase had to be announced and that Barclays Bank and Deutsche Bank had underwritten the entire increase. According to the applicant, that measure would have made it possible to restore the loss of confidence and, together with the grant of a loan or emergency liquidity assistance, could have resolved the one-off crisis. It adds that some of Banco Popular's shareholders were willing to use a possible capital increase.

317 As regards the letters from Barclays Bank and Deutsche Bank, extracts from which are annexed to the reply, they do not contain any firm commitment on the part of those banks to increase Banco Popular's capital, but merely reflect discussions on a potential future capital increase. Those letters show that, on the date they were sent, the proposed increase in Banco Popular's capital was still only at a very early stage.

318 In its letter of 3 June 2017 to Banco Popular, Barclays Bank refers only to recent discussions concerning a capital increase, the aim of which was, for Banco Popular, to cover its additional provisioning needs and to reach significantly higher levels of capital, in order to mitigate the challenges it was facing as a result of a particular real estate exposure and other non-performing assets. Thus, in that letter, first, there is nothing to indicate that Barclays Bank was willing to participate in that capital increase and, second, Barclays Bank does not refer to the liquidity crisis faced by Banco Popular, and does not propose any solution to remedy that crisis.

319 In its letter of 5 June 2017 to Banco Popular, Deutsche Bank mentions only its interest in providing 50% of a possible capital increase of EUR 4 billion. Deutsche Bank merely states that 'there are clearly certain conditions, but the letter is based on our conviction that, in circumstances which we believe can realistically be satisfied, a [capital] increase could be achieved which would stabilise the bank'. That letter cannot therefore be interpreted as containing a firm commitment from Deutsche Bank and does not concern a solution aimed at resolving Banco Popular's liquidity crisis.

320 In addition, it is apparent from the statements of a number of Banco Popular's shareholders annexed to the observations on the Kingdom of Spain's statement in intervention that the proposed capital increase by Banco Popular's shareholders was only at a preparatory stage on the date of the resolution. In that regard, it is appropriate to cite an extract from the statement of Mr Del Valle Ruíz, in which he indicates that he and another investor discussed, on 2 June 2017, the organisation of a meeting with an investment bank on how best to structure the capital increase and that that meeting had been scheduled for 5 June 2017.

321 It must be observed that the applicant's argument is based on the purely theoretical assumption that those capital increases could have taken place within a sufficiently short period of time in order to prevent Banco Popular from failing or being likely to fail. Moreover, it should be noted that the applicant does not explain to what extent a capital increase would have been capable of resolving the liquidity problems faced by Banco Popular and that it itself acknowledges that such a measure could not be envisaged without the addition of a loan or emergency liquidity assistance. Finally, it must be stated that although the bank itself stated, on 6 June 2017, that it was failing, that is because it considered that such measures were not possible.

322 Therefore, as the SRB maintains, in the resolution scheme it was not necessary to envisage, in order to reject them, measures which did not allow the necessary liquidity to be provided to Banco Popular to combat withdrawals of deposits and which could not be implemented within a sufficient time frame to prevent its failure. In accordance with Article 18(1)(b) of Regulation No 806/2014, the SRB was fully entitled to limit its assessment to the measures which could actually have been implemented in the light of the prescribed deadlines and the circumstances.

323 Thirdly, the applicant complains that the SRB failed to examine the other supervisory measures provided for in Article 86 of Directive 2013/36.

324 It must be observed that Article 86(1) of Directive 2013/36 provides that 'competent authorities shall ensure that institutions have robust strategies, policies, processes and systems for the identification, measurement, management and monitoring of liquidity risk over an appropriate set of time horizons, including intra-day, so as to ensure that institutions maintain adequate levels of liquidity buffers'. Under paragraph 3 thereof, mentioned by the applicant, 'competent authorities shall ensure that institutions, taking into account the nature, scale and complexity of their activities, have liquidity risk profiles that are consistent with and, not in excess of, those required for a well-functioning and robust system'.

325 It is sufficient to note, as the Commission has done, that that provision cannot be regarded as a plausible solution to Banco Popular's liquidity problems. The fact that Banco Popular was failing or likely to fail arose precisely because it had not been able to meet those liquidity requirements.

326 Accordingly, the applicant has failed to establish that the SRB had failed in its duty of care or breached its duty to state reasons by not examining the other supervisory measures it had invoked, or that the SRB had not demonstrated that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been met.

327 Accordingly, the second part and the eighth plea in law must be dismissed as unfounded.

5. The first plea in law, alleging breach of the duty to state reasons and of the rights of the defence, enshrined in Articles 15 and 296 TFEU and Articles 42 and 47 of the Charter

328 The applicant submits that the SRB has breached the duty to state reasons and the rights of the defence, enshrined in Articles 15 and 296 TFEU and Articles 42 and 47 of the Charter, in so far as the statement of reasons for the resolution scheme is insufficient and contradictory and was not made fully accessible since it was declared confidential.

329 This plea is divided, in essence, into two parts, alleging, first, breach of the duty to state reasons and, secondly, infringement of the rights of the defence and of the right to effective judicial protection.

(a) The first part, alleging breach of the duty to state reasons

330 According to the settled case-law of the Court of Justice, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgments of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraphs 85 and 87 and the case-law cited, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 41 and the case-law cited).

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

332 The applicant submits that the statement of reasons for the resolution scheme is insufficient and contradictory.

333 First, it claims that there is a contradiction between recital 24 of the resolution scheme, concerning Banco Popular's liquidity problems, and recital 26, concerning measures relating to a solvency problem.

334 Those two recitals concern the description of Banco Popular's situation before the adoption of the resolution scheme. In recital 24 of the resolution scheme, the SRB lists the circumstances that led to Banco Popular's liquidity crisis. Recital 26 concerns the measures which had been envisaged by Banco Popular, before the adoption of the resolution scheme, to attempt to resolve its liquidity problems. There can therefore be no contradiction between those two recitals.

335 Moreover, contrary to what the applicant appears to maintain, recital 26 does not refer to the solutions which the SRB proposed in the resolution scheme to resolve Banco Popular's liquidity problems. The fact that the applicant considers that the measures envisaged by Banco Popular in the weeks preceding the resolution, mentioned in recital 26 of the resolution scheme, were measures which appeared to concern a solvency and not a liquidity problem, is irrelevant.

336 Secondly, the applicant submits that the SRB did not explain why the sale of business tool is an appropriate and proportionate measure to resolve a liquidity problem.

337 In that regard, as the SRB states, the sale of business tool, defined in Article 24 of Regulation No 806/2014, applies to all situations in which an entity is deemed to be failing or likely to fail. There is nothing to suggest that that tool would not be suitable for a liquidity crisis.

338 Moreover, the SRB explained, in Articles 4 and 5 of the resolution scheme, the need for and proportionality of the sale of business tool in the light of the objectives of the resolution and stated that the other resolution tools provided for in Article 22 of Regulation No 806/2014 would not achieve those objectives to the same extent.

339 More specifically, the SRB considered, in Article 5.3 of the resolution scheme, that the other resolution tools provided for in Article 22(2) of Regulation No 806/2014 would not meet the objectives of the resolution to the same extent. As regards the bail-in tool, the SRB took the view that, even combined with the asset separation tool, it could not be guaranteed that it would immediately provide an effective remedy for Banco Popular's liquidity situation and thus restore its financial soundness and long-term viability. As regards the bridge institution tool, the SRB took the view that, even combined with the asset separation tool, given that the bridge institution was intended to maintain access to critical functions and to sell Banco Popular within a period of, in principle, two years and, since the sale of business tool allowed the same result to be achieved within a short period of time, the latter was considered to be more effective than the bridge institution tool in achieving the resolution objectives.

340 The SRB therefore provided justification as to why the sale of business tool was the appropriate resolution action for the failure of Banco Popular, namely as a result of a liquidity crisis.

341 Thirdly, the applicant claims that valuation 2 reveals a further contradiction, namely that the SRB is said to have considered Banco Popular to be solvent, but it had a negative value of minus EUR 8.2 billion.

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

343 That assessment concerns the disposal value of Banco Popular, which corresponds to what a potential purchaser would be prepared to pay for Banco Popular in the circumstances which prevailed on the date of adoption of the resolution scheme. It is therefore the economic value of Banco Popular and not its book value.

344 Therefore, the finding that Banco Popular was solvent for accounting purposes does not conflict with the negative estimate of its disposal value.

345 Fourthly, the applicant submits that the confidential data were essential to understanding the reasoning followed and that it does not know what Banco Popular's liquidity crisis entailed. It notes that recital 25 of the resolution scheme merely states that 'the above circumstances resulted in significant deposits outflows …'.

346 It is sufficient to note that the circumstances which led to Banco Popular's liquidity crisis between February 2017 and the date of the resolution are explained in recital 24 of the resolution scheme.

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

348 In recital 26(c) of the resolution scheme, the SRB also stated 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.

349 It must be held that those factors are sufficient to explain the severity of the liquidity crisis faced by Banco Popular.

350 The ECB's finding that Banco Popular was failing or likely to fail, as a result of the deterioration of its liquidity position, is sufficient to understand the justification for the measures adopted by the SRB, without there being any need to know the exact amount of the withdrawals of deposits.

351 As can be seen from the first sentence of recital 25 of the resolution scheme, that scheme contains confidential data in relation to the amount of deposits outflows. The applicant does not explain how that information is essential to understanding the reasoning followed in the resolution scheme.

352 In that regard, the applicant refers to Annex C.7 to the reply, which supposedly explains the missing data. That annex contains a comparative table of the three successive published versions of the resolution scheme, which merely states that, as regards recital 25, it was not supplemented.

353 It follows from all of the foregoing that the applicant has failed to establish a breach of the duty to state reasons and that the first part must be dismissed.

(b) The second part, alleging infringement of the rights of the defence and of the right to effective judicial protection

354 The applicant claims that it did not have access to the entire resolution scheme since the essential parts of it were not published and its requests for access have been refused. Therefore, it states that it does not know the reasons that led the SRB to deprive it of its right to property, which constitutes an infringement of its rights of defence and its right to effective judicial protection, enshrined in Article 47 of the Charter. It submits that it would be necessary for it to have access to the complete text of the resolution scheme in order to exercise its rights of defence and that the confidentiality of the resolution scheme is not justified.

355 It must be recalled that, as regards the principle of effective judicial protection, the first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by EU law are infringed has the right to an effective remedy before a court or tribunal in compliance with the conditions laid down in that article. It follows from the case-law of the Court of Justice that the effectiveness of the judicial review guaranteed by that provision requires, inter alia, that the person concerned is able to defend his or her rights in the best possible conditions and to decide, in full knowledge of the facts, whether it would be useful to bring an action against a given entity before the competent court (see judgment of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 57 and the case-law cited).

356 In that regard, 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 national decision in question (see judgments of 26 April 2018, *Donnellan*, C-34/17, EU:C:2018:282, paragraph 55 and the case-law cited; of 24 November 2020, *Minister van Buitenlandse Zaken*, C-225/19 and C-226/19, EU:C:2020:951, paragraph 43 and the case-law cited; and of 3 February 2021, *Ramazani Shadary* v *Council*, T-122/19, not published, EU:T:2021:61, paragraph 50 and the case-law cited).

357 As regards the notification of the resolution scheme, it must be borne in mind that the applicant is not the addressee of that scheme, which is addressed to the FROB. The applicant must be regarded as a third party and therefore does not have the right to be notified of the resolution scheme.

358 In that regard, it must be observed that the applicant is wrong to rely on the case-law on restrictive measures, according to which compliance with the obligation to communicate the reasons for a decision is necessary to enable the persons to whom such measures are addressed to defend their rights in the best possible conditions and to respect the right to effective judicial protection.

359 Unlike restrictive measures whereby an individual economic and financial sanction (freezing of funds) is imposed on a person, a resolution scheme is not an individual measure taken against the shareholders of Banco Popular and, accordingly, the applicant. Therefore, the case-law cited by the applicant according to which the person subject to a restrictive measure, as the addressee of such a decision, must be informed of the reasons for that decision is not applicable in the present case.

360 As regards the publication of the resolution scheme, under Article 29(5) of Regulation No 806/2014, the SRB must 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.

361 In the present case, on 7 June 2017, the SRB published on its website a notice regarding the adoption of the resolution scheme, together with a document summarising the effects of the resolution in accordance with Article 29(5) of Regulation No 806/2014. On 11 July 2017, the SRB

published a non-confidential version of the resolution scheme. The SRB also published on its website, on 2 February 2018 and then on 31 October 2018, less redacted non-confidential versions of the resolution scheme and valuations 1 and 2.

362 Furthermore, Article 88(5) of Regulation No 806/2014 provides:

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

363 That provision expressly lays down an obligation on the SRB to ensure, prior to the publication or communication of the resolution scheme to a third party, that that scheme does not contain confidential information. That obligation also applies to valuation 2, which is an annex to the resolution scheme and forms an integral part of it, pursuant to Article 12.2 of that scheme.

364 The applicant submits that the confidentiality of the resolution scheme has no basis in Regulation No 806/2014 and is contrary to 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) and to the principle of transparency enshrined in Article 15 TFEU and Article 42 of the Charter.

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

366 First, the applicant submits that it is clear from recital 116 of Regulation No 806/2014 that confidentiality obligations would apply only so long as the resolution decision has not been made public.

