Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 December 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) – Single Resolution Board (SRB) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption of a resolution scheme in respect of Banco Popular Español SA – Sale of business tool – Write-down and conversion of capital instruments – Regulation (EU) No 806/2014 – Article 20 – Concept of 'definitive valuation' – Consequences – Refusal or failure to proceed with an *ex post* definitive valuation – Remedies – Action for annulment)

In Case C-874/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 November 2019,

Aeris Invest Sàrl, established in Luxembourg (Luxembourg), represented initially by R. Vallina Hoset and A. Sellés Marco, abogados, and subsequently by R. Vallina Hoset, E. Galán Burgos and M. Varela Suárez, abogados,

appellant,

the other party to the proceedings being:

Single Resolution Board (SRB), represented by J. King, L. Pogarcic Mataija and E. Muratori, acting as Agents, F. Louis and G. Barthet, avocats, and H. -G. Kamann and L. Hesse, Rechtsanwälte,

defendant at first instance,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi and N. Wahl (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 15 April 2021,

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 8 July 2021,

gives the following

Judgment

1 By its appeal, Aeris Invest Sàrl asks the Court of Justice to set aside the order of the General Court of the European Union of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, not published, 'the order under appeal', EU:T:2019:740), by which the General Court dismissed as inadmissible its action for annulment of the alleged refusal of the Single Resolution Board ('the SRB' or 'the Board') to carry out an *ex post* definitive valuation of Banco Popular Español SA ('Banco Popular'), of which it was allegedly informed by letter of 14 September 2018.

Legal context

2 Recital 64 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) states:

'It is important that losses be recognised upon failure of the entity. The valuation of assets and liabilities of failing entities should be based on fair, prudent and realistic assumptions at the moment when the resolution tools are applied. The value of liabilities should not, however, be affected in the valuation by the entity's financial state. It should be possible, for reasons of urgency, that the Board makes a rapid valuation of the assets or the liabilities of a failing entity. That valuation should be provisional and should apply until an independent valuation is carried out.'

3 Article 20 of Regulation No 806/2014, headed 'Valuation for the purposes of resolution', provides:

'1. Before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the Board shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity referred to in Article 2 is carried out by a person independent from any public authority, including the Board and the national resolution authority, and from the entity concerned.

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

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

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

5. The purposes of the valuation shall be:

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

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

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

…

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

6. Without prejudice to the [European] Union State aid framework, where applicable, the valuation shall be based on prudent assumptions, including as to rates of default and severity of losses. The valuation shall not assume any potential future provision of any extraordinary public financial support, any central bank emergency liquidity assistance, or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to an entity referred to in Article 2 from the point at which resolution action is taken or the power to write down or convert relevant capital instruments is exercised. …

…

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

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

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

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

…

9. The valuation shall indicate the subdivision of the creditors in classes in accordance with the priority of claims referred to in Article 17 and an estimate of the treatment that each class of shareholders and creditors would have been expected to receive, if an entity referred to in Article 2 were wound up under normal insolvency proceedings. That estimate shall not affect the application of the "no creditor worse off" principle referred to in Article 15(1)(g).

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

valuation shall be carried out. The provisional valuation shall comply with the requirements laid down in paragraph 4 and, in so far as reasonably practicable in the circumstances, with the requirements laid down in paragraphs 1, 7 and 9.

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

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

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

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

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

12. In the event that the *ex post* definitive valuation's estimate of the net asset value of an entity referred to in Article 2 is higher than the provisional valuation's estimate of the net asset value of that entity, the Board may request the national resolution authority to:

(a) exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool;

(b) instruct a bridge institution or asset management vehicle to make a further payment of consideration in respect of the assets, rights or liabilities to an institution under resolution, or as the case may be, in respect of the instruments of ownership to the owners of those instruments of ownership.

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

14. The Board shall establish and maintain arrangements to ensure that the assessment for the application of the bail-in tool in accordance with Article 27 and the valuation referred to in paragraphs 1 to 15 of this Article are based on information about the assets and liabilities of the institution under resolution that is as up to date and complete as is reasonably possible.

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

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

17. The valuation referred to in paragraph 16 shall determine:

(a) the treatment that shareholders and creditors, or the relevant deposit guarantee schemes, would have received if an institution under resolution with respect to which the resolution action or actions have been effected, had entered normal insolvency proceedings at the time when the decision on the resolution action was taken;

(b) the actual treatment that shareholders and creditors have received in the resolution of an institution under resolution; and

(c) whether there is any difference between the treatment referred to in point (a) of this paragraph and the treatment referred to in point (b) of this paragraph.

