Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 14 January 2021 [1]

Joined Cases C-551/19 P and C-552/19 P

ABLV Bank AS (C-551/19 P)
Ernests Bernis,
Oļegs Fiļs,
OF Holding SIA,
Cassandra Holding Company SIA (C-552/19 P)
v

European Central Bank (ECB)

(Appeal – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Regulation (EU) No 806/2014 – Resolution procedure applicable where an entity is failing or is likely to fail – Parent company and subsidiary – Declaration by the ECB that an entity is failing or is likely to fail – Preparatory measures – Acts not open to judicial review – Inadmissibility)

1. On 23 February 2018, the European Central Bank ('ECB'), which was responsible for supervising ABLV Bank AS ('ABLV Bank') on the ground that the latter was a 'significant' financial entity, declared that that entity and ABLV Luxembourg SA ('ABLV Luxembourg') 'were failing or were likely to fail' within the meaning of Article 18(1) of Regulation (EU) No 806/2014. [2]

2. ABLV Bank and some of its direct and indirect shareholders brought actions against that declaration by the ECB before the General Court, which, by way of two orders [3] made in Cases T-281/18 [4] and T-283/18, [5] held the respective applications for annulment to be inadmissible.

3. The applicants before the General Court are now challenging those two orders on appeal.

4. The adjudication of those two appeals offers the Court the opportunity to rule for the first time, unless I am mistaken, on the procedure applicable to the adoption of 'resolution schemes' for financial institutions subject to the Single Supervisory Mechanism ('SSM'), which it is for the Single Resolution Board ('SRB') to implement within the framework of the Single Resolution Mechanism ('SRM').

5. One of the steps in that procedure involves the ECB, which assesses whether a credit institution is 'failing or is likely to fail'.

1 Original language: Spanish.

2 Regulation 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; 'SRM Regulation').

3 'The orders under appeal'.

4 Order of 6 May 2019, *ABLV Bank* v *ECB* (T-281/18, EU:T:2019:296).

5 Order of 6 May 2019, *Bernis and Others* v *ECB* (T-283/18, not published, EU:T:2019:295).

6. The dispute at issue centres on whether an action for annulment may be brought against such an assessment by the ECB. The two opposing positions are that:

– this is a binding measure with its own substantive content which, because it produces legal effects, may be the subject of an action for annulment (position taken by the appellants);

– since it is merely a preparatory measure of the final decision to be taken by the SRB, it is not open to judicial review. Only the decision adopted by the SRB is open to judicial review, before the General Court (position taken by the ECB, supported by the European Commission).

I. Legal framework: SRM Regulation

7. According to recitals 24 and 26:

'(24) Since only institutions of the Union may establish the resolution policy of the Union and since a margin of discretion remains in the adoption of each specific resolution scheme, it is necessary to provide for the adequate involvement of the Council and the Commission, as institutions which may exercise implementing powers, in accordance with Article 291 TFEU. The assessment of the discretionary aspects of the resolution decisions taken by the Board should be exercised by the Commission. Given the considerable impact of the resolution decisions on the financial stability of Member States and on the Union as such, as well as on the fiscal sovereignty of Member States, it is important that implementing power to take certain decisions relating to resolution be conferred on the Council. It should therefore be for the Council, on a proposal from the Commission, to exercise effective control on the assessment by the Board of the existence of a public interest and to assess any material change to the amount of the [Single Resolution] Fund to be used in a specific resolution action. Moreover, the Commission should be empowered to adopt delegated acts to specify further criteria or conditions to be taken into account by the Board in the exercise of its different powers. Such a conferral of resolution tasks should not in any way hamper the functioning of the internal market for financial services. EBA [European Banking Authority] should therefore maintain its role and retain its existing powers and tasks: it should develop and contribute to the consistent application of the Union legislation applicable to all Member States and enhance convergence of resolution practices across the Union as a whole.

…

(26) The ECB, as the supervisor within the SSM, and the Board, should be able to assess whether a credit institution is failing or is likely to fail and whether there is no reasonable prospect that any alternative private sector or supervisory action would prevent its failure within a reasonable timeframe. The Board, if it considers all the criteria relating to the triggering of resolutions to be met, should adopt the resolution scheme. The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union (the 'Court of Justice'). Therefore, this Regulation provides that the resolution scheme adopted by the Board enters into force only if, within 24 hours after its adoption by the Board, there are no objections from the Council or the Commission or the resolution scheme is approved by the Commission. The grounds on which the Council is permitted to object, on a proposal by the Commission, to the Board's resolution scheme should be strictly limited to the existence of a public interest and to material modifications by the Commission of the amount of the use of the [Single Resolution] Fund as proposed by the Board.

…'

8. Article 18 ('Resolution procedure') states:

'1. The Board shall adopt a resolution scheme pursuant to paragraph 6 in relation to 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 when it assesses, in its executive session, on receiving a communication pursuant to the fourth subparagraph, or on its own initiative, that the following conditions are met:

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

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

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

An assessment of the condition referred to in point (a) of the first subparagraph shall be made by the ECB, after consulting the Board. The Board, in its executive session, may make such an assessment only after informing the ECB of its intention and only if he ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB shall, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.

Where the ECB assesses that the condition referred to in point (a) of the first subparagraph is met in relation to an entity or group referred to in the first subparagraph, it shall communicate that assessment without delay to the Commission and to the Board.

An assessment of the condition referred to in point (b) of the first subparagraph shall be made by the Board, in its executive session, or, where applicable, by the national resolution authorities, in close cooperation with the ECB. The ECB may also inform the Board or the national resolution authorities concerned that it considers the condition laid down in that point to be met.

