Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

4 March 2021 *

(Appeal – Economic and monetary union – Banking union – Recovery and resolution of credit institutions and investment firms – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure – Adoption of a resolution scheme in respect of Banco Popular Español SA – Regulation (EU) No 806/2014 – Article 24 – Sale of business tool – Article 21 – Write-down and conversion of capital instruments – Tier 2 instruments – Action for annulment – Partial annulment – Not severable – Inadmissibility)

In Case C-947/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 December 2019,

Carmen Liaño Reig, residing in Alcobendas (Spain), represented by F. López Antón, abogado,

appellant,

the other party to the proceedings being:

Single Resolution Board (SRB), represented by A. Valavanidou, S. Branca and J. King, acting as Agents, and by B. Meyring and T. Klupsch, Rechtsanwälte, and F.B. Fernández de Trocóniz Robles, abogado,

defendant at first instance,

THE COURT (Eighth Chamber),

composed of N. Wahl (Rapporteur), President of the Chamber, F. Biltgen and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Spanish.

Judgment

1 By her appeal, Ms Carmen Liaño Reig asks the Court to set aside the order of the General Court of the European Union of 24 October 2019, *Liaño Reig* v *SRB* (T-557/17, not published, EU:T:2019:771; 'the order under appeal'), by which that court dismissed her action seeking (i) the annulment of Article 6(1)(d) of Decision SRB/EES/2017/08 of the Single Resolution Board (SRB) of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español SA ('Banco Popular') ('the resolution decision'), inasmuch as Article 6(1)(d) makes provision for the conversion of the Tier 2 instruments identified by International Securities Identification Number (ISIN) XS 0550098569 into newly issued shares of Banco Popular, and also the annulment of the provisional valuation carried out by the independent expert and of the provisional valuation carried out by the SRB, and (ii) compensation, further to the annulment thus sought, for the loss allegedly sustained as a result of that conversion.

Legal context

Regulation (EU) No 806/2014

2 According to Article 3(1)(30), (40), (44), (47) and (51) 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):

'For the purposes of this Regulation the following definitions apply:

…

30. "sale of business tool" means the mechanism for effecting a transfer by a resolution authority of instruments of ownership issued by an institution under resolution, or assets, rights or liabilities of an institution under resolution, to a purchaser that is not a bridge institution, in accordance with Article 24;

…

40. "own funds" means own funds as defined in Article 4(1)(118) 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, and corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6)];

…

44. "write-down and conversion powers" means the powers referred to in Article 21;

…

47. "Tier 2 instruments" means capital instruments or subordinated loans that meet the conditions laid down in Article 63 of Regulation [No 575/2013];

…

51. “relevant capital instruments” means Additional Tier 1 instruments and Tier 2 instruments’.

3 Article 15(1)(a), (b), (f) and (g) of Regulation No 806/2014 provides:

‘1. When acting under the resolution procedure referred to in Article 18, the Board, the Council [of the European Union], the [European] Commission and, where relevant, the national resolution authorities, shall take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

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

(b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims pursuant to Article 17, save as expressly provided otherwise in this Regulation;

…

(f) except where otherwise provided in this Regulation, creditors of the same class are treated in an equitable manner;

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

4 Article 17 of Regulation No 806/2014, entitled ‘Order of priority of claims’, provides:

‘1. When applying the bail-in tool to an entity referred to in Article 2 of this Regulation, and without prejudice to liabilities excluded from the bail-in tool under Article 27(3) of this Regulation, the Board, the Commission, or, where applicable, the national resolution authorities, shall decide on the exercise of the write-down and conversion powers, including on any possible application of Article 27(5) of this Regulation, and the national resolution authorities shall exercise those powers in accordance with Articles 47 and 48 of Directive 2014/59/EU [of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190)] and in accordance with the reverse order of priority of claims laid down in their national law, including the provisions transposing Article 108 of that Directive.

2. Participating Member States shall notify to the Commission and to the Board the ranking of claims against entities referred to in Article 2 in national insolvency proceedings on 1 July of every year or immediately, where there is a change of the ranking.

Where the bail-in tool is applied, the relevant deposit guarantee scheme shall be liable in the terms provided for in Article 79.’

5 Under Article 21(1), (7), (10) and (11) of that regulation:

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

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

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

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

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

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

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

…

7. If one or more of the conditions referred to in paragraph 1 are met, the Board, acting under the procedure laid down in Article 18, shall determine whether the powers to write down or convert relevant capital instruments are to be exercised independently or, in accordance with the procedure under Article 18, in combination with a resolution action.

…

10. The Board shall ensure that the national resolution authorities exercise the write-down or conversion powers without delay, in accordance with the priority of claims pursuant to Article 17 and in a way that produces the following results:

(a) Common Equity Tier 1 items are reduced first in proportion to the losses and to the extent of their capacity;

(b) the principal amount of Additional Tier 1 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 14 or to the extent of the capacity of the relevant capital instruments, whichever is lower;

(c) the principal amount of Tier 2 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 14 or to the extent of the capacity of the relevant capital instruments, whichever is lower.

11. The national resolution authorities shall implement the instructions of the Board and exercise the write-down or conversion of relevant capital instruments in accordance with Article 29.'

