Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

6 May 2021 *

(Appeal – Economic and monetary union – Banking union – Regulation (EU) No 806/2014 – Resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism (SRM) and a Single Resolution Fund – Article 18 – Resolution procedure – Conditions – Entity failing or likely to fail – Declaration by the European Central Bank (ECB) that an entity is failing or is likely to fail – Preparatory measure – Act not open to judicial review – Inadmissibility)

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

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 17 July 2019, by

ABLV Bank AS, established in Riga (Latvia) (C-551/19 P),

and

Ernests Bernis, residing in Jurmala (Latvia),

Oļegs Fiļs, residing in Jurmala,

OF Holding SIA, established in Riga (Latvia),

Cassandra Holding Company SIA, established in Jurmala (C-552/19 P),

represented initially by O. Behrends and M. Kirchner, Rechtsanwälte, and subsequently by O. Behrends,

appellants,

the other parties to the proceedings being:

European Central Bank (ECB), initially represented by E. Koupepidou and G. Marafioti, acting as Agents, and also by J. Rodríguez Cárcamo, abogado, then by E. Koupepidou, G. Marafioti and R. Ugena, acting as Agents,

defendant at first instance,

* Language of the case: English.

supported by:

European Commission, represented initially by D. Triantafyllou, A. Nijenhuis, K.-P. Wojcik and A. Steiblytė, and subsequently by D. Triantafyllou, A. Nijenhuis and A. Steiblytė, acting as Agents,

intervener in the appeals,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Wahl (Rapporteur), F. Biltgen and L.S. Rossi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 22 October 2020,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2021,

gives the following

Judgment

1 By their appeals, ABLV Bank AS, on the one hand, and Mr Ernests Bernis, Mr Oļegs Fiļs, OF Holding SIA and Cassandra Holding Company SIA, on the other hand, seek to have set aside, respectively, the order of the General Court of the European Union of 6 May 2019, *ABLV Bank* v *ECB* (T-281/18, EU:T:2019:296) (Case C-551/19 P), and the order of 6 May 2019, *Bernis and Others* v *ECB* (T-283/18, not published, EU:T:2019:295) (Case C-552/19 P) ('the orders under appeal'), by which the General Court dismissed as inadmissible their actions for annulment of the acts of the European Central Bank (ECB) of 23 February 2018 by which the ECB declared that ABLV Bank and its subsidiary, ABLV Bank Luxembourg SA, were failing or were likely to fail, 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) ('the acts at issue').

Legal context

2 Recitals 8, 11, 24 and 26 of Regulation No 806/2014 state:

'(8) More efficient resolution mechanisms are an essential instrument to avoid damages that have resulted from failures of banks in the past.

…

(11) For participating Member States, in the context of the Single Resolution Mechanism (SRM), a centralised power of resolution is established and entrusted to the Single Resolution Board established in accordance with this Regulation ("the Board" [or "the SRB"]) and to the national resolution authorities. …

…

(24) Since only institutions of the Union may establish the resolution policy of the Union and since a margin of discretion remains in the adoption of each specific resolution scheme, it is necessary to provide for the adequate involvement of the [Council of the European Union] and the [European Commission], as institutions which may exercise implementing powers, in accordance with Article 291 TFEU. The assessment of the discretionary aspects of the resolution decisions taken by the Board should be exercised by the Commission. Given the considerable impact of the resolution decisions on the financial stability of Member States and on the Union as such, as well as on the fiscal sovereignty of Member States, it is important that implementing power to take certain decisions relating to resolution be conferred on the Council. It should therefore be for the Council, on a proposal from the Commission, to exercise effective control on the assessment by the Board of the existence of a public interest and to assess any material change to the amount of the [Single Resolution Fund] to be used in a specific resolution action. …

…

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

…'

3 Article 7 of Regulation No 806/2014, entitled 'Division of tasks within the SRM', provides:

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

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

(a) the entities referred to in Article 2 that are not part of a group and for groups:
   (i) which are considered to be significant in accordance with Article 6(4) of [Council] Regulation (EU) No 1024/2013 [of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63)]; or
   (ii) in relation to which the ECB has decided in accordance with Article 6(5)(b) of Regulation [No 1024/2013] to exercise directly all of the relevant powers; and

(b) other cross-border groups.

3. In relation to entities and groups other than those referred to in paragraph 2, without prejudice to the responsibilities of the Board for the tasks conferred on it by this Regulation, the national resolution authorities shall perform, and be responsible for, the following tasks:

…

4. Where necessary to ensure the consistent application of high resolution standards under this Regulation, the Board may:

…

(b) at any time decide, in particular if its warning referred to in point (a) is not being appropriately addressed, on its own initiative, after consulting the national resolution authority concerned, or upon request from the national resolution authority concerned, to exercise directly all of the relevant powers under this Regulation also with regard to any entity or group referred to in paragraph 3 of this Article.

