Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

6 July 2022 *

(Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Decision of the SRB not to adopt a resolution scheme – Action for annulment – Act adversely affecting a person – Interest in bringing proceedings – Standing to bring proceedings – Inadmissibility in part – Article 18 of Regulation (EU) No 806/2014 – Power of the author of the measure – Right to be heard – Obligation to state reasons – Proportionality – Equal treatment)

In Case T-280/18,

ABLV Bank AS, established in Riga (Latvia), represented by O. Behrends, lawyer,

applicant,

v

Single Resolution Board (SRB), represented by J. De Carpentier, E. Muratori and H. Ehlers, acting as Agents, and by J. Rivas Andrés, lawyer, and B. Heenan, Solicitor,

defendant,

supported by

European Central Bank (ECB), represented by R. Ugena, A. Witte and A. Lefterov, acting as Agents,

intervener,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of A. Kornezov, President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse (Rapporteur) and D. Petrlík, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure, and in particular:

– the application lodged at the Court Registry on 3 May 2018,

* Language of the case: English.

– the ECB's statement in intervention lodged at the Court Registry on 10 May 2019,

– the decision of 17 March 2020 to stay the proceedings pending the final decision of the Court of Justice in the cases which gave rise to 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 new evidence lodged at the Court Registry on 27 October 2021,

further to the hearing on 28 October 2021,

gives the following

Judgment [1]

1 By its action under Article 263 TFEU, the applicant, ABLV Bank AS, seeks the annulment of the decisions of the Single Resolution Board (SRB) of 23 February 2018 not to adopt resolution schemes in respect of the credit institutions ABLV Bank AS and ABLV Bank Luxembourg SA within the meaning of Article 18(1) 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).

Background to the dispute

…

12 By two decisions (SRB/EES/2018/09 and SRB/EES/2018/10) of 23 February 2018, the SRB decided not to adopt a resolution scheme with regard to the applicant and ABLV Luxembourg respectively (together 'the contested decisions'). The SRB endorsed the ECB's assessment that those credit institutions were failing or were likely to fail within the meaning of point (a) of the first subparagraph of Article 18(1) of Regulation No 806/2014. It also considered that there was no reasonable prospect that other measures would prevent their failure within a reasonable timeframe, in accordance with point (b) of the first subparagraph of Article 18(1) of that regulation. However, the SRB concluded that, in view of the particular characteristics of the applicant and ABLV Luxembourg, resolution action in respect of them was not necessary in the public interest within the meaning of point (c) of the first subparagraph of Article 18(1) and Article 18(5) of that regulation. On the same day, the contested decisions were notified to their respective addressees, the FKTK and the CSSF.

13 Article 1 of the operative part of Decision SRB/EES/2018/09 is worded as follows: 'ABLV Bank, A.S. shall not be placed under resolution.'

14 In accordance with Article 2(1) of the operative part of Decision SRB/EES/2018/09: 'This Decision is addressed to the [FKTK], in its capacity as National Resolution Authority, within the meaning of Article 3(1)(3) of Regulation No 806/2014.'

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

15 Article 2(2) of the operative part of Decision SRB/EES/2018/09 provides that, 'pursuant to Article 29(1) of [Regulation No 806/2014], the [FKTK] shall implement [that] Decision and shall ensure that any action it takes complies with it, in line with the considerations provided [therein]'.

16 Articles 1 and 2 of the operative part of Decision SRB/EES/2018/10, which concerns ABLV Luxembourg, are similar in content.

…

Law

Admissibility

23 The SRB raises four pleas of inadmissibility, alleging, in essence, first, that the applicant has not based the action on the wording of the contested decisions, but on that of the press release, second, that the contested decisions are not open to challenge, third, that the applicant has no standing to bring proceedings in so far as it is not directly concerned by the contested decisions, and, fourth, that the applicant has no interest in bringing proceedings.

…

Plea of inadmissibility alleging that the contested decisions are not open to challenge

29 According to the SRB, the contested decisions are not acts that are open to challenge, since they are not intended to produce binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in its legal position. They claim that the contested decisions did not contain an order requiring the liquidation of the two credit institutions. According to the SRB, it was for the NRAs to take the necessary measures, in accordance with applicable national law, in respect of those institutions after it had decided not to adopt a resolution scheme.

30 It is in principle those measures which definitively determine the position of an institution upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the applicant, that constitute acts open to challenge, and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects (see judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 48 and the case-law cited).

31 More specifically, the Court of Justice has held previously that, although the ECB's FOLTF assessment, referred to in the second and third subparagraphs of Article 18(1) of Regulation No 806/2014, does not constitute an act that is open to challenge, the fact remains that the subsequent adoption by the SRB of a resolution scheme, in accordance with Article 18(6) of that regulation, or the decision not to adopt such a scheme may be the subject of proceedings before the Courts of the European Union, in the context of which that assessment could be subject to judicial review (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 56).

32 Moreover, Article 86(2) of Regulation No 806/2014 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 such a decision of the SRB (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 56).

33 It follows that the SRB's decision whether or not to adopt a resolution scheme in respect of a credit institution is an act that is open to challenge. That decision definitively establishes the position of the SRB at the end of the complex administrative procedure provided for in Article 18 of Regulation No 806/2014 and triggered by the FOLTF assessment of an entity, which is carried out, initially, by the ECB. That procedure is intended to produce binding legal effects vis-à-vis the applicant in that it will not be the subject of a resolution scheme.

34 Moreover, a decision not to adopt a resolution scheme, such as the contested decisions, is no less an act open to challenge than a decision to adopt such a scheme. The decision to adopt resolution action entails the imposition of resolution tools as referred to in Article 18(6)(b) and (c) and Article 22 of Regulation No 806/2014, such as the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool, or even use of the Single Resolution Fund to support resolution action. Accordingly, the decision not to adopt such tools, some of which may enable the applicant to continue part of its activities, produces binding legal effects such as to affect the interests of the applicant.

