Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 14 March 2024[1]

Case C-541/22 P

Araceli García Fernández,
Faustino González Parra,
Fernando Luis Treviño de Las Cuevas,
Juan Antonio Galán Alcázar,
Lucía Palazuelo Vallejo-Nágera,
Macon, SA,
Marta Espejel García,
Memphis Investments Ltd,
Pedro Alcántara de la Herrán Matorras,
Pedro José de Jesús Benito Trebbau López,
Pedro Regalado Cuadrado Martínez,
María Rosario Mari Juan Domingo
v
Eleveté Invest Group, SL,
Antonio Bail Cajal,
Carlos Sobrini Marín,
Edificios 1326 de l'Hospitalet, SL,
Juan José Homs Tapias,
Anna María Torras Giro,
Marbore 2000, SL,
Trístan González del Valle,
European Commission,
Single Resolution Board (SRB),
Kingdom of Spain,

Banco Santander, SA

(Appeal – Economic and monetary policy – Banking Union – Single Resolution Mechanism – Regulation (EU) No 806/2014 – Article 18 – Conditions for resolution – Article 20 – Valuation for the purposes of resolution – Article 296 TFEU – Duty to state reasons –

[1] Original language: English.

Article 47 of the Charter of Fundamental Rights of the European Union – Action for annulment and action for damages – Resolution of Banco Popular)

I. Introduction

1. The Single Resolution Mechanism (SRM) was established in 2014.[2] On 6 June 2017, it was used for the first time, in respect of Banco Popular Español, SA ('Banco Popular').

2. The appellants are natural and legal persons and were shareholders in, or held Additional Tier 1 or Tier 2 capital instruments issued by, Banco Popular before the resolution scheme[3] was adopted in respect of Banco Popular.

3. By their action before the General Court, the applicants at first instance (the appellants in this case) challenged the resolution scheme, the European Commission's approval thereof and the documents relating thereto, and sought damages and compensation. That action, alongside five others, was chosen as a pilot case before the General Court,[4] and was dismissed on the merits in the judgment of 1 June 2022, *Eleveté Invest Group and Others* v *Commission and SRB* (T-523/17, EU:T:2022:313) ('the judgment under appeal').

4. Alongside this, there is another appeal pending in the context of the resolution of Banco Popular, Case C-535/22 P, *Aeris Invest* v *Commission and SRB*,[5] and there is significant overlap in the arguments made ('the parallel appeal'). My Opinion in that appeal is being delivered on the same day ('the parallel Opinion'), and these two parallel Opinions should be read together.

5. For the purposes of the present appeal, the task of the Court of Justice is not to review the resolution scheme and the Commission's approval thereof (and any other documents challenged at first instance), but rather the manner in which the General Court exercised its power of review.[6] In the context of the two present appeals, this means that the review of the Court of Justice will be directed first, at ascertaining whether the General Court correctly interpreted the relevant

[2] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1) ('the SRM Regulation').

[3] SRB Decision SRB/EES/2017/08 of the Single Resolution Board of 7 June 2017 in its Executive Session concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A. ('the resolution scheme'). The resolution scheme was approved by Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p. 15) ('the Commission's approval').

[4] The remaining pilot cases are: (1) Judgment of 1 June 2022, *Del Valle Ruíz and Others* v *Commission and SRB* (T-510/17, EU:T:2022:312). The appeal in Case C-539/22 P, *Del Valle Ruíz and Others* v *Commission and SRB* was submitted but withdrawn on 22 July 2023. (2) Judgment of 1 June 2022, *Aeris Invest* v *Commission and SRB* (T-628/17, EU:T:2022:315). The appeal against that judgment is pending in Case C-535/22 P, *Aeris Invest* v *Commission and SRB*. (3) Judgment of 1 June 2022, *Algebris (UK) and Anchorage Capital Group* v *Commission* (T-570/17, EU:T:2022:314). That judgment was not appealed. (4) Judgment of 1 June 2022, Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB (T-481/17, EU:T:2022:311). Two appeals against that judgment are currently pending. First, in Case C-551/22 P, *Commission* v *SRB*. See Opinion of Advocate General Ćapeta in *Commission* v *SRB* (C-551/22 P, EU:C:2023:846). Second, in Case C-448/22 P, *SFL* v *SRB*. (5) Order of 24 October 2019, *Liaño Reig* v *SRB* (T-557/17, EU:T:2019:771). That order was confirmed on appeal by the Court of Justice, which held that the General Court did not err in finding that the contested provision is not severable from the SRB's resolution scheme, in the judgment of 4 March 2021, *Liaño Reig* v *SRB* (C-947/19 P, EU:C:2021:172).

