Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 8 July 2021 [1]

Case C-874/19 P

Aeris Invest Sàrl
v
Single Resolution Board (SRB)
and
Case C-934/19 P
Algebris (UK) Ltd,
Anchorage Capital Group LLC
v

Single Resolution Board (SRB)

(Appeal – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms – Resolution of Banco Popular Español – Regulation (EU) No 806/2014 – Establishment of a resolution scheme – Sale of business tool – Article 20 – Valuation for the purposes of resolution – Write-down or conversion of relevant capital instruments – Provisional valuation – Concept – Requirement to carry out an *ex post* definitive valuation – Protection of shareholders and creditors – Correction pursuant to Article 20(12) of Regulation (EU) No 806/2014 – 'No creditor worse off' principle – Charter of Fundamental Rights of the European Union – Article 17 – Protection of property)

I. Introduction

1. Time plays a central role in the resolution of a bank. In order not to unsettle the financial markets or depositors and to avoid 'bank runs', resolution authorities must be equipped with the power to decide on and execute the resolution of a bank within the space of a few days. The implications of such a decision are considerable, because not only does it entail, under certain circumstances, major encroachments on the ownership positions of shareholders and creditors, it also produces *faits accomplis* to a large extent.

2. The prior valuation of the assets and liabilities of the bank in difficulty is therefore of pivotal importance for the shareholders and creditors of the bank in question. The outcome of that valuation will determine which resolution tools are applied and the extent to which the shareholders and creditors are used to absorb losses.

[1] Original language: German.

3. In the case of the Spanish Banco Popular, which was the first credit institution to be resolved at European level in 2017, the Single Resolution Board ('the SRB') concluded that, in order to offset the losses of that bank, it was first necessary to cancel shares in the bank and write down claims against the bank in the amount of over EUR 4 billion. Only then could all the remaining assets, rights and liabilities be transferred to Banco Santander, which paid a symbolic price of one euro for them. In that context, the relevant valuations had to be carried out under extreme time pressure.

4. The present appeal proceedings now revolve around the question of whether and, if so, under what conditions, the former shareholders and creditors of Banco Popular may demand that an *ex post* definitive valuation be carried out after their capital instruments have already been completely written down or cancelled and Banco Popular has ceased to exist as a result of the merger with Banco Santander.

II. Legal framework

5. The legal framework of both appeals is formed by 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 ('the SRM Regulation'). [2]

6. Recitals 56, 58, 63 and 64 of that regulation read, in extract, as follows:

'(56) In order to minimise disruption of the financial market and of the economy, the resolution process should be accomplished in a short time. …

'(58) … The objectives of resolution should … be to ensure the continuity of essential financial services, to maintain the stability of the financial system, to reduce moral hazard by minimising reliance on public financial support to failing entities, and to protect depositors.

…

(63) For the purpose of protecting the rights of shareholders and creditors, clear obligations should be laid down concerning the valuation of the assets and liabilities of the institution under resolution and … the valuation of the treatment that shareholders and creditors would have received if the entity had been wound up under normal insolvency proceedings. … Before any resolution action is taken, a fair, prudent and realistic valuation of the assets and liabilities of the entity should be carried out. Such valuation should be subject to a right of appeal only together with the resolution decision. In addition, … an *ex post* comparison between the treatment that shareholders and creditors have received and the treatment they would have received under normal insolvency proceedings should be carried out after resolution tools have been applied. If it is determined that shareholders and creditors have received, in payment of their claims, less than the amount that they would have received under normal insolvency proceedings, they should be entitled to the payment of the difference where required under this Regulation. That difference, if any, should be paid by the Fund established in accordance with this Regulation.

[2] OJ 2014 L 225, p. 1.

(64) … 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.'

7. Article 3(1) of that regulation provides:

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

…

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

…

(40) "own funds" means own funds as defined in Article 4(1)(118) of Regulation (EU) No 575/2013 [Capital Requirements Regulation; 'the CRR];[3]

…

(45) "Common Equity Tier 1 instruments" means capital instruments that meet the conditions laid down in Article 28(1) to (4), Article 29(1) to (5) or Article 31(1) of [the CRR];

(46) "Additional Tier 1 instruments" means capital instruments that meet the conditions laid down in Article 52(1) of [the CRR];

(47) "Tier 2 instruments" means capital instruments or subordinated loans that meet the conditions laid down in Article 63 of [the CRR];

…

(51) "relevant capital instruments" means Additional Tier 1 instruments and Tier 2 instruments;

…'

8. Article 15(1) of the SRM Regulation sets out the 'General principles governing resolution'. According to that provision:

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

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

…

[3] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1). According to that definition, the own funds of an institution consist of the sum of its Tier 1 capital and Tier 2 capital.

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

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

9. Article 17 of the SRM Regulation, read in conjunction with Article 48 of Directive 2014/59/EU (Bank Resolution and Recovery Directive; 'the BRRD'),[4] provides for a 'liability cascade' in the event that, inter alia, the SRB exercises write-down and conversion powers. In accordance with that cascade, a write-down and conversion of capital instruments is to be carried out to the extent provided for by the valuation, in a certain order, starting with the Common Equity Tier 1 items, then the Additional Tier 1 instruments, and then the Tier 2 instruments.

10. Under the heading 'Resolution procedure', Article 18(1)(1) of the SRM Regulation provides as follows:

'The Board shall adopt a resolution scheme … only when it assesses … that the following conditions are met:

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

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

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

11. The 'Valuation for the purposes of resolution' is regulated in Article 20 of the SRM Regulation:

'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.

[4] 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 (OJ 2014 L 173, p. 190).

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;

…

(f) when the sale of business tool is applied, to inform the decision on the assets, rights, liabilities or instruments of ownership to be transferred and to inform the Board's understanding of what constitutes commercial terms for the purposes of Article 24(2)(b);

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

…

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. …

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.

…

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.

18. The valuation referred to in paragraph 16 shall:

(a) assume that an institution under resolution with respect to which the resolution action or actions have been effected, would have entered normal insolvency proceedings at the time when the decision on the resolution action was taken;

(b) assume that the resolution action or actions had not been effected;

(c) disregard any provision of extraordinary public financial support to an institution under resolution.'

12. Article 76 of the SRM Regulation governs the use of the resolution fund:

'1. Within the resolution scheme, when applying the resolution tools to entities referred to in Article 2, the Board may use the Fund only to the extent necessary to ensure the effective application of the resolution tools for the following purposes:

…

(e) to pay compensation to shareholders or creditors if, following an evaluation pursuant to Article 20(5) they have incurred greater losses that they would have incurred, following a valuation pursuant to Article 20(16), in a winding up under normal insolvency proceedings;

…'

III. Facts

13. The appellant in Case C-874/19 P, Aeris Invest Sàrl ('Aeris'), was a shareholder of Banco Popular Español, SA ('Banco Popular'). The appellants in Case C-934/19 P, Algebris (UK) Ltd and Anchorage Capital Group LLC ('Algebris and Anchorage'), manage investment funds which held Additional Tier 1 and Tier 2 instruments of Banco Popular.

A. The resolution procedure

14. By decision of 7 June 2017,[5] the SRB – after having obtained endorsement from the Commission[6] – decided to resolve Banco Popular ('the Resolution Decision').

15. That decision was preceded by a valuation of Banco Popular's assets and liabilities within the meaning of Article 20 of the SRM Regulation. The SRB had produced a first valuation on 5 June 2017 ('Valuation 1'). It is apparent from the Resolution Decision that the latter concerned the question of whether the conditions for resolution were met within the meaning of Article 18(1) of the SRM Regulation,[7] which the SRB answered in the affirmative. On 6 June 2017, a second valuation was produced by an independent expert, namely the auditing company Deloitte ('Valuation 2'). The objective of the valuation was, first, to assess the value of the assets and liabilities of Banco Popular within the meaning of Article 20(4) of the SRM Regulation; second, to provide for an estimate of the treatment that the shareholders and creditors would have received if the entity had entered into normal insolvency proceedings; and, third, to provide an assessment of which assets, rights, liabilities or instruments of ownership enter into consideration for the purposes of the sale of business tool and to establish an understanding of what constitutes commercial terms in that context.[8]

16. Deloitte carried out Valuation 2 over 12 days and, as a result, put the net asset value of Banco Popular at EUR 1.3 billion in the best case scenario and minus EUR 8.2 billion in the worst case scenario, and considered that a negative value of minus EUR 2 billion was the most likely figure. According to Deloitte, that value range included 'a buffer for additional losses, as provided for by Article 36(9) of the BRRD,[9] which could not be determined with precision'. In view of the limited nature of the information and time available, Deloitte designated that valuation as 'provisional for the purposes of Article 36 BRRD'.[10]

17. Both Valuation 1 and Valuation 2 were annexed to the Resolution Decision.

18. The Resolution Decision provides, in Articles 5 and 6, that first the Common Equity Tier 1 capital in its entirety, that is to say, in particular the shares,[11] and the Additional Tier 1 capital are to be written down to zero and the Tier 2 instruments are to be converted into shares before the sale of business resolution tool is applied.