367 Recital 116 of Regulation No 806/2014 provides:

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

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

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

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

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

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

373 Secondly, it is true that recital 116 of Regulation No 806/2014 mentions the SRB's obligation of professional secrecy before a resolution decision is adopted. It states that, as certain information held by the SRB is sensitive and is covered by business secrecy, it must not be communicated to the public prior to the adoption of a resolution action. The disclosure of information that an entity is failing or likely to fail and that it is likely to be the subject of a resolution action could, inter alia, encourage shareholders to sell their securities on the markets and also lead to a massive withdrawal of deposits, which would have the effect of exacerbating the bank's financial situation and, therefore, undermine the effectiveness of the SRB's action and the functioning of the market.

374 However, that recital also expressly states that resolution actions 'should be properly notified and, subject to the limited exceptions laid down in this Regulation, made public'. It must be recalled that Article 88(5) of Regulation No 806/2014, cited in paragraph 362 above, expressly imposes an obligation on the SRB to ensure, before the resolution scheme is disclosed, that it does not contain confidential information.

375 It follows from this that recital 116 of Regulation No 806/2014 cannot be interpreted as meaning that the rules on confidentiality and professional secrecy apply only so long as the resolution decision has not been made public.

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

377 That provision cannot mean that the SRB is obliged to disclose the full resolution decision as soon as judicial proceedings are initiated. That provision refers to the possibility for a court to order the production of documents, including those containing confidential information.

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

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

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

381 Thirdly, the applicant merely alleges that the confidentiality of the resolution scheme is contrary to the principle of transparency and to the provisions of Regulation No 1049/2001 concerning public access to documents, without raising any specific argument.

382 It is sufficient to note that, first, Regulation No 1049/2001 is not relevant to the question of whether the SRB was obliged to disclose the entire resolution scheme and, secondly, it establishes a system for public access to documents which includes exceptions designed to ensure the confidentiality of certain data.

383 In that regard, the Court of Justice has held, with regard to Article 54 of Directive 2004/39, which establishes the general rule that disclosure of confidential information held by the competent authorities is prohibited and lists exhaustively the specific cases where, exceptionally, that general prohibition does not preclude their communication or use, that it was, accordingly not the aim of that article to create a right of access that can be exercised by the public to information held by the competent authorities or to regulate in detail how any such right of access that may be recognised in some cases by national law is to be exercised (judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraphs 38 and 39).

384 It must be observed that Article 88 of Regulation No 806/2014 lays down the requirements in respect of professional secrecy and establishes, in the same way as Article 54 of Directive 2004/39, a general rule that disclosure of confidential information held by the SRB is prohibited and provides for the cases where, exceptionally, that general prohibition does not preclude its communication.

385 The Court of Justice held that the objective served by Article 54 of Directive 2004/39 differs from that pursued by Regulation No 1049/2001. The aim of Regulation No 1049/2001 is to give the public a right of access to documents of the institutions of the European Union which is as wide as possible (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraphs 40 and 41 and the case-law cited).

386 According to the Court of Justice, that was the objective in the light of which Regulation No 1049/2001 requires, as a general rule, an EU institution that proposes to refuse access to a document to explain how access to that document could specifically undermine the interest protected by one of the exceptions that are provided for to the right of access at issue, without prejudice to that institution's right to rely, in that regard, on a general presumption of confidentiality that applies to a category of documents, where considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 42 and the case-law cited).

387 It concluded that, however, where an individual submits to the competent authorities a request for access to information relating to a supervised entity and they considered that the information requested was confidential, within the meaning of Article 54(1) of Directive 2004/39, they can grant such a request only in the situations that are listed exhaustively in Article 54 (judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 43).

388 It must be held that that case-law applies by analogy to the confidential information held by the SRB within the meaning of Article 88 of Regulation No 806/2014.

389 Fourthly, in the reply, the applicant relies on the decisions of the SRB Appeal Panel of 28 November 2017 and 19 June 2018 in response to its requests for access to documents pursuant to Article 90(1) of Regulation No 806/2014 and Regulation No 1049/2001, following which the SRB published on its website in February and October 2018 less redacted non-confidential versions of the resolution scheme and valuations 1 and 2. It submits that those SRB Appeal Panel decisions confirmed that access to a substantial part of the resolution scheme had been refused unjustifiably and that the version of the resolution scheme published in February 2018 contained excessive confidentiality.

390 It must be observed that the Court of Justice has held that, if the objectives pursued by Article 54(1) of Directive 2004/39 are not to be jeopardised, the competent authorities are, as a general rule, bound to comply with the obligation of professional secrecy imposed on them by that provision throughout the period during which the information that they hold for the purposes of that directive has to be deemed to be confidential. That said, the passage of time is a circumstance that is normally liable to have an influence on the analysis of whether the conditions governing the confidentiality of the information concerned are satisfied at a given point in time (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraphs 48 and 49 and the case-law cited).

391 In so far as, as has already been stated, Article 88(1) of Regulation No 806/2014 contains a provision equivalent to Article 54(1) of Directive 2004/39, that case-law is applicable to the present case by analogy.

392 The two decisions by the appeal panel were delivered more than six months and more than one year, respectively, after the resolution scheme was adopted. Thus, the passage of several months since the adoption of the resolution scheme may have influenced the analysis of the confidential nature of certain data contained in the resolution scheme and valuations 1 and 2. It follows that the appeal panel's assessment, in its decisions of 28 November 2017 and 19 June 2018, of the excessive confidentiality of certain data does not call into question the fact that, immediately after the resolution scheme was adopted, that confidentiality was justified. Moreover, the appeal panel did not require the publication of the entire resolution scheme or of valuation 2 as certain data remained confidential.

393 It follows that the applicant is wrong to claim that the confidentiality of certain data in the resolution scheme was unfounded.

394 Moreover, it must be recalled that, on 11 July 2017, the SRB published on its website a non-confidential version of the resolution scheme. Having had access to that version, the applicant was able to challenge it before the Court by way of the present action, brought on the basis of Article 263 TFEU, which establishes the existence of its right to an effective remedy.

395 Moreover, after the present action had been brought and following the decisions of the SRB Appeal Panel referred to in paragraph 389 above, on 2 February and 31 October 2018, thus before the reply was lodged, the SRB published on its website less redacted non-confidential versions of the resolution scheme and valuations 1 and 2. The applicant was therefore able to submit arguments on those versions.

396 The applicant claims that, although it had access to a greater amount of information, following the publication on 2 February and 31 October 2018 of less redacted versions of the resolution scheme and valuations 1 and 2, that cannot remedy the failure to state reasons after the proceedings were initiated.

397 In that regard, it is sufficient to note that the successive publications on the SRB's website concerned the resolution scheme and valuations 1 and 2 in their original versions. Those publications were intended to give the public access to parts of those documents which had initially been considered to be confidential. It was not a matter of the SRB publishing information which was not originally contained in the resolution scheme or valuations 1 and 2 and which was intended to supplement its statement of reasons.

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

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

400 First, it is clear from the analysis of the first part that the applicant had not established that the versions of the resolution scheme and valuation 2 published on the SRB's website and to which it had access were insufficiently reasoned. Secondly, the applicant has not explained to what extent the economic data which remained redacted in the non-confidential versions of the resolution scheme and valuation 2 were necessary in order to understand the resolution scheme and for it to exercise its right to an effective judicial remedy.

401 Therefore, it must be held that the applicant cannot claim that a right of access to the entire resolution scheme was necessary for the exercise of its rights of defence or its right to an effective remedy.

402 It follows from all of the foregoing that the second part must be rejected and, accordingly, the first plea in law must be dismissed in its entirety.

6. The second plea in law, alleging breach of the principle nemo auditur propriam turpitudinem allegans ***and of Article 88 of Regulation No 806/2014***

403 The applicant claims that the SRB breached the principle *nemo auditur propriam turpitudinem allegans* and the duty of professional secrecy laid down in Article 88 of Regulation No 806/2014 and Article 339 TFEU by adopting a measure adversely affecting Banco Popular and its shareholders on account of a crisis which was of its own making.

404 It submits that the statements made by the Chair of the SRB in an interview with Bloomberg TV on 23 May 2017 and in an article published by Reuters on 31 May 2017 constitute an infringement of Article 88 of Regulation No 806/2014 which imposes an obligation of professional secrecy on the staff and members of the SRB. The applicant claims that those statements caused the public to panic and withdraw funds from Banco Popular on a massive scale, which led to an outflow of deposits. The applicant relies on various factors establishing a causal link between those

statements and the crisis faced by Banco Popular. The information contained in those statements by the Chair of the SRB on 23 and 31 May 2017 are said to be the cause of Banco Popular's liquidity crisis which was the reason for the resolution of Banco Popular.

405 Moreover, the applicant submits that, in accordance with the principle *nemo auditur propriam turpitudinem allegans*, an institution cannot rely on its own mistakes to adopt a measure adversely affecting an individual.

406 The Commission considers that, in an action concerning the legality of the resolution scheme, the circumstances that may have put the entity in difficulty are irrelevant and that the only relevant question is whether the legal conditions for the adoption of that scheme were met. The SRB also submits that, for the resolution scheme to be valid, the entity must be failing or likely to fail and the conditions laid down by Regulation No 806/2014 must be met at the time when it is adopted, whatever the reasons which led to such a situation.

407 As a preliminary point, with regard to the applicant's reliance on the principle *nemo auditur propriam turpitudinem allegans*, in accordance with which nobody may rely on his own misconduct vis-à-vis another in such a way as to obtain an advantage, it should be noted, as the Commission and the SRB have done, that that principle is not applicable in the present case.

408 As the SRB points out, that principle applies where a party seeks to take unfair advantage from its own unlawful conduct. However, the applicant does not indicate what advantage the SRB would have derived from the adoption of the resolution scheme.

409 Moreover, none of the examples from the case-law cited by the applicant makes it possible to establish the relevance of that principle in support of an application for annulment of an act adopted by an EU institution or body. Thus, in paragraph 55 of the judgment of 11 December 1996, *Barraux and Others* v *Commission* (T-177/95, EU:T:1996:187), the Court held that the argument that that principle would prevent the Council from adopting a regulation with retroactive effect was irrelevant. In paragraph 63 of the judgment of 10 July 2003, *Commission* v *Fresh Marine* (C-472/00 P, EU:C:2003:399), the Court of Justice merely recalled the General Court's finding that Fresh Marine contributed to the damage through its own negligence. In paragraph 13 of the judgment of 9 February 1984, *Kohler* v *Court of Auditors* (316/82, EU:C:1984:49), the Court of Justice held that the Court of Auditors' argument as to the absence of any written form for the disputed act was unfounded quite apart from the fact that to accept those arguments would be tantamount to allowing the Court of Auditors to take advantage of an infringement, which it had itself committed, so as to deprive the applicant of her right of action.

410 Accordingly, the present plea must be examined in so far as the applicant is claiming that the SRB has infringed its obligation of professional secrecy, laid down in Article 339 TFEU and Article 88 of Regulation No 806/2014.

411 It must be observed that, even if the applicant had established that the SRB had disclosed confidential information to the press, according to settled case-law, an irregularity of that kind may lead to annulment of the decision in question only if it is established that, had it not been for that irregularity, the content of that decision would have been different (see judgment of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 283 and the case-law

cited; judgment of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 416; see, also, judgment of 3 March 2011, *Siemens* v *Commission*, T-110/07, EU:T:2011:68, paragraph 402 and the case-law cited).

412 In that regard, as the Commission and the SRB submit, a resolution scheme is validly adopted where the conditions laid down in Article 18 of Regulation No 806/2014 are met, irrespective of the reasons which led to the entity in question failing or being likely to fail.

413 It must be recalled that the applicant's arguments concerning an infringement of Article 18 of Regulation No 806/2014 were dismissed in the context of the analysis of the eighth plea in law.

414 Thus, it must be observed that the SRB, having taken the view that the conditions laid down in Article 18(1) of Regulation No 806/2014 were met, adopted the resolution scheme in respect of Banco Popular and that the Commission, having taken the view that the resolution scheme was consistent with the provisions of Regulation No 806/2014, approved it. The circumstances that led to Banco Popular meeting the conditions justifying the adoption of the resolution scheme, in particular the condition that it was failing or likely to fail, are irrelevant.

415 Consequently, an alleged causal link between the statements of 23 and 31 May 2017 and Banco Popular's liquidity crisis, invoked by the applicant, is irrelevant and cannot lead to the annulment of the contested decisions.

416 Accordingly, the applicant's argument that the SRB could not validly adopt the resolution scheme given that the statements by its Chair, which were made in breach of its duty of confidentiality and of the principle of good administration, were the cause of Banco Popular's liquidity crisis must be dismissed as ineffective as regards the assessment of the legality of the resolution scheme.

417 Moreover, the applicant cannot validly argue that the disclosures on 23 and 31 May 2017 caused Banco Popular's acute liquidity crisis. The applicant's arguments are based on a partial and erroneous presentation of the facts giving rise to Banco Popular's liquidity crisis and the causes that led to it failing or being likely to fail.

418 Thus, it must be borne in mind that, in its assessment that Banco Popular was failing or likely to fail, cited in paragraphs 53 to 61 above, the ECB mentioned various events which had given rise to a deterioration in Banco Popular's liquidity situation.

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

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

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

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

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

– on 12 May 2017, Banco Popular breached the 80% liquidity coverage requirement and was subsequently unable to restore compliance with the regulatory limit;

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

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

420 The SRB noted that all of those circumstances had resulted in significant deposit outflows.

421 It is apparent from those facts, which are not disputed by the applicant, that Banco Popular's situation had already deteriorated well before 23 May 2017 and that Banco Popular's liquidity crisis was caused by multiple factors which stemmed from the bank's poor results announced in February and April 2017. In particular, the liquidity coverage requirement of Banco Popular had not met the minimum legal requirements since 12 May 2017.