5. Notwithstanding paragraph 3 of this Article, participating Member States may decide that the Board exercise all of the relevant powers and responsibilities conferred on it by this Regulation in relation to entities and to groups, other than those referred to in paragraph 2, established in their territory. …'

4 Article 18 of Regulation No 806/2014, entitled 'Resolution procedure', is worded as follows:

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

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

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

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

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

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

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

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

…

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

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

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

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

(d) extraordinary public financial support is required …

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

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

(a) place the entity under resolution;

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

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

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

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

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

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

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

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

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

…

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

…'

5 Article 86 of Regulation No 806/2014, entitled 'Actions before the Court of Justice', provides as follows:

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

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

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

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

Background to the dispute

6 ABLV Bank, the appellant in Case C-551/19 P, is a credit institution established in Latvia and the parent company of the ABLV group. ABLV Bank Luxembourg is a credit institution established in Luxembourg and is one of the subsidiaries of the ABLV group; ABLV Bank is the sole shareholder of ABLV Bank Luxembourg.

7 Mr Bernis, Mr Fiļs, OF Holding and Cassandra Holding Company, the appellants in Case C-552/19 P, are direct and indirect shareholders of ABLV Bank.

8 ABLV Bank and ABLV Bank Luxembourg were considered to be significant within the meaning of Article 6(4) of Regulation No 1024/2013 and, as such, were subject to supervision by the ECB as part of the SSM.

9 On 13 February 2018, the United States Department of the Treasury (United States of America), through the *Financial Crimes Enforcement Network*, announced its intention to adopt special measures to prevent the ABLV group from accessing the financial system in US dollars (USD).

10 On 18 February 2018, the ECB requested the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia) ('the FKTK'), Latvia's national resolution authority (NRA), to suspend payments of the financial obligations of ABLV Bank. The ECB invited the Commission de surveillance du secteur financier (Financial Sector Supervisory Commission, Luxembourg), Luxembourg's NRA, to adopt similar measures with respect to ABLV Bank Luxembourg.

11 On 22 February 2018, the ECB sent to the SRB its draft assessment as to whether ABLV Bank and ABLV Bank Luxembourg were failing or were likely to fail, with the aim of consulting the SRB in that regard in accordance with the second subparagraph of Article 18(1) of Regulation No 806/2014.

12 On 23 February 2018, the ECB found that ABLV Bank and ABLV Bank Luxembourg 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. The ECB's assessments concerning ABLV Bank and ABLV Bank Luxembourg were sent to the SRB on the same day. Those assessments constitute the acts at issue.

13 On the same day, by two decisions concerning ABLV Bank and ABLV Bank Luxembourg, respectively, the SRB found that, notwithstanding the ECB's assessments that those credit institutions were failing or were likely to fail, it was not necessary to adopt a resolution scheme in their case, on the ground that, in the light of their particular characteristics and their financial and economic situation, resolution action 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.

14 Also on 23 February 2018, those decisions of the SRB were notified to their respective addressees, the FKTK and the Luxembourg Commission de surveillance du secteur financier (Financial Sector Supervisory Commission).

15 On 26 February 2018, the shareholders of ABLV Bank resolved to initiate a procedure allowing that bank to wind itself up and submitted to the FKTK an application for approval of its voluntary liquidation plan.

16 On 11 July 2018, the ECB adopted a decision withdrawing ABLV Bank's authorisation, following a proposal to that effect from the FKTK.

The actions before the General Court and the orders under appeal

17 By applications lodged at the General Court Registry on 3 May 2018, the appellant in Case C-551/19 P and the appellants in Case C-552/19 P, respectively, brought actions for annulment of the acts at issue. Those two actions were registered as Cases T-281/18 and T-283/18.

18 By applications also lodged at the General Court Registry on 3 May 2018, the appellant in Case C-551/19 P and the appellants in Case C-552/19 P, respectively, also brought actions for annulment of the decisions of the SRB of 23 February 2018 referred to in paragraph 13 of the present judgment. Those two actions were registered as Cases T-280/18 and T-282/18 and are pending before the General Court.

19 In support of their respective actions as referred to in paragraph 17 of the present judgment, the appellants relied on 10 identical pleas in law, alleging, respectively (i) erroneous assessment of the 'failing or likely to fail' criterion; (ii) infringement of the right to be heard and other related rights; (iii) infringement of the obligation to state reasons; (iv) failure to examine fully and impartially all the relevant aspects of the case; (v) breach of the principle of proportionality; (vi) breach of the principle of equal treatment; (vii) infringement of the right to property and the freedom to conduct a business; (viii) breach of the *nemo auditur* principle; (ix) misuse of powers; and (x) infringement of Article 41 of the Charter of Fundamental Rights of the European Union.