…'

Background to the dispute

4 The background to the dispute was set out in paragraphs 1 to 23 of the order under appeal and, for the purposes of the present proceedings, may be summarised as follows.

5 The appellant, Aeris Invest, was a shareholder of Banco Popular when a resolution scheme was adopted in respect of that bank on the basis of Regulation No 806/2014.

6 For the purpose of adopting a resolution decision, a valuation of Banco Popular was carried out, pursuant to Article 20 of Regulation No 806/2014. To that end, two reports were drawn up initially.

7 The first report ('the first valuation report'), dated 5 June 2017, was compiled by the SRB, on the basis of Article 20(5)(a) of Regulation No 806/2014, and was intended to inform the determination of whether the conditions for resolution were met.

8 The second report ('the second valuation report'), dated 6 June 2017, was compiled by an independent expert, pursuant to Article 20(10) of Regulation No 806/2014. The purpose of that valuation was to assess 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.

9 On 7 June 2017, the SRB adopted Decision SRB/EES/2017/08, concerning a resolution scheme in respect of Banco Popular ('the resolution decision'). On the same day, the European Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for Banco Popular Español

S.A. (OJ 2017 L 178, p. 15). Also on the same day, the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring; 'the FROB') adopted the measures necessary to implement the resolution decision.

10 Article 5(1) of the resolution decision states:

'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.'

11 In Article 6 of the resolution decision, which relates to the write-down of capital instruments and the sale of business tool, paragraph 1 states that the SRB decided, in essence:

(a) to write down the nominal amount of Banco Popular's share capital in an amount of EUR 2 098 429 046, which would result in the cancellation of 100% of Banco Popular's share capital;

(b) to convert all the principal amount of 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, called 'New Shares I';

(c) to write down to zero the nominal amount of the 'New Shares I', which would result in the cancellation of 100% of those shares;

(d) 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, called 'New Shares II'.

12 According to Article 6(3) of the resolution decision, those write-down and conversion measures were based on the second valuation report, corroborated by the results of an open and transparent marketing process conducted by the FROB.

13 In Article 6(5) of the resolution decision the SRB also ordered that the 'New Shares II' were to be transferred to Banco Santander SA, free and clear of any rights or liens of any third party, in consideration for payment of the purchase price of EUR 1, and stated that the purchaser had already consented to the transfer.

14 On 18 September 2017, the appellant brought an action before the General Court, registered as Case T-628/17, for annulment of the resolution decision and of Decision 2017/1246.

15 On 4 May 2018, the appellant submitted a request to the SRB for access to documents on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), concerning the definitive version of the second valuation report ('the *ex post* definitive valuation'), provided for in Article 20(11) of Regulation No 806/2014, and the independent expert's final valuation report, provided for in Article 20(16) and (17) of that regulation and intended to determine whether the shareholders and creditors affected by the resolution scheme in respect of Banco Popular would have received better treatment if the institution had entered into normal insolvency proceedings ('the third valuation report').

16 The SRB received the third valuation report on 14 June 2018.

17 On 19 June 2018, the SRB responded to the request referred to in paragraph 15 of the present judgment, stating, first, that it had received the third valuation report and that a non-confidential version of it would be prepared before it was published and, secondly, that it was not in possession of the *ex post* definitive valuation.

18 On 30 July 2018, in response to a measure of organisation of procedure in the proceedings in Case T-628/17, the SRB stated, providing an explanation of the reasons, that it would not prepare an *ex post* version of the first valuation report and that the second valuation report would not be followed by an *ex post* definitive valuation.

19 In that regard, the SRB stated that, 'due to the particularities of the present case, [it had come] to the conclusion that an *ex post* [definitive] valuation would not serve any practical purpose in the context of Article 20(11) of Regulation No 806/2014 or lead to a compensatory decision provided for in Article 20(12) of Regulation No 806/2014'. The SRB noted that an *ex post* definitive valuation could not be required where that valuation was not capable of achieving its objectives and explained why that was so in the circumstances of the case. The General Court served that reply on the appellant on 2 August 2018.

20 On the same day, the SRB sent the independent expert a letter that was worded as follows:

'After careful assessment of the legal framework, the SRB considers that, in light of the circumstances of the resolution of [Banco Popular], it is not necessary for an *ex post* definitive [v]aluation … as referred to in Article 20(11) of [Regulation No 806/2014] to be prepared, in particular, since carrying out such [a] valuation could not have an impact on the concluded sale of [Banco Popular] to Banco Santander that determined the market price of [Banco Popular] as an entity in an open, fair and transparent process.'

