Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 14 March 2024[1]

Case C-535/22 P

Aeris Invest Sàrl
v
European Commission,

Single Resolution Board (SRB)

(Appeal – Economic and monetary policy – Banking Union – Single Resolution Mechanism – Regulation (EU) No 806/2014 – Article 18 – Conditions for resolution – Article 15 – Resolution objectives – Article 22 – General principles of resolution tools – Article 296 TFEU – Duty to state reasons – Article 47 of the Charter of Fundamental Rights of the European Union – Action for annulment and action for damages – Resolution of Banco Popular)

I. Introduction

1. The Single Resolution Mechanism ('SRM') was established in 2014.[2] On 6 June 2017, it was used for the first time, in respect of Banco Popular Español, SA ('Banco Popular').

2. The appellant, Aeris Invest Sàrl ('Aeris Invest'), is a legal person under Luxembourg law, and was a shareholder in Banco Popular before the resolution scheme[3] of that bank was adopted. Over 100 direct actions were submitted to the General Court by natural and legal persons who owned capital in Banco Popular before its resolution on 7 June 2017.

3. By its action before the General Court, Aeris Invest challenged the resolution scheme and the European Commission's approval thereof due to a number of alleged errors as well as the validity of certain provisions of the SRM Regulation. That action was dismissed on the merits in the judgment of 1 June 2022, *Aeris Invest* v *Commission and SRB* (T-628/17, EU:T:2022:315) ('the judgment under appeal').

1 Original language: English.

2 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').

3 Decision SRB/EES/2017/08 of the Single Resolution Board of 7 June 2017 in its executive session concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A. ('the resolution scheme'). The resolution scheme was approved by Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p. 15) ('the Commission's approval').

4. Alongside this, there is another appeal pending in Case C-541/22 P, *García Fernández and Others* v *Commission and SRB*,[4] which challenges the parallel judgment of the General Court concerning the same resolution scheme ('the parallel appeal'). There is significant overlap in the arguments made. My Opinion in that appeal is being delivered on the same day ('the parallel Opinion'), and these two parallel Opinions should be read together.

5. Taking into account the standard of review presented in points 5 to 7 of the parallel Opinion, I will suggest that the Court uphold the two judgments under appeal.

II. Events leading to the proceedings before the General Court

6. The facts relevant to the present appeal, which are explained in more detail in paragraphs 25 to 83 of the judgment under appeal, are identical to those in the parallel Opinion. I therefore refer the reader to points 9 to 24 of that opinion.

III. The proceedings before the General Court and the judgment under appeal

7. By its action lodged before the General Court on 18 September 2017, Aeris Invest sought the annulment of the resolution scheme and the Commission's approval.

8. On 6 August 2018, the Kingdom of Spain, the European Parliament, and the Council of the European Union were granted leave to intervene and on 12 April 2019, the same was granted to Banco Santander. They all intervened in support of the Commission and the Single Resolution Board (SRB).

9. By order of 12 May 2021, the General Court ordered the SRB to produce the full versions of the resolution scheme, valuation 2, the European Central Bank's (ECB) failing or likely to fail ('FOLTF') assessment of 6 June 2017, Banco Popular's letter of 6 June 2017 to the ECB, including the annex to that letter, and the ECB's letter of 18 May 2017 to Banco Popular.

10. By order of 9 June 2021, the General Court, after inspecting those documents, decided that they were not necessary for resolving the case and removed the confidential versions of the documents from the file, and sent the appellant (the applicant at first instance), the Commission, the Kingdom of Spain, the Parliament, the Council, and Banco Santander the letter of 6 June 2017 from Banco Popular to the ECB, without the annex to that letter.

11. The General Court dismissed the action in its entirety as unfounded.

[4] Challenging judgment of 1 June 2022, *Eleveté Invest Group and Others* v *Commission and SRB* (T-523/17, EU:T:2022:313) ('the parallel judgment under appeal').

IV. Procedure before the Court of Justice

12. By its appeal lodged on 9 August 2022, Aeris Invest claims that the Court should:

– annul the judgment under appeal, and in accordance with the form of order sought by the applicant at first instance before the General Court:

  – annul the resolution scheme of the SRB,

  – annul the Commission approval of the resolution scheme, and

  – declare Articles 15 and 22 of the SRM Regulation inapplicable, pursuant to Article 277 TFEU;

– order the Commission and the SRB to pay the costs incurred at first instance and on appeal;

– in the alternative, refer the case back to the General Court and, in that case, reserve the costs.

13. The Commission, the SRB, the Council, the Kingdom of Spain, and Banco Santander contend that the Court should:

– dismiss the appeal in its entirety;

– order the appellant to pay the costs.

14. The Council additionally claims that the Court should:

– in the event that the Court annuls the judgment under appeal and decides on the action pursuant to Article 61 of the Statute of the Court of Justice of the European Union, it should dismiss the plea of illegality of Articles 15, 18, 20, 21, 22 and 24 of the SRM Regulation.

15. Banco Santander additionally contends that, should the Court uphold the appeal and decide, in accordance with Article 61 of the Statute of the Court of Justice of the European Union, to give judgment itself on the action for annulment, it should:

– in accordance with the second paragraph of Article 264 TFEU, limit the scope of its judgment by upholding the effects of the sale of Banco Popular to Banco Santander.