20 By separate document, the ECB raised a plea of inadmissibility, in two parts, in respect of each action.

21 In the first place, the ECB submitted that the acts at issue were only preparatory measures and that the factual assessment they contained was not binding. It added that Regulation No 806/2014 did not envisage the possibility of bringing an action for annulment in respect of an assessment as to whether an entity is failing or is likely to fail ('FOLTF assessment'). Last, the ECB noted that the appellants had brought actions for annulment of the decisions of the SRB, so that the alleged legal defects in the acts at issue could be relied on in the context of those actions, thus ensuring sufficient judicial protection for the appellants.

22 In the second place, the ECB claimed that the appellants were not directly concerned by the acts at issue.

23 By the orders under appeal, the General Court upheld that plea of inadmissibility and, accordingly, dismissed both actions as being inadmissible.

24 After noting that only measures the legal effects of which are binding on, and capable of affecting the interests of, an applicant by bringing about a distinct change in his or her legal position may be the subject of an action for annulment and that, in the case of acts adopted by a procedure involving several stages of an internal procedure, in principle an act is open to challenge only if it is a measure which definitively lays down the position of the institution on the conclusion of that procedure, and not a provisional measure that is intended to pave the way for the final decision, the General Court held that the acts at issue were preparatory measures in the procedure designed to allow the SRB to take a decision, whether positive or negative, regarding the resolution of the banks in question, and that they could not therefore form the subject of an action for annulment.

Forms of order sought

25 The appellant in Case C-551/19 P claims that the Court should:

– set aside the order under appeal;

– declare the action for annulment admissible;

– refer the case back to the General Court for it to determine the action for annulment; and

– order the ECB to pay the costs incurred at first instance and on appeal.

26 The appellants in Case C-552/19 P claim that the Court should:

– set aside the order under appeal;

– declare the action for annulment admissible;

– refer the case back to the General Court for it to determine the action for annulment; and

– order the ECB to pay the costs incurred at first instance and on appeal.

27 The ECB contends that the Court should dismiss the appeals in their entirety as being manifestly unfounded or, in the alternative, dismiss them as being, in part, inadmissible and, in part, unfounded, and order the appellants to pay the costs.

28 The Commission, intervening in support of the ECB, requests that the appeals be dismissed as being unfounded and that the Court replace the reasoning set out in paragraph 34 of the orders under appeal, 'by clarifying the authoritative nature of the FOLTF assessment by the ECB, which is to be followed by the SRB and the Commission, if resolution action is finally taken on assessment of the other conditions for resolution by the SRB, the Commission and, as the case may be, the Council'.

29 By decision of the President of the Court of Justice of 24 September 2019, Cases C-551/19 P and C-552/19 P were joined for the purposes of the written and oral procedure and of the judgment.

The appeal

30 In support of its appeal, the appellant in Case C-551/19 P puts forward two grounds of appeal which are identical to the two grounds of appeal put forward by the appellants in Case C-552/19 P.

31 By their first ground of appeal, the appellants submit that the General Court erred in law and infringed Article 263 TFEU by failing to base the orders under appeal on the decisions which the ECB actually adopted, when it should have assessed the admissibility of the actions in the light of the nature of the assessment made by the ECB in the present case. By their second ground of appeal, they maintain that those orders are, moreover, based on an erroneous interpretation of Article 18(1) of Regulation No 806/2014.

32 As a preliminary point, before each of those grounds is analysed in detail, it must be noted that the ECB contends that the appeals as a whole are manifestly unfounded because the grounds of appeal are ineffective. It argues that it was only for the sake of completeness that the General Court made a finding in the orders under appeal as to the non-binding nature of the FOLTF assessments in the acts at issue. In that context, the ECB advances four arguments. First, since the General Court found the acts at issue to be preparatory measures and the appellants do not dispute that finding, the non-binding nature vis-à-vis the SRB of the ECB's FOLTF assessments is irrelevant for the application of Article 263 TFEU. Second, the appellants do not dispute the General Court's finding that their legal status has not been changed by the acts at issue. Third, the question whether or not the ECB's FOLTF assessments are binding on the SRB is a hypothetical issue in the present dispute, which does not affect its substance. Fourth, the General Court dismissed the actions as inadmissible also taking into consideration, in accordance with Article 263 TFEU, the actions brought by the appellants in Cases T-280/18 and T-282/18, and that assessment has not been contested by the appellants.

33 In the present case, it is sufficient to note that, in so far as the General Court concluded, in paragraph 49 of the orders under appeal, that the acts at issue were preparatory measures that did not change the appellants' legal status, since those acts set out a factual assessment by the ECB as to whether ABLV Bank and its subsidiary were failing or were likely to fail which was in no way binding, but which constituted, in this case, the basis for the adoption by the SRB of decisions establishing that resolution was not necessary in the public interest, the finding that the ECB's FOLTF assessments are not binding on the SRB clearly underlies those orders, contrary to the ECB's contention.

