Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 June 2024*

(Appeal – Economic and monetary policy – Banking Union – Regulation (EU) No 806/2014 – Single resolution mechanism – Resolution procedure applicable where an entity is failing or is likely to fail – Article 18(7) – Adoption by the Single Resolution Board of a resolution scheme – Endorsement of that scheme by the European Commission – Article 86(2) – Act against which proceedings may be brought – Action for annulment – Admissibility)

In Case C-551/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 August 2022,

European Commission, represented by L. Flynn, P. Němečková, A. Nijenhuis, A. Steiblytė and D. Triantafyllou, acting as Agents,

appellant,

the other parties to the proceedings being:

Fundación Tatiana Pérez de Guzmán el Bueno, established in Madrid (Spain),

Stiftung für Forschung und Lehre (SFL), established in Zürich (Switzerland), represented by R. Pelayo Jiménez and R. Pelayo Torrent, abogados,

applicants at first instance,

Single Resolution Board (SRB), represented by H. Ehlers, S. Fernández Rupérez, A.R. Lapresta Bienz and J.M. Rius Riu, acting as Agents, and by F.B. Fernández de Trocóniz Robles, abogado, and B. Meyring and S. Schelo, Rechtsanwälte,

defendant at first instance,

Kingdom of Spain,

European Parliament, represented by J. Etienne, P. López-Carceller, M. Menegatti, L. Stefani and L. Visaggio, acting as Agents,

Council of the European Union, represented by J. Bauerschmidt, J. Haunold, H. Marcos Fraile and A. Westerhof Löfflerová, acting as Agents,

* Language of the case: Spanish.

Banco Santander SA, established in Santander (Spain), represented by J. Remón Peñalver, J.M. Rodríguez Cárcamo, A.M. Rodríguez Conde and D. Sarmiento Ramírez-Escudero, abogados,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, K. Jürimäe, C. Lycourgos, E. Regan, T. von Danwitz (Rapporteur), F. Biltgen and N. Piçarra, Presidents of Chambers, S. Rodin, P.G. Xuereb, L.S. Rossi, N. Jääskinen, N. Wahl, I. Ziemele and D. Gratsias, Judges,

Advocate General: T. Ćapeta,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2023,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2023,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB* (T-481/17, 'the judgment under appeal', EU:T:2022:311), by which the General Court dismissed the application brought by Fundación Tatiana Pérez de Guzmán el Bueno ('Fundación') and Stiftung für Forschung und Lehre (SFL) seeking annulment of Decision SRB/EES/2017/08 of the Executive Session of the Single Resolution Board (SRB or 'the Board') of 7 June 2017, concerning the adoption of a resolution scheme in respect of Banco Popular Español SA ('the resolution scheme at issue').

Legal context

Regulation (EU) No 1024/2013

2 Article 6(4) and (5) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) provides:

'4. In relation to the tasks defined in Article 4 except for points (a) and (c) of paragraph 1 thereof, the [European Central Bank (ECB)] shall have the responsibilities set out in paragraph 5 of this Article and the national competent authorities shall have the responsibilities set out in paragraph 6 of this Article … for the supervision of the following credit institutions, financial

holding companies or mixed financial holding companies, or branches, which are established in participating Member States, of credit institutions established in non-participating Member States:

– those that are less significant on a consolidated basis, at the highest level of consolidation within the participating Member States, or individually in the specific case of branches, which are established in participating Member States, of credit institutions established in non-participating Member States. The significance shall be assessed based on the following criteria:

(i) size;
(ii) importance for the economy of the [European] Union or any participating Member State;
(iii) significance of cross-border activities.

With respect to the first subparagraph above, a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met:

(i) the total value of its assets exceeds EUR 30 billion;
(ii) the ratio of its total assets over the [gross domestic product (GDP)] of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion;
(iii) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution.

The ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the conditions laid down in the methodology.

…

5. With regard to the credit institutions referred to in paragraph 4, and within the framework defined in paragraph 7:

…

(b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4 …

…’

SRM Regulation

3 Recitals 24, 26, 62, 90 and 120 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1; 'the SRM Regulation') are worded as follows:

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

…

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

A change of 5% or more to the amount of the Fund compared with the original proposal of the Board should be considered to be material. The Council should approve or object to the Commission's proposal without amending it. As an observer to the meetings of the Board, the Commission should, on an ongoing basis, check that the resolution scheme adopted by the Board complies fully with this Regulation, balances appropriately the different objectives and interests at stake, respects the public interest and that the integrity of the internal market is preserved. Considering that the resolution action requires a very speedy decision-making process, the Council and the Commission should cooperate closely and the Council should not duplicate the preparatory work already undertaken by the Commission. The Board should instruct the national resolution authorities which should take all necessary measures to implement the resolution scheme.

…

(62) Interference with property rights should not be disproportionate. As a consequence, affected shareholders and creditors should not incur greater losses than those which they would have incurred had the entity been wound up at the time that the resolution decision is taken. In the event of partial transfer of assets of an institution under resolution to a private purchaser or to a bridge institution, the residual part of the institution under resolution should be wound up under normal insolvency proceedings. In order to protect shareholders and creditors of the entity during the winding up proceedings, they should be entitled to receive in payment of their claims not less than what it is estimated they would have recovered if the entity as a whole had been wound up under normal insolvency proceedings.

…

(90) When applying resolution tools and exercising resolution powers, the Board should instruct the national resolution authorities to ensure that the representatives of the employees of the entities concerned are informed and, where appropriate, are consulted, as provided for in Directive 2014/59/EU [of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190)].

…

(120) The [Single Resolution Mechanism (SRM)] brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States. The Court of Justice has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the

resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability.'

4 Article 1 of the SRM Regulation, entitled 'Subject matter', provides:

'This Regulation establishes uniform rules and a uniform procedure for the resolution of the entities referred to in Article 2 that are established in the participating Member States referred to in Article 4.

Those uniform rules and that uniform procedure shall be applied by the Single Resolution Board established in accordance with Article 42 (the "Board"), together with the Council and the Commission and the national resolution authorities within the framework of the single resolution mechanism ("SRM") established by this Regulation. The SRM shall be supported by a single resolution fund ("the Fund").

…'

5 Article 2 of that regulation, entitled 'Scope', provides:

'This Regulation shall apply to the following entities:

(a) credit institutions established in a participating Member State;

(b) parent undertakings, including financial holding companies and mixed financial holding companies, established in a participating Member State, where they are subject to consolidated supervision carried out by the ECB in accordance with Article 4(1)(g) of Regulation [No 1024/2013];

…'

6 Article 7 of the SRM Regulation, entitled 'Divisions of tasks within the SRM', states in paragraphs 1 and 2:

'1. The Board shall be responsible for the effective and consistent functioning of the SRM.