422 It must be observed that the applicant cannot be unaware of all the objective circumstances which caused Banco Popular's liquidity problems, particularly since April 2017. It cannot validly maintain that the statement of 23 May 2017 and the article of 31 May 2017, even if they gave rise to a breach of the principle of confidentiality on the part of the SRB, were the cause of Banco Popular's liquidity crisis.

423 That conclusion is not called in question by the applicant's other arguments.

424 The applicant claims that the ECB, in its assessment that Banco Popular was failing or likely to fail, noted that the outflows of deposits since 31 May 2017 were particularly significant, after the media revealed that the bank could face liquidation if the private sale process underway did not come to fruition within a very short period.

425 It is clear from its assessment that, according to the ECB, the announcement of the failure of the private sale process and the undertaking's wind-down risk exacerbated Banco Popular's deposit outflows. However, it is only one factor among the many others cited by the ECB which caused those outflows of deposits. The applicant cannot claim that the ECB acknowledged that the article published by Reuters on 31 May 2017 was the cause of Banco Popular's liquidity crisis.

426 The ECB noted the significant unfavourable media coverage of Banco Popular during that period and even cites the examples of the articles published on 11 and 15 May 2017, referred to in paragraphs 40 and 41 above. The applicant cannot separate from all of those press articles the only article which refers to an EU official in order to claim that that article alone was the cause of Banco Popular's liquidity outflows.

427 The applicant also submits that the statements of 23 and 31 May 2017 had an impact on the fall in the share price of Banco Popular and on the listing of various financial instruments.

428 It must be observed that the evolution of Banco Popular's share price showed a steady decline between June 2016 and June 2017. Contrary to the applicant's assertion, that evolution does not reveal any link between the statement of 23 May and the article of 31 May 2017 and Banco

Popular's share price. The reason for the fall in Banco Popular's share price is the bank's poor financial situation and that must be linked to the successive downgrades of Banco Popular's rating by the ratings agencies referred to in paragraphs 32, 38 and 46 above.

429 Furthermore, the applicant acknowledged at the hearing that, on 15 May 2017, Banco Popular was deleted from the MSCI (Morgan Stanley Capital International) index. That exit led to major investment funds selling their shares in Banco Popular and contributed to the fall in Banco Popular's share price.

430 Moreover, with regard to the evolution of Banco Popular's contingent convertible capital instruments (CoCos), it is sufficient to note that the journalist who interviewed the Chair of the SRB on 23 May 2017 mentioned their collapse due to the risk of non-payment. The applicant cannot therefore claim that the fall in the CoCos resulted from that interview.

431 In any event, it should be noted that the applicant does not raise any argument seeking to establish which elements of the statements of 23 and 31 May 2017 would constitute a breach of the obligation of professional secrecy on the part of the Chair of the SRB, nor has it demonstrated the existence of a breach of the duty of confidentiality or of professional secrecy which is attributable to the Chair of the SRB.

432 In the first place, as regards the Chair of the SRB's interview on the television channel Bloomberg on 23 May 2017, the journalist asked:

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

433 The Chair of the SRB replied:

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

434 It must be held, first, as the SRB points out, that these are general remarks as the supervision of institutions forms part of its tasks in cooperation with the ECB. The information that Banco Popular, as a credit institution covered by the single supervisory mechanism is 'being watched' is not confidential.

435 Moreover, it is clear from the article of 15 May 2017 published by *elconfidencial.com*, referred to in paragraph 41 above, that the information that Banco Popular had been inspected by the ECB was already public.

436 Secondly, during that interview, the Chair of the SRB does not mention the possibility of a resolution of Banco Popular. No conclusion can be drawn from those comments with regard to the forthcoming implementation of a resolution of Banco Popular and even less so with regard to the resolution tool that could be implemented by the SRB.

437 Furthermore, in so far as those comments cannot be interpreted as meaning that Banco Popular would be the subject of a resolution procedure, they do not fall within the scope of the situations envisaged by recital 116 of Regulation No 806/2014 with regard to the provision of any information in respect of a resolution decision before it is taken.

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

439 In the second place, as regards the article published by Reuters on 31 May 2017 entitled 'EU warned of wind-down risk for Spain's Banco Popular' (La UE, advertida de riesgo de una resolución ordenada en Banco Popular), that article states that, according to a senior EU official who has remained anonymous, one of Europe's top bank watchdogs had warned EU officials that Banco Popular may need to be wound down if it failed to find a buyer and that the Chair of the SRB had recently issued an 'early warning'. According to that article, that senior official also stated that the Chair of the SRB had said that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention and added that the bank's merger bid may be fruitless.

440 That article by Reuters also states that, according to another source, general preparations were underway although no concrete steps had yet been taken. According to that article, a spokesperson for Banco Popular had said that the bank was working on several plans including a merger, a capital hike and asset sales.

441 It should also be noted that that article mentions the SRB's press release of the same day, in which the SRB stated that it did not comment on difficulties that were specific to a bank, that it could not confirm the interpretations regarding alleged quotes made by the Chair of the SRB and that it never issued warnings about banks.

442 It must be observed that the applicant does not specify which information contained in that article is confidential, or to what extent its disclosure constitutes an infringement of the SRB's requirements of professional secrecy. The applicant submits that the statements reported in that article originate from the Chair of the SRB and that the Commission has not adduced any evidence to the contrary. It should be noted that the comments by an EU official, mentioned in that article, did not concern confidential information which only members of the SRB could have known, and even less so only its Chair.

443 Thus, first, the official mentioned an 'early warning' which is said to have been issued by the Chair of the SRB. It must be observed that that claim does not correspond to one of the SRB's powers, as the SRB pointed out in its press release dated 31 May 2017.

444 Secondly, as regards that official's assertion that '[the Chair of the SRB had said] that the [SRB] is following the (Banco Popular) procedure with particular attention with a view to a possible intervention', it is sufficient to note that those comments repeat the substance of what the Chair of the SRB had publicly stated during her interview with the television channel Bloomberg on 23 May 2017, namely that Banco Popular was being 'watched'. Moreover, the broad interpretation given to those comments was refuted by the SRB in its press release.

445 Thirdly, as regards that official's assertion that the bank's merger bid may be fruitless, it is clear from the same article that Banco Popular itself had stated that it would have to extend the deadline initially set for 10 June 2017 for submitting offers under the private sale process.

446 Fourthly, as regards the assertion that, according a senior EU official who has remained anonymous, one of Europe's top bank watchdogs had warned EU officials that Banco Popular may need to be wound down if it failed to find a buyer, it must be observed that a number of press articles already mentioned in May that Banco Popular was in difficulty and that it had initiated a private sale process.

447 Thus, it is clear from an article dated 11 May 2017 that was published on the website *elconfidencial.com*, cited in paragraph 40 above, that the Chairman of Banco Popular had ordered the urgent sale of the bank due to a risk of insolvency. The reference, in the article of 31 May, to the fact that EU officials had been warned by 'one of Europe's top bank watchdogs' appears to be consistent with the information given in that article that, on account of a serious risk of insolvency due, inter alia, to the continued outflow of deposits, the Chairman of Banco Popular had been forced to implement the sales process in order to meet the requirements of the ECB. Moreover, an article dated 15 May 2017, published on the website *elconfidencial.com*, referred to in paragraph 41 above, stated that the sales plan for Banco Popular had been implemented by its chairman after the ECB's inspection.

448 Thus, the fact that Banco Popular was facing a risk of insolvency if it had not found a buyer at the end of the sales process it had initiated had been public information since mid-May 2017.

449 It follows that, contrary to the applicant's claims, the comments of the anonymous EU official reported in that article do not contain confidential information regarding the implementation of a resolution procedure concerning Banco Popular such as that referred to in recital 116 of Regulation No 806/2014.

450 Moreover, the applicant is wrong to claim that it is for the SRB or the Commission to prove that the statements reported in that article did not originate from the Chair of the SRB.

451 As the SRB submits, many persons other than members of the SRB or Commission officials may have made such comments having regard in particular to the possibilities for exchanging information provided for inter alia in Article 88(6) of Regulation No 806/2014.

452 Even if the comments reported in that article originated from a leak by an EU official, since it has not been established that the Chair of the SRB is responsible for the leak of information evidenced by the press articles to which the applicant refers, it follows from the case-law that such an origin of the leak cannot be presumed (see, to that effect, judgment of 15 March 2006, *BASF* v *Commission*, T-15/02, EU:T:2006:74, paragraph 605).

453 Moreover, it should be noted that, even if it were likely that the SRB was the source of that leak, that mere possibility is not sufficient, as the applicant claims, to place on it the burden of proving the contrary (see, to that effect, judgment of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 412).

454 Accordingly, the fact that that article reports the alleged words of the Chair of the SRB is not sufficient to establish their authenticity, especially since the person supposedly reporting those words has not been identified himself. In addition, contrary to the applicant's submissions, the SRB's press release dated 31 May 2017, the content of which is recalled in paragraph 441 above, refutes the information contained in that article.

455 Furthermore, the applicant cannot rely on the fact that the alleged statements by the Chair of the SRB were reproduced in the press articles dated 1 June 2017 contained in the annex to the application. Those articles do not establish that the Chair of the SRB made the statements on 31 May 2017. It is sufficient to note that the extract from the *bolsamania.com* article dated 1 June 2017 cited by the applicant merely reproduces the content of the Chair of the SRB's interview with the television channel Bloomberg on 23 May, and that the extract from the *Financial Times* article dated 1 June 2017 reproduces the content of the Reuters article of 31 May 2017.

456 In the absence of a presumption that the statement of 31 May 2017 originated from the Chair of the SRB, there is no need for the Commission or the SRB to prove that that was not the case.

457 Moreover, by letter lodged at the Registry of the General Court on 2 October 2020, the applicant submitted a new offer of evidence under Article 85(3) of the Rules of Procedure. That offer of evidence relates to two internal SRB emails dated 10 and 18 August 2017 concerning the actions taken by the SRB to investigate the leak of information to the press relating to the resolution of Banco Popular. The applicant justifies the delay in producing those documents by stating that it had access to those documents following the SRB's decision of 24 August 2020 to disclose those documents, adopted in accordance with the decision of the SRB Appeal Panel of 15 April 2020 concerning a request for access to documents submitted by a third party. It states that it had access to those documents in September 2020. The applicant states that that new evidence is intended to support its arguments raised in connection with the second plea in law and that those documents show the absence of an investigation into the leaks of information to the press on 23 May 2017.

458 The Commission, the SRB, the Kingdom of Spain and the Council submit that those documents are not relevant for the purpose of assessing the legality of the contested decisions.

459 It is sufficient to note that the absence of an internal investigation by the SRB into the statement by its Chair dated 23 May 2017 or the statement which gave rise to the article dated 31 May 2017 cannot in any way be inferred from the evidence of the infringement by the SRB of its obligations of confidentiality. Therefore, it must be held that the fact that the SRB did not carry out an internal investigation into those statements, subsequent to the adoption of the resolution decision, is not relevant to the assessment of the legality of the contested decisions.

460 Therefore, the documents submitted in that new offer of evidence must be dismissed as irrelevant to the outcome of the dispute.

461 It follows from all of the foregoing that the second plea in law must be dismissed as unfounded.

7. The sixth plea in law, alleging infringement of the right to property, enshrined in Article 17 of the Charter and infringement of Article 5(4) TEU

462 The applicant, as a former shareholder of Banco Popular, submits that the SRB's decision, in the resolution scheme, to write down and convert Banco Popular's shares and to sell it to Banco Santander constitutes a restriction of its right to property, enshrined in Article 17 of the Charter, which does not comply with the condition of proportionality provided for in Article 52(1) of the Charter and Article 5(4) TEU.

463 It must be recalled that, in accordance with Article 52(1) of the Charter, cited in paragraph 158 above, and the case-law referred to in paragraph 159 above, restrictions may be imposed on the exercise of the right to property, provided that they are provided for in the applicable texts, are necessary for the pursuit of a general objective and are proportionate to that objective.

464 By its sixth plea in law, the applicant does not call into question the fact that the limitation on its right to property resulting from the write-down and conversion of Banco Popular's capital instruments and the sale of Banco Popular to Banco Santander, which were decided on in the resolution scheme, was provided for in the applicable texts and necessary for the pursuit of a general objective. It merely questions the proportionality of those measures in view of the fact that Banco Popular was facing a liquidity problem and criticises the SRB for not having sought other solutions that were less restrictive of shareholders' right to property.

465 According to settled case-law, already referred to in paragraph 176 above, the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 55 and the case-law cited, and of 6 May 2021, *Bayer CropScience and Bayer* v *Commission*, C-499/18 P, EU:C:2021:367, paragraph 166 and the case-law cited).

466 It should be noted that the power to write down or convert Banco Popular's capital instruments, provided for in Article 21 of Regulation No 806/2014, is the consequence of the application of the principle, laid down in Article 15(1)(a) of that regulation, that the shareholders of the institution under resolution bear first losses. The sale of Banco Popular to Banco Santander is the result of the application of the sale of business tool provided for in Article 22 of Regulation No 806/2014.

467 In that regard it must be borne in mind that it is clear from the analysis of the fourth plea in law that Articles 15 and 22 of Regulation No 806/2014 do not constitute a disproportionate and intolerable interference impairing the very substance of the right to property of the shareholders of the entity concerned by a resolution action, but must be regarded as a justified and proportionate restriction of their right to property, in accordance with the provisions of Article 17(1) and Article 52(1) of the Charter.