34 It follows from this that the appeal cannot be dismissed as being manifestly unfounded because the appellants' grounds of appeal are ineffective, and those grounds must therefore be examined in turn.

The first ground of appeal

Arguments of the parties

35 In the context of their first ground of appeal, referred to in paragraph 31 of the present judgment, the appellants submit that the General Court did not distinguish between the question whether the ECB had the power to make a binding determination and the question whether, in this particular case, the ECB's assessment in the acts at issue purported to be binding. According to the appellants, in essence, in the orders under appeal, the General Court dismissed the actions as being inadmissible in the light of the nature not of the acts at issue as adopted by the ECB, but of the acts which, in accordance with the interpretation of Article 18 of Regulation No 806/2014 considered by the General Court to be correct, the ECB should have adopted. However, according to the appellants' interpretation of that provision, if an authority adopts a binding act because it believes that the binding nature of that act is in accordance with the law, then an action for annulment against that act is admissible, the question whether the adoption of such an act is lawful being relevant to the assessment of the merits of such an action and not to its admissibility.

36 In order to demonstrate that, in adopting the acts at issue, the ECB, in the present case and irrespective of the precise interpretation of Article 18 of Regulation No 806/2014, did in fact adopt binding acts against which an action for annulment may be brought, the appellants invoke various points, such as the fact that the ECB did not merely communicate factual information in order to prepare a subsequent decision by the SRB; the fact that the ECB itself stated, both in the acts at issue and in the accompanying public announcement, that it had made the FOLTF assessment, within the meaning of point (a) of the first subparagraph of Article 18(1) of Regulation No 806/2014; the fact that the assessment carried out by the ECB was communicated to the banks concerned; or the General Court's analysis of the judgment delivered on 9 March 2018 by the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg), mentioned in the orders under appeal.

37 The ECB disputes the appellants' arguments, contending, principally, that the first ground of appeal is inadmissible in that it does not indicate precisely the elements of the orders under appeal that are contested, and, in the alternative, that it is unfounded. It is supported in respect of the latter point by the Commission, which submits that the FOLTF assessment of an entity is a preparatory measure.

Findings of the Court

38 As to whether the first ground of appeal is admissible, it should be noted that, contrary to what is claimed by the ECB, the error of law invoked by the appellants is, on a reading of the various supporting arguments put forward and summarised in paragraphs 35 and 36 of the present judgment, clearly identifiable; accordingly that ground of appeal is admissible.

39 By contrast, it must be held that the objections to the General Court's reasoning are unfounded. As the General Court correctly noted, it follows from the case-law that, under the fourth paragraph of Article 263 TFEU, a natural or legal person may challenge only measures the legal effects of which are binding on, and capable of affecting the interests of, that person by bringing about a distinct change in his or her legal position (see, to that effect, judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 9; of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 54; and of 31 January 2019, *International Management Group* v *Commission*, C-183/17 P and C-184/17 P, EU:C:2019:78, paragraph 51). Thus, 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 complainant, 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 (judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 48 and the

case-law cited). Consequently, intermediate measures setting out an assessment by the institution and whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment (see, to that effect, judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 50, and of 15 March 2017, *Stichting Woonpunt and Others* v *Commission*, C-415/15 P, EU:C:2017:216, paragraph 44).

40 In order to determine whether the acts at issue constitute preparatory measures, as the General Court held in the orders under appeal, or whether they are, as the appellants maintain, acts which are open to challenge, for the purposes of Article 263 TFEU, it is necessary to look to the actual substance of those acts (see, to that effect, judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 46 and the case-law cited) and to the intention of those who drafted them, in this case, the ECB (see, to that effect, judgments of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 42, and of 26 January 2010, *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, EU:C:2010:40, paragraph 52).

41 In that regard, the Court has stated that examining the substance of an act involves assessing its effects on the basis of objective criteria, such as the content of the act in question, taking into account, as appropriate, the context in which it was adopted and the powers of the EU institution, body, office or agency which adopted it (see, to that effect, judgments of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 55, and of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 47), powers which should not be understood in the abstract but should be regarded as factors that inform the specific analysis of the content of that act, which is central and indispensable (see, to that effect, judgment of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraphs 49, 51, 52 and 55).

42 In so far as the appellants make the intention which they ascribe to the ECB when it adopted the acts at issue one of the central elements of the first ground of appeal, it must also be stated that the Court has emphasised that, while it is clear from the case-law that it is possible to take into consideration a subjective criterion relating to the intention that led the EU institution, body, office or agency which drafted the contested act to adopt it, that subjective criterion can play only a complementary role as compared with the objective criteria referred to in the preceding paragraph and, therefore, cannot be given greater weight than those objective criteria, nor can it affect the assessment of the effects of the resulting contested act (judgment of 21 January 2021, *Germany* v *Esso Raffinage*, C-471/18 P, EU:C:2021:48, paragraph 65).