…

4. For the purposes of point (a) of paragraph 1, the entity shall be deemed to be failing or to be likely to fail in one or more of the following circumstances:

(a) the entity infringes, or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the ECB, including but not limited to the fact that the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own fund;

(b) the assets of the entity are, or there are objective elements to support a determination that the assets of the entity will, in the near future, be less than its liabilities;

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

(d) extraordinary public financial support is required …

5. For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

6. If the conditions laid down in paragraph 1 are met, the Board shall adopt a resolution scheme. The resolution scheme shall:

(a) place the entity under resolution;

(b) determine the application of the resolution tools to the institution under resolution referred to in Article 22(2), in particular any exclusions from the application of the bail-in in accordance with Article 27(5) and (14);

(c) determine the use of the [Single Resolution] Fund to support the resolution action in accordance with Article 76 and in accordance with a Commission decision taken in accordance with Article 19.

…'

9. Article 86 ('Actions before the Court of Justice') provides:

'1. Proceedings may be brought before the Court of Justice in accordance with Article 263 TFEU contesting a decision taken by the Appeal Panel or, where there is no right of appeal to the Appeal Panel, by the Board.

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

3. In the event that the Board has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice in accordance with Article 265 TFEU.

4. The Board shall take the necessary measures to comply with the judgment of the Court of Justice.'

II. Background to the dispute [6]

10. ABLV Bank is a credit institution established in Latvia and the parent company of the ABLV group.

11. ABLV Luxembourg is a credit institution established in Luxembourg. It is one of the subsidiaries of the ABLV group, of which ABLV is the sole shareholder.

12. Ernest Bernis, Oļegs Fiļs, OF Holding SIA and Cassandra Holding Company SIA [7] are direct and indirect shareholders of ABLV Bank.

13. ABLV Bank was categorised as a 'significant institution' and, as such, is subject to supervision by the ECB as part of the SSM.

6 This account of the background is taken from the order of 6 May 2019, ABLV Bank v ECB (T-281/18, EU:T:2019:296, paragraphs 1 to 9).

7 Hereafter I shall refer to them simply as the 'direct and indirect shareholders'.

14. On 13 February 2018, the Department of the Treasury of the United States of America published its intention to adopt special measures to prevent ABLV group from accessing the financial system in US dollars.

15. On 22 February 2018, the ECB sent to the SRB its draft assessment concerning whether ABLV Bank and ABLV Luxembourg were failing or were likely to fail, with the aim of consulting the SRB in that regard in accordance with the second subparagraph of Article 18(1) of the SRM Regulation.

16. On 23 February 2018, the ECB concluded that ABLV Bank and ABLV Luxembourg were failing or were likely to fail within the meaning of Article 18(1) of the SRM Regulation. The assessments of the situations of ABLV Bank and ABLV Luxembourg were sent to the SRB on the same day.

17. On 23 February 2018, the SRB issued two decisions (SRB/EES/2018/09 and SRB/EES/2018/10), concerning ABLV Bank and ABLV Luxembourg respectively. In both, it agreed with the assessments as to whether those banks were failing or were likely to fail within the meaning of Article 18(1)(a) of the SRM Regulation, but decided that, in the light of the particular characteristics of those two entities and their financial and economic situation, resolution action was not necessary in the public interest.

18. On the same day, those decisions of the SRB were sent to the national resolution authorities ('the NRA') in Latvia and Luxembourg, the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia) and the Commission de surveillance du secteur financier (Financial Sector Supervisory Commission, Luxembourg).

19. ABLV Bank and the direct and indirect shareholders each brought actions before the General Court against the ECB's declarations of 23 February 2018. ABLV Bank's action was registered under number T-281/18 and the direct and indirect shareholders' action under number T-283/18.

20. At the same time, ABLV Bank and its direct and indirect shareholders each brought before the General Court an action for annulment (numbers T-280/18 and T-282/18 respectively) against the SRB's decisions of 23 February 2018.[8]

21. On 26 February 2018, ABLV's shareholders initiated a procedure allowing that bank to wind itself up and submitted to the NRA in Latvia an application for approval of a voluntary liquidation plan.

22. On 11 July 2018, the ECB revoked the ABLV Bank's authorisation following a request from the Latvian NRA.

III. Procedure before the General Court and the orders under appeal

23. Both ABLV Bank (Case T-281/18) and the direct and indirect shareholders (Case T-283/18) put forward before the General Court the same 10 grounds for annulment.

24. In both cases, the ECB raised several pleas of inadmissibility under Article 130(1) of the Rules of procedure of the General Court, which allows the defendant to apply to that Court for a decision on admissibility without going to the substance of the case.

8 The proceedings before the General Court in Case T-280/18, *ABLV Bank* v *SRB*, are suspended pending the judgment in the present appeals. Case T-282/18 was declared inadmissible by the General Court by order of 14 May 2020, *Bernis and Others* v *SRB* (T-282/18, not published, EU:T:2020:209).

25. By its first plea of inadmissibility, the ECB claimed in essence that 'the contested acts are preparatory measures that contain a factual assessment, but do not contain any obligations, and that those documents are not communicated to the institution concerned, but to the SRB; further it argues that they cannot be the subject of an action for annulment, but that they form the basis for the adoption by the SRB of a resolution scheme or a decision establishing that resolution is not in the public interest'. [9]

26. The General Court upheld the first plea raised by the ECB, but did not need to rule on the others.

IV. Procedure before the Court of Justice and the arguments of the parties

27. Since the two appeals, brought by ABLV Bank (Case C-551/19 P) and by its direct and indirect shareholders (Case C-552/19 P) respectively, are very similar from the point of view of their content, they have been joined.

28. In both appeals, the appellants claim that the Court should:

– set aside the orders of the General Court declaring their actions for annulment to be inadmissible;

– declare the applications for annulment to be admissible;

– refer the cases back to the General Court for it to rule on the substance of the actions;

– order the ECB to pay the costs.

29. The ECB contends that the Court should dismiss the appeals on the ground either that they are manifestly inadmissible or that they are in part inadmissible and in part unfounded. It also contends that the appellants should be ordered to pay the costs.

30. The Court granted the Commission leave to intervene in support of the form of order sought by the ECB. The Commission contends that the appeal should be dismissed as unfounded and that the Court should replace the reasoning contained in paragraph 34 of the orders under appeal.