19. According to Article 6(1) of the Resolution Decision, the following was decided, more specifically:

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

5 See Decision SRB/EES/2017/08 (OJ 2017 C 222, p. 3).

6 Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme of Banco Popular Español, SA (OJ 2017 L 178, p. 15).

7 Paragraph 43 of Decision SRB/EES/2017/08.

8 See paragraph 42 of Decision SRB/EES/2017/08.

9 That provision corresponds to Article 20(10) of the SRM Regulation.

10 Corresponds to Article 20 of the SRM Regulation.

11 See Article 28(1)(a) of the CRR.

(b) next, to convert all the principal amount of the Additional Tier 1 instruments issued by Banco Popular and outstanding as at the date of the resolution decision into newly issued shares of Banco Popular ("New Shares I");

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

(d) lastly, to convert all the principal amount of Tier 2 instruments issued by Banco Popular and outstanding as at the date of the resolution decision into newly issued shares of Banco Popular ("New Shares II"). The Tier 2 instruments concerned are converted into "New Shares II".'

20. According to Article 6(3) of the Resolution Decision, those write-down and conversion measures are based on Valuation 2, as corroborated by the results of an open and transparent marketing process conducted by the Spanish resolution authority, the FROB.

21. Article 6(5) of the Resolution Decision orders that the 'New Shares II' are to be transferred to Banco Santander, SA ('Banco Santander'), free and clear of any rights of any third party, in consideration of a purchase price of EUR 1. It is specified that the purchaser had already consented to the transfer.

22. On 14 June 2018, the SRB received from Deloitte the valuation provided for in Article 20(16) and (17) of the SRM Regulation, which concerns the question of whether shareholders and creditors affected by the resolution action would have received better treatment if the institution had entered into normal insolvency proceedings ('Valuation 3').

23. According to the announcement of the SRB of 7 August 2018, it follows from Valuation 3 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. The SRB therefore decided on a preliminary basis that it is not required to pay compensation to the affected shareholders and creditors of Banco Popular pursuant to Article 76(1)(e) of the SRM Regulation. [12]

24. The merger with Banco Santander was effected on 28 September 2018, with the result that Banco Santander became the universal successor of Banco Popular.

B. Background to the dispute

25. On 4 May 2018, Aeris submitted a request to the SRB for access to documents on the basis of Regulation No 1049/2001, [13] requesting, inter alia, access to the documents concerning the *ex post* definitive valuation in Valuation 2. After both parties had exchanged views on the question of the necessity to conduct an *ex post* definitive valuation in the pending parallel action brought against the Resolution Decision, [14] on 3 August 2018 that appellant requested the SRB, on the basis of Article 265 TFEU, to conduct an *ex post* definitive valuation within the meaning of Article 20(11) of the SRM Regulation.

[12] Announcement with regard to the Notice of the Single Resolution Board of 2 August 2018 regarding its preliminary decision on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español SA have been effected and the launching of the right to be heard process (SRB/EES/2018/132)', OJ 2018 CI 277, p. 1.

[13] 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).

[14] Pending Case T-628/17, *Aeris Invest* v *Commission and SRB*.

26. The SRB rejected that request by letter of 14 September 2018 ('the letter of 14 September 2018), making reference to its legal appraisal already expressed in the parallel action.

27. Algebris and Anchorage wrote to the SRB on 3 October 2018 requesting that it conduct an *ex post* definitive valuation within the meaning of Article 20(11) of the SRM Regulation, as Valuations 1 and 2 had been provisional.

28. With regard to that request, the SRB stated in a letter of 25 October 2018 that it had published a letter to Deloitte on its website setting out the reasons why an *ex post* definitive valuation was not required. In response, Algebris and Anchorage requested, by letter of 16 November 2018, express confirmation from the SRB that it had taken the decision not to carry out an *ex post* definitive valuation within the meaning of Article 20(11) of the SRM Regulation. On 18 December 2018, the SRB replied by stating, inter alia, that it had already expressed its position in the letter of 25 October 2018 and that the reasons for the decision not to carry out an *ex post* definitive valuation had been set out therein within the meaning of Article 296 TFEU.

29. On the substance, the SRB took the view in both cases that it was not necessary to carry out an *ex post* definitive valuation of Banco Popular within the meaning of Article 20(11) of the SRM Regulation in the present case, as the outcome of such a valuation could not have any impact on the sale of Banco Popular to Banco Santander. That sale, moreover, had determined the market price of Banco Popular as an undertaking in an open, fair and transparent procedure. Therefore, an *ex post* definitive valuation could neither fulfil the purposes referred to in Article 20(11) of the SRM Regulation nor lead to compensation within the meaning of paragraph 12 of that provision.

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

30. On 5 October 2018, Aeris brought an action for annulment, on the basis of the fourth paragraph of Article 263 TFEU, against the letter of 14 September 2018 before the General Court (Case T-599/18).

31. On 4 January 2019, Algebris and Anchorage also lodged an application with the General Court on the basis of the fourth paragraph of Article 263 TFEU, seeking the annulment of the 'decision of the SRB, notified by the letter of 18 December 2018, not to proceed with an *ex post* definitive valuation of Banco Popular' (Case T-2/19).

32. By two orders of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, EU:T:2019:740) ('order under appeal in Case T-599/18') and *Algebris (UK) and Anchorage Capital Group* v *SRB* (T-2/19, EU:T:2019:741) ('order under appeal in Case T-2/19), the General Court dismissed the respective actions of the appellants as being inadmissible.

V. Forms of order sought and procedure before the Court

33. Aeris brought an appeal by statement of written observations of 28 November 2019, received at the Court on the same day.

34. It contends that the Court should:

– set aside the order under appeal in Case T-599/18, in so far as the General Court found the action to be inadmissible;

– remit the case to the General Court for judgment, bound by the decision of the Court of Justice, in accordance with the forms of order sought by the appellant at first instance; and

– reserve the decision as to costs.

35. The SRB opposed the appeal by statement of written observations of 18 February 2019 and contended that the Court should:

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

– in the alternative, remit the case to the General Court for final judgment;

– in the further alternative, in the event of a final decision by the Court, dismiss the action before the General Court in Case T-599/18; and

– order the appellant to pay the costs or, in the alternative, to reserve the decision as to the costs of the appeal.

36. Algebris and Anchorage brought an appeal by statement of written observations of 20 December 2019, received at the Court on the same day.

37. They contend that the Court should:

– set aside point 1 of the operative part of the order under appeal in Case T-2/19;

– set aside point 2 of the operative part of the order under appeal in Case T-2/19 and order the SRB to pay its own costs and to pay the costs of the appellants in the proceedings at first instance and on appeal; and

– declare that the appellants have standing to bring proceedings.

38. The SRB opposed that appeal by statement of written observations of 10 March 2019 and contended that the Court should:

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

– in the alternative, remit the case to the General Court for final judgment;

– in the further alternative, in the event of a final decision by the Court, dismiss the action before the General Court in Case T-2/19; and

– order the appellants to pay the costs or, in the alternative, to reserve the decision as to the costs of the appeal.

39. The appellants and the SRB submitted written submissions on the respective appeals in Cases C-874/19 P and C-934/19 P. In Case C-874/19 P, a hearing took place on 15 April 2021, in which Aeris and the SRB participated.