2. Subject to the provisions referred to in Article 31(1), the Board shall be responsible for drawing up the resolution plans and adopting all decisions relating to resolution for:

(a) the entities referred to in Article 2 that are not part of a group and for groups:
   (i) which are considered to be significant in accordance with Article 6(4) of Regulation [No 1024/2013]; or
   (ii) in relation to which the ECB has decided in accordance with Article 6(5)(b) of Regulation [No 1024/2013] to exercise directly all of the relevant powers; and

(b) other cross-border groups.'

7 Under Article 14 of the SRM Regulation, entitled 'Resolution objectives':

'1. When acting under the resolution procedure referred to in Article 18, the Board, the Council, the Commission, and, where relevant, the national resolution authorities, in respect of their respective responsibilities, shall take into account the resolution objectives, and choose the

resolution tools and resolution powers which, in their view, best achieve the resolution objectives that are relevant in the circumstances of the case.

2. The resolution objectives referred to in paragraph 1 are the following:

(a) to ensure the continuity of critical functions;

(b) to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;

(c) to protect public funds by minimising reliance on extraordinary public financial support;

(d) to protect depositors covered by Directive 2014/49/EU [of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149)] and investors covered by Directive 97/9/EC [of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ 1997 L 84, p. 22)];

(e) to protect client funds and client assets.

When pursuing the objectives referred to in the first subparagraph, the Board, the Council, the Commission and, where relevant, the national resolution authorities, shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

3. Subject to different provisions of this Regulation, the resolution objectives are of equal significance, and shall be balanced, as appropriate, to the nature and circumstances of each case.'

8 Under Article 15(1) of that regulation, the SRB, the Council, the Commission and, where relevant, the national resolution authorities are to 'take all appropriate measures' to ensure that the resolution action is taken in accordance with the principles laid down in the regulation, when they act under the resolution procedure referred to in Article 18 thereof.

9 Article 18 of the SRM Regulation, entitled 'Resolution procedure', provides:

'1. The Board shall adopt a resolution scheme pursuant to paragraph 6 in relation to entities and groups referred to in Article 7(2), and to the entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met, only when it assesses, in its executive session, on receiving a communication pursuant to the fourth subparagraph, or on its own initiative, that the following conditions are met:

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

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

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

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

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

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

2. Without prejudice to cases where the ECB has decided to exercise directly supervisory tasks relating to credit institutions pursuant to Article 6(5)(b) of Regulation [No 1024/2013], in the event of receipt of a communication pursuant to paragraph 1 or where the Board intends to make an assessment under paragraph 1 on its own initiative in relation to an entity or group referred to in Article 7(3), the Board shall communicate its assessment to the ECB without delay.

…

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

…

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

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

(a) place the entity under resolution;

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

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

7. Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission.

Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme in the cases not covered in the third subparagraph of this paragraph.

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council:

(a) to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest referred to in paragraph 1(c);

(b) to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.

For the purposes of the third subparagraph, the Council shall act by simple majority.

The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board.

The Council or the Commission, as the case may be, shall provide reasons for the exercise of their power of objection.

Where, within 24 hours from the transmission of the resolution scheme by the Board, the Council has approved the proposal of the Commission for modification of the resolution scheme on the ground referred to in point (b) of the third subparagraph or the Commission has objected in accordance with the second subparagraph, the Board shall, within eight hours modify the resolution scheme in accordance with the reasons expressed.

Where the resolution scheme adopted by the Board provides for the exclusion of certain liabilities in the exceptional circumstances referred to in Article 27(5), and where such exclusion requires a contribution by the Fund or an alternative financing source, in order to protect the integrity of the internal market, the Commission may prohibit or require amendments to the proposed exclusion setting out adequate reasons based on an infringement of the requirements laid down in Article 27 and in the delegated act adopted by the Commission on the basis of Article 44(11) of Directive [2014/59].

8. Where the Council objects to the placing of an institution under resolution on the ground that the public interest criterion referred to in paragraph 1(c) is not fulfilled, the relevant entity shall be wound up in an orderly manner in accordance with the applicable national law.

9. The Board shall ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme shall be addressed to the relevant national resolution authorities and shall instruct those authorities, which shall take all necessary measures to implement it in accordance with Article 29, by exercising resolution powers. Where State aid or Fund aid is present, the Board shall act in conformity with a decision on that aid taken by the Commission.

10. The Commission shall have the power to obtain from the Board any information which it deems to be relevant for performing its tasks under this Regulation. The Board shall have the power to obtain from any person, in accordance with Chapter 5 of this Title, any information

necessary for it to prepare and decide upon a resolution action, including updates and supplements of information provided in the resolution plans.'

10 Article 22 of the SRM Regulation, entitled 'General principles of resolution tools', provides, in paragraphs 2 and 4:

'2. The resolution tools referred to in point (b) of Article 18(6) are the following:

(a) the sale of business tool;

(b) the bridge institution tool;

(c) the asset separation tool;

(d) the bail-in tool.

…

4. The resolution tools shall be applied to meet the resolution objectives specified in Article 14, in accordance with the resolution principles specified in Article 15. They may be applied either individually or in any combination, except for the asset separation tool which may be applied only together with another resolution tool.

…'

11 Article 23 of that regulation, entitled 'Resolution Scheme', provides:

'The resolution scheme adopted by the Board under Article 18 shall establish, in accordance with any decision on State aid or Fund aid, the details of the resolution tools to be applied to the institution under resolution … and determine the specific amounts and purposes for which the Fund shall be used.

…

When adopting a resolution scheme, the Board, the Council and the Commission shall take into account and follow the resolution plan as referred to in Article 8 unless the Board assesses, taking into account the circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plan.

In the course of the resolution process, the Board may amend and update the resolution scheme as appropriate in light of the circumstances of the case. For amendments and updates the procedure laid down in Article 18 shall apply.

…'

12 Article 30 of that regulation, entitled 'Obligation to cooperate and information exchange within the SRM', states, in paragraphs 1 and 2:

'1. The Board shall inform the Commission of any action it takes in order to prepare for resolution. With regard to any information received from the Board, the members of the Council, the Commission as well as the Council and the Commission staff shall be subject to the requirements of professional secrecy laid down in Article 88.