[5] Against the judgment of 1 June 2022, *Aeris Invest* v *Commission and SRB* (T-628/17, EU:T:2022:315) ('the parallel judgment under appeal').

[6] According to the Court, 'the purpose of review by the Court of Justice is, primarily, to examine to what extent the General Court took into consideration, in a legally correct manner, all the arguments relied upon at first instance by the appellant'. Judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland* (C-933/19 P, EU:C:2021:905, paragraph 50).

provisions of the SRM Regulation, and second, whether it reviewed, to a sufficient extent, the resolution scheme as prepared by the Single Resolution Board (SRB) and approved by the Commission.

6. The relevant standard of review has recently been consolidated by the Court of Justice in *Crédit lyonnais*.[7] In that case, the Court found that the EU Courts must not substitute the decision of an EU authority with their own. They must instead determine whether the decision is based on materially correct facts and is not vitiated by a manifest error of assessment or a misuse of powers.[8]

7. This standard is corroborated by the requirements of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). For judicial review to be effective and to safeguard the rights of defence, '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'.[9]

8. With the above considerations in mind, I will suggest that the Court uphold the two judgments under appeal.

II. Events leading to the proceedings before the General Court

9. The facts relevant to the present appeal, which are explained in more detail in paragraphs 25 to 83 of the judgment under appeal, may be summarised as follows.

10. The financial situation of Banco Popular began deteriorating in 2016. On 5 December 2016, the Executive Session of the SRB adopted a resolution plan for the Banco Popular group. The preferred resolution tool in the 2016 resolution plan was the bail-in tool provided for by Article 27 of the SRM Regulation. However, that plan was not used in the resolution that finally took place.

11. In April 2017, Banco Popular initiated a private sale process with a view to being sold 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. By letter of 16 May 2017, Banco Santander SA ('Banco Santander') informed Banco Popular that it could not make a concrete bid in the context of the private sale process.

12. 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.

7 Judgment of 4 May 2023, *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2023:368). This approach was also taken up by the General Court in the judgment under appeal, paragraphs 110 to 115, and in the parallel judgment under appeal, paragraphs 115 to 119.

8 Judgment of 4 May 2023, *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2023:368, paragraph 55).

9 Judgment 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).

13. Throughout May 2017, several news outlets reported on the difficulties faced by Banco Popular, including Reuters. The article published by Reuters stated inter alia that, according to an anonymous EU official, one of Europe's top bank watchdogs had warned EU officials that Banco Popular might have to be wound down if it failed to find a buyer. According to the 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 closely with a view to a possible intervention. On the same day, the SRB published a press release disputing the content of that article.

14. In the first days of June 2017, Banco Popular faced massive liquidity outflows.

15. 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 ('the FROB')), concerning the marketing of Banco Popular. The SRB approved the immediate launch 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.[10] In particular, the SRB instructed the FROB to contact the five potential purchasers that had been invited to submit bids in the context of the earlier private sale process managed by Banco Popular. Of the five potential purchasers, two decided not to participate in the marketing process and one was excluded by the European Central Bank (ECB) for prudential reasons.

16. On 5 June 2017, the SRB adopted a first valuation ('valuation 1'), pursuant to Article 20(5)(a) of the SRM Regulation, which had the objective of determining whether the conditions for resolution were met. This valuation was carried out by Deloitte, which the SRB hired on 23 May 2017 as an independent expert.

17. On the morning of 5 June 2017, Banco Popular submitted an initial request for emergency liquidity assistance ('ELA') to Banco de España (Bank of Spain), and 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 of Banco Popular's request for ELA, the Governing Council of the ECB did not raise any objections to urgent liquidity assistance for Banco Popular for the period up to 8 June 2017. Banco Popular received part of that ELA, however, the Bank of Spain was not in a position to provide the remaining amount of ELA to Banco Popular.[11]

18. On 6 June 2017, the ECB found that Banco Popular was failing or likely to fail ('FOLTF') under Article 18(4)(c) of the SRM Regulation, and communicated that assessment to the SRB, in accordance with the third subparagraph of Article 18(1) of the SRM Regulation.[12]

19. On the same day, Deloitte submitted a second valuation ('valuation 2') to the SRB, pursuant to Article 20(10) of the SRM Regulation. The purpose of valuation 2 was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders

[10] 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) ('Directive 2014/59').