VI. Appraisal

40. The subject of the dispute underlying the present appeals is neither the legality of the Resolution Decision taken on the basis of Valuations 1 and 2 [15] nor the substantive correctness of those valuations. Rather, the appellants in the present proceedings ultimately seek to have the SRB carry out an *ex post* definitive valuation of Banco Popular within the meaning of Article 20(11) of the SRM Regulation.

41. In accordance with that provision, an *ex post* definitive valuation is carried out in the event that a previous valuation was provisional. The SRB decided, in respect of the present case, not to initiate an *ex post* definitive valuation of Banco Popular within the meaning of that provision following the conclusion of the resolution. That decision was challenged by the appellants' actions at first instance.

42. In that regard, in the orders under appeal, the General Court did not substantively examine whether, in a situation such as the present one, the SRB is obliged to have an *ex post* definitive valuation carried out within the meaning of Article 20(11) of the SRM Regulation. Rather, it confined itself, from a procedural point of view, to the question of whether the appellants could make such a request in the first place and whether, accordingly, they had standing to bring proceedings for that purpose.

43. There is no doubt that an *ex post* definitive valuation cannot be requested where there is not actually a situation in which the decision on resolution was made on the basis of a merely provisional valuation. Therefore, it is first necessary to assess whether Valuations 1 and 2 were in fact 'provisional' within the meaning of Article 20 of the SRM Regulation, which the SRB has disputed in the present appeal proceedings (see section A.).

44. However, even if Valuations 1 and 2 are to be regarded as 'provisional' following that assessment, the admissibility of the actions against the refusal of an *ex post* definitive valuation presupposes that such a valuation could affect the legal position of the appellants in the present circumstances. The General Court found that this was not the case in the orders under appeal (see section B.1).

45. Therefore, in the present appeal, it is necessary to clarify, in essence, what the effects and purpose of an *ex post* definitive valuation are in order to determine whether such a valuation could affect the legal position of the appellants in the present case. This joint Opinion is confined to an examination of that question (see section B.2.). [16]

[15] That order is, rather, the subject of the actions currently pending before the General Court, brought by Aeris in Case T-628/17 (in that regard, see above, and footnote 14 of this Opinion) and by Algebris and Anchorage in Cases T-570/17 and T-575/17.

[16] Accordingly, this joint Opinion addresses neither the admissibility of the individual grounds of appeal in Cases C-874/19 P and C-934/19 P, which was contested by the SRB, nor the issue of the standing of Algebris and Anchorage to bring proceedings before the General Court on behalf of certain funds, which was raised by the SRB both before the General Court and in Case C-934/19 P.

A. The provisional nature of Valuations 1 and 2

46. In the orders under appeal, the General Court took it for granted that Valuations 1 and 2 were 'provisional' within the meaning of Article 20(11) of the SRM Regulation and that it might therefore be necessary, in principle, for an *ex post* definitive valuation to be carried out. The parties at first instance all proceeded on the basis of that premiss as well. However, in response to a question from the Court of Justice, the SRB took the view for the first time in the appeal proceedings that Valuation 2 was not provisional within the meaning of that provision and that the question as to whether an *ex post* definitive valuation must be carried out would therefore not arise at all.

47. In that context, however, the question arises as to whether the legal categorisation of Valuations 1 and 2 as provisional within the meaning of Article 20(11) of the SRM Regulation can still be reviewed by the Court of Justice at all at the stage of the appeal proceedings, especially of its own motion (see section 1.). In any case, I am of the opinion that there is no doubt that those valuations are to be categorised as provisional (see section 2.).

1. Permissibility of such an examination at the stage of the appeal proceedings

48. Under the system governing judicial review proceedings before the EU Courts, the dispute is in principle determined and circumscribed solely by the parties, who thereby delimit the subject matter of the dispute. [17]

49. Judicial review by the Court of Justice in appeal proceedings extends in principle only to submissions already put forward in the proceedings before the General Court. Submissions which could have been pleaded in the proceedings before the latter Court but were not pleaded may not be raised in an appeal. [18]

50. However, the SRB did not challenge the provisional nature of Valuations 1 and 2 at first instance and thus did not make it the subject of the dispute. Accordingly, it may not raise a new defence in that respect in the appeal proceedings. [19]

51. It is true that certain pleas may, and indeed must, be raised by the courts of their own motion. [20] In that respect, in appeal proceedings, the Court of Justice may examine of its own motion a plea which the General Court should itself have examined of its own motion. A plea going to the substantive legality of a decision, which falls within the scope of infringement of the Treaties or of any rule of law relating to their application, within the meaning of Article 263 TFEU, can, by contrast, be examined by the EU Courts only if it is raised by a party (in due time). [21]

[17] Judgments of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 27), and of 14 November 2017, *British Airways* v *Commission* (C-122/16 P, EU:C:2017:861, paragraph 87).

[18] Judgments of 23 November 2000, *British Steel* v *Commission* (C-1/98 P, EU:C:2000:644, paragraph 47); of 29 April 2004, *IPK-München and Commission* (C-199/01 P and C-200/01 P, EU:C:2004:249, paragraph 52); and of 21 September 2006, *JCB Service* v *Commission* (C-167/04 P, EU:C:2006:594, paragraph 114).

[19] See also, to that effect, judgments of 26 September 2013, *Dow Chemical* v *Commission* (C-179/12 P, EU:C:2013:605, paragraph 82), and of 30 April 2014, *FLSmidth* v *Commission* (C-238/12 P, EU:C:2014:284, paragraph 42).

[20] Judgments of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 28), and of 14 November 2017, *British Airways* v *Commission* (C-122/16 P, EU:C:2017:861, paragraph 88).

[21] See judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 28).

52. Accordingly, the Court of Justice has already ruled that the examination by the General Court, of its own motion, of a precondition of the contested measure is impermissible where none of the parties have challenged the fulfilment of that precondition. [22]

53. However, the categorisation of Valuations 1 and 2 as provisional within the meaning of Article 20(11) of the SRM Regulation is a plea going to the substantive legality of the decision not to carry out an *ex post* definitive valuation. This is because, according to the wording of that provision, the existence of a provisional valuation is a precondition for the carrying out of an *ex post* definitive valuation.

54. Consequently, the Court of Justice should examine the provisional nature of Valuations 1 and 2 only if this had been contested by one of the parties before the General Court in a permissible manner. However, in so far as the SRB did so at the hearing in the appeal proceedings, that submission must be rejected as out of time. [23] Therefore, an examination of that question is ruled out in the present case.

2. Substantive examination

55. In the event that the Court nevertheless considers it possible to examine the provisional nature of Valuations 1 and 2 of its own motion in the appeal proceedings, I shall address that issue below by way of an alternative view.

56. To that end, it is first necessary to consider the functioning and significance of the valuation for the purposes of resolution (section a)). After that, it will be possible to answer the question of whether Valuations 1 and 2 are to be regarded as provisional (section b)).

(a) The functioning and significance of the valuation for the purposes of resolution

57. In the course of every resolution, (at least) three valuations of the credit institution in difficulty are carried out. It is true that Article 20 of the SRM Regulation expressly distinguishes only between a valuation to be carried out prior to resolution (paragraphs 1 to 10) and a valuation to be carried out after resolution (paragraphs 16 to 18). However, it follows from recital 1 of Delegated Regulation (EU) 2018/345 [24] that two different valuations are to be carried out prior to resolution, that is to say, from an *ex ante* perspective. Those two valuations may be of only a provisional nature if necessary. [25] The third valuation is a valuation from the *ex post* perspective, [26] which, however, must not be confused with the *ex post* definitive valuation within the meaning of Article 20(11) of the SRM Regulation, as requested in the present case.

58. According to Article 20(5)(a) of the SRM Regulation, the purpose of the first valuation is to inform the determination of whether the conditions for resolution or the conditions for the write-down or conversion of capital instruments are met. For this purpose, it focuses on, in

[22] See judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 33).

[23] See point 50 above.

[24] Commission Delegated Regulation of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities (OJ 2018 L 67, p. 8) ('Regulation 2018/345').

[25] See Article 20(3), (10) and (11) of the SRM Regulation.