V. Analysis

16. The appellant puts forward eight grounds in support of its appeal. The first ground of appeal alleges that the General Court breached Article 18 of the SRM Regulation, the duty of care, and the duty to state reasons. Under the second ground of appeal, the appellant alleges that the General Court breached Articles 14 and 20 of the SRM Regulation, the duty of care, and Article 296 TFEU. The third ground of appeal alleges that the General Court breached its duty of care, Articles 17 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Article 14 of the SRM Regulation. The fourth ground of appeal alleges that the

General Court breached the right of defence under Article 47 of the Charter, and Article 296 TFEU. The fifth ground of appeal alleges that the General Court breached Article 296 TFEU and the right of defence under Article 47 of the Charter in respect of confidentiality of the resolution scheme and valuation 2. The sixth ground of appeal alleges that the General Court breached Article 47 of the Charter and Article 6 of the European Convention on Human Rights (ECHR) by rejecting the appellant's request for documents. The seventh ground of appeal alleges that the General Court breached Articles 17 and 52 of the Charter in that it rejected the plea of illegality of Articles 15 and 22 of the SRM Regulation, inasmuch as they constitute a disproportionate interference with the right to property. The eighth ground of appeal alleges that the General Court breached Articles 17 and 52 of the Charter as well as Article 5(4) TEU.

17. The present appeal shares a number of grounds of appeal with the parallel appeal. Due to the connections between the two, I will divide the present Opinion in two parts: in Section A, I will address the grounds of appeal common to both appeals, and in Section B, I will deal with those specific to the present appeal.

A. Grounds of appeal common to Case C-535/22 P and Case C-541/22 P

18. Two topics are common to both appeals. The first concerns Article 18 of the SRM Regulation [5] which I will deal with in Section 1.

19. The second topic common to both appeals concerns the alleged breach of the duty to state reasons and of Article 47 of the Charter by the General Court. [6] I will address those issues in Section 2.

1. Article 18 of the SRM Regulation

(a) Article 18(1)(a) of the SRM Regulation

20. The appellant in the first ground of appeal argue that the General Court erred in law [7] when it found that liquidity issues may be a reason for which a bank may be considered FOLTF, because the bank, albeit experiencing liquidity issues, was solvent. In the parallel appeal, the appellants also argue, in the first part of the first ground of appeal, that the General Court wrongly considered that insolvency is not a requirement for establishing that a bank is FOLTF.

21. Second, the appellants in the parallel appeal also argue that the General Court was wrong to accept the passivity of the SRB regarding the need to grant emergency liquidity assistance ('ELA') to Banco Popular, since the SRB has a duty of care, including an obligation to ensure ELA before the bank is FOLTF. [8]

[5] These claims are in the first ground of appeal in Case C-535/22 P and in the first ground of appeal in Case C-541/22 P.

[6] These claims are in the fourth, fifth, and sixth grounds of appeal in Case C-535/22 P, and in the fifth and sixth parts of the second ground of appeal in Case C-541/22 P.

[7] Judgment under appeal, paragraphs 275 to 304.

[8] Parallel judgment under appeal, paragraphs 118 to 177.

22. In respect of the first claim, according to both of the judgments under appeal, the conditions to establish FOLTF are regulated in more detail by Article 18(4) of the SRM Regulation [9] and do not require that a bank be insolvent, nor do those conditions exclude a FOLTF finding being made where a bank is experiencing non-temporary liquidity problems.

23. The General Court then assessed the various sources and explanations on the basis of which the ECB (in its FOLTF assessment) and the SRB (in the resolution scheme) complied with Article 18(1)(a) of the SRM Regulation, which they did in light of Banco Popular's acute liquidity problems.

24. This included Banco Popular's 2016 annual report, the downgrading of Banco Popular by various rating agencies, the negative press coverage, the bank's liquidity coverage (which had fallen below the minimum threshold of 80%), the EBA Guidelines [10] which set out the conditions for a FOLTF assessment, and the letter of the Board of Directors of Banco Popular itself. [11]

25. The General Court referred to recital 57 of the SRM Regulation, according to which a resolution decision should be in place before the entity becomes insolvent and before all equity is wiped out. It thus rightly concluded that insolvency is not the only scenario under which a decision on resolution can be made. [12]

26. There is nothing in the text of the SRM Regulation or the EBA Guidelines to suggest that liquidity issues that are not temporary cannot lead to a FOLTF conclusion. The General Court has therefore rightly interpreted Article 18(1) and (4) of the SRM Regulation and concluded that the finding that Banco Popular was FOLTF met the condition set out in Article 18(4)(c) of the SRM Regulation, according to which 'the entity is, or there are objective elements to support a determination that the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due'.

27. In respect of the second claim, the appellants in the parallel appeal claim that the General Court erred in law, by finding that the SRB had not contributed to the failing of Banco Popular. They argue that the General Court wrongly found that the causes of a bank FOLTF are distinct from establishing whether the resolution complied with the requirements of Article 18(1)(a) of the SRM Regulation. [13]

28. The appellants in the parallel appeal argue that recital 52 of the SRM Regulation [14] imposes an obligation on the SRB to ensure that a bank receives ELA prior to deciding on resolution. In response, the General Court was, in my view, right in to reject that argument by stating that ELA

[9] Judgment under appeal, paragraph 288; parallel judgment under appeal, paragraph 130.

[10] Guidelines of the European Banking Authority (EBA) of 6 August 2015 on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU (EBA/GL/2015/07).

[11] Judgment under appeal, paragraphs 291, 292, 297 and 298. See also, parallel judgment under appeal, paragraphs 118 to 145.

[12] Judgment under appeal, paragraph 286; parallel judgment under appeal, paragraph 132.

[13] Parallel judgment under appeal, paragraph 166.

[14] 'The SRM should be based on the frameworks of [Council] Regulation (EU) No 1024/2013 [of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to prudential supervision of credit institutions (OJ 2013 L 287, p. 63)] and of Directive 2014/59/EU [of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190)]. Therefore, the Board should be empowered to intervene at an early stage where the financial situation or the solvency of an entity is deteriorating. The information that the Board receives from the national resolution authorities or the ECB at that stage is instrumental in making a determination on the action it might take in order to prepare for the resolution of the entity concerned.'

falls within the remit of national central banks.[15] Indeed, as the Commission and the SRB have rightly pointed out in their written submissions, recital 52 of the SRM Regulation cannot be read as a legal basis for establishing an obligation to 'save the bank' before a decision on resolution is taken.