6 According to Article 22(1) of Regulation No 806/2014:

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

7 Article 24 of that regulation provides:

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

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

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

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

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

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

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

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

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

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

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

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

Regulation No 575/2013

8 Article 4(1)(118) of Regulation No 575/2013 states that 'own funds' means 'the sum of Tier 1 capital and Tier 2 capital'.

9 According to Article 63(n) of that regulation, in the version applicable on the date of adoption of the resolution decision:

'Capital instruments and subordinated loans shall qualify as Tier 2 instruments provided the following conditions are met:

…

(n) where the instruments are not issued directly by an institution, or where the subordinated loans are not raised directly by an institution, as applicable, both of the following conditions shall be met:
(i) the instruments are issued or subordinated loans are raised, as applicable, through an entity, which is part of the consolidation pursuant to Chapter 2 of Title II of Part One;
(ii) the proceeds are immediately available to the institution without limitation in a form that satisfies the conditions laid down in this paragraph.'

Background to the dispute

10 The background to the dispute is summarised as follows in paragraphs 1 to 11 of the order under appeal:

'1 The applicant, Ms … Liaño Reig, was the owner of a bond with a nominal value of EUR 50 000 issued by BPE Financiaciones, SA, identified by [ISIN] XS 0550098569, prior to the adoption of a resolution … scheme in respect of [Banco Popular].

2 On 7 June 2017, the [SRB] adopted the resolution decision …, on the basis of [Regulation No 806/2014].

3 Prior to the adoption of the resolution decision, Banco Popular was valued in accordance with Article 20 of Regulation No 806/2014. That valuation comprises two reports which are annexed to the resolution decision. The first valuation report ("Valuation 1"), dated 5 June 2017, was compiled by the SRB pursuant to Article 20(5)(a) of Regulation No 806/2014

and was intended to inform the determination of whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met. The second valuation report ("Valuation 2"), dated 6 June 2017, was compiled by an independent expert, …, 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 constituted commercial terms for the purposes of the sale of business tool.

4 In Article 5(1) of the resolution decision, the SRB decided that:

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

5 Article 6 of the resolution decision concerns the write-down of capital instruments and the sale of business tool. In Article 6(1) of that decision, the SRB stated which measures it had decided upon pursuant to its write-down power provided for in Article 21 of Regulation No 806/2014.

6 Accordingly, in Article 6(1) of the resolution decision, the SRB decided:
(a) 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;
(b) next, to convert all the principal amount of the Additional Tier 1 instruments issued by Banco Popular and outstanding as at the date of the resolution decision into newly issued shares of Banco Popular ("New Shares I");
(c) subsequently, to write down to zero the nominal amount of the "New Shares I", which would result in the cancellation of 100% of those "New Shares I";
(d) lastly, to convert all the principal amount of Tier 2 instruments issued by Banco Popular and outstanding as at the date of the resolution decision into newly issued shares of Banco Popular ("New Shares II"). The Tier 2 instruments concerned are converted into "New Shares II".

7 Article 6(3) of the resolution decision provides that those write-down and conversion measures are based on Valuation 2, corroborated by the results of an open and transparent marketing process conducted by the Spanish resolution authority, the Fondo de Reestructuración Ordenada Bancaria (the FROB (Fund for Orderly Bank Restructuring)).

8 In Article 6(5) of the resolution decision, the SRB stated that it was exercising its powers under Article 24(1)(a) of Regulation No 806/2014, concerning the sale of business tool, and ordered the "New Shares II" to be transferred to Banco Santander, SA, free and clear of any right or liens of any third party, in consideration for the payment of a purchase price of EUR 1. It is specified that the purchaser had already consented to the transfer.

9 On 7 June 2017, the … Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for Banco Popular [SA] (OJ 2017 L 178, p. 15).

10 On the same day, the FROB adopted the necessary measures to implement the resolution decision, in accordance with Article 29 of Regulation No 806/2014. Within that context, the FROB approved the transfer to Banco Santander of Banco Popular's new shares resulting from the conversion of the Tier 2 instruments.

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

The action before the General Court and the order under appeal

11 By application lodged at the General Court Registry on 17 August 2017, the appellant brought an action, first, for the annulment of Article 6(1)(d) of the resolution decision, inasmuch as that provision provides for the conversion of the Tier 2 instruments identified by ISIN XS 0550098569 into newly issued shares of Banco Popular, and for the annulment of the provisional valuation carried out by the independent expert and the provisional valuation carried out by the SRB and, secondly, for compensation, further to the annulment thus sought, for the loss allegedly sustained as a result of that conversion.

12 On 14 February 2018, in the context of the measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, the General Court invited the SRB to produce certain documents. The SRB complied with that request within the period prescribed.

13 On 6 July 2018, in the context of the measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, the General Court put written questions to the parties concerning, in particular, the appellant's legal interest in bringing proceedings and her standing to bring such proceedings. The parties replied to those questions within the period prescribed.

14 On 17 May 2019, in the context of the measures of organisation of procedure provided for in Article 89 of its Rules of Procedure, the General Court put written questions to the parties concerning the admissibility of the action. Those questions related, in particular, to the partial annulment of the resolution decision and the severability of certain provisions of that decision. The parties replied to those questions within the period prescribed.

15 By the order under appeal, the General Court, on the basis of Article 129 of its Rules of Procedure, decided to rule by reasoned order on whether there was any absolute bar to proceeding with the case and dismissed the action as manifestly inadmissible without ruling on the pleas in law raised by the appellant.