[26] See Article 1(1), first subparagraph, of Commission Delegated Regulation (EU) 2018/344 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution (OJ 2019 L 67, p. 3) ('Regulation 2018/344').

essence, the accounting values of the assets and liabilities of the credit institution concerned in order to determine whether over-indebtedness or balance sheet insolvency exists or is imminent.[27] The second valuation serves in particular to decide on the choice of resolution tool and the design of the resolution strategy (see Article 20(5)(b) to (g) of the SRM Regulation). It is intended to determine the economic value of the assets and liabilities.[28] The third valuation serves to assess, after the implementation of the resolution measures, whether shareholders or creditors would have received better treatment in normal insolvency proceedings. This is to ensure that no creditor is worse off as a result of the intervention of the authorities than they would have been had the credit institution concerned been wound up under normal insolvency proceedings ('no creditor worse off' principle). If this is not the case, entitlement to compensation pursuant to Article 76(1)(e) of the SRM Regulation arises.

59. The second valuation has the greatest influence on the specific form taken by the resolution decision and thus on the legal positions of the shareholders and creditors.[29] This is because the outcome of that valuation – specifically, the negative difference determined between the value of the assets and the amount of the liabilities of the bank concerned ('capital shortfall') – determines the extent to which a write-down and conversion of capital instruments is required.[30]

60. The write-down and conversion of capital instruments, which realise the concept of bail-in, can be described as the 'cornerstone' of bank resolution within the framework of the Single Resolution Mechanism ('the SRM'). When it was created, the European legislature made the fundamental decision to make shareholders and creditors bear the losses of failing banks instead of taxpayers.[31] The SRM therefore introduced the concept of bail-in. This is understood to refer to balance sheet restructuring, that is to say, the absorption of losses and, if necessary, the recapitalisation of a bank, *by means of the write-down and conversion of capital instruments*, whereby the holders of those capital instruments are the shareholders and creditors of the bank in question. The opposite is bail-out, that is to say, the absorption of losses and recapitalisation *by means of the injection of capital*, usually in the form of taxpayers' money.

61. The concept of bail-in appears in the SRM Regulation both as a separate resolution tool (Article 27) and in the form of the 'power to write down and convert capital instruments' pursuant to Article 21 of the SRM Regulation.[32] The latter is not a resolution tool in the strict sense, but is usually exercised prior to the application of any of the other three resolution tools in order to ensure that shareholders and creditors are called upon to bear losses to the appropriate extent within the framework of every resolution. This is also what happened in the present case, as the SRB carried out the write-down and conversion of capital instruments prior to the application of the sale of business tool under Article 24 of the SRM Regulation.[33]

27 See Article 18(4)(b) and (c) of the SRM Regulation.

28 See recital 7 of Regulation 2018/345.

29 See also, in that regard, recital 63 of the SRM Regulation.

30 See, to that effect, judgment of 4 March 2021, *Liaño Reig* v *SRB* (C-947/19 P, EU:C:2021:172, paragraph 73). This follows from, inter alia, the second subparagraph of Article 21(8), Article 21(10) and Article 27(13) of the SRM Regulation.

31 See recital 73 and Article 14(2) of the SRM Regulation.

32 An essential difference between bail-in pursuant to Article 27 and write-down and conversion pursuant to Article 21 is the scope of potential liability: in accordance with Article 21, only regulatory equity (that is to say, Common Equity Tier 1, Additional Tier 1 and Tier 2 capital) can be written down and converted, whereas, in the case of bail-in, all liabilities of the bank up to the limit of the deposit guarantee can in principle be written down and converted.

33 See point 18 of this Opinion.

62. Specifically, the write-down of capital instruments enables the absorption of losses, since, simply put, this 'reduces' the liabilities side of the balance sheet by the nominal value of those instruments. If impairments occur on the assets side, they can be offset at balance sheet level in this way. In addition, the conversion of relevant capital instruments into Common Equity Tier 1 capital on the balance sheet can restore the Common Equity Tier 1 capital ratio prescribed by Article 92(1) of the CRR and thereby recapitalise the bank. [34] This is because when liabilities such as certain bonds and subordinated instruments (the relevant capital instruments) [35] are converted into shares (that is to say, Common Equity Tier 1 capital), [36] the proportion of Common Equity Tier 1 capital in the total liabilities increases, as does, therefore, the abovementioned ratio.

63. In that context, the write-down and conversion of capital instruments proceeds in a certain order – according to the 'liability cascade' pursuant to Article 17 of the SRM Regulation. [37] This is, in essence, the reverse of the order of priority in insolvency cases. Consequently, losses are first offset by a write-down of shares, then by a write-down and/or conversion of certain long-term subordinated bonds and similar liabilities, and so forth.

64. The greater the capital shortfall determined on the basis of the second valuation, the more extensive the creditor liability imposed by Article 17 of the SRM Regulation. [38]

65. The determination of the economic value of the assets and liabilities of the bank in question within the framework of the valuation pursuant to Article 20 of the SRM Regulation, which is necessary to determine the capital shortfall, is highly complex. It is also highly dependent on certain constraints such as time, quantity and quality of available data and market conditions. [39]

66. However, time is a scarce commodity when it becomes apparent that a bank's economic situation is rapidly deteriorating. This is because, once market confidence is lost, collapse can no longer be averted without State intervention. [40]

67. In order to prevent this – and thus minimise the impact on the overall economy – the BRRD and the SRM Regulation endow resolution authorities with very extensive powers to *pre-empt* a collapse. In order to do so, however, they must be able to act, above all, quickly, effectively and decisively. [41]

68. For that reason, Article 20(10) of the SRM Regulation provides that a provisional valuation may be carried out in cases where there is an urgent need for resolution.

[34] See, for instance, Article 27(13)(b) of the SRM Regulation.

[35] See, regarding the definition, point (51) of Article 3(1) of the SRM Regulation.

[36] See Article 28(1)(a) of the CRR.

[37] See, in that respect, point 9 of this Opinion.

[38] In that regard, see point 59 above.

[39] European Banking Authority, Handbook on Valuation for Purposes of Resolution, 22 February 2019, p. 7.

[40] See Adolff/Eschwey, *Lastenverteilung bei der Finanzmarktstabilisierung* [burden-sharing in financial market stabilisation], ZHR 177 (2013), pp. 904, 910 to 912; Binder, *Ausgestaltung und Umsetzung der aufsichtsrechtlichen Restrukturierung* [design and implementation of supervisory restructuring], ZBB 2012, 417, 421.

[41] See, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 55).

(b) Provisional nature of Valuations 1 and 2 in the present case

69. According to Article 20(11) of the SRM Regulation, an (*ex ante*) valuation is to be considered provisional where it does not comply with all the requirements laid down in paragraphs 1 and 4 to 9; in such a case, an *ex post* definitive valuation that is fully compliant with all of the requirements laid down in those paragraphs is to be carried out as soon as practicable.

70. Article 20(1) provides that the valuation is to be carried out by an independent expert. Where this is not possible, the valuation may be carried out by the SRB in accordance with paragraph 3, but it will then be considered to be provisional. Since Valuation 1 was carried out by the SRB in the present case, there are therefore no doubts as to its provisional nature.

71. Valuation 2, by contrast, was carried out by an independent expert – Deloitte. According to the wording of Article 20(11) of the SRM Regulation, the categorisation of such a valuation as 'provisional' therefore depends, in particular, on whether it complies with the requirements of paragraphs 4 to 9.

72. This includes, for example, an updated balance sheet and a report on the financial position of an entity (paragraph 7(a)), an analysis and an estimate of the accounting value of the assets (paragraph 7(b)) and the list of outstanding on-balance-sheet and off-balance-sheet liabilities shown in the books and records, with an indication of the respective credits and priority of claims within the meaning of Article 17 of the SRM Regulation (paragraph 7(c)). Moreover, in accordance with paragraph 8, in the event that the sale of business resolution tool is applied, an estimate of the value of the assets and liabilities of the entity is to be carried out on a market value basis. Lastly, according to paragraph 9, the valuation is to indicate the subdivision of the creditors in classes in accordance with the priority of claims and an estimate of the treatment that each class would have been expected to receive in normal insolvency proceedings.

73. However, contrary to what the SRB asserted at the hearing in Case C-874/19 P, it cannot be concluded that Valuation 2 is definitive from the mere fact that it contains all those elements, at least to some extent.