35 Lastly, as is also apparent from the Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:16, point 93), observance of the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), is ensured by the fact that the SRB's decision which concludes the procedure referred to in Article 18 of Regulation No 806/2014 is an act that is open to challenge, with the result that any unlawfulness vitiating the ECB's FOLTF assessment, which is carried out at the first stage of the procedure, can be relied upon in support of an action against that decision of the SRB. It follows that the applicant must be in a position to seek annulment of the decision of the SRB to adopt or not adopt a resolution scheme in respect of it.

36 Consequently, the contested decisions are acts that are open to challenge.

Plea of inadmissibility alleging that the applicant has no standing to bring proceedings

37 The SRB submits that the applicant is not directly concerned by the contested decisions. They did not directly affect its legal situation and give the NRAs responsible for implementing them a wide margin of discretion. The liquidation of the applicant and its subsidiary is the result of decisions taken at national level and not of the application of the rules of EU law.

38 It should be noted, first of all, that the issue of whether the applicant is individually affected, for the purpose of the fourth paragraph of Article 263 TFEU, has not been called into question by the SRB. The contested decisions concern the applicant and its 100% subsidiary respectively as credit institutions in respect of which the SRB does not adopt resolution schemes and, thus, those decisions distinguish the applicant individually in the same way as the addressee of those decisions. The applicant is therefore individually concerned by the contested decisions.

39 As regards the allegation that the applicant in the present case is not directly affected by the contested decisions, it should be noted that the condition that a natural or legal person who is not the addressee of the decision against which the action is brought must be directly concerned by that decision, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, the contested measure must directly affect its legal situation and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules (judgments of 22 March 2007, *Regione Siciliana* v *Commission*, C-15/06 P, EU:C:2007:183, paragraph 31; of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 66; and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42).

– *Whether the applicant is directly affected in so far as the action is directed against Decision SRB/EES/2018/10 which concerns ABLV Luxembourg*

40 It should be noted at the outset that the action was lodged by the applicant in its own name against Decision SRB/EES/2018/09 and as the parent company and sole shareholder of ABLV Luxembourg as regards Decision SRB/EES/2018/10.

41 It should be borne in mind that, as is clear from paragraph 12 above, Decision SRB/EES/2018/10 provides that no resolution scheme will be adopted in respect of ABLV Luxembourg. Thus, that decision has effects on the legal situation of ABLV Luxembourg (see, to that effect, order of 14 May 2020, *Bernis and Others* v *SRB*, T-282/18, not published, EU:T:2020:209, paragraph 39).

42 However, Decision SRB/EES/2018/10 does not directly affect the legal situation of shareholders such as the applicant, since the right of those shareholders to receive dividends and to participate in the management of ABLV Luxembourg has not been affected by that decision (see, by analogy, judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 110).

43 As is apparent from the judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923), the adverse effect on shareholders of the withdrawal of a credit institution's licence is economic and not legal in nature, although such a credit institution is no longer in a position to continue its activity following that withdrawal and, in fact, to distribute dividends, the right of shareholders to receive dividends and to participate in management remains unchanged (see, to that effect, judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others*, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 111, and order of 14 May 2020, *Bernis and Others* v *SRB*, T-282/18, not published, EU:T:2020:209, paragraph 41).

44 In the present case, that is all the more so since Decision SRB/EES/2018/10 provides only that ABLV Luxembourg is not to be placed under resolution. Thus, unlike the situation at issue in the case that gave rise to the judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923), that decision has neither the object nor the effect of withdrawing from that bank its licence authorising it to carry on the business of a credit institution (see, to that effect, order of 14 May 2020, *Bernis and Others* v *SRB*, T-282/18, not published, EU:T:2020:209, paragraph 42).

45 In the light of the foregoing, it must be concluded that Decision SRB/EES/2018/10 is not of direct concern to the applicant within the meaning of the fourth paragraph of Article 263 TFEU.

– *Whether the applicant is directly affected in so far as the action is directed against Decision SRB/EES/2018/09 which concerns the applicant*

46 The present action was brought by the applicant in its own name in so far as it seeks the annulment of Decision SRB/EES/2018/09.

47 In the first place, as regards the question whether that decision directly affects the applicant's legal situation, it should be recalled that, in accordance with Article 18 of Regulation No 806/2014, if the ECB considers, in its assessment, that the entity concerned is failing or is likely to fail within the meaning of Article 18(1)(a) of that regulation, that results in the initiation of the procedure provided for in Article 18 of that regulation. By contrast, if the ECB reaches the opposite conclusion, the resolution procedure is not initiated, since the third subparagraph of Article 18(1) of Regulation No 806/2014 provides that the ECB must communicate its assessment to the Commission and the SRB only where it considers that the entity is failing or is likely to fail (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraphs 67 and 70).

48 Thus, first, the SRB's conclusion, which is based on the ECB's assessment that the applicant is failing or is likely to fail, is therefore an essential prerequisite for the operative part of Decision SRB/EES/2018/09 which provides that a resolution scheme is not to be adopted in respect of the applicant. Therefore, the conclusion that the applicant is failing or is likely to fail constitutes the necessary justification for Article 1 of the operative part of that decision. Accordingly, in so far as Decision SRB/EES/2018/09 states that the applicant is failing or is likely to fail, that decision directly affects the applicant's legal situation within the meaning of the case-law cited in paragraph 39 above.

49 Second, as has been pointed out in paragraph 34 above, the decision not to adopt a resolution scheme and therefore not to impose resolution tools within the meaning of Regulation No 806/2014, some of which may allow the applicant to continue to carry on part of its activities, has direct effects on the applicant's legal situation.