468 Moreover, the General Court has already held that a measure consisting of reducing the nominal value of the shares of a Cypriot bank was proportionate to the objective pursued by that measure. The Court stated, first of all, that that measure was intended to contribute to the recapitalisation of the bank and that that measure was capable of contributing to the objective of ensuring the stability of the Cypriot financial system and that of the euro area as a whole. Next, it found that

that measure did not exceed the limits of what was appropriate and necessary in order to achieve that objective, given that less restrictive alternatives were not feasible, or would not have allowed the expected outcome to be achieved. Finally, the Court considered that, in the light of the importance of the objective pursued, the measure did not create disproportionate disadvantages. It stated, in that regard, that shareholders of banks bear the full risk of their investments (judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 330).

469 In those circumstances, the General Court concluded that it cannot be considered that the reduction of the nominal value of the shares of that bank constituted a disproportionate and intolerable interference, impairing the very substance of the shareholders' right to property (judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 331).

470 In the present case, it must be recalled that, in the resolution scheme, the SRB found that the conditions laid down in Article 18 of Regulation No 806/2014 had been met, namely, first, that Banco Popular was failing or likely to fail, secondly, that there was no reasonable prospect that alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame and, thirdly, that resolution action in the form of a sale of business tool in respect of Banco Popular was necessary in the public interest. In that regard, the SRB stated that the resolution was a necessary and proportionate way to meet the two objectives referred to in Article 14(2) of Regulation No 806/2014, namely to achieve the continuity of the bank's critical functions and to avoid significant adverse effects on financial stability. In Decision 2017/1246, the Commission stated that it agreed with the resolution scheme and in particular with the reasons provided by the SRB as to why resolution was necessary in the public interest.

471 In so far as the applicant has failed to establish that the conditions laid down in Article 18(1) of Regulation No 806/2014 were not met in the present case and since, in its capacity as shareholder of Banco Popular, it had to fully bear the risk of its investments, it must be concluded that the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute a disproportionate and intolerable interference impairing the very substance of its right to property, but must be regarded as a justified and proportionate restriction of its right to property, in accordance with the provisions of Article 17(1) and Article 52(1) of the Charter.

472 The arguments put forward by the applicant are not such as to call that conclusion into question.

473 In the first place, the applicant claims that the write-down of shares and the sale of Banco Popular were disproportionate since Banco Popular was solvent and that they were not appropriate solutions to resolve a liquidity problem. It disputes that the alternative solution to resolution was insolvency proceedings since Banco Popular was solvent.

474 First, it must be recalled that it is clear from the analysis of the first part of the eighth plea in law that Banco Popular's insolvency was not a condition for the adoption of the resolution scheme. A situation in which an entity is unable to pay its debts or other liabilities as they fall due, which corresponds in particular to a liquidity crisis, is one of the situations in which that entity will be deemed to be failing or likely to fail, provided for in Article 18(4)(c) of Regulation No 806/2014.

475 Thus, the arguments relating to the fact that Banco Popular was solvent are ineffective since the ECB found that Banco Popular was failing or likely to fail, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014, on account of the deterioration of its liquidity position.

476 Secondly, it must be recalled that the fact that Banco Popular was failing or likely to fail and that there were no alternative measures that could prevent that failure within a reasonable time frame constituted conditions for its resolution, within the meaning of Article 18(1) of Regulation No 806/2014. Accordingly, contrary to what the applicant claims, the insolvency proceedings were the only alternative to resolution.

477 Thirdly, in Article 5 of the resolution scheme, the SRB justified the choice of the sale of business tool as the resolution tool. The SRB stated that that tool was necessary and proportionate to the objectives laid down in Article 14(2) of Regulation No 806/2014 and was aimed primarily at protecting critical functions for the functioning of the real economy and preserving financial stability.

478 It is apparent in particular from Article 5(3) of the resolution scheme, referred to in paragraph 339 above, that, contrary to what is claimed by the applicant, the SRB stated the reasons why the sale of business tool was the most appropriate to resolve Banco Popular's liquidity problems.

479 The applicant does not put forward any argument capable of calling into question the SRB's assessments and merely states that, in its view, a separation of assets and the bridge institution tool constituted appropriate measures to resolve the liquidity problems and restore market confidence.

480 In the second place, the applicant claims that the solution for resolving a liquidity problem was to provide more liquidity. It refers to the expert's reports annexed to the application and the reply which state that, to resolve Banco Popular's liquidity problem, it was possible to take supervisory measures, to provide emergency liquidity assistance or to grant loans, or to provide another type of liquidity assistance. It submits that, according to those reports, there were other less restrictive measures for shareholders which would have enabled them to retain all or part of their investment and refers to the arguments raised in support of the eighth plea in law.

481 First, it should be recalled that the analysis of the eighth plea in law shows that emergency liquidity assistance was not possible at the time when the resolution scheme was adopted and that, since the SRB plays no role in the provision of emergency liquidity assistance, which falls within the remit of the national central banks, it was not required to take such a possibility into account. Moreover, the applicant does not explain to which supervisory measures and other forms of loans or liquidity assistance it refers. It is also apparent from the analysis of the eighth plea in law that the applicant has not established that the alternative solutions it proposed were possible.

482 First, as regards the pages of the expert's report of 16 September 2017, entitled 'Regulatory and economic assessment', annexed to the application and to which the applicant refers, it is sufficient to note that they contain only a purely theoretical analysis of the measures which, in that expert's view, the SRB could have used in order to avoid the crisis faced by Banco Popular, such as cooperating with other competent authorities or informing the supervisory authorities. That expert relies, inter alia, on the erroneous finding that the SRB could require the Bank of Spain to provide urgent liquidity assistance.

483 Finally, with regard to the general reference made by the applicant to the expert's report of 2 December 2018, entitled 'Regulatory and economic assessment of valuation reports and the defence of the SRB', annexed to the reply, it is sufficient to point out that, in accordance with the case-law, it is not for the General Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see judgments of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 41 and the case-law cited; of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the case-law cited; and of 24 September 2019, *Netherlands and Others* v *Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraph 114 and the case-law cited).

484 In the third place, the applicant submits that the resolution scheme did not seek a balance between the public interest and its right to property and did not determine whether there was a public interest in depriving it of its property or whether measures existed that were less restrictive of the right to property.

485 It must be recalled that, under Article 18(5) of Regulation No 806/2014:

'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.'

486 It follows that the applicant's arguments are based on a misinterpretation of the public-interest condition laid down in Article 18(1) of Regulation No 806/2014. Contrary to the applicant's submissions, the SRB was not required to investigate whether there was a 'public interest in depriving it of its property'. Moreover, it was not for the SRB to balance the public interest against the private interest of the shareholders.

487 In that regard, it should be recalled that, according to the case-law cited in paragraph 164 above, although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system.

488 In the reply, the applicant adds that the SRB had not prepared itself in accordance with the principle of sound administration and the duty of care which prevented it from analysing the alternative solutions that existed and from choosing the most appropriate and least expensive one. According to the applicant, the 2016 resolution plan drawn up by the SRB did not verify whether the proposed resolution strategy was viable, it lacked the information and preparation necessary for the assessment of other solutions and had to be rejected.

489 It is sufficient to note that, by those arguments, the applicant criticises the SRB for failing to prepare the resolution action in breach of the principle of sound administration and its duty of care.

490 As the Commission points out, those arguments raised for the first time in the reply must be regarded as inadmissible under Article 84(1) of the Rules of Procedure.

491 In any event, those arguments are irrelevant for determining whether the resolution action adopted by the SRB, once the conditions laid down in Article 18(1) of Regulation No 806/2014 were met, entailed a disproportionate interference with the applicant's right to property.

492 Accordingly, the sixth plea in law must be dismissed.

8. The seventh plea in law, alleging infringement of the right to be heard, enshrined in Articles 17 and 41 of the Charter

493 The applicant claims that the SRB infringed Articles 17 and 41 of the Charter in so far as it adopted the resolution scheme, which resulted in an infringement of its property right over the shares in Banco Popular without hearing it either before or after the scheme was adopted. A hearing would have made it possible to ascertain whether or not any alternative private measures existed, such as a capital increase. It adds that that restriction is not provided for by law and is not proportionate since urgency does not justify the absence of a hearing.

494 As a preliminary point, it is clear from the analysis of the fifth plea in law that the fact that Article 18 of Regulation No 806/2014 does not provide for the shareholders of the entity subject to a resolution action to be heard constitutes a limitation on the right to be heard (i) which is justified by an objective of general interest, namely the objective of ensuring the stability of the financial markets referred to in Article 14 of Regulation No 806/2014, to which the objective of ensuring the continuity of the critical functions of the entity also contributes, and by the need to adopt a decision quickly once the conditions for resolution have been met and (ii) which complies with the principle of proportionality in accordance with Article 52(1) of the Charter.

495 However, it follows from the case-law cited in paragraphs 225 and 226 above that compliance with the right to be heard must apply to any procedure which may culminate in a measure adversely affecting a person, even where the applicable legislation does not expressly provide for such a formality.

496 First of all, it must be recalled that the resolution scheme adopted by the SRB at the end of the procedure laid down in Article 18 of Regulation No 806/2014 concerns the resolution of Banco Popular. The sole addressee of the resolution scheme is the FROB and Banco Popular must be regarded as the person in respect of which an individual measure was adopted and for which the right to be heard is guaranteed by Article 41(2)(a) of the Charter.

497 Thus, account must be taken of the fact that the applicant, in its capacity as shareholder of Banco Popular, is not an addressee of the resolution scheme, which is not an individual decision taken against it, nor is it an addressee of Decision 2017/1246 approving that resolution scheme.

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

499 Therefore, the procedure followed by the SRB to adopt the resolution scheme, even though it does not constitute an individual procedure initiated against the applicant, may lead to the adoption of a measure liable to have an adverse effect on its interests in its capacity as shareholder of Banco Popular.

500 The case-law of the Court of Justice cited in paragraph 225 above adopted a broad interpretation of the right to be heard as being guaranteed to every person during proceedings which are liable to culminate in a measure adversely affecting that person.

501 However, it must also be observed that, under Article 52(1) of the Charter, cited in paragraph 158 above, and the case-law referred to in paragraph 235 above, if the applicant was able to rely on the right to be heard, enshrined in the Charter, in the procedure for the resolution of Banco Popular, that right may be subject to limitations. In particular, the failure to hear the applicant in its capacity as shareholder of Banco Popular, in the context of the resolution procedure, whether that failure was due to the SRB or the Commission, could be justified.

502 In the present case, in Article 4.2 of the resolution scheme, the SRB stated that the resolution of Banco Popular was necessary for and proportionate to the achievement of two objectives referred to in Article 14(2) of Regulation No 806/2014, namely avoiding significant adverse effects on financial stability and ensuring the continuity of Banco Popular's critical functions.

503 In that regard, in Article 4.4.2 of the resolution scheme, the SRB explained that it had concluded that Banco Popular's situation entailed an increased risk of significant adverse effects on financial stability in Spain, on the basis of various elements. Those elements included, first, the size and relevance of Banco Popular, which was the parent company of the sixth largest banking group in Spain, with total assets of EUR 147 billion, and which was classified by the Bank of Spain in 2017 as a systemically important institution. The SRB noted, inter alia, that Banco Popular was one of the main market participants in Spain, with a significant market share in the segment of small and medium-sized enterprises (SMEs), and that it had a relatively high market share of deposits (almost 6%) and a large number of retail clients (approximately 1.4 million) throughout Spain. Second, the SRB took into account the nature of Banco Popular's business, which was structured around commercial banking activities and focused primarily on offering financing, savings management and financial services to individuals, families and companies (in particular SMEs). According to the SRB, the similarity between Banco Popular's business model and that of other Spanish commercial banks contributes to the potential for indirect contagion to those banks which might have been perceived as facing the same difficulties.

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

505 It must be pointed out that the applicant does not dispute that the resolution scheme was necessary in the public interest within the meaning of Article 18(1)(c) of Regulation No 806/2014, namely that the resolution of Banco Popular was necessary for the achievement of and was proportionate to one or more of the resolution objectives referred to in Article 14 of that regulation and winding up of the entity under normal insolvency proceedings would not have met those resolution objectives to the same extent. It follows that the applicant does not deny that the resolution scheme was necessary and proportionate in order to avoid the significant adverse effects of Banco Popular's failure on financial stability in the European Union and in order to ensure the continuity of Banco Popular's critical functions.

506 Therefore, the resolution scheme, in so far as it was intended to preserve Banco Popular's financial situation and constituted an alternative to its winding up, did in fact meet an objective of general interest, namely that of ensuring the stability of the financial markets, which, in accordance with the analysis carried out in respect of the fifth plea in law, is capable of justifying a limitation on the applicant's right to be heard.

507 Furthermore, it is also apparent from the analysis of the fifth plea in law that, where an entity satisfies the conditions for the adoption of a resolution action, Article 18 of Regulation No 806/2014 provides that a decision must be adopted within a very short period of time.

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

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

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

511 It must be observed that the applicant does not dispute that the resolution scheme had to be adopted as a matter of urgency.

512 In addition, it must be observed that a prior hearing of the applicant and the other shareholders of Banco Popular, informing them of the existence of an imminent resolution action, would have led to a risk of them adopting conduct on the market that could have exacerbated Banco Popular's financial situation. Such a hearing could thus have undermined the effectiveness of the planned resolution.

513 Therefore, it must be held that a hearing of the applicant before the adoption of the resolution scheme or before the adoption of Decision 2017/1246 would have entailed a substantial slowdown in the procedure and, therefore, would have compromised both the attainment of the objectives pursued by the resolution and its effectiveness.

514 In the present case, it is apparent from the analysis of the eighth plea in law that the applicant has failed to establish that the SRB infringed Article 18(1)(a) and (b) of Regulation No 806/2014. This reveals in particular that the applicant has not demonstrated that there were alternative measures capable of remedying Banco Popular's liquidity problems and therefore of preventing the resolution of Banco Popular. In that regard, it should be recalled that it was found that the capital increase referred to by the applicant was not a possible alternative measure capable of preventing the actual or foreseeable failure of Banco Popular within a reasonable time frame.