74. That already follows directly from the wording of Article 20(10) of the SRM Regulation: according to that provision, the requirements of paragraphs 1, 4, 7 and 9 must also be complied with in cases in which only a provisional valuation can be carried out due to the required urgency – in so far as reasonably practicable in the circumstances. In other words, a valuation may be considered to be provisional under that provision even if it complies with those requirements to some extent. The decisive factor is whether it is 'fully' compliant with those requirements, because only in that case is a valuation to be considered definitive in accordance with Article 20(11).

75. The provisional or definitive nature of the valuation is therefore a *qualitative characteristic*, the fulfilment of which depends in particular on the time available.[42] This is apparent from, for example, the fact that the relevant legislation proceeds on the assumption that a provisional valuation is based on a situation characterised by incomplete information and data.[43] However,

[42] In that regard, see point 65 above.

[43] See Article 6(e) of Regulation 2018/345, and European Banking Authority, Handbook on Valuation for Purposes of Resolution, 22 February 2019, pp. 15 and 26.

this is precisely due to the lack of time to collect and sift through that data. According to experts, it takes at least six months on average to carry out a valuation of a bank. [44] Depending on the balance sheet total and the activity, an even longer period may have to be estimated.

76. In practice, therefore, a resolution will regularly have to be effected on the basis of a provisional valuation. [45] This is why Article 20(13) of the SRM Regulation precisely provides that a provisional valuation may constitute a valid basis for the resolution decision. [46]

77. In the present case, the sixth largest Spanish bank with total assets of EUR 130 billion, which included assets that are extremely difficult to value, such as non-performing loans, immovable property assets and deferred tax assets, was valued within the space of 12 days. During that time, however, it was simply not possible for all the assets and liabilities to be recognised, which is why Deloitte itself designated the valuation as 'provisional'. [47] Rather, the auditors were forced to focus on the main assets and liabilities. [48]

78. This approach is entirely justified in a provisional valuation, and it is precisely for this reason that a provisional valuation pursuant to the second subparagraph of Article 20(10) of the SRM Regulation contains a buffer for additional losses. [49] It is common ground that Valuation 2 in the present case contains such a buffer.

79. In that respect, the SRB argued at the hearing in Case C-874/19 P that the wording of the second subparagraph of Article 20(10) of the SRM Regulation does not automatically rule out the possibility that a definitive valuation also contains such a buffer.

80. However, such a reading must be rejected. Accordingly, it follows from Article 13 of Regulation 2018/345 that the buffer serves to cover additional losses that are still uncertain or could not be recognised at the time of the provisional valuation. By contrast, the purpose of the definitive valuation is precisely to ensure that any losses on assets are fully recognised and that a decision can be taken as to whether to write back claims or to increase the consideration paid by a bridge institution or a special purpose vehicle (second subparagraph of Article 20(11) of the SRM Regulation). As long as a buffer for additional losses is included, however, such determinations cannot be made. Rather, the capital shortfall that actually exists can be determined only once all assets and liabilities have been fully valued.

81. It follows from the foregoing that the General Court was right to conclude that Valuations 1 and 2 were provisional.

44 See Philippon/Salord, *Bail-in and Bank Resolution in Europe*, International Center for Monetary and Banking Studies, 2017, p. 47.

45 See, inter alia, Wojcik, *Bail-in in the Banking Union*, CMLR 53 (2016) 91 (110); Binder, *Komplexitätsbewältigung durch Verwaltungsverfahren* [coping with complexity through administrative procedures], ZHR 179 (2015) 83 (120).

46 Gardella, in: Busch/Ferranini (eds.), European Banking Union, *Bail-in and the Financing of Resolution within the SRM Framework*, 1st edition 2015, 11.55.

47 See also point 16 of this Opinion.

48 See de Groen, *Valuation reports in the context of banking resolution: What are the challenges*?, Economic Governance Support Unit, European Parliament, June 2018, PE 624.418, p. 11.

49 European Banking Authority, Handbook on Valuation for Purposes of Resolution, 22 February 2019, pp. 12 and 26.

B. The appeals

82. The appellants take the view, in essence, that Banco Popular was significantly undervalued in the provisional Valuation 2, in particular on account of the buffer. They take the view that it follows, in turn, that the write-down and/or conversion of their capital instruments to the extent undertaken was not justified and that they were therefore entitled to financial compensation or reparation on the basis of the *ex post* definitive valuation.

1. Orders under appeal

83. By contrast, in the orders under appeal, the General Court held that an *ex post* definitive valuation could not affect the legal position of the appellants in the present circumstances. For that reason, the General Court dismissed the actions as inadmissible.

84. In that context, in the case of Algebris and Anchorage, it found that the contested decision is not of direct concern to them within the meaning of the fourth paragraph of Article 263 TFEU,[50] since, in accordance with settled case-law, this presupposes, inter alia, that the requested measure directly affects the legal situation of the applicant.[51] In the case of Aeris, it held that the decision not to carry out an *ex post* definitive valuation does not constitute a challengeable act within the meaning of the fourth paragraph of Article 263 TFEU. This is because the binding legal effects of that decision would not affect the interests of Aeris by bringing about a distinct change in its legal position.[52]

85. In that connection, it should be recalled that the Court has made clear that the latter requirement overlaps with that of direct concern, which must be met in actions for annulment brought by applicants that are not addressees of the EU legal act in question,[53] such as Algebris and Anchorage in the present proceedings. Consequently, the legal question raised is identical in the two cases.

86. The General Court justified its view that the carrying out of an *ex post* definitive valuation of Banco Popular could not affect the legal position of the appellants by stating, in essence, that, in the present case, such a valuation could not fulfil either of the purposes set out in the second subparagraph of Article 20(11) of the SRM Regulation and would therefore bear no effects on the appellants in any respect.

87. According to point (a) of that provision, the purpose of the *ex post* definitive valuation is, on the one hand, to ensure that any losses on the assets of the bank under resolution are fully recognised in the books of accounts of that entity. However, the General Court took the view that that objective can no longer be achieved after the complete write-down and conversion of Banco Popular's regulatory equity and the subsequent merger with Banco Santander, since the latter is now responsible for properly recognising on its balance sheet all the assets and liabilities newly introduced in that way.[54]

[50] See paragraph 64 of the order under appeal in Case T-2/19.

[51] Judgments of 5 May 1998, *Glencore Grain* v *Commission* (C-404/96 P, EU:C:1998:196, paragraph 41); of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 66); and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42).

[52] See paragraph 61 of the order under appeal in Case T-599/18.

[53] 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 38).

[54] See paragraph 42 of the order under appeal in Case T-599/18 and paragraph 44 of the order under appeal in Case T-2/19.

88. On the other hand, an *ex post* definitive valuation in the present case could likewise not lead to one of the decisions referred to in point (b) of the second subparagraph of Article 20(11) and Article 20(12) of the SRM Regulation. The latter provides for two means of correction in the event that the *ex post* definitive valuation and the provisional valuation produce different outcomes with regard to the actual size of the capital shortfall: if the bail-in tool has been applied on the basis of the provisional valuation, then, firstly, a decision may be taken to write back creditors' claims (point (b) of the second subparagraph of paragraph 11, read in conjunction with point (a) of paragraph 12).[55] Secondly, after an *ex post* definitive valuation has been carried out, a decision may be taken to increase the value of the consideration paid by a bridge institution or special purpose vehicle in exchange for the transfer of the assets and liabilities (point (b) of the second subparagraph of paragraph 11, read in conjunction with point (b) of paragraph 12).

89. However, according to the General Court, none of those cases materialised in the present case, since after the SRB had exercised its write-down and conversion powers, the sale of business tool was applied. However, for such a case, Article 20(12)(b) of the SRM Regulation does not provide, in the view of the General Court, for a subsequent increase of the consideration paid by the purchaser. Moreover, in the event that all the shares and relevant capital instruments are completely written down and converted and the newly created shares are subsequently transferred to a third party, point (a) of that provision does not provide for the possibility for those shares to be written back either. The appellants could therefore not obtain a subsequent write back of their shares or claims, nor any other type of compensation payment, on the basis of an *ex post* definitive valuation.[56]

90. At best, the compensation provided for in Article 76(1)(e) of the SRM Regulation would have entered into consideration in so far as it had been established in Valuation 3 that the appellants had to bear greater losses as a result of the resolution than they would have had to bear in normal insolvency proceedings. The requested *ex post* definitive valuation, on the other hand, would not be a suitable basis for that and, consequently, could not affect the legal position of the appellants in that respect either.[57]

2. Examination of the grounds of appeal

91. The appellants take the view that the General Court erred in law in giving that interpretation of Article 20(11) and (12) of the SRM Regulation.