31. The hearing held on 22 October 2020 was attended by ABLV Bank, the direct and indirect shareholders, the ECB and the Commission.

V. Analysis

A. Admissibility

32. The ECB takes the view that the grounds of appeal are based on the premiss that the assessment that a financial entity is failing or is likely to fail, which is carried out by the ECB itself, is not binding on the SRB. Since, however, that argument did not form the basis of the position adopted by the General Court in the orders under appeal, the grounds of appeal are ineffective.

33. The ECB's contention cannot be upheld.

9 Paragraph 17 of the orders under appeal.

34. It is true that the General Court dismissed the actions for annulment as inadmissible on the basis of the preparatory nature of the ECB's FOLTF ('fail or likely to fail') assessments in the procedure for the resolution of financial institutions.

35. However, the General Court reaches that conclusion after finding that, in accordance with Article 18 of the SRM Regulation, the ECB's assessment 'does not in any way bind the SRB' and that the ECB 'has no decision-making power within the framework for the adoption of a resolution scheme'. [10]

36. In reasoning in that way, the General Court expresses the view that the ECB's assessments are preparatory measures which are incapable of modifying the applicants' legal position because they have no binding legal force within the framework of the bank resolution procedure.

37. The General Court thus emphasises that, in its view, the fact that the ECB's assessments are not binding (on the SRB) is key to the reasoning that culminates in the decision in the orders under appeal. By the same token, the appellants are able to challenge that decision.

38. As regards the Commission's contention that paragraph 34 should be replaced, it must be recalled that that institution is participating in the appeal as an intervener in support of the form of order sought by the ECB. The form of order sought by the ECB does not include the claim that the content of paragraph 34 of the orders should be replaced.

39. Article 40 of the Statute of the Court of Justice and Articles 129 and 132 of its Rules of Procedure, which are applicable to the appeal pursuant to Article 190, provide that the purpose of the intervention must be limited to supporting in full or in part the form of order sought by one of the parties. Given that the ECB claims only that the appeals should be dismissed (and that the appellants should be ordered to pay the costs), the Commission's plea goes beyond the relief it is permitted to seek in its intervention and, for that reason, must not be upheld. [11]

B. Substance

40. The appellants put forward two grounds of appeal:

– the General Court made an error of law in breach of Article 263 TFEU by failing to state the reasons for the orders under appeal in relation to the decision actually adopted by the ECB;

– the General Court misinterprets Article 18(1) of the SRM Regulation.

1. First ground of appeal: infringement of Article 263 TFEU

(a) Arguments of the parties

41. Even though a reading of the first ground of appeal does not afford an entirely clear understanding of the arguments that are being put forward by the parties raising it, it is possible, in my view, to identify in those arguments those aspects of the orders under appeal with which those parties take issue.

10 Paragraph 34 of the orders under appeal.

11 The Commission asked the Court to *clarify* two aspects of paragraph 34 of the orders under appeal: (a) the possible intervention by the Commission and the Council in the resolution procedure; and (b) the extent to which the SRB is bound by the ECB's assessment. The Court will have to rule on the latter issue in analysing the appeal; there is, on the other hand, no need to dwell on any possible intervention by the Commission and the Council, which did not materialise in this case.

42. If I have understood it correctly, the first ground of appeal is comprised of arguments to the effect that the General Court made an error of law by considering the actions for annulment to be inadmissible on the basis of the decisions which the ECB *should* have adopted (according to the General Court's own reading of Article 18 of the SRM Regulation) rather than on the basis of those *actually adopted* with respect to the failure or likely failure of ABLV Bank.

43. As the appellants see it, the General Court's position is erroneous because the ECB's declaration that ABLV Bank was failing or was likely to fail constitutes, in their submission, a measure having binding legal effects on, and direct consequences for, their legal position.

44. On that premiss, the appellants claim that the General Court made an error of law, in breach of Article 263 TFEU, by failing to give reasons for its order on the decision actually adopted by the ECB. The actions for annulment should therefore have been declared admissible and the legality of the ECB's actions must be examined as a matter of substance.

45. Aside from the interpretation of Article 18 of the SRM Regulation, the appellants make a number of points in support of their position. In particular, they note that the FOLTF assessment was sent by the ECB to ABLV Bank and ABLV Luxembourg; that the ECB published the assessments on its website, stating that these were FOLTF assessments under Article 18(1)(a) of the SRM Regulation; and that the ECB did not confine itself to transmitting factual data on the banks' financial situation.

46. The ECB submits that the appellants do not clearly identify the error of law which the General Court is said to have made in breach of Article 263 TFEU. Otherwise, the ECB and the Commission contest the appellants' arguments.

(b) Assessment

47. In my opinion, the Court must declare this ground of appeal to be admissible, even though it is not exactly conspicuous by its clarity. A – less than easy – reading of it elicits the error of law attributed to the General Court, namely that of failing to give reasons for its orders on the decisions actually adopted by the ECB.

48. As regards the substance, it is my view that this ground of appeal should be dismissed.

49. The General Court did not rely, in the abstract, on the decisions which the ECB *should* have adopted with respect to the viability of ABLV Bank. On the contrary, it took into account the decisions *actually and really* adopted by the ECB, to which it applied, without making any error of law, the case-law of the Court of Justice on the admissibility of actions for annulment.

50. The General Court, as I have said, took into consideration the case-law of the Court of Justice on the admissibility of actions for annulment under Article 263 TFEU.[12] According to that case-law:

– a natural or legal person may, pursuant to Article 263 TFEU, challenge only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position;[13]

12 Paragraphs 29 to 32 of the orders under appeal.

13 Judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 9), and of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481, paragraph 44): 'acts or measures are harmful … only if they produce binding effects such as to affect the applicant's interests by bringing about a distinct change in his or her legal position'.