2. In the exercise of their respective responsibilities under this Regulation, the Board, the Council, the Commission, the ECB and the national resolution authorities and national competent authorities shall cooperate closely, in particular in the resolution planning, early intervention and resolution phases pursuant to Articles 8 to 29. They shall provide each other with all information necessary for the performance of their tasks.'

13 Article 43(3) of the SRM Regulation is worded as follows:

'The Commission and the ECB shall each designate a representative entitled to participate in the meetings of executive sessions and plenary sessions as a permanent observer.

The representatives of the Commission and the ECB shall be entitled to participate in the debates and shall have access to all documents.'

14 Under Article 86 of that regulation, entitled 'Actions before the Court of Justice':

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

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

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

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

Background to the dispute

15 The background to the dispute is set out in paragraphs 24 to 80 of the judgment under appeal. For the purposes of the present appeal, it can be summarised as follows.

16 Banco Popular Español SA ('Banco Popular') was a Spanish credit institution under direct prudential supervision by the ECB.

17 At its Executive Session of 7 June 2017, the SRB, by its Decision SRB/EES/2017/08, adopted, on the basis of the SRM Regulation, the resolution scheme at issue in respect of Banco Popular.

18 According to Article 1 of that resolution scheme, given that the conditions provided for in Article 18(1) of that regulation had been met, the SRB decided to place Banco Popular under resolution as of the resolution date.

19 Accordingly, as is apparent from Articles 2 to 4 of the resolution scheme at issue, the SRB considered, first, that Banco Popular was failing or was likely to fail, second, that there were no alternative measures which could prevent the failure of that bank within a reasonable time frame

and, third, that resolution action in the form of a sale of business tool in respect of that bank was necessary in order to achieve the continuity of the bank's critical functions and to avoid significant adverse effects on financial stability.

20 Article 5.1 of the resolution scheme at issue is worded as follows:

'The resolution tool to be applied to [Banco Popular] shall consist in the sale of business pursuant to Article 24 of [the SRM Regulation] for transferring shares to a purchaser. The write down and conversion of capital instruments will be exercised immediately before the application of the sale of business tool.'

21 Article 6 of that resolution scheme sets out the detailed rules concerning the write down and the sale of business.

22 Moreover, Article 12.1 of the resolution scheme at issue states that it was to 'enter into force' on 7 June 2017 at 6.30 a.m.

23 The resolution scheme at issue was submitted to the Commission for endorsement at 5.13 a.m. on 7 June 2017.

24 On the same day, at 6.30 a.m., the Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for Banco Popular Español SA (OJ 2017 L 178, p. 15) and notified it to the SRB. Recital 4 of that decision, as corrected on 6 December 2017 (OJ 2017 L 320, p. 31) states as follows:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 18(5) of [the SRM Regulation].'

25 On 7 June 2017 still, the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring (FROB), Spain) adopted the necessary measures to implement the resolution scheme at issue, in accordance with Article 29 of the SRM Regulation.

The procedure before the General Court and the judgment under appeal

26 By application lodged at the Registry of the General Court on 2 August 2017, Fundación and SFL, then shareholders in Banco Popular, brought an action seeking annulment of the resolution scheme at issue.

27 By decisions of 1 August 2018 and 12 April 2019 respectively, the Kingdom of Spain, the European Parliament, the Council and the Commission, on the one hand, and Banco Santander SA, on the other, were granted leave to intervene in support of the SRB.

28 Even though the SRB confined itself to claiming that the action should be dismissed on the merits, without challenging its admissibility, the Commission pleaded in its statement in intervention that the action was inadmissible. The Commission submitted that the resolution scheme at issue was only an intermediate act, which produced no binding legal effects, since, by Decision 2017/1246, it had approved that resolution scheme, had endorsed it and had given it such effects.

29 The Parliament and the Council also argued, in their statements in intervention, that the resolution scheme at issue did not in itself produce any legal effects vis-à-vis third parties within the meaning of Article 263 TFEU.

30 In the context of the examination of the admissibility of the action, the General Court pointed out, first of all, in paragraph 112 of the judgment under appeal, that, admittedly, it is settled case-law that an intervener is not entitled to raise an objection of inadmissibility independently and that the General Court is therefore not bound to examine the pleas of inadmissibility on which the intervener relies exclusively. However, in paragraph 113 of that judgment, the General Court held that, since this was an objection of inadmissibility involving public policy considerations, it should examine the admissibility of the action of its own motion.

31 Next, the General Court assessed whether the resolution scheme at issue could be regarded as a challengeable act for the purposes of Article 263 TFEU. In that regard, it recalled, in paragraphs 114 and 115 of the judgment under appeal, that, according to consistent case-law, any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as such acts and that, in order to determine whether an act produces such effects, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act.

32 In that regard, in paragraphs 116 to 123 of that judgment, the General Court held the following:

> ‘116 … it must be noted that the SRB exercises the powers conferred on it by [the SRM Regulation], in particular the power provided for in Article 16(1) of that regulation to “decide on a resolution action in relation to a financial institution established in a participating Member State, where the conditions laid down in Article 18(1) are met”. The EU legislature has thus expressly conferred a decision-making power on the SRB.
>
> 117 A decision of the SRB on a resolution action is an act which is capable of entering into force. Article 12 of the resolution scheme [at issue] states that it entered into force on 7 June 2017 at 6.30 a.m.
>
> 118 Moreover, according to the first paragraph of Article 23 of [the SRM Regulation], the resolution scheme adopted by the SRB under Article 18 of that regulation is to establish the details of the resolution tools to be applied to the institution under resolution and to be implemented by the national resolution authorities in accordance with the relevant provisions of Directive 2014/59, as transposed into national law.
>
> 119 Accordingly, pursuant to Article 9 of the resolution scheme [at issue], it is for the FROB to take all necessary measures to proceed with the execution and implementation of that decision In particular, the FROB must implement the sale of Banco Popular in accordance with the detailed rules set out in the resolution scheme [at issue]. Article 10 of the resolution scheme [at issue] also provides that the SRB must monitor the execution of [that] resolution scheme by the FROB in accordance with Article 28 of [the SRM Regulation].
>
> 120 Accordingly, it must be held that, in view of its substance, the resolution scheme [at issue] produces binding legal effects.