21 The following day, the appellant formally called upon the SRB, on the basis of Article 265 TFEU, to ensure that an *ex post* definitive valuation of Banco Popular, provided for in Article 20(11) of Regulation No 806/2014, be carried out by an independent person.

22 On 7 August 2018, the SRB published an announcement with regard to its 'Notice … of 2 August 2018 regarding its preliminary decision on whether compensation need[ed] to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular … ha[d] been effected and the launching of the right to be heard process (SRB/EES/2018/132)' (OJ 2018 C 277 I, p. 1), that notice being accompanied by the third valuation report. In the announcement it stated:

'It follows from the [third valuation report] that there is no difference between the actual treatment of the Affected Shareholders and Creditors and the treatment that they would have received had the Institution been subject to normal insolvency proceedings at the date of resolution. In view of the above, the SRB, in the Notice, decides on a preliminary basis that it is not required to pay compensation to the Affected Shareholders and Creditors …

In order for the SRB to be able to take its final decision on whether compensation needs to be granted, the SRB invites by the Notice the Affected Shareholders and Creditors to express interest in exercising their right to be heard regarding the above preliminary decision of the SRB, by following the consultation procedure …'

23 On 10 September 2018, the appellant sent the SRB a request for access to documents on the basis of Regulation No 1049/2001, concerning all the communications between the SRB and the Commission relating to the *ex post* definitive valuation, in particular the communications informing the Commission of the SRB's decision not to proceed with that valuation and, if any, those requesting the Commission's authorisation, as well as the Commission's replies, specifying, as the case may be, whether such authorisation had been granted.

24 By letter of 14 September 2018 ('the letter at issue'), the SRB replied to the appellant's formal request referred to in paragraph 21 of the present judgment and stated that it wished to inform it that, due to the particularities of the case, namely the use of the sale of business tool to perform a share deal, it considered that an *ex post* valuation would not serve any practical purpose in the context of Article 20(11) of Regulation No 806/2014, nor could it lead to a compensatory decision, provided for in Article 20(12) of that regulation, and that, therefore, an *ex post* definitive valuation would not be performed. The SRB noted that it had already expressed that position in the proceedings in Case T-628/17 and that the appellant had therefore already been made aware of it.

25 On 28 September 2018, following a merger by acquisition, Banco Santander became the universal successor of Banco Popular. In that context, the FROB consented to the transfer to Banco Santander of the new shares in Banco Popular resulting from the conversion of the Tier 2 instruments.

26 On 4 October 2018, the SRB responded to the request referred to in paragraph 23 of the present judgment and to a request for access to documents dated 16 August 2018 concerning the SRB's internal or preparatory documents relating to the *ex post* definitive valuation and to communications between the SRB and the independent expert regarding that valuation. First, the SRB, on the basis of Article 4(2) and (3) of Regulation No 1049/2001, refused access to the internal documents, the communications between it and the Commission, and the Commission's replies relating to the *ex post* definitive valuation. Secondly, it sent the appellant a copy of the letter which it had sent to the expert on 2 August 2018.

The proceedings before the General Court and the order under appeal

27 By document lodged at the Registry of the General Court on 5 October 2018, the appellant brought an action for annulment of the letter at issue.

28 By the order under appeal, the General Court dismissed the action as inadmissible on the ground that the letter at issue was not a challengeable act for the purposes of Article 263 TFEU.

29 To that end, the Court found, first of all, that, in order to determine whether the letter at issue constituted such an act in that, as the appellant maintained, it contained the SRB's decision not to proceed with the *ex post* definitive valuation of Banco Popular, it was necessary to examine whether that decision would itself have produced binding legal effects capable of affecting the appellant's legal situation.

30 After setting out the wording of Article 20(11) and (12) of Regulation No 806/2014, the General Court observed that the *ex post* definitive valuation had two objectives.

31 As regards the first objective, referred to in Article 20(11)(a) of Regulation No 806/2014 and intended to ensure that any losses on the assets of an entity referred to in Article 2 of that regulation are fully recognised in the books of accounts of that entity, the Court stated that, in accordance with the resolution decision, following the exercise of the power to write down and convert Banco Popular's capital instruments, all of Banco Popular's shares had been transferred to Banco Santander pursuant to the sale of business tool. It deduced therefrom that it was for Banco Santander to ensure that any losses incurred were reflected in the accounts when consolidating Banco Popular's assets and liabilities.