43 The General Court clearly proceeded in accordance with that case-law when it examined the substance of the acts at issue in detail in paragraphs 33 to 36 of the orders under appeal, taking into consideration in particular, as factors that inform the specific analysis of the content of those acts, the powers of the ECB when it is required to carry out an FOLTF assessment of an entity pursuant to Article 18 of Regulation No 806/2014, as compared with those conferred on the SRB by that article when such an assessment is communicated to it. Furthermore, the General Court considered, in paragraph 47 of those orders, that the ECB's intention when adopting the acts at issue did not call in question the nature of those acts as preparatory measures. That method of analysis is consistent with the case-law recalled in the preceding paragraph, according to which the intention of the author of an act that is the subject of proceedings is merely complementary when establishing whether or not that act is open to challenge.

44 Accordingly, the appellants are wrong to complain that the General Court relied in the abstract on the non-binding act which, according to its interpretation of Article 18 of Regulation No 806/2014, was required to be adopted by the ECB, instead of on the measures which the ECB actually adopted.

45 The appellants attempt to call in question the findings of the General Court mentioned in paragraph 43 of the present judgment by relying on a presumption that an assessment by an authority is binding unless the authority makes it clear that that assessment is not binding. They explain that the ECB has itself stated, both in the acts at issue and in the accompanying public announcement, that it made the FOLTF assessment within the meaning of point (a) of the first subparagraph of Article 18(1) of Regulation No 806/2014. The appellants also point to a number of other circumstances, such as the ECB's proportionality analysis, which presupposes that the decision by which such an assessment is made produces binding legal effects, the public announcement and the communication of the acts at issue to the credit institutions concerned, or the public statement that the liquidation of those credit institutions was inevitable. Likewise, the appellants refer to the General Court's inappropriate understanding of the term 'binding' with respect to its analysis of the judgment of the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) of 9 March 2018, that term meaning in fact, in the context of Article 18 of that regulation, that the ECB's FOLTF assessment is binding on the SRB in that it is not possible for the SRB to adopt resolution action if the ECB has concluded that the bank concerned is not failing or likely to fail and, conversely, is obliged to adopt such a measure if the ECB has concluded that an institution is failing or is likely to fail.

46 Yet the presumption for which the appellants seek recognition is incompatible with the requirement that, in the case of any given act, its possibly binding nature must be determined in the light of its substance and the intention of those who drafted it, which accords with the case-law recalled in paragraphs 40 to 42 of the present judgment. In addition, that presumption renders Article 263 TFEU largely meaningless, since its application would lead the Courts of the European Union to proceed on the basis that every act of the institutions, bodies, offices or agencies of the European Union is in the nature of a decision, unless they have expressly indicated that that is not the case in relation to a particular act. Furthermore, by leaving it to those institutions, bodies, offices or agencies themselves to classify their acts as being or not being in the nature of a decision and by presupposing that, unless stated otherwise, those acts are binding and therefore constitute decisions, such a presumption would run counter to the case-law cited in paragraph 39 of the present judgment, according to which it is irrelevant whether or not an act is described by the EU institutions, bodies, offices and agencies as being a 'decision' (see, to that effect, judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 47 and the case-law cited).

47 While it is, moreover, true that any decision-making act of an EU institution, body, office or agency must comply with the general principles of EU law, which include the principle of proportionality (see, to that effect, judgment of 11 June 2009, *Nijemeisland*, C-170/08, EU:C:2009:369, paragraph 41 and the case-law cited), and that, therefore, there are many legally binding acts which contain a proportionality analysis, the presence of such an analysis cannot, reasoning *a contrario*, be elevated to evidence that an act is binding. It is entirely conceivable that the authority concerned may analyse the proportionality of a measure during an administrative procedure comprising several stages without, however, the substance of an act that is supposed to be an intermediary act being modified as a result.

48 The appellants' argument in relation to the public announcement and the communication of the acts at issue to the credit institutions concerned must also be rejected. It is apparent from paragraph 45 of the orders under appeal that the General Court considered that 'it was not the [acts at issue] that were published by the ECB, but rather two announcements, which [were] not the [acts at issue]'. Such a finding is part of the General Court's finding of fact, which is not, save where the facts are distorted – which the appellants do not allege – subject to review in the context of an appeal (see, to that effect, order of 5 February 2015, *Greece* v *Commission*, C-296/14 P, not published, EU:C:2015:72, paragraph 32 and the case-law cited). Furthermore, it must be stated, as the Advocate General noted in point 63 of his Opinion, that the ECB's publication of press releases concerning an FOLTF assessment does not mean that the ECB intended to make that assessment binding or that that assessment is binding in its own right.