121 Furthermore, it should be noted that Article 86(1) of [the SRM Regulation] provides that proceedings may be brought before the Court of Justice of the European Union in accordance with Article 263 TFEU contesting a decision taken by the Appeal Panel or, where there is no right of appeal to the Appeal Panel, by the SRB. According to Article 86(2) of [the SRM Regulation], Member States and the [EU] institutions, as well as any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the SRB, in accordance with Article 263 TFEU.

122 In that regard, the Court … has held that Article 86(2) of [the SRM Regulation] provides that Member States and the EU institutions, as well as any natural or legal person, may, in accordance with Article 263 TFEU, institute proceedings before the Court of Justice of the European Union against decisions of the SRB, the latter being mentioned to the exclusion of any other institution, body, office or agency of the European Union (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 56).

123 The Court … has also held that the resolution procedure must be regarded as a complex administrative procedure involving a number of authorities, only the outcome of which, resulting from the SRB's exercise of its power, may be subject to the judicial review provided for in Article 86(2) of that regulation (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 66).'

33 On the basis of those considerations, the General Court concluded, in paragraph 124 of the judgment under appeal, that the resolution scheme at issue was an act against which an action for annulment may be brought.

34 Last, the General Court held that that conclusion was not called into question by the arguments raised by the Parliament, the Council and the Commission.

35 In that regard, it noted, in the first place, in paragraph 127 of the judgment under appeal, that, if a resolution scheme enters into force only as a result of its endorsement by the Commission, that does not mean that that endorsement has the effect of eliminating the independent legal effects of that resolution scheme and replacing them with those of the Commission decision alone. In paragraphs 128 to 130 of that judgment, while taking the view that the Commission's endorsement is a necessary step for the entry into force of the resolution scheme and that its endorsement gives legal force to that scheme, the General Court held that compliance with the principles relating to the delegation of powers laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, 'the judgment in *Meroni* v *High Authority*', EU:C:1958:7), does not imply that only the decision adopted by the Commission produces legal effects. In its view, it is necessary for the Commission to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects, thereby avoiding an 'actual transfer of responsibility' within the meaning of that latter judgment. In addition, the General Court pointed out, in paragraph 132 of the judgment under appeal, that the Commission has its own competence to assess the discretionary aspects of the resolution scheme, but it is not entitled to exercise the powers reserved to the SRB or to modify the resolution scheme or its legal effects.

36 In the second place, the General Court rejected the argument that a resolution scheme is not binding on the Commission and constitutes a preparatory measure which is not capable of forming the subject matter of an action under Article 263 TFEU. In that regard, it held, in paragraph 137 of the judgment under appeal, that, in the context of the complex administrative procedure established by the SRM Regulation, a resolution scheme cannot be regarded as a

preparatory measure intended to pave the way for the Commission decision. In its view, while, pursuant to Article 18(7) of that regulation, the endorsement of the resolution scheme by the Commission has the effect of making it enter into force and while that institution may object to that scheme with regard to its discretionary aspects, it may neither object to nor amend its purely technical aspects.

37 In the third place, in paragraphs 140 to 142 of the judgment under appeal, the General Court held that it is apparent both from Article 86 of the SRM Regulation and from other provisions of that regulation that a resolution scheme is an act against which proceedings may be brought. It argues that Article 86 refers not only to independent decisions of the SRB, which do not require the Commission's endorsement, but to all decisions of the SRB, with the exception of those which may be the subject of an appeal before the appeal committee. Thus, a resolution scheme by definition would fall within the category of decisions against which, under Article 86, proceedings may be brought on the basis of Article 263 TFEU.

38 In the fourth place, the General Court held, in paragraph 147 of the judgment under appeal, that an interpretation to the contrary would be incompatible with the principles of legal certainty and effective judicial protection, since any person affected by a resolution decision adopted by the SRB would be subject to a condition of admissibility of his or her action which has not been expressly provided for.

39 Finally, in paragraph 148 of the judgment under appeal, the General Court rejected the argument that it is not possible to annul the resolution scheme if the Commission decision remains in force. It noted in that regard that, if it were to annul a resolution scheme, the Commission decision endorsing it would be deprived of its purpose.

40 In those circumstances, taking the view, in paragraph 149 of the judgment under appeal, that, once endorsed by the Commission, a resolution scheme adopted by the SRB produces legal effects and constitutes an act against which an independent action for annulment may be brought, the General Court, in paragraph 150 of that judgment, declared admissible the action for annulment brought before it.

41 As to the substance, the General Court rejected all the pleas put forward and, consequently, dismissed the action as unfounded.

Forms of order sought

42 The Commission claims that the Court should:

– annul the judgment under appeal, in so far as the General Court declared that the action for annulment at first instance was admissible;

– find that the action for annulment introduced at first instance in Case T-481/17 is inadmissible and, consequently, dismiss it in its entirety;

– order the applicants at first instance to pay the costs incurred by the Commission as part of the proceedings before the General Court and the present appeal.

43 SFL contends that the Court should dismiss the appeal and order the Commission to pay the costs.

44 The SRB contends that the Court should dismiss the appeal and order the Commission to pay the costs.

45 The Parliament claims, in essence, that the Court should uphold the Commission's appeal and order the applicants at first instance to pay the costs.

46 The Council claims that the Court, in the event that it sets aside the judgment under appeal, should find that there is nothing to call into question the legality of the SRM Regulation and Directive 2014/59.

The appeal

47 In support of its appeal against the judgment under appeal in so far as, in that judgment, the General Court held that the resolution scheme at issue is an act against which an action may be brought under Article 263 TFEU, the Commission raises three grounds of appeal. The first ground of appeal alleges an error of law in the interpretation of the fourth paragraph of Article 263 TFEU and Article 18(7) of the SRM Regulation. The second ground of appeal alleges an error of law in the interpretation of the fourth paragraph of Article 263 TFEU and an infringement of the rights of defence of the Commission. The third ground of appeal alleges contradictory reasoning in the judgment under appeal.

Admissibility

48 SFL contends that the appeal is inadmissible. It points out that the form of order sought in an application to intervene is to be limited to supporting the form of order sought by one of the parties and infers from this that the Commission, which had the status of intervener at first instance, cannot raise an objection of inadmissibility independently at the appeal stage.