515 Accordingly, the applicant cannot claim that, if it had had the opportunity to submit observations on the existence of supervisory action or private sector measures during the procedure, the resolution scheme would not have been adopted.

516 Moreover, the applicant's argument that a hearing could take place even after the adoption of the resolution scheme must be dismissed. Such a hearing would not be capable of altering the content of the resolution scheme which theoretically had already entered into force.

517 It follows from the foregoing that the failure to hear the applicant, in the procedure leading to the adoption of the contested decisions, constituted a limitation on the right to be heard which was justified and necessary in order to meet an objective of general interest, and complied with the principle of proportionality, in accordance with Article 52(1) of the Charter.

518 Therefore, the seventh plea in law must be dismissed.

9. The ninth plea in law, alleging infringement of Articles 14 and 20 of Regulation No 806/2014, of the duty of care and of Article 296 TFEU

519 The applicant claims that the SRB, in the resolution scheme, infringed Articles 14 and 20 of Regulation No 806/2014, the duty of care and Article 296 TFEU in so far as, first, the sales process took place without obtaining the highest possible sale price and, secondly, valuation 2 was not established in accordance with market criteria. This plea is divided into two parts.

(a) The first part, concerning the sales process

520 The applicant claims the sales process in respect of Banco Popular did not enable the highest possible sales price to be obtained in breach of Article 14 of Regulation No 806/2014. It submits, first, that the process was not competitive and, secondly, that the process was vitiated by irregularities.

521 As a preliminary point it must be observed that the applicant submits that the fact that the sales process did not maximise the sale price constitutes an infringement of the second subparagraph of Article 14(2) of Regulation No 806/2014, in accordance with which:

'When pursuing the objectives referred to in the first subparagraph, the [SRB], the Council, the Commission and, where relevant, the national resolution authorities, shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.'

522 It must be observed, as the Commission and Banco Santander have done, that the objective of 'maximising the sale price' is not one of the objectives laid down in the second subparagraph of Article 14(2) of Regulation No 806/2014. It is therefore not the relevant provision to support the applicant's arguments in respect of maximising the sale price.

523 However, it should be noted that, under Article 24(2)(d) of Regulation No 806/2014, concerning the sale of business tool, the resolution scheme is to establish:

'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 …'.

524 Article 39(2)(f) of Directive 2014/59 provides that the sale by the resolution authority, when applying the sale of business tool, is to aim at maximising, as far as possible, the sale price for the shares or other instruments of ownership, assets, rights or liabilities involved.

525 It is therefore necessary to examine the applicant's arguments that the procedure was not conducted with all the necessary safeguards to maximise Banco Popular's sale price.

526 It must be observed, first of all, that, in the decision on marketing, adopted on 3 June 2017, taking into account the rapid deterioration in Banco Popular's liquidity situation, the significant fall in the value of its shares as well as the adverse effects that the failure of the bank could have on financial stability, the SRB considered that it had to take all necessary measures to be able to adopt a resolution action if necessary and that the effectiveness of the sale of business tool had to be ensured with the aim of guaranteeing the objectives of the resolution. Accordingly, the SRB approved the immediate launching of the marketing of Banco Popular by the FROB and informed the latter of the requirements concerning the sale, in accordance with Article 39 of Directive 2014/59.

527 In Article 2(b) of the decision on marketing, the SRB stated that the marketing procedure was to aim to maximise the sale price, while taking into account the need to effect a rapid resolution action. It also stated that the main criterion for the evaluation of bids was the price offered.

528 Next, the procedure for the sale of Banco Popular was conducted by the FROB pursuant to the provisions of Directive 2014/59 and Law 11/2015. In that regard, the FROB, in the letter of procedure adopted on 6 June 2017, in the context of a possible resolution of Banco Popular, invited potential purchasers to participate in the marketing process and to submit to it a bid for the acquisition of 100% of Banco Popular's capital, in accordance with the terms and conditions set out in that letter. In the letter of procedure, the FROB stated that the price offered in the bids had to be equal to or higher than one euro.

529 Finally, in Article 6.6 of the resolution scheme, the SRB considered that the marketing efforts conducted with respect to Banco Popular by the FROB prior to the adoption of that scheme had complied with the requirements set out in Article 24 of Regulation No 806/2014, read in conjunction with Article 39 of Directive 2014/59.

530 The SRB noted that, during the period immediately preceding the resolution, Banco Popular had conducted a private sale process and that, in the week of 29 May 2017, it was apparent that that process would fail. It stated that the decision to limit its commercial effort to banks which had already expressed a general interest in the acquisition of Banco Popular in the context of the private sale process was consistent with the requirements of Article 39 of Directive 2014/59.

531 The SRB also noted that, following the implementation of the marketing procedure by the FROB, ultimately, two banks had been invited to participate in the sale. It stated that all potential purchasers had been approached on the same date, had received access to the same virtual data room and that their bids had been subject to the same conditions and deadline.

532 The SRB finally noted that, out of the two potential purchasers, one valid bid had been received and took the view that, since the purchaser was the only one to have submitted a bid, it was prudent to accept its conditions and thus to prevent an uncontrolled insolvency of Banco Popular which could, inter alia, have undermined its critical functions.

533 In the first place, the applicant submits that the process did not take place over a sufficient period of time and was not a competitive procedure since it was conducted without advertising or transparency and without a sufficient number of potential purchasers. The private sale process was 'recycled' without any explanation being given in the resolution scheme. The banks of the other Member States were excluded and were discriminated against.

534 As a preliminary point, it must be observed that the requirements concerning the sale and, in particular the decision to limit the number of participants are not contained in the resolution scheme, but in the decision on marketing previously adopted by the SRB on 3 June 2017.

535 In that regard, according to the settled case-law of the Court of Justice, intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment (see judgments 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, and of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 43 and the case-law cited).

536 It also follows from the case-law that an intermediate measure is also not capable of forming the subject matter of an action if it is established that the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection (see judgment of 15 March 2017, *Stichting Woonpunt and Others* v *Commission*, C-415/15 P, EU:C:2017:216, paragraph 46 and the case-law cited).

537 In the present case, in the resolution scheme, the SRB took the view that the sales process established by the FROB was consistent with the requirements of Article 39 of Directive 2014/59. It must be observed that the FROB took account of the requirements set by the SRB in the decision on marketing. It follows that, in the resolution scheme, the SRB implicitly confirmed the requirements concerning the sale which it had itself laid down in the decision on marketing.

538 In addition, it must be observed that Article 13(3) of Regulation No 806/2014, concerning early intervention, provides:

'The [SRB] shall have the power to require the institution, or the parent undertaking, to contact potential purchasers in order to prepare for the resolution of the institution, subject to the criteria specified in Article 39(2) of Directive 2014/59 … and the requirements of professional secrecy laid down in Article 88 of this Regulation.

…'

539 Therefore, it must be held that the decision on marketing is an intermediate measure adopted by the SRB with a view to the potential resolution of Banco Popular and that the applicant cannot be prevented from relying on the unlawfulness of the assessment contained in that decision in support of its action against the resolution scheme.

540 As regards the transparency of the procedure for the sale of Banco Popular, it must be observed that, in recital 4 of the decision on marketing, the SRB stated that any public disclosure of the marketing of the bank had to be delayed in order to avoid adverse effects on financial stability.

541 Such a possibility is expressly provided for in the final subparagraph of Article 39(2) of Directive 2014/59 which stipulates that any public disclosure of the marketing of the institution that would otherwise be required in accordance with Article 17(1) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1) may be delayed in accordance with Article 17(4) or (5) of that regulation.

542 Recital 64 of Directive 2014/59 states in that regard:

'Information concerning the marketing of a failing institution and the negotiations with potential acquirers prior to the application of the sale of business tool is likely to be of systemic importance. In order to ensure financial stability, it is important that the disclosure to the public of such information required by Regulation … No 596/2014 … may be delayed for the time necessary to plan and structure the resolution of the institution in accordance with delays permitted under the market abuse regime.'

543 It follows that the requirement of transparency in Article 39(2)(a) of Directive 2014/59 must be interpreted as concerning the conduct of the sales procedure and not any advertising measures announcing that procedure.

544 As regards the limitation of the sales procedure to those institutions which had participated in the private sale process initiated by Banco Popular, referred to in paragraph 33 above, in Article 2(a)(i) of the decision on marketing, the SRB provides a number of reasons justifying its decision to invite the FROB to contact only those five participants.

545 In that regard the SRB stated:

'With regard to the selection of the particular purchasers to be solicited, the FROB shall contact in all cases a sufficient number of purchasers, following a research of the market interest to invest in the activities of the Bank. Having due regard to the need to finalise the relevant marketing procedure within an extremely short time frame, the analysis of the market interest can be informed by the interest shown during the private sales process. During the private sales process, various potential bidders operating on the Spanish and international markets have been contacted. Only five parties have expressed their initial interest and therefore have been invited to present non-binding offers in the context of the private sales process.

FROB will contact the five parties which have been invited to present non-binding offers in the context of the private sales process.

Contacting these five parties is justified on the basis of financial stability grounds and the substantial risk that marketing to a wider circle of potential purchasers and the disclosure of risks and valuations or the identification of critical and non-critical functions in respect of the Bank may result in additional uncertainty and in a loss of market confidence. Moreover, contacting a wider number of purchasers might increase the probability of leakage and thus the risk that the Bank may enter resolution within an extremely short time frame.

Further, due to the urgency and the very limited time that is expected to be available for the marketing procedure, inviting a larger number of participants would increase the complexity of the process. Moreover, based on the information received from the Bank, it is doubtful whether bidders that have not shown interest so far in the private sales process would submit offers.

Pursuant to Article 24(3) [of Regulation No 806/2014], the SRB will strive to balance the marketing requirements with the need to achieve the resolution objectives. In particular, the SRB will partially deviate from the marketing requirements, due to the urgency of the circumstances and, in particular due to the material threat to financial stability which would arise from the failure of the Bank and the fact that complying with the need to contact a broader range of purchasers would undermine the effectiveness of the sale of business tool.'

546 It must be observed that the second subparagraph of Article 39(2) of Directive 2014/59 states that, subject to not unduly favouring or discriminating between potential purchasers, the principles referred to in that paragraph must not prevent the resolution authority from soliciting particular potential purchasers.

547 Consequently, the SRB's decision to ask the FROB to contact only the five institutions that had participated in the private sale process is consistent with that provision.

548 The applicant does not put forward any argument to demonstrate that limiting the number of potential purchasers to the five that participated in the private sale process did not allow genuine price competition between them.

549 In that regard, the SRB cannot be criticised for the circumstances arising during the course of the procedure, namely that four of the five participants did not submit a binding offer and that the only binding offer submitted proposed a purchase price of one euro.

550 Moreover, that decision was based on an objective criterion, namely the interest already shown by those undertakings in purchasing Banco Popular, and was justified by the very short period within which the sales process had to be completed. As the SRB pointed out, expanding the procedure to a larger number of participants risked slowing it down, but also increased the risk of leaks about Banco Popular's situation and thus the risks to financial stability.

551 Accordingly, the applicant is wrong to claim that that procedure was discriminatory. The decision to contact only those institutions which had expressed an interest in purchasing Banco Popular in the context of the private sale process did not, in principle, exclude institutions from other Member States.

552 In that regard, it must be observed that the private sale process had been open to any Spanish or international operator. The applicant does not explain why other Spanish or foreign institutions which had not expressed an interest in purchasing Banco Popular at the time of the private sale process would have been interested a few weeks later when the FROB launched the procedure. Moreover, since any public information concerning the implementation of the sales process was precluded, the applicant does not explain on the basis of which criteria other operators could have been contacted.

553 It follows that the applicant has not established that the sales process was not competitive.

554 In the second place, the applicant submits that the procedure was vitiated by irregularities which distorted the selling price. The FROB is said to have signed confidentiality agreements with potential purchasers before it was declared that Banco Popular was failing or likely to fail and the resolution procedure had therefore started before the conditions were met. The applicant notes that Banco Santander submitted its bid at 3.12 a.m. on 7 June 2017, when the competitive procedure had ended.

555 As regards the conduct of the procedure, it must be recalled that, of the five potential purchasers contacted by the FROB, two decided not to participate in the sales procedure and one was excluded by the ECB for prudential reasons. On 4 June 2017, the two potential purchasers which had decided to participate in the marketing process, Banco Santander and BBVA, signed a non-disclosure agreement and on 5 June 2017 were given access to the virtual data room. On 6 June 2017, the FROB sent them the letter of procedure and the sale and purchase agreement. By letter of 6 June 2017, BBVA informed the FROB that it had decided not to submit a bid.

556 By letter of 7 June 2017, the FROB informed the SRB of the outcome of the marketing process and stated that Banco Santander had submitted a bid at 3.12 a.m. on 7 June and that the price offered by Banco Santander for the sale of Banco Popular shares was one euro. The FROB proposed that Banco Santander, as the successful bidder in the competitive sale process of Banco Popular, be designated as the purchaser of Banco Popular in the resolution scheme.

557 In the resolution scheme, the SRB took the view that the sales procedure conducted in respect of Banco Popular by the FROB had met the requirements set out in Article 24 of Regulation No 806/2014, read in conjunction with Article 39 of Directive 2014/59 and accepted the FROB's proposal to designate Banco Santander as the purchaser of Banco Popular.