49 As to the argument that the ECB's public statement that the liquidation of the credit institutions in question was inevitable confirms that the acts at issue are binding, it should be noted that it is based neither on the substance of those acts nor on the intention of those who drafted them. In addition, such a liquidation, under Latvian law in the case of ABLV Bank, arose not from those acts but from a decision taken by the shareholders of that company following the SRB's decision that it was not necessary in the public interest to apply the resolution scheme to ABLV Bank and to ABLV Bank Luxembourg, in accordance with Regulation No 806/2014.

50 Last, it is necessary to reject the argument that the General Court based its decision, as, it is submitted, is apparent in particular from paragraph 48 of the orders under appeal, on an inappropriate understanding of the term 'binding' in the context of Article 18 of Regulation No 806/2014. In that paragraph, the General Court merely set out a ground of the judgment of the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) of 9 March 2018 that refers expressly to the fact that 'the parties agree[d] that the assessments and findings of the ECB and the SRB in respect of [that] regulation [were] not binding on the court hearing the present application', in order to indicate that, according to the appellants themselves, the FOLTF assessments are a mere factual assessment that has no legal effect.

51 It follows from the foregoing that the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

52 By their second ground of appeal, the appellants submit that the orders under appeal are based on an erroneous interpretation of Article 18(1) of Regulation No 806/2014. The second ground of appeal comprises, in essence, two sets of arguments, relating (i) to the strict interpretation of Article 18, which led the General Court to conclude that the acts at issue were not challengeable acts for the purposes of Article 263 TFEU, and (ii) to the error which they claim the General Court made when it found that the position of ABLV Bank and ABLV Bank Luxembourg had not been altered by those acts.

53 The ECB, supported by the Commission, contends that the second ground of appeal is unfounded.

Findings of the Court

54 Before examining both sets of arguments advanced by the appellants in the context of the second ground of appeal, it is appropriate to set out a number of preliminary considerations.

– Preliminary considerations

55 In the first place, it must be pointed out that the origin of Regulation No 806/2014 lies in the EU legislature's intention to prevent crises such as the 'sub-prime' crisis, in 2008, from occurring. This is why that regulation 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. That objective presupposes a speedy decision-making process, as the short time limits laid down in Article 18 of that regulation illustrate, so that financial stability is not jeopardised. Such an objective cannot, therefore, be disregarded when interpreting that provision to determine whether or not the ECB's FOLTF assessment constitutes, in the context of the resolution procedure, a challengeable act, since recognition of such an assessment as being in the nature of a decision could significantly affect the speediness of that procedure.

56 In the second place, it must be stated that 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 decisions of the SRB, the latter being mentioned to the exclusion of any other institution, body, office or agency of the European Union. Accordingly, no mention is made there of the ECB and, in particular of the FOLTF assessments which it may carry out, which would seem to confirm that the EU legislature did not intend to confer a decision-making power on the ECB in this area. In addition, the SRB's adoption 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 the ECB's FOLTF assessment could be subject to judicial review.

57 Both sets of arguments put forward by the appellants must be examined in the light of those considerations.

– The first set of arguments, relating to the interpretation of Article 18 of Regulation No 806/2014

58 The appellants submit, in essence, that the General Court failed to take into account, in its interpretation of Article 18(1) of Regulation No 806/2014, the second subparagraph of that provision, with the result that it incorrectly held that that provision envisages a mere non-binding communication of factual information by the ECB to the SRB and that the SRB alone has the power to determine whether the three conditions referred to in the first subparagraph of that provision are met. The appellants add that whether an entity is failing or is likely to fail requires, having regard to the definition of that concept in Article 18(4) of that regulation, a legal analysis and conclusion.

59 The appellants also claim that the General Court failed, in paragraph 46 of the orders under appeal, to give sufficient weight to the 'functional equivalence' between an FOLTF assessment and the withdrawal of an entity's authorisation. By refusing to recognise that the FOLTF assessment, which is the prerogative of the supervisory authority, is binding, the General Court had called in question the coherence of the system of banking supervision and resolution, as Article 18 of Regulation No 806/2014 should be interpreted in such a way that the resolution authority is bound by the FOLTF assessment carried out by the supervisory authority.

60 In that regard it must be stated, first, that it is for the SRB, in accordance with Article 18(1) and (6) of Regulation No 806/2014, to adopt a resolution scheme, which must then, under Article 18(7) of that regulation, be endorsed by the Commission or, as the case may be, the Council, and such a scheme may enter into force only if those institutions do not object. In addition, a resolution scheme may be adopted, according to the express wording of points (a) to (c) of the first subparagraph of Article 18(1) of that regulation, only if three conditions are met, namely that the entity is failing or is likely to fail, there is no reasonable prospect that any alternative measures would prevent its failure within a reasonable timeframe, and a resolution action is necessary in the public interest pursuant to Article 18(5) of that regulation.

