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 of a resolution scheme by the SRB in respect of Banco Popular Español – Action for annulment – Challengeable act – Admissibility – Right to be heard – Right to property – Obligation to state reasons – Articles 18, 20 and 24 of Regulation (EU) No 806/2014)

In Case T-481/17,

Fundación Tatiana Pérez de Guzmán el Bueno, established in Madrid (Spain),

Stiftung für Forschung und Lehre (SFL), established in Zürich (Switzerland),

represented by R. Pelayo Jiménez, A. Muñoz Aranguren and R. Pelayo Torrent, lawyers,

applicants,

v

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,

defendant,

supported by

Kingdom of Spain, represented by S. Centeno Huerta, L. Aguilera Ruiz, S. Jiménez García 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, A. Westerhof Löfflerová and H. Marcos Fraile, acting as Agents,

by

European Commission, represented by L. Flynn and A. Steiblytė, 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 under Article 263 TFEU seeking the annulment of Decision SRB/EES/2017/08 of the Executive Session of the SRB of 7 June 2017, concerning the adoption of a resolution scheme in respect of Banco Popular Español, SA,

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 14 June 2021,

gives the following

Judgment

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

relating to the prudential supervision of credit institutions with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the European Union and each Member State.

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

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

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

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

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

7 Recital 12 of Regulation No 806/2014 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 Under the first paragraph of Article 1 of Regulation No 806/2014, the purpose of that regulation is to establish uniform rules and a uniform procedure for the resolution of the entities defined in Article 2, which are established in the participating Member States, namely banks whose home supervisor is the ECB or the national competent authority in Member States whose currency is the euro or in Member States whose currency is not the euro which have established a close cooperation in accordance with Article 7 of Regulation No 1024/2013 (see recital 15 of Regulation No 806/2014).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 The applicants, Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL), were shareholders in Banco Popular Español, SA ('Banco Popular') before a resolution scheme was adopted in respect of Banco Popular.

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 preferred resolution tool in that 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 (CNMV) (National Securities Market Commission, Spain), Banco Popular stated that potential purchasers had expressed an interest in the private sale process, but that it had not received any concrete bids.

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

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

40 In May 2017, several press articles reported on the difficulties faced by Banco Popular. By way of example, it is worth mentioning an article of 11 May 2017, published on the website *elconfidencial.com*, entitled 'Saracho orders the urgent sale of Popular to JP Morgan and Lazard due to risk of insolvency' ('*Saracho encarga la venta urgente del Popular a JP Morgan y Lazard por riesgo de quiebra*'). That article states that the Chairman of the bank had instructed JP Morgan and Lazard to organise the urgent sale of the bank due to a risk of insolvency, as a result of the massive outflow of deposits by private and institutional clients, and that he considered that the only way of ensuring the viability of the bank was the complete and imminent sale of the entire group. The article 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' ('*La UE, advertida de riesgo de una resolución ordenada en 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 as Banco Popular's request for emergency liquidity assistance, the Governing Council of the ECB did not raise any objections to urgent liquidity assistance to Banco Popular for the period up to 8 June 2017. Banco Popular received part of that emergency liquidity assistance, then the Bank of Spain stated that it was not in a position to provide additional emergency liquidity assistance to Banco Popular.

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

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) ('FROB'), concerning the marketing of Banco Popular ('the marketing decision'). 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 present non-binding 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 of whether the conditions for initiating a resolution procedure, 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 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 process letter') setting the deadline for the submission of bids at midnight on 6 June 2017.

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

65 Also on 6 June 2017, Deloitte submitted a second valuation ('valuation 2') to the SRB, drawn up pursuant to Article 20(10) of Regulation No 806/2014. The purpose of valuation 2 was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into

normal insolvency proceedings, and to inform the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool. That valuation, inter alia, estimated the economic value of Banco Popular at EUR 1.3 billion in the best-case scenario, at minus EUR 8.2 billion in the worst-case scenario and at minus EUR 2 billion for the best estimate.

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

67 By letter of 7 June 2017, the FROB informed the SRB that Banco Santander had submitted a bid at 03:12 on 7 June and that the price offered by Banco Santander for the sale of Banco Popular shares was EUR 1. The FROB stated that its governing committee had selected Banco Santander as awardee of the competitive sale process of Banco Popular and had decided to propose to the SRB to designate Banco Santander as buyer in the SRB's decision on the adoption of a resolution scheme in respect of Banco Popular.

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 a 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 EUR 1. It was specified that the purchaser had already consented to the transfer.

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

77 The resolution scheme was submitted to the Commission for endorsement at 05:13 on 7 June 2017.

78 On 7 June 2017, at 06:30, 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.

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.

Procedure and forms of order sought

84 By application lodged at the Registry of the General Court on 2 August 2017, the applicants brought the present action.

85 By document lodged at the Court Registry on 30 October 2017, the SRB requested the Court, pursuant to Article 92(3) of the Rules of Procedure of the General Court, to order measures of inquiry concerning the production of certain documents referred to in the annex. By decision of 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 Court Registry on 3, 26 and 27 October 2017 and on 10 and 14 November 2017 respectively, Banco Santander, the Kingdom of Spain, the European Parliament, the Council and the Commission applied for leave to intervene in the present proceedings in support of the form of order sought by the SRB. By decisions of 1 August 2018, the President of the Eighth Chamber of the General Court granted the Kingdom of Spain, the Parliament, the Council and the Commission leave to intervene and, by order of 12 April 2019, the President granted Banco Santander leave to intervene. The Kingdom of Spain, the Parliament, the Council, the Commission and Banco Santander submitted their statements in intervention, and the main parties submitted their observations on those statements within the prescribed time limits.

87 On 13 February 2018, in the context of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court requested the SRB to lodge the latest, non-confidential version of the resolution scheme, as well as a non-confidential version of valuation 2 which were published on the SRB's website. The SRB lodged the documents within the prescribed time limit.

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

89 By letter lodged at the Court Registry on 15 November 2018, the applicants requested the Court to order the SRB, by way of a measure of organisation of procedure, to translate certain documents into Spanish. The SRB submitted its observations on that request within the prescribed time limit.

90 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.

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 Court Registry on 8 September 2020, the applicants produced new evidence pursuant to Article 85(3) of the Rules of Procedure. The SRB, the Kingdom of Spain, the Parliament, the Council, the Commission and Banco Santander lodged their observations within the prescribed time limit.

93 On 16 March 2021, the Court, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, 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 Court Registry on 20 April 2021, the applicants submitted a request for measures of organisation of procedure. The SRB, the Parliament, the Council, the Commission and Banco Santander submitted their observations on that request 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 of 28 May 2021, the applicants requested measures of organisation of procedure and produced new evidence. The SRB, the Kingdom of Spain, the Parliament, the Council, the Commission and Banco Santander were invited to submit their observations at the hearing.

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 applicants, the Kingdom of Spain, the Parliament, the Council, the Commission 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 14 June 2021.

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

101 The applicants claim that the Court should:

– annul the resolution scheme;

– order the SRB to pay the costs.

102 The SRB contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

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

– dismiss the action;

– order the applicants 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 and Directive 2014/59;

– order the applicants to pay the costs.

Law

105 In the application, the applicants put forward 10 pleas in law in support of their action. The first plea alleges breach of the obligation to state reasons, infringement of the right to good administration enshrined in Article 41(2)(b) and (c) of the Charter of Fundamental Rights of the European Union ('the Charter') and infringement of the right to an effective remedy enshrined in Article 47 of the Charter. The second plea alleges that Article 18, Article 24(2)(a) and Article 27 of Regulation No 806/2014 and Articles 32, 38 and 43 of Directive 2014/59 are unlawful in that they infringe the right to be heard enshrined in Article 41(2)(a) of the Charter. The third plea alleges

that Articles 21, 22, 24 and 27 of Regulation No 806/2014 and Articles 38 and 63 of Directive 2014/59 are unlawful in that they infringe the right to property, enshrined in Article 17(1) of the Charter, and breach the principle of the freedom to conduct a business, enshrined in Article 16 of the Charter. The fourth plea alleges infringement of the right to an effective remedy enshrined in Article 47 of the Charter. The fifth plea alleges infringement of Article 18(1) of Regulation No 806/2014 and Article 32 of Directive 2014/59. The sixth plea alleges breach of the principle of prudential banking. The seventh plea alleges breach of the principle of the protection of legitimate expectations. The eighth plea alleges infringement of the right to property and breach of the principle of proportionality enshrined in Articles 17 and 52 of the Charter. The ninth plea alleges infringement of Article 20(1) of Regulation No 806/2014. The tenth plea alleges that the procedure for the sale of Banco Popular infringes Article 24 of Regulation No 806/2014 and Article 39(2)(a), (b), (d) and (f) of Directive 2014/59.

106 In the reply, the applicants raise three new pleas in law. The first alleges infringement of Article 20(3) and (11) of Regulation No 806/2014, the second alleges breach of the obligation to state reasons, the rights of the defence and the right to an effective remedy and the third alleges infringement of essential procedural requirements. In so far as, by those three new pleas, the applicants challenge, in essence, the fact that the SRB will not carry out an *ex post* definitive valuation pursuant to Article 20(11) of Regulation No 806/2014, they will be grouped together under an eleventh plea.

Admissibility

107 In its statement in intervention, the Commission submits that the action is inadmissible on the ground that the resolution scheme is an intermediate measure which does not produce binding effects. The Commission argues that, by Decision 2017/1246, the Commission endorsed the resolution scheme, adopted it and gave it binding effect and that, accordingly, an action directed solely against the resolution scheme is inadmissible.

108 The Parliament and the Council also argue, in their statements in intervention, that the resolution scheme does not in itself produce legal effects vis-à-vis third parties within the meaning of Article 263 TFEU.

109 The applicants submit that the interveners' arguments concerning the inadmissibility of the action are not admissible, in so far as the issue of inadmissibility was not raised by the SRB. In the alternative, they maintain that the action is admissible.

110 It must be observed that, under Article 142(1) of the Rules of Procedure, the purpose of the intervention must be limited to supporting in full or in part the form of order sought by one of the main parties. Moreover, pursuant to Article 142(3) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention.

111 In the present case, the SRB, in the form of order sought, has confined itself to seeking the dismissal of the action on the substance and has not challenged the admissibility of the action.

112 It is true that according to settled case-law an intervener is not entitled to raise the objection of inadmissibility independently and that the Court is therefore not bound to consider the pleas of inadmissibility on which the intervener relies exclusively (judgments of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraph 22, and of 13 December 2018, *Post Bank Iran* v *Council*, T-559/15, EU:T:2018:948, paragraph 63).

113 However, since this is an objection of inadmissibility involving public policy considerations, the Court should examine it of its own motion (see, to that effect, judgments of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraph 23, and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraph 36).

114 According to consistent case-law, any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects, are regarded as actionable measures, within the meaning of Article 263 TFEU (see judgments of 25 October 2017, *Slovakia* v *Commission*, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 46 and the case-law cited, and of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 37 and the case-law cited).

115 In order to determine whether an act produces such effects and may, accordingly, form the subject matter of an action for annulment under Article 263 TFEU, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (see judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 38 and the case-law cited).

116 In that regard, it must be noted that the SRB exercises the powers conferred on it by Regulation No 806/2014, in particular the power provided for in Article 16(1) of that regulation to 'decide on a resolution action in relation to a financial institution established in a participating Member State, where the conditions laid down in Article 18(1) are met'. The EU legislature has thus expressly conferred a decision-making power on the SRB.

117 A decision of the SRB on a resolution action is an act which is capable of entering into force. Article 12 of the resolution scheme states that it entered into force on 7 June 2017 at 06:30.

118 Moreover, according to the first paragraph of Article 23 of Regulation No 806/2014, the resolution scheme adopted by the SRB under Article 18 of that regulation is to establish the details of the resolution tools to be applied to the institution under resolution and to be implemented by the national resolution authorities in accordance with the relevant provisions of Directive 2014/59, as transposed into national law.

119 Accordingly, pursuant to Article 9 of the resolution scheme, it is for the FROB to take all necessary measures to proceed with the execution and implementation of that decision. In particular, the FROB must implement the sale of Banco Popular in accordance with the detailed rules set out in the resolution scheme. Article 10 of the resolution scheme also provides that the SRB must monitor the execution of the resolution scheme by the FROB in accordance with Article 28 of Regulation No 806/2014.

120 Accordingly, it must be held that, in view of its substance, the resolution scheme produces binding legal effects.

121 Furthermore, it should be noted that Article 86(1) of Regulation No 806/2014 provides that proceedings may be brought before the Court of Justice of the European Union in accordance with Article 263 TFEU contesting a decision taken by the Appeal Panel or, where there is no right of appeal to the Appeal Panel, by the SRB. According to Article 86(2) of Regulation No 806/2014,

Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the SRB, in accordance with Article 263 TFEU.

122 In that regard, the Court of Justice has held that Article 86(2) of Regulation No 806/2014 provides that Member States and the EU institutions, as well as any natural or legal person, may, in accordance with Article 263 TFEU, institute proceedings before the Court of Justice of the European Union against decisions of the SRB, the latter being mentioned to the exclusion of any other institution, body, office or agency of the European Union (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 56).

123 The Court of Justice has also held that the resolution procedure must be regarded as a complex administrative procedure involving a number of authorities, only the outcome of which, resulting from the SRB's exercise of its power, may be subject to the judicial review provided for in Article 86(2) of that regulation (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 66).

124 Thus, it is apparent from the wording of Article 86 of Regulation No 806/2014 and the case-law of the Court of Justice that the resolution scheme, which is not open to appeal before the Appeal Panel, is an act against which an action for annulment may be brought before the General Court.

125 That conclusion is not called into question by the arguments raised by the Parliament, the Council and the Commission.

126 In the first place, at the hearing, the Parliament and the Commission argued that, in a procedure involving several institutions, only the final act was open to challenge. The Commission argued that, by its endorsement, it adopted the resolution scheme and became its author, which is consistent with the principles relating to the delegation of powers laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). The Parliament argued that the Commission decision incorporated the resolution scheme and that that scheme, as part of the Commission decision, is not actionable.

127 It is true, as the Commission stated at the hearing, that the resolution scheme enters into force only as a result of its endorsement. However, this does not mean that the Commission's endorsement has the effect of eliminating the autonomous legal effects of the resolution scheme and replacing them with those of the Commission decision alone.

128 In the light of the wording used, inter alia, in Article 18(7) of Regulation No 806/2014, it must be held that the Commission's endorsement is a necessary step for the entry into force of the resolution scheme and that its endorsement gives legal force to that scheme.

129 However, contrary to what the Commission maintains, compliance with the principles relating to the delegation of powers laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), does not imply that only the decision adopted by the Commission produces legal effects. According to that judgment, a delegation of powers that involves a discretionary power implying a wide margin of discretion which could, according to the use which is made of it, make possible the execution of actual economic policy, since it replaced the choices of the delegator by the choices of the delegate, brings about an 'actual transfer of responsibility'.

130 It must be held that, under the second subparagraph of Article 18(7) of Regulation No 806/2014, it is necessary for the Commission to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects, 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).

131 In that regard, it follows in particular from recital 26 of Regulation No 806/2014 that:

'… 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. …'

132 Moreover, it must be held that the division of powers between the SRB and the Commission provided for by Regulation No 806/2014 does not support the Commission's line of argument that, by virtue of its endorsement, it adopted the resolution scheme. The Commission has its own competence to assess the discretionary aspects of the resolution scheme. In addition, pursuant to Article 18(7) of Regulation No 806/2014, the Commission may either endorse the resolution scheme or object to it with regard to its discretionary aspects. By contrast, it is not entitled to exercise the powers reserved to the SRB or to modify the resolution scheme or its legal effects.

133 In the second place, at the hearing, the Commission argued that the resolution scheme is not binding on it. If it disagreed with the scheme, the Commission was not obliged to endorse it. The Commission took the view that the solution adopted in the judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369), concerning the ECB's assessment as to whether the entity concerned was failing or was likely to fail, was applicable by analogy to the resolution scheme. In the Commission's view, therefore, the resolution scheme is a preparatory measure which is not capable of forming the subject matter of an action under Article 263 TFEU.

134 According to the case-law, in the case of acts adopted by a procedure involving several stages of an internal procedure, in principle an act is open to challenge only if it is a measure which definitively lays down the position of the institution on the conclusion of that procedure, and not a provisional measure that is intended to pave the way for the final decision, and the legal defects of which could reasonably be raised in an action brought against it (see order of 6 May 2019, *ABLV Bank* v *ECB*, T-281/18, EU:T:2019:296, paragraph 30 and the case-law cited).

135 In paragraph 66 of the judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369), the Court of Justice held that, the ECB's assessment as to whether the entity concerned was failing or was likely to fail did not, as such, have a binding legal effect that was capable of affecting the interests of the appellants, by bringing about a distinct change in their legal position, only the adoption, followed by the entry into force of a resolution scheme and the implementation of resolution tools, within the meaning of Article 22(2) of Regulation No 806/2014 being capable of bringing about a change in their legal position.