29. The appellants in the parallel appeal submit that the General Court breached the principle *nemo auditur propriam turpitudinem allegans*, according to which a person may not plead his or her own misconduct in order to obtain an advantage.[16] Within that context, the appellants in the parallel appeal argue that the General Court wrongly separated the principle of good administration from the legality of the resolution scheme.[17]

30. In my view, the General Court correctly focused on the SRB's tasks under the SRM Regulation and the conditions imposed by it in order to decide on a resolution under Article 18(1) thereof. The General Court also did not err when it decided to deal with the alleged misconduct of the SRB within the scope of the claim for damages of the appellants in the parallel appeal, rather than in relation to the lawfulness of the resolution scheme.[18]

31. In sum, I consider that the Court of Justice should dismiss all the grounds of appeal concerning Article 18(1)(a) of the SRM Regulation.

(b) Article 18(1)(b) of the SRM Regulation

32. In the first place, Aeris Invest argues that there were alternative measures to resolution and that the General Court therefore wrongly interpreted Article 18(1)(b) of the SRM Regulation.[19] More specifically, it criticises the General Court for not having demanded that the SRB examine in a detailed and impartial manner why additional ELA was not granted to Banco Popular. Similarly, the appellants in the parallel appeal argue that the General Court breached its obligation to state reasons, wrongly assessed the evidence, and wrongly interpreted Article 18(1)(b) of the SRM Regulation.[20]

33. The General Court examined (i) the fact that the SRB had taken into account ELA granted to Banco Popular, (ii) the approval thereof by the ECB, and (iii) the lack of any effect of such assistance on the 'depletion of Banco Popular's liquidity position'.[21] It also examined the letters exchanged between the ECB and Banco de España (Bank of Spain) in respect of the ELA, which, in the view of the General Court, demonstrated the speed of Banco Popular's deterioration.[22] The General Court also referred to the finding of the ECB that even if ELA had been approved on

15 Parallel judgment under appeal, paragraph 175.

16 Parallel judgment under appeal, paragraphs 167 to 168.

17 Judgment under appeal, paragraph 173.

18 I will discuss the ground of appeal concerning the non-contractual liability of the European Union in the parallel Opinion, as part of the fourth ground of the parallel appeal (points 63 to 87).

19 This ground of appeal concerns the judgment under appeal, paragraphs 305 to 327.

20 These allegations concern the parallel judgment under appeal, paragraphs 178 to 231.

21 Judgment under appeal, paragraph 308.

22 Ibid., paragraph 310.

5 June 2017, Banco Popular would not have been able to meet its obligations by 7 June 2017 at the latest.[23] Lastly, the General Court concluded that the provision of ELA is not a task incumbent on the SRB under the SRM Regulation.[24]

34. Taking the foregoing into account, I am of the view that the General Court correctly reviewed the obligations incumbent upon the SRB under Article 18(1)(b) of the SRM Regulation.

35. In the second place, the appellant discusses the amounts which they consider were actually available as ELA, without claiming, however, that the General Court distorted facts. The appellants in the parallel appeal also dispute the assessment of evidence by the General Court in respect of the amount of ELA that could have been granted, the increase of capital, the separation of assets, the private sale to a third party, and the possible State aid and use of the Single Resolution Fund (SRF).

36. I consider these arguments to be inadmissible, given that the Court of Justice does not have jurisdiction to establish the facts or examine the evidence, except where the appellants argue that the General Court distorted the facts and that such distortion is obvious from the documents on the Court's file.[25]

37. In addition, the party claiming distortion must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal that, in that party's view, led to such distortion.[26]

38. The appellants in both appeals confine themselves to reiterating the facts submitted before the General Court, without demonstrating that that court distorted the evidence.

39. In light of the above considerations, and to the extent that they are admissible, the appellants' arguments in respect of Article 18(1)(b) of the SRM Regulation should be rejected.

(c) Article 18(1)(c) of the SRM Regulation

40. The appellants in the parallel appeal, in the third part of their first ground of appeal, first argue that the General Court wrongly interpreted how the balancing of interests should be carried out under Article 18(1)(c) and Article 14(2) of the SRM Regulation.

41. Second, they argue that the General Court erred in finding that the treatment of Italian banks which were FOLTF, but for which no resolution took place, was not discriminatory.[27]

42. Third, they contest the decision of the General Court finding the new arguments inadmissible as they were raised too late in the course of the proceedings at first instance.[28]

[23] Judgment under appeal, paragraph 308; parallel judgment under appeal, paragraph 184.

[24] Instead, the General Court examined the documents on which the SRB relied in finding that no alternative to a resolution is possible (the additional ELA approved, which did not help the situation; and the lack of further ELA by the Bank of Spain). Judgment under appeal, paragraphs 314 and 315.

[25] Judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 63); judgment of 29 October 2015, *Commission* v *ANKO* (C-78/14 P, EU:C:2015:732, paragraph 54).

[26] Judgment of 10 November 2022, *Commission* v *Valencia Club de Fútbol* (C-211/20 P, EU:C:2022:862, paragraph 55).

[27] Parallel judgment under appeal, paragraph 254.

[28] These alleged errors are contained in the parallel judgment under appeal, paragraphs 243 to 247, 254, and 261.

43. Concerning the first argument, the appellants in the parallel appeal argue that the SRB and the Commission should have balanced the public interest against the interest of the shareholders.

44. In rejecting that argument, rightly in my view, the General Court stated, in paragraph 246 of the parallel judgment under appeal, that in deciding on the public interest in the resolution, not only do the interests of shareholders play a role, but also those of the bank's depositors, employees, and other creditors, in line with Article 14(2) of the SRM Regulation. In addition, the General Court analysed the benefits [29] that offset the losses incurred by the shareholders of Banco Popular, in comparison to a situation where the bank would have been wound up under normal insolvency proceedings.