49 The Commission and the Parliament dispute that line of argument.

50 In that regard, it is apparent from the judgment under appeal that, before the General Court, the Commission claimed that the action at first instance was inadmissible on the ground that the resolution scheme at issue does not constitute a challengeable act. Furthermore, and as the General Court moreover pointed out in paragraphs 112 and 113 of the judgment under appeal, if an intervener is not entitled to raise an objection of inadmissibility independently, the Court should, as regards an objection of inadmissibility involving public policy considerations, examine of its own motion the admissibility of the action (see, to that effect, judgment of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraphs 22 and 23). In paragraphs 114 to 149 of the judgment under appeal, the General Court carried out such an examination of its own motion as to the admissibility of the action and, at the end of it, held that the action was admissible, thereby implicitly rejecting the objection of inadmissibility raised by the Commission. That examination must be amenable to review by the Court of Justice in the context of the present appeal.

51 In that regard, the fact that, by the judgment under appeal, the General Court dismissed the action at first instance on the merits does not mean that the present appeal is inadmissible. In accordance with settled case-law, an appeal brought against a judgment of the General Court is admissible in so far as, ruling of its own motion or on an objection of inadmissibility raised by one party in respect of an action, it ruled out the inadmissibility of the action, even though it subsequently in the remainder of the judgment dismissed that action as being unfounded (see, to that effect, judgment of 10 September 2009, *Commission* v *Ente per le Ville Vesuviane* and *Ente per le Ville Vesuviane* v *Commission*, C-445/07 P and C-455/07 P, EU:C:2009:529, paragraph 40 and the case-law cited).

52 It follows that SFL's objection that the appeal is inadmissible must be rejected.

Substance

The first ground of appeal

– *Arguments of the parties*

53 By its first ground of appeal, the Commission, supported by the Parliament, submits that the General Court erred in its interpretation of the fourth paragraph of Article 263 TFEU and Article 18(7) of the SRM Regulation when it held, in paragraphs 116 to 120, 127 and 137 of the judgment under appeal, that the resolution scheme at issue is a challengeable act producing binding legal effects.

54 First of all, the Commission notes that it is the Commission or, as the case may be, the Council that confers binding legal effects on a resolution scheme in order to avoid an 'actual transfer of responsibility', within the meaning of the case-law resulting from the judgment in *Meroni* v *High Authority*. According to the Commission, by stating, in paragraph 132 of the judgment under appeal, that the Commission is not entitled to modify a resolution scheme, the General Court misinterpreted the provisions of the first, second and seventh subparagraphs of Article 18(7) of the SRM Regulation.

55 Next, the Commission argues that the interpretation that the resolution scheme at issue produces independent legal effects irrespective of whether it is endorsed by the Commission or, as the case may be, by the Council is contrary to the case-law resulting from the judgment in *Meroni* v *High Authority*. According to that case-law, powers involving the exercise of discretionary powers cannot be delegated to autonomous entities which have not been provided for in the Treaties. The adoption of binding decisions by such entities should, in general, be limited to strictly technical matters, without going beyond the narrow limits defined in the basic act. It is apparent from recital 24 of the SRM Regulation that that case-law guided the EU legislature when adopting that regulation, by which review of the discretionary aspects of a resolution scheme was reserved to EU institutions with policy powers for the resolution of credit institutions.

56 In addition, the Commission submits that, by stating, in paragraphs 130, 132 and 137 of the judgment under appeal, that it is called upon to assess only certain discretionary aspects which are decisive for the endorsement of a resolution scheme, the General Court failed to take into

account the fact that the discretionary aspects are intrinsically linked to the more technical aspects. Thus, when it is led to object to the discretionary aspects of a resolution scheme, the Commission objects to that scheme as a whole.

57 According to the Commission, the SRM Regulation established a complex administrative procedure in that, in accordance with Article 18(7) of that regulation, the resolution procedure leads to a decision by the Commission or, as the case may be, the Council endorsing or objecting to the resolution scheme presented. However, the SRB's assessment does not prejudge the outcome of that procedure. Consequently, in the context of that procedure, only measures definitively laying down the position of the Commission or the Council at the end of that procedure constitute challengeable acts, to the exclusion of intermediate measures whose aim is to prepare the final decision.

58 As regards, last, the argument set out in paragraphs 122, 124 and 140 of the judgment under appeal, based on the right of appeal provided for in Article 86 of the SRM Regulation against decisions of the SRB, the Commission recalls that the provisions of that regulation cannot alter the system of remedies laid down by the Treaties.

59 The SFL and the SRB dispute that line of argument. They submit that the General Court was fully entitled to hold that the resolution scheme at issue constitutes a challengeable act producing independent legal effects.

60 First of all, they note that, under, inter alia, Article 7, Article 18(1) and Article 20 of the SRM Regulation, the SRB is responsible for planning, devising and adopting the resolution scheme. By contrast, according to Article 18(7) of that regulation, read in conjunction with recitals 24 and 26 thereof, the role of the Commission and the Council is limited to participating in the resolution procedure and reviewing the discretionary aspects of the resolution scheme. In that regard, SFL states that, in the absence of objections raised by the Commission or the Council within 24 hours from the transmission of the resolution scheme, that scheme is to enter into force. Furthermore, in the event that the Commission or the Council disagrees with the resolution scheme devised by the SRB, it is for the SRB to take the final decision in accordance with their guidelines.

61 The SRB contends that, while Article 18(7) of the SRM Regulation reserves legal and political responsibility for the discretionary aspects of the resolution scheme to the Commission or, as the case may be, the Council, it attributes the other elements of the resolution scheme explicitly to the SRB. The role of those institutions is either to endorse or to object to the resolution scheme, but under no circumstances to devise, draw up or apply that scheme. It argues that the EU legislature entrusted the specialised agency constituted by the SRB with the task of carrying out the highly technical assessments which the adoption of a resolution scheme presupposes. In its view, the SRB is responsible for planning, devising and adopting resolution measures as well as monitoring their implementation by the national authorities. In those circumstances, it cannot be denied the right to defend a resolution scheme, on pain of infringing its rights of defence.

62 Next, SFL and the SRB submit that the assessment that the SRB's decision brings the procedure to an end and must therefore be regarded as the act against which an action may be brought in the event of the resolution of a financial institution does not conflict with the case-law resulting from the judgment in *Meroni* v *High Authority*. In their view, the SRM Regulation avoids an 'actual transfer of responsibility' within the meaning of that case-law, by ensuring that the Commission and, as the case may be, the Council can review, or even object to, any discretionary element of the resolution decision. According to the SRB, there is no contradiction between, on the one

hand, the right to bring an action against the SRB, as the author of the resolution scheme, and, on the other hand, the fact that the Commission and, as the case may be, the Council are involved in the decision on that resolution scheme and that that scheme cannot enter into force if those institutions object to it. In any event, the SRB is of the view that the power to adopt all resolution decisions, conferred on it by Article 7(2) of the SRM Regulation, does not constitute a power which the Treaty confers on the Commission and which the Commission has decided to delegate, but a power created by the EU legislature in that regulation.