558 Moreover, in the letter of procedure, the FROB had set a timetable for the procedure for the sale of Banco Popular. That timetable stipulated that binding offers had to be submitted by midnight on 6 June 2017 at the latest. That timetable also indicated that at 1.00 a.m. on 7 June 2017, tenderers would be contacted to finalise the procedure and select the offer; at 5.30 a.m. the SRB's resolution scheme would then take effect (where applicable) and the purchase and sale agreement would be executed; at 6.30 a.m. the FROB's implementing act would take effect and at 7.00 a.m. the procedure would close and the transaction would be announced.

559 It must be observed that the applicant does not explain which provision was infringed by the fact that the FROB started the sales process before it was declared that Banco Popular was failing or likely to fail, or the consequences this had on the sale price.

560 Furthermore, if the FROB had had to wait for it to be declared that Banco Popular was failing or likely to fail in order to start the sales process, that process would not have been carried out in sufficient time to prevent the winding up of Banco Popular and would not have enabled the objectives of the resolution to be achieved.

561 As Banco Santander has stated, the timetable for the sales process set out in the letter of procedure was intended to enable all formalities to be concluded on 7 June 2017 at 7.00 a.m. so that Banco Popular could operate normally after the markets opened in order inter alia to avoid a break in its critical functions.

562 Given that Banco Santander was the only participant in the procedure to submit a concrete bid and it was certain, after the announcement by BBVA, that none of the other institutions invited to participate in the sales procedure would be making a bid, the FROB accepted that offer, even though it was submitted after the expiry of the time limit set in the letter of procedure.

563 Moreover, it follows from Article 24(3) of Regulation No 806/2014 that:

'The [SRB] 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).'

564 In that regard, it must be recalled, as was stated in paragraph 533 above, that, in Article 6.6 of the resolution scheme, the SRB noted that, since the purchaser was the only one to have submitted a bid, it was prudent to accept its conditions and thus to prevent an uncontrolled insolvency of Banco Popular which could, inter alia, have undermined its critical functions.

565 If the SRB had not accepted the FROB's proposal to designate Banco Santander as the purchaser of Banco Popular, Banco Popular would have been wound up. As was stated in the context of the analysis of the fifth plea in law, in accordance with Article 18(5) of Regulation No 806/2014, the winding up of Banco Popular under normal insolvency proceedings would not have met the resolution objectives set out in Article 14 of that regulation to the same extent. In particular, it was found that the resolution was necessary in order to achieve the objectives of ensuring the continuity of Banco Popular's critical functions and avoiding significant adverse effects on financial stability.

566 The FROB sent the SRB the results of the procedure for the sale of Banco Popular within a sufficient time frame to enable it to adopt the resolution scheme and send it to the Commission at 5.13 a.m. on 7 June 2017. The Commission thus adopted its decision allowing the resolution scheme to enter into force at 6.30 a.m. on the same day. The conduct of the procedure therefore enabled the FROB to conclude all formalities and close the sale before the expiry of the time limit set in the letter of procedure, namely before 7.00 a.m. on 7 June 2017.

567 Lastly, as regards the applicant's argument that Banco Santander, knowing that it was the only tenderer to submit a bid, offered the minimum price, it is sufficient to note that that argument is based on an unsubstantiated allegation that Banco Santander was informed that it was the only tenderer before the end of the sales procedure organised by the FROB.

568 It follows from the foregoing that the applicant has failed to establish that the sales procedure was vitiated by irregularities and cannot claim that the conduct of the procedure did not maximise the sale price.

569 Therefore, the first part must be dismissed.

(b) The second part, concerning valuation 2

570 The applicant claims, in essence, that valuation 2 is incorrect and that the SRB infringed Article 20 of Regulation No 806/2014 and its duty to state reasons.

571 The second part is divided, in essence, into five parts. First, the applicant claims that the SRB breached its duty to state reasons in so far as valuation 2 was not attached to the resolution scheme. Secondly, it also submits that the SRB infringed Article 20(1) of Regulation No 806/2014 in so far as valuation 2 was not 'fair, prudent and realistic'. In that regard, it submits that valuation 2 was unreliable as Deloitte had acknowledged that it was based on insufficient information. It submits that valuation 2 can be reliable only if it is supplemented by a definitive valuation. Thirdly, it challenges the method used in valuation 2. Fourthly, it claims that valuation 2 contradicted valuation 1 and the fact that Banco Popular had been regarded as solvent, that it did not take account of the market value of Banco Popular and that it included buffers for losses without justification. Fifthly, the applicant claims that, according to the expert's report of 2 December 2018, concerning valuation 2, annexed to the reply ('the expert's report'), valuation 2 contains manifest errors of assessment.

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

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

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

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

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

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

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

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

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

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

582 Consequently, in accordance with the case-law cited in paragraphs 114 to 119 above, the review carried out by the Court is a limited review which is confined to verifying that there was no manifest error of assessment by the SRB when it considered that valuation 2 complied with the requirements of Article 20 of Regulation No 806/2014. It is for the applicant to adduce sufficient evidence to render valuation 2 implausible.

(1) The first part, relating to the breach of the duty to state reasons

583 The applicant submits that the SRB breached its duty to state reasons in so far as valuation 2 was not attached to the resolution scheme and that the access granted subsequently to a censured version of that valuation did not put an end to that breach. It considers that a failure to state reasons cannot be remedied after the action has been brought.

584 It must be observed that valuation 2 was published on the SRB's website on 2 February and 31 October 2018 in progressively less redacted versions.

585 In that regard, it must be observed that, in the reply, following those publications, the applicant does not raise any arguments in respect of inadequate reasoning in valuation 2. It merely claims that access to a non-confidential version of valuation 2 does not eliminate the infringement of the obligation to state reasons.

586 Moreover, it must be observed that the successive publications on the SRB's website concerned the resolution scheme and valuations 1 and 2 in their original versions. Those publications were aimed at giving the public access to parts of those documents which were originally considered to be confidential.

587 It was not a matter of the SRB publishing information which was not originally contained in the resolution scheme or valuations 1 and 2 and which was intended to supplement its statement of reasons. By that argument, the applicant confuses the publication of a decision, that is to say the act of making the statement of reasons public, and the act of supplementing the statement of reasons with additional elements which were not included at the time of its adoption.

588 Accordingly, the first part must be dismissed.

(2) The second part, relating to the reliability of valuation 2

589 The applicant submits that valuation 2 was unreliable as Deloitte had acknowledged that it was based on insufficient information.

590 In that regard, it must be observed that, in the letter accompanying the communication of valuation 2 to the SRB, Deloitte stated that, given Banco Popular's difficult liquidity position, it had been asked to carry out its valuation within an extremely short period. The main work was limited to 12 days from the day on which it had access to the documentation, whereas normally such a project would take 6 weeks. Deloitte stated that there were a number of gaps and inconsistencies in the available information. It mentioned that the valuation had to be regarded as highly uncertain and provisional under Article 36 of Directive 2014/59 and that a buffer for additional losses had been included in the valuation in accordance with Article 36(9) of Directive 2014/59, which corresponds to Article 20(10) of Regulation No 806/2014.

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

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

593 Furthermore, it is clear from Article 20(13) of Regulation No 806/2014 that, in view of the urgency of the situation, the SRB could rely on valuation 2, carried out under Article 20(10) of Regulation No 806/2014, in order to adopt the resolution scheme, which is not disputed by the applicant.

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

595 Moreover, the applicant submits that valuation 2 can be reliable only if it is supplemented by a definitive valuation. The SRB is said to have confirmed that there would be no *ex post* definitive valuation.

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

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

598 Furthermore, as stated in paragraph 593 above, under Article 20(13) of Regulation No 806/2014, a provisional valuation such as valuation 2 is a valid basis for adopting the resolution scheme.

599 It is sufficient to note that, according to settled case-law, the legality of an EU measure is assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission*, C-398/13 P, EU:C:2015:535, paragraph 22 and the case-law cited). It follows that elements post-dating the adoption of the EU measure cannot be taken into account in assessing the legality of that measure (see judgment of 17 December 2014 *Si.mobil* v *Commission*, T-201/11, EU:T:2014:1096, paragraph 64 and the case-law cited).

600 It follows that the issue whether or not an *ex post* definitive valuation was carried out manifestly after the adoption of the resolution scheme cannot affect the validity of the contested decisions.

601 The second part must therefore be dismissed.

(3) The third part, concerning the method used in valuation 2

602 In the first place, the applicant submits that, in valuation 2, Deloitte assumed that the valuation of Banco Popular was to be made in the context of a liquidation scenario, which presupposes the application of the criteria in Article 20(16) and (17) of Regulation No 806/2014 and which constitutes a manifest error and is contrary to Article 20(8) of that regulation. It considers that valuation 2 could not apply the criterion of the bank's liquidation value, which would be the relevant criterion for valuation 3, which is a separate valuation from valuation 2.

603 It must be held that that argument is based on a misunderstanding of the methodology used in valuation 2. Valuation 2 comprises two parts, a first containing the provisional valuation of Banco Popular and a second consisting of a simulation of a liquidation scenario. The first part seeks to determine the economic value of Banco Popular in the context of the application of the sale of business tool. The aim of the second part is to determine whether the shareholders and creditors would have received better treatment if Banco Popular were to be wound up under normal insolvency proceedings pursuant to Spanish law.

604 The SRB adopted the resolution scheme taking into account the first part of valuation 2 containing the valuation of the assets and liabilities of Banco Popular itself. However, since Deloitte stated that it did not have all the necessary information or sufficient time to make an estimate that was more than merely indicative at that stage, the second part of valuation 2 corresponds to an initial simulation, in accordance with Article 20(9) of Regulation No 806/2014. Valuation 3, which is the definitive valuation intended to determine whether shareholders and

creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings, under Article 20(16) of Regulation No 806/2014, was carried out after the resolution.

605 The liquidation value, the use of which by Deloitte is challenged by the applicant, corresponds to the second part of valuation 2. In the context of the first part, Deloitte took into account the disposal value of Banco Popular.

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

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

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

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

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

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

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

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

612 It follows that the applicant cannot claim that the disposal value was not the correct methodology for assessing the value of Banco Popular in the context of valuation 2.

613 In the second place, the applicant claims that valuation 2 did not take account of Banco Popular's market value before the resolution.

614 It should be noted that the share value of Banco Popular on the market before the resolution decision was adopted cannot be a criterion for assessing the disposal value of Banco Popular in the context of the application of the sale of business tool.

615 Article 2(1) of the regulatory technical standards provides:

'When performing the valuation, the valuer shall consider circumstances affecting the expected cash flows of, and discount rates applicable to an entity's assets and liabilities, and shall aim to fairly represent the entity's financial position in the context of the opportunities and risks it deals with.'

616 With regard more specifically to the disposal value, Article 12(5) of the regulatory technical standards provides:

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

617 The purpose of valuation 2 was to determine what a potential purchaser would be prepared to pay for Banco Popular in the circumstances which prevailed on the date of adoption of the resolution scheme. In that respect, with regard to the methodology used in valuation 2, Deloitte stated that it had adopted a category-by-category approach, adjusting the book values of each class of assets and liabilities in order to estimate profits and losses, and other adjustments that any purchaser would apply to the value. It produced a valuation range for each class of assets and liabilities.

618 First, it must be held that the market value of Banco Popular before it was declared to be failing or likely to fail cannot constitute a criterion for determining the bank's disposal value. In that regard, as the Commission points out, the markets were unaware of Banco Popular's imminent resolution, of the scope of the measures envisaged and of the fact that, if the resolution had not taken place, Banco Popular would have been the subject of insolvency proceedings, and therefore the share price of that institution prior to the resolution did not necessarily correspond to its real economic value.

619 Secondly, the value of Banco Popular's shares on the market cannot constitute sufficient information to enable an estimate by categories or groups of assets to be established.

620 On those grounds, contrary to what is stated in the expert's report, the market value of Banco Popular cannot be regarded as an indicator of its value for the purposes of valuation 2.

621 Moreover, in valuation 2, Deloitte explained why Banco Popular's market value was not an appropriate methodology for assessing its disposal value. In particular, Deloitte stated that, given the situation in which the bank found itself, the share price had been very volatile.

622 In that regard, the expert's report states that 'the prevailing share price is direct evidence of a price which a purchaser was willing to pay for a small block of shares, regardless of its volatility'. It is sufficient to point out that the disposal value that Deloitte was to estimate related to the acquisition of Banco Popular as a whole and not only to a few shares.

623 In the third place, the applicant submits that valuation 2 includes buffers for losses without justification, which is contrary to Article 20(10) of Regulation No 806/2014.

624 In that regard, it must be recalled that the second subparagraph of Article 20(10) of Regulation No 806/2014 states that the provisional valuation referred to in the first subparagraph is to include a buffer for additional losses, with appropriate justification.

625 Article 13 of the regulatory standards defines the methodology for calculating and including a buffer for additional losses in the context of the provisional valuation and provides:

'1. To address the uncertainty of provisional valuations conducted in accordance with points (b) to (g) of Article 36(4) of Directive 2014/59/EU, the valuer shall include in the valuation a buffer to reflect facts and circumstances supporting the existence of additional losses of uncertain amount or timing. In order to avoid double counting of uncertainty, the assumptions supporting the calculation of the buffer shall be adequately explained and justified by the valuer.

2. In order to determine the size of the buffer, the valuer shall identify factors that may affect expected cash flows as a result of resolution actions likely to be adopted.'

626 In that regard, it must be borne in mind that, in the cover letter for valuation 2, Deloitte expressly stated that that valuation included a buffer for additional losses in accordance with Article 36(9) of Directive 2014/59 and that it applied the technical regulatory standards, which stipulate that the valuation must include a buffer for additional losses. Deloitte stated that the buffer for additional losses was an integral part of valuation 2 and that the details were set out in the report on valuation 2 and the annex thereto.