45. As regards the second point, I consider that the General Court did not err in finding that the lack of resolution of Italian banks is not a comparable situation that would give rise to discrimination. The General Court rightly referred to the fact that those banks were, according to the SRB, not performing critical functions and that their winding up (as opposed to resolution) would not have significant adverse effects on financial stability. The General Court was also correct in stating that a proper comparator in this situation would be a bank that also went through a resolution procedure.

46. Finally, I consider that the General Court rightly rejected the new argument of the appellants in the parallel appeal on account of their delay. In paragraph 261 of the parallel judgment under appeal, the General Court explained that the applicants at first instance belatedly raised an argument concerning Article 24 of the SRM Regulation, justifying the lateness of that argument by stating that the documents were not available at the time of introducing the action.

47. However, as the General Court pointed out, the documents refer to facts that were known to the applicants at first instance, and that the late introduction of new argument was not therefore based on matters of law or fact that the applicants at first instance were unaware of.

48. I therefore propose that the Court of Justice reject the arguments of the appellants in the parallel appeal concerning Article 18(1)(c) of the SRM Regulation as unfounded.

2. Duty to state reasons and Article 47 of the Charter

49. In the fourth, fifth, and sixth grounds of appeal in the present proceedings as well as the fifth and sixth parts of the second ground of appeal in the parallel appeal, the appellants argue that the General Court breached its duty to state reasons and Article 47 of the Charter in respect of, first, the resolution scheme and valuation 2 and, second, the confidentiality of some of the documents in the resolution procedure, as well as the decision of the General Court not to order measures of inquiry at first instance.

50. As to the General Court's duty to state reasons, what obligations should the Court of Justice review?

51. The Court of Justice has ruled that 'the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose the General Court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and

[29] Namely, in the form of maintaining critical functions, limiting adverse effects on the economy and financial stability, as well as preventing losses by creditors. Parallel judgment under appeal, paragraph 247.

the Court of Justice to exercise its power of review'.[30] Still, that does not mean that the General Court must follow exhaustively, one by one, all the arguments put forward by the parties to the case, meaning that the reasoning of the General Court may be implicit, so long as it 'enables the persons concerned to ascertain the reasons why it has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review'.[31]

52. The Court found that 'the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision'.[32]

53. For the purposes of the present appeal, it is therefore the role of the Court of Justice to ascertain whether the General Court has sufficiently explained the reasons for its decision concerning the pleas at the first instance.

(a) Valuations and the resolution scheme

54. The appellant submits, by its fourth ground of appeal, that the General Court provided insufficient and contradictory reasoning in its review of the resolution scheme, in particular concerning valuation 2[33] in the resolution scheme, and recitals 23, 24, and 26 of the resolution scheme in respect of the gravity of Banco Popular's liquidity problems. The appellants in the parallel appeal, in the sixth part of their second ground of appeal, argue that the General Court supplanted the SRB's duty to state reasons.

55. It should be added that the appellant in the present appeal questions the facts[34] accepted by the General Court as proven, without claiming a distortion of the facts by the General Court.[35] In addition, a plea is inadmissible where 'an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly disregarded by that Court … Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake'.[36]

56. I consider that the fourth ground of appeal merely reiterates the arguments raised at first instance, without addressing the arguments made by the General Court. Therefore, in so far as those factual claims are concerned, the Court of Justice should find them inadmissible.

57. Should the Court of Justice disagree, I consider that ground of appeal should be rejected as unfounded. The General Court, in the judgment under appeal, found that there was no contradiction between the findings in valuation 2, as those findings served different purposes: the finding by the SRB that Banco Popular was solvent was an expression of the bank's book value, whereas the different estimates of the bank's value[37] expressed its market value.

30 Judgment of 19 December 2019, *HK* v *Commission* (C-460/18 P, EU:C:2019:1119, paragraph 38 and the case-law cited).

31 Judgment of 18 January 2024, *Jenkinson* v *Council and Others* (C-46/22 P, EU:C:2024:50, paragraph 131).

32 Judgment of 6 November 2012, *Éditions Odile Jacob* v *Commission* (C-551/10 P, EU:C:2012:681, paragraph 48 and the case-law cited).

33 For the presentation of different valuations, see points 16, 19, and 23 of the parallel Opinion.

34 These concern the amounts found in valuation 1 and valuation 2.

35 See the case-law cited in footnotes 25 and 26 above.

36 Judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraph 45 and the case-law cited).

37 That valuation, inter alia, estimated the economic value of Banco Popular at EUR 1.3 billion in the best-case scenario, at minus EUR 8.2 billion in the worst-case scenario and at minus EUR 2 billion for the best estimate.

58. Book value may be most easily described as the company's value as recorded on its balance sheet. Market value is the current price the bank would achieve in the market. [38] In light of that explanation, I am of the view that the General Court was right to find that there was no contradiction in valuation 2 when it referred to Banco Popular as being solvent, while its market value was estimated at worst as being negative EUR 8.2 billion.

59. By the second part of the fourth ground of appeal, the appellant claims that the General Court breached its duty to state reasons by accepting that recitals 23, 24 and 26 of the resolution scheme are sufficient to understand Banco Popular's deteriorating situation and the need for resolution. They argue that the information is generic and could be applied to any liquidity crisis.

60. The Court of Justice should reject these arguments. As the SRB rightly points out in its response, the appellant fails to show why the information concerning the deterioration of Banco Popular is generic and fail to specify what is missing in order properly to understand its liquidity crisis and the need for a resolution.