63 Finally, SFL notes that recitals 90 and 120 of the SRM Regulation and Articles 7, 20 and 86 of that regulation refer to the SRB's powers, while specifying that the decisions which it adopts may be subject to judicial review before the Court. Thus, Article 86(2) of that regulation provides for such review of all decisions of the SRB which, like those relating to resolution schemes, cannot be the subject of an appeal before the Appeal Panel. In its view, the Commission's argument to the contrary contradicts those recitals and articles of the SRM Regulation and therefore constitutes an interpretation *contra legem*.

– *Findings of the Court*

64 The first ground of appeal concerns the question whether the General Court erred in law in holding, in paragraphs 116 to 120, 127, 137, 149 and 150 of the judgment under appeal, that the resolution scheme at issue is a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU.

65 It is settled case-law that an action for annulment may be brought, under the fourth paragraph of Article 263 TFEU, read in conjunction with the first paragraph thereof, against all measures or acts adopted by the EU institutions, bodies, offices and agencies, whatever their form, which are intended to produce legal effects binding on and are capable of affecting the interests of a natural or legal person by bringing about a distinct change in their legal position. In order to ascertain whether an act produces such effects and may, accordingly, form the subject matter of such an action, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution, body, office or agency which adopted the act (see, to that effect, judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 9; of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraphs 39 and 41; and of 12 July 2022, *Nord Stream 2* v *Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraphs 62 to 64 and the case-law cited).

66 As regards, in the first place, the content of the resolution scheme at issue, it is true that it states, first of all, in Articles 1 to 4 thereof, that the SRB 'decides' to place Banco Popular under resolution on the ground that the conditions set out in Article 18(1) of the SRM Regulation have been met; next, it determines, in Articles 5 to 7 thereof, the resolution tools to be applied; and, last, it states, in Articles 9 and 10 thereof, that it is for the FROB to take all necessary measures to proceed with the execution of that decision and that the execution will be monitored by the SRB.

67 However, Article 12(1) of the resolution scheme at issue provides that it 'shall enter into force' on 7 June 2017, and not, as the General Court incorrectly found in paragraph 117 of the judgment under appeal, that it 'entered into force' on that date. Furthermore, Article 13 of that scheme states that it is addressed to the FROB and is to be notified to it after it has been endorsed by the Commission or the Council.

68 It follows from the information stated in the previous paragraph that the resolution scheme at issue adopted by the SRB by means of Decision SRB/EES/2017/08 of its Executive Session of 7 June 2017, which is the contested act before the General Court in the present case, had not yet been endorsed, which is confirmed by the fact, noted in paragraphs 77 and 78 of the judgment under appeal, that, after its adoption, it was notified to the Commission for endorsement at 5.13 a.m. on 7 June 2017, which occurred at 6.30 a.m. on the same day. It also follows from that information that the entry into force of that scheme and, consequently, the production by that scheme of binding legal effects depended on its endorsement.

69 Second, as regard the context in which the resolution scheme at issue was adopted, it is important to observe that, as stated in its preamble, its legal basis is the SRM Regulation, in particular Article 18 thereof. The scheme put in place by that regulation is based on the finding, set out in essence in recitals 24 and 26 thereof, that the exercise of the resolution powers provided for in that regulation falls within the resolution policy of the European Union, which only EU institutions may establish, and that there remains a margin of discretion in the adoption of each specific resolution scheme, given the considerable impact of the resolution decisions on the financial stability of the Member States and on the European Union as such, as well as on the fiscal sovereignty of the Member States. It is apparent from those recitals that the EU legislature, for those reasons, considered it necessary to provide for the adequate involvement of the Council and the Commission, namely involvement that strengthens the necessary operational independence of the SRB while respecting the principles of delegation of powers to agencies identified in the judgment in *Meroni* v *High Authority* and recalled in the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18).

70 In those judgments, the Court held, in essence, that the consequences resulting from a delegation of powers are very different depending on whether the delegation involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority or whether it involves a 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy' (see, to that effect, the judgment in *Meroni* v *High Authority*, pages 152 to 154, and judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 41).

71 A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator with the choices of the delegate, brings about an 'actual transfer of responsibility' (the judgment in *Meroni* v *High Authority*, page 152, and judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 42). In the case that led to the judgment in *Meroni* v *High Authority*, the Court held that the delegation of powers at issue in that case, in so far as it allowed the bodies concerned a 'degree of latitude which implies a wide margin of discretion', could not be considered to be compatible with the 'requirements of the Treaty', while stating that, in reserving to itself only the power to refuse its approval of the decisions of those bodies, the High Authority had not retained sufficient powers to avoid such a transfer of responsibility (see, to that effect, the judgment in *Meroni* v *High Authority*, page 154).

72 It follows from the considerations set out on page 152 of the judgment in *Meroni* v *High Authority* that the case-law resulting from that judgment is based on the premiss that the balance of powers, which is characteristic of the institutional structure of the European Union, is a fundamental guarantee granted by the Treaties and that to delegate a broad discretionary power would render that guarantee ineffective, by entrusting it to bodies other than those which the Treaties have

established to effect and supervise the exercise thereof within the limits of their respective functions. In the light of the considerations set out on pages 152 and 154 of that judgment, the broad discretionary power referred to in that case-law relates, in particular, to the fundamental issues of the policy area concerned, which imply a wide margin of discretion in order to reconcile various objectives which are sometimes contradictory.

73 It is apparent, specifically, from that case-law that the applicability of the principles concerning the delegation of powers to agencies identified by that case-law depends not on the individual or general nature of the acts which the agencies are authorised to adopt, but solely on whether the delegation relates to a broad discretionary power or, on the contrary, to executive powers which are precisely delineated (see, to that effect, judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraphs 54, 65 and 66).

74 As is apparent from recitals 24 and 26 of the SRM Regulation, the scheme put in place by that regulation is intended to give concrete expression to the principles identified in the judgment in *Meroni* v *High Authority* and recalled in the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18).