50 In the second place, as regards the question whether that decision leaves discretion to the addressees responsible for implementing it within the meaning of the case-law referred to in paragraph 39 above, it must be found that that is not the case here. The decision not to adopt a resolution scheme in respect of the applicant leaves no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules. The NRA concerned has no discretion in relation to the SRB's decision that no resolution tool is to be adopted with regard to the applicant, since that decision does not require the application of any rule or intermediate measure in order to produce its binding legal effects. That conclusion is not called into question by the fact that that NRA may find it necessary to adopt measures implementing Decision SRB/EES/2018/09, in accordance with Article 29(1) of Regulation No 806/2014, the content of which is set out in Article 2(2) of the operative part of that decision, since they fall outside the framework of the resolution mechanism (see, to that effect, order of 14 May 2020, *Bernis and Others* v *SRB*, T-282/18, not published, EU:T:2020:209, paragraph 43).

51 In particular, the liquidation of the applicant, under Latvian law, sits outside of any resolution scheme and does not arise from Decision SRB/EES/2018/09. That liquidation was decided upon by the shareholders of that company following the SRB's decision that it was not necessary in the public interest to apply a resolution scheme to the applicant in accordance with Regulation No 806/2014 (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 49). The liquidation was therefore not ordered by that decision (see, to that effect, order of 14 May 2020, *Bernis and Others* v *SRB*, T-282/18, not published, EU:T:2020:209, paragraphs 39 to 45).

52 It follows from the foregoing that the applicant does not have standing to bring proceedings against Decision SRB/EES/2018/10 and that the action is inadmissible in so far as it is directed against that decision. On the other hand, it does have such standing to bring proceedings against Decision SRB/EES/2018/09.

Plea of inadmissibility alleging that the applicant has no interest in bringing proceedings

53 According to the SRB, the applicant has not established that it has a vested and present interest in bringing proceedings. It argues that the applicant has not shown how it would benefit from an annulment of the contested decisions. As regards the interests relied on by the applicant in so far as the contested decisions allegedly damaged the reputation of the credit institutions, the SRB submits that their reputation was affected not by the contested decisions, but by the FinCEN draft measure or by the ECB's FOLTF assessment in respect of the two credit institutions. It claims that the interest in having the option of bringing an action for damages is not vested and present in the context of the action for annulment at hand. Lastly, if the applicant has suffered a loss, that would be the result of the shareholders' decision to put the bank in self-liquidation.

54 According to the Court's settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55 and the case-law cited).

55 It is common ground that, while seeking the annulment in full of Decision SRB/EES/2018/09, the applicant does not take issue with the refusal to put in place a resolution scheme, but disputes, in essence, the SRB's conclusions that it was failing or likely to fail and that there was no reasonable prospect that other measures would prevent that failure.

56 However, particular aspects of the present case mean that it is impossible to deny that the applicant does have an interest in bringing proceedings.

57 First, as is also apparent from paragraphs 47 and 48 above, if the ECB concludes that the entity concerned is not failing or likely to fail, no assessment is submitted to the SRB and the resolution procedure is therefore not initiated. As soon as the FOLTF assessment is adopted by the SRB, that assessment is therefore an essential prerequisite for triggering the resolution procedure provided for in Article 18 of Regulation No 806/2014 and, therefore, for a formal decision as to whether or not to adopt a resolution scheme.

58 Thus, the grounds of Decision SRB/EES/2018/09, in particular the ECB's FOLTF assessment in respect of the applicant, adopted by the SRB, constitute the necessary support for the operative part of that decision. If the Court were to conclude that that assessment was incorrect, the procedure which gave rise to that decision should not have been triggered in respect of the applicant.

59 Second, in the light of the banking activities in question, the entity concerned has a legitimate interest in not being subject to an assessment which makes it clear that it is failing or is likely to fail.

60 In the light of the foregoing, it must be concluded that the applicant has established that it has an interest in bringing proceedings for the annulment of Decision SRB/EES/2018/09.

61 The action is therefore inadmissible in so far as it is directed against Decision SRB/EES/2018/10 and admissible in so far as it seeks annulment of Decision SRB/EES/2018/09.

Substance

…

The third and fourth pleas in law, alleging infringement of Article 18(1)(a) and (b) of Regulation No 806/2014

87 It is appropriate to deal with the third and fourth pleas together; the former consists of one part, while the latter consists of four parts. In the fourth plea, which should be addressed first, the applicant submits, in the first place, that the SRB erred in failing to carry out its own examination of the condition laid down in Article 18(1)(a) of Regulation No 806/2014. The SRB relied entirely on the ECB's FOLTF assessment in respect of the applicant. In the second place, as regards that assessment, the applicant argues that the temporary liquidity problems with which it was confronted following the FinCEN draft measure do not in themselves constitute sufficient grounds for finding that it was failing or likely to fail. The EBA/GL/2015/07 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 ('the EBA Guidelines') recommend that all objective elements be taken into account and advise against basing the FOLTF assessment of an entity on a single element, such as the immediate availability of cash. In the third place, the applicant maintains that the amount of EUR 1 thousand million which the ECB stated must be available in the applicant's account with the Bank of Latvia before the moratorium would be lifted on 23 February 2018 was disproportionate. The ECB made an overestimation in its prediction of the amount of deposits that would be withdrawn if the applicant were to reopen by taking as its basis an average withdrawal of EUR 200 million per day over a five-day period. In the fourth place, the applicant puts forward a series of arguments in support of its claim that the ECB did not take into account all its liquid assets, especially those to which it did not have immediate access. In the third plea, the applicant submits that the SRB did not examine sufficiently whether there was a reasonable prospect that other measures would prevent its failure.

…

– *Whether the SRB was entitled to rely on the ECB's FOLTF assessment in respect of the applicant*

103 The applicant submits, in the reply, that the SRB could not rely solely on the ECB's FOLTF assessment in respect of the applicant without carrying out its own examination. That objection, which it is appropriate to deal with first, must be rejected irrespective of whether it is a new objection for the purpose of Article 84(1) of the Rules of Procedure.

104 That objection amounts to disregarding the role of the ECB in the system established by Article 18 of Regulation No 806/2014 as found by the Court of Justice in 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).