61. In the sixth part of the second ground of appeal submitted by the appellants in the parallel appeal, a number of arguments [39] should be declared inadmissible. Although they indicate the relevant paragraph of the parallel judgment under appeal, the appellants in the parallel appeal refer only to a general failure to state reasons, without specifying the error allegedly committed by the General Court. [40] In addition, they also raise new arguments concerning the non-confidential version of valuation 2 at the appeal stage, which are not admissible. [41]

62. As for the merits, two arguments remain to be addressed. First, the appellants in the parallel appeal argue that the General Court wrongly found that the Commission had fulfilled its duty to state reasons in approving the resolution scheme. [42] Second, they argue that the General Court was wrong to find their argument delayed, by which they relied on the breach of the *Meroni* doctrine in respect of the extent to which the Commission participates in the resolution procedure. [43]

63. In respect of the first argument, the General Court found that the Commission's approval satisfies the duty to state reasons, and explains the references it makes to the resolution scheme. The General Court relied on Article 18(7) of the SRM Regulation, according to which the Commission may either endorse the resolution scheme or object to its discretionary aspects. This means, according to the General Court, that the Commission should in fact not reiterate the reasoning of the SRB behind the resolution scheme, but merely endorse it.

[38] See the judgment under appeal, paragraph 343. For an explanation of the differences that the two methods can yield, see Macit, F., and Topaloğlu, Z., 'Why bank market value to book ratios are so different: evidence from Turkish banking sector', *Economic and Business Review*, Vol. 14(2), 2012, p. 169. For an analysis of the differences in the two methods of debt measurement, see Bowman, R.G., 'The Importance of a Market-Value Measurement of Debt in Assessing Leverage', *Journal of Accounting Research*, Vol. 18(1), 1980, p. 242, in particular at pp. 245 to 246.

[39] These concern arguments directed against the SRB and its alleged breach of the duty to state reasons in respect of the resolution scheme with regard to the choice of Deloitte as an independent valuator. Some of the arguments in this part are also a repetition of the arguments raised in respect of Article 18 of the SRM Regulation, dealt with above (whether a severe liquidity crisis is a basis for finding that a bank is FOLTF; whether the SRB has any role in granting ELA).

[40] Which is to be considered inadmissible following the Court of Justice's judgment of 28 April 2022, *Changmao Biochemical Engineering* v *Commission* (C-666/19 P, EU:C:2022:323, paragraphs 187 to 189). In addition, 'an appeal that does not contain any arguments aimed at specifically identifying the error of law by which the judgment or order in question is allegedly vitiated does not satisfy that requirement'. Judgment of 14 October 2021, *NRW. Bank* v *SRB* (C-662/19 P, EU:C:2021:846, paragraph 36).

[41] Under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. See also, judgment of 1 February 2007, *Sison* v *Council* (C-266/05 P, EU:C:2007:75, paragraph 95).

[42] Parallel judgment under appeal, paragraphs 570 to 578.

[43] Parallel judgment under appeal, paragraphs 579 to 581. Judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

64. It should be said that the question whether the Commission's approval was sufficient, or a mere rubber-stamping of the SRB's decision, was already addressed by the General Court in one of the pilot cases, *Algebris*,[44] not appealed before the Court of Justice. The General Court found that the Commission's reference to the resolution scheme and the reasons stated therein complied sufficiently with the duty to state reasons. It considered that 'the resolution scheme and its statement of reasons form part of the context'[45] in which the Commission's approval was adopted.

65. I agree with that finding.[46] So long as the resolution scheme itself is sufficiently reasoned, the Commission also endorses that the SRB has complied with its duty to state reasons. In other words, if the Commission were to consider that the resolution scheme does not meet that duty, it must object to it and require that the SRB modify the resolution scheme.

66. I therefore do not find any fault in the reasoning of the General Court concerning the Commission's approval.

67. Finally, the General Court held that the appellants in the parallel appeal introduced a *Meroni* -based argument[47] for the first time in their reply, and thus found it inadmissible.

68. The General Court explained that in their action at first instance, the applicants claimed that the Commission had breached its duty to state reasons, whereas this was its duty under the *Meroni* doctrine. In their reply at first instance, they additionally claimed that the Commission's role in the resolution procedure, more generally, breaches the principle of delegation under Article 291 TFEU and the *Meroni* doctrine.

69. Those are indeed two different arguments, the latter of which could implicitly be read as a plea of illegality in relation to Article 18 of the SRM Regulation, which clarifies the role of the Commission when resolution action is taken.

70. I therefore consider that the General Court did not err in finding that that argument was delayed and thus inadmissible.

(b) The confidentiality of the resolution scheme and other documents

71. In the fifth ground of appeal, the appellant argues that the General Court erred[48] in holding that the appellant was not entitled to receive the full (confidential) version of the resolution scheme. In addition, they also argue that the General Court erred in finding that a non-confidential version of the resolution scheme did not breach Article 88(1) of the SRM Regulation.

72. The appellant further argues that the General Court erred in finding that it was able to bring a direct action against the resolution scheme, and that they were able to comment on the subsequent publication of a less confidential version which took place during the proceedings at

[44] Judgment of 1 June 2022, *Algebris (UK) and Anchorage Capital Group* v *Commission* (T-570/17, EU:T:2022:314).

[45] Ibid, paragraph 151.

[46] See also, Opinion of Advocate General Ćapeta in *Commission* v *SRB* (C-551/22 P, EU:C:2023:846, points 123 to 128).

[47] The doctrine results from the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). For an explanation of the doctrine and my views on its applicability in the resolution procedure, see Opinion of Advocate General Ćapeta in *Commission* v *SRB* (C-551/22 P, EU:C:2023:846, points 75 to 97).