61 It must therefore be emphasised at the outset, as the ECB and the Commission have done, that, in so far as the adoption of a resolution scheme is subject to the three conditions referred to in the preceding paragraph being met and the ECB's FOLTF assessment concerns only the first of those conditions, that assessment cannot prejudge the outcome of the resolution procedure, which also depends on the other two conditions.

62 In that respect, as regards the first condition, the second subparagraph of Article 18(1) of Regulation No 806/2014 gives the ECB a primary – albeit not exclusive – role, since it is the ECB which, as a general rule, is required to carry out FOLTF assessments. 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, as the Commission points out, 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.

63 That interpretation is confirmed by the ECB's obligation, under the second subparagraph of Article 18(1) of Regulation No 806/2014, to communicate to the SRB without delay any relevant information requested by the SRB, should the SRB intend to carry out an FOLTF assessment itself. As regards, however, the two other conditions laid down in the first subparagraph of Article 18(1) of that regulation, the SRB has exclusive power to determine whether they are satisfied.

64 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.

65 The role of the ECB is therefore limited to assessing the first of the conditions laid down in the first subparagraph of Article 18(1) of Regulation No 806/2014 and to providing the SRB with that assessment, or, if the SRB declares its intention to make such an assessment itself, to assisting it in carrying out that task.

66 Consequently, in the present case, the ECB's assessment as to whether ABLV Bank and ABLV Bank Luxembourg were failing or were likely to fail did not, as such, have a binding legal effect that was capable of affecting the interests of the appellants, by bringing about a distinct change in their legal position, only the adoption, followed by the entry into force of a resolution scheme and the implementation of resolution tools, within the meaning of Article 22(2) of Regulation No 806/2014 being capable of bringing about a change in their legal position. The resolution procedure must therefore be regarded as a complex administrative procedure involving a number of authorities, only the outcome of which, resulting from the SRB's exercise of its power, may be subject to the judicial review provided for in Article 86(2) of that regulation.

67 Contrary to the appellants' contention, the ECB's assessment of the condition referred to in point (a) of the first subparagraph of Article 18(1) of Regulation No 806/2014 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. Indeed, either the ECB finds, in its assessment, that the entity is failing or is likely to fail, which results in the initiation of the procedure provided for in Article 18 of that regulation, or it considers that not to be the case, and the procedure is not, therefore, initiated. There is nothing in the wording of that provision to indicate that the SRB would have no power in either situation to assess whether the entity in question is failing or is likely to fail.

68 In the first of the situations mentioned in the preceding paragraph, in the light of the assessment communicated by the ECB and the supporting file, it cannot be ruled out that the SRB may not agree entirely or at all with the ECB's analysis, or that it may detect an irregularity which it is then required to remedy, so as to ensure that it is not subsequently penalised by the Courts of the European Union in any action for annulment as envisaged in Article 86(2) of Regulation No 806/2014. It must, in that regard, be emphasised that, as has been recalled in paragraph 62 of the present judgment, the SRB does have the power, if it so decides, to assess the first of the conditions referred to in the first subparagraph of Article 18(1) of that regulation, and is therefore in a position, for that purpose, to use the documents made available to it by the ECB.

69 It is true that, in fact, the ECB's expertise and its knowledge of supervisory information relating to the entity concerned are such that the SRB will probably in most cases endorse the ECB's assessment. However, as the Advocate General stated in point 111 of his Opinion, while there is 'no objection to the assumption that the ECB's assessment may carry *auctoritas* within the classical sense of that term, and that the SRB could not refrain from taking it into account or reject its content uncritically', 'this does not mean … that it is also vested with the *potestas* inherent in legal decisions that are imposed in relations between institutions in the case where one of them may not depart from the substance of what the other has agreed or decided to do'.

70 In the second of the situations mentioned in paragraph 67 of the present judgment, the SRB is, again, not legally bound by the ECB's assessment. Admittedly, if the ECB comes to the conclusion that the entity concerned is not failing or is not likely to fail, no assessment is sent to the SRB and the resolution procedure is not, therefore, 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 to the SRB only if it assesses that the entity is failing or is likely to fail.

71 The ECB's assessment of the condition laid down in point (a) of the first subparagraph of Article 18(1) of Regulation No 806/2014 is not therefore binding on the SRB, not least because it is for the SRB, upon receiving that assessment, itself to assess, in the context of the examination of the condition referred to in point (b) of the first subparagraph of Article 18(1) of that regulation, whether there are reasonable prospects that other measures would prevent the failure of the entity concerned.