105 It is true that the SRB is not bound by the ECB's FOLTF assessment. That assessment is not a binding act and, in particular, does not put the SRB in a position where its powers in respect of that assessment are circumscribed. There is nothing in the wording of that provision to indicate that the SRB would have no power to assess whether the entity in question is failing or is likely to fail (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 67).

106 However, the second subparagraph of Article 18(1) of that regulation gives the ECB a primary – albeit not exclusive – role, since it is the ECB which, as a general rule, is first required to carry out a FOLTF assessment. While the SRB may also carry out such an assessment, it may do so only after informing the ECB of its intention to do so and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment. The ECB is therefore recognised as having primary power to carry out such an assessment, based on its expertise as supervisory authority, since, having access in that capacity to all supervisory information regarding the entity concerned, it is best placed to determine, in the light of the definition of failing or likely to fail in Article 18(4) of that regulation, which refers, in particular, to matters related to the prudential situation such as the requirements for authorisation, the amount of assets compared to liabilities or the present or future indebtedness, whether that condition is satisfied (see, to that effect, judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 62).

107 In the present case, the SRB stated in Section 3.2.1 of contested decision SRB/EES/2018/09, relying on the ECB's assessment, that the applicant was deemed to be failing or likely to fail within the meaning of Article 18(1)(a) of Regulation No 806/2014, read in conjunction with Article 18(4)(c) of that regulation, on the ground that, if the moratorium were lifted after 23 February 2018, it was highly likely that the outflows from the establishments would continue at the same pace as before the moratorium was imposed, given the reputational damage caused by the FinCEN draft measure. In doing so, the SRB endorsed the ECB's assessment that the applicant had to have a counterbalancing capacity of EUR 1 thousand million in its account held with the Bank of Latvia, an amount which would be capable of responding to the scale of the withdrawals expected during the five days immediately following the lifting of the moratorium. Given that that counterbalancing capacity had not been reached, the SRB also endorsed the ECB's view that the applicant was likely to be unable, in the near future, to pay its liabilities as they fell due and that it was failing or was likely to fail.

108 In those circumstances and having regard to the broad discretion enjoyed by the SRB in accordance with the case-law referred to in paragraphs 91 to 94 above in the context of the complex economic assessment represented by the FOLTF assessment in respect of the applicant,

the SRB, while not bound by the ECB's examination and view, did not err in law by taking the latter as its basis, since the ECB was the institution best placed to carry out the FOLTF assessment in respect of the applicant.

109 Therefore, the applicant's arguments cannot be accepted.

– *The FOLTF assessment in respect of the applicant which is based, in essence, on its liquidity crisis*

110 According to the applicant, the ECB erred in taking the view that a temporary problem in accessing certain liquidity substantiated the conclusion that that applicant was failing or likely to fail. The ECB relied on a single circumstance, namely the temporary cash-flow shortage following huge withdrawals between 14 and 16 February 2018, and did not take sufficient account of the applicant's overall situation. The applicant maintains that neither its coverage ratio nor its high capitalisation were sufficiently taken into account. It follows, in particular, from the EBA Guidelines that all objective elements relating to a credit institution's difficulties had to be weighed up when determining whether that institution is failing or likely to fail.

111 It should be noted at the outset that, according to Article 18(4) of Regulation No 806/2014, an entity is to be deemed to be failing or likely to fail in one or more of the circumstances listed under points (a) to (d) of that provision. In the present case, the ECB took the view that the applicant was, or there were objective elements to support a determination that the entity would, in the near future, be unable to pay its debts or other liabilities as they fell due, within the meaning of Article 18(4)(c) of that regulation. As the ECB correctly submitted, it is not apparent from Article 18 of Regulation No 806/2014 that the ECB and the SRB must take account of factors such as the coverage ratio or the level of capitalisation of a credit institution before being able to conclude that that credit institution is failing or is likely to fail.

112 That finding is not called into question by the EBA Guidelines. Under paragraph 5 of the English-language version thereof, pursuant to Article 32(6) of Directive 2014/59, those guidelines intend to promote the convergence of supervisory and resolution practices regarding the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail. The ECB correctly submits that those guidelines cannot be interpreted in a manner that contradicts Regulation No 806/2014 and therefore that they do not impose additional conditions which do not flow from Article 18 of that regulation.

113 In any event, in accordance with paragraph 14 of the English-language version of the EBA Guidelines, the resolution authority should assess the objective elements relating to, inter alia, the capital and liquidity positions of the credit institution. Under paragraph 16 of the English-language version of those guidelines, although, in most cases, it is expected that several factors, rather than merely one, set out in those guidelines would inform the determination that an institution is failing or likely to fail, there might be situations where meeting just one condition, depending on its severity and prudential impact, would be sufficient to trigger resolution. Contrary to what is claimed by the applicant, it does not therefore follow from the EBA Guidelines that several conditions or factors must necessarily be taken into consideration before it can be concluded that a credit institution is or will, in the near future, be unable to pay its debts or other liabilities as they fall due.

114 Next, as the ECB has argued, liquidity is of primary importance for a credit institution, given that its main function is to take deposits from the public and to reinvest them in the real economy by granting loans. That function as an intermediary is based on the premiss that a depositor must be

in a position to have his or her deposits returned on demand; in principle, they must be available immediately. If a bank cannot repay depositors' funds, that affects not only confidence in that credit institution but also, potentially, as that distrust spreads, confidence in the banking system as a whole. It is common ground, moreover, that phenomena involving huge withdrawals affect not only credit institutions in difficulty, but also healthy institutions following a loss of public confidence in the soundness of that system (see, to that effect, judgment of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 56 and the case-law cited).

115 Consequently, in circumstances such as those of the present case, characterised by huge withdrawals of deposits following a breakdown in confidence between the credit institution and its customers, that institution's cover ratio and its capitalisation are of less importance compared to the immediate availability of liquidity within that institution. The applicant's arguments must therefore be rejected.