16 For that purpose, as regards, first, the application for partial annulment of the resolution decision, the General Court pointed out that, according to the case-law (judgment of 16 July 2015, *Commission* v *Council*, C-425/13, EU:C:2015:483, paragraph 94 and the case-law cited), partial annulment of an EU act is possible only in so far as the elements whose annulment is sought may be severed from the remainder of that act. The General Court also noted that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance. Review of whether the contested provisions are severable requires consideration of their scope, in order to be able to assess whether their annulment would alter the spirit and substance of the decision the annulment of which is sought. Lastly, the General Court stated that since an application for partial annulment of a decision had been brought before it, it was necessary to ascertain whether such partial annulment was possible. If that were not the case, the

action would have to be dismissed as inadmissible, since the General Court could not declare an act void in its entirety, if only an application for partial annulment had been brought before it, without ruling *ultra petita*.

17 Consequently, in order to determine whether the provision of the resolution decision whose annulment was sought – namely that providing for the conversion of the Tier 2 instruments held by the appellant – is severable from Banco Popular's resolution scheme as a whole, the General Court pointed out that the securities issued by BPE Financiaciones held by the appellant were Tier 2 instruments of Banco Popular, identified in Article 6(1)(d) of the resolution decision among the Tier 2 instruments of Banco Popular to be written down and converted into 'New Shares II'. In that regard, the General Court added that, according to Article 6 of the resolution decision, the resolution tool applied, namely the sale of business tool, presupposed, in the case of Banco Popular, the conversion of all the Tier 2 instruments identified in the resolution decision into 'New Shares II'. The General Court further noted that, according to Article 6(3) of the resolution decision, 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 FROB. Since Banco Santander had offered to purchase the shares of Banco Popular for the price of EUR 1, which entailed in particular the conversion of 100% of Banco Popular's Tier 2 instruments, the conversion of all those instruments was a prerequisite for the sale to Banco Santander which could not have taken place under the same conditions if some of the Tier 2 instruments outstanding as at the date of the resolution decision had not been converted. Lastly, the General Court rejected the other arguments put forward by the appellant concerning the severability, from the resolution decision as a whole, of the decision to convert the Tier 2 instruments.

18 As regards, secondly, the application for annulment of Valuations 1 and 2, the General Court held that since the application for partial annulment of the resolution decision had been dismissed as inadmissible, the application for the annulment of those valuations should also be declared inadmissible.

19 As regards, thirdly, the claim for compensation, the General Court held that since the application for annulment had been dismissed as inadmissible, that claim also had to be dismissed, without prejudice to the possibility for the appellant of subsequently bringing an action for damages.

Forms of order sought

20 By her appeal, Ms Liaño Reig claims that the Court of Justice should:

– allow the appeal and set aside the order under appeal as regards the dismissal of the action before the General Court as inadmissible and the order for her to pay the costs, which are set out in points 1 and 3, respectively, of the operative part of the order under appeal, and

– give final judgment itself on the dispute submitted to the General Court, allowing all her claims set out in the application at first instance if it considers that the state of the proceedings so permits, or, failing that, refer the case back to the General Court for judgment, reserving the decision on costs.

21 The SRB contends that the Court should:

– dismiss the appeal, and

– order the appellant to pay the costs of the present proceedings and those of the proceedings before the General Court.

The appeal

22 The appellant puts forward four grounds in support of her appeal. By the first ground of appeal, divided into eight parts, she challenges the order under appeal in so far as the General Court held that the provision whose annulment was sought was not severable from the other elements of the resolution scheme without altering the substance of that decision. By the second ground of appeal, which is divided into three parts, the appellant challenges the order under appeal in so far as the General Court held that the partial annulment of the resolution decision was contrary to the principle of equal treatment of creditors belonging to the same class. By the third ground of appeal, the appellant challenges the inadmissibility of the application for annulment of Valuations 1 and 2. Lastly, by the fourth ground of appeal, she challenges the inadmissibility of the compensation claim.

The first, third, fourth and sixth to eighth parts of the first ground of appeal

Arguments of the parties

23 By the first, third, fourth and sixth to eighth parts of the first ground of appeal, which it is appropriate to examine together and first of all, the appellant submits that the order under appeal, and, in particular, paragraphs 30 and 35, 31 and 32, 40 and 42 thereof, are vitiated by a failure to state reasons and that the General Court did not respond to certain of her arguments.

24 The General Court thus failed to identify the substance of the resolution decision, failed to state reasons for the assertion that the conversion of the BPE Financiaciones bonds into Banco Popular shares was important for the transfer of its entire share capital to Banco Santander, and failed to explain the reasons for which the appellant's argument was 'illogical'. The General Court also failed to explain the objective criterion on which it based the inadmissibility of the action. Furthermore, the General Court failed to state reasons for its finding that it was necessary, for the purposes of transferring the entire share capital of Banco Popular to Banco Santander, to convert all Tier 2 instruments as a precondition for applying the sale-of-business resolution tool. Lastly, the General Court failed to state reasons for rejecting several of the appellant's contentions relating to the invalidity of Valuation 2, to the insignificance of the amount of her securities in the light of all the capital instruments of Banco Popular that were written down and converted, and to the application of Article 21(1)(c) of Regulation No 806/2014.