32 As regards the second objective, referred to in Article 20(11)(b) of Regulation No 806/2014 and consisting in informing the decision to write back creditors' claims or to increase the value of the consideration paid, the General Court pointed out that that provision had to be read in the light of Article 20(12) of the regulation, according to which if, following the *ex post* definitive valuation, the estimate resulting from that valuation is higher than the estimate resulting from the provisional valuation, the SRB may request the national resolution authority either to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool or to instruct a bridge institution or asset management vehicle to make a further payment of consideration to an institution under resolution.

33 While the latter provision expressly refers to the situations in which compensation, by an increase in the value of the claims or the payment of additional consideration, may be granted following an *ex post* definitive valuation, that is to say, only where the resolution scheme applied to the entity is either the bail-in tool provided for in Article 27 of Regulation No 806/2014, the bridge institution tool referred to in Article 25 of that regulation, or the asset separation tool under Article 26 of that regulation, the General Court observed that those resolution tools had not been applied in the circumstances of this case since the resolution tool adopted in respect of Banco Popular was the sale of business tool, under Article 24 of Regulation No 806/2014, and that the application of that tool had led to the sale of the entirety of Banco Popular to Banco Santander.

34 The General Court therefore found that the sale of business tool applied to Banco Popular was not one of the situations referred to in Article 20(12) of Regulation No 806/2014 in which compensation could be paid following an *ex post* definitive valuation and, in addition, that that provision did not allow compensation for former shareholders and creditors of an entity whose capital instruments had been fully converted, written down and transferred to a third party.

35 The General Court then rejected the appellant's argument that the *ex post* definitive valuation would directly affect the legal situation of Banco Popular's former shareholders and that if the estimate of that bank's market value were higher than that resulting from the second valuation report, those shareholders would be entitled to compensation under Article 20 of Regulation No 806/2014.

36 It took the view that, by that argument, the appellant was submitting, in essence, that if an *ex post* definitive valuation of Banco Popular were carried out, it could claim a write-back of its claims or an increase in the value of the consideration paid by Banco Santander and stated that such an argument could not succeed since, in the resolution of Banco Popular, the Additional Tier 1 instruments had been converted into shares, fully written down and cancelled and the Tier 2 instruments had been converted, written down and fully transferred to Banco Santander. It concluded from this that Banco Popular's previous shareholders had lost their status as shareholders as a result of the adoption of the resolution decision.

37 Since the appellant had submitted, in its application, that the letter at issue prevented it from having access to the *ex post* definitive valuation of a bank 'of which it is a shareholder' or, in its reply, that it wished to obtain such a valuation in order to assert its rights 'as a shareholder of Banco Popular', the General Court therefore held, in response to those submissions, that, following the exercise of the power to write down and convert Banco Popular's capital instruments and the subsequent transfer of all the shares resulting from that exercise to Banco Santander, the appellant no longer held capital instruments that could be the subject of compensation on the basis of Article 20(12) of Regulation No 806/2014.

38 For the purpose of rejecting the appellant's arguments, the General Court stated that a distinction had to be made between the third valuation report, provided for in Article 20(16) of Regulation No 806/2014, and the *ex post* definitive valuation referred to in Article 20(11) of that regulation, since the objective of the third valuation report was to determine whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings and, possibly, to grant them compensation. The General Court held that, whilst the appellant would potentially be entitled to compensation on the basis of the third valuation report, it could not claim compensation by reason of the *ex post* definitive valuation.

39 The General Court therefore held that the appellant's legal situation would not be affected by an *ex post* definitive valuation of Banco Popular and that, consequently, the SRB's decision not to proceed with that valuation did not produce binding legal effects capable of affecting that situation. Consequently, according to the General Court, the letter at issue cannot be a challengeable act, for the purposes of Article 263 TFEU, to the extent that the appellant submits that the letter produces such effects owing to the fact that it contains that decision.

40 Lastly, the General Court rejected the appellant's argument that the possibility of bringing an action against the letter at issue would be the sole way to guarantee its right to effective judicial protection secured by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), since, according to the case-law, although the requirement as to legal effects which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position must be interpreted in the light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside that condition without going beyond the jurisdiction conferred by the Treaty on the Courts of the European Union.

Forms of order sought

41 The appellant claims that the Court should:

– set aside the order under appeal in so far as the General Court held that its action was inadmissible;

– refer the case back to the General Court 'for judgment, bound by the decision of the Court of Justice on points of law, in accordance with the form of order sought by [the appellant] at first instance'; and

– reserve the costs.