– The ECB's conclusion that, in order to prevent its failure, the applicant had to have EUR 1 thousand million in cash held with the Bank of Latvia on 23 February 2018 at 18.00

116 The applicant claims, in essence, that the counterbalancing capacity in the amount of EUR 1 thousand million in its account with the Bank of Latvia, which the ECB regarded as being necessary in order to repay deposits that may have been withdrawn in the short term if the applicant had reopened after the moratorium was lifted, was disproportionate.

117 First, the applicant submits that the ECB's FOLTF assessment, which was adopted by the SRB, failed to take account of the fact that sight deposits, which did not fall due as such and were therefore payable immediately, had been converted into term deposits amounting to EUR 449 million on 22 February 2018. According to the applicant, those deposits were not payable, without its consent, for a period of six months after conversion, which is why those deposits could not be withdrawn in the short term. The amount of deposits immediately payable is therefore EUR 1.596 thousand million and not EUR 2.043 thousand million as assessed by the ECB.

118 Second, according to the applicant, there is no basis for the ECB's argument that withdrawals of deposits would have continued at the same pace as during the three days preceding the suspension of payments, from 14 to 16 February 2018, namely withdrawals of EUR 200 million on average per day. There is no evidence that the withdrawal of deposits after the lifting of the moratorium would have been linear. It claims that, after the initial withdrawal of the most volatile deposits, a more stable core balance of deposits would have remained. On that point, the applicant refers to the internal liquidity adequacy assessment process (ILAAP), approved by the ECB in its most recent Supervisory Review and Evaluation Process (SREP) decision from 2017, from which it is apparent that a large proportion of sight deposits are stable and enjoy depositor confidence.

119 Moreover, the outflows were already lower on 16 February 2018 compared with the previous day. The attempts to withdraw sums via the internet concerned only EUR 28 million per business day during the moratorium. Moreover, the applicant had already discharged a considerable number of its payment obligations in United States dollars by securities transfers in euros, even though, on 15 February 2018, it had taken the decision to replace payments in United States dollars with payments in euros or in kind and, from 16 February onwards, to cease completely all payments on debts denominated in United States dollars, relying on force majeure. During that period of

force majeure, EUR 167 million was still paid in kind in respect of the applicant's United States dollar payment obligations. It is highly unlikely that the requests to withdraw deposits immediately after the lifting of the moratorium would have amounted to EUR 200 million per day.

120 In response to those arguments, first, it should be noted, as observed by the ECB, that there was no guarantee that deposits converted into term deposits would not be withdrawn in the short term, if necessary in return for the payment of a penalty. The ECB also pointed out, at the hearing, that the vast majority of depositors had not accepted to convert their deposits into term deposits. It inferred from this that those depositors who had refused to convert their deposits were in a position to ask that their deposits be returned to them at short notice. Those were deposits with a value of EUR 1.596 thousand million. In addition, it noted that the conversion of a certain number of deposits did not alter the estimate that the withdrawals would continue at an average pace of EUR 200 million per day and that it was therefore necessary for the applicant to have a counterbalancing capacity of EUR 1 thousand million before that credit institution could reopen.

121 The arguments put forward by the applicant do not call into question the ECB's assessment of the facts. The applicant merely asserts, without adducing any supporting evidence, that it was agreed as regards term deposits that they would not be withdrawn for a period of six months. In any event, even if that assertion were proved and substantiated, it would not invalidate the ECB's view that the withdrawals would probably take place at the same speed and to the same extent after the hypothetical reopening of the entity in question and that it was therefore necessary to have a high amount of liquidity in order to support the requests during the five days following that reopening. Unconverted deposits still amounted to EUR 1.596 thousand million, an amount which vastly exceeds the counterbalancing capacity of EUR 1 thousand million required by the ECB.

122 Second, nothing in the documents available to the General Court is such as to call into question the ECB's view that the applicant's internal liquidity adequacy assessments, on which it relies, were of limited value at the time of the exceptional situation that gave rise to Decision SRB/EES/2018/09. It is true that the applicant's ILAAP had been approved by the ECB in 2017, but it is not in dispute that, in February 2018, the applicant was facing an unforeseen circumstance involving huge withdrawals of deposits following a loss of public confidence in the soundness of that credit institution, which was separate from the question of whether it was a healthy institution or one that was in difficulty.

123 In those extraordinary circumstances, the ECB did not make a manifest error of assessment in relying on the level of withdrawals of deposits from 14 to 16 February 2018, which sufficiently reflected that credit institution's situation at the time of the FOLTF assessment and the adoption of the contested decision. As the ECB correctly pointed out, considering the average liquidity outflows of EUR 200 million per day from 14 to 16 February 2018 when calculating the liquidity reserve at the deadline is explained by the fact that, during a liquidity crisis, outflows can be volatile and using an average measure reduces the risk of calculation errors. Moreover, the ECB used uncontested and objective data that were up to date at the time Decision SRB/EES/2018/09 was adopted. With regard to the reputational damage to the applicant and the resulting loss of confidence, the ECB did not make a manifest error of assessment in taking the view that the withdrawals would continue at the same pace after the lifting of the moratorium, since no event capable of reassuring the markets had occurred in the meantime.

124 Moreover, nor can the applicant's argument that the extent of the withdrawals showed a downward trend between 14 and 16 February 2018 succeed. In that regard, the ECB stated at the hearing, without being contradicted, that the amount of the withdrawals was higher on 15 February than on 14 February, with the result that it was impossible to find that there was either an upward or a downward trend. The applicant's arguments must therefore be rejected.