25 The SRB disputes the appellant's arguments.

Findings of the Court

26 First of all, it must be borne in mind that, according to settled case-law, the obligation to state reasons requires the General Court to clearly and unequivocally disclose the reasoning followed by it in such a way as to enable the persons concerned to ascertain the reasons for the decision

taken and the Court of Justice to exercise its power of review (judgment of 16 July 2020, *Inclusion Alliance for Europe* v *Commission*, C-378/16 P, EU:C:2020:575, paragraph 95 and the case-law cited).

27 Next, it must be recalled that, in accordance with equally settled case-law of the Court of Justice in relation to appeals, the reasoning in a judgment of the General Court may be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review (judgment of 16 July 2020, *Nexans France and Nexans* v *Commission*, C-606/18 P, EU:C:2020:571, paragraph 101 and the case-law cited). Thus, the duty to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case (judgment of 25 June 2020, *SatCen* v *KF*, C-14/19 P, EU:C:2020:492, paragraph 96 and the case-law cited).

28 Lastly, the General Court's duty to state reasons must be distinguished from the question whether the reasoning underlying the order under appeal is well founded (see, to that effect, judgments of 18 June 2015, *Ipatau* v *Council*, C-535/14 P, EU:C:2015:407, paragraph 37, and of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 48), with the result that the fact that the General Court, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate that order for failure to state reasons (judgment of 20 May 2010, *Gogos* v *Commission*, C-583/08 P, EU:C:2010:287, paragraph 35 and the case-law cited).

29 As regards the first and third parts of the first ground of appeal, the appellant complains that the General Court failed to identify, in paragraph 40 of the order under appeal, the substance of the resolution decision and, consequently, failed to take account of the case-law according to which, in order to assess the admissibility of an application for partial annulment of an EU act, it is necessary to determine, in the light of an objective criterion, whether such annulment would alter the substance of the act at issue.

30 In that regard, in the first place, it should be noted that, in paragraphs 27 to 36 of the order under appeal, the General Court assessed the severability of Article 6(1)(d) of the resolution decision, the annulment of which the appellant sought.

31 To that end, the General Court analysed the provisions of that decision and concluded therefrom that, first, the write-down and conversion of all the Additional Tier 1 instruments and the conversion of all Tier 2 instruments was a prerequisite for applying the sale of business tool and, secondly, the conversion of all the Tier 2 instruments of Banco Popular was a prerequisite for the sale to Banco Santander.

32 Even though the General Court did not expressly so state, such factors reveal the content and substance of the resolution decision. In addition, that analysis by the General Court shows that by means thereof – in accordance with the case-law (judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 38) – it determined on the basis of an objective criterion, that is the content of the resolution decision, whether the element of that decision whose annulment was sought could be severed from the remainder of the decision, and whether the partial annulment of that decision would have the effect of altering its substance.

33 Secondly, it should be noted that paragraph 40 of the order under appeal seeks to respond to the appellant's argument referred to in paragraph 39 of that order, and not to assess, *stricto sensu*, the severability of Article 6(1)(d) of the resolution decision. Moreover, contrary to what the appellant maintains, the General Court sets out, in paragraph 40 of that order, clearly and unequivocally, the reason why it describes the appellant's argument as 'illogical'. Thus, it follows from the second sentence of that paragraph, introduced moreover by the phrase 'indeed', that that argument is 'illogical', since if the securities held by the appellant had not been converted into 'New Shares II', it would be impossible to consider that the entire share capital of Banco Popular had been transferred to Banco Santander.

34 It follows that the first and third parts of the first ground of appeal must be rejected.

35 As regards the fourth part of the first ground of appeal, the appellant submits that paragraphs 30 and 35 of the order under appeal are vitiated by a failure to state reasons concerning the need to convert all the Tier 2 instruments as a prerequisite for applying the sale-of-business resolution tool.

36 In that regard, it should be stated at the outset that, in paragraph 30 of the order under appeal, the General Court confined itself to identifying the substance of the resolution decision by referring to the content of Article 6 of that decision without carrying out an assessment of the need to convert all the Tier 2 instruments as a prerequisite for applying the resolution tool.

37 As regards paragraph 35 of the order under appeal, the General Court states therein that, for the reasons which it had just set out, the conversion of all the Tier 2 instruments of Banco Popular was a prerequisite for the sale to Banco Santander, that that sale could not have taken place under the same conditions if some of the Tier 2 instruments outstanding as at the date of the resolution decision had not been converted and the annulment of the conversion of some of those instruments would be such as to alter the substance of the resolution decision.

38 That paragraph cannot, therefore, be read in isolation from paragraphs 28 to 34 of the order under appeal which precede it, in which the General Court, in accordance with the requirements recalled in paragraph 26 of the present judgment, set out the reasons which led it to consider that the conversion of all the Tier 2 instruments was a prerequisite for applying the resolution tool.

39 It follows that, contrary to the appellant's contention, the General Court's assessment in paragraph 35 of the order under appeal is sufficiently reasoned.

40 The appellant also submits that, in paragraph 35 of the order under appeal, the General Court erred in law since, in the light of the various arguments which she put forward, it would have been justified to conclude that if the BPE Financiaciones bonds had not been converted into shares in Banco Popular, Banco Santander would neither have declined to submit its bid for the purchase of Banco Popular's business nor reduced the purchase price offered. Accordingly, the conversion of the BPE Financiaciones bonds into Banco Popular shares did not entail a change in the conditions of the sale of Banco Popular's shares to Banco Santander and the annulment requested had no bearing on the substance of the resolution decision.