42 The SRB contends that the Court should:

– dismiss the appeal as inadmissible and, in any event, unfounded;

– in the alternative, refer the case back to the General Court;

– in the further alternative, if the Court of Justice gives final judgment, dismiss the action at first instance; and

– order the appellant to bear the costs of the present proceedings and of the proceedings before the General Court or, in the alternative, reserve the costs of the appeal.

Request for reopening of the oral procedure

43 By document lodged at the Court Registry on 18 October 2021, the appellant requested that the Court order the reopening of the oral part of the procedure, claiming, in support of that request, that the judgment of the European Court of Human Rights of 14 September 2021 in *Pintar and Others v. Slovenia* provides new arguments, which have not been discussed by the parties, concerning the right to an effective remedy in the area of the resolution of banks and the right of access to information on resolution, those rights being closely linked to the articles of the Charter relied on in the present appeal.

44 In that regard, it must be recalled that, under Article 83 of the Rules of Procedure of the Court of Justice, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court (judgment of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraph 10 and the case-law cited).

45 That is not the position in the present case. The Court, after hearing the Advocate General, considers that it has all the information necessary to give a ruling and that the judgment of the European Court of Human Rights of 14 September 2021 in *Pintar and Others v. Slovenia* is not a new fact which is of such a nature as to be a decisive factor for its decision in the present case.

46 In the light of the foregoing considerations, the Court considers that there is no need to order the reopening of the oral part of the procedure.

The appeal

47 The appellant puts forward four grounds in support of its appeal. By the first ground of appeal, it submits that the General Court infringed Article 47 of the Charter and Article 20 of Regulation No 806/2014 in finding that its action was inadmissible, because the letter at issue has binding legal effects since the *ex post* definitive valuation itself has binding legal effects capable of affecting its legal situation. By the second ground of appeal, it alleges that the General Court's interpretation of Article 20 of the regulation is incompatible with the right to property and thereby infringes Article 17 of the Charter. By the third ground of appeal, the appellant submits that the General Court infringed Article 20(11)(b) of the regulation by stating that the appellant would not potentially be entitled to compensation following the *ex post* definitive valuation and

that, consequently, the letter at issue had no binding effects. By the fourth ground of appeal, the appellant submits that the General Court infringed Article 20(11) and (14) of the regulation and Article 41 of the Charter by refusing to recognise that the letter at issue has binding effects on it since that letter prevents it from having access to up to date and complete information on the accounting situation of an entity in which it held a 3.45% shareholding.

Admissibility of the appeal

48 In the SRB's submission, the appeal is inadmissible under Article 169(2) of the Rules of Procedure since it does not identify precisely the contested points in the grounds of the decision of the General Court which the appellant seeks to have set aside and does not indicate precisely the legal arguments in support of the appeal. It is also contrary to Article 170(1) of the Rules of Procedure in that it is founded on new pleas in law.

49 Those arguments cannot succeed.

50 In the first place, it should be recalled that it follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and also from Article 168(1)(d) and Article 169(2) of the Rules of Procedure 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 the appeal. In particular, under Article 169(2) of the Rules of Procedure, the pleas in law and legal arguments relied on must identify precisely those points in the grounds of the decision of the General Court which are contested (judgment of 20 September 2016, *Mallis and Others* v *Commission and ECB*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraphs 33 and 34 and the case-law cited).

51 In the present case, first, it must be found that, in accordance with Article 169(2) of the Rules of Procedure, the appeal identifies the points in the grounds of the order under appeal which are contested, either expressly or by citing or reproducing the elements set out therein, which thus makes it possible to identify them. Secondly, as is apparent in particular from paragraph 47 of the present judgment, the appellant has set out pleas in law and legal arguments enabling the Court to carry out its review of legality (see, to that effect, judgment of 20 September 2016, *Mallis and Others* v *Commission and ECB*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraph 38). Thirdly, in the summary of the grounds of appeal and the form of order sought, the appellant expressly asks the Court, as it is allowed to do under Article 170(1) of its Rules of Procedure, to grant the form of order sought by it at first instance (see, to that effect, judgment of 5 November 2019, *ECB* v *Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 86).

52 Consequently, contrary to the arguments made by the SRB, the appeal satisfies the requirements laid down by Article 169(2) of the Rules of Procedure.