136 In that regard, it is sufficient to note that, unlike in the case of the resolution scheme, there is no provision in Regulation No 806/2014 which provides for the ECB's assessment to enter into force.

137 Moreover, in the context of the complex administrative procedure established by Regulation No 806/2014, it is not possible to regard the resolution scheme as a preparatory measure in that it is intended to pave the way for the Commission decision. In that regard, it must be observed that, on the one hand, pursuant to Article 18(7) of Regulation No 806/2014, the endorsement of the resolution scheme by the Commission has the effect of making it enter into force and that, on the other hand, the Commission may object to the resolution scheme with regard to its discretionary aspects, but may neither object to nor amend its purely technical aspects.

138 In the third place, at the hearing, the Parliament and the Council argued that Article 86 of Regulation No 806/2014 should be interpreted as referring only to autonomous decisions of the SRB which do not require the Commission's endorsement.

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

140 It must be noted, however, that Article 86 of Regulation No 806/2014 provides that proceedings may be brought, on the basis of Article 263 TFEU, against all decisions of the SRB, with the exception of those open to appeal before the Appeal Panel. A resolution scheme by definition falls within that category of decisions and there is no reservation in that article or in any other provision in Regulation No 806/2014 which allows it to be excluded.

141 In addition, it should also be noted that Article 20(15) of Regulation No 806/2014 provides that the valuation is to be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments and that the valuation itself is not to be subject to a separate right of appeal but may be subject to an appeal together with the decision of the SRB.

142 Accordingly, that provision provides for the possibility of challenging the valuation in the context of an action against the resolution scheme adopted by the SRB, but makes no reference to the decision adopted by the Commission.

143 It must therefore be held that it is apparent from the very wording of Article 86 of Regulation No 806/2014, but also from other provisions of Regulation No 806/2014, that an action may be brought against a resolution scheme adopted by the SRB, without there being any requirement that an action must also be brought against the Commission decision endorsing that scheme.

144 Moreover, the interpretation of Article 86 of Regulation No 806/2014 which is proposed by the Parliament, the Council and the Commission does not meet the requirements of the settled case-law according to which the wording of secondary EU legislation must be interpreted, in so far as possible, in a manner consistent with primary law as a whole and, in particular, the provisions of the Treaties and of the Charter and general principles of EU law (see, to that effect, judgments of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)*, C-442/18 P, EU:C:2019:1117, paragraph 40 and the case-law cited; of 2 February 2021, *Consob*, C-481/19, EU:C:2021:84, paragraph 50 and the case-law cited; and order of 24 October 2019, *Liaño Reig* v *SRB*, T-557/17, not published, EU:T:2019:771, paragraph 47 and the case-law cited), including the principles of legal certainty and effective judicial protection.

145 First, as regards the principle of legal certainty, this requires that rules of law be clear, precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 111; of 25 November 2020, *ACRE* v *Parliament*, T-107/19, not published, EU:T:2020:560, paragraph 66; and of 9 December 2020, *Adraces* v *Commission*, T-714/18, not published, EU:T:2020:591, paragraph 37). Compliance with the requirements arising from that principle is all the more important where the legal rules at issue may have negative consequences for individuals and undertakings (see, to that effect, judgments of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 111, and of 26 March 2020, *Hungeod and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 93 and the case-law cited). In particular, according to that principle, EU law must allow those concerned to know unequivocally what their rights and obligations are and take steps accordingly (see, to that effect, judgments of 10 March 2009, *Heinrich*, C-345/06, EU:C:2009:140, paragraph 44; of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 41; and of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 51).

146 Second, 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 the law of the Union are violated has the right to an effective remedy before a 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).

147 An interpretation which makes an action against a resolution scheme adopted by the SRB contingent on the bringing of a combined action against the Commission's endorsement decision would be contrary not only to the provisions of Regulation No 806/2014 recalled in paragraphs 140 and 141 above, but also to the principles of legal certainty and effective judicial protection, in so far as any person affected by a resolution decision adopted by the SRB would be subject to a condition for the admissibility of his or her action which has not been expressly provided for.

148 Finally, it is necessary to reject the argument raised by the Parliament at the hearing that it is not possible to annul the resolution scheme if the Commission decision remains in force. It must be noted that if, in the context of an action brought against a resolution scheme, the Court annuls that scheme, it follows that the Commission decision endorsing the scheme would be deprived of its purpose.

149 It follows from the foregoing that, once it has been endorsed by the Commission, the resolution scheme adopted by the SRB produces legal effects and constitutes an act against which an independent action for annulment may be brought.

150 Accordingly, the action must be regarded as admissible.

Substance

Preliminary observations

– *The scope of the action*

151 In the first place, it must be noted that, in the part of the reply relating to the background to the dispute, the applicants submit that the statements made by the Chair of the SRB on 23 May 2017 in the interview given to the television channel Bloomberg, referred to in paragraph 39 above, caused Banco Popular's liquidity crisis and resulted in the failure of the private sale process. They argue that, in the event of infringement of the duty of confidentiality, the resolution scheme must be annulled if it is established that, in the absence of that leak, the content of that scheme would have been different. They add that the burden of proof concerning the source of the leak published by Reuters and referred to in paragraph 42 above lies with the SRB.

152 The SRB takes the view that those arguments cannot constitute a new plea and that they are raised in the introductory part of the reply. The SRB notes that the applicants have not raised any plea for annulment based on its alleged conduct. It argues that, if the Court finds that those claims constitute a plea in law, that plea is inadmissible under Article 84(1) of the Rules of Procedure, since the information on which those claims are based was known to the applicants before the action was brought.

153 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. In accordance with Article 84(2) of the Rules of Procedure, where appropriate, any new pleas in law are to be introduced in the second exchange of pleadings and identified as such.

154 It must be observed, first, that, as the SRB maintains, the applicants' claims are included not in a specific plea, but in the part of the reply relating to the background to the dispute, and that the applicants have therefore not identified those claims as constituting a new plea. In addition, since those claims do not present a sufficiently close connection with the pleas or heads of claim initially put forward in the application in order to be considered as forming part of the normal evolution of debate in proceedings before the Court, nor do they constitute an amplification of a plea raised in the application (see, to that effect, judgment of 8 July 2020, *VQ* v *ECB*, T-203/18, EU:T:2020:313, paragraph 56 and the case-law cited).

155 Second, even if those claims could be regarded as a new plea in law raised for the first time in the reply, it must be noted that the applicants do not claim that that plea is based on matters of law or of fact which came to light after the action was brought.

156 In that regard, it is sufficient to note that both the interview of the Chair of the SRB of 23 May 2017 and the Reuters article of 31 May 2017, on which the applicants rely, had already been referred to in the application. Consequently, if those claims were to be regarded as constituting a new plea in law raised in the reply, that plea would be inadmissible and it would therefore not be necessary to respond to it.

157 In the second place, by letter lodged at the Court Registry on 8 September 2020, the applicants produced new evidence, under Article 85(3) of the Rules of Procedure, relating to two internal SRB emails of 10 and 18 August 2017 concerning a potential leak of information giving rise to the

Reuters article of 31 May 2017. The applicants state that they were given access to those documents following the SRB's decision of 24 August 2020 to disclose the documents, adopted pursuant to the decision of the SRB's Appeal Panel of 15 April 2020, concerning a request for access to documents made by a third party.

158 The applicants argue that it may be inferred from those emails that no effective internal investigation was carried out by the SRB to determine the source of that alleged leak of information.

159 The SRB and Banco Santander submit that those new documents are inadmissible, in so far as they do not relate to any of the pleas raised in the reply. The Commission and the Kingdom of Spain argue that those documents are not relevant to the resolution of the dispute and the Council argues that the applicants have not established that relevance.

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

161 It should be noted that the applicants do not explain in support of which plea or line of argument those documents were produced, or what relevance they might have to the assessment of the validity of the resolution scheme.

162 In that regard, it must be observed that it is clear from paragraphs 151 to 156 above that the claims relating to the Reuters article appeared only in the part of the reply relating to the background to the dispute and that the applicants raised no plea in the application, or in the reply, concerning that article and the alleged information leaks. It was concluded that, even if those claims were to be regarded as a new plea in law raised in the reply, that plea would be inadmissible.

163 Accordingly, it must be held that, since the documents produced in that offer of evidence have no connection with the pleas in law duly raised in the application or in the reply, they are not relevant to the resolution of the dispute and must be rejected, without it being necessary to examine whether the delay in producing them was justified.

– *The scope of the Court's review*

164 It should be observed that the applicants argue that the Court must examine whether the economic and financial information on which the SRB relied is factually accurate, reliable and consistent and ensure that the resolution scheme rests on a sufficiently solid factual basis.

165 The SRB maintains that, in the case of complex technical issues, the Court must examine the findings of fact and law made by the authority, verify whether there has been a manifest error of assessment or a misuse of powers and ascertain whether the authority has manifestly exceeded the limits of its discretion. According to the SRB, it had to have considerable discretion in determining whether valuation 2 was appropriate for the purposes of adopting the resolution scheme, in so far as that scheme was based on a complex factual or technical assessment.

166 In that regard, 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.

167 First, with regard to situations in which the EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which they adopt, review by the EU Courts is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU 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).

168 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).

169 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 167 and 168 above apply to the review which the Court is called upon to carry out.

170 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).

171 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 applicant 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).

172 The Court considers it appropriate, on the one hand, to examine first the pleas of illegality raised in the second and third pleas in law and, on the other hand, to address together the first and fourth pleas in law, in so far as they are based on an infringement of the right to an effective remedy.

The second plea in law, alleging that Article 18, Article 24(2)(a) and Article 27 of Regulation No 806/2014 and Articles 32, 38 and 43 of Directive 2014/59 are unlawful in that they infringe the right to be heard enshrined in Article 41(2)(a) of the Charter

173 The applicants, pursuant to Article 277 TFEU, raise a plea of illegality in respect of Article 18, Article 24(2)(a) and Article 27 of Regulation No 806/2014 and Articles 32, 38 and 43 of Directive 2014/59, 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 hearing of the shareholders of the entity which is the subject of a resolution action before the adoption of such an action.

174 According to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see judgment of 17 December 2020, *BP* v *FRA*, C-601/19 P, not published, EU:C:2020:1048, paragraph 26 and the case-law cited).

– *The scope of the plea of illegality*

175 In the first place, the Parliament and the Council argue that the plea of illegality raised against Articles 32, 38 and 43 of Directive 2014/59 must be dismissed as inadmissible, since Directive 2014/59 does not constitute the legal basis for the resolution scheme and has no connection with it.

176 The applicants submit that, according to the case-law, a plea of illegality may be raised not only against regulations but also against directives and that it must extend to measures which, although not formally constituting the legal basis of the contested act, have a direct legal connection with it. Accordingly, it should also be possible to raise a plea of illegality against the provisions of Directive 2014/59.

177 Since the purpose of Article 277 TFEU is not to allow a party to contest the applicability of any act of general application in support of any action whatsoever, the act the legality of which is called in question must be applicable, directly or indirectly, to the issue with which the action is concerned (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 68 and the case-law cited).

178 Thus, in an action for annulment brought against individual decisions, the Court of Justice has accepted that the provisions of an act of general application that constitute the basis of those decisions or that have a direct legal connection with such decisions may legitimately form the subject matter of a plea of illegality. By contrast, the Court of Justice has held that a plea of illegality covering an act of general application in respect of which the individual decision being challenged does not constitute an implementing measure is inadmissible (see judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraphs 69 and 70 and the case-law cited).

179 It is settled case-law that a plea of illegality raised indirectly under Article 277 TFEU, when challenging in the main proceedings the legality of another act, is admissible only if there is a link between the contested act and the provision forming the subject matter of the objection. The

scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings (see judgments of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 170 and the case-law cited, and of 4 December 2018, *Janoha and Others* v *Commission*, T-517/16, not published, EU:T:2018:874, paragraph 40 and the case-law cited).

180 However, it must be observed that the procedure followed by the SRB in the resolution scheme is based solely on the provisions of Regulation No 806/2014 and that Articles 32, 38 and 43 of Directive 2014/59, which concern the resolution actions adopted by national authorities, have not been applied in the present case and are not referred to in that scheme.

181 The applicants argue that the directive is closely linked to the resolution scheme in so far as Regulation No 806/2014 was adopted following Directive 2014/59 and contains the same shortcomings.

182 Such an argument relies only on a similarity between the provisions of Regulation No 806/2014 and those of Directive 2014/59, but is not such as to establish the direct legal connection between the resolution scheme and Directive 2014/59 required by the case-law referred to in paragraphs 177 to 179 above.

183 Moreover, the legality of the articles of Directive 2014/59 referred to by the applicants may be challenged in an action against a resolution decision taken by a national authority by way of a reference for a preliminary ruling on validity.

184 Therefore it must be concluded, as did the Parliament and the Council, that any finding of illegality of Articles 32, 38 and 43 of Directive 2014/59, as alleged by the applicants, and of the inapplicability of those articles in the present case would have no effect on the validity of the resolution scheme and that, consequently, the plea of illegality in respect of those articles must be dismissed as inadmissible.

185 In the second place, with regard to Article 27 of Regulation No 806/2014, relating to the bail-in tool, it is sufficient to note that that tool was not applied by the SRB in the resolution scheme and that, accordingly, the plea of illegality relating to it must also be dismissed as inadmissible.

186 In the third place, Article 24(2)(a) of Regulation No 806/2014 provides that, concerning the sale of business tool, the resolution scheme is to establish the instruments, assets, rights and liabilities to be transferred by the national resolution authority in accordance with Article 38(1) and (7) to (11) of Directive 2014/59. That provision does not concern the conduct of the resolution procedure and the applicants do not explain how the application of that provision is likely to lead to an infringement of the shareholders' right to be heard before the adoption of a resolution action.

187 The plea of illegality of Article 24(2)(a) of Regulation No 806/2014 must therefore be dismissed as inadmissible.

188 Moreover, it must be noted that, in their observations on the Council's statement in intervention, the applicants argue that they challenge in their plea of illegality the fact that the resolution procedure provided for by Article 18 of Regulation No 806/2014 does not contain any safeguard which limits the conduct of the SRB when a resolution action is adopted. The applicants thus acknowledge that their plea of illegality relates only to the procedure laid down by that article.

189 It follows from the foregoing that it must be held that, by their plea of illegality raised in the context of the second plea, the applicants are challenging only the validity of Article 18 of Regulation No 806/2014, in so far as that article, by failing to provide 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.

– *The plea of illegality in respect of Article 18 of Regulation No 806/2014*

190 The applicants argue that the resolution procedure, governed by Article 18 of Regulation No 806/2014, infringes the rights of the defence in that it does not permit the involvement of the persons concerned by the resolution action. The resolution action is adopted without the persons concerned being heard and without them having the opportunity to obtain access to the valuation report on which the action is based and therefore to challenge it. The only possible remedy against the provisional valuation, provided for in Article 20 of Regulation No 806/2014, is to challenge the resolution action itself, which is already irrevocable in that it entails a transfer to a third party.

191 The SRB argues that the fact that Regulation No 806/2014 does not provide for a formal hearing of shareholders or creditors prior to the adoption of a resolution action is justified on public interest grounds. Resolution actions do not concern only one entity, but are concerned with the stability of financial markets. In addition, the resolution action is not addressed to the shareholders of the entity concerned and there is therefore no need for them to be heard.

192 The Parliament and the Council argue that the shareholders of an entity subject to a resolution procedure do not have a right to be heard under Article 41(2)(a) of the Charter in the context of that procedure. The Parliament and the Council take the view that, in any event, if the shareholders of an entity could rely on the right to be heard, that right could be subject to limitations.

193 Furthermore, the Parliament, the Council and the Commission 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 providing for a hearing of shareholders, in Article 18 of Regulation No 806/2014, does not render that regulation unlawful, since there is no provision prohibiting such a hearing.

194 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.

195 The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely. In addition, it 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, second, to ensure that the person concerned is in fact protected. The right to be heard is intended, inter alia, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his or her personal circumstances as will argue in favour of the adoption or

non-adoption of the decision, or in favour of its having a specific content (see judgment of 4 June 2020, *EEAS* v *De Loecker*, C-187/19 P, EU:C:2020:444, paragraphs 68 and 69 and the case-law cited).

196 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).

197 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).

198 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).

199 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.

200 In addition, it should be noted, as the Council and the Commission 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.

201 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.

202 However, it must be noted 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.

203 Thus, even if the procedure laid down in Article 18 of the regulation 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.

204 The case-law of the Court of Justice cited in paragraph 196 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 and creditors of an entity which is the subject of a resolution action may rely on the right to be heard in a resolution procedure.

205 However, the exercise of the right to be heard may be subject to limitations in accordance with Article 52(1) of the Charter, according to which:

'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.'

206 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.

207 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).