– in the case of acts adopted by a procedure involving several stages of an internal procedure, in principle, an act is open to challenge only if it is a measure which definitively lays down the position of the institution on the conclusion of that procedure, and not a provisional measure that is intended to pave the way for the final decision and the legal defects of which could reasonably be raised in an action against it; [14]

– an intermediate measure is not capable of forming the subject of an action if it is established 'that the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection'; [15]

– the position would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings were themselves the culmination of a special procedure distinct from that intended to permit the institution to take a decision on the substance of the case. [16]

51. After recalling that case-law, with which the appellants do not take issue, the General Court determined whether, in that case, the ECB's FOLTF assessments, in the light of their substance, had consequences for the applicants' legal position or whether, conversely, they were simply preparatory to the SRB's final decision on the application or otherwise of a resolution scheme. [17]

52. In the view of the General Court, the ECB's FOLTF assessments constituted preparatory measures adopted in the course of the procedure intended to permit the SRB to adopt a decision on the resolution of the two banking institutions, and could not therefore be the subject of a direct action for annulment.

53. In interpreting Article 18(1) of the SRM Regulation, the General Court considered that the decision on the relevance or otherwise of a resolution scheme fell to the SRB and that the ECB's role was confined to communicating its FOLTF assessment of the banking institution in question. It recalled in that connection that the applicants had also each brought an action for the annulment of the SRB's decisions in Cases T-280/18 and T-282/18.

54. I see no flaw in the reasoning so followed by the General Court, which, to my mind, is consistent with the case-law of the Court of Justice.

55. The appellants put forward various arguments, most of them considered and dismissed by the General Court, to demonstrate that the ECB's FOLTF assessments were actually binding and impacted their interests by bringing about a distinct change in their legal position.

14 Judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 50).

15 Judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 53); of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 12); and of 24 June 1986, *AKZO Chemie and AKZO Chemie UK* v *Commission* (53/85, EU:C:1986:256, paragraph 19).

16 Judgment of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 11).

17 Paragraph 33 of the orders under appeal.

56. Some of those arguments amount to a claim that the facts have been distorted,[18] although the appellants do not direct a criticism to that effect at the General Court.[19] In any event, the arguments set out under this first ground warrant analysis on appeal,[20] since they are not confined to simply repeating or reproducing verbatim what has already been explained to the General Court.[21]

57. In the first place, the appellants argue that there is a presumption that any assessment by an authority is binding unless that authority expressly states otherwise.

58. That assertion is unacceptable. If such a presumption were to exist, the Court's case-law laying down an obligation to analyse the content and of an act of an EU institution in order to determine whether or not it is binding would be meaningless. If the Court were to endorse the appellants' position, all acts of the institutions, bodies and agencies of the European Union would be binding unless they expressly indicated otherwise, an eventuality which would be exclusively dependent on the will of those issuing the acts. That is clearly not the case.

59. In the second place, they submit that the ECB's FOLTF assessments involve an analysis of proportionality and are for that reason binding in nature.

60. It is true that many binding legal acts of the institutions, bodies and agencies of the European Union contain an analysis of the proportionality of the measures that they include. This does not support the inference, however, that every act containing an analysis of proportionality is binding. In any event, the ground of appeal does not set out the reasons why the alleged analysis of proportionality carried out by the ECB in its FOLTF assessments would confer on them binding effects impacting the legal position of the banks concerned.

61. In the third place, the appellants claim that the ECB's FOLTF assessments are measures the content of which is binding because the ECB publicly announced that they were being prepared and communicated them to the banks concerned.

62. This argument cannot succeed either. On the one hand, it is based on a factual appraisal not open to review on appeal: the General Court took the view that 'it was not the contested acts that were published by the ECB, but rather two announcements which are not the contested acts'.[22]

63. Furthermore, the publication of two press releases concerning a FOLTF assessment does not mean that the ECB wishes to make those assessments binding or that the latter are binding in their own right. I shall return to that point later.

18 A distortion of the facts occurs where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect. Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence. Where an appellant alleges distortion of the evidence by the General Court, he must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his view, led to that distortion by the General Court (judgments of 19 September 2019, *Poland* v *Commission*, C-358/18 P, not published, EU:C:2019:763, paragraph 45, and of 3 December 2015, *Italy* v *Commission*, C-280/14, EU:C:2015:792, paragraph 52).

19 They say as much in paragraph 42 of their reply.

20 It is settled case-law that, 'provided that an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. If an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose' (judgments of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 42, and of 20 September 2016, *Mallis and Others* v *Commission*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraph 36 and the case-law cited).

21 'The points of law examined at first instance may be argued again in the course of an appeal, provided that the appellant challenges the interpretation or application of EU law by the General Court. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose' (see the judgment of 3 December 2015, *Italy* v *Commission*, C-280/14, EU:C:2015:792, paragraph 43, and the order of 5 September 2019, *Iceland Foods* v *EUIPO*, C-162/19 P, not published, EU:C:2019:686, paragraph 5).

22 Paragraph 45 of the orders under appeal.

64. In the fourth place, the appellants take the view that the binding nature of the ECB's FOLTF assessments follows from the fact that the ECB itself and the SRB declared that the winding-up of ABLV Bank and its Luxembourg subsidiary was inevitable.

65. That deduction is unfounded. The content of the FOLTF assessments was not intended to determine that the two banks should be resolved under Latvian and Luxembourg law, any more than this was the ECB's intention in adopting them. That outcome was the consequence of the SRB's decision that there was no public interest in placing the two financial institutions under resolution schemes in accordance with the SRM Regulation.

66. Finally, the appellants call into question the General Court's reference to the passage from the judgment of the Tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) of 9 March 2018 in which that court stated that 'the parties agree that the assessments and findings of the ECB and the SRB in respect of the Regulation are not binding on the court hearing the present application'. [23]

67. Suffice it to say by way of rejection of that criticism that, in making that reference, the General Court was simply corroborating its main argument. If the reproduction of that passage did not therefore embody the *ratio decidendi* of the order of the General Court, the complaint that it did, which is made under this ground of appeal, is rendered ineffective.