– Other arguments concerning the ECB's FOLTF assessment in respect of the applicant adopted by the SRB

125 The applicant puts forward a series of other arguments in support of its challenge to the outcome of the ECB's FOLTF assessment adopted by the SRB. In that regard, it claims, in essence, that the ECB failed to take into account all the liquid assets available to it or which could be made available to it. The ECB took into account the amount of EUR 694 million available in the applicant's account with the Bank of Latvia at the deadline, 23 February 2018 at 18.00, and disregarded the assets not included in that account. The applicant argues, in essence, that a series of assets worth EUR 690 million were incorrectly excluded by the ECB, which could have been converted into cash if the ECB had so requested. Those assets would have been available within a reasonable period of time as deposits were withdrawn.

126 As regards, at the outset, the fact that only the liquid assets in the applicant's account with the Bank of Latvia were taken into consideration by the ECB, it should be noted that the ECB confirmed, at the hearing, that only the cash available on that account could be verified by it, whereas it was unable to confirm the immediate availability of other assets. Moreover, the applicant's argument that it had not been informed of the fact that only the cash available in that account could be taken into consideration in order to calculate the counterbalancing capacity at the deadline must be rejected. As the ECB argued in paragraph 93 of its statement in intervention and without being contradicted, that requirement was clearly communicated to the applicant's representatives, in particular at a meeting of 20 February 2018, the minutes of which are set out in Annex F.4.1 to the ECB's statement in intervention.

127 The applicant cannot validly complain that the ECB made no distinction between liquid assets in its possession with access to it, given that certain assets were temporarily inaccessible. The applicant has not shown that access to those assets would have been reinstated in time to satisfy the demand in withdrawals of deposits.

128 It follows that the ECB took into account and evaluated the assets referred to by the applicant, but that, because of the uncertainty as to whether those assets could be available immediately, it based its conclusion solely on the assets actually available in the applicant's account with the Bank of Latvia at the deadline.

129 The ECB explained, in that regard, in paragraphs 15 to 19 of the statement in intervention, that the liquid assets that a credit institution holds to meet liquidity outflows come mainly from two sources. The first source is cash, which is, in principle, in the form of cash accounts held with the central bank or with other stakeholders, to which the establishment in question may have access on request. The second source of liquidity is certain high-quality marketable securities which may be pledged as collateral, usually with a haircut from nominal value, in order to obtain a cash loan from a central bank or a partner or which can be sold outright to another counterparty to obtain cash. Obtaining a loan requires the custodian holding the securities to pledge those securities,

whereas the sale of securities may require additional time, as it involves the assistance of more stakeholders, in addition to that of the custodian holding the security, such as the central securities depository and the commercial or central bank.

130 Next, it stated that existing moneys in cash accounts, especially those held with a central bank, were immediately available for a bank in need of cash to pay out to depositors and other creditors. However, borrowing on the money markets, or otherwise obtaining cash from sources other than the central bank, is dependent on the willingness of commercial partners. Therefore, market funding cannot be taken for granted and may be limited, or subject to very high haircuts on the collateral, or at times completely unavailable. Given these limitations on market funding, many central banks retain a lender of last-resort function, in which they generally extend emergency cash loans to commercial banks, against collateral, in situations when other counterparties are not willing to do so.

131 According to the ECB, in that context, the solution to the applicant's liquidity crisis which it and the ECB adopted was one of seeking to transform the credit institution's supposedly liquid assets into a sufficient amount of cash – a counterbalancing capacity – which would be immediately accessible to the bank without any restrictions in order to meet withdrawal demand.

132 It is the ECB's view that, given that several partners holding the applicant's securities did not wish to release the applicant's assets because of the FinCEN draft measure and since the majority of the correspondent banks of the applicant ceased their business relations or imposed severe limits on transaction amounts, only cash balances or securities held with the Bank of Latvia could be considered immediately available for the purpose of satisfying upcoming requests to withdraw deposits.

133 In the light of the foregoing, the ECB provided a plausible explanation of the reasons why the assets whose actual availability in the applicant's account with the Bank of Latvia at the deadline had not been proved could not be taken into account for the purposes of calculating the counterbalancing capacity.

134 Furthermore, the applicant makes reference to a number of specific categories of assets that the ECB should have taken into consideration when carrying out its FOLTF assessment.

135 As regards, first, the income from the sale of securities in the amount of EUR 407 million, it must be held that the applicant has not established to the requisite legal standard that those securities were assets that were easily and immediately accessible and available for use in order to pay depositors wishing to withdraw their deposits immediately after any lifting of the moratorium. It is common ground that the proceeds from that sale, even if they were realised, were not paid into the applicant's account with the Bank of Latvia before 23 February 2018 at 18.00, as the ECB correctly pointed out. The ECB cannot therefore be criticised for not having counted the securities or income from their supposed sale among the liquid assets directly available on the day after 23 February 2018 for the purpose of repaying deposits if such repayment was requested.

136 As regards, second, the liquid assets held by the applicant in the nostro accounts (bank accounts held by the applicant with other banks) amounting to EUR 29 million and the assets with a value of EUR 13 million in its possession in the account it holds with Euroclear, it should be noted that the ECB took them into account in paragraphs 30 and 31 of the FOLTF assessment in respect of the applicant. The securities held by Euroclear on behalf of the applicant were, in its opinion, high-quality securities, such as government bonds, and were easily convertible within a

reasonable period of time. However, those conversions into cash were equally unable to be performed in time, with the outcome that the corresponding amounts were not available in the applicant's account with the Bank of Latvia on 23 February 2018 at 18.00. It is clear from the tables in Annexes G.4 and G.5 to the applicant's observations on the ECB's statement in intervention that a substantial part of the proceeds of sale were paid by Euroclear to the applicant long after that date.

137 The applicant's argument that the conversion of highly liquid assets had to be carried out in step with ongoing payments and that it became apparent after 23 February 2018 that the period for converting certain securities had decreased does not call into question the ECB's assessment, given that the ECB had concluded, without making a manifest error of assessment, as is apparent from paragraphs 126 to 133 above, that only the presence of cash in the applicant's account with the Bank of Latvia guaranteed that that cash would be immediately available.