208 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.

209 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.

210 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'.

211 In that regard, the Court of Justice has stated that financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, the 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).

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

213 In addition, the European Court of Human Rights (ECtHR) held, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799, § 6), that, in sensitive economic areas such as the stability of the banking system, the States enjoyed a wider margin of discretion 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.

214 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).

215 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.

216 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.

217 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'.

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

219 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.

220 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).

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

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

223 In that regard, the Court of Justice has held that the objective of Regulation No 806/2014 is to establish, in accordance with recital 8, more efficient resolution mechanisms, which must be an essential instrument to avoid damage that has resulted from failures of banks in the past and that

that objective presupposes a speedy decision-making process, as the short time limits laid down in Article 18 of that regulation illustrate, so that financial stability is not jeopardised (judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 55).

224 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.

225 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 of that regulation provides that a decision must be adopted within a very short time frame.

226 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.

227 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).

228 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).

229 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).

230 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.

231 It should also be noted that, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799), the European Court of Human Rights found that the sale of the bankrupt bank as a going concern was 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.

232 In the judgment of 24 November 2005, *Capital Bank AD v. Bulgaria* (CE:ECHR:2005:1124JUD004942999, § 136), the European Court of Human Rights 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.

233 Furthermore, the fact that a 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.

234 In that regard, the General Court has already highlighted in paragraph 282 of the judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others* (T-680/13, EU:T:2018:486) that the applicable provisions must offer the person concerned a reasonable opportunity of putting his or her case to the competent authorities. In order to ensure compliance with that requirement, which constitutes a requirement inherent in Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR), 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*, EC: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*, EC:ECHR:2006:0919JUD001384402, §§ 20 and 21).

235 The General 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 General Court noted that it concerned prevention of an imminent risk of collapse of the banks concerned in order to protect the stability of the financial system of a Member State and, therefore, to prevent contagion to other Member States of the euro area. The establishment of a prior consultation procedure, in the context of which the thousands of depositors and shareholders of the banks concerned could have usefully made their views known prior to the adoption of the harmful provisions, would inevitably have delayed the

application of measures seeking to prevent such a collapse. The achievement of the objective consisting in protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 282 and the case-law cited).

236 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 European Court of Human Rights 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* 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).

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

238 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 adopted during the proceedings, must be presumed to have effects on the public and private interests concerned by the action.

239 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.

240 Moreover, in view of the urgency of adopting a resolution action, it is not possible to consult shareholders beforehand, in particular on account of the difficulties involved in identifying them. As the Kingdom of Spain and the Council submit, 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.

241 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.

242 Therefore, the absence of any provision requiring the shareholders and creditors of the entity concerned to be heard in the context of the procedure referred to 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 and respects the principle of proportionality, in accordance with Article 52(1) of the Charter.

243 That conclusion is not called into question by the applicants' other arguments.

244 First, the applicants submit that the lack of a prior hearing of the shareholders prevents the SRB from knowing, through the institution's organs or its shareholders, of the existence of private sector measures (such as a capital increase, the implementation of the business plan approved by the board of directors or a sale of assets) other than the resolution.

245 It should be noted that, pursuant to Article 18(1)(b) of Regulation No 806/2014, the SRB is to adopt a resolution scheme only if, having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures taken in respect of the entity, independently or in combination with a resolution action, would prevent its failure within a reasonable time frame.

246 Accordingly, the SRB must examine whether measures already contemplated by the bank to deal with its difficulties are likely to be implemented within a reasonable time frame that allows its failure to be averted. If alternative private sector measures were contemplated when the resolution procedure was initiated, in particular the measures referred to by the applicants, such as a capital increase, the implementation of the business plan approved by the board of directors or the sale of assets, the SRB should be informed of them by the entity concerned or its organs. It is not for the SRB to find alternative private sector solutions of which the bank itself was unaware.

247 Therefore, the applicants cannot claim that shareholders, in the context of an individual hearing held once the resolution procedure has been initiated, would be able to advise the SRB of the existence of other alternative measures which are practicable in the light of the situation of the entity concerned and capable of preventing the entity's failure within a reasonable time frame, and which had not been notified to the SRB by the bank itself or by its organs.

248 Second, the applicants argue that neither the objective of ensuring financial stability nor the need to adopt a resolution action quickly justifies totally removing the right of the entity's shareholders to be heard, in so far as Regulation No 806/2014 could provide for the shareholders to be heard after a resolution action has been adopted.

249 In that regard, it is sufficient to note, as did Banco Santander and the Parliament, that a hearing of the shareholders subsequent to the adoption of the resolution scheme would not be capable of altering the content of that scheme and could not therefore lead to its annulment.

250 Third, the applicants submit that there is an unjustified disparity between, on the one hand, the provisions at issue and, on the other hand, those of Article 22 of Regulation No 1024/2013 and those of Article 31 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (OJ 2014 L 141, p. 1), which recognises that credit institutions have a right to be heard before the adoption of a supervisory decision which may adversely affect the rights of an institution.

251 It must be observed, as the SRB submitted, that no equivalent provision has been incorporated into Regulation No 806/2014 in order, inter alia, to allow the adoption of resolution actions in emergency situations and to avoid negative consequences on the financial markets. As the Council points out, those provisions are not applicable during the resolution procedure referred to in Article 18 of Regulation No 806/2014. In addition, those provisions provide for the right to be heard to be granted to the addressee of a decision, that is to say the bank which is the subject of the ECB's supervisory measure.

252 Accordingly, it cannot be inferred from those provisions, which grant a right to be heard to the institution to which a decision is addressed, that the shareholders or creditors of an entity which is the subject of a resolution action should be granted the same right.

253 Furthermore, contrary to the applicants' claim, the second subparagraph of Article 22(1) of Regulation No 1024/2013 and Article 31(4) of the SSM Framework Regulation lay down particular provisions, if an urgent decision must be adopted, which exclude the possibility for the persons concerned to be heard before a decision is adopted.

254 Fourth, the applicants submit that the SRB's introduction of a procedure for hearing shareholders and creditors concerning valuation 3 does not remedy the impossibility of making comments in the context of the procedure provided for in Article 18 of Regulation No 806/2014.

255 By that argument, the applicants seek to respond to the observation of the SRB, the Council and the Commission that a procedure for hearing Banco Popular's shareholders was established in the context of valuation 3, provided for in Article 20(16) of Regulation No 806/2014, even though such a hearing is not provided for by the regulation. That observation was intended to illustrate that, in the absence of urgency or risk to the stability of the financial markets, the SRB ensures observance of the shareholders' right to be heard by organising a hearing, prior to the adoption of a decision on their right to possible compensation under Article 76(1)(e) of Regulation No 806/2014, even though that hearing is not expressly provided for by Regulation No 806/2014.

256 It follows from all of the foregoing that the plea of illegality in respect of Article 18 of Regulation No 806/2014, in so far as the procedure which it establishes infringes the right to be heard by failing to provide for a hearing of the shareholders and creditors of the entity concerned, must be rejected.

257 Accordingly, the second plea must be dismissed as partly inadmissible and partly unfounded.

The third plea in law, alleging that Articles 21, 22, 24 and 27 of Regulation No 806/2014 and Articles 38 and 63 of Directive 2014/59 are unlawful in that they infringe the right to property, enshrined in Article 17(1) of the Charter, and breach the principle of the freedom to conduct a business, enshrined in Article 16 of the Charter

258 The applicants raise a plea of illegality, on the basis of Article 277 TFEU, against Articles 21, 22, 24 and 27 of Regulation No 806/2014 and Articles 38 and 63 of Directive 2014/59. They argue that those articles infringe the right to property and breach the principle of the freedom to conduct a business, in so far as they authorise the sale of a financial institution's shares and confer on the resolution authorities the power to reduce its capital to zero by cancelling the shares, without a hearing of the shareholders or their consent. The granting of special expropriation powers to the

SRB by Regulation No 806/2014 and Directive 2014/59, without shareholders having a right to be heard or to make observations, constitutes a disproportionate interference with the rights enshrined in Articles 16 and 17 of the Charter.

259 As regards Articles 38 and 63 of Directive 2014/59 and Article 27 of Regulation No 806/2014, relating to the bail-in tool, it is sufficient to note that those articles have not been applied by the SRB in the resolution scheme. Therefore, in accordance with the case-law cited in paragraphs 177 to 179 above, in so far as there is no direct legal connection between those articles and the resolution scheme, the plea of illegality in respect of them must be rejected as inadmissible.

260 The other articles of Regulation No 806/2014 which the applicants challenge as unlawful are Article 21, relating to the write down and conversion of capital instruments, Article 22, concerning the general principles governing resolution tools, and Article 24, relating to the sale of business tool.

261 The applicants argue, in essence, that Articles 21, 22 and 24 of Regulation No 806/2014 infringe the right to property guaranteed by Article 17(1) of the Charter in so far as they confer on the SRB the power to reduce to zero the capital of an entity which is the subject of a resolution action, write down and convert the relevant capital instruments and sell that entity, without its shareholders being heard or having given their consent.

262 In that regard, it must be observed that Article 41 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.

263 It is sufficient to note, as did the SRB, that that right is distinct from the right to property guaranteed by Article 17(1) of the Charter.

264 Therefore, the fact that the provisions of Regulation No 806/2014 challenged by the applicants do not provide for a hearing of the shareholders cannot establish an infringement of their right to property.

265 It must be noted that, in the other parts of the application, the applicants do not refer to the provisions of Articles 21, 22 and 24 of Regulation No 806/2014 and do not raise any specific argument capable of establishing that the application of those provisions entails an infringement of the right to property guaranteed by Article 17(1) of the Charter.

266 In addition, with regard to the freedom to conduct a business guaranteed by Article 16 of the Charter, first, it must be observed, as the SRB, the Council and the Commission have submitted, that the applicants do not specify which right guaranteed by the freedom to conduct a business is infringed by the contested provisions of Regulation No 806/2014. The Court of Justice has stated that the protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition (judgments of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 42; of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 82; and of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 56). Second, suffice it to note that the applicants do not put forward any argument capable of establishing an infringement of that freedom.

267 As regards the applicants' assertion that the absence of any compensation constitutes an infringement of Article 1 of Protocol No 1 to the ECHR, it is sufficient to note that that assertion is based on a misreading of the provisions of Regulation No 806/2014. It must be observed that Regulation No 806/2014 expressly provides for the possibility that the shareholders and creditors of the entity which is the subject of a resolution action be paid compensation pursuant to Article 76(1)(e) thereof if they have incurred greater losses in the context of the resolution than they would have incurred in a winding up under normal insolvency proceedings.

268 Furthermore, the applicants submit that upholding the plea of illegality would establish that the limitation of their right to property, attributable to the resolution scheme, is without legal basis, since it fails to fulfil the requirements of necessity and proportionality laid down by Article 52(1) of the Charter. Since the shareholders of Banco Popular were deprived of their right to property without being heard or compensated, that right was infringed.

269 In that regard, it is sufficient to note that those arguments seek to challenge not the provisions of Regulation No 806/2014 or Directive 2014/59, but the resolution scheme. They will therefore be examined in the context of the eighth plea.

270 Finally, the applicants also add, in their observations on the statements in intervention, that Regulation No 806/2014 and Directive 2014/59 grant the SRB disproportionate powers which could result in the elimination of solvent financial institutions without any justification, which would be contrary to the rule set out in the judgment of 13 June 1958, *Meroni* v *High Authority* (10/56, EU:C:1958:8).

271 It is sufficient to note that, by that argument, the applicants put forward a new plea of illegality, alleging that Regulation No 806/2014 and Directive 2014/59 breach the principle relating to the delegation of powers.

272 That argument must therefore be regarded as forming a new plea which, having been put forward only at the stage of observations on the statements in intervention, is out of time. That new plea of illegality is not based on a matter of law or of fact which came to light in the course of the procedure and must be dismissed as inadmissible pursuant to Article 84(1) of the Rules of Procedure.

273 Accordingly, the third plea must be dismissed as partly inadmissible and partly unfounded.

The first and fourth pleas in law, alleging a failure to state reasons for the resolution scheme, an infringement of the right to good administration enshrined in Article 41(2)(b) and (c) of the Charter and an infringement of the right to an effective remedy enshrined in Article 47 of the Charter

274 By their first and fourth pleas in law, the applicants raise, in essence, three complaints. They argue that the SRB, by failing to give them access to the resolution scheme and to valuation 2, infringed, first, the obligation to state reasons enshrined in Article 41(2)(c) of the Charter, second, the right of access to the file enshrined in Article 41(2)(b) of the Charter and, third, the right to an effective remedy under Article 47 of the Charter.

The first complaint, relating to the infringement of the obligation to state reasons

275 The applicants argue that the SRB was in breach of its duty to state reasons under Article 41(2)(c) of the Charter. The applicants submit, in essence, that the fact that the resolution scheme and valuations 1 and 2 were not disclosed in full prevented them from ascertaining the reasons why the SRB adopted the resolution scheme.

276 Article 41(2)(c) of the Charter, relating to the right to good administration, provides that that right includes the duty of the administration to give reasons for its decisions.

277 According to settled case-law of the Court of Justice, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the 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).

278 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).

279 In the first place, the applicants submit that certain passages omitted from the non-confidential version of the resolution scheme to which they had access were essential for ascertaining the reasons for the resolution scheme and for exercising their rights of defence. The absence of those passages prevents the applicants from ascertaining the reasons why the SRB had recourse to the resolution scheme and constitutes a breach of its duty to state reasons.

280 First, the applicants list in the application a number of paragraphs in the resolution scheme which were not included in the version originally published by the SRB on its website on 11 July 2017 and which, in their view, constitute significant aspects of it.

281 In that regard, it is sufficient to note that the various paragraphs of the resolution scheme referred to by the applicants are set out in full in the less redacted versions of the resolution scheme published on the SRB's website on 2 February and 31 October 2018 and that the applicants were in a position to acquaint themselves with those versions before the reply was lodged.

282 Second, the applicants submit that the resolution scheme makes no reference to the reason why early intervention, restructuring or prudential supervision measures were not adopted. In that regard, they argue that the resolution scheme merely states that the institution was 'failing' without specifying the reasons and without explaining why early intervention measures were not

sufficient. In their reply, the applicants add that, on account of the omissions in the latest version of the resolution scheme made public by the SRB, they still do not know the reasons for the resolution of Banco Popular and for choosing the sale of business tool.

283 In that regard, it is apparent from the resolution scheme that the SRB explained that the conditions laid down in Article 18(1) of Regulation No 806/2014 were fulfilled, which constitutes a sufficient statement of the reasons for the adoption of the resolution scheme.

284 In particular, in Article 2 of the resolution scheme, the SRB stated that the ECB had assessed that Banco Popular was failing or was likely to fail on the basis of Article 18(1)(a) and (4)(c) of Regulation No 806/2014. It noted 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. In addition, the difficulties of Banco Popular described in the ECB's assessment and recalled in the resolution scheme suffice to explain that the fact that Banco Popular was failing or was likely to fail resulted from the deterioration of its liquidity situation.

285 It follows that the reasons for the resolution scheme are sufficient in law and that the applicants were in a position to understand the reasons for Banco Popular's failure and the justification for adopting the resolution scheme.

286 In addition, recital 26 of the resolution scheme lists the measures taken to attempt to resolve Banco Popular's difficulties before the resolution. Article 3 of the resolution scheme concerns alternative measures and states, in accordance with Article 18(1)(b) of Regulation No 806/2014, that there was no reasonable prospect that any alternative private sector measures, or supervisory action, or the write-down or conversion of relevant capital instruments, would prevent Banco Popular's failure within a reasonable time frame.

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

288 It follows that the SRB sufficiently explained in the resolution scheme the reasons why early intervention measures were not sufficient to resolve Banco Popular's difficulties.

289 Finally, it must be noted that recitals 44 to 46 of the resolution scheme explain why the 2016 resolution plan and, in particular, the bail-in tool provided for by Article 27 of Regulation No 806/2014 and contemplated in that plan were not adopted.

290 Article 5 of the resolution scheme concerns the choice of resolution tool, and the SRB explains inter alia in Article 5.3 of that scheme why the other tools listed in Article 22(2) of Regulation No 806/2014 did not allow the resolution objectives to be achieved to the same extent.

291 It must be held that sufficient reasons have been given for the resolution scheme and that those various provisions of the resolution scheme allowed the applicants to understand the reasons for the choice of the sale of business tool as a resolution tool.

292 Moreover, it must be observed that the applicants' arguments concerning the failure to state reasons are general points, do not make reference to the content of the resolution scheme and do not demonstrate in what respect the elements contained therein and referred to above are insufficient for the purpose of understanding its scope.

293 It must therefore be held that the applicants' arguments are not sufficient to establish the existence of a breach of the duty to state reasons concerning the resolution scheme.

294 In the second place, the applicants submit in the application that valuation 2 was not communicated to them, with the result that it was impossible for them to ascertain the assessment criteria used by the independent expert.