[11] The facts of the case are silent on any possible explanation as to why the Bank of Spain could not provide the entire amount of ELA to Banco Popular.

[12] A non-confidential version of that assessment can be accessed at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.2017_FOLTF_ESPOP.en.pdf?ed492d2c6735d43ab422f25ed966d712.

and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and to provide information on the decision to be taken on the shares and instruments of ownership to be transferred. [13]

20. On 7 June 2017, the FROB informed the SRB that it had received a binding offer from Banco Santander that same day at 3.12 a.m., offering to purchase the shares of Banco Popular for the amount of EUR 1. The FROB proposed that the SRB accept that offer.

21. At its Executive Session of 7 June 2017, the SRB accepted Banco Santander's offer and adopted the resolution scheme. The sale of business tool was used, [14] under which all the existing shares (Common Equity Tier 1), and the Additional Tier 1 instruments of Banco Popular were written down. Tier 2 instruments were converted into new shares, and then transferred to Banco Santander for the price of EUR 1.

22. That scheme was submitted to the Commission for approval at 5.13 a.m. At 6.30 a.m., by a decision addressed to the SRB, the Commission approved the resolution scheme.

23. On 14 June 2018, Deloitte sent the SRB the valuation of the difference in treatment, provided for in Article 20(16) to (18) of the SRM Regulation, carried out to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings ('valuation 3').

24. On 17 March 2020, the SRB adopted Decision SRB/EES/2020/52 [15] determining that the shareholders and creditors who were affected by the resolution of Banco Popular were not entitled to compensation from the Single Resolution Fund (SRF) under Article 76(1)(e) of the SRM Regulation. [16]

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

25. By their action lodged before the General Court on 7 August 2017, the applicants at first instance brought an action seeking the annulment of the resolution scheme and the Commission's approval, claiming damages and seeking the annulment of valuation 2 and the award of compensation.

26. On 12 April 2019, the Kingdom of Spain and Banco Santander were granted leave to intervene in support of the Commission and the SRB.

27. By order of 12 May 2021, the General Court ordered the SRB to produce the full versions of the resolution scheme, valuation 2, the ECB's assessment of 6 June 2017 that Banco Popular was FOLTF, and the ECB's letter of 18 May 2017 to Banco Popular. By order of 9 June 2021, the General Court, after inspecting those documents, decided that they were not necessary for resolving the case and removed them from the file.

[13] 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.

[14] Pursuant to Article 24 of the SRM Regulation.

[15] 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), available at: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XX0320(01).

[16] That decision of the SRB was challenged by a number of former shareholders of Banco Popular. The General Court dismissed that challenge in the judgment of 22 November 2023, *Del Valle Ruíz and Others* v *SRB* (T-302/20, T-303/20 and T-307/20, EU:T:2023:735). That judgment was not appealed.

28. The General Court dismissed the action in its entirety as unfounded.

IV. Procedure before the Court of Justice

29. By their appeal lodged on 11 August 2022, the appellants claim that the Court should:

– annul the judgment under appeal;

– uphold their claims before the General Court seeking the annulment of the resolution scheme and the Commission's approval and, consequently, order the Commission and the SRB to reimburse their investments in Banco Popular or, alternatively, order them to pay compensation based on their non-contractual liability;

– order the Commission and the SRB to pay them compensation based on their non-contractual liability;

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

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

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

– grant them any other additional compensation deemed appropriate.

30. The Commission, the SRB, the Kingdom of Spain, and Banco Santander contend that the Court should:

– dismiss the appeal in its entirety;

– order the appellants to pay the costs of the appeal and those incurred at first instance.

31. Banco Santander additionally contends that, should the Court uphold the appeal and decide, in accordance with Article 61 of the Statute of the Court of Justice of the European Union, to give judgment itself on the action for annulment, it should:

– in accordance with the second paragraph of Article 264 TFEU, limit the scope of its judgment by upholding the effects of the sale of Banco Popular to Banco Santander.