41 In that regard, the Court of Justice points out that the appellant relies on the arguments put forward concerning the legality of the provision of the resolution decision. However, the question of the legality of that decision must be distinguished from that of the admissibility of

the application for partial annulment of that decision, with the result that, in assessing the admissibility of an action for annulment of that decision, the General Court is not required to assess and reply to the arguments raised contesting its legality.

42 Accordingly, the appellant cannot complain that the General Court erred in law and infringed the obligation to state reasons by failing to assess arguments relating to the legality of the resolution decision.

43 Consequently, the fourth part of the first ground of appeal must be rejected.

44 As regards the sixth and eighth parts of the first ground of appeal, the appellant submits that the General Court failed to take into account, in paragraphs 31 and 32 of the order under appeal, her contentions concerning Valuation 2 and that it also disregarded her contention relating to the application of Article 21(1)(c) of Regulation No 806/2014 concerning compliance with the condition of severability.

45 First, it must be noted that, in paragraphs 31 and 32 of the order under appeal, the General Court merely set out the provisions of the resolution decision and, in particular, Article 6(4) thereof.

46 Although, in so doing, the General Court referred to Valuation 2, it is clear that the appellant complains that, when assessing the admissibility of her application for partial annulment of the resolution decision, the General Court failed to take into account certain arguments put forward in the reply challenging the legality of that decision.

47 However, as is apparent from paragraph 41 above, when assessing the admissibility of an action for annulment of an EU act, the question of the legality of that act must be distinguished from that of the admissibility of the application for partial annulment of the decision in question.

48 Secondly, it should be noted that, in answer to question 2 asked by way of the measure of organisation of procedure of 17 May 2019, the appellant stated that, as she had argued in paragraph 37 of the reply, even if the bonds issued by BPE Financiaciones were considered a relevant capital instrument and even if resolution action could be applied to capital instruments issued by a subsidiary not falling within the scope of Regulation No 806/2014, that regulation requires, in Article 21(1)(c) thereof, that in order for the bonds to be written down and converted, the group must cease to be viable unless the power to write down or convert the capital instruments issued by the subsidiary is exercised.

49 Admittedly, in the order under appeal, the General Court did not expressly adopt a position in relation to the appellant's argument.

50 It should, however, be pointed out that, in paragraph 42 of the order under appeal, the General Court set out clearly and unequivocally the reasons for which it had to reject the argument that the failure to convert the appellant's securities would not have precluded the transfer of all the shares to Banco Santander under the same conditions.

51 In addition, in paragraphs 43 to 51 of the order under appeal, the General Court set out to the requisite legal standard the reasons for which observance of the principle of equality between all creditors in the same class and Article 21 of Regulation No 806/2014 did not preclude the resolution decision from relating to capital instruments such as those held by the appellant, namely Tier 2 instruments of Banco Popular issued by a wholly owned subsidiary of it.

52 It follows that, in accordance with the case-law referred to in paragraph 27 above, the General Court considered by implication that the appellant's contention relating to the application of Article 21(1)(c) of Regulation No 806/2014 could not show that Article 6(1)(d) of the resolution decision, the annulment of which she sought, was severable from that decision.

53 Moreover, it must also be stated that the appellant's argument that the conditions laid down by that regulation for writing down and converting the capital instruments at issue were not met concerned the legality of Article 6(1)(d) of the resolution decision, not whether that provision was severable. Consequently, the General Court cannot be criticised for not having expressly responded to it.

54 The sixth and eighth parts of the first ground of appeal must, therefore, be rejected.

55 As regards the seventh part of the first ground of appeal, the appellant submits that paragraph 42 of the order under appeal is vitiated by an error of law on account of a failure to state reasons. The General Court did not give reasons for rejecting the appellant's argument referred to in paragraph 41 of the order under appeal or why it was necessary to convert all the capital instruments before applying the sale of business tool by transferring Banco Popular's entire share capital to Banco Santander.

56 In that regard, first, in so far as the appellant submits that paragraph 42 of the order under appeal is vitiated by the same failure to state reasons as paragraph 30 of that order, it suffices to recall that, as the Court of Justice has noted in paragraph 36 above, the General Court confined itself, in paragraph 30 of that order, to identifying the substance of the resolution decision by referring to the content of Article 6 of the resolution decision.

57 Secondly, it should be noted that, in paragraph 42 of the order under appeal, the General Court rejected the appellant's argument by stating that the fact that the securities which she held represented only a small amount was immaterial, since the write-down and conversion power had to be exercised in respect of the entirety of Banco Popular's capital instruments prior to the transfer.

58 It follows that the General Court substantiated its rejection of the appellant's argument. Furthermore, the appellant cannot claim that the General Court failed to state reasons for the need to convert all the capital instruments prior to applying the sale of business tool by transferring Banco Popular's entire share capital to Banco Santander, since such a statement of reasons is expressly set out in paragraphs 28 to 35 of the order under appeal.

59 Accordingly, the seventh part of the first ground of appeal must be rejected.

60 In the light of all the foregoing considerations, the first, third, fourth and sixth to eighth parts of the first ground of appeal must be rejected as unfounded.