295 However, valuation 2 was published on the SRB's website on 2 February and 31 October 2018, in successively less redacted versions.

296 It must be observed that, in the reply, following those publications, the applicants do not raise any argument concerning the inadequacy of the statement of reasons for valuation 2.

297 In any event, it must be noted that, in valuation 2, Deloitte explained the methodology used and, in particular, stated that, in order to determine the economic value of Banco Popular, it had used the scenario of Banco Popular's sale under the sale of business tool, which required a valuation on commercial terms of the assets and liabilities to be sold. Deloitte explained that its economic valuation was intended to provide an estimate of the value which would be offered by a potential purchaser for the whole bank and that it had adopted an asset category approach. It also stated that it had relied on the requirements set out in Article 36 of Directive 2014/59 (corresponding to Article 20 of Regulation No 806/2014) and on the final draft of the Regulatory Technical Standards of the European Banking Authority (EBA) No 2017/05 of 23 May 2017 on valuation for the purposes of resolution. Deloitte next explained in valuation 2 the approach it used for the valuation of each category of assets.

298 It follows that the assessment criteria used in valuation 2 were sufficiently explained.

299 In the third place, the applicants submit that, once the resolution scheme had been adopted, there was no reason not to make public the resolution scheme and valuation 2 in their entirety. In the reply, they dispute that only the addressee of the resolution scheme, namely the FROB, is entitled to a reasoned decision. Since the applicants have standing to challenge the resolution scheme, they should be entitled to receive a reasoned decision.

300 In that regard, it must be noted that the applicants are not the addressees of the resolution scheme, which is addressed to the FROB. The applicants must be regarded as third parties and therefore do not have the right to be notified of the resolution scheme.

301 Under Article 29(5) of Regulation No 806/2014, the SRB is to publish on its official website either a copy of the resolution scheme or a notice summarising the effects of the resolution action, and in particular the effects on retail customers.

302 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 valuation 2.

303 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.'

304 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.

305 In that regard, it must be noted 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).

306 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).

307 First, the applicants do not deny that the resolution scheme and valuation 2 contain confidential information which the SRB is obliged to protect. Second, the applicants have not explained to what extent the data which remained redacted in the non-confidential versions of the resolution scheme and valuation 2 were necessary in order to understand the resolution scheme.

308 The applicants have therefore not established that the SRB was in breach of its duty to state reasons by redacting economic data from the non-confidential versions of the resolution scheme and valuation 2.

309 It must therefore be held that the applicants cannot claim that they are entitled to be provided with the full versions of the resolution scheme and valuation 2 or that those versions should be published.

310 In the fourth place, the applicants merely argue in the reply that the failure to publish valuation 1, which was subsequently provided in a redacted form in February 2018, and then in a less redacted form in October 2018, prevented them from acquainting themselves with an essential part of the resolution scheme.

311 It is sufficient to note that that claim is insufficient to establish a breach of the duty to state reasons, since the applicants do not explain the part of the SRB's reasoning in the resolution scheme which they were not in a position to understand because valuation 1 was not published in its entirety.

312 In the fifth place, the applicants submit that the SRB cannot claim that it complied with its duty to state reasons by publishing the resolution scheme and valuations 1 and 2 in less redacted versions on 2 February and 31 October 2018, since that obligation cannot be fulfilled retrospectively.

313 In that regard, it is sufficient to note that the successive publications on the SRB's website concern the resolution scheme and valuations 1 and 2 in their original versions. Those publications were aimed at giving the public wider access to those documents, by disclosing parts which were originally considered to be confidential. For the SRB, this was not a question of publishing information which was not originally included in the resolution scheme or in valuations 1 and 2 and which was intended to supplement their statements of reasons.

314 In the sixth place, in the reply the applicants rely on the decisions of the SRB's Appeal Panel of 28 November 2017 and 19 June 2018, adopted in response to their requests for access to documents pursuant to Article 90(1) of Regulation No 806/2014 and 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), following which the SRB published, in February and October 2018, less redacted versions of the resolution scheme and valuations 1 and 2 on its website. The applicants argue that the SRB's Appeal Panel stated that the refusal to grant access to the essential content of the resolution scheme and the valuations was an indication of non-observance of the right to a reasoned decision and to effective judicial protection.

315 In that regard, it must be noted that, in its decision of 28 November 2017, the SRB's Appeal Panel stated that the SRB's decision totally refusing to grant access to valuation 2 under Regulation No 1049/2001 was excessive and that the SRB's assertion that any disclosure of valuation 2, and therefore its disclosure in a redacted and non-confidential version, would undermine the objective of protecting an interest protected by Regulation No 1049/2001 did not satisfy the obligation to state reasons. The Appeal Panel also considered that the SRB's statements justifying the exception to disclosure of the resolution scheme were so vague and general that they did not fulfil the obligation to state reasons.

316 The findings of the SRB's Appeal Panel concerning the breach of the duty to state reasons were therefore not directed at the resolution scheme or valuation 2, but at the SRB's decision adopted under Regulation No 1049/2001, which refused to grant the applicants access to those documents.

317 Contrary to what the applicants maintain, it is not apparent from the extracts from the decisions of the Appeal Panel, cited in the reply, that the Appeal Panel considered that the version of the resolution scheme initially published by the SRB was in breach of the duty to state reasons. As the SRB points out, the Appeal Panel does not have jurisdiction to rule on the validity of the resolution scheme and could not adjudicate on a breach of the duty to state reasons for that scheme.

318 In that regard, it should be noted that it was following the decisions of the Appeal Panel of 28 November 2017 and 19 June 2018 that the SRB published on its website, on 2 February and 31 October 2018, less redacted versions of valuations 1 and 2 and the resolution scheme.

319 The decisions of the Appeal Panel relied on by the applicants are therefore not relevant for the purpose of establishing either an infringement of the SRB's obligation to state reasons in the resolution scheme or the inadequacy of the statement of reasons for valuation 2.

320 Accordingly, the first complaint, relating to the duty of the duty to state reasons, must be rejected.

– *The second complaint, relating to the infringement of the right of access to the file*

321 The applicants claim that the fact that valuation 2 was not disclosed constitutes an infringement of their right of access to the file, enshrined in Article 41(2)(b) of the Charter.

322 Article 41(2)(b) of the Charter, relating to the right to good administration, provides that that right includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

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

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

324 In the context of this complaint, the applicants rely, in essence, on paragraphs 81 to 83 of the judgment of 29 June 1995, *Solvay* v *Commission* (T-30/91, EU:T:1995:115), in which the Court held, in the context of an administrative procedure in the field of competition law, that it cannot be for the Commission alone to decide which documents are of use for the defence of the undertaking concerned. Where difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed. The Court added that it could not be acceptable for the Commission alone to have had available to it, when taking a decision on the infringement, the relevant documents, and for it therefore to be able to decide on its own whether or not to use them against the applicant, when the applicant had had no access to them and was therefore unable likewise to decide whether or not it would use

them in its defence. In such a situation, the rights of defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission.

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

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

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

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

329 It follows from the case-law cited in paragraphs 325 to 328 that both the right of access to the file enshrined in Article 41(2)(b) of the Charter and, more specifically, access to the file in competition cases, concern persons or undertakings subject to proceedings opened or decisions taken against them.

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

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

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

333 It follows that the applicants cannot claim that the fact that the SRB did not disclose valuation 2 during the administrative procedure which led to the adoption of the resolution scheme constitutes an infringement of the right of access to the file enshrined in Article 41(2)(b) of the Charter.

334 Finally, in so far as, by that complaint, the applicants rely on a right to be notified of valuation 2 after the adoption of the resolution scheme, it must be noted that such subsequent notification does not fall within the scope of the right of access to the file enshrined in Article 41(2)(b) of the Charter.

335 In any event, it should be noted that, as the applicants state, they submitted requests to the SRB for access to documents under Regulation No 1049/2001, which led the SRB to publish non-confidential versions of valuation 2 on its website on 2 February 2018 and again on 31 October 2018.

336 In addition, it follows from the analysis of the first complaint that, since the applicants are not addressees of the resolution scheme or of valuation 2, which is an annex thereto, and since they do not dispute that valuation 2 contains confidential data, they cannot claim that they are entitled to be provided with a full version of valuation 2 or are entitled to have it published.

337 Accordingly, the second complaint, relating to an infringement of the right of access to the file, must be dismissed.

– *The third complaint, relating to the infringement of the right to an effective remedy*

338 In their first and fourth pleas, the applicants claim that there has been an infringement of the right to an effective remedy, enshrined in Article 47 of the Charter, on account of, first, a failure to state reasons for the resolution scheme and, second, an infringement of their rights of defence and a breach of the principle of equality of arms, since the SRB refused to grant them access to the resolution scheme and valuation 2 in their entirety.

339 It is important to note 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).

340 It must be noted that it follows from the analysis of the first complaint that the applicants' argument relating to the breach of the duty to state reasons has been dismissed. It also follows from the analysis of the first and second complaints that the applicants were neither entitled to be provided with full versions of the resolution scheme or valuation 2 nor entitled to have them published.

341 Accordingly, the applicants' claims in the present complaint relating to the infringement of the rights of the defence, breach of the principle of equality of arms and infringement of the right to an effective remedy, in so far as they are based on the same arguments, must be dismissed.

342 Moreover, it should be noted 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 applicants were, by the present action, able to challenge that scheme before the Court.

343 Furthermore, subsequent to bringing the present action and following the decisions of the SRB's Appeal Panel referred to in paragraph 314 above, the SRB published on its website, on 2 February and 31 October 2018, that is to say before the lodging of the reply, less redacted versions of the resolution scheme and of valuation 2. The applicants were thus in a position to submit arguments on those versions.

344 In so far as it has been found that the applicants have not established that the versions of the resolution scheme and of valuation 2 published on the SRB's website and to which they had access were insufficiently reasoned, they cannot maintain that access to a full version was necessary for the exercise of their rights of defence or their right to an effective remedy.

345 Moreover, the Court has the power to request the SRB to produce any document which the Court considers relevant for the purpose of ruling on the dispute, by way of a measure of 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.

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

347 In addition, in the present case, 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.

348 Furthermore, the applicants' other arguments seeking to establish an infringement of their right to an effective remedy must also be dismissed.

349 On the one hand, the applicants are 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.

350 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, therefore, the applicants.

351 Accordingly, the case-law cited by the applicants is not applicable in the present case.

352 On the other hand, the applicants claim, in the reply, that the SRB's Appeal Panel considered that, by refusing to grant them access to the essential content of the resolution scheme and to valuations 1 and 2, the SRB had infringed their right to an effective remedy.

353 It must be noted that the applicants do not specify to which decision of the Appeal Panel, that of 28 November 2017 or that of 19 June 2018, they are referring, which does not permit the Court to identify precisely the elements that might be regarded as forming the basis of that argument.

354 In any event, suffice it to note that, pursuant to Article 85(3) and Article 90(3) of Regulation No 806/2014, the Appeal Panel has jurisdiction to decide on an appeal brought against a confirmatory decision of the SRB, adopted on the basis of Regulation No 1049/2001, relating to a request for access to documents. The Appeal Panel's role is to examine whether the SRB correctly justified a refusal to grant access to documents in the light of the exceptions provided for by that regulation and not in assessing the legality of decisions such as the resolution scheme and valuations 1 and 2.

355 Finally, the applicants rely on a breach of the principle of equality of arms.

356 In that regard, according to the case-law, the principle of equality of arms, which is an integral part of the principle of effective judicial protection of the rights that individuals derive from EU law, enshrined in Article 47 of the Charter, in that it is a corollary, like, in particular, the principle *audi alteram partem*, of the very concept of a fair trial, implies an obligation to offer each party a reasonable opportunity to present its case in conditions that do not place it in a clearly less advantageous position by comparison with its opponent (see judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 61 and the case-law cited).

357 The aim of that principle is to ensure a procedural balance between the parties to judicial proceedings, guaranteeing the equality of rights and obligations of those parties as regards, inter alia, the rules that govern the taking of evidence and the adversarial hearing before the court and also those parties' rights to bring an action. In order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings (see judgment of 16 October 2019, *Glencore Agriculture Hungary*, C-189/18, EU:C:2019:861, paragraph 62 and the case-law cited).

358 Since the SRB does not constitute a court within the meaning of Article 47 of the Charter, and that provision therefore does not apply in the present case, the applicants may not successfully assert the right to a fair trial against the resolution scheme (see, by analogy, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 213).

359 Accordingly, the third complaint, relating to an infringement of the right to an effective remedy must be dismissed.

360 It follows that the first and fourth pleas must be dismissed as unfounded.

The fifth plea in law, alleging infringement of Article 18(1) of Regulation No 806/2014 and Article 32 of Directive 2014/59

361 The applicants submit that the SRB infringed Article 18(1) of Regulation No 806/2014 and Article 32 of Directive 2014/59 and made a manifest error of assessment in so far as the conditions laid down in those provisions for the adoption of the resolution scheme were not met. They state that Banco Popular's problem was not one of solvency, but one of liquidity, with the result that the resolution scheme was not necessary.

362 As a preliminary point, it should be noted that, since the resolution scheme is not based on Article 32 of Directive 2014/59, the plea is ineffective in so far as it alleges an infringement of that provision.

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

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

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

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

364 This plea in law is divided, in essence, into three parts, corresponding to each of the conditions laid down in Article 18(1) of Regulation No 806/2014.

– The first part, relating to the first condition laid down in Article 18(1)(a) of Regulation No 806/2014

365 The applicants submit that, since Banco Popular was experiencing a liquidity problem and not a problem with solvency, it was not failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014.

366 It should be noted, first, that, on 6 June 2017, the ECB carried out an assessment as to whether Banco Popular was failing or likely to fail, 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.

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

368 Contrary to what the applicants claim, that conclusion of the Board of Directors of Banco Popular cannot be dismissed as irrelevant on the ground that the members of the Board of Directors of Banco Popular, faced with the threat of incurring personal liability and being penalised by the ECB, agreed formally to declare the alleged failure of the bank at the request of the SRB. In the absence of any concrete evidence, that argument must be rejected as purely speculative.

369 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.

370 That letter states:

‘Pursuant to Article 21.4 of Law 11/2015 and Articles 45 and 46 of Commission Delegated Regulation (EU) 2016/1075 [of 23 March 2016 supplementing Directive 2014/59/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.’

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

372 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’.

373 In the first place, 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’.

374 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.

375 In that regard, as the SRB notes, according to recital 57 of Regulation No 806/2014:

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

376 Therefore, contrary to what the applicants submit, Banco Popular's insolvency was not the only scenario in which it could be regarded as failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014.

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

378 It also follows that, contrary to what the applicants maintain, the statement in valuation 1 that Banco Popular was solvent with net assets of more than EUR 8.4 billion does not conflict with the finding that Banco Popular was failing or was likely to fail. As the latter finding is based on the ECB's assessment and not on valuation 1 or valuation 2, the applicants' argument that those valuations are contradictory as regards Banco Popular's solvency situation is also ineffective.

379 In the second place, it must be noted that the applicants admit that Banco Popular had liquidity problems on the date of the resolution scheme. Furthermore, they do not raise any argument to dispute that Banco Popular was, on the date of the resolution scheme, in the situation referred to in Article 18(4)(c) of Regulation No 806/2014, that is to say that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due.

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

381 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.

382 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.

383 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.'

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

385 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.

386 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.

387 According to the EBA Guidelines, an institution is to be deemed to be failing or is 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.

388 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.

389 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.

390 It follows that the SRB did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(a) of Regulation No 806/2014 had been satisfied.

391 Accordingly, the first part of this plea must be dismissed.

– The second part, relating to the second condition laid down in Article 18(1)(b) of Regulation No 806/2014

392 The applicants submit that it was not necessary, in the case of a liquidity problem, to have recourse to the resolution scheme, since there existed other more proportionate solutions. The adoption of early intervention measures would have made it possible to restore the confidence, stability and value of Banco Popular. Therefore, the condition laid down in Article 18(1)(b) of Regulation No 806/2014 was not met. It has not been demonstrated that it was impossible to use early intervention measures or private sector measures which would have avoided resolution.

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

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

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

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

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

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

395 In addition, in Article 3.3 of the resolution scheme, referred to in paragraph 287 above, the SRB took the view that there was no reasonable prospect that any supervisory action, including early intervention measures, could prevent the failure of Banco Popular.

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

397 It follows that the SRB explained in the resolution scheme why alternative supervisory action, including early intervention measures, or private sector measures were not conceivable. The applicants do not raise any argument capable of calling that conclusion into question.

398 First, the applicants argue that there was a supervisory solution to prevent the failure of Banco Popular for the purpose of Article 18(1)(b) of Regulation No 806/2014, resulting from the emergency liquidity assistance authorised by the Bank of Spain and the ECB on 5 June 2017, which would have made it possible to cover Banco Popular's liquidity needs.