[48] In the judgment under appeal, paragraphs 356 to 402.

first instance, before the submission of their reply. Finally, the appellant criticises the General Court for finding that the full versions (containing confidential information) of the resolution scheme, valuations 1 and 2, and other documents relating to the resolution, were not relevant for the resolution of the dispute. [49]

73. The appellants in the parallel appeal, in the fifth part of their second ground of appeal, claim that the General Court erred, in paragraphs 503 and 504 of the parallel judgment under appeal, in finding that their rights of defence had not been breached due to their lack of access to all of the files in the resolution procedure.

74. In essence, did the General Court in both of the judgments under appeal correctly review the need for the applicants at first instance to have access to the confidential versions of the resolution scheme and associated documents? I consider that it did.

75. The General Court first established the standard of review in respect of Article 47 of the Charter, specifically taking into account the context of the SRM Regulation, which, in Article 88(5), lays down the obligation for the SRB to ensure that any disclosure it makes does not contain confidential information, [50] and Article 88(1) thereof, according to which 'information subject to the requirements of professional secrecy shall not be disclosed to another public or private entity except where such disclosure is due for the purpose of legal proceedings'.

76. The General Court also rejected the arguments of the appellant that the full version of the resolution scheme and other documents should have been notified to it, in support of which they invoked the case-law concerning restrictive measures. That court found that the resolution scheme is not an individual measure taken against the shareholders of a bank, unlike a restrictive measure which freezes individual funds. [51]

77. The same logic also led the General Court to reject the argument of the applicants at first instance in the parallel judgment, according to which they should have had access to the file under Article 90(4) of the SRM Regulation. According to the General Court, such access is to be given solely to the entity that is the subject of the resolution scheme, that being Banco Popular, rather than its shareholders or creditors. [52]

78. The General Court further distinguished the obligation of confidentiality incumbent upon the SRB under the SRM Regulation from the right of access to documents under Regulation 1049/2001 [53] relied on by the applicants. The General Court rejected this comparison, because the SRM Regulation established a general rule that disclosure of confidential information held by the SRB is prohibited. [54]

[49] Ibid., paragraph 723.

[50] Ibid., paragraphs 356, 363 to 365.

[51] Ibid., paragraphs 358 and 359.

[52] Parallel judgment under appeal, paragraphs 503 and 504.

[53] 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).

[54] The General Court relied on the judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 38 and 39), in the judgment under appeal, paragraphs 383 and 384.

79. Instead, making an analogy with Directive 2004/39,[55] Article 54(1) of which is equivalent to Article 88(1) of the SRM Regulation, the General Court, in my view, rightly found that the aim of those two provisions is not to grant the public access to documents.

80. The General Court then analysed in great detail the secrecy obligations concerning the resolution scheme, valuation 2, and the documents on which the SRB relied in making its decision. It described the various adverse consequences that full disclosure could have had.[56]

81. That court also explained that Article 88(1) of the SRM Regulation concerns the *possibility* of a court ordering disclosure if necessary for the purposes of judicial proceedings, rather than, as the applicant at first instance argued, disclosure becoming *mandatory* whenever judicial proceedings are initiated against a decision.[57]

82. In respect of the argument that the SRB unjustifiably restricted access to the resolution scheme, because it published less redacted non-confidential versions of the resolution scheme and valuations 1 and 2, the General Court stated that the passage of time (in this case, eight months apart) is a circumstance liable to influence whether the conditions governing confidentiality are satisfied at a given point in time.[58] It explained, in my view, in sufficient detail, that the subsequent publication of further information did not influence the right of the applicant at first instance to submit a direct action, and respond to additional information in its reply.

83. In their sixth ground of appeal, the appellant claims that the General Court erred when it rejected, in paragraphs 721 to 728 of the judgment under appeal, their request for measures of inquiry, including an order to produce various documents and that written questions be put to the Kingdom of Spain.

84. The General Court, having ordered the SRB to produce confidential versions of the resolution scheme and various other documents,[59] decided that these were not relevant for the resolution of the dispute.[60] The appellant claims that this breached its rights of defence, because the confidential versions of the documents had been seen not just by the SRB and the Commission, but also by the General Court. Conversely, the appellant claims it was not able to form new arguments or alter its views on the existing arguments without access to that information.

85. In my view, the General Court was right to rely on the case-law of the Court of Justice according to which the General Court is the sole judge of the need to supplement the information available to it in respect of the cases before it. It was thus possible for it to give a ruling on the basis of the forms of order sought.[61]

[55] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

[56] Such as that it could 'encourage shareholders to sell their securities on the markets and also lead to massive withdrawal of deposits, which would have the effect of exacerbating the bank's financial situation and, therefore, undermine the effectiveness of the SRB's action and the functioning of the market'. Judgment under appeal, paragraph 373.

[57] Emphasis added. Judgment under appeal, paragraphs 376 and 377.

[58] Relying on the judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464, paragraphs 48 and 49), in judgment under appeal, paragraph 390.

[59] Listed in paragraph 95 of the judgment under appeal.

[60] Except for the letter from Banco Popular to the ECB of 6 June 2017, which was communicated to the parties. The General Court based its decision on Article 103 of its Rules of Procedure. See judgment under appeal, paragraphs 380 and 723.

[61] Judgment under appeal, paragraphs 725 to 727.

86. The Court should therefore reject the fifth and sixth grounds of appeal and the fifth and sixth parts of the second ground of appeal in the parallel appeal as unfounded.

B. Grounds of appeal specific to Case C-535/22 P

87. The appellant in the present case challenges the findings of the General Court in respect of the alleged irregularities in the sale process of Banco Popular (Section 1), as well as the breach of the right to property in respect of certain provisions of the SRM Regulation (Section 2) and the resolution scheme (Section 3).