68. In short, I propose that the Court should dismiss the first ground of appeal.

2. Second ground of appeal: misinterpretation of Article 18(1) of the SRM Regulation

69. By the second ground of appeal, the appellants complains that the General Court made an error of law by adopting a strict interpretation of Article 18(1) of the SRM Regulation by finding that the ECB's FOLTF assessments are not challengeable acts.

70. The appellants further claim that the General Court erred in law in taking the view that the situation of ABLV Bank and ABLV Luxembourg had not been changed by the ECB's FOLTF assessments.

(a) First part of the second ground of appeal: misinterpretation of Article 18 of the SRM Regulation

(1) Arguments of the parties

71. According to the appellants, the second subparagraph of Article 18(1) of the SRM Regulation cannot be interpreted in the way the General Court interpreted it (that is to say, to the effect that it provides only for a non-binding communication of information from the ECB to the SRB, the latter being alone competent to adopt a resolution scheme).

72. In the view of the appellants, a FOLTF assessment requires a legal analysis and a conclusion of the same nature. The second subparagraph of Article 18(1) of the SRM Regulation, they claim, confers on the ECB the power to issue an opinion the effects of which are binding on the SRB.

23 Paragraph 48 of the orders under appeal.

73. The General Court, moreover, called into question the coherence of the relationship between the prudential supervision system and the system for the resolution of credit institutions. Under the latter system, the supervisory authority (in this case, the ECB) determines whether a bank is failing or is likely to fail and its assessment is binding on the resolution authority.

74. Finally, the appellants submit that the General Court did not properly assess the functional equivalence between the FOLTF assessment and the withdrawal of banking authorisation.

75. The ECB and the Commission contest those arguments.

(2) Assessment

76. I take the view, in common with the General Court, that the ECB's FOLTF assessments are to be classified as preparatory acts within the procedure for the resolution of banking institutions. Although the reasoning employed in the orders under appeal in order to arrive at that classification may be open to some qualification in one regard or another, it does not, to my mind, exhibit any error of law as to its substance.

77. In order to reach that conclusion, I shall, in the first place, examine the complex administrative procedure for approving resolution schemes. In the second place, I shall look at the coherence of the relationship between the SSM and the SRM. In the third place, I shall address the possible functional equivalence between the FOLTF assessment and the withdrawal of banking authorisation.

(i) The complex administrative procedure for approving resolution schemes under Article 18 of the SRM Regulation

78. The approval of resolution schemes for financial institutions has enormous economic and legal consequences. Because of this, the SRM Regulation provides for a procedure in which several institutions and one agency of the European Union are involved or may participate.

79. Most of the decision-making power lies with the SRB. The ECB has a power of initiative, although this is not exclusive, and the Commission and the Council of the European Union have a power of objection at last instance, in particular in cases calling for the mobilisation of sums by the Single Resolution Fund. [24]

80. The complexity of the procedure is compounded by the speed with which the aforementioned institutions and agency of the European Union must take their decisions in order to ensure that the resolution of the banking institution does not have an adverse impact on the financial markets. That need for speed also requires them, in effect, to have the decision *prepared* before they launch the procedure, which they usually start and finish over the course of a weekend in order to take advantage of the financial markets' being closed.

24 Immediately after the resolution scheme has been adopted, the SRB forwards it to the Commission, which, within a period of 24 hours, approves it or rejects it, taking into account the discretionary aspects of the resolution scheme. If the Commission considers that the SRB's decision does not satisfy the public interest criterion or entails a material modification of the amount of the Single Resolution Fund, it proposes to the Council, within 12 hours, that it raise an objection to the scheme. The Council acts by simple majority. The SRB's decision enters into force within 24 hours if there are no objections from the Commission or the Council. If there are any objections from the Council to the contribution to the Single Resolution Fund, or from the Commission to any discretionary aspects of the resolution scheme, the SRB may modify its proposal within 8 hours. If the Council raises objections to the placing of an institution under resolution on the ground that the public interest criterion is not fulfilled, the relevant entity is wound up in an orderly manner in accordance with the applicable national law, in accordance with Article 8 of the SRM Regulation.

81. The complexity of the decision-making procedure derives from the involvement or participation in it of the following:

– the supervisory authority (the ECB), which has been responsible for monitoring the bank experiencing solvency issues;

– the resolution authority (SRB), to which it falls to decide whether a credit institution is to be placed under a resolution scheme;

– the Commission and the Council, whose involvement is necessary because the SRB is an agency of the European Union to which powers are delegated on a limited basis, and because of the existence until its definitive unification in 2024 of a Single Resolution Fund with an intergovernmental component. [25]

82. It is important to specify which of the measures within that complex procedure are merely preparatory (not open to judicial review) and to differentiate them from the final decisions amenable to an action for annulment before the General Court.

83. The resolution procedure [26] starts with the declaration that the banking institution is failing or is likely to fail. [27] To an extent, that declaration brings the monitoring to an end and operates as an alert to the risk to financial stability posed by the institution's insolvency and to the fact that intervention by the resolution authority may therefore be necessary.

84. Responsibility for assessing whether a bank under supervision is failing or is likely to fail lies in the first place with the ECB, although the latter must consult the SRB before making such an assessment. [28] If its assessment is affirmative, the ECB communicates this without delay to the Commission and the SRB. [29]

85. It is logical that the principal responsibility for making a FOLTF assessment should lie with the ECB, since the latter must take into consideration a number of factors of which it has direct knowledge as the supervisory authority under the SSM. [30]

25 See recital 24 of the SRM Regulation.

26 Article 18 of the SRM Regulation largely reproduces the content of Article 32 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).

27 The substantive aspects of the FOLTF assessments, together with certain points of procedure, were developed by the European Banking Authority's Guidelines EBA/GL/2015/07 of 6 August 2015 on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59 ('the 2015 EBA Guidelines on FOLTF assessments')

28 The second subparagraph of Article 18(1) of the SRM Regulation.

29 The third subparagraph of Article 18(1) of the SRM Regulation.

30 Those factors, set out in Article 18(4) of the SRM Regulation, are:
– assessment of compliance with the requirement for retaining authorisation to pursue the activity of banking and of the grounds for the withdrawal of that authorisation by the ECB, which include but are not limited to the fact that the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;
– verification that 'the assets of the entity will, in the near future, be less than its liabilities';
– a finding that 'the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due';
– the need for extraordinary public financial support, with certain exceptions.