399 It must be observed that, on 6 June 2017, in its assessment that Banco Popular was failing or likely to fail, the ECB considered that, although Banco Popular had developed various additional liquidity generating measures over the immediately preceding weeks 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 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.

400 In recital 26(c) of the resolution scheme, the SRB stated that Banco Popular had received an 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.

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

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

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

404 In addition, as the SRB maintains, it plays no role in the provision of emergency liquidity assistance, which falls within the remit of the national central banks.

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

406 It follows that, contrary to what the applicants submit, emergency liquidity assistance was not an alternative to resolution.

407 Second, the applicants submit that granting the entire emergency liquidity assistance initially authorised by the ECB would have allowed Banco Popular to meet its immediate liquidity requirements in order to implement alternative private sector measures, such as asset sales.

408 It is sufficient to note that, in so far as it was found that Banco Popular could not benefit from additional emergency liquidity assistance, the asset sales referred to by the applicants, in so far as they were conditional on the granting of that assistance, therefore did not constitute alternative measures to resolution.

409 In any event, it must be observed that the applicants appear to disregard the fact that, on 6 June 2017, the deterioration in Banco Popular's liquidity position was such that urgent measures had to be adopted. In addition, the applicants have not shown that the alternative measures on which they rely, consisting of asset sales, such as the sale of Totalbank or WiZink, could have taken place within a short enough time frame to allow Banco Popular to find sufficient liquidity to meet its liabilities on 7 June 2017.

410 As the SRB points out, such asset sales, which were only at a preparatory stage, could not have been concluded for several weeks. Therefore, even assuming, as the applicants maintain, that additional emergency liquidity assistance would have been granted to Banco Popular until 21 June 2017, such sales could not have been concluded within that time frame.

411 In that regard, it should also be noted that the ECB considered that 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.

412 In addition, in April 2017 the Chairman of Banco Popular, when he announced the launch of a procedure for the private sale of the bank in order to address the risks of insolvency, effectively acknowledged that asset sales no longer constituted measures sufficient to address Banco Popular's difficulties.

413 Lastly, even supposing that those asset sales could have taken place within a sufficiently short period to generate new liquidity, the applicants do not explain how such measures would have made it possible to stem the deposit outflows and, consequently, interrupt liquidity runs and restore Banco Popular's long-term viability.

414 Third, the applicants argue that alternative private sector measures would have made it possible to resolve Banco Popular's liquidity problems. In that regard, they rely on two letters in which Barclays Bank and Deutsche Bank purportedly stated, on 3 and 5 June 2017, that they were prepared to provide Banco Popular with a capital increase of EUR 4 billion. According to the applicants, it was possible to postpone the resolution scheme until the weekend following 7 June 2017, in so far as the SRB could have made a loan to Banco Popular through the SRF under Article 76(1)(b) of Regulation No 806/2014, in order to enable it to survive until the close of trading on Friday.

415 It is sufficient to note that the letters referred to by the applicants do not contain any firm commitment on the part of Barclays Bank or Deutsche Bank 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.

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

417 In its letter of 5 June 2017 to Banco Popular, Deutsche Bank mentions only its interest in providing 50% of a possible capital increase of EUR 4 billion. Deutsche Bank merely states that 'there are clearly certain conditions, but [that] the letter is based on our conviction that, in circumstances which we believe can realistically be satisfied, a [capital] increase could be achieved which would stabilise the bank'. 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.

418 Furthermore, the applicants' argument is based on the purely theoretical assumption that those capital increases could have occurred within a sufficiently short period to allow liquidity assistance a few days after 7 June. It must be observed that the applicants do not explain how that capital increase could have stemmed the runs on deposits and restored Banco Popular's long-term liquidity position.

419 As regards the argument relating to the possibility of the SRF making a loan to Banco Popular, 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 of, inter alia, making loans to the institution under resolution. It clearly follows that that possibility may be considered only in the context of a resolution action and is in no way an alternative measure to that action.

420 Fourth, the applicants submit that the replacement of the members of Banco Popular's management body by the ECB was effective in resolving the liquidity crisis by conveying an image of confidence to the markets and to the bank's customers and creditors.

421 Even if it were accepted that the replacement of Banco Popular's management could have restored the bank's image of confidence, this cannot be regarded as an alternative solution which could have immediately stopped the run on deposits or provided the liquidity necessary for the continuing deposit outflows, and thus could have met Banco Popular's liquidity needs within a short time frame.

422 It must also be noted that, in its assessment that Banco Popular was failing or likely to fail, the ECB considered that the measures available to it in its capacity as supervisory authority, including those provided for in Articles 27 to 29 of Directive 2014/59, allowing it, inter alia, to require the removal of the bank's senior management and management body, 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.

423 It follows that the applicants have not established that the alternative measures on which they rely could have enabled Banco Popular's liquidity position to be restored within a sufficiently short time frame, and it follows the applicants have therefore failed to demonstrate that the SRB made

a manifest error of assessment in finding that there were no alternative measures to resolution that would have been capable of preventing Banco Popular from failing or being likely to fail on 6 June 2017.

424 Moreover, as regards the applicants' argument that the ECB and the SRB had decided to sell Banco Popular to Banco Santander as early as May 2017, it is sufficient to note that that argument is ineffective with respect to the assessment of the condition laid down in Article 18(1)(b) of Regulation No 806/2014 and that, in addition, that argument is purely speculative.

425 It follows that the SRB did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(b) of Regulation No 806/2014 had been satisfied.

426 Accordingly, the second part of this plea must be dismissed.

– The third part, relating to the third condition laid down in Article 18(1)(c) of Regulation No 806/2014

427 The applicants submit that the public interest did not require the adoption of the resolution scheme, in so far as there were more proportionate measures which would have made it possible to remedy Banco Popular's liquidity crisis while avoiding confiscation of the shareholders' right to property, and therefore that the resolution scheme does not fulfil the condition laid down in Article 18(1)(c) of Regulation No 806/2014.

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

429 The resolution objectives, listed in Article 14(2) of Regulation No 806/2014, 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 investors; to protect client funds and client assets.

430 Compliance with the condition laid down in Article 18(1)(c) of Regulation No 806/2014 requires an assessment of whether the objectives referred to in Article 14 of that regulation will be better achieved by a resolution action than by the winding up of the entity.

431 In the present case, the SRB concluded in Article 4.1 of the resolution scheme that resolution in the form of the sale of business tool was necessary in the public interest within the meaning of Article 18(1)(c) and (5) of Regulation No 806/2014.

432 In Article 4.2 of the resolution scheme, the SRB noted that the resolution was necessary and proportionate to the objectives laid down in the first subparagraph of Article 14(2) of Regulation No 806/2014, namely to ensure the continuity of critical functions and to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline. It stated that winding up Banco Popular

under normal insolvency proceedings would not achieve those objectives to the same extent. The SRB then carried out, in Article 4.4 of the resolution scheme, an analysis of the resolution objectives in the light of the circumstances prevailing on that date.

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

434 It is apparent that the SRB gave reasons concerning the extent to which the resolution of Banco Popular met, inter alia, the objective of general interest of avoiding adverse effects on financial stability, in particular, in limiting the contagion effect.

435 Furthermore, it must be observed that, in recital 4 of Decision 2017/1246, which endorsed the resolution scheme, the Commission expressly stated that it agreed with the resolution scheme and in particular with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation No 806/2014.

436 The applicants' arguments are not such as to call into question the SRB's assessment as regards fulfilment of the condition laid down in Article 18(1)(c) of Regulation No 806/2014.

437 The applicants argue, in essence, that the sale of business tool was disproportionate in the light of the alternative measures to the sale of Banco Popular, referred to in their line of argument relating to the second condition laid down in Article 18(1)(b) of Regulation No 806/2014, measures which would have made it possible to resolve the liquidity crisis without infringing their right to property. By that argument, the applicants are in fact challenging the proportionality of the resolution action vis-à-vis the alternative measures relied on having regard to the infringement of their right to property.

438 In a further argument, raised in the reply, they add that the SRB does not explain on what grounds the sale of business tool was the best solution to achieve the resolution objectives as compared with the other resolution tools referred to in Regulation No 806/2014.

439 First, the applicants do not claim that the resolution scheme fails to meet the public interest objectives laid down in the first subparagraph of Article 14(2) of Regulation No 806/2014, seeking to protect Banco Popular's critical functions and preserving financial stability.

440 Second, the applicants do not put forward any argument capable of establishing that those objectives would have been achieved to the same extent if Banco Popular had been wound up under normal insolvency proceedings. The proportionality of the resolution action in the light of the alternative measures or other resolution tools referred to in Regulation No 806/2014 is not relevant as regards the application of the condition laid down in Article 18(1)(c) of Regulation No 806/2014.

441 It follows that the SRB did not make a manifest error of assessment in finding that the condition laid down in Article 18(1)(c) of Regulation No 806/2014 had been satisfied.

442 Accordingly, it is necessary to reject the third part and, consequently, the fifth plea in its entirety.

The sixth plea in law, alleging breach of the principle of prudential banking

443 The applicants argue that, by failing to implement early intervention measures, the ECB, in coordination with the SRB, acted in breach of the principle of prudential banking, in that the implementation of such measures would have made it possible to avoid the adoption of the resolution scheme. The applicants maintain, in essence, that the adoption of early intervention measures would have made it possible to avoid the liquidity crisis of Banco Popular that justified the adoption of the resolution scheme and the sale of Banco Popular to a third party. The applicants take the view that the implementation of such measures would have altered the content of the resolution scheme or could have prevented its adoption.

444 As a preliminary point, it must be observed, first, that this plea, in so far as it is directed against the ECB, on the ground that the latter did not adopt early intervention measures, must be dismissed as inadmissible, since the ECB is not a party to the present dispute.

445 Second, by this plea, the applicants allege breach of the principle of prudential banking. In the application and at the hearing, they argued that that principle derives from the precautionary principle applicable in environmental matters.

446 However, it must be observed that, while Article 191(2) TFEU provides that the policy on the environment is to be based on, inter alia, the precautionary principle, that principle is also applicable in the context of other EU policies, in particular the policy on the protection of public health and where the EU institutions adopt, under the common agricultural policy or the policy on the internal market, measures for the protection of human health (see judgment of 1 October 2019, *Blaise and Others*, C-616/17, EU:C:2019:800, paragraph 41 and the case-law cited).

447 That principle entails that, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent (see judgment of 1 October 2019, *Blaise and Others*, C-616/17, EU:C:2019:800, paragraph 43 and the case-law cited, and judgment of 6 May 2021, *Bayer CropScience and Bayer* v *Commission*, C-499/18 P, EU:C:2021:367, paragraph 80).

448 However, it is sufficient to note that the applicants do not explain how the precautionary principle, as defined by the case-law, applies in the banking sector.

449 It is therefore necessary to examine this plea in so far as the applicants criticise the SRB for failing to adopt early intervention measures which might have prevented Banco Popular's liquidity crisis. In that regard, the applicants submit that the adoption of early intervention measures or other measures referred to in Article 13 of Regulation No 806/2014, Regulation No 1024/2013 and Articles 27 to 29 of Directive 2014/59 would have prevented the crisis caused by the resolution. They argue that, in the months preceding Banco Popular's resolution, the SRB adopted no effective measures and allowed the situation to deteriorate, resulting in the resolution of a solvent bank on account of a liquidity problem.

450 The applicants list certain early intervention measures which would have been appropriate in the case of Banco Popular and which, in their view, would have made it possible to remedy the deterioration in the bank's situation. They mention separation of the bank into a good bank and a bad bank, provisional administration and the replacement of the board of directors, the monitoring of the liquidity position and a rapid restriction of leverage, liquidity assistance in order to gain time to allow a competitive sale process and, finally, the negotiation of financial recovery with creditors.

451 First of all, it must be observed that Article 18(3) of Regulation No 806/2014 provides that the previous adoption of an early intervention measure pursuant to Article 16 of Regulation No 1024/2013, to Article 27(1) or Articles 28 or 29 of Directive 2014/59 or to Article 104 of Directive 2013/36 is not a condition for taking a resolution action.

452 Next, it must be noted that Article 13 of Regulation No 806/2014, relating to early intervention measures, provides, in paragraph 1 thereof, that the ECB or national competent authorities are to inform the SRB of any measure that they require an institution or group to take or that they take themselves pursuant to Article 16 of Regulation No 1024/2013, to Article 27(1) or Article 28 or 29 of Directive 2014/59, or to Article 104 of Directive 2013/36.

453 It is clear, as pointed out by the SRB, supported by Banco Santander and the Kingdom of Spain, that the adoption of early intervention measures falls not within the SRB's competence but within that of the ECB and the competent national authorities.

454 In that regard, it must be noted that the applicants do not explain on what legal basis the SRB could have adopted such measures.

455 Therefore, since the SRB did not have the power to adopt the measures listed by the applicants, the latter cannot criticise the SRB for not having adopted those measures before the adoption of the resolution scheme.

456 Finally, as argued by the SRB, supported by the Commission, the applicants' arguments are not capable of calling into question the legality of the resolution scheme. The adoption of the resolution scheme must be regarded as justified where the conditions laid down in Regulation No 806/2014 are met, in particular the conditions laid down in Article 18 thereof. The fact that preventive measures could have been adopted in order to remedy Banco Popular's difficulties is ineffective for the purposes of the assessment as to the legality of the resolution scheme, since it has been established that the conditions laid down in Article 18 of Regulation No 806/2014 were met when that scheme was adopted.

457 Furthermore, it must be noted that this plea is based on purely speculative and unsubstantiated claims that, if early intervention measures or other preventive measures had been adopted, Banco Popular's liquidity crisis would have been avoided and the resolution scheme would not have been necessary or its content would have been different.

458 By letter lodged at the Court Registry on 28 May 2021, first, the applicants produced, pursuant to Article 85(3) of the Rules of Procedure, new evidence relating to two press articles published on the internet on 27 May 2021, which referred to emails from the President of the FROB to the SRB concerning statements made by the Chair of the SRB during her interview with the television channel Bloomberg and, second, asked the Court to order the SRB to produce those emails by way of a measure of organisation of procedure. The applicants argue that those documents, which are intended to establish the existence of leaks and the influence which they had on Banco Popular's loss of liquidity, support their sixth plea. In that regard, the applicants refer to paragraph 83 of the application, in which they asserted that the statements made by the Chair of the SRB caused panic among Banco Popular's customers and led to the fall in its stock market value and that that 'conduct [was] incompatible with the most elementary idea of prudence'.

459 However, it cannot be inferred from that single sentence in paragraph 83 of the application that the applicants have raised, in the present plea, arguments seeking to criticise the SRB for the statements made by its Chair. First, it is clear from the heading of this plea in the application and from the arguments raised that the applicants criticise the SRB only for not having adopted other measures, including early intervention measures, which would have made it possible to avoid the adoption of the resolution scheme. Second, the applicants do not put forward any line of argument concerning the statements made by the Chair of the SRB and, in that sentence, do not explain which provision or principle was infringed by the SRB. Furthermore, it must be noted that the applicants did not put forward any line of argument on that point in the sixth plea in law at the reply stage.

460 Therefore, in so far as they relate to the statements made by the Chair of the SRB, the press articles provided by the applicants and the emails from the President of the FROB which the applicants requested be produced in their letter of 28 May 2021 must be regarded as irrelevant.

461 Accordingly, the sixth plea must be dismissed as partly inadmissible and partly unfounded.

The seventh plea in law, alleging breach of the principle of the protection of legitimate expectations

462 The applicants argue that various circumstances prior to the adoption of the resolution scheme were such as to establish their legitimate expectation that Banco Popular would not enter resolution.

463 As regards the principle of protection of legitimate expectations, in accordance with settled case-law, the right to rely on that principle presupposes that precise, unconditional and consistent assurances, originating from authorised, reliable sources, have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an institution, body or agency of the European Union, by giving that person precise assurances, has led him or her to entertain well-founded expectations (see judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 62 and the case-law cited;

see also, to that effect, judgment of 16 December 2020, *Council* 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 178 and the case-law cited).

464 As the Court of Justice has previously held, while the principle of protection of legitimate expectations is one of the fundamental principles of the European Union, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretion will be maintained, particularly in a field such as State aid in the banking sector, whose subject matter involves constant adjustment to reflect changes in the economic situation (see judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 66 and the case-law cited).

465 That case-law is applicable to the situation of a bank which is the subject of a resolution action (see, by analogy, judgment of 16 December 2020, *Council* 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, paragraphs 181 and 182). In the banking sector, as the Court of Justice points out, as a result of constant adjustment to reflect changes in the economic situation, the shareholders and creditors of an entity cannot claim to have any legitimate expectation that that entity will not in the future find itself in a situation which justifies the application of resolution action. Nor can such persons claim that the SRB is in a position to provide them with any assurance that a bank, which has met the conditions laid down in Article 18 of Regulation No 806/2014, will not be the subject of a resolution action.