53 In the second place, it is apparent from Article 58 of the Statute of the Court of Justice of the European Union that the grounds of appeal must be based on arguments made in the proceedings before the General Court. Moreover, according to Article 170(1) of the Rules of Procedure, the subject matter of the proceedings before the General Court may not be changed in the appeal. Thus, the jurisdiction of the Court of Justice in an appeal is confined to a review of the findings of law on the pleas and arguments debated before the General Court (order of 21 July 2020, *Abaco Energy and Others* v *Commission*, C-436/19 P, not published, EU:C:2020:606, paragraph 37 and the case-law cited).

54 Contrary to the SRB's assertions, the appellant, by its four grounds of appeal, contests the General Court's interpretation or application of EU law in that the appellant argues that the *ex post* definitive valuation was mandatory and that the SRB's refusal to proceed with such a valuation produced legal effects which changed its legal situation as a shareholder of Banco Popular. Accordingly, those grounds of appeal are not new pleas in law (see, to that effect, judgment of 28 July 2016, *Tomana and Others* v *Council and Commission*, C-330/15 P, not published, EU:C:2016:601, paragraph 35).

55 The appeal is therefore admissible.

The grounds of appeal

56 It is appropriate to examine the grounds of appeal in the order in which they are presented by the appellant and thus to begin with the first plea.

Arguments of the parties

57 In support of the first ground of appeal, the appellant states first that, as is clear from Article 20(15) of Regulation No 806/2014, the *ex post* definitive valuation is an integral part of the resolution decision. On that basis, it would produce legal effects and affect the appellant's situation since that decision led to the total write-down of the shares held by the appellant in Banco Popular. In addition, it is apparent from Article 20(5) of that regulation that any valuation, including the *ex post* definitive valuation, informs, first of all, the determination of whether the conditions for resolution are met, next, the determination of whether the conditions for the write-down or conversion of capital instruments are present and, finally, the decision on the appropriate resolution action to be taken in respect of the entity concerned. The appellant therefore argues that, among other purposes, the *ex post* definitive valuation serves as a basis for that resolution decision and that it is in the light of its statement of reasons that that decision must be interpreted and applied, as the appellant claimed before the General Court.

58 Secondly, owing to the consequences attached to a judgment annulling a measure, if the General Court had annulled the letter at issue, the SRB would have been obliged to ensure that an *ex post* definitive valuation was carried out in accordance with Article 20 of Regulation No 806/2014, which confirms that that letter produces binding legal effects.

59 Thirdly, the *ex post* definitive valuation is not severable from the resolution decision, (i) because it follows from settled case-law that partial annulment is possible only in so far as the elements whose annulment is sought may be severed from the remainder of the act and (ii) because it is apparent from Article 20(15) of Regulation No 806/2014 that that valuation itself cannot be subject to a separate right of appeal.

60 Fourthly, there is, however, no mention in Article 20(15) of Regulation No 806/2014 of the situation where an *ex post* definitive valuation has not been carried out and the legal remedy which must be sought in respect of a decision not to ensure that such a valuation is performed is not easy to determine. Accordingly, the fact that that valuation has not been carried out cannot be raised in an action for annulment of the resolution decision since the adoption or otherwise of an *ex post* definitive valuation is an event which necessarily occurs after the adoption of a resolution decision and, depending on the circumstances, after an action for annulment has been brought.

61 In the present case, the appellant states that proceedings against the resolution decision, adopted on 7 June 2017, were brought before the General Court in September 2017, but that it was only in August 2018 that the SRB informed the General Court and the independent expert that an *ex post* definitive valuation would not be carried out. It is settled case-law that events taking place after the adoption of a contested measure cannot be raised in an action for annulment, given that the legality of that measure must be assessed in the light of the information available at the time of its adoption.

62 The lack of an *ex post* definitive valuation cannot therefore, in principle, be challenged in an action for annulment of the resolution decision. Therefore, where no *ex post* definitive valuation has been carried out, the only solution compatible with the right to an effective remedy enshrined in Article 47 of the Charter is to bring an action against the contested measure, which, in the present case, is the letter at issue.

63 The SRB contests both the admissibility of the first ground of appeal, on the basis of the same arguments as those already put forward in support of the inadmissibility of the appeal as a whole, and the merits of that ground.

Findings of the Court

64 It is necessary at the outset to reject the SRB's arguments relating to the inadmissibility of the first ground of appeal, for the reasons already set out in paragraphs 50 to 54 of the present judgment in respect of the appeal as a whole, namely that this ground of appeal and the arguments advanced to support it do make it possible to identify those points in the grounds of the order under appeal which are contested and the provisions of Article 20 of Regulation No 806/2014 that the General Court allegedly infringed.