75 It is true that, under Article 7(2) of the SRM Regulation, the SRB is responsible for adopting all resolution decisions relating to, inter alia, financial institutions and groups which are considered to be significant for financial stability in the European Union, and for other cross-border groups. To that end, Article 18(1) and (6) of the SRM Regulation provides that the SRB is to adopt a resolution scheme in relation to those entities and groups only when it assesses, on receiving the communication of the ECB's assessment that the entity concerned is failing or is likely to fail, or on its own initiative, that the conditions for resolution set out in Article 18(1)(a) to (c) of that regulation are met. Those conditions relate to whether the entity is failing or is likely to fail, the absence of alternative measures with regard to resolution and whether a resolution action is necessary in the public interest.

76 Where those conditions are met, the SRB adopts, on the basis of Article 18(6) of the SRM Regulation, a resolution scheme which places the entity concerned under resolution and determines the application to that entity of the resolution tools referred to in Article 22(2) of that regulation and the use of the Single Resolution Fund. Article 22(4) of that regulation states that those tools, with the exception of that of asset separation, may be applied either individually or in any combination in order to meet the resolution objectives specified in Article 14 of that regulation, in accordance with the resolution principles specified in Article 15 thereof.

77 However, while the provisions referred to in the two preceding paragraphs confer on the SRB a wide margin of discretion concerning whether and by what means the entity concerned is to be the subject of a resolution procedure, that discretion, by virtue of Article 18(1) and (4) to (6) of the SRM Regulation, is circumscribed by objective criteria and conditions delimiting the SRB's scope of action and relating both to the resolution tools and conditions. In addition, the regulation provides for the participation of the Commission and of the Council in the procedure leading to the adoption of a resolution scheme, which, in order to enter into force, must be endorsed by the Commission and, where relevant, the Council.

78 Thus, according to Article 30(1) and (2) of the SRM Regulation, the SRB is to inform the Commission of any action it takes in order to prepare for resolution and exchanges, with the Commission and the Council, all information necessary for the performance of their tasks. In accordance with Article 43(3) of that regulation, the Commission is to designate a representative

entitled to participate in the meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that representative is entitled to participate in the debates and is to have access to all documents.

79 Furthermore, the first subparagraph of Article 18(7) of the SRM Regulation states that the SRB is required to transmit the resolution scheme to the Commission immediately after its adoption and, in its second and third subparagraphs, that, within 24 hours from the transmission, the Commission either endorses the resolution scheme or objects to it with regard to the discretionary aspects of that scheme, excluding those relating to compliance with the criterion of public interest and the amount earmarked for the use of the Single Resolution Fund. As regards the latter discretionary aspects, the third subparagraph states that the Commission may, within 12 hours from the transmission, propose to the Council to object. The fifth subparagraph of Article 18(7) of that regulation states that the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB.

80 Thus, the provisions of Article 18(7) of the SRM Regulation make the entry into force of the resolution scheme subject to the Commission's endorsement, in the absence of objections on the part of the Commission or the Council. Where the Commission endorses such a scheme, it must then fully assume the responsibilities conferred on it by the Treaties.

81 It is apparent from paragraphs 75 to 80 above that the provisions of Article 18 of the SRM Regulation, on the basis of which the resolution scheme at issue was adopted, are such as to avoid a 'transfer of responsibility' within the meaning of the case-law resulting from the judgment in *Meroni* v *High Authority*. While conferring on the SRB the power to assess whether the conditions for the adoption of a resolution scheme are met in the present case and the power to determine the tools necessary for the purposes of such a scheme, those provisions confer on the Commission, or, as the case may be, on the Council, the responsibility for the final assessment of the discretionary aspects of the scheme which fall within the scope of EU policy for the resolution of credit institutions and which, as is clear from Article 14 and recitals 24, 26 and 62 of the SRM Regulation, involve a balancing of various objectives and interests, relating to the safeguarding of the financial stability of the European Union and the integrity of the internal market, the taking into account of the budgetary sovereignty of the Member States and the protection of the interests of shareholders and creditors.

82 As regards, in the third place, the SRB's powers, the Court notes that the interpretation adopted by the General Court in paragraphs 129 and 130 of the judgment under appeal, according to which a resolution scheme may produce binding legal effects irrespective of the Commission's endorsement decision, disregards both the powers conferred on the SRB by the SRM Regulation and the case-law resulting from the judgment in *Meroni* v *High Authority*.

83 While Articles 7 and 18 of that regulation provide that the SRB is responsible for drawing up and adopting a resolution scheme, they do not confer on it the power to adopt an act producing independent legal effects. In the context of the resolution procedure resulting from Article 18 of the SRM Regulation, endorsement by the Commission is, as the General Court rightly pointed out in paragraph 128 of the judgment under appeal, an essential element for the entry into force of the resolution scheme.

84 That endorsement is also decisive for the content of the resolution scheme at issue.

85 While Article 18(7) of the SRM Regulation allows the Commission to endorse such a scheme without having raised any objections with regard to its discretionary aspects or proposed to the Council to do so, it also allows the Commission and the Council to substitute their own assessment for that of the SRB as regards those discretionary aspects by objecting thereto, in which case the SRB is required, under the seventh subparagraph of Article 18(7), to modify that scheme, within eight hours, in accordance with the reasons expressed by the Commission or the Council, so that that scheme may enter into force.

86 It is also important to note that, as is apparent from Article 18(8) of that regulation, an objection by the Council on the ground that the public interest criterion is not fulfilled has the effect of ultimately preventing the resolution under that regulation of the entity concerned, that entity then having to be wound up in an orderly manner in accordance with the applicable national law.

87 In the present case, by its Decision 2017/1246, the Commission endorsed the resolution scheme at issue. As it expressly stressed in recital 4 of that decision, by endorsing that scheme, the Commission expressed its 'agreement' with the content thereof and with 'the reasons provided by the SRB of why resolution is necessary in the public interest'. In that regard, as the Commission noted at the hearing, the discretionary aspects of a resolution scheme, which relate both to the establishment of the resolution conditions and to the determination of the resolution tools, are inextricably linked to the more technical aspects of resolution. Contrary to what the General Court held in paragraph 137 of the judgment under appeal, a distinction, therefore, cannot be drawn between those discretionary aspects and those technical aspects, for the purposes of determining the act against which an action may be brought in the context of a resolution scheme endorsed in its entirety by the Commission.

88 Thus, it is only by the Commission's endorsement decision that the resolution action adopted by the SRB in the resolution scheme at issue was definitively fixed and that that action produced binding legal effects, with the result that, having regard, in particular, to the principles identified in the judgment in *Meroni* v *High Authority*, it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature.

89 It is thus apparent from its content, the context in which it was adopted and the powers of the SRB that the resolution scheme at issue did not produce binding legal effects capable of affecting the interests of a legal or natural person, with the result that it does not constitute an act against which an action for annulment may be brought under the fourth paragraph of Article 263 TFEU.