V. Analysis

32. The appellants put forward four grounds in support of their appeal. The first ground of appeal alleges that the judgment under appeal wrongly interprets and applies Article 18 of the SRM Regulation. Under the second ground of appeal, it is alleged that the judgment under appeal wrongly interprets and applies Article 20 of the SRM Regulation. The appellants, by their third ground of appeal, seek damages based on the annulment of the decision contested at first

instance, based on Article 264 TFEU. Finally, the fourth ground of appeal alleges errors in the judgment under appeal concerning the independent claim of the non-contractual liability of the European Union.

33. As stated earlier, my opinion in the present appeal should be read together with the parallel Opinion. Accordingly, the first ground of the present appeal is analysed in points 20 to 48 of the parallel Opinion, whereas the fifth and sixth parts of the second ground of appeal [17] are dealt with in points 49 to 86 of that opinion.

34. The remaining grounds of appeal concern, first, alleged breaches of Article 20 of the SRM Regulation, which I will address in Section A. Second, they concern a request for damages, which I will analyse in Section B. Finally, the appellants also invoke the non-contractual liability of the European Union, which I will deal with in Section C.

35. In the forthcoming analysis, I will explain why the Court should dismiss the appeal in its entirety.

A. Article 20 of the SRM Regulation

36. By the first four parts of their second ground of appeal, the appellants claim that the General Court erred [18] in its interpretation and application of Article 20 of the SRM Regulation to the different valuations of Banco Popular. As a reminder, the resolution procedure of Banco Popular involved three valuations. [19]

37. As the Court of Justice confirmed in *Aeris Invest* v *SRB*, [20] Article 20 of the SRM Regulation refers to two types of valuation. The first (provisional) valuation is regulated by Article 20(1) to (15) of the SRM Regulation. The second (definitive) valuation, is regulated by Article 20(16) to (18) of the SRM Regulation and must be carried out by an independent person.

38. The Court found that valuations 1 and 2 in the resolution of Banco Popular belong to the first category, while valuation 3 belongs to the second category. [21]

39. First, the appellants argue that the General Court erred in finding that valuations 1 and 2 were fair, prudent, and realistic, as required by Article 20(1) of the SRM Regulation.

40. I consider that the General Court was correct to point out [22] that both valuations 1 and 2 were provisional and therefore necessarily contained uncertain or approximate information.

[17] Whereby the appellant in the parallel appeal alleges a breach by the General Court of the duty to state reasons and of Article 47 of the Charter.

[18] Judgment under appeal, paragraphs 279 to 282, and paragraphs 346 to 425.

[19] See points 16, 19, 23, and 24 above.

[20] Judgment of 21 December 2021, *Aeris Invest* v *SRB* (C-874/19 P, EU:C:2021:1040, paragraphs 70 to 71).

[21] Ibid., paragraph 72.

[22] Judgment under appeal, paragraphs 294, 347, and 357.

41. In fact, the General Court undertook a detailed assessment of valuation 2 in relation to each category of assets, taking into account the urgency of the situation as the context under which Deloitte had carried out the valuation. [23]

42. The General Court finally, and correctly in my view, referred to the different purposes served by valuations 1 and 2, the different points in time at which they were drawn up (and the difference in information available), and thus correctly concluded that they were not contradictory. [24]

43. I therefore consider that the General Court correctly interpreted and applied Article 20(1) of the SRM Regulation.

44. Second, the appellants argue that the General Court erred [25] in finding that valuations 1 and 2 did not breach the requirements of Article 20(5) of the SRM Regulation. [26]

45. With regard to the objective set out in Article 20(5)(a) of the SRM Regulation, the General Court found that in valuation 1, the SRB analysed that objective, determining whether the conditions for resolution under Article 18(1)(a) of that regulation were met. [27] There is nothing in the arguments of the appellants that brings into question the soundness of the General Court's analysis.