138 The same applies, third, to the other securities which the applicant claims to have held and which were allegedly sold for EUR 358 million, which included a quantity of investment-grade securities worth EUR 229 million, and, fourth, to the EUR 12 million in cash which the applicant claims it had at its disposal. It has not been established that those assets would have been available immediately if the moratorium were to have been lifted; nor were those assets converted into cash in the applicant's account with the Bank of Latvia by the end of the day on 23 February 2018.

139 Fifth, the applicant claims that the ECB erred in deciding on 21 February 2018 to limit the applicant's access to monetary policy operations. Thus, it did not have access to a EUR 40 million credit line which could have been used to raise additional liquidity. The ECB contends that this was a decision of its Governing Council of 21 February 2018 taken in the context of prudential supervision. The applicant does not actually dispute the validity of that decision of the Governing Council and does not clearly explain how access to that credit line could have contributed to raising additional liquidity in order to meet the objective of making EUR 1 thousand million available in the applicant's account with the Bank of Latvia. In any event, that decision does not form part of the decision contested in the present action, nor does it constitute its legal basis, which means that it does not fall within the subject matter of the present proceedings.

140 In circumstances such as those of the present case, having regard to the precaution and prudence required of the ECB in a crisis situation, it was entitled to take into account only the cash immediately available to the Bank of Latvia on the applicant's account, in order to avoid any risk that requests for withdrawals would not be satisfied within five days of the lifting of the moratorium, since the assets which the applicant claims to have elsewhere were not rapidly available.

141 Nor is the ECB's FOLTF assessment in respect of the applicant, which was subsequently adopted by the SRB, called into question by the argument that the ECB's counterbalancing capacity requirement was not reasonable, given that, in order to meet that requirement, the applicant had to release significant sums in order to convert securities and other assets into cash that was immediately available. That argument does not detract from the ECB's assessment of the counterbalancing capacity that had to be proved to be in the account at the deadline.

142 Lastly, according to the applicant, the moratorium could have been extended so that it could restore its liquidity without triggering the deposit guarantee scheme. In that regard, the ECB relied on a misinterpretation of Article 2(8) of the Noguldījumu garantiju likums (Latvian Deposit Protection Act). That provision states that the FKTK is to adopt a decision on the

unavailability of deposits within five working days from the date when it has ascertained that the deposit taker was unable to disburse deposits. However, during a moratorium, it is impossible to establish that deposits are unavailable, since payments are, in any event, suspended. Accordingly, the ECB's argument that an extension of the moratorium automatically triggered the deposit guarantee scheme and was therefore impossible is, on that basis, incorrect.

143 That argument is also unsuccessful.

144 In the present case, the ECB took the view that the applicant was experiencing a cash-flow shortage following a huge withdrawal of deposits from 14 to 16 February 2018. It gave the applicant five days from the entry into force of the moratorium to restore its liquidity in order to cope with a forthcoming wave of withdrawals. However, when the deadline was reached, the applicant was not able to show that it had EUR 1 thousand million in its account with the Bank of Latvia.

145 The ECB therefore did not make a manifest error of assessment when it concluded, at that time, on the basis of point (a) of the first subparagraph and the second subparagraph of Article 18(1) and Article 18(4)(c) of Regulation No 806/2014, that the applicant was failing or likely to fail. In those circumstances, the ECB was under no obligation to instruct the FKTK to extend the moratorium.

146 Therefore, in the light of the discretion available to the SRB in its complex economic analysis, the applicant has not demonstrated that it made a manifest error of assessment in concluding that it was failing or likely to fail.

– *Whether there was a reasonable prospect of other measures preventing a failure*

147 The applicant submits, in essence, that the SRB has not sufficiently substantiated its conclusion that there was no reasonable prospect that other private-sector measures or supervisory action, taken with regard to the applicant, could have prevented its failure within a reasonable timeframe.

148 The SRB disputes those arguments.

149 In accordance with Article 18(1)(b) of Regulation No 806/2014, a resolution scheme may be adopted only if, inter alia, having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private-sector measures, including measures by an institutional protection scheme, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with Article 21 of that regulation, taken in respect of the entity, would prevent its failure within a reasonable timeframe.

150 In Section 3.2.2 of Decision SRB/EES/2018/09, the SRB concluded that there was no alternative measure which could reasonably have prevented the applicant's failure. The SRB relied, in essence, in its examination, on evidence produced by the ECB in the context of its FOLTF assessment in respect of the applicant.

151 The SRB cannot be criticised for having relied on the ECB's FOLTF assessment in respect of the applicant when examining the condition laid down in Article 18(1)(b) of Regulation No 806/2014. It is true that the conditions referred to in Article 18(1)(a) and (b) of that regulation are separate. The fact remains that, in the present case, the examination of the various measures and actions referred to in Article 18(1)(b) of that regulation was integrated into the

ECB's FOLTF assessment in respect of the applicant, which related to the condition laid down in Article 18(1)(a) of that regulation. Before the ECB concluded that the applicant was failing or was likely to fail, it examined whether that failure could still be avoided by alternative measures, such as an extension of the moratorium or the implementation of the available liquidity recovery options from its 2017 recovery plan. In addition, under the fourth subparagraph of Article 18(1), '[the] assessment of the condition referred to in point (b) of the first subparagraph shall be made by [SRB] … in close cooperation with the ECB' and 'the ECB may also inform the [SRB] … that it considers the condition laid down in that point to be met'. The SRB could therefore rely on the examination carried out by the ECB.

152 In view of the specific and objective factors put forward by the SRB in Section 3.2.2 of Decision SRB/EES/2018/09, the applicant has failed to set out the reasons why the alternative measures taken into consideration by the SRB and by the ECB were indeed such as to prevent its failure within a reasonable timeframe. The applicant does not identify other measures which the SRB should have taken into account in its examination. In those circumstances, the mere unsubstantiated assertion that the SRB disregarded the existence of alternative measures is insufficient to render implausible the SRB's assessment and is not capable of demonstrating that there has been a manifest error of assessment.