The second part of the first ground of appeal and the second ground of appeal

Arguments of the parties

61 By the second part of the first ground of appeal and the second ground of appeal, the appellant submits that the General Court erred in law in holding that Article 6(1)(d) of the resolution decision was not severable from that decision.

62 Paragraph 40 of the order under appeal is misconceived, since the General Court failed to take into account the data concerning the amounts of the Tier 2 instruments referred to in Article 6(1)(d) of the resolution decision and converted into shares in Banco Popular. Furthermore, the appellant did not merely state that BPE Financiaciones could not be placed under resolution and never maintained that that entity was the subject of the resolution scheme, but contended that Regulation No 806/2014, and in particular Article 21 thereof, relating to the exercise of the power to convert and write down capital instruments, was not applicable to it. The General Court also erred in law, in paragraphs 45 and 46 of the order under appeal, by wrongly applying to the bonds issued by BPE Financiaciones the general resolution principle laid down in Article 15(1)(f) of Regulation No 806/2014 whereas that entity does not fall within the scope of that regulation and that principle is not applicable to it. Lastly, the General Court erred in law, in paragraphs 44 to 46 and 51 of the order under appeal, by incorrectly applying the principle of equal treatment in respect of the bonds issued by BPE Financiaciones.

63 The SRB disputes the appellant's arguments.

Findings of the Court

64 As a preliminary point, it should be noted that the resolution decision is composed of two parts. First, the SRB set out, in Articles 1 to 4 of that decision, comprising 'Title I' thereof, the reasons for which Banco Popular should be placed under resolution. Secondly, the SRB set out, in Articles 5 to 7 of that decision, comprising 'Title II' thereof, the resolution tool itself. In particular, Article 5 of the resolution decision makes clear the resolution tool applied, in this case the sale of business tool, and Article 6 of that decision states that, prior to the sale, the SRB is to exercise its power to write down and convert Banco Popular's capital instruments.

65 As regards Article 6(1)(d) of the resolution decision, the annulment of which the appellant sought, the SRB stated therein that all Tier 2 instruments of Banco Popular had to be written down and converted into 'New Shares II', and drew up a list of those instruments including the Tier 2 instruments issued by BPE Financiaciones, identified by ISIN XS 0550098569.

66 It follows that the action before the General Court sought the annulment of an individual item in the list of relevant capital instruments mentioned in Article 6(1)(d) of the resolution decision.

67 In that regard, it must be borne in mind that, according to the Court of Justice's settled case-law, the partial annulment of an EU act is possible only if the elements whose annulment is sought may be severed from the remainder of the act. The Court has repeatedly held that the requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (judgment of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraph 36 and the case-law cited).

68 It follows that review of whether elements of an EU act are severable requires consideration of the scope of those elements in order to assess whether their annulment would alter the spirit and substance of the act (judgment of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraph 37 and the case-law cited).

69 In the present case, those conditions are not met.

70 Indeed, the elements of the resolution decision relating to the writing down and conversion of capital instruments cannot be severed from the other elements of that decision and, in particular, from the decision to use the sale-of-business resolution tool.

71 The substance of a resolution decision such as that at issue in the present case includes not only the choice of resolution tool, but also the decision to combine it with the exercise of the power to write down and convert the capital instruments and the detailed rules for applying them.

72 Accordingly, as the Court of Justice stated in paragraphs 31 and 32 above, the General Court did not err in law in concluding that Article 6(1)(d) of the resolution decision was intrinsically linked to the very substance of the resolution decision and that the partial annulment of that decision would undermine the substance of that decision which presupposes that all the Tier 2 instruments of Banco Popular are written down and then converted into 'New Shares II'.

73 Thus, first, it follows from Article 15(1)(b), in conjunction with Articles 17, 21(10)(c) and 22(1) of Regulation No 806/2014 that where resolution action is taken in respect of an entity, the writing down of capital instruments depends on that entity's level of losses. The full writing down of Tier 2 instruments is, therefore, necessary if losses reach that level of priority of claims.

74 Secondly, the resolution tool chosen in the present case, namely the sale of business tool, presupposes a convergence between a supply and a demand, with the result that calling into question the write-down and conversion of a Tier 2 instrument, such as that referred to in the appellant's application for annulment, would necessarily undermine the price offered by Banco Santander and, therefore, the sale of business to that entity and the application of the resolution instrument.

75 That assessment is not called into question by the appellant's argument that, in paragraph 40 of the order under appeal, the General Court erred in failing to take into account the data relating to the amounts of the Tier 2 instruments referred to in Article 6(1)(d) of the resolution decision and converted into shares in Banco Popular.

76 Indeed, first, the delimitation of the Tier 2 instruments to be written down or converted prior to the application of the resolution tool is, in accordance with Articles 15(1)(b), 17 and 21(10)(c) of Regulation No 806/2014, determined by the level of losses of the entity as well as by the rules on priority of claims.

77 Secondly, contrary to the appellant's contention, whatever the amounts of each of those capital instruments, it could not be considered that all the instruments identified in Article 6(1)(d) of the resolution decision had been converted if one of those instruments representing even an insignificant proportion of those instruments had not been written down. As the General Court rightly pointed out, in such a case, it would be impossible to consider that the entire share capital of Banco Popular was transferred to Banco Santander.