466 The applicants, as shareholders or creditors of Banco Popular, cannot therefore claim that the SRB acted in breach of the principle of the protection of legitimate expectations by adopting the resolution scheme.

467 In any event, it must be held that none of the circumstances relied on by the applicants provides grounds for applying the principle of the protection of legitimate expectations.

468 First, the applicants argue that there is a legitimate expectation based on recital 13 of Regulation No 806/2014, which provides that 'in order to restore trust and credibility in the banking sector, the European Central Bank (ECB) is currently conducting a comprehensive balance sheet assessment of all banks supervised directly' and that 'such an assessment should assure all stakeholders that banks entering the SSM, and therefore falling within the scope of the SRM, are fundamentally sound and trustworthy'. The ECB should exercise its powers, in cooperation with the SRB, with the aim of ensuring the solvency and soundness of the credit institutions under its supervision.

469 It is sufficient to note that that recital of Regulation No 806/2014 relates to the assessment made by the ECB in the context of establishing the SSM. To take the view, as the applicants do, that any bank supervised by the ECB is guaranteed to be permanently 'sound and trustworthy' and will not be the subject of a resolution action would be to deprive Regulation No 806/2014 of all practical effect.

470 Second, the applicants rely on the results of the 2014 and 2016 stress tests on Banco Popular and the results of the Supervisory Review and Evaluation Process (SREP) of November 2016, carried out by the ECB, to argue that there was a reasonable expectation that the institution was stable and solvent and that there was no risk that it would enter resolution.

471 In that regard, it is sufficient to note that the elements relied on by the applicants concern Banco Popular's situation at a given date, several months before the date on which the resolution scheme was adopted. For example, the 2016 stress test on Banco Popular was published in July 2016 and the results of the SREP of November 2016 carried out by the ECB have a reference date of 31 December 2015. Those elements cannot be regarded as indicative of the future financial development of Banco Popular. They cannot be regarded as giving the applicants a legitimate expectation that Banco Popular would not, in the future, be failing or likely to fail. Furthermore, it must be noted that, in the present case, Banco Popular's liquidity situation deteriorated subsequent to those results, after February 2017. In particular, it must be observed that, on 12 May 2017, Banco Popular no longer complied with the minimum liquidity coverage requirement. In any event, those elements cannot constitute precise, unconditional and consistent assurances from an EU institution that Banco Popular would not in the future be the subject of a resolution action.

472 Third, the applicants rely on the fact that, in 2017, the ECB authorised the partial redemption of an issue of Banco Popular's subordinated debt in the amount of EUR 400 000. They take the view that any rational investor would have been led to believe that, if Banco Popular had solvency or liquidity problems, the ECB would have opposed that measure.

473 However, on the one hand, those facts do not constitute precise assurances, within the meaning of the case-law cited in paragraph 463 above, given by the SRB as to the financial soundness of Banco Popular. On the other hand, the applicants do not explain why those facts were such as to give any well-informed investor a legitimate expectation as to the solvency or liquidity situation of Banco Popular, even though those investors must have been aware that the bank's situation had deteriorated rapidly a few months before the adoption of the resolution scheme. Thus, the publication on 3 February 2017 of Banco Popular's 2016 annual report, the publication on 5 May 2017 of its financial report for the first quarter of 2017 and the downgrading of its credit rating were elements known to investors which revealed Banco Popular's difficulties. In addition, between February and May 2017, Banco Popular was the subject of considerable media coverage concerning the deterioration of its financial situation.

474 Fourth, the applicants submit that the non-implementation by the SRB and the ECB of early intervention measures led them reasonably to believe that Banco Popular would not promptly be subject to a resolution action.

475 It is sufficient to recall that it follows from Article 18(3) of Regulation No 806/2014 that the prior adoption of early intervention measures is not a condition for taking a resolution action, which the applicants expressly acknowledge in the reply. The applicants therefore could not draw any conclusions from the absence of such measures.

476 Accordingly, it must be held that the applicants cannot legitimately maintain that they had had assurances from the SRB that it would not adopt a resolution scheme in respect of Banco Popular. It must also be noted that the shareholders of Banco Popular had no assurance that certain of the resolution actions adopted by the SRB would not be liable to affect their investments.

477 Accordingly, the seventh plea must be dismissed as unfounded.

The eighth plea in law, alleging infringement of the right to property and breach of the principle of proportionality, enshrined in Articles 17 and 52 of the Charter

478 The applicants argue that the resolution scheme disproportionately deprives Banco Popular's shareholders of their right to property in breach of Articles 17 and 52 of the Charter.

479 The applicants claim that the interference with their right to property was disproportionate to the objective of protecting financial stability pursued by the SRB. They argue that, under the pretext of protecting the public interest and the stability of the financial markets, the SRB deprived Banco Popular's shareholders of their right to property absolutely, which proves that the requirement of proportionality was not satisfied. They argue, in essence, that there were measures less onerous than the measure adopted in the resolution scheme and that that scheme deprived them of their right to property without the applicants first being heard and without any compensation being paid to them.

480 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.

481 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.'

482 It should be noted 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).

483 It follows that the right to property is not an absolute right, but that, in accordance with Article 52(1) of the Charter, cited in paragraph 205 above, 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.

484 The applicants acknowledge that their right to property may be limited and do not dispute that Article 22 of Regulation No 806/2014 allows the SRB to decide to convert or write down the capital instruments of the entity concerned in the context of the resolution.

485 As a preliminary point, it should be noted that it follows, first, from recital 61 of Regulation No 806/2014 that limitations on the rights of shareholders and creditors should comply with Article 52(1) of the Charter and, second, from recital 62 of that regulation that interference with property rights should not be disproportionate.

486 According to Article 15(1)(a) of Regulation No 806/2014, concerning the general principles governing resolution, the shareholders of the institution under resolution bear first losses.

487 In that regard, 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).

488 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).

489 It must be held, by analogy, that the exercise of the power to write down and convert Banco Popular's capital instruments held by the applicants, in the resolution scheme, is 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.

490 In that regard, 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).

491 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 which impaired 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).

492 In the present case, in the first place, the applicants maintain that the interference with their right to property was disproportionate, since the stability of the financial markets was not threatened given the solvency of Banco Popular, the economic situation in Spain and the growth prospects of the Spanish economy. They argue that the liquidity crisis affecting Banco Popular did not lead to a fall in share prices or a run on deposits at other Spanish financial institutions, that it was therefore a problem affecting one financial institution and that there was no contagion effect.

493 By that argument, the applicants seek to challenge the fact that Banco Popular's failure would have led to contagion and risked causing significant adverse effects on financial stability in Spain.

494 It must be observed that, in the resolution scheme, the SRB considered that the resolution of Banco Popular and, therefore, the write-down and conversion of capital instruments were necessary and proportionate to avoid the adverse effects which the failure of the institution would have on financial stability and, in particular, to avoid contagion to other Spanish banks.

495 First, it should be noted that Banco Popular was failing or was likely to fail on the date on which the resolution scheme was adopted, pursuant to Article 18(1)(a) and (4)(c) of Regulation No 806/2014. Accordingly, the applicants' assertion that the bank was solvent is irrelevant.

496 Second, the applicants do not explain how the economic situation in Spain made it possible to avoid the contagion effect which the failure of Banco Popular would have caused. In that regard, it must be observed that the applicants do not put forward any argument capable of calling into question the explanations provided by the SRB in Article 4.4.2 of the resolution scheme, referred to in paragraph 433 above, according to which, owing to its systemic importance and the nature of its activity, the failure of Banco Popular would have resulted in contagion to Spanish financial institutions with a similar business model and, accordingly, significant adverse effects on financial stability in Spain.

497 In that regard, it should be noted that it follows from the case-law cited in paragraph 211 above that financial services play a central role in the EU economy and that the failure of one or more systemic banks is likely to spread rapidly to other banks either in the Member State concerned or in other Member States.

498 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).

499 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).

500 The applicants submit that the solution adopted in the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), is not applicable, since that case concerned the entire financial system of a Member State threatened by a systemic crisis, whereas the present case concerns only a single entity.

501 In that regard, it is sufficient to note that, in paragraph 50 of the judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), the Court of Justice held that 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. Application of the principle set out in that judgment, according to which the objective of ensuring financial stability may justify a restriction on the right to property of shareholders, therefore cannot be regarded as being limited to situations in which the entire financial system of a Member State is undergoing a systemic crisis. That judgment is relevant where, as in the present case, the bank concerned is of systemic importance and its winding up represented a risk to the stability of the financial system in Spain.

502 In the second place, the applicants submit that the resolution scheme does not comply with the requirements of proportionality, in so far as the SRB did not opt for the least onerous measure to resolve the liquidity crisis faced by Banco Popular. They argue that the resolution scheme does not justify the failure to adopt in good time early intervention measures which could have resolved Banco Popular's liquidity problem, such as emergency liquidity assistance, or the failure to adopt less radical measures than that adopted, such as the asset separation tool or the bridge institution tool.

503 It must be observed that it is clear from the analysis carried out in the context of the second part of the fifth plea, concerning compliance with the condition laid down in Article 18(1)(b) of Regulation No 806/2014, that the SRB justified, in the resolution scheme, the reasons why alternative supervisory or private sector measures were not conceivable and that the applicants have failed to demonstrate the existence of other, less onerous measures which could have enabled Banco Popular's liquidity position to be restored within a sufficiently short period to prevent it from failing or being likely to fail on 6 June 2017.

504 Furthermore, it is clear from Article 5 of the resolution scheme that the SRB justified the choice of the sale of business tool as a resolution tool. The SRB stated that that tool was necessary and proportionate to the objectives provided for in Article 14(2) of Regulation No 806/2014 and had as its primary objective the protection of functions critical to the functioning of the real economy and the preservation of financial stability.

505 The SRB also considered, in Article 5.3 of the resolution scheme, that the other resolution tools provided for in Article 22 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 considered that, even used in combination with the asset separation tool, it could not be guaranteed immediately to make it possible adequately to remedy Banco Popular's liquidity situation and thus to restore its financial soundness and long-term viability. As regards the bridge institution tool, even used in combination with the asset separation tool, the SRB considered that, given that the aim of the bridge institution tool was to maintain access to critical functions and, in principle, to sell Banco

Popular within a period of two years and, in so far as the sale of business tool made it possible to achieve the same result within a short time frame, the latter allowed the resolution objectives to be achieved more effectively than the bridge institution tool.

506 Accordingly, the SRB stated in the resolution scheme the reasons for the choice of the sale of business tool as well as the reasons why the other resolution tools provided for in Regulation No 806/2014 were not appropriate.

507 The applicants have not put forward any arguments to challenge that assessment by the SRB. They merely refer to the existence of other resolution tools the application of which would have interfered less with their right to property without explaining how those tools could have been applied in the case of Banco Popular.

508 In addition, the applicants refer to the alternative solutions presented in their expert's report, annexed to the application, which show that the resolution scheme does not meet the requirements of necessity and proportionality.

509 Under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure of the General Court, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law, it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (see judgments of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the case-law cited, and of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 92 (not published) and the case-law cited). Furthermore, it is not for the 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; 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).

510 It must be noted that, as regards the existence of alternative solutions to resolution, the applicants confine themselves to a general reference to the expert report annexed to the application, which does not permit the Court to identify precisely the elements which might be regarded as forming the basis of that argument.

511 Accordingly, it must be held that that argument is merely asserted without being supported by any line of argument, contrary to the rule laid down in Article 76(d) of the Rules of Procedure, and that it must be declared inadmissible.

512 In the third place, the applicants submit that the resolution scheme disproportionately infringes their right to property in so far as they were not entitled to compensation. They take the view that the write-down of Banco Popular's entire share capital without any recompense for the shareholders constitutes expropriation. The resolution scheme constitutes a disproportionate confiscatory measure.

513 It is necessary to conclude, as did the Commission, that that argument is premature.

514 In that regard, it must be noted that Article 15(1)(g) of Regulation No 806/2014 establishes the principle that no creditor will incur greater losses than would have been incurred if the entity under resolution had been wound up under normal insolvency proceedings.

515 In order to determine whether the shareholders and creditors would have benefited from better treatment if the entity concerned had been subject to normal insolvency proceedings, Article 20(16) of Regulation No 806/2014 provides that a valuation is to be carried out after resolution. According to Article 20(17) of Regulation No 806/2014, that valuation establishes whether there is a difference between the treatment that shareholders and creditors would have received if the institution had entered normal insolvency proceedings at the time when the decision on resolution action was taken and the actual treatment which they received under the resolution.

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

517 It follows that Regulation No 806/2014 establishes a mechanism to ensure fair compensation for the shareholders or creditors of the entity under resolution, in accordance with the requirements of Article 17(1) of the Charter.

518 In so far as any payment of such compensation is the outcome of the valuation referred to in paragraph 515 above, carried out after the adoption of the resolution scheme, the fact that the applicants did not obtain compensation on the date of the resolution scheme is irrelevant.

519 In the reply, the applicants argue that it is not possible to maintain that observance of the right to fair compensation, which may justify depriving the shareholders of their property rights, must be understood as being ensured if the no creditor worse off principle set out in Article 15(1)(g) of Regulation No 806/2014 has been satisfied. The difference in outcome between hypothetical insolvency proceedings in Spain and the resolution scheme is not relevant. The shareholders should be compensated having regard to the value of their shares when they were deprived of their right to property. Banco Popular had a liquidity problem but, according to valuation 1, was solvent at the date of resolution, with the result that the no creditor worse off principle is not relevant.

520 In that regard, it must be observed, as Banco Santander has done, that the application of the no creditor worse off principle does not derive from the resolution scheme, but from a future decision of the SRB following valuation 3.

521 Consequently, the applicants' argument challenging the application of that principle in determining the parameters for calculating compensation must be regarded as ineffective.

522 In any event, contrary to what the applicants submit, the value of their investment must not be calculated having regard to the nominal value of their shares before the adoption of the resolution scheme, but rather corresponds to the value of that investment in a situation in which the resolution scheme was not adopted. It must be noted that, if the resolution scheme had not been adopted, Banco Popular, because it was failing or was likely to fail, would have been wound up under normal insolvency proceedings.

523 In that regard, 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).

524 Furthermore, as regards securities, the amount of the compensation payable is calculated in relation to the true market value of those securities at the time of the adoption of the contested regulation, and not in relation to its nominal value or the amount the owner thereof hoped to receive at the time of its acquisition (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 314 and the case-law cited).

525 As already stated, Banco Popular's balance sheet solvency noted in valuation 1 was not relevant at the date of resolution. On that date, Banco Popular's value corresponded to its disposal value following the finding that it was failing or was likely to fail.

526 It follows that the applicants cannot argue that, on the date on which the resolution scheme was adopted, the write-down and conversion of Banco Popular's capital instruments constituted an 'expropriation' without compensation, in so far as any compensation could be decided upon subsequently.

527 In the fourth place, the applicants argue that the resolution scheme is disproportionate in so far as it deprived the shareholders of their right to property without the shareholders first being heard.

528 In that regard, it must be noted that it follows from the analysis of the second plea in law, and in particular from paragraphs 234 and 235 above, that the Court has already held that the protection of the right to property enshrined in Article 1 of Protocol No 1 to the ECHR cannot be interpreted as meaning that the person concerned must, in all circumstances, have been able to make his or her point of view known to the competent authorities prior to the adoption of measures adversely affecting his or her right to property.

529 In addition, it must be noted that the applicants have not put forward any argument to explain how the SRB's failure to hear the applicants prior to the adoption of the resolution scheme affected their right to property.

530 It follows from all of the foregoing, first, that Banco Popular was failing or likely to fail and that there were no alternative measures capable of preventing that situation, second, that, in the absence of resolution, Banco Popular would have been the subject of normal insolvency proceedings and, third, that Banco Popular's shareholders had to bear the risk of their investments and that Regulation No 806/2014 provides for the possible payment of compensation in accordance with the no creditor worse off principle. Accordingly, it must be concluded that the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute an excessive and intolerable interference impairing the

very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction of their right to property, in accordance with the provisions of Article 17 and Article 52 of the Charter.

531 Furthermore, it must be noted that, in the application, the applicants do not claim an infringement of the freedom to conduct a business in the context of the eighth plea in law and do not raise any arguments in that regard. The only reference to the freedom to conduct a business is set out in the third plea in law, a plea of illegality.

532 Since the SRB chose to respond to the third and eighth pleas in law at the same time, the applicants put forward in the reply new arguments relating to the SRB's infringement of the freedom to conduct a business, in that Banco Popular was sold without its shareholders, in the context of a general meeting, being heard or being able to adopt the commercial decisions which they considered appropriate in order to guarantee the viability of Banco Popular.

533 First, as the SRB points out, the applicants do not specify the rights guaranteed by the freedom to conduct a business, as referred to in paragraph 266 above, which were infringed. Second, as the Commission argues, the applicants, as minority shareholders in Banco Popular, do not carry on an economic activity in the banking sector and cannot therefore rely on the freedom to conduct a business in that regard.