86. Nonetheless, the ECB does not have a monopoly on FOLTF assessments.[31] The SRB has a subsidiary role, inasmuch as it may carry out such an assessment only after informing the ECB of its intention to do so and only if the ECB has not made such an assessment within three calendar days of receipt of that information. In that event, the ECB must, without delay, provide the SRB with any relevant information which the latter requests in order to inform its assessment.[32]

87. Once the FOLTF assessment has been completed by the ECB (or, alternatively, by the SRB), it is for the SRB to decide whether or not to adopt a resolution scheme. In order for it to be able to decide to do so, three conditions, set out in Article 18(1) of the SRM Regulation, must be present:

– it must be confirmed that the entity is failing or is likely to fail;

– there must be no reasonable prospect that any alternative private sector measures would prevent the entity's failure within a reasonable timeframe, having regard to timing and other relevant circumstances;

– resolution must be necessary in the public interest.[33]

88. If the SRM finds that those three conditions are met, it adopts a resolution scheme which, in accordance with Article 18(6) of the SRM Regulation: (a) places the entity under resolution; (b) determines the application of the resolution tools to the institution under resolution referred to in Article 22(2); and (c) determines 'the use of the [Single Resolution] Fund to support the resolution action in accordance with Article 76 and in accordance with a Commission decision taken in accordance with Article 19'.

89. It follows from that description that it is the SRM's decision adopting the resolution scheme (or electing not to apply the scheme and directing that the banking institution be wound up in accordance with national law) which is the true final act in the procedure. If the Commission or the Council were to intervene, their decisions would have the same status.[34]

90. Since, therefore, it is the SRB's decision which is the final act in the resolution procedure, the FOLTF assessment that falls to the ECB is in the nature of a preparatory measure within the framework of that procedure, as the General Court rightly noted in its orders.[35]

91. It is nonetheless reasonable to ask whether, notwithstanding its preparatory status, the ECB's FOLTF assessment may exert on the banks concerned specific legal effects (a change in their legal position) as a result of which they or their shareholders could bring a direct action for its annulment.

92. The answer to that question must be in the negative. Any impact on the legal position of the banks concerned that might justify the admissibility of any action for annulment before the General Court[36] would flow from the decisions of the SRB, not from the declarations of the ECB.

31 Article 21(2) of the SRM Regulation provides another means of making a FOLTF assessment for the purposes of deciding on the write-down or conversion of capital instruments. This assessment takes the same form as that provided for in Article 18.

32 Second subparagraph of Article 18 of the SRM Regulation.

33 In accordance with Article 18(5) of the SRM Regulation, 'a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent'.

34 In this case, there were only two decisions by the SRB, dated 23 February 2018 (SRB/EES/2018/09 and SRB/EES/2018/10), and none by the Commission or the Council. The SRB took the view that it was not appropriate to adopt a resolution scheme and notified the NRAs in Latvia and Luxembourg to that effect.

35 The proximity in time of one act (the FOLTF assessment) to the other (the SRB's decision) must not lead to any confusion over their different nature. In this case, the ECB's FOLTF assessments and the SRB's decisions took place on the same date. See the information at https://srb.europa.eu/en/node/495

36 As I have already explained, ABLV Bank and its direct and indirect shareholders each brought an action for the annulment of the measures adopted by the SRB before the General Court. On the outcome of those actions, see footnote 8 to this Opinion.

93. At the hearing, the appellants laid emphasis in their submissions on the absence of any judicial protection that would follow from endorsement of the position adopted in the orders under appeal. To my mind, however, there is no such absence of judicial protection, since the (alleged) illegality of the content of the ECB's assessments may be relied on in support of an action directed against any decisions by the SRB that incorporate that content and conclude the procedure.

94. Such an action against the decisions of the SRB ensures adequate judicial protection for anyone seeking to highlight any defects which might have vitiated the preparatory measures adopted by the ECB, on the basis of whose assessments the SRB takes its own decisions.

95. That negative reply is borne out by the fact that resolution schemes must not be contested by 'superfluous' actions against preparatory measures in cases where the illegality of those measures may be challenged without reservation by way of an action for the annulment of the final act adopted by the SRB, thus ensuring the judicial protection of the persons concerned.

96. Acceptance of the possibility of two parallel series of simultaneous actions (those against the ECB's FOLTF assessments, on the one hand, and those against decisions adopted by the SRB on the same day, on the other) would not make for a sound administration of justice and seems inappropriate from the point of view of procedural economy. The legality of the ECB's assessments can, as I have said, be examined in the context of the actions against the decisions of the SRB, without the need for any further (superimposed) actions specifically intended to contest FOLTF declarations issued by the ECB.

97. The inadmissibility of actions against FOLTF declarations by the ECB is consistent, moreover, with the criteria laid down by the Court in the judgment in *Berlusconi and Fininvest* and reiterated in the judgment in *Iccrea Banca*.[37]

98. That case-law, even though applicable in principle to vertical composite administrative procedures involving national authorities and institutions and bodies or agencies of the European Union (such as the ECB and the SRB), can be extrapolated to an EU procedure the participants in which are a number of EU institutions or bodies.

99. In accordance with those judgments, judicial review must be exercised in relation to the final decision in the procedure. Any allegations as to the illegality of the preparatory measures must be disposed of by the court hearing the action against that final act, unless the former measures are binding on the institution exercising the power to adopt a final decision.

100. In the procedure for the adoption of resolution schemes, the final decision falls, as I have explained, to the SRB.[38] The only matter that remains to be resolved is whether the ECB's FOLTF assessment is binding on the SRB. If it is, it would be reasonable to consider whether that act by the ECB may be the subject of a specific action, on the ground that it is substantive in itself and affects the rights of individuals.