78 The Court of Justice must also reject the appellant's argument that, in paragraphs 48 and 51 of the order under appeal, the General Court erred in its assessment of her claims inasmuch as she did not merely contend that BPE Financiaciones could not be placed under resolution and never argued that that entity was the subject of the resolution scheme, but submitted that BPE Financiaciones, because of its activity, was not among the institutions referred to in Article 1(1) of Directive 2014/59 and Article 2 of Regulation No 806/2014, to which those acts, and in particular Article 21 of that regulation, are applicable.

79 In that regard, it must be pointed out that, in response to point (b) of the first question of the measure of organisation of procedure of the General Court of 17 May 2019, the appellant argued that there was a fundamental and objective difference between the bonds issued by BPE Financiaciones and the other Tier 2 instruments converted into Banco Popular shares pursuant to Article 6(1)(d) of the resolution decision. In particular, she stated that those bonds were the only Tier 2 instrument – converted into shares in Banco Popular – which had been issued by an entity, BPE Financiaciones, which could not be placed under resolution.

80 As it is, in stating, in paragraph 48 of the order under appeal, that the appellant had argued that the failure to convert the securities issued by BPE Financiaciones held by her was compatible with observing the principle of equal treatment between creditors belonging to the same class and that she pleaded an objective difference between the securities she held and the other Tier 2 instruments which had been converted – which lay in the fact that the securities she held had not been issued by Banco Popular, but by BPE Financiaciones – and that BPE Financiaciones did not meet the conditions for being placed under resolution, the General Court did not err in its assessment of the appellant's claims.

81 As regards paragraph 51 of the order under appeal, the General Court stated therein that the appellant's argument, according to which the failure to convert the securities issued by BPE Financiaciones which she held was compatible with observing the principle of equal treatment between creditors belonging to the same class, was the result of confusion. In particular, the General Court found that since the conversion and write-down power, provided for in Article 21 of Regulation No 806/2014, is exercised in respect of the capital instruments of the entity placed under resolution, in this case Banco Popular, the fact that those instruments were issued by a wholly owned subsidiary of Banco Popular did not mean that the entity that issued the instruments was the subject of the resolution scheme and is not such as to establish that there was a difference in situation with regard to Banco Popular's other Tier 2 instruments. In so doing, the General Court did not err in its assessment of the appellant's claims.

82 The Court of Justice must also reject the appellant's argument that the General Court erred in law, in paragraphs 45 and 46 of the order under appeal, by wrongly applying to the bonds issued by BPE Financiaciones, an entity not falling within the scope of Regulation No 806/2014, the general resolution principle laid down in Article 15(1)(f) of that regulation.

83 In that regard, it should be borne in mind that, in paragraphs 45 and 46 of the order under appeal, the General Court found that the general principle governing resolution enshrined in Article 15(1)(f) of Regulation No 806/2014, according to which creditors of the same class are treated in an equitable manner, would be undermined if it were possible to annul the resolution decision only in so far as it provides for the conversion of certain Tier 2 instruments. The General Court concluded from this that that principle also precluded the annulment of the conversion of certain Tier 2 instruments.

84 Such an assessment does not amount to an error of law.

85 Article 3(1)(47) of Regulation No 806/2014 provides that, for the purposes of that regulation, the concept of 'Tier 2 instruments' means capital instruments or subordinated loans that meet the conditions laid down in Article 63 of Regulation No 575/2013. According to that latter provision, instruments which are not issued directly by an institution, or subordinated loans that are not raised directly by an institution, may, however, qualify as Tier 2 instruments provided that certain conditions are met.

86 It follows that the conversion and write-down power provided for in Article 21 of Regulation No 806/2014 does not depend on the entity which issued the bonds, but on the characteristics of those bonds.

87 Since the appellant has not disputed, either before the General Court or the Court of Justice, that the securities issued by BPE Financiaciones constitute Tier 2 instruments of Banco Popular, and since she has not raised any objection to paragraph 28 of the order under appeal, she does not dispute that those securities constitute a capital instrument of an institution placed under resolution.

88 Consequently, the General Court rightly stated that, first, the applicable legal framework allowed the securities issued by BPE Financiaciones to be considered Tier 2 instruments and, secondly, that such instruments could be subject to the power to write down and convert under Article 21 of Regulation No 806/2014 and to the principle of equality between all creditors of the same class enshrined in Article 15(1)(f) of Regulation No 806/2014.

89 Lastly, the Court of Justice must also reject the appellant's argument that the General Court erred in law and committed an error of reasoning, in paragraphs 44 to 46 and 51 of the order under appeal, by incorrectly applying the principle of equal treatment to the bonds issued by BPE Financiaciones.

90 It should be borne in mind that, in paragraphs 44 to 46 of the order under appeal, the General Court held that the holders of an institution's Tier 2 instruments are a class of creditors who should be treated in the same manner in the context of the SRB's exercising its power to write down and convert capital instruments. It inferred from this that that general principle of equality in relation to resolution would be undermined if it were possible to annul the resolution decision only in so far as it provides for the conversion of certain Tier 2 instruments and that, consequently, observance of the principle of equality between all creditors of the same class also precluded the annulment of the conversion of only certain Tier 2 instruments.