534 In any event, like the right to property enshrined in Article 17 of the Charter, the freedom to conduct a business is not absolute and its exercise may be subject to restrictions under Article 52(1) of the Charter. In so far as it has been found that the resolution scheme does not constitute an excessive and intolerable interference impairing the very substance of the applicants' right to property, it must be held that, for the same reasons, it does not infringe the very substance of the freedom to conduct a business.

535 It follows from all of the foregoing that the eighth plea must be dismissed as partly inadmissible and partly unfounded.

The ninth plea in law, alleging infringement of Article 20(1) of Regulation No 806/2014

536 The applicants submit that valuation 2 could not be regarded as 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014. The applicants' arguments are divided into four complaints aimed at challenging, first, the independence of the expert who carried out valuation 2, second, the coexistence of two *ex ante* valuations, third, the methodology used in valuation 2 and, fourth, the credibility of that valuation.

537 In the present case, it should be noted 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.

538 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 whether the conditions for initiating a resolution procedure, as defined in Article 18(1) of Regulation No 806/2014, were met.

539 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.

540 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.

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

542 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.

543 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.

544 It must, in addition, be noted that, at 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).

545 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.

546 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.

547 Consequently, in accordance with the case-law cited in paragraphs 166 to 171 above, the review carried out by the Court is a limited review which is confined to verifying that there was no manifest error of assessment by the SRB when it considered that valuation 2 complied with the requirements of Article 20 of Regulation No 806/2014. It is for the applicants to adduce sufficient evidence to render valuation 2 implausible.

– *The first complaint, relating to the independence of the expert who carried out valuation 2*

548 First, the applicants argue that Deloitte could not be regarded as an independent company on account of the existence of a conflict of interests, since the FROB had accused Deloitte of forgery in the file relating to the initial public offering of Bankia.

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

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

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

552 The applicants argue that there is a conflict of interest between the FROB and Deloitte, resulting from the existence of criminal proceedings in Spain implicating Deloitte, which relate to the alleged forgery of Bankia's accounts and in which the FROB joined the proceedings as a civil party. The applicants state, however, that the FROB did not bring any charges against Deloitte or any of its associates in those proceedings.

553 If that argument is to be interpreted as meaning that the applicants dispute that Deloitte fulfilled the third condition laid down in Article 38 of Delegated Regulation 2016/1075, relying on the existence of a material common or conflicting interest within the meaning of Article 41 of that delegated regulation, it is sufficient to note that it is based on a misunderstanding of that provision.

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

555 The applicants do not argue that Deloitte and Banco Popular have interests in common or in conflict and fail to explain how the fact that the FROB had joined criminal proceedings in which Deloitte was implicated in Spain as a civil party was capable of influencing Deloitte's assessment of the value of Banco Popular.

556 Second, the applicants argue that Deloitte was not independent, since the SRB required it to draw up valuation 2 by applying the sale of business tool, without allowing it to assess which resolution tool was most appropriate to resolve Banco Popular's liquidity crisis.

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

558 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.

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

560 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 appointed Deloitte to carry out a valuation meeting the objectives of that tool cannot be regarded as undermining Deloitte's independence.

561 Therefore, the first complaint must be dismissed.

– *The second complaint, relating to the coexistence of two ex ante valuations*

562 The applicants submit that Regulation No 806/2014 does not provide for the valuation report to be split into two documents drawn up by different authors. They add that the conclusions of valuation 2 conflict with those of valuation 1, which stated that Banco Popular was solvent and valued its assets at EUR 8.4 billion.

563 It should be noted 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 applicable to the write-down or conversion of capital instruments were met. In particular, the SRB stated that the purpose 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.

564 Although the technical standards of the EBA, adopted on 23 May 2017, were not binding, they were available at the date of valuation 2. In valuation 2, Deloitte expressly states that it complied with the requirements of the technical standards of the EBA.

565 The introductory summary of the technical standards of the EBA states that it is necessary to draw a distinction between two types of pre-resolution valuations, 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.

566 Recital 1 of the regulatory technical standards, reproduced in recital 1 of Delegated Regulation 2018/345, recalls that distinction between, on the one hand, an initial valuation assessing whether the conditions for the write-down and conversion of capital instruments or the condition 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 establish different criteria for the conduct of valuation 1 and valuation 2.

567 With regard to valuation 1, the regulatory technical standards state that the relevant criterion is whether the entity is failing or is likely to fail, which corresponds to the condition laid down in Article 18(1)(a) of Regulation No 806/2014.

568 However, it must be observed that, according to the second subparagraph of Article 18(1) of Regulation No 806/2014, the assessment of that condition is to be made by the ECB or the SRB.

569 Accordingly, in view of the distinct objectives of valuation 1 and valuation 2, there was justification for the first to be carried out by the SRB and the second to be conducted by the independent valuer, Deloitte.

570 Furthermore, it should be noted that the applicants confine themselves to relying on the fact that Regulation No 806/2014 does not expressly provide for a distinction between those two valuations, but they do not state which provision was infringed.

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

572 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.

573 It is true that, in valuation 1, the SRB stated that, at the reference date for its assessment, that is to say 31 March 2017, Banco Popular was solvent. However, it should be noted, first, 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. Second, 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, for the purposes of Article 18(4)(c) of Regulation No 806/2014, and not on the fact that Banco Popular was balance sheet insolvent. Thus, as the SRB rightly points out, the conclusions in valuation 1 were no longer relevant on the date of the resolution.

574 Furthermore, it should be noted that differences in the conclusions of valuation 1 and valuation 2 are explained by the fact that, since they have different objectives, they are based on different assessment criteria set out in the technical standards of the EBA. Thus, according to the technical standards of the EBA, valuation 1 seeks primarily to determine whether the total value of the entity's assets exceeds the value of its liabilities, in other words whether the entity is balance sheet solvent, whereas valuation 2 must be based on the economic value and not the book value of the entity.

575 Accordingly, the second complaint must be dismissed.

– *The third complaint, relating to the method used in valuation 2*

576 The applicants argue that the valuation of the institution should be carried out not as if it were an undertaking being wound up, but as if it were a going concern, and that its market value should be determined as an institution which will continue to perform its financial activities. They argue that valuation 2 is based on an incorrect methodology, which disregards any capacity of Banco Popular to generate future profits.

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

578 The SRB adopted the resolution scheme taking into account the first part of valuation 2, containing the valuation of Banco Popular's assets and liabilities in the strict sense. By contrast, since Deloitte stated that it did not have all the necessary information or sufficient time to make more than a merely indicative estimate at that stage, the second part of valuation 2 is equivalent to an initial simulation, pursuant to Article 20(9) of Regulation No 806/2014. Valuation 3, which is the final valuation seeking to determine whether the shareholders and creditors would have received better treatment if Banco Popular had been wound up under normal insolvency proceedings, under Article 20(16) of Regulation No 806/2014, was carried out after the resolution.

579 It is Deloitte's use of the liquidation value contained in the second part of valuation 2 which is contested by the applicants. In the first part, Deloitte took into account Banco Popular's disposal value.

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

581 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 …)'.

582 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.

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

'Where the resolution actions referred to in Article 10(1) require that assets and liabilities are to be retained by an entity that continues to be a going concern institution, the valuer shall use the hold

value as the appropriate measurement basis. The hold value may, if considered fair, prudent and realistic, anticipate a normalisation of market conditions.

The hold value shall not be used as the measurement basis where assets are transferred to an asset management vehicle pursuant to Article 42 of Directive [2014/59] 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.'

584 According to 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'.

585 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.

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

587 Furthermore, the applicants also argue, first, that valuation 2 is inconsistent with the audited annual accounts for 2016, the 2014 and 2016 stress tests, the results of the solvency assessment carried out by the EBA in 2016 and the book value of Banco Popular's own funds in its financial report for the first quarter of 2017. According to the applicants, it is inconceivable that Banco Popular's value deteriorated in such a short period of time.

588 It is sufficient to note that none of the points of comparison relied on by the applicants is relevant, on the one hand, because they reflect only Banco Popular's book value and not the disposal value at the date of resolution and, on the other hand, because they relate to Banco Popular's value at a date well before the resolution.

589 Second, the applicants submit that valuation 2 conflicts with valuations made by analysts around the same date and with BBVA's purchase offer.

590 In that regard, it is sufficient to note that the applicants do not specify the analyses to which they are referring or what BBVA's purchase offer was, BBVA having made a purchase offer neither in the context of the private sale process nor in the context of the resolution procedure.

591 Third, the applicants take the view that valuation 2 is inconsistent with the increase in Banco Santander's share price and the prospect of immediate gains, according to the analysis in the expert report annexed to the application.

592 It is sufficient to note that that argument is ineffective, since developments in the purchaser's situation after the resolution are not relevant for assessing the validity of the assessment made in valuation 2 of Banco Popular's value.

593 Fourth, in the reply the applicants refer to the expert report, annexed to the reply, which states that valuation 2 is vitiated by technical errors which invalidate its conclusions concerning the valuation of certain assets.

594 In that regard, the SRB argues that, as regards the alleged technical errors in valuation 2, the applicants merely referred in general terms to the expert report annexed to the reply. Since that reference does not enable the SRB to identify the arguments raised, that annex should be disregarded and the applicants' arguments are not sufficiently substantiated.

595 In the context of the present plea, the applicants supplement the text of the reply on a specific argument, that is to say the alleged errors contained in valuation 2, by references to their expert report annexed to the reply. However, those references to the expert report are made only in general terms and therefore do not permit the Court to identify precisely the arguments that might be regarded as supplementing that plea.

596 The case-law referred to in paragraph 509 above also applies to the conditions for admissibility of a reply, which according to Article 83(1) of the Rules of Procedure is intended to supplement the application (see judgments of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 95 and the case-law cited, and of 11 July 2018, *Europa Terra Nostra* v *Parliament*, T-13/17, not published, EU:T:2018:428, paragraph 86 and the case-law cited).

597 Accordingly, it must be held that the argument concerning alleged technical errors in valuation 2 is merely asserted without being supported by any line of argument, contrary to the rule laid down in Article 76(d) of the Rules of Procedure. It follows that that argument of the applicants must be declared inadmissible.

598 Accordingly, the third complaint must be dismissed.

– *The fourth complaint, relating to the credibility of valuation 2*

599 First, the applicants submit that Deloitte acknowledged, in valuation 2, that that valuation was carried out in a few days with limited access to information and that there were limitations in it affecting its reliability. Accordingly, valuation 2 could not serve as a basis for decision-making and it was therefore necessary to carry out an *ex post* definitive valuation.

600 In that regard, it must be noted 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 six 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.

601 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 should incorporate a buffer for additional losses.

602 Thus, in accordance with that provision, Deloitte merely stated that, given the limited time available to carry out the valuation, it 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.

603 In addition, it is apparent from Article 20(13) of Regulation No 806/2014 that, in view of the urgency of the situation, the SRB could rely on valuation 2, carried out under Article 20(10) of Regulation No 806/2014, in order to adopt the resolution scheme, which the applicants also acknowledge in the reply.

604 As regards the applicants' argument that the SRB should have carried out an *ex post* definitive valuation, that argument will be examined in the context of the eleventh plea.

605 Second, the applicants submit that valuation 2 is not fair in that the range of values for Banco Popular set out in valuation 2 is excessive in breadth and lacks credibility.

606 In that regard, Deloitte stated, in valuation 2, 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.

607 On the one hand, it must be noted that the applicants merely challenge the credibility of that range without raising any specific argument. On the other hand, it should be noted that the breadth of the range is justified by the method used in valuation 2.

608 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 or losses, and other adjustments that any purchaser would apply to the value. It produced a valuation range for each class of assets and liabilities.

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

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

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

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

612 In addition, it must be noted that Article 20(10) of Regulation No 806/2014 states that the provisional valuation is to comply with the requirements laid down in paragraphs 1, 7 and 9 of that article 'in so far as reasonably practicable in the circumstances'.

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

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

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

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

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

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

618 Accordingly, the fourth complaint must be dismissed.

619 It follows from the foregoing that the SRB did not make a manifest error of assessment in finding that valuation 2 was fair, prudent and realistic, within the meaning of Article 20(1) of Regulation No 806/2014.

620 Accordingly, the ninth plea must be dismissed as partly inadmissible and partly unfounded.

The tenth plea in law, alleging that the procedure for the sale of Banco Popular infringes Article 24 of Regulation No 806/2014 and Article 39(2)(a), (b), (d) and (f) of Directive 2014/59

621 The applicants argue that the procedure for the sale of Banco Popular, set out in the marketing decision, infringes Article 24 of Regulation No 806/2014, concerning the sale of business tool, and Article 39(2)(a), (b), (d) and (f) of Directive 2014/59, in so far as it was not a competitive sale process.

622 Article 39(1) of Directive 2014/59 provides that when applying the sale of business tool to an institution or entity, a resolution authority is to market, or make arrangements for the marketing of the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer. Article 39(2) of that Directive lays down the criteria in accordance with which the marketing referred to in paragraph 1 is to be carried out.

623 This plea is divided into four complaints corresponding to four of the criteria laid down in Article 39(2) of Directive 2014/59. The applicants submit that the procedure for the sale of Banco Popular, first, was not transparent, second, favoured Banco Santander, third, conferred on Banco Santander an unfair advantage and, fourth, did not allow the highest possible sale price to be obtained.

624 As a preliminary point, it must be observed, first of all, that, in the marketing decision, adopted on 3 June 2017, the SRB, in view of the rapid deterioration of Banco Popular's liquidity situation and the significant fall in the value of its shares, as well as the adverse effects which the bank's failure could have on financial stability, considered that it should take all necessary measures to adopt a resolution action if necessary and that the effectiveness of the sale of business tool should be ensured with the aim of securing the resolution objectives. 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.

625 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, in the procedural letter issued on 6 June 2017, the FROB invited potential purchasers, in the context of a possible resolution of Banco Popular, to participate in the marketing process and to submit an offer to the FROB for the acquisition of 100% of Banco Popular's share capital according to the terms and conditions described in that letter.

626 Finally, in Article 6.6 of the resolution scheme, the SRB considered that the marketing effort carried out in relation to Banco Popular by the FROB prior to the adoption of that scheme had met the requirements set out in Article 24 of Regulation No 806/2014, read together with Article 39 of Directive 2014/59.

627 The SRB noted that, in the period immediately preceding the resolution, Banco Popular had conducted a private sale process and that, in the week of 29 May 2017, it had become apparent that that process would be unsuccessful. The SRB stated that the decision to limit the marketing effort to banks which had already expressed a general interest in acquiring Banco Popular in the private sale process was consistent with the requirements of Article 39 of Directive 2014/59.

628 The SRB also noted that, following implementation of the marketing process by the FROB, two banks were ultimately invited to participate in the sale. It stated that all the potential purchasers were approached on the same date, had access to the same virtual data room and had submitted their offers under the same conditions and by the same deadline.

629 The SRB finally noted that, out of the two potential bidders, one valid offer was received and it considered that, as the buyer was the only one to have submitted an offer, it was prudent to accept the buyer's conditions and thereby prevent Banco Popular's uncontrolled insolvency, which could, inter alia, have affected its critical functions.

– *The first complaint, relating to the transparency of the marketing process*

630 The applicants argue that the rules of Banco Popular's competitive sale process, laid down in the marketing decision, are not transparent, in breach of Article 24(2)(d) of Regulation No 806/2014 and Article 39(2)(a) of Directive 2014/59. Participation in the marketing process was arbitrarily restricted solely to those institutions which had participated in the private sale process initiated by Banco Popular before the resolution.

631 According to 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 the entity or the instruments, assets, rights and liabilities in accordance with Article 39(1) and (2) of Directive 2014/59.

632 In accordance with the criterion laid down in Article 39(2)(a) of Directive 2014/59, the marketing is to be as transparent as possible and is not materially to misrepresent the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer, having regard to the circumstances and in particular the need to maintain financial stability.

633 As a preliminary point, it should be noted that the requirements regarding marketing and, in particular, the decision to limit the number of participants in the marketing process are contained not in the resolution scheme, but in the marketing decision adopted previously by the SRB on 3 June 2017.

634 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).

635 It is also clear 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).

636 In the present case, in the resolution scheme, the SRB considered that the marketing process established by the FROB complied with the requirements of Article 39 of Directive 2014/59. However, it must be noted that the FROB took into account the requirements which had been laid down by the SRB in the marketing decision. It follows that the SRB, in the resolution scheme, implicitly confirmed the requirements relating to the sale which it had itself laid down in the marketing decision.

637 In addition, it must be noted that Article 13 of Regulation No 806/2014, on early intervention, provides in paragraph 3 thereof that:

'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/EU and the requirements of professional secrecy laid down in Article 88 of this Regulation.'

638 Accordingly, it must be held that the marketing decision constitutes an intermediate measure adopted by the SRB with a view to the potential resolution of Banco Popular and that the applicants cannot be prevented from relying, in support of their action against the resolution scheme, on the illegality vitiating the assessment contained in the marketing decision.