92. In their view, in the light of the principle of equal treatment, the appellants should be granted the right, just like the affected shareholders and stockholders in the case of the resolution tools referred to in Article 20(12) of the SRM Regulation (setting up of a bridge institution, asset separation and bail-in), to demand an *ex post* definitive valuation in order to obtain, like the latter, a write back of their shares or claims or an increase in the consideration paid by the purchaser.[58] According to the appellants, that possibility cannot be precluded just because the sale of business tool was applied in the resolution of Banco Popular after the write-down and conversion of the capital instruments.

[55] Regarding the significance of the outcome of the valuation for the scope of the write-down and conversion of capital instruments, see Article 21(8), subparagraph 2, Article 21(10) and Article 27(13) of the SRM Regulation, and also point 59 of this Opinion.

[56] See paragraphs 46 and 47 and paragraphs 48 to 52 of the order under appeal in Case T-599/18 and paragraphs 48 and 49 and paragraphs 50 to 54 of the order under appeal in Case T-2/19.

[57] See paragraphs 60 and 61 of the order under appeal in Case T-599/18 and paragraphs 63 and 64 of the order under appeal in Case T-2/19.

[58] Second ground of appeal in Case C-934/19 P.

93. The appellants submit that, in that respect, the *ex post* definitive valuation is necessary in order to obtain fair compensation within the meaning of the second sentence of Article 17(1) of the Charter for the loss of their property, which is why failure to carry out that valuation would affect their legal position. Only an *ex post* definitive valuation could enable them to determine the extent to which their capital instruments were – allegedly – wrongfully written down and converted and the amount they should consequently be compensated. They claim that the (in this case fruitless) possibility of compensation in the amount of the liquidation value of their shares, which was the subject of the third valuation ('no creditor worse off'), is not sufficient, as an *ex post* definitive valuation could have arrived at a higher value of their capital instruments. [59]

94. The appellants' line of argument is based on an incorrect interpretation of the function of Article 20(11) and (12) of the SRM Regulation, for the understanding of which some explanations on the functioning of the various resolution tools and their application are necessary in advance (see section a)). It follows that the General Court's interpretation of that provision does not infringe either Article 17 of the Charter (see section b)) or the principle of equal treatment (see section c)).

(a) Functioning of the resolution tools and their application by the SRB

95. The SRM Regulation recognises four resolution tools: [60] sale of business (Article 24), setting up of a bridge institution (Article 25), asset separation (Article 26) and the bail-in tool (Article 27).

96. In the case of bail-in, as already explained, [61] the bank in question is subjected to balance sheet restructuring by means of the write-down and conversion of capital instruments in order then to be either resolved in an orderly manner or continued as a going concern. [62]

97. In the case of both the setting up of a bridge institution and asset separation, part of the assets, rights, liabilities or shares of the failing bank is transferred to an undertaking established and run by the authorities in return for the payment of consideration. That undertaking pursues the goal of managing them as profitably as possible with a view to selling them at a later point in time. In the case of the bridge institution, the latter will continue to manage the critical functions of the bank, at least provisionally. The bank remains a 'bad bank', which is subsequently wound up in accordance with the normal insolvency rules.

98. The sale of business mechanism also consists in the transfer of shares or assets, rights or liabilities of the failing bank, but to a private purchaser who must also pay consideration for them. However, if the failing bank is sold as a whole in that context, it ceases to exist at that moment, unlike in the case of the setting up of a bridge institution or asset separation.

99. In accordance with Article 18(5) of the SRM Regulation, when deciding on the choice of resolution tool, the SRB must ensure that the resolution objectives referred to in Article 14 are achieved. Those objectives are, in particular, to ensure the continuity of critical functions, to avoid significant adverse effects on financial stability, and to protect public funds and depositors.

[59] See the second part of the first ground of appeal of Algebris and Anchorage in Case C-934/19 P and the second and third grounds of appeal of Aeris in Case C-874/19 P.

[60] That set of tools corresponds, in essence, to that of the BRRD, which national resolution authorities apply when implementing the SRB's resolution plans and when resolving banks supervised at national level (see recital 10 of the SRM Regulation).

[61] See above, points 60 to 62 of this Opinion.

[62] See Article 27(1)(a) and Article 27(2) of the SRM Regulation.

The greatest possible protection of the shareholders and creditors of the failing bank is not one of the resolution objectives. The decision as to the most appropriate resolution tool in the light of those objectives requires a complex assessment that is subject to only limited judicial review. [63]

100. The valuation of assets and liabilities is only one factor among many that play a role both in the decision as to whether the resolution requirements are met within the meaning of Article 18(1) of the SRM Regulation and in the choice of resolution tool. [64] In addition, the results of stress tests, the ongoing fulfilment of the conditions for authorisation and, in particular, the public interest in resolution, which is conditioned by, inter alia, the overall economic position of the bank and its activities, are also important factors.

101. In that regard, it is true that the appellants are correct in arguing that the inclusion or size of the buffer in a provisional valuation may lead to an increase in the liabilities of the bank concerned, which may in turn influence the decision to enter into resolution. [65] In other words, an over-cautious provisional valuation may play a part in the adoption of a resolution decision.

102. Contrary to the appellants' line of argument, however, an *ex post* definitive valuation – even if, without the inclusion of a buffer, it were to result in a larger net asset value of the bank concerned at the time of resolution – could not be used by the appellants as a means of asserting the substantive incorrectness of the provisional valuation or the illegality of the resolution decision in proceedings against the resolution decision.

103. First, uncertainties are inherent in a provisional valuation, and therefore do not make it 'incorrect'. Second, it follows from Article 20(13) of the SRM Regulation that the resolution decision is not unlawful on the ground that it is based on a provisional valuation. Similarly, a specific valuation result does not give rise to an obligation to apply a specific resolution tool. This remains the case if the assumptions of the valuation prove to be overly cautious in retrospect.

104. The reason for this is that the system created by the SRM Regulation and the BRRD would otherwise be deprived of its essential stabilising function. Indeed, the SRM's primary objective of stabilising the financial system and minimising the impact of banking crises on the real economy can be achieved only if resolution authorities can act quickly, effectively and decisively. [66] Last but not least, market confidence in the ability of the authorities to act and in the sustainability of their decisions is of decisive importance in that context. [67]

105. Therefore, although it is of course possible to bring an action against the resolution decision, the focus of judicial protection is clearly on the retrospective review of the fairness of the compensation that shareholders and creditors can claim for the loss of their ownership positions. This is illustrated by Article 85(4) of the BRRD, according to which the annulment of a decision of a resolution authority is not to affect any subsequent administrative acts or transactions.

106. However, as will be shown below, an *ex post* definitive valuation has no bearing on that compensation, contrary to what the appellants claim.

[63] See also Article 85(3) of the BRRD.

[64] In particular, the resolution of a bank does not in fact require a determination of its over-indebtedness or insolvency – see also, in that connection, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 62).

[65] In that regard, see also Gardella, in: Busch/Ferranini (eds.), European Banking Union, *Bail-in and the Financing of Resolution within the SRM Framework*, 1st edition 2015, 11.55.

[66] See point 67 of this Opinion.

[67] See, in that regard, Wojcik, *Bail-in in the Banking Union*, CMLR 53 (2016) 91 (131).

(b) Ex post *definitive valuation as a basis for fair compensation within the meaning of the second sentence of Article 17(1) of the Charter*

107. The appellants take the view, in essence, that Article 20(11) and (12) of the SRM Regulation is based on the legal rationale underlying the second sentence of Article 17(1) of the Charter. They submit that, since a provisional valuation may not accurately reflect the value of the shares and relevant capital instruments of the bank concerned, the true economic value for the purposes of compensation must be determined by an *ex post* definitive valuation within the meaning of that provision.