37 Judgments of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), and of 3 December 2019, *Iccrea Banca* (C-414/18, EU:C:2019:1036).

38 Recital 11 of the SRM Regulation states that, in the context of the SRM, 'a centralised power of resolution is established and entrusted to the Single Resolution Board established in accordance with this Regulation … and to the national resolution authorities'.

101. The ECB can implement the bank resolution procedure by making a FOLTF assessment and transmitting it to the SRB. If it takes the view that the bank in question is not failing, it does not have to transmit anything to the SRB and its assessment does not produce any effects on that institution. In that event, since the procedure under Article 18 of the SRM Regulation would not be triggered, there would be no right to bring an action for annulment against the ECB (or an action for failure to act, since the assessment would have been carried out but it would not have concluded that there is a risk of failure).

102. Where, on the other hand, the ECB transmits its FOLTF assessment, the SRB must decide whether a resolution scheme is to be adopted or whether the institution concerned is to be wound up in accordance with national law.

103. The legal effects on the bank are not felt until the SRB assesses whether the aforementioned three conditions set out in Article 18(1) of the SRM Regulation are met. The ECB's assessment does not in itself produce any binding legal effects (subject to the reservation which I shall set out below), since, as I have said, the SRB must adjudicate on whether the aforementioned three conditions are met in order to be able to apply a resolution scheme.

104. Where the ECB has made a FOLTF declaration, the SRB cannot refrain from making a decision. If, contrary to the ECB's finding, the SRB takes the view that the entity in question is not failing or likely to fail, the SRB itself must decline to apply a resolution scheme. In those circumstances, that decision would be the final act amenable to judicial review. The ECB's assessment would be the preparatory measure the legality of which could be addressed in the context of that action against the final decision adopted by the SRB.

105. Accordingly, Article 86(1) of the SRM Regulation provides only for the possibility of bringing an action for annulment against the decisions of the SRB (or the Appeal Panel, if this is involved), but does not mention the FOLTF assessments by the ECB.

106. The ECB's FOLTF assessment obliges the SRB to adopt a final decision on the adoption of a resolution scheme, but it does not dictate what the content of that decision should be. The SRB is also able to make a FOLTF assessment as part of its decision.

107. In short, the ECB's power is limited to triggering the procedure. Although it is difficult to conceive of there being a difference of opinion between the supervisory authority and the resolution authority with respect to whether a bank is failing (Article 18 of the SRM Regulation encourages cooperation between them), they each have different functions and responsibilities.[39]

108. The General Court states that the ECB's FOLTF declaration is 'mere[ly an] assessment, which does not in any way bind the SRB'. That assertion, understandable and correct in the context of paragraph 34 of the orders under appeal, calls for some clarification.

109. The body with the power to take final decisions in the resolution procedure is indeed the SRB, and not the ECB. The ECB, however, has the ability to trigger that procedure and, in this way, to 'oblige' the SRB to make a decision once the former has communicated to the latter the outcome of its FOLTF assessment. It is only in this way that the ECB's declaration has binding effects on the SRB, and, even then, these are procedural in nature and do not attach to the assessment, from which the SRB might depart.

39 Paragraphs 32 to 38 of the EBA/GL/2015/07 Guidelines on FOLTF assessments call for consultation and exchange of information between the two authorities.

110. At the hearing, the Commission emphasised that the ECB's FOLTF declaration carried 'authority' derived from the fact that the ECB is better acquainted with the situation of the banks under its supervision, but stopped short of advocating that the content of that declaration should bind the SRB to the point of predetermining every aspect of the latter's subsequent decision.

111. I have no objection to the assumption that the ECB's assessment may carry *auctoritas* in the classical sense of that term, and that the SRB could not refrain from taking it into account or reject its content uncritically. This does not mean, however, that it is also vested with the *potestas* inherent in legal decisions that are imposed in relations between institutions in the case where one of them may not depart from the substance of what the other has agreed or decided to do.[40] That is the very essence of binding effect.

(ii) Coherence of the relationship between the prudential supervision system and the system for the resolution of credit institutions

112. The appellants express the view, in a less than precise way, that the position adopted by the General Court is vitiated by an error of law inasmuch as it runs counter to the proper configuration of the relationship between the SSM and the SRM.

113. In their opinion, the FOLTF assessment of a credit institution should always be the mandatory responsibility of the supervisory authority (in this case, the ECB) and it would be illogical to allow a banking decision adopted by the SRB to run counter to the opinion of the supervisory body.

114. That argument leaves out of account that the SRB has a subsidiary power to make the FOLTF assessment itself if it has not been made by the ECB.

115. The second subparagraph of Article 18(1) of the SRM Regulation states that the SRB may make such an assessment, in its executive session, only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB must, without delay, provide the Board with any relevant information that the Board requests in order to inform its assessment.

116. Although that situation will not arise on a regular basis (it is the ECB, as supervisor, which handles information suitable for the assessment), the SRM Regulation allows the SRB to trigger the resolution procedure without an assessment from the ECB.

117. The reasoning applied by the appellants in this part of the second ground of appeal must therefore be rejected.

(iii) The possible functional equivalence between the FOLTF assessment and the withdrawal of banking authorisation

118. The appellants raise again on appeal the equivalence between the FOLTF assessment and the withdrawal of banking authorisation.

40 Article 266 TFEU provides a typical example of a binding decision.

119. The General Court provided them with a suitable response to this plea in the orders under appeal. It stated that, 'while it is true that such an assessment may be based on a finding of fact that the requirements for continuing authorisation are no longer satisfied under Article 18(4)(a) of [the SRM] Regulation …, those two acts are not the same. In that regard, suffice it to find that the requirements for withdrawing an authorisation set out in Article 18 of Directive 2013/36/EU [41] … are manifestly different from the considerations forming the basis of a FOLTF assessment as set out in Article 18(4) of [the SRM] Regulation …'. [42]

120. Since the appellants reiterate in this regard the arguments they put forward before the General Court, without adding any others of any relevance, this part of the second ground of appeal cannot be upheld.