627 Thus, with regard to the justification for that buffer, it must be observed that, in valuation 2, for each category of assets, Deloitte provided explanations of the different circumstances that could lead to additional losses and mentioned the uncertainties regarding their assessment. Deloitte has thus justified the inclusion of the buffer for additional losses in accordance with the requirements of the regulatory technical standards.

628 It must be observed that the applicant does not put forward any argument to challenge those explanations contained in valuation 2. In the expert's report, the expert merely states that Deloitte did not quantify, explain or justify the buffer for additional losses.

629 Accordingly, the third part must be dismissed.

(4) The fourth part, relating to the contradiction with valuation 1

630 The applicant claims that valuation 2 contradicts the fact that Banco Popular was considered to be solvent in valuation 1, in the ECB's assessment that Banco Popular was failing or likely to fail, and the fact that the Bank of Spain declared that Banco Popular was solvent on 5 June 2017.

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

632 The technical standards of the EBA adopted on 23 May 2017 were, admittedly, not binding, but were available at the time of valuation 2. In valuation 2, Deloitte expressly states that it has complied with the requirements of the technical standards of the EBA.

633 In their introductory summary, the technical standards of the EBA specify the need to distinguish between two types of valuation prior to the resolution: valuation 1 carried out under Article 36(4)(a) of Directive 2014/59, which is the equivalent of Article 20(5)(a) of Regulation No 806/2014, and valuation 2, carried out under Article 36(4)(b) to (g) of Directive 2014/59, which corresponds to Article 20(5)(b) to (g) of Regulation No 806/2014.

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

635 Moreover, it must be recalled that, under the second subparagraph of Article 18(1) of Regulation No 806/2014, the assessment of that condition is carried out by the ECB or by the SRB.

636 As regards the applicant's argument that the conclusions of valuations 1 and 2 were contradictory, it is sufficient to note that it is ineffective.

637 Valuation 1, adopted on 5 June 2017, which was aimed at determining whether Banco Popular was failing or likely to fail, in order to establish whether the conditions for initiating a resolution procedure or for the write-down or conversion of capital instruments had been met, became obsolete following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or likely to fail.

638 It is true that, in valuation 1, the SRB stated that, on the reference date for its assessment, namely 31 March 2017, Banco Popular was solvent. However, first, it should be noted that the ECB relied on the significant withdrawals of deposits from Banco Popular from April and May 2017 and on its inability to generate further liquidity in order to conclude that, on 6 June 2017, Banco Popular was failing or likely to fail. Secondly, the ECB's conclusion was based on the fact that Banco Popular was unable to pay its debts or other liabilities as they fell due, within the meaning of Article 18(4)(c) of Regulation No 806/2014, and not on the fact that Banco Popular was insolvent on the balance sheet. Thus, the conclusions in valuation 1 were no longer relevant on the date of the resolution.

639 Moreover, it must be observed that differences in the conclusions in valuation 1 and valuation 2 are due to the fact that, since they had different objectives, they rely on different assessment criteria defined in the technical standards of the EBA. Thus, according to the technical standards

of the EBA, the main purpose of valuation 1 is to determine whether the total value of the entity's assets exceeds that of its liabilities, in other words whether the entity is solvent on the balance sheet, whereas valuation 2 must rely on the economic value and not the book value of the entity.

640 Finally, in so far as valuation 2 must take account of the economic value and not the book value of Banco Popular, the applicant cannot claim that there is a contradiction between the finding that Banco Popular was solvent, made in valuation 1, in the assessment by the ECB or the Bank of Spain, and the conclusion of valuation 2.

641 Accordingly, the fourth part must be dismissed.

(5) The fifth part, concerning the existence of manifest errors of assessment

642 The applicant claims that, according to the expert's report, valuation 2 contains manifest errors of assessment.

643 First of all, it must be observed that the applicant submits that, according to the expert's report, valuation 2 contains a downward assessment in so far as it does not take account of the market data and the data of the auditors who had had time to assess Banco Popular.

644 In that respect, with regard to market value, reference is made to the analysis in paragraphs 614 to 621 above. As regards the auditors' data, it should be noted that the value given to Banco Popular's assets by those auditors corresponds to their book value. Those data cannot therefore be compared with data relating to the economic value of the assets, which Deloitte had to take into account in order to determine the disposal value of Banco Popular.

645 First, with regard to loans and receivables, the applicant, relying on the expert's report, claims that their valuation is unrealistic in that it contradicts the provision ratios approved by the supervisor and valuation 1, in which the book value of the loan portfolio was not reduced.

646 It is sufficient to recall that it follows from paragraph 644 above and the analysis of the fourth part that the supervisor's data and valuation 1, in so far as they take into account only the book value of Banco Popular's assets, are irrelevant for the purposes of comparison with valuation 2.

647 In addition, it should be noted that the loans and receivables are among the areas where there is significant uncertainty and on which the valuer places specific focus, in accordance with Article 8(a) of the regulatory technical standards, which provides:

'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'.

648 In addition, in pages 4 to 11 of the annex to valuation 2, Deloitte explained the adjustments it had made with regard to the valuation of loans and receivables, in particular in the light of risks of non-payment. The applicant does not put forward any argument to dispute those adjustments.

649 Secondly, with regard to immovable assets, the applicant, relying on the expert's report, claims that valuation 2 unjustifiably reduced their value by not taking account of the assessments of those assets carried out by the experts authorised by the Bank of Spain. It states that valuation 2 ignores the value given to those assets by Banco Popular's auditors and the Bank of Spain's recommendations for valuing them.

650 That argument must be rejected in so far as it is based on a comparison with the assessments carried out by the auditors, which are not relevant.

651 Moreover, it must be observed that that argument is not sufficiently clear to understand its scope. In particular, the applicant does not specify which experts authorised by the Bank of Spain or which recommendations by the Bank of Spain were said to have been ignored by Deloitte.

652 In any event, it is evident from reading the expert's report that the 'Bank of Spain's recommendations' refer to its Circular 4/2016. The expert points out that, in respect of the valuation of repossessed immovable assets, Deloitte used Orden ECO/805/2003, sobre normas de valoración de bienes inmuebles y de determinados derechos para ciertas finalidades financieras (Order ECO/805/2003 on the rules for the valuation of immovable property and certain rights for financial purposes), of 27 March 2003 (BOE No 85 of 9 April 2003, p. 13678), in order to make adjustments, which resulted in a lower value than if it had followed Circular 4/2016. In that regard, it is sufficient to note that the expert does not dispute the applicability of order ECO/805/2003.

653 Moreover, in the report on valuation 2, Deloitte took the view that a fair valuation of repossessed immovable assets required an adjustment of between 42% and 47% compared with the valuations provided by Banco Popular. In the annex to valuation 2, Deloitte stated that most of the inconsistencies found were due to insufficient consideration of order ECO/805/2003, which lays down the mandatory rules for the valuation of immovable property in the Spanish banking sector. In particular, Deloitte states that those inconsistencies concern inter alia the assessment of planning expectations and the state of progress of works.

654 In the expert's report, the expert does not raise any argument to question that assessment by Deloitte in valuation 2. It merely states that the experts authorised by the Bank of Spain were also qualified to carry out the assessment of Banco Popular's immovable assets.

655 It follows that Deloitte explained the method used, in valuation 2, to value Banco Popular's immovable assets and provided justification as to why its valuation of the repossessed immovable assets was different from that provided by Banco Popular.

656 Thirdly, with regard to deferred tax assets, the applicant submits that Deloitte valued those assets without having the necessary documents and that that valuation contradicts valuation 1.

657 It is sufficient to recall that it follows from the analysis of the fourth part that the applicant's argument concerning the contradiction with valuation 1 is ineffective.

658 With regard to the valuation of deferred tax assets, Deloitte set out in the annex to valuation 2 the uncertainties in its assessment which relate to the time and information available and which are inherent in the very nature of those assets. In that regard, Deloitte provided explanations with regard to the method used to assess the deferred tax assets and the assumptions it had taken into account.

659 For example, in the report on valuation 2, Deloitte stated that the assessment of unprotected deferred tax assets would depend on the purchaser's anticipated taxable profits (business plan) and the levels of existing tax credits. It explained, inter alia, in the annex to valuation 2 that the valuation of unprotected deferred tax assets would depend on the purchaser, in particular on whether it was a Spanish or a foreign entity and that, if the purchaser was a Spanish bank, whether those assets were recoverable and their inclusion in the balance sheet would depend on Banco Popular's and the purchaser's business plan. The report on the valuation states that Deloitte's assessment takes account of those various scenarios.

660 Finally, it should be borne in mind that the existence of uncertainties is inherent in any provisional valuation carried out on the basis of Article 20(10) of Regulation No 806/2014.

661 The applicant does not put forward any argument to call into question the method of valuing the deferred tax assets used by Deloitte and explained in pages 27 to 33 of the annex to valuation 2.

662 Fourthly, with regard to provisions for legal risks, the applicant refers to the expert's report according to which valuation 2 unjustifiably increased those provisions.

663 It is sufficient to note that the expert's report merely compares the outcome of the valuation of the legal risks carried out by Deloitte with that used in the Banco Popular audit report.

664 Those findings are not such as to call into question the adjustments made by Deloitte on the basis of its own experience and trends in the sector which led to the various scenarios explained in pages 34 to 38 of the annex to valuation 2.

665 Moreover, the applicant considers that valuation 2 did not take account of the significant synergies that Banco Popular presented for Banco Santander, demonstrated by the significant increase in Banco Santander's stock exchange listing on 7 June 2017 and the following two days.

666 In that regard, it is sufficient to note that the purpose of valuation 2 was to determine the disposal value of Banco Popular for any potential purchaser. Deloitte could not therefore take into account, in valuation 2, synergies relating to a purchaser whose identity it did not know. The specific value attributed to Banco Popular's assets and liabilities in Banco Santander's accounts following its inclusion is therefore irrelevant.

667 Accordingly, the applicant has failed to establish the existence of manifest errors of assessment in valuation 2 and the fifth part must be dismissed.

668 It follows from all of the foregoing that the second part must be dismissed as must the ninth plea in law in its entirety.

10. The 10th plea in law, alleging infringement of Article 14 of Regulation No 806/2014, of the duty of care and of Article 296 TFEU

669 The applicant claims that the SRB, in the resolution scheme, infringed Article 14 of Regulation No 806/2014, its duty of care and Article 296 TFEU in so far as it proceeded with the write-down of shares and sale of business without examining whether there were other measures which would reduce the destruction in value for shareholders.

670 In the first place, the applicant submits that there is nothing in the statement of reasons for the resolution scheme which shows that the SRB examined other less onerous solutions for the shareholders before proceeding with the write-down of Banco Popular's capital instruments and the sale of the business. The applicant states that the SRB did not justify whether other solutions would have avoided the destruction of value for shareholders in accordance with Article 14 of Regulation No 806/2014.

671 It must be observed that the applicant's arguments are based on a misinterpretation of the second subparagraph of Article 14(2) of Regulation No 806/2014, cited in paragraph 521 above.

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

673 Moreover, as the Commission points out, the destruction of value within the meaning of the second subparagraph of Article 14(2) of Regulation No 806/2014 concerns not only the financial interests of the entity's shareholders and holders of capital instruments, but also those of its depositors, its employees and its other creditors.

674 Contrary to the applicant's submissions, that provision does not mean that the proportionality of the resolution action must be assessed in the light of the interference in the right to property of the shareholders.

675 It must be recalled that, in Article 5.2 of the resolution scheme, the SRB stated that the sale of business tool was an appropriate, necessary and proportionate means of meeting the resolution objectives in Article 14(2) of Regulation No 806/2014, namely mainly to ensure the continuity of critical functions and to preserve financial stability. In Article 5.3 of the resolution scheme, referred to in paragraph 339 above, the SRB explained why the other resolution tools provided for in Regulation No 806/2014 were not appropriate and would not meet the resolution objectives to the same extent.

676 Thus, the SRB set out the reasons why the other resolution tools, such as the separation of assets, which, in the applicant's view, would have avoided the destruction of value for shareholders, would not have met the objectives set out in the first subparagraph of Article 14(2) of Regulation No 806/2014.

677 Contrary to the applicant's submissions, since the SRB justified that the sale of business tool was necessary for the attainment of those objectives, it did not have to indicate whether other solutions would have avoided the destruction of value within the meaning of the second subparagraph of Article 14(2) of Regulation No 806/2014.

678 Moreover, it must be observed that, in Article 4.5 of the resolution scheme, the SRB concluded that the resolution also contributed to minimising the destruction of value, taking into account the fact that the winding up of Banco Popular would have resulted in creditors bearing higher losses than in resolution. The SRB also considered, in Article 4.6 of the resolution scheme, that the disadvantages and costs associated with the adoption of the resolution action, mainly the

losses suffered by the shareholders, would be outweighed by the benefits derived from it, namely the maintenance of critical functions, the minimisation of adverse effects for the economy and financial stability and the avoidance of losses that could be suffered by other creditors.

679 It follows that, contrary to the applicant's submissions, in the resolution scheme the SRB took into account the destruction of value that the sale of the business was likely to entail for the shareholders of Banco Popular.

680 In the second place, the applicant submits that the SRB did not examine whether the asset separation tool, combined with a loan from the SRF, would have been appropriate to resolve the liquidity problems and restore market confidence and thus exceeded the limits of its discretion. The applicant submits that, according to the expert's report annexed to the application, referred to in paragraph 482 above, a separation of assets combined with other measures intended to provide liquidity was, in principle, feasible and would have avoided a destruction of value for shareholders contrary to Article 14 of Regulation No 806/2014.