90 The considerations set out by the General Court in paragraphs 121 to 123 of the judgment under appeal are not such as to call into question the foregoing finding.

91 In that regard, contrary to what the General Court held in those paragraphs, it cannot be inferred from Article 86(1) and (2) of the SRM Regulation that the resolution scheme at issue was capable of forming the subject matter of an action for annulment. As the Commission observes, the provisions of a regulation cannot alter the system of remedies laid down by the FEU Treaty. In addition, it is apparent from the very wording of those provisions of the SRM Regulation that the actions they concern must be brought before the Court 'in accordance with Article 263 [TFEU]', which presupposes that they satisfy the condition, set out therein, relating to the challengeable nature of the contested act.

92 It is true that, in paragraphs 56 and 66 of the judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369), the Court held, in essence, that a resolution scheme may, as the outcome of a complex resolution procedure, be subject to judicial review before the EU judicature. However, in the case which gave rise to that judgment, the Court of Justice was called upon to assess the legality of a decision of the General Court holding as inadmissible actions for annulment brought not against such a scheme but against preparatory measures of the ECB which had found that entities were failing or were likely to fail, within the meaning of Article 18(1) of the SRM Regulation. The considerations set out in those paragraphs 56 and 66 must therefore be read in the light of the Court's settled case-law on complex procedures according to which, in the case of acts which are drawn up in several procedural stages, only the measure which, at the end of the procedure, definitively lays down the position of the competent EU institution, body, office or agency – to the exclusion of intermediate measures whose aim is to prepare that final measure and which produce no independent legal effects – is capable of forming the subject matter of an action for annulment (see, to that effect, judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 10; of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraphs 43 and 46; and of 22 September 2022, *IMG* v *Commission*, C-619/20 P and C-620/20 P, EU:C:2022:722, paragraph 103).

93 In a complex procedure of that sort, acts adopted during the preparatory stages leading to the adoption of the definitive act cannot, where they do not produce independent legal effects, form the subject matter of an action for annulment.

94 Contrary to what the General Court held in paragraphs 122 to 124 of the judgment under appeal, it cannot therefore be inferred from Article 86 of the SRM Regulation and from the judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369), that the resolution scheme at issue is an act against which an action for annulment may be brought before the General Court, when it did not constitute the outcome of the resolution procedure at issue, that outcome having materialised only through the endorsement of that scheme by the Commission, and, as is clear from the foregoing analysis, it did not produce independent legal effects.

95 Nor can the finding set out above be called into question by the considerations set out by the General Court in paragraphs 146 and 147 of the judgment under appeal, according to which the failure to recognise that the resolution scheme at issue is actionable would lead to an infringement of the right of the applicants at first instance to effective judicial protection.

96 A Commission endorsement decision such as Decision 2017/1246 displays, for its part, the features of an act against which an action for annulment may be brought under the fourth paragraph of Article 263 TFEU. In an action for annulment brought against such a decision, it is open to the natural or legal persons concerned to plead the illegality of the resolution scheme approved by that institution, thereby giving it binding legal effect, which is capable of guaranteeing them sufficient judicial protection (see, to that effect, 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 53 and the case-law cited). In that regard, it must be stated that, as is apparent from paragraphs 87 and 88 above, the Commission is, by that approval, deemed to endorse the information and grounds contained in that scheme, with the result that it must, if necessary, answer to the EU judicature.

97 It follows from all the foregoing considerations that the resolution scheme at issue does not constitute a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU.

98 Accordingly, the judgment under appeal must be set aside in so far as it declared admissible the action for annulment of that scheme.

The second and third grounds of appeal

99 Since the judgment under appeal is to be set aside on the basis of the first ground of appeal, there is no need to examine the second and third grounds of appeal.

The action before the General Court

100 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, if the decision of the General Court is quashed, give final judgment in the matter, where the state of the proceedings so permits.

101 That is so in the present case, since the Court has all the information necessary to rule on the admissibility of the action at first instance.

102 For the reasons set out in paragraphs 66 to 97 above, the resolution scheme at issue does not constitute a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU.

103 In those circumstances, the action brought before the General Court by Fundación and SFL must be dismissed as inadmissible.

Costs

104 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

105 Under Article 138(1) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

106 In the present case, since SFL has been unsuccessful in the appeal proceedings, it must, having regard to the form of order sought by the Commission, be ordered to bear its own costs and to pay those incurred by that institution in connection with those proceedings. Since Fundación and SFL have been unsuccessful in the proceedings at first instance, they must be ordered, in accordance with the forms of order sought by the SRB and Banco Santander, to bear their own costs and to pay those incurred by the SRB and Banco Santander in connection with the latter proceedings.

107 Under Article 138(3) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. Since the SRB has been unsuccessful as regards the admissibility of the action, which alone is at issue in the appeal, it is to bear its own costs relating to the appeal.

108 In accordance with Article 140(1) of the Rules of Procedure, which also applies to the procedure on appeal by virtue of Article 184(1), the Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Kingdom of Spain, the Parliament and the Council, interveners at first instance, are to bear their own costs relating to the proceedings at first instance and to the appeal. The Commission, as intervener in the proceedings at first instance, is to bear its own costs relating to those proceedings.

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

1. **Sets aside the judgment of the General Court of the European Union of 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB* (T-481/17, EU:T:2022:311), in so far as it finds that the action brought by Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) seeking annulment of Decision SRB/EES/2017/08 of the Executive Session of the Single Resolution Board of 7 June 2017, concerning the adoption of a resolution scheme in respect of Banco Popular Español SA is admissible;**

2. **Dismisses the action brought by Fundación Tatiana Pérez de Guzmán el Bueno and SFL seeking annulment of Decision SRB/EES/2017/08 as inadmissible;**

3. **Orders Fundación Tatiana Pérez de Guzmán el Bueno and SFL to bear their own costs and to pay those incurred by the Single Resolution Board (SRB) and Banco Santander SA, relating to the proceedings at first instance; orders SFL to bear its own costs and to pay those incurred by the European Commission relating to the present appeal;**

4. **Declares that the SRB shall bear its own costs relating to the present appeal;**

5. **Declares that the Kingdom of Spain, the European Parliament and the Council of the European Union shall bear their own costs relating to the proceedings at first instance and to the present appeal; declares that the Commission shall bear its own costs relating to the proceedings at first instance.**

[Signatures]