46. The General Court also rightly analysed the compliance of valuation 2 with the objectives set out in Article 20(5)(b), (f) and (g) of the SRM Regulation, given that in that valuation, Deloitte referred to materially the same objectives, citing Article 36(4)(b), (f) and (g) of Directive 2014/59. [28]

47. The appellants are correct in stating that the General Court wrongly stated, in paragraph 298 of the judgment under appeal, that no specific argument was put forward in respect of the objective provided for in Article 20(5)(c) of the SRM Regulation. [29]

48. However, the General Court was right to refer to Article 20(10) of the SRM Regulation, according to which the provisional valuation 'shall comply with the requirements laid down in paragraph 4 and, in so far as reasonably practicable in the circumstances, with the requirements laid down in paragraphs 1, 7 and 9'. That provision does not mention Article 20(5). In addition, the General Court also rightly stated that Article 20(11) of the SRM Regulation is of relevance, because it states that a valuation that does not comply with the requirements of Article 20(5) is to be considered provisional, as valuations 1 and 2 were.

[23] The Court of Justice found that 'the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision'. Judgment of 6 November 2012, *Éditions Odile Jacob* v *Commission* (C-551/10 P, EU:C:2012:681, paragraph 48 and the case-law cited).

[24] See also the analysis in the parallel Opinion concerning valuations and the duty to state reasons, points 54 to 70.

[25] Judgment under appeal, paragraphs 286 to 304.

[26] The purposes of valuation according to Article 20(5) of the SRM Regulation are: '(a) to inform the determination of whether the conditions for resolution or the conditions for the write-down or conversion of capital instruments are met; (b) if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in respect of an entity referred to in Article 2; (c) when the power to write down or convert relevant capital instruments is applied, to inform the decision on the extent of the cancellation or dilution of instruments of ownership, and the extent of the write-down or conversion of relevant capital instruments; … (f) when the sale of business tool is applied, to inform the decision on the assets, rights, liabilities or instruments of ownership to be transferred and to inform the Board's understanding of what constitutes commercial terms for the purposes of Article 24(2)(b); (g) in all cases, to ensure that any losses on the assets of an entity referred to in Article 2 are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised.'

[27] Judgment under appeal, paragraphs 292 and 293.

[28] Judgment under appeal, paragraphs 300 and 301.

[29] They refer to points 61 to 66 of their reply at first instance, where indeed that objective is addressed.

49. I therefore consider that the General Court did not err in its interpretation of Article 20(5) of the SRM Regulation.

50. Third, the appellants argue that the General Court erred in finding that valuation 2 did not breach the requirements of Article 20(7) and (9) of the SRM Regulation.

51. The General Court found that Article 20(10) of the SRM Regulation, which concerns provisional valuations, provides that paragraphs 1, 7 and 9 of Article 20 shall be complied with 'in so far as reasonably practicable' in the circumstances. [30]

52. 'As far as reasonably practicable' in my view therefore rightly includes the valuation having been made on a consolidated basis, rather than concerning each entity in the Banco Popular group, which, as the General Court rightly stated, is not a requirement under Article 20(7) of the SRM Regulation. [31]

53. The General Court also did not err in concluding that valuation 2 complied with Article 20(9) of the SRM Regulation without including the subdivision of creditors in classes, given that that information was not available until valuation 3. [32]

54. Fourth, the appellants argue that the General Court erred in interpreting and applying Article 20(10) and (11) of the SRM Regulation with regard to valuation 2. They argue that because valuation 2 (which is provisional under Article 20(10) of the SRM Regulation) was not followed by a definitive *ex post* valuation (contrary to the second sentence of Article 20(11) of the SRM Regulation), the resolution scheme, which was based on such a provisional valuation, is invalid.

55. The SRB confirmed, in response to written questions put by the General Court, that it will not carry out an *ex post* definitive valuation, because it would serve no practical purpose under Article 20(11) of the SRM Regulation. [33]

56. The General Court relied on Article 20(13) of the SRM Regulation, which states that 'a provisional valuation conducted in accordance with paragraphs 10 and 11 shall be a valid basis for the Board to decide on resolution actions', in finding that the lack of an *ex post* valuation does not affect the legality of the resolution scheme. [34] The General Court further found that a valuation that would have been carried out *after* the adoption of the resolution scheme and its approval by the Commission cannot affect the legality of that scheme or that approval. [35]

57. Taking into account the findings of the Court of Justice in *Aeris Invest* v *SRB*, [36] I am of the view that the General Court correctly interpreted and applied Article 20(10) and (11) of the SRM Regulation.