121. In any event, the General Court's reasoning is correct. A FOLTF assessment of a credit institution is different from the adoption of a decision on the withdrawal of its authorisation to operate.

122. Still less is it possible to draw the inference, as the appellants do, that the adoption of a withdrawal decision by the supervisory authority means that it must be that authority alone which carries out the FOLTF assessment.

123. In short, this part of the second ground of appeal must be dismissed too.

(b) Second part of the second ground of appeal: modification of the legal position of ABLV Bank and ABLV Luxembourg

(1) Arguments of the parties

124. In addition to the error in the interpretation of Article 18 of the SRM Regulation, the appellants also criticise what they describe as the General Court's misplaced arguments with respect to the modification of their legal position as a result of the ECB's FOLTF assessment.

125. In the first place, they maintain that their legal position was changed by the ECB's publication of their FOLTF assessments, which renders those acts open to challenge.

126. In the second place, they submit that the General Court erred in paragraph 47 of its orders in taking the view that the relevant text was that communicated internally by the ECB to the SRB, irrespective of the publication by the ECB.

127. In the third place, they state that the General Court made a further error of law in basing its decision on the case-law which it cites [43] in order to support the proposition that the ECB's FOLTF assessment is not a challengeable act.

128. The ECB and the Commission contest those arguments.

41 Directive of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

42 Paragraph 46 of the orders under appeal.

43 Orders under appeal, paragraphs 29 to 32.

(2) Assessment

129. In so far as the appellants repeat in this part of the second ground of appeal arguments already put forward in the other parts of this ground, the submissions I have made elsewhere in this Opinion hold good for these repeated arguments too.

130. I think it appropriate to note also that the appellants refer only to the legal effects of the FOLTF declarations adopted by the ECB (that is to say, to the effects on their legal position). No mention is made of any impact which those declarations may have on the economic situation of the banks involved.

131. In reply to the questions put by the Court at the hearing, the appellants were unable to identify any provision that would support the inference that the FOLTF declaration made by the ECB is capable in and of itself of altering their legal position.

(i) Publication of the FOLTF declaration

132. The ECB's FOLTF assessments and the SRB's decisions on ABLV Bank and ABLV Luxembourg were published on the same date, 24 February 2018.

133. The SRB's decisions are published officially because they are the final act in the procedure and, as such, clearly have an impact on the legal positions of the entities to which they relate. The ECB's assessment, however, was the subject of a mere press release. [44]

134. Any alteration of the banks' legal position would flow, if at all, from the SRB's final decision, which was published officially. The ECB's press release on its FOLTF assessment of the two banking institutions was issued because the SRB had adopted and published its final decision.

135. The ECB contends in its rejoinder [45] that, if the SRB does not adopt a final decision in the procedure, the ECB's FOLTF assessment is not made public, so as to ensure that it does not have any adverse economic repercussions on the credit institutions analysed.

136. As one would expect, the ECB likewise does not communicate its assessment before the SRB makes its final decision public, so as to neutralise the potential adverse economic repercussions mentioned above. According to the practice followed to date, which was observed in this case too, the SRB's decision and the ECB's press release are published simultaneously.

137. In theory, the ECB could publish its FOLTF declaration on a credit institution even if the SRB has not adopted the final decision in the resolution procedure under Article 18 of the SRM Regulation. As this was not the case in this instance, there is no need to investigate the repercussions of that conduct on the situation of the banking institution concerned.

138. In the light of all the foregoing, the first argument put forward by the appellants under this second part of the second ground of appeal must be dismissed.

(ii) Differences between the FOLTF declaration and the press release published by the ECB

139. The second argument under this second part of the ground of appeal must also be dismissed, since it is based on an inadequate understanding of paragraph 47 of the orders under appeal.

44 The press release is available on the ECB's website: https://www.bankingsupervision.europa.eu/press/pr/date/2018/html/ssm.pr180224.en.html

45 ECB's rejoinder, paragraph 19.

140. In that paragraph, the General Court, drawing on the considerations set out in the previous paragraphs 32 to 36, inferred that 'it is apparent from the substance of the contested acts that they are not decisions but preparatory measures'.

141. Now, that reasoning (the substantive soundness of which I have already analysed) rebutted the criticism, raised by the applicants for annulment, that the FOLTF declaration was different from the publication on the ECB's website.

142. The important point, in any event, was that the ECB act forming the subject of the action (the FOLTF declaration) could not be independently challenged before the General Court.

(iii) Case-law cited in the orders under appeal

143. The third and final argument under this part of the second ground of appeal is circular and should also be dismissed. The appellants state that the case-law cited by the General Court concerns situations in which there were doubts about whether the act in question was open to challenge by way of an action for annulment, a scenario which, in their view, is not present in this case.

144. As I have explained, that dispute concerned whether an action for annulment could be brought against an ECB FOLTF assessment itself, and separately from the action against the SRB's final decision in a bank resolution procedure.

145. Now, the case-law cited by the General Court was relevant to the adjudication on the admissibility of the particular action which the appellants had brought. That case-law provides guidance on when the successive measures adopted by the EU institutions in complex administrative procedures such as that under analysis here may be challenged.

146. In short, the second part of the second ground of appeal must also be dismissed, in common with the remainder of the appeal.

VI. Costs

147. In accordance with Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings pursuant to Article 184(1) of the same Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

148. In accordance with Article 184(1) in conjunction with Article 140(1) of the aforementioned Rules, the Commission, as intervener in the disputes, must bear its own costs.

VII. Conclusion

149. In the light of the foregoing considerations, I propose that the Court:

(1) Dismiss the appeals on the ground that they are in part inadmissible and in part unfounded;

(2) Order ABLV Bank AS to pay the costs in Case C-551/19 P, and order Ernests Bernis, Oļegs Fiļs, OF Holding SIA and Cassandra Holding Company SIA to pay those in Case C-552/19 P;

(3) Order the Commission to bear its own costs.