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

640 That possibility is expressly provided for by the last subparagraph of Article 39(2) of Directive 2014/59, which provides 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.

641 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.'

642 It follows that the transparency requirement in Article 39(2)(a) of Directive 2014/59 must be interpreted as relating to the conduct of the marketing process and not to any publicity measures announcing that process.

643 As regards the restriction of the marketing process solely to the institutions which had participated in the private sale process initiated by Banco Popular, referred to in paragraph 33 above, the SRB sets out, in Article 2(a)(i) of the marketing decision, a number of reasons for its decision to invite the FROB to contact only those five participants.

644 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 timeframe, 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.'

645 It must be noted 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 are not to prevent the resolution authority from soliciting particular potential purchasers.

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

647 In addition, 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 in which the marketing process had to be completed. As the SRB pointed out, extending the process to a larger number of participants was liable to slow down the process, but also increased the risk of leaks concerning Banco Popular's situation and thus the risk to financial stability.

648 It follows that, contrary to what the applicants maintain, the SRB's decision to invite the FROB to contact only the five parties who participated in the private sale process was not arbitrary.

649 Furthermore, the applicants are wrong to argue that it was arbitrary and discriminatory to approach only the five Spanish institutions which had stated that they were not interested in purchasing Banco Popular in the context of the private sale process.

650 Through their participation in the private sale process, those five institutions were the only banks to have shown an interest in acquiring Banco Popular. The applicants are confusing the expression of interest in the acquisition of Banco Popular, which took the form of participation in the private sale process, with the fact that that process ultimately failed.

651 Finally, it must be noted that the private sale process was open to any Spanish or international operator. The applicants fail to explain why other Spanish or foreign institutions which had expressed no interest in acquiring Banco Popular at the time of the private sale process would be interested a few weeks later, when the FROB launched its process. Furthermore, since it was not

possible to provide information to the public on the implementation of the marketing process, the applicants do not explain which non-discriminatory criteria could have served as a basis for contacting other operators.

652 It follows that the SRB, by restricting, in the marketing decision, the marketing process to the five establishments which participated in the private sale process, did not infringe Article 24 of Regulation No 806/2014, read in conjunction with Article 39(2)(a) of Directive 2014/59.

653 Accordingly, the first complaint must be dismissed.

– *The second complaint, relating to the existence of discrimination in favour of Banco Santander*

654 The applicants argue that Banco Santander was favoured over the other participants in the earlier private sale process, in breach of Article 39(2)(b) of Directive 2014/59. Banco Santander was favoured because of the exclusion of potential purchasers which had not participated in the private sale process and because of the reduced deadlines. The applicants take the view that Banco Santander, which had spent several months studying the possibility of acquiring Banco Popular, was able to take advantage of that privileged situation to submit a low offer. Banco Santander was the only bank which continued to have access to updated information on Banco Popular's situation. Bringing forward to 6 June 2017 the deadline for responding to the call for tenders favoured Banco Santander.

655 In accordance with the criterion laid down in Article 39(2)(b) of Directive 2014/59, the marketing is not unduly to favour or discriminate between potential purchasers.

656 In Article 2(a)(ii) of the marketing decision, the SRB stated that the marketing procedure had to be transparent to allow the participating potential purchasers to be equally and duly informed at each stage of the procedure. It considered that any information required by and provided to one of the potential purchasers had to be provided at the same time to all the others.

657 It must be observed that this complaint of the applicants is directed not against the marketing decision or the resolution scheme, but against the marketing process as implemented by the FROB. Accordingly, the applicants cannot claim an infringement of Article 39(2)(b) of Directive 2014/59 by the SRB. It must therefore be held that, by this complaint, the applicants are arguing, in essence, that the SRB made a manifest error of assessment in that it approved, in the resolution scheme, the marketing process conducted by the FROB, even though that process favoured Banco Santander in breach of Article 39(2)(b) of Directive 2014/59.

658 In that regard, it must be recalled that, in Article 6.6 of the resolution scheme, the SRB considered that the marketing process conducted with respect to Banco Popular by the FROB had complied with the requirements set out in Article 24 of Regulation No 806/2014 read together with Article 39 of Directive 2014/59 and, in particular, that all the potential purchasers were approached on the same date, had access to the same virtual data room and had submitted their offers under the same conditions and by the same deadline.

659 First of all, it is clear from the analysis of the first complaint that the restriction of the process to the potential purchasers that participated in the private sale process was justified. The applicants do not explain how that restriction was such as to favour Banco Santander over the other four institutions contacted by the FROB in order to participate in the marketing process.

660 Next, with regard to the conduct of the process, it should also be noted that, of the five potential purchasers contacted by the FROB, two decided not to participate in the marketing process 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, the FROB sent them the process letter and the Sale and Purchase Agreement.

661 By letter dated 6 June 2017, BBVA informed the FROB that it had decided not to submit a bid. BBVA stated in that letter that:

'… in view of the price constraints and other conditions imposed in the process letter, as well as the lack of available information, BBVA is not in a position to submit an offer in accordance with that process letter and the Sale and Purchase Agreement (SPA) presented today.

Notwithstanding the foregoing, we also confirm that if sufficient information were available to allow its management bodies properly to analyse the transaction and if the terms of the process could be amended, BBVA would be interested in participating in it.'

662 The fact that BBVA informed the FROB that the information available to BBVA did not allow it to submit a bid cannot be interpreted as meaning that it had less information than Banco Santander.

663 As regards the argument that the reduction in the duration of the process favoured Banco Santander, it must be noted that the deadline set out in the process letter was the same for all participants. Moreover, all the potential purchasers had already participated in the private sale process and were therefore able to acquaint themselves with information on Banco Popular and to analyse it during the same period.

664 Furthermore, as the SRB points out, setting a deadline of midnight on 6 June was justified in view of the fact that the ECB had on that day declared Banco Popular to be failing or likely to fail, that Banco Popular would therefore not have been in a position to operate on the market the following day and that it was therefore necessary to adopt a resolution action as a matter of urgency.

665 In addition, as can be seen from paragraph 661 above and contrary to the applicants' claim, BBVA, in its letter to the FROB, did not justify its decision not to submit an offer on grounds of lack of time.

666 It follows that, contrary to what the applicants claim, the marketing process conducted by the FROB did not favour Banco Santander and that the SRB did not make a manifest error of assessment in finding that that process had met the requirements set out in Article 39(2)(b) of Directive 2014/59.

667 Accordingly, the second complaint must be dismissed.

– The third complaint, relating to the existence of an unfair advantage granted to Banco Santander

668 The applicants claim that Banco Santander was given an unfair advantage, in breach of Article 39(2)(d) of Directive 2014/59, because it submitted its bid on 7 June 2017 at 03:12, that is to say, beyond the deadline set by the SRB and the FROB, and that BBVA was not informed that it could submit an offer after the expiry of the prescribed deadline. According to the applicants, if

BBVA had been informed that the deadline was flexible, it would have no doubt submitted an offer. The applicants take the view that the content of the process letter contradicts Banco Santander's argument that the deadline of midnight on 6 June 2017 was purely indicative.

669 In accordance with the criterion laid down in Article 39(2)(d) of Directive 2014/59, the marketing is not to confer any unfair advantage on a potential purchaser.

670 It must be recalled that, 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 03:12 on 7 June and that the price offered by Banco Santander for the sale of Banco Popular shares was EUR 1. The FROB proposed that Banco Santander, as awardee of the competitive sale process of Banco Popular, should be designated as the buyer of Banco Popular in the resolution scheme.

671 In the resolution scheme, the SRB found that the marketing process conducted in respect of Banco Popular by the FROB had met the requirements set out in Article 24 of Regulation No 806/2014, read together with Article 39 of Directive 2014/59, and accepted the FROB's proposal to designate Banco Santander as the buyer of Banco Popular.

672 Accordingly, this complaint must be interpreted as seeking a declaration that the SRB made a manifest error of assessment in that it approved, in the resolution scheme, the FROB's proposal to designate Banco Santander as the buyer, even though the latter had obtained an unfair advantage during the marketing process, in breach of Article 39(2)(d) of Directive 2014/59.

673 It must be observed that, in the marketing decision, the SRB did not set any deadline for the procedure for selecting the buyer of Banco Popular. The applicants are therefore wrong to claim that the deadline for the submission of offers was set by the SRB.

674 In the process letter, the FROB set out a timetable for the procedure for the sale of Banco Popular. That timetable provided that binding offers had to be submitted by midnight on 6 June 2017 at the latest. That timetable also provided that at 01:00 on 7 June 2017 contacts would take place with the bidders to finalise the process and to select the offer; this was to be followed, at 05:30, by the adoption of the SRB's resolution scheme (where appropriate) and the execution of the Sale and Purchase Agreement, at 06:30, by the FROB's implementing measure and, at 07:00, by the closing and announcement of the transaction.

675 As stated by Banco Santander, the timetable for the marketing process set out in the process letter was intended to allow all formalities to be concluded by 7 June 2017 at 07:00, so that Banco Popular could operate normally after the markets opened, in particular to avoid an interruption of its critical functions.

676 Since BBVA had announced on 6 June, prior to the expiry of the deadline, that it would not submit an offer and did not justify that decision on the ground that it had insufficient time, it cannot be held that the fact that Banco Santander made its offer after the expiry of the deadline conferred on the latter an unfair advantage over BBVA.

677 The applicants' assertion that BBVA would have no doubt submitted an offer if it had been informed that the deadline set by the FROB was 'flexible' is purely speculative. Moreover, that assertion conflicts with the applicants' argument, raised in the reply, that the SRB should have ensured that Banco Popular would be kept afloat until the weekend of 10 and 11 June 2017 in

order to enable BBVA to complete its analysis of Banco Popular's financial situation and submit an offer. The applicants cannot therefore argue that an extension of the deadline for making offers of a few hours would have enabled BBVA to submit an offer.

678 Since Banco Santander was the only participant in the process to make a concrete offer and since it was certain, following BBVA's announcement, that none of the other institutions invited to take part in the marketing process would submit an offer, the fact that the FROB accepted that offer, even though it was submitted after the deadline set in the process letter, could not confer an unfair advantage on Banco Santander.

679 Furthermore, it is apparent 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).'

680 In that regard, it must be noted, as stated in paragraph 629 above, that in Article 6.6 of the resolution scheme, the SRB noted that, as the buyer was the only one to have submitted an offer, it was prudent to accept the buyer's conditions and thereby prevent Banco Popular's uncontrolled insolvency, which could, inter alia, have affected its critical functions.

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

682 The FROB sent to the SRB the results of the procedure for the sale of Banco Popular in sufficient time for the SRB to adopt the resolution scheme and to send it to the Commission at 05:13 on 7 June 2017. The Commission thus adopted its decision enabling the resolution scheme to enter into force at 06:30 on the same day. The conduct of the process therefore allowed the FROB to conclude all formalities and close the sale before the expiry of the deadline set out in the process letter, that is to say before 07:00 on 7 June 2017.

683 It follows that the FROB's proposal to designate Banco Santander as the buyer of Banco Popular did not confer an unfair advantage on Banco Santander and that the SRB did not make a manifest error of assessment in finding that the marketing process had met the requirements set out in Article 39(2)(d) of Directive 2014/59.

684 Accordingly, the third complaint must be dismissed.

– *The fourth complaint, relating to the fact that the marketing process did not aim at maximising the sale price*

685 The applicants submit that no attempt was made to obtain the highest possible sale price, in breach of Article 39(2)(f) of Directive 2014/59. In their view, minimising the number of potential purchasers removed any possibility of competition between the various players in the banking sector, which would have made it possible to obtain the highest possible sale price.

686 It must be held that, by that complaint, the applicants claim, in essence, that the SRB infringed Article 24 of Regulation No 806/2014, concerning the sale of business tool, read together with Article 39(2)(f) of Directive 2014/59, by restricting, in the marketing decision, the marketing process to the five establishments which participated in the private sale process.

687 In accordance with the criterion laid down in Article 39(2)(f) of Directive 2014/59, the marketing 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.

688 It must be recalled that it is clear from the analysis of the first complaint that the SRB's decision to limit the marketing process to the five institutions which had participated in the private sale process was justified by the need to finalise the process within a very short period and to avoid the risk of leaks concerning Banco Popular's situation and thus the risk to financial stability.

689 Furthermore, in Article 2(b) of the marketing decision, the SRB stated that the marketing procedure should 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 the offers was the price offered.

690 In the process letter, the FROB stated that the offer price had to be equal to or higher than EUR 1.

691 The applicants do not raise any argument seeking to establish that the restriction of the number of potential purchasers to the five participants in the private sale process prevented genuine price competition between them.

692 The SRB cannot be criticised on the basis of facts arising in the course of the process, that is to say because four of the five participants did not make a concrete bid and because the only concrete bid submitted proposed a purchase price of EUR 1.

693 The applicants are therefore wrong in arguing that the marketing decision did not aim at maximising the sale price in breach of Article 24 of Regulation No 806/2014, read together with Article 39(2)(f) of Directive 2014/59.

694 In the reply, the applicants add that the three options set out in the process letter suggested to bidders that the FROB was implicitly informing them that losses would lead to the destruction of all or part of the capital of Banco Popular. The applicants argue that, in order to obtain a price which maximises the value of the shares, it was necessary for the SRB to require potential purchasers to determine the losses themselves.

695 By that argument, the applicants challenge the content of the process letter issued by the FROB. In that letter, the FROB stated that offers had to indicate the proposed payment price for the transfer of Banco Popular shares on the basis of three options.

696 First, it is sufficient to note that that argument of the applicants is purely speculative and is based not on facts, but on the alleged impression that bidders had when reading the process letter. Second, it is not possible from that argument to determine what criticisms of the SRB the applicants are making.

697 Furthermore, it is necessary to reject the applicants' purely speculative claims, first, that Banco Santander was aware that it was the only potential purchaser to submit an offer and, second, that the decision to sell Banco Popular at the price of EUR 1 was taken in advance.

698 Accordingly, the fourth complaint must be dismissed.

699 It follows from all of the foregoing that the applicants have not shown that the procedure for the sale of Banco Popular infringed Article 24 of Regulation No 806/2014 and Article 39(2)(a), (b), (d) and (f) of Directive 2014/59.

700 The tenth plea must therefore be dismissed as unfounded.

The eleventh plea in law, alleging that the SRB will not carry out an ex post *definitive valuation*

701 By their three new pleas in law raised in the reply, grouped together under the eleventh plea, the applicants argue that the fact that the SRB did not carry out an *ex post* definitive valuation constitutes, first, an infringement of Article 20(3) and (11) of Regulation No 806/2014, second, a breach of the duty to state reasons, of the rights of the defence and of the right to an effective remedy and, third, an infringement of essential procedural requirements.

702 The applicants state that it was when the SRB replied to a question put by the Court in the present proceedings that the applicants were informed that no *ex post* definitive valuation would be carried out.

703 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.

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

705 Furthermore, as stated in paragraph 603 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.

706 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).

707 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 that scheme.

708 Furthermore, it must be noted that the applicants cannot argue that, in so far as an *ex post* definitive valuation will not be carried out, the resolution scheme is insufficiently reasoned. The adoption of an *ex post* definitive valuation cannot in any event allow the SRB to supplement the statement of reasons for the resolution scheme *ex post facto*.

709 Accordingly, the arguments raised by the applicants in the eleventh plea are ineffective and that plea must be dismissed.

The applications for measures of organisation of procedure and measures of inquiry

710 The applicants requested the Court to order various measures of organisation of procedure and measures of inquiry.

711 First, in the application and the reply and by letters of 15 November 2018, 20 April 2021 and 28 May 2021 the applicants asked the Court to order the production of various documents.

712 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.

713 Second, the applicants proposed in the application that a number of witnesses be heard.

714 As regards applications made by a party for measures of organisation of procedure or measures of inquiry, it must be recalled that the Court is the sole judge of any need to supplement the information available to it in respect of the cases before it (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 117 and the case-law cited, and judgment of 12 November 2020, *Fleig* v *EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 53).

715 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, and judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission*, C-702/19 P, EU:C:2020:857, paragraph 29).

716 In the present case, it must be noted that the information contained in the file and the explanations provided during the hearing are sufficient to enable the Court to give judgment, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings and in the light of the documents lodged by the parties.

717 It follows that the applicants' application for measures of organisation of procedure and measures of inquiry must be dismissed, and that the action must be dismissed in its entirety.

Costs

718 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay the costs incurred by the SRB and Banco Santander, in accordance with the forms of order sought by the latter parties.

719 Under Article 138(1) of the Rules of Procedure, the Member States and the institutions which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain, the Parliament, the Council and the Commission must therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) to bear their own costs and to pay the costs incurred by the Single Resolution Board (SRB) and Banco Santander, SA;**

3. **Orders the Kingdom of Spain, the European Parliament, the Council of the European Union and the European Commission 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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