681 First of all, it should be borne in mind that, in Article 5.3 of the resolution scheme, referred to in paragraph 339 above, the SRB considered that the asset separation tool, whether combined with the bail-in tool or the bridge institution tool, would not meet the resolution objectives to the same extent as the sale of business tool.

682 Moreover, the applicant does not raise any argument capable of establishing that the solution it relies on, namely a separation of assets combined with liquidity assistance, was in fact conceivable in view of Banco Popular's liquidity situation and the urgency with which the resolution scheme had to be adopted or that that solution could have restored Banco Popular's long-term viability.

683 Thus, in the application, the applicant merely refers to the part of the expert's report annexed thereto entitled 'The decision does not take sufficient account of alternative resolution tools'. It is sufficient to note that, in that report, drawn up on 16 September 2017 on the basis of the version of the resolution scheme published in July 2017, the experts acknowledge numerous shortcomings in their analysis due to the fact that the version of the resolution scheme available to them was redacted and that they were unaware of the extent of Banco Popular's liquidity problems. They point out that Banco Popular was solvent and rely on a number of purely theoretical assumptions relating to the sale of certain assets. However, that report does not contain any analysis aimed at establishing that an alternative solution to the sale of business tool was feasible in practice in the light of the deterioration in Banco Popular's liquidity situation and the urgency. That report does not establish whether those asset sales were actually feasible in the circumstances that prevailed on the date of the resolution.

684 As the SRB points out, the applicant does not explain sufficiently how the alternative solution would have been as effective, legally possible and less costly than the sale of assets through the sale of business tool. In that regard, it must be observed that the experts who drafted the expert's report of 16 September 2017 also produced the expert's report annexed to the reply, referred to in paragraph 483 above, in which they acknowledged that, due to a lack of available information, they had not been able in their first report to explain in greater detail how that alternative solution could function.

685 Moreover, the expert's report annexed to the application does not take account of the resolution objectives laid down in Article 14 of Regulation No 806/2014 and therefore does not demonstrate that the application of another resolution tool, such as asset separation, would have achieved those objectives as effectively as the sale of business tool.

686 Finally, as the Commission and the SRB point out, the implementation of the asset separation tool requires a period of time which was not available on the date of the resolution.

687 In that regard, in the reply, the applicant submits that the SRB could have carried out a separation of assets as a matter of urgency. It refers, in that regard, to Section 8 of the expert's report annexed to the reply. It is sufficient to note that that expert's report annexed to the reply merely states that the essential parts of such an exercise could be carried out in a significantly shorter time frame than the six to nine months mentioned by the Commission. Those factors are not capable of establishing that the asset separation tool was actually feasible due to the urgency of the situation in which Banco Popular found itself.

688 The applicant also claims that the separation of assets could have been applied as a matter of urgency if the 2016 resolution plan had been properly prepared.

689 It must be held, as the Commission considered, that that argument is irrelevant since the 2016 resolution plan could not have envisaged the liquidity crisis that Banco Popular would face from April 2017 onwards.

690 In that regard, under the third paragraph of Article 23 of Regulation No 806/2014, 'when adopting a resolution scheme, the [SRB], the Council and the Commission shall take into account and follow the resolution plan as referred to in Article 8 unless the [SRB] assesses, taking into account the circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plan'.

691 In the present case, the SRB explained, in recitals 44 to 46 of the resolution scheme, the reasons why the resolution tool envisaged in the 2016 resolution plan was not appropriate to the circumstances that prevailed on the date of the resolution. Thus, it noted that the 2016 resolution plan was based on the assumption that the failure of Banco Popular would be linked to a deterioration of its capital situation. However, in so far as the failure of Banco Popular stemmed from the deterioration of its liquidity position, the SRB stated that it was not guaranteed that the bail-in tool, envisaged in that plan, would have provided an immediate and effective remedy to Banco Popular's liquidity crisis.

692 It follows that any weaknesses in the 2016 resolution plan cannot lead to the annulment of the contested decisions and the arguments raised by the applicant in that regard are ineffective. In particular, Special Report 23/2017 by the Court of Auditors entitled '[SRB]: Work on a challenging Banking Union task started, but still a long way to go', referred to by the applicant, is irrelevant.

693 In the third place, the applicant submits that the SRB breached its duty of care and of sound administration by not examining the possible solutions offered by Article 76 of Regulation No 806/2014, namely a loan from the SRF, in order to resolve Banco Popular's liquidity problems.

694 In that regard, it is sufficient to note that, under Article 76(1)(b) of Regulation No 806/2014, within the resolution scheme, when applying the resolution tools, the SRB may use the SRF only to the extent necessary to ensure the effective application of the resolution tools for the purposes, inter alia, of making loans to the institution under resolution. It is clear from that provision that that possibility can be envisaged only in the context of a resolution action and is in no way an alternative to it. As the SRB points out, recourse to the SRF cannot be used in isolation in order to resolve the liquidity problems of an entity.

695 In the fourth place, in the alternative, the applicant submits that the SRB could have had recourse to other measures provided for by Directive 2014/59. It states that the SRB breached its duty of care and exceeded the limits of its discretion by not examining the possibility of designing an ad hoc resolution tool, in the light of the fact that Regulation No 806/2014 was not designed to resolve liquidity problems.

696 It is sufficient to note, as the SRB has done, that it can use only the resolution tools referred to in Article 22(2) of Regulation No 806/2014.

697 Accordingly, the 10th plea in law must be dismissed.

11. The 11th plea in law, alleging infringement of Article 20(14) of Regulation No 806/2014, read in conjunction with Article 20(11) and (15) of that regulation, and infringement of essential procedural requirements

698 By this new plea in law raised in the reply, the applicant states that, in its response of 30 July 2018 to a measure of organisation of procedure, the SRB stated that it would not carry out an *ex post* definitive valuation and submits that the resolution scheme infringes Article 20(11), (14) and (15) of Regulation No 806/2014. It claims that resolution scheme was adopted without the provisions and mechanisms necessary for the valuation referred to in Article 20 of Regulation No 806/2014 to be based on information relating to Banco Popular's assets and liabilities that is as complete and up-to-date as possible.

699 The applicant submits that the new plea in law is admissible under Article 84 of the Rules of Procedure since it is based on a new factor which arose in the course of the proceedings, namely the information communicated by the SRB in its response of 30 July 2018 to a measure of organisation of procedure, according to which it would not carry out an *ex post* definitive valuation.

700 The Commission submits that this new plea is inadmissible and, in any event, unfounded, since the applicant relies on a factor subsequent to the adoption of the resolution scheme which cannot affect its legality. The SRB and Banco Santander also submit that the plea refers to a decision by the SRB which is subsequent to the adoption of the resolution scheme and that that cannot affect the legality of the resolution scheme.

701 It is sufficient to point out that, for the same reasons as those set out in paragraphs 596 to 599 above, the issue whether or not an *ex post* definitive valuation was carried out manifestly after the adoption of the resolution scheme cannot affect the validity of the contested decisions.

702 Moreover, in its observations on Banco Santander's statement in intervention, the applicant explains that that new plea is not based on the absence of an *ex post* definitive valuation, but seeks to argue that the resolution scheme was flawed from the moment it was adopted since the guarantees provided for in Article 20(14) of Regulation No 806/2014 did not exist.

703 It is sufficient to note that, by that explanation, the applicant calls into question the reasons which it had put forward to justify the introduction of that new plea in law at the reply stage.

704 Accordingly, the 11th plea in law must be dismissed.

12. The 12th plea in law, alleging infringement of Article 20(1) of Regulation No 806/2014, read in conjunction with Article 20(3) and (5) of that regulation

705 By this new plea in law raised in the reply, the applicant, following access to the versions of valuation 2 published in February and October 2018, submits that the resolution scheme, of which valuation 2 forms an integral part, infringes Article 20(1) and (5) of Regulation No 806/2014.

706 First, the applicant submits that valuation 2 considered only one resolution tool, namely the sale of business tool, which is contrary to Article 20(1) of Regulation No 806/2014, under which the provisional valuation must be carried out before deciding on resolution action. It states that it is contrary to that provision to draw up a provisional valuation after having chosen the resolution action to be used. Secondly, the applicant states that the resolution scheme infringes Article 20(1) of Regulation No 806/2014 in so far as valuation 2 was not carried out by an independent person. The applicant submits that Deloitte worked in accordance with the instructions of the SRB, that it was unable to form its own opinion because the SRB had ordered it to concentrate on the sale of business tool and that part of the provisional valuation, namely valuation 1, was carried out by the SRB itself. Thirdly, since the resolution tool had been chosen in advance, valuation 2 could not fulfil the objective referred to in Article 20(5) of Regulation No 806/2014 of providing the SRB with information on the type of resolution tool to be used.

707 The Commission submits that this new plea is inadmissible.

708 Under Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

709 It must be held that all of the arguments raised by the applicant in this new plea in law rely, in essence, on the fact that valuation 2 was carried out by considering only one resolution tool, namely the sale of business tool.

710 In that regard, recital 42 of the resolution scheme, in the version annexed to the application, stated that:

'Given the urgency of the circumstances of the case, Deloitte carried out a provisional valuation, in accordance with Article 20(10) [of Regulation No 806/2014]. Such provisional valuation was carried out with the purpose of:

…

(c) informing the decision on the shares or instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool.'

711 It follows that the fact that Deloitte carried out a provisional valuation for the purpose of assessing the conditions for implementing the sale of business tool is information which was already included in the resolution scheme available to the applicant at the time when the action was brought.

712 The applicant does not refer to any new information that would have come to its knowledge as a result of its access to a less confidential version of valuation 2, as published on the SRB's website in February and October 2018, and which would be capable of justifying the fact that that plea was raised only in the reply. The applicant cannot therefore rely on the fact that it gained access to valuation 2 only in the course of the proceedings to justify the admissibility of this new plea in law under Article 84 of the Rules of Procedure.

713 Accordingly, the 12th plea in law must be dismissed as inadmissible.

714 In any event, it must be held that the applicant's arguments are unfounded.

715 First, contrary to what is claimed by the applicant, it does not follow from Article 20(1) of Regulation No 806/2014, cited in paragraph 15 above, that a valuation may not be carried out by taking into account a particular resolution tool. The applicant is therefore wrong to claim that the fact that valuation 2 considered only the sale of business tool is contrary to Article 20(1) of Regulation No 806/2014.

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

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

718 Article 20(5) of Regulation No 806/2014 cannot be interpreted as requiring the valuer to carry out a valuation taking into account all potentially conceivable resolution tools. Accordingly, the applicant is wrong to claim that that provision precludes valuation 2 from being carried out taking into account the sale of business tool, which the SRB had considered to be the tool best able to fulfil the objectives of the resolution.

719 Thirdly, with regard to the applicant's arguments intended to call into question the independence of the valuer, it should be noted that it is not for valuers themselves to define what would be the most appropriate resolution tool. As the SRB points out, it is for the resolution authority to choose the most appropriate tool for the situation of the entity concerned.

720 Accordingly, the fact that the SRB took the view that the sale of business tool was best able to fulfil the objectives of the resolution and that the SRB commissioned Deloitte to carry out a valuation meeting the objectives of that tool cannot be regarded as undermining Deloitte's independence. Finally, it should be noted that the applicant does not explain how the fact that the SRB itself carried out valuation 1 is capable of calling into question Deloitte's independence when it carried out valuation 2 as those two valuations had different objectives.

13. The requests for measures of organisation of procedure and measures of inquiry

721 The applicant has requested that the Court order various measures of organisation of procedure and of inquiry.

722 First, in the application and the reply and by letter of 19 April 2021, the applicant asked the Court to order the production of various documents. In addition, by letter of 17 May 2021, the applicant asked the Court to put written questions to the Kingdom of Spain.

723 It must be recalled that, by its order for a measure of inquiry of 12 May 2021, pursuant to Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, the Court ordered the SRB to produce certain documents referred to in paragraph 95 above. By order of 9 June 2021, the Court held that the documents produced by the SRB in their confidential version were not relevant to the resolution of the dispute. By contrast, the letter from Banco Popular to the ECB of 6 June 2017, without its annex, was communicated to the other parties.

724 Secondly, in the application, the applicant proposed that a number of witnesses be heard.

725 As regards applications made by a party for measures of organisation of procedure or measures of inquiry, it must be recalled that the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 117 and the case-law cited; judgment of 12 November 2020, *Fleig* v *EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 53).

726 It is clear from the case-law of the Court of Justice that, even where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it falls to the General Court to assess the relevance of the application to the subject matter of the dispute and the need to examine the witnesses named (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 118 and the case-law cited; judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission*, C-702/19 P, EU:C:2020:857, paragraph 29).

727 In the present case, it must be observed that the elements in the case file and the explanations provided during the hearing are sufficient to allow the Court to give a ruling, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings and in the light of the documents lodged by the parties.

728 It follows that the applicant's requests for measures of organisation of procedure and measures of inquiry must be rejected and the action must be dismissed in its entirety.

V. Costs

729 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs as well as those incurred by the Commission, the SRB and Banco Santander, in accordance with the form of order sought by those parties.

730 Under Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain, the Parliament and the Council must therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition),

hereby:

1. Dismisses the action;

2. Orders Aeris Invest Sàrl to bear its own costs and pay the costs incurred by the European Commission, the Single Resolution Board (SRB) and Banco Santander, SA;

3. Orders the Kingdom of Spain, the European Parliament and the Council of the European Union to bear their own costs.

Van der Woude Jaeger Kreuschitz

De Baere Steinfatt

Delivered in open court in Luxembourg on 1 June 2022.

[Signatures]

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