65 As to the merits, it should be noted that the first ground of appeal comprises, in essence, two parts. It is therefore appropriate, in the first place, to examine the first part, relating to the alleged infringement of Article 20 of that regulation, before addressing, in the second place and if necessary, the second part, concerning an alleged infringement of Article 47 of the Charter.

66 At the outset, it must be borne in mind that, in the present case, the SRB, faced with a rapid deterioration in Banco Popular's financial situation, in particular a lack of liquidity, decided that the appropriate resolution tool would be the sale of business tool, as provided for in Article 24 of Regulation No 806/2014, rather than a bail-in, which it viewed as being insufficient. While having recourse to that resolution tool, the SRB made use of its power under Article 21 of Regulation No 806/2014 to write down and convert relevant capital instruments.

67 As stated in paragraphs 7 and 8 of the present judgment, the first valuation report, compiled by the SRB, was intended to inform the determination of whether the conditions for resolution were met, while the second valuation report, drawn up by an independent expert appointed by the SRB, was to assess the value of Banco Popular's assets and liabilities, provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and 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. The third valuation report, also drawn up by the independent expert, was intended to determine whether the shareholders and creditors affected by the resolution scheme in respect of Banco Popular would have received better treatment if the institution had entered into normal insolvency proceedings.

68 The SRB took the view that it was not necessary either to prepare an *ex post* version of the first valuation report or to have the second valuation report followed by an *ex post* definitive valuation. After receiving the formal request from the appellant, the SRB repeated that analysis of the situation in the letter at issue.

69 Since the appellant claims, first of all, that the General Court and the SRB infringed Article 20 of Regulation No 806/2014, it is appropriate to provide an interpretation of the wording of that provision, in the light of recital 64 of the regulation.

70 It is apparent from recital 64 that a distinction should be drawn between valuation of the assets and liabilities of failing entities as carried out by the SRB for reasons of urgency, which is provisional, and that carried out independently, which in principle brings an end to that provisional nature.

71 As regards types of valuation, Article 20(11) and (16) of Regulation No 806/2014 expressly provides for two such types, namely (i) the valuation 'carried out under paragraphs 1 to 15' and (ii) the valuation 'referred to in paragraphs 16, 17 and 18'. According to Article 20(11) and (16), those valuations are to be and must remain distinct and are to be carried out by an independent person, but may nevertheless be carried out either separately, or by the same independent person simultaneously.

72 It follows that, in the present case, both the first and second valuation reports and any *ex post* definitive valuation belong to the first type of valuation since they fall under Article 20(1) to (15) of Regulation No 806/2014, while the third valuation report, falling under Article 20(16) to (18), belongs to the second type of valuation.

73 It is true that the existence of a definitive valuation other than the *ex post* definitive valuation – which is implied by the addition, in Article 20(11) *in limine* of Regulation No 806/2014, of the words '*ex post*' to 'definitive valuation', in contrast to a definitive valuation carried out '*ex ante*' – may have an effect on the possibility for the SRB to refuse to proceed with an *ex post* definitive valuation since a definitive valuation would itself serve as the basis for the decision to apply a resolution tool or exercise a resolution power or the decision to exercise the power to write down or convert capital instruments, and would thus be open to challenge through those decisions, in accordance with Article 20(15) of Regulation No 806/2014.

74 That interpretation is also supported by Article 20(2) of Regulation No 806/2014, according to which, subject to Article 20(15), that is to say, the possibility of contesting the valuation indirectly through the decisions referred to in paragraph 73 of the present judgment, 'the valuation shall be considered to be definitive' where 'all of the requirements laid down in paragraphs 1 and 4 to 9 are met'. Those requirements include, in Article 20(1) of the regulation, the requirement that the valuation be carried out by a person who is independent, including in relation to the SRB and the national resolution authority, as well as in relation to the entity concerned.

75 It should be noted, as an incidental point, that this means not only that the first valuation report, compiled by the SRB, was in fact provisional in nature, but also that, even if the SRB had prepared an *ex post* version of that first report, as requested by the appellant, such a version would not have constituted a definitive valuation since it would not have been drawn up by an independent person. As the Advocate General has stated in point 70 of her Opinion, since the first valuation report was prepared by the SRB in the present case, there are no doubts as to its provisional

nature. In the present case, only the second valuation report, which fulfils that condition, is therefore capable of being regarded as constituting a 'definitive valuation', within the meaning of Article 20 of Regulation No 806/2014.