1. The sale process of Banco Popular

88. The appellant claims [62] that the General Court wrongly applied Article 14 of the SRM Regulation [63] in respect of maximising the sale price. It argues that this is one of the objectives of resolution under Article 14 of the SRM Regulation, which should be read in conjunction with Article 39 of Directive 2014/59. Lastly, the appellant argues that the General Court erred in finding that the SRB was not required to attempt alternative measures prior to resolution. [64]

89. By the second and third parts of the third ground of appeal, the appellant criticises the General Court in that it: (i) breached its duty of care in dismissing its arguments concerning the alleged errors in the 2016 resolution plan as inadmissible, and (ii) breached its rights of defence.

90. In respect of the claims described in point 88 above, the General Court found that maximising the sale price is not among the resolution objectives contained in the second subparagraph of Article 14(2) of the SRM Regulation. In addition, it found that Article 39(2)(f) of Directive 2014/59 is relevant to the sale of Banco Popular. That article sets out the procedural requirements for the sale of business tool, which states that the marketing process 'shall aim at maximising, as far as possible, the sale price for the shares or other instruments of ownership, assets, rights or liabilities involved'.

91. The General Court examined every step of the sale process of Banco Popular in detail, taking into account the SRB's explanations in the resolution scheme and its marketing decision. An important factor that the General Court took into account was the need for the marketing procedure to remain as secret as possible, in order to prevent leaks that could result in additional uncertainty and loss of market confidence, thus jeopardising financial stability. [65]

92. Equally the General Court analysed the alleged obligation of the SRB to use alternative measures prior to the resolution, by interpreting Article 14(2) of the SRM Regulation. The General Court found that the appellant misinterpreted that provision, which states that the actors involved in the resolution 'shall seek to minimise the cost of resolution and avoid

[62] The second ground of appeal and the first part of the third ground of appeal.

[63] Judgment under appeal, paragraphs 520 to 569.

[64] Judgment under appeal, paragraphs 669 to 697.

[65] Judgment under appeal, paragraphs 545 to 552.

destruction of value *unless necessary to achieve the resolution objectives*'.[66] The General Court also decided that the balancing of interests and the proportionality of the resolution cannot be assessed solely in light of the interference with the right to property of the shareholders.[67]

93. The General Court then reviewed the statement of reasons in the resolution scheme as to why other resolution tools would not achieve the objectives of the resolution, why the SRB departed from its 2016 resolution plan, and why recourse to the SRF was not an option.[68]

94. I consider that the General Court correctly interpreted Article 14(2) of the SRM Regulation when it comes to balancing the different interests that are necessarily affected by resolution action. It also thoroughly reviewed the statement of reasons in the resolution scheme concerning other alternatives that were not undertaken.

95. When it comes to the second and third parts of the third ground of appeal, set out in point 89, I am of the view that they are inadmissible. First, the General Court found that arguments directed against the 2016 resolution plan,[69] which were not taken up in the final resolution scheme of Banco Popular, were introduced only in the reply and were therefore inadmissible. The General Court added that they were, in any event, irrelevant to determining the validity of the resolution scheme that was ultimately adopted.[70]

96. I agree. First, it appears that at first instance, the appellant claimed in its reply that the 2016 resolution plan was not properly prepared,[71] however, the argument has since been changed to claim that the 2016 resolution plan should have been updated. As this is a new argument on appeal, it is inadmissible.[72]

97. Even if the Court were to disagree and find these arguments admissible, I consider them unfounded. The third paragraph of Article 23 of the SRM Regulation states: '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.'

98. The General Court explained that the 2016 resolution plan could not have taken into account the liquidity crisis that Banco Popular faced from April 2017 onwards.[73] In addition, the General Court referred to recitals 44 to 46 of the resolution scheme, in which the SRB explained 'why the resolution tool envisaged in the 2016 resolution plan was not appropriate to the circumstances that prevailed on the date of the resolution'.[74] As a consequence, the SRB amended the resolution tool to be implemented regarding Banco Popular from the bail-in tool to the sale of business tool.[75]

66 Emphasis added. See also, judgment under appeal, paragraphs 671 and 672.

67 Judgment under appeal, paragraphs 486, 487, 673, and 674. The General Court also reviewed the statement of reasons contained in the resolution scheme that addresses the balancing of interests (paragraphs 675 to 679).

68 Judgment under appeal, paragraphs 680 to 697.

69 See point 10 of the parallel Opinion.

70 Judgment under appeal, paragraphs 490 and 491.

71 Judgment under appeal, paragraph 688.

72 See footnote 41 above.

73 Judgment under appeal, paragraph 689.

74 Judgment under appeal, paragraph 691.

75 The SRB stated that 'it was not guaranteed that the bail-in tool, envisaged in that plan, would have provided an immediate and effective remedy to Banco Popular's liquidity crisis'. Judgment under appeal, paragraph 691.

99. The General Court was therefore right to dismiss that claim as irrelevant.

100. By the third part of the third ground of appeal, the appellant argues that the General Court infringed its rights of defence, because it found that the appellant's observations and the expert report it submitted do not prove how other alternatives would achieve the resolution objectives.

101. I propose that the Court find these claims manifestly inadmissible, because, contrary to Article 169(2) of Rules of Procedure of the Court of Justice,[76] they do not specify the parts of the judgment under appeal that they seek to challenge.

102. In conclusion, to the extent that they are admissible, I propose that the Court dismiss the second and the third grounds of appeal.

2. The plea of illegality of Articles 15 and 22 of the SRM Regulation

103. The appellant, in its seventh ground of appeal, further challenged the General Court's assessment of the validity of Articles 15 and 22 of the SRM Regulation.