153 The third and fourth pleas must therefore be rejected.

The fifth plea in law, alleging infringement of the right to be heard and of the right to have access to the administrative file

154 The applicant claims that the SRB infringed its right to be heard, within the meaning of Article 41 of the Charter, by failing to give it the opportunity to submit comments to the SRB before the adoption of Decision SRB/EES/2018/09. Nor did it have access to the SRB's administrative file.

155 The SRB disputes those arguments.

156 Under Article 41(2)(a) of the Charter, the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him or her adversely is taken.

157 The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely. Next, it should be stated that the right to be heard pursues a dual objective. First, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible, and, second, to ensure that the person concerned is in fact protected. The right to be heard is intended, inter alia, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content (see judgment of 4 June 2020, *EEAS* v *De Loecker*, C-187/19 P, EU:C:2020:444, paragraphs 68 and 69 and the case-law cited).

158 The Court of Justice has previously affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right had to apply in all proceedings which are liable to culminate in an act adversely affecting a person. Observance of the right to be heard is

required even where the applicable legislation does not expressly provide for such a procedural requirement (see judgments of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraphs 85 and 86 and the case-law cited; of 7 November 2019, *ADDE* v *Parliament*, T-48/17, EU:T:2019:780, paragraph 89 and the case-law cited; and of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited).

159 Similarly, Article 41(2)(b) of the Charter enshrines the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.

160 It should be stated, at the outset, that Regulation No 806/2014 has the objective of establishing, in accordance with recital 8 thereof, more efficient resolution mechanisms, which must be an essential instrument to avoid damages that have resulted from failures of banks in the past. As regards the procedure provided for in Article 18 of that regulation, that objective presupposes a speedy decision-making process, which often occurs in emergency circumstances – as the short time limits laid down in that provision illustrate – so that financial stability is not jeopardised (judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 55).

161 However, although it is necessary to take into account the need for speed in the procedure provided for in Article 18 of Regulation No 806/2014, it must also be reconciled with the right to be heard.

162 Recital 26 of Regulation No 806/2014, moreover, confirms both the shared power of the ECB, as the supervisor within the SSM, and the SRB, as resolution authority, to assess whether a credit institution is failing or is likely to fail, and the exclusive power of the SRB to assess whether the other requirements for the adoption of a resolution scheme are met (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 64).

163 Having regard to the nature of that complex administrative procedure referred to in Article 18 of Regulation No 806/2014 and conducted by the ECB and the SRB jointly and successively, neither Article 41 of the Charter nor the provisions of that regulation require that the entity concerned by the decision to adopt or not adopt a resolution scheme be heard at each stage of the procedure by each of those two bodies separately.

164 In the present case, it is common ground, first, that, although the applicant was not heard by the SRB before Decision SRB/EES/2018/09 was adopted, it was, by contrast, heard on several occasions by the ECB.

165 The applicant was given an opportunity to comment on the relevant elements in the FOLTF assessment. In addition, as is apparent from paragraph 151 above, the ECB examined the alternative measures which may have been capable of preventing the applicant's failure. In its assessment, which it carried out after hearing the applicant, the ECB examined its arguments, summarising them and responding to them. The SRB, to which the ECB's assessment was subsequently sent, was therefore fully aware of the applicant's arguments when it adopted Decision SRB/EES/2018/09, in which it endorsed the ECB's conclusions concerning the conditions laid down in Article 18(1)(a) and (b) of Regulation No 806/2014.

166 It is true that, in Decision SRB/EES/2018/09, the SRB examined for the first time the condition laid down in Article 18(1)(c) of Regulation No 806/2014 requiring resolution action to be necessary in the public interest. However, none of the applicant's objections is directed against the alleged absence of any public interest; instead, they are directed against, first, the conclusion that the applicant was failing or was likely to fail, in accordance with Article 18(1)(a) of Regulation No 806/2014, and, second, the assertion that, having regard to timing and other relevant circumstances, there was no reasonable prospect that any alternative private-sector measures or supervisory action would prevent its failure within a reasonable timeframe within the meaning of Article 18(1)(b) of that regulation. Therefore, the applicant was heard on the points which it is contesting during the administrative procedure.

167 It should also be noted that no new event occurred and no new data were brought to the attention of the SRB between, on the one hand, the ECB's communication of its FOLTF assessment in respect of the applicant and, on the other hand, the adoption of the contested decision. Moreover, the SRB did not base Decision SRB/EES/2018/09 on elements other than those already established by the ECB and in respect of which the applicant had already been heard, as far as concerns the elements of that decision which were disputed by the applicant in the present proceedings. Nor did the SRB base that decision on grounds that were different from those set out by the ECB.

168 In those circumstances, it must be held that the applicant's right to be heard was not infringed.

169 Second, with regard to the right to have access to the file, the Court of Justice has held that the question as to whether there is an infringement of the rights of the defence, including that right, must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (see judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraph 97 and the case-law cited). In the present case, it is sufficient to note that the applicant has neither alleged nor established that it was unable to consult the documents relevant to the examination carried out by the ECB, in particular in the context of the dialogue between it and that institution in the context of that examination, and the file submitted to the General Court contains no evidence to that effect. Nor has the applicant specified the documents to which it did not have access in the context of the ECB's examination and to which it ought to have had access in the context of the procedure before the SRB, or how those documents would have enabled it better to defend itself. Moreover, the SRB did not rely on documents other than those on which the examination carried out by the ECB was based.

170 The fifth plea must therefore be rejected.

…

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders ABLV Bank AS to pay, in addition to its own costs, the costs incurred by the Single Resolution Board (SRB);

3. Orders the European Central Bank (ECB) to bear its own costs.

Kornezov Buttigieg Kowalik-Bańczyk

Hesse Petrlík

Delivered in open court in Luxembourg on 6 July 2022.

E. Coulon S. Papasavvas
Registrar President