76 However, it must be stated, without it being necessary to rule on that last question or on the change in the SRB's position in that regard, that the General Court was right in holding that, in any event, an *ex post* valuation would not have had any effect on the appellant's legal position in the circumstances of the present case, with the result that the refusal to proceed with an *ex post* definitive valuation notified to the appellant could not be regarded as an act that adversely affected it and therefore was not a challengeable act, for the purposes of Article 263 TFEU.

77 It should be noted that the SRB's answer to the General Court as to why it did not intend to have an *ex post* definitive valuation drawn up in the present case is based on the purposes of such a valuation.

78 While it is true, as the appellant argues, that the wording of Article 20(11) *in limine* of Regulation No 806/2014 appears to make the carrying out of an *ex post* definitive valuation necessary when the SRB has only a provisional valuation at its disposal, in particular owing to the use of the present indicative in the words '*est effectué*' ['shall be carried out' in the English version], which usually has a mandatory quality (see, to that effect, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, EU:C:2020:142, paragraph 20), and to the reference to 'as soon as practicable', the fact remains that the General Court was justified in pointing out that omitting to draw up such a report had no effect on the appellant's legal situation, particularly in the light of the two purposes of the *ex post* definitive valuation, as set out in Article 20(11) of Regulation No 806/2014.

79 In that regard, the rationale of Article 20(11) of Regulation No 806/2014, expressed in the second subparagraph of that provision, is apparent from its two specific purposes, namely 'to ensure that any losses on the assets of an entity referred to in Article 2 are fully recognised in the books of accounts of that entity' and 'to inform the decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 12 of [Article 20]'. Even though the wording of that second purpose includes a fairly broad description of the conditions which are to lead to the drawing up of an *ex post* definitive valuation, it must be noted, as the General Court rightly observed in the order under appeal, that that purpose refers expressly to Article 20(12) of the regulation, from which it follows that it applies only to specific situations, namely those in which the SRB had recourse to the bail-in tool, the bridge institution tool, or an asset management vehicle.

80 In view of the particular features of the present case, the drawing up of an *ex post* definitive version of the second valuation report, even if that was mandatory, would not, in any event, have corresponded to either of those two purposes. The appellant thus does not adduce anything capable of establishing that the purpose referred to in Article 20(11)(a) of Regulation No 806/2014 would apply in the circumstances of the present case. Nor does the purpose referred to in Article 20(11)(b) apply, because, as the General Court rightly pointed out in paragraphs 46 and 47 of the order under appeal, the resolution tool adopted in respect of Banco Popular was the sale of business tool, under Article 24 of Regulation No 806/2014.

81 The application of the sale of business tool is not one of the situations provided for in Article 20(12) of that regulation in which compensation may be paid following an *ex post* definitive valuation.

82 Lastly, in a case such as the present one, where the second valuation report is followed by the use of the sale of business tool, the result specified in that report is, in any event, either corroborated or invalidated by the sale price obtained at the end of a lawfully conducted tender procedure. The right price therefore corresponds quite simply to the actual market price, as determined. The sale of business tool thus, de facto, settles any debate on the potential economic value of the assets of the transferred institution. Consequently, at least in the circumstances of the present case, an *ex post* definitive valuation could only have recorded that market value and therefore it would have had no effect at all on the appellant.

83 The appellant counters that the *ex post* definitive valuation is not intended only to fulfil the two purposes in question, but, as an integral part of the decision that will subsequently be adopted by the SRB, it, like any valuation, informs, first of all, the determination of whether the conditions for resolution are met, secondly, the determination of whether the conditions for the write-down or conversion of capital instruments are present and, finally, the decision on the appropriate resolution action to be taken in respect of the entity concerned.

84 However, from the point of view of the admissibility of the action for annulment of the letter at issue, none of those arguments is capable of invalidating the finding in paragraph 82 of the present judgment concerning the market price of Banco Popular's assets, which can be none other than the actual market price resulting from the use of the sale of business tool.

85 It follows from all of the foregoing considerations that the first part of the first ground of appeal raised by the appellant in support of its appeal, alleging an infringement by the SRB of Article 20 of Regulation No 806/2014, must be rejected. In view of the fact that, as the General Court rightly held, the letter at issue did not, on any view, constitute a challengeable act, the appeal must be dismissed, without it being necessary to examine the second part of the first ground of appeal or the other grounds of appeal.

Costs

86 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of 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.

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

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

1. Dismisses the appeal;

2. Orders Aeris Invest Sàrl to pay the costs.

[Signatures]