104. It argues, first, that the General Court[77] wrongly applied the case-law of the Court of Justice concerning banks which were insolvent; second, that Articles 15 and 22 of the SRM Regulation breach the requirement of necessity, because they are framed too broadly, thus allowing for arbitrary action; third, that those same provisions are contrary to Article 5(4) TEU because they do not provide for different solutions for banks which have issues with liquidity on the one hand, and those which have issues with insolvency on the other; fourth, those same provisions are contrary to Article 52 of the Charter and to Article 5(4) TEU because they do not provide for a possibility of correcting the write-down of shares after the final valuation under Article 20 of the SRM Regulation; and lastly, the appellant argues that Articles 15 and 22 of the SRM Regulation are disproportionate as they do not provide for adequate compensation, and choosing amongst the different resolution tools results in discrimination between banks that have liquidity issues and banks that are insolvent.

105. It should first be stated that the fourth part of this ground of appeal is inadmissible, as it does not refer to the parts of the judgment under appeal that it is challenging.[78] In addition, in so far as it refers to discrimination arising from the choice of the resolution tool, the fifth part of this ground of appeal is inadmissible as it is a new argument raised at the point of appeal.[79]

106. Turning to the merits, the General Court in responding to the plea of illegality, followed the steps necessary for determining whether a limitation of the right to property protected by Article 17 of the Charter, may be justified under Article 52 thereof.[80]

[76] See also, judgment of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group* (C-396/19 P, EU:C:2020:845, paragraph 24).

[77] Judgment under appeal, paragraphs 150 to 219.

[78] See point 101 and footnote 76 above.

[79] See footnote 41 above.

[80] Judgment under appeal, 159 and 160.

107. Starting with the objective of general interest as a result of which the right to property was limited, the General Court revisited the extensive case-law of the Court of Justice in the context of the financial crisis, explaining the risks that bank failure poses to the stability of the financial and banking system in the euro area, and the risk of losses of depositors. [81]

108. The choices made in Articles 15 and 22 of the SRM Regulation, as explained in great detail by the General Court, result from the lessons learned following the financial crisis of 2008 and are based on the principle that shareholders are the first to bear the losses of a failing bank. The General Court concluded, on the basis specifically of the findings of the Court of Justice in *Kotnik*, that shareholders must fully bear the risk of their investments, including the economic consequences of bank failure, which therefore cannot be considered to be an infringement of their right to property. [82]

109. The appellant's argument that the General Court was wrong to apply the case-law concerning insolvent banks to the present situation cannot, in my view, be accepted. *Kotnik* and the other judgments of the Court of Justice concerning the public interest in financial stability were used to show that shareholders must bear the risk of their investment when a bank is failing. The General Court, however, also showed that Articles 15 and 22 of the SRM Regulation place conditions on the SRB and the Commission when they decide whether and how to take resolution action. Referring to Article 18(1)(b) of the SRM Regulation, the General Court stated that resolution action is used only if other measures, such as normal insolvency, State aid, or loans, would not be available in a specific case. [83]

110. By its second argument, the appellant claims that the General Court found that a limitation of the right to property is justified where the conditions for resolution are met. [84] However, the General Court further explained the additional conditions imposed by Articles 18 and 21 of the SRM Regulation, which limit the freedom of the SRB and the Commission in determining the parameters of a given resolution action. [85]

111. The appellant's third and fifth arguments criticise the General Court, arguing that it erred when it found Articles 15 and 22 of the SRM Regulation to be proportionate, although these provisions do not distinguish between banks suffering from liquidity issues, and those that are insolvent, in terms of the resolution tool used and the treatment of shareholders and creditors.

112. Taking into account the analysis concerning the conditions for resolution in Article 18(1) of the SRM Regulation, there is no reason why the SRM Regulation should have imposed different rules on resolution for banks that are insolvent, and for those suffering from liquidity issues.

113. In conclusion, I propose that the Court reject the seventh ground of appeal.

[81] The General Court, in paragraphs 161 to 164 the judgment under appeal, refers to the well-known corpus of post-crisis case-law of the Court: judgments of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570); 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); of 8 November 2016, *Dowling and Others* (C-41/15, EU:C:2016:836); and of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249).

[82] Judgment under appeal, paragraphs 172 to 174.

[83] Judgment under appeal, paragraphs 180 to 188.

[84] Judgment under appeal, paragraph 169.

[85] Judgment under appeal, paragraphs 170, 171, 179, and 180.

3. The right to property and the principle of proportionality in the resolution scheme of Banco Popular

114. In its eighth ground of appeal, the appellant argues first that the General Court wrongly held that the SRM Regulation presumes insolvency, and thus, that the normal insolvency procedure is the only alternative to resolution; second, that it erred in finding that the procedure leading to the resolution scheme was not arbitrary by relying on valuation 2; and third, that it erred in finding that the lack of just compensation is proportionate.

115. In respect of the first argument, it is partially inadmissible, as contrary to Article 169(2) of the Rules of Procedure of the Court of Justice, it does not specify the part of the judgment under appeal in which the General Court established that the SRM Regulation relies on the presumption of insolvency.

116. The appellant further argues that the General Court erred in applying the case-law of the Court of Justice concerning insolvent banks to the situation of Banco Popular.[86] Thus, for the same reasons previously set out in relation to the seventh ground of appeal,[87] this argument should be rejected.

117. The second and third arguments, according to which the General Court erred in that it did not find that the resolution scheme was arbitrary because it relied on valuation 2 and that it was disproportionate because it lacked just compensation, are inadmissible, because they are raised for the first time at the point of the appeal.[88] Specifically, the paragraphs of the judgment under appeal[89] that the appellant refers to do not deal with valuation 2 or with just compensation. In fact, the General Court did not deal with these arguments at first instance.

118. In conclusion, I propose that the Court, to the extent that it is admissible, reject the eighth ground of appeal.

VI. Conclusion

119. In light of the foregoing, I propose that the Court should:

– dismiss the appeal;

– order the appellant to pay the costs.

[86] Judgment under appeal, paragraphs 198 to 208.

[87] Points 111 and 112 above.

[88] See footnote 41 above.

[89] Judgment under appeal, paragraphs 466, 467, 474 to 476, and 481.