91 In paragraph 51 of that order, the General Court concluded its assessment of the appellant's argument, stating that it was the result of confusion. It pointed out that the conversion and write-down powers, provided for in Article 21 of Regulation No 806/2014, were exercised in respect of the capital instruments of the entity placed under resolution, that is in this case Banco Popular. It further stated that the fact that those instruments had been issued by a wholly owned subsidiary of Banco Popular did not mean that the entity which had issued the instruments was the subject of the resolution scheme and was not such as to establish that there was a difference in situation with regard to Banco Popular's other Tier 2 instruments.

92 To the extent that the appellant complains that the General Court failed to respond to some of her contentions, it should be borne in mind that, in accordance with paragraphs 26 to 28 and 41 above, the General Court is not required to respond to all the arguments raised before it and, in particular, to those relating to the legality of the provision whose annulment is sought. Indeed, since the analysis of the severability of a provision is carried out at the stage of assessing whether an action is admissible, to consider and, if necessary, to respond to arguments put forward concerning the legality of the act at issue is premature.

93 In addition, the appellant merely invokes such arguments and states that since Article 6(1)(d) of the resolution decision is unlawful, that provision is severable from the remainder of that decision, without actually proving the differences between the holders of the bonds issued by BPE Financiaciones and the holders of the other Tier 2 instruments referred to in that provision, justifying a difference in treatment with regard to the latter and partial annulment of the resolution decision.

94 In the light of all the foregoing considerations, the second part of the first ground of appeal and the second ground of appeal must be rejected as unfounded.

The fifth part of the first ground of appeal

Arguments of the parties

95 In the fifth part of the first ground of appeal, the appellant submits that, by relying, in paragraphs 33 and 34 of the order under appeal, on the firm offer submitted by Banco Santander on 7 June 2017, even though that document was not placed on the file, the General Court erred in law and infringed the rights of the defence. She also complains that the General Court failed to adopt a measure of organisation of procedure in order to remedy that deficiency in the file. Lastly, the appellant submits that, in that context and in view of the importance which the General Court attributed to it, knowledge of that offer would have enabled her to demonstrate, as is apparent from footnote 37 of the SRB's rejoinder before the General Court, that in that offer, Banco Santander had not formulated any condition or requirement concerning the Tier 2 instruments to be converted.

96 The SRB disputes the appellant's arguments.

Findings of the Court

97 First, in so far as the appellant submits that Banco Santander had not formulated any condition or requirement concerning the Tier 2 instruments to be converted and that the General Court distorted the offer submitted by Banco Santander on 7 June 2017, such an argument must be rejected. As the appellant herself states, the General Court did not have access to that document.

98 Secondly, it must be borne in mind that the General Court is the sole judge of whether the information available to it concerning the cases before it needs to be supplemented (judgment of 24 September 2009, *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, EU:C:2009:576 paragraph 319 and the case-law cited). Consequently, the appellant cannot criticise the General Court for not having requested the SRB to produce that offer.

99 Thirdly, it must be stated that the General Court indirectly relied on Banco Santander's firm offer and its assessments are based on other documents placed on the file.

100 Although the General Court did indeed mention, in paragraphs 33 and 34 of the order under appeal, Banco Santander's firm offer, it did not refer to the content of that offer, but rather to the information in the resolution decision relating to that offer and to the information produced by the SRB.

101 Furthermore, it is apparent from the FROB's procedural letter of 6 June 2017, which was mentioned in the resolution decision and in paragraphs 33 and 34 of the order under appeal, was placed on the file by the appellant and is included on the SRB's website, that Banco Santander's offer necessarily had to comply with the particulars set out in that letter. That procedural letter stated that all the Tier 2 instruments listed in Annex 2 thereto, including those held by the appellant, had to be converted into shares and then transferred to Banco Santander.

102 Accordingly, the fact that Banco Santander's offer was not placed on the file does not constitute an infringement of the appellant's rights of defence.

103 It follows that the fifth part of the first ground of appeal must be rejected as unfounded.

The third and fourth grounds of appeal

Arguments of the parties

104 By the third and fourth grounds of appeal, the appellant challenges, respectively, the inadmissibility of the application for annulment of Valuations 1 and 2 and the inadmissibility of the claim for compensation. She submits that the inadmissibility of that application and that claim are founded, in paragraphs 55 and 66 of the order under appeal, solely on the ground that the application for partial annulment of the resolution decision is inadmissible. Consequently, if the dismissal of the latter application were annulled, the application for annulment of Valuations 1 and 2 and the claim for compensation would have to be held admissible.

105 The SRB disputes the appellant's arguments.

Findings of the Court

106 It must be stated that the appellant has not put forward any independent arguments in support of the third and fourth grounds of appeal, but has merely contended that if the first and second grounds of appeal were upheld and the General Court's dismissal of the application for partial annulment annulled, the application for annulment of Valuations 1 and 2 and the claim for compensation would have to be held admissible.

107 Since the appellant's first and second grounds of appeal have been rejected as unfounded, the third and fourth grounds of appeal must also be rejected and, therefore, the appeal must be dismissed in its entirety.

Costs

108 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules of procedure, applicable to the procedure on an appeal pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

109 Since the SRB has applied for the appellant to be ordered to pay the costs and the appellant has been unsuccessful, she must be ordered to bear her own costs and to pay those incurred by the SRB.

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

1. Dismisses the appeal;

2. Orders Ms Carmen Liaño Reig to pay the costs.

[Signatures]