30 Judgment under appeal, paragraph 414.

31 Judgment under appeal, paragraph 415.

32 Judgment under appeal, paragraphs 421 and 422.

33 The SRB also stated that a compensatory function of such an *ex post* valuation under Article 20(12) of the SRM Regulation would not be applicable to the present resolution action. The Court of Justice confirmed that Article 20(12) of the SRM Regulation does not apply to the sale of business tool in the judgment of 21 December 2021, *Aeris Invest* v *SRB* (C-874/19 P, EU:C:2021:1040, paragraphs 80 to 82).

34 Judgment under appeal, paragraph 280.

35 Referring to the 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) in the judgment under appeal, paragraphs 281 and 282.

36 Judgment of 21 December 2021, *Aeris Invest* v *SRB* (C-874/19 P, EU:C:2021:1040).

58. In conclusion, I suggest that the Court reject the first four parts of the second ground of appeal as unfounded.

B. Claim for damages

59. By their third ground of appeal, the appellants simply state, in one paragraph, that they maintain their arguments in respect of the request for damages.

60. Although they indicate the relevant paragraphs of the parallel judgment under appeal, the appellants only generally refer to their request for damages and to Article 264 TFEU, without specifying the error allegedly committed by the General Court. [37]

61. According to the settled case-law of the Court of Justice, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, and Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of that appeal. [38]

62. I therefore suggest that the Court find this ground of appeal manifestly inadmissible.

C. Non-contractual liability of the Union

63. By their fourth ground of appeal, the appellants raise two arguments. First, they argue that the General Court failed to establish the breach, on the part of the SRB, of the obligation of confidentiality under Article 88 of the SRM Regulation and Article 339 TFEU. The breach refers to the interview given by the Chair of the SRB, Ms König, to Bloomberg on 23 May 2017 and the alleged leak of information published by various press outlets. [39] They also argue that the SRB and the Commission breached their duty of confidentiality by remaining passive and not conducting an internal investigation in respect of the alleged leaks that were published in an article by Reuters.

64. Second, they argue that the General Court erred in finding their challenge against valuation 2 and the resulting claim for compensation inadmissible.

65. In respect of the first argument, the appellants argue that the information that Banco Popular was under supervision was in itself confidential, contrary to what the General Court stated in paragraph 613 of the judgment under appeal.

[37] This is to be considered inadmissiblefollowing the Court of Justice's judgment of 28 April 2022, *Changmao Biochemical Engineering* v *Commission* (C-666/19 P, EU:C:2022:323, paragraphs 187 to 189). In addition, 'an appeal that does not contain any arguments aimed at specifically identifying the error of law by which the judgment or order in question is allegedly vitiated does not satisfy that requirement'. Judgment of 14 October 2021, *NRW. Bank* v *SRB* (C-662/19 P, EU:C:2021:846, paragraph 36).

[38] Judgment of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group* (C-396/19 P, EU:C:2020:845, paragraph 24 and the case-law cited).

[39] The General Court confined its analysis to the interview with Bloomberg and the article published by Reuters, given that the applicants at first instance did not specify other alleged leaks by the SRB. Judgment under appeal, paragraph 610.

66. Recital 116 of the SRM Regulation sets out the information that may be considered confidential: the contents and details of resolution plans and the result of any assessment of those plans, and any information provided in respect of a decision before it is taken, such as whether the conditions for resolution are met, on the use of a specific resolution tool, or of any action during the proceedings.

67. The General Court examined the information that the Chair of the SRB shared in the interview. More specifically, she stated the following: 'Well, I am never talking about individual banks. There are more banks than just one on our radar screen and of course, Banco Popular is also a case we are watching but it is not the only one we are watching.' [40]

68. The General Court found that those remarks were of a general nature and that the 'information that Banco Popular, as a credit institution covered by the single supervisory mechanism, was being "watched" was not confidential'. [41] The General Court added that it was already public information that the ECB had conducted an inspection of Banco Popular. [42]

69. I consider that the General Court was right in finding that the statements of the Chair of the SRB were broad enough so as not to divulge the information that Banco Popular was in the process of determining whether the resolution conditions were met, information that would be confidential under recital 116 of the SRM Regulation.

70. With regards to the Reuters article, the General Court found, in paragraphs 619 to 643 of the judgment under appeal, that it was not established that an employee of the SRB was the source of the leaks, and that the SRB's inaction in denying the leaked information did not prove that it was responsible for that leak.