108. Specifically, Algebris and Anchorage assume that an *ex post* definitive valuation in the present case would have resulted in a significantly smaller capital shortfall, in view of which the write-down and conversion of the Additional Tier 1 and Tier 2 instruments would not have been necessary.[68] They conclude from this that an *ex post* definitive valuation could form the basis for compensation. Aeris submits, in turn, that an *ex post* definitive valuation in the present case could have arrived at the conclusion that the net asset value of Banco Popular was positive at the time of resolution. In that case, its shares in Banco Popular would have also had a positive value, for which, consequently, it should be compensated.[69]

109. It submits that, therefore, Article 20(11) and (12) provides that the shareholders and creditors concerned must be compensated for the value of their instruments, which is subsequently determined on the basis of the *ex post* definitive valuation of the credit institution. This must be the case – even going beyond the express wording of the provision – irrespective of which resolution instrument is applied.

110. According to Aeris, the General Court therefore erred in law by ruling that a write back of shares or claims on the basis of an *ex post* definitive valuation could be considered only in the event of the application of the bail-in instrument, and that a subsequent increase in the consideration could be considered only in the event of a transfer of assets to a bridge institution or a special purpose vehicle.

111. It must be conceded that the appellants are correct in arguing that the write-down of shares to zero, resulting in the cancellation of those shares, as well as the write-down and conversion of capital instruments into shares, in combination with the subsequent transfer of the newly created shares to a purchaser, is to be regarded as a deprivation of property. This is because it leads to the forced, complete and final loss of the ownership position of the shareholders and creditors concerned. A transfer to the State or a public authority is not required in order for that to be the case.[70]

68 See the third part of the first ground of appeal in Case C-934/19 P.

69 See the second ground of appeal and the second part of the third ground of appeal in Case C-874/19 P.

70 See, to that effect, judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraphs 81 and 84).

112. In the case of a deprivation of property, the second sentence of Article 17(1) of the Charter provides that it must serve a public interest and be fairly compensated in good time. [71] This applies irrespective of which resolution instrument has been applied. In accordance with the case-law of the ECtHR, [72] compensation at market value is usually appropriate; however, compensation below market value may also be considered appropriate under certain circumstances. [73]

113. However, in the case of the deprivation of shares or capital instruments that have been issued by a failing bank, compensation in the amount of the liquidation value as determined in the third valuation pursuant to Article 20(16) of the SRM Regulation [74] is to be regarded as appropriate. In principle, the appellants would also be entitled to such compensation pursuant to Article 76(1)(e) of the SRM Regulation. However, that amounts to zero in the present case because they could not have expected any payment in the context of a normal insolvency. [75]

114. By contrast, compensation greater than the liquidation value would not be required even if the net asset value of the bank in question determined within the framework of Valuation 2 had been positive at the time of the resolution. This is because, unlike an undertaking in the real economy, the operational viability of a bank does not end at the moment when the conditions for insolvency are met – that is to say, over-indebtedness or insolvency – due to the specificities of its business object. [76] Rather, as soon as market confidence is lost, only State intervention can avert collapse. [77] Accordingly, the conditions for resolution within the meaning of Article 18(1) of the SRM Regulation will usually already be met before the insolvency of the undertaking in question occurs, [78] whereby the SRB must have a wide margin of discretion in determining whether the conditions for resolution are met. [79]

115. At the same time, this means that from the point in time when the conditions for resolution are met – that is to say, in particular, when the bank fails (or is likely to fail) – the comparison with the hypothetical situation of liquidation or normal insolvency proceedings – as carried out in the context of the third valuation – is entirely appropriate: this is because without intervention by the authorities, insolvency would be the only alternative.

116. This is the case even if, due to a comparatively positive economic situation of the credit institution concerned, it is not resolution in the narrower sense which is ultimately decided upon, but rather recovery by the authorities. [80] This is because the decisive factor is that, in view of dwindling market confidence and the threat of failure, such recovery could no longer be negotiated by the credit institution concerned and its investors on their own.

71 Judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 87).

72 Since Article 17 of the Charter corresponds to Article 1 of Protocol No 1 to the ECHR, the latter provision must be taken into account as the minimum threshold of protection in accordance with Article 52(3) of the Charter; see judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 72).

73 See, in that regard, ECtHR, 25 March 1999, *Papachelas v. Greece*, CE:ECHR:1999:0325JUD003142396, § 48.

74 See, in that regard, point 58 of this Opinion.

75 See point 23 above.

76 See the working document of the Directorate-General for Internal Market, 'Discussion Paper on the Debt Write-Down Tool – Bail-in', p. 5.

77 See points 66 and 67 above.

78 Freudenthaler/Lintner, *Conditions for Taking Resolution Action and the Adoption of a Resolution Scheme*, in: World Bank Group (ed.), Bank Resolution and 'Bail-in' in the EU: Selected Case Studies Pre and Post BRRD, Washington D.C. 2017, p. 106; Grünewald, *Legal challenges of bail-in*, ESCB Legal Conference 2017, Frankfurt am Main 2018, pp. 291 and 292.

79 In that regard, see points 99 and 100 above.

80 Such a possibility is provided for in Article 27(1)(a) and (2) of the SRM Regulation (bail-in instrument as a restructuring measure). However, the shareholders and creditors of the failing bank have no right to demand that the resolution authority recover the institution for them or choose the instrument that is likely to result in the least losses for them. In accordance with Article 18(4) of the SRM Regulation, the SRB must, rather, be guided by the resolution objectives set out in Article 14. In that regard, see points 99 and 103 above.

117. Therefore, contrary to what the appellants claim, the value of the capital instruments, which may be higher than the liquidation value under the assumptions of an *ex post* definitive Valuation 2, cannot be regarded as being their market value. This is because Valuation 2 is carried out on the premiss of intervention by the authorities, and not under 'market conditions', that is to say, without interference by the authorities. [81] By contrast, the third valuation pursuant to Article 20(18)(b) of the SRM Regulation is carried out on the assumption that the resolution action would not have been implemented.

118. The Court has therefore already recognised that, in the case of the (likely) failure of a bank, equating the situation of the shareholders and creditors of that bank with a hypothetical liquidation scenario does not constitute unjustified interference with their fundamental right to property. [82]

119. Consequently, the interpretation of Article 20(11) and (12) of the SRM Regulation given by the General Court with reference to the possibility of compensation based on the third valuation under the 'no creditor worse off' principle does not infringe Article 17 of the Charter. This is because the fair compensation for the deprivation of the ownership positions consists of the liquidation value of the capital instruments concerned, the amount of which is determined within the scope of the third valuation pursuant to Article 20(16) of the SRM Regulation. An *ex post* definitive valuation within the meaning of Article 20(11) is therefore not necessary for that purpose.

(c) Ex post *definitive valuation to establish equal treatment with affected shareholders and creditors in the case of other resolution tools*

120. Algebris and Anchorage also contend that such an interpretation of Article 20(11) and (12) of the SRM Regulation violates the principle of equal treatment. [83]

121. According to the appellants' understanding of that provision, as already explained above, [84] the interpretation given by the General Court leads to a situation where affected shareholders and creditors in the case of the resolution measures referred to in paragraph 12 – namely in the case of bail-in, the setting up of a bridge institution and asset separation – ultimately receive greater compensation for the loss of their property and therefore receive better treatment than in a case such as the present one (write-down and conversion with subsequent sale of business). This is because, instead of just the compensation in the amount of the liquidation value based on the third valuation, the affected shareholders and creditors in the cases of paragraph 12 would be compensated for the higher value of their capital instruments resulting from the *ex post* definitive valuation.

122. In that respect, Algebris and Anchorage submit, in essence, that the difference between the write-down and conversion of capital instruments within the meaning of Article 21 of the SRM Regulation carried out in the present case and the bail-in instrument within the meaning of Article 27 referred to in Article 20(12)(a) is not significant enough to justify giving consideration to a write back of shares or claims only in the event of the application of the latter instrument.

[81] See Article 10(1) to (3) of Regulation 2018/345.

[82] See, to that effect, judgments of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraphs 78 and 79), and of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 73 and 74).

[83] Second ground of appeal in Case C-934/19 P.

[84] See, in that regard, point 107 of this Opinion.