71. In addition, the General Court rightly pointed out, in paragraph 623 of the judgment under appeal, that the applicants at first instance 'fail[ed] to specify which items of information contained in that article [were] confidential, or to what extent their disclosure would constitute a breach of the requirements of professional secrecy of the SRB or the Commission'.

72. In addition, the General Court stated, in paragraph 625 of the judgment under appeal, that the SRB had issued a press release, which contradicted the broad interpretation given in the Reuters article to the interview given by the Chair of the SRB.

73. Furthermore, the General Court referred, in paragraphs 628 to 632 of the judgment under appeal, to other information available in the public sphere, proving that the Reuters article did not divulge any confidential information.

74. Finally, the General Court found, in paragraph 637 of the judgment under appeal, that the applicants at first instance did not prove the allegation that a SRB or a Commission official leaked the information to Reuters, as they have adduced no evidence to that end.

75. The appellants also argue that the General Court wrongly assessed a number of facts, without, however, arguing that they were distorted. This relates to the comparison of facts established in the interview with Bloomberg with those in the Reuters article, as well as the alleged leaks of information to the Spanish administrative authorities.

[40] Judgment under appeal, paragraph 612.

[41] Ibid, paragraph 613.

[42] Ibid, paragraph 614.

76. I consider these arguments to be inadmissible, as the Court of Justice does not have jurisdiction to establish the facts or examine the evidence, except where the appellants argue that the General Court distorted the facts and that such distortion is obvious from the documents on the Court's file. [43]

77. In addition, the party alleging distortion must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that party's view, led to such distortion. [44]

78. The appellants confine themselves to characterising the facts already assessed by the General Court, without demonstrating that that court distorted the evidence.

79. I therefore consider that the General Court rightly established that the SRB and the Commission did not breach their obligation of confidentiality under Article 88 of the SRM Regulation and Article 339 TFEU.

80. In the event that the Court finds otherwise, the alleged causal link between that breach and the damage caused to the appellants remains to be addressed.

81. The appellants claim that the General Court was wrong to find, in paragraphs 653 to 674 of the judgment under appeal, that there was no causal link between the breach of confidentiality and Banco Popular being placed under resolution.

82. I consider that the General Court rightly pointed out that Banco Popular's liquidity problems were severe before the interview took place on 23 May 2017 and that Banco Popular's liquidity crisis was caused by multiple factors that originated in the bank's poor results announced in February and April 2017.

83. In referring to the case-law on the causal link, I consider that the General Court was right to conclude that the applicants at first instance did not establish a sufficiently direct link between the damage and the conduct complained of, which must be the decisive cause of the damage. [45]

84. I therefore consider that the first part of the fourth ground of appeal should be rejected.

85. In respect of the second argument, the General Court referred to Article 20(15) of the SRM Regulation [46] and concluded that a challenge against valuation 2 cannot be subject to a separate appeal. [47]

86. The General Court also found their claim for compensation inadmissible, because the SRM Regulation does not provide for the possibility of seeking compensation, nor did the applicants at first instance specify the exact extent of the damage sustained or the exact amount of the

[43] Judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 63); judgment of 29 October 2015, *Commission* v *ANKO* (C-78/14 P, EU:C:2015:732, paragraph 54).

[44] Judgment of 10 November 2022, *Commission* v *Valencia Club de Fútbol* (C-211/20 P, EU:C:2022:862, paragraph 55).

[45] Judgment under appeal, paragraph 655, referring to judgment of 11 July 2019, *BP* v *FRA* (T-838/16, EU:T:2019:494, paragraph 217 and the case-law cited).

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

[47] Judgment under appeal, paragraphs 680 to 682.

compensation sought. The General Court supported this finding by pointing out that the applicants at first instance failed to structure their claim in respect of the conditions for establishing the non-contractual liability of the European Union under Article 340 TFEU. [48]

87. I therefore propose that the Court uphold the findings of the General Court in respect of the second part of the fourth ground of appeal.

VI. Conclusion

88. In light of the foregoing, I propose that the Court should:

– dismiss the appeal;

– order the appellants to pay the costs.

[48] Judgment under appeal, paragraphs 685, 689, and 697.