123. That argument cannot be accepted, however.

124. This is because Article 20(11) and (12) of the SRM Regulation does not in fact provide for compensation for a deprivation of property within the meaning of the second sentence of Article 17(1) of the Charter at all, but, rather, provides for the possibility of a correction in the event of a change in the content of the ownership positions. However, such a correction – specifically, the write back of shares or claims or an increase in the consideration paid for the transfer of assets or rights to another undertaking – is simply not possible in the case of the write-down and conversion of capital instruments with a subsequent sale of business. The reason for this is that it leads to a deprivation of property. [85] In both respects, therefore, the present case does not represent a scenario comparable with the cases referred to in Article 20(11) and (12) (bail-in, setting up of a bridge institution, asset separation).

125. To illustrate: in the latter cases, as a result of the application of those tools, the shareholders and creditors may have an interest in another entity, for example a newly set up bridge institution. Alternatively, the value of their holdings may be reduced due to the resolution action, for example because they were written down as part of the bail-in, or because all performing assets were separated or transferred to a bridge institution, while their holdings or claims remain in the assets of the failing bank. It is also conceivable that both effects materialise. However, they are not completely and finally deprived of their ownership positions for the time being.

126. Consequently, a correction of the value of the ownership position in such cases is still possible by means of an *ex post* definitive valuation and may even be required for reasons of proportionality. [86]

127. In contrast, firstly, in the case of a complete write-down and conversion of all shares and relevant capital instruments and the subsequent transfer of the newly created shares to a third party (that is to say, in the case of sale of business, as in the present case), it is simply impossible to write back the previously written-down and converted capital instruments. This is because, as a result of that process, those instruments or the undertaking issuing them no longer exist. Consequently, in that context, the General Court rightly proceeded on the assumption that the appellants were no longer shareholders or holders of relevant capital instruments of Banco Popular. [87]

128. The argument of Algebris and Anchorage, according to which, in the light of Article 20(12)(a), shareholders and creditors in the case of a write-down and conversion of capital instruments within the meaning of Article 21 of the SRM Regulation would necessarily receive the same treatment as in the case of a bail-in therefore comes to nothing. It is true that the exercise of the write-down and conversion powers largely corresponds to the application of the bail-in instrument. However, those powers cannot be considered in isolation from the application of the sale of business tool here. [88]

129. Secondly, in the case of a sale of business to a private third party, unlike in the case of the setting up by the authorities of a bridge institution or a special purpose vehicle, the consideration cannot be increased, even retrospectively. This could take place only by means of sovereign

[85] See point 111 of this Opinion.

[86] See, to that effect, in relation to bail-in, judgment of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570, paragraph 102).

[87] See paragraph 52 of the order under appeal in Case T-599/18 and paragraph 54 of the order under appeal in Case T-2/19.

[88] Judgment of 4 March 2021, *Liaño Reig* v *SRB* (C-947/19 P, EU:C:2021:172, paragraph 70).

intervention under the conditions contractually stipulated in advance.[89] However, such a power on the part of the SRB could seriously jeopardise the effectiveness of the sale of business tool and thus the resolution objectives. This is because that tool has the great advantage that the risks for the public authorities remain extremely low, as the assurance of the continuity of critical functions and the protection of assets are essentially assumed by the private purchaser. If, however, a private purchaser had to accept that there was a possibility that he or she could subsequently be obliged to pay a higher amount of consideration, the effects of the already commercially risky decision to take over a failing bank would become entirely unforeseeable. It is likely that, under such circumstances, it would be almost impossible to find a party interested in a takeover in the context of resolution.

130. It follows from the above considerations that the situation of shareholders and creditors in the cases referred to in Article 20(11) and (12) of the SRM Regulation is not comparable to that of the affected shareholders and creditors in the case of a sale of business.

131. For the sake of completeness, it should be recalled at this point that the circumstance of whether or not an *ex post* definitive valuation is carried out could in no way call into question the decision to opt for sale of business instead of bail-in, setting up a bridge institution or asset separation.[90] Similarly, there is no entitlement to the application of the resolution tool that has the prospect of leading to the smallest loss of assets for shareholders and creditors; the crucial factor is rather which resolution tool best achieves the resolution objectives of Article 14 of the SRM Regulation.[91]

132. If a deprivation of ownership of capital instruments is necessary to achieve that public interest objective, that deprivation only needs to be compensated fairly and in good time,[92] which, however – as already explained in detail by the General Court[93] and also in the context of this Opinion[94] – is ensured not by the *ex post* definitive valuation within the meaning of Article 20(11) of the SRM Regulation, but by the third valuation pursuant to Article 20(16).

133. Consequently, the General Court did not err in law in that regard either.

C. Conclusion

134. In conclusion, the General Court was right to find that the carrying out of an *ex post* definitive valuation could not affect the legal position of the appellants at all in the present circumstances. It could not lead to the write back of their shares or claims or to any other compensation or reparation. Nor could it serve the appellants in terms of their burden of pleading and proving the facts in the action against the resolution decision.

135. Lastly, that conclusion means that it is also possible to reject the appellants' arguments which are connected, in essence, to a formal or objective obligation of the SRB to carry out an *ex post* valuation under Article 20(11) of the SRM Regulation.

89 See also, in that regard, judgment of 4 March 2021, *Liaño Reig* v *SRB* (C-947/19 P, EU:C:2021:172, paragraph 74).

90 In that regard, see points 99 to 103 above.

91 In that regard, see point 99 and footnote 80 above.

92 See point 112 of this Opinion.

93 Paragraph 54 et seq. of the order under appeal in Case T-599/18 and paragraph 57 et seq. of the order under appeal in Case T-2/19.

94 See, in particular, point 113 et seq.

136. Accordingly, by the first part of their first ground of appeal in Case C-934/19 P, Algebris and Anchorage submit that the obligation to carry out an *ex post* valuation under the first subparagraph of Article 20(11) is unconditional and, in particular, not dependent on whether it is capable of fulfilling one of the purposes referred to in the second subparagraph.

137. The first and fourth parts of the first ground of appeal of Aeris in Case C-874/19 P, according to which the admissibility of its action depends solely on the fact that the decision not to carry out an *ex post* valuation produces binding legal effects and could no longer be challenged in the context of the action against the resolution decision pursuant to Article 20(15) of the SRM Regulation, follow the same lines. According to Aeris, the dismissal of the action by the General Court therefore violated its right to effective judicial protection.

138. In that context, however, it should be recalled that, in order for an action for annulment brought by a natural or legal person to be admissible, it is not sufficient that the contested decision produces binding legal effects. Rather, the binding legal effects of that act must also affect the interests of the applicant by bringing about a distinct change in its legal position. [95]

139. In other words, Article 263 TFEU does not grant non-preferential persons the possibility to demand an abstract review of legality of EU legal acts. This is also not contrary to Article 47 of the Charter, which only provides for the right to an effective remedy against a measure which violates that person's *rights and freedoms guaranteed by the law of the Union*.

140. Consequently, the possible existence of a formal or objective obligation on the SRB to carry out an *ex post* definitive valuation under Article 20(11) of the SRM Regulation could not in any event do anything to change the fact that the admissibility of the actions before the General Court presupposes that the appellants are directly affected. However, in accordance with the above considerations, this is not the case, with the result that the General Court was right in ruling that the actions must be dismissed as inadmissible.

141. The appeals are therefore unfounded.

VII. Costs

142. Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. In that respect, under Article 184(1) of the Rules of Procedure, read in conjunction with Article 138(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.

143. Since, in accordance with the above statements, the appellants have been unsuccessful in their grounds of appeal, they must be ordered to pay the SRB's costs in addition to their own, in accordance with the form of order sought by the SRB.

[95] See judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 36 and 37).

VIII. Proposed answer

144. In conclusion, I suggest that the Court rule as follows:

1. The appeals against the orders of the General Court of the European Union of 10 October 2019, *Aeris Invest* v *SRB* (T-599/18, EU:T:2019:740) and *Algebris (UK) and Anchorage Capital Group* v *SRB* (T-2/19, EU:T:2019:741) are dismissed.

2. Aeris Invest Sàrl is ordered to pay the costs in Case C-874/19 P; Algebris (UK) Ltd and Anchorage Capital Group LLC are ordered to pay the costs in Case C-934/19 P.