72 Second, with regard to the appellants' arguments based on the distinction between supervision and resolution of credit institutions, it should be noted, as did the ECB, that, as supervisor of significant entities and groups as referred to in Article 6(4) of Regulation No 1024/2013, such as, in this case, ABLV Bank and ABLV Bank Luxembourg, the ECB is, as a rule, best placed to make an FOLTF assessment. Nevertheless, as has been noted in paragraphs 62, 68 and 70 of the present judgment, Article 18(1) of Regulation No 806/2014 does not give the ECB exclusive power to carry out such an assessment, since the SRB may also do so after informing the ECB of its intention to do so and if the ECB, within three calendar days of receipt of that information, does not make such an assessment.

73 In addition, the ECB's involvement in the procedure provided for in Article 18 of Regulation No 806/2014 is based not so much on the separation of supervisory and resolution functions as on the particular expertise which that institution has as supervisory authority. Consequently, while it is true that the banking legislation makes a distinction between the supervision and the resolution of credit institutions and, for that purpose, lays down a separation of functions between the ECB and the SRB, that dichotomy has no bearing on the nature of the ECB's FOLTF assessment, which remains a preparatory measure.

74 As to the argument that there is a functional equivalence between the FOLTF assessment and withdrawal of an entity's authorisation, it should be noted that, in paragraph 46 of the orders under appeal, the General Court pointed out, in response to that argument, that while such an assessment may be based on a finding of fact that the requirements for continuing authorisation are no longer satisfied under Article 18(4)(a) of Regulation No 806/2014, those two acts are not the same.

75 In that respect, while it is the case that, according to Article 18(4) of Regulation No 806/2014, an entity is to be deemed to be failing or to be likely to fail in one or more of the circumstances described therein, an FOLTF assessment does not formally require a decision on whether the authorisation of that entity must be withdrawn. It follows that, contrary to the appellants' claim, the argument set out in the preceding paragraph does not mean that the FOLTF assessment is exclusively and necessarily a matter for the ECB as supervisor, with the result that it may also be carried out by the SRB as resolution authority.

– The appellants' second set of arguments, relating to a change in the legal position of ABLV Bank and ABLV Bank Luxembourg

76 The appellants put forward three arguments in that regard.

77 First, the appellants submit that the position of ABLV Bank and ABLV Bank Luxembourg was altered because of the publication of the FOLTF assessment by the ECB. However, it must first of all be noted that the appellants do not provide any details in that regard. In any event, while it is not inconceivable that that publication had an effect on the situation, including the economic situation, of those entities, it did not entail any change in their legal position.

78 Second, as regards the appellants' argument concerning paragraph 47 of the orders under appeal, it is sufficient to note that it is based on a misreading of that paragraph. In fact, the General Court merely noted in paragraph 47 of the orders under appeal, for the purposes of rejecting the appellants' argument regarding an alleged difference in wording between the publication on the ECB's website and the acts at issue, that it followed from paragraphs 32 to 36 of those orders that, having regard to their substance, those acts had to be classified as preparatory measures.

79 Third, the appellants submit that the General Court erred in relying on case-law that is not relevant, as it applies only if the acts concerned are not binding, which is not the case here.

80 In that regard, while the case-law to which that argument relates arose, as the appellants submit, in circumstances that differ from those of the present case, the fact remains that it is relevant for the purposes of determining whether or not the acts at issue are open to challenge. In particular, the premiss on which that argument is based, namely that the acts at issue are binding, is erroneous, as follows from the examination of the first set of arguments put forward in the context of the present ground of appeal.

– Conclusion concerning the second ground of appeal

81 Neither set of arguments put forward by the appellants in connection with the second ground of appeal having been accepted, this ground of appeal must be rejected.

Conclusion

82 Since neither ground of appeal has been upheld, both must be rejected in their entirety.

83 As to the Commission's claim that the Court should clarify two aspects of paragraph 34 of the orders under appeal, it must be recalled that it follows unambiguously from Article 40 of the Statute of the Court of Justice of the European Union and from Articles 129 and 132 of the Rules of Procedure of the Court, applicable to appeal proceedings in accordance with Article 190 of those rules, that the form of order sought by the intervener is to be limited to supporting, in whole or in part, the form of order sought by one of the parties. By asking the Court to clarify paragraph 34 of the orders under appeal, however, the Commission goes beyond the form of order sought by the ECB, which merely claims that the appeals should be dismissed and the appellants ordered to pay the costs. This head of the Commission's claim must therefore be rejected as being inadmissible.

Costs

84 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded the Court is to make a decision as to the costs. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful

party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In addition, in accordance with Article 140(1) of the Rules of Procedure, which is also rendered applicable to appeals by Article 184(1), the Member States and institutions which have intervened in the proceedings are to bear their own costs.

85 Since the ECB has applied for the appellants to be ordered to pay the costs and the latter have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the ECB. The Commission, having intervened in the proceedings in support of the ECB, is to bear its own costs.

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

1. **Dismisses the appeals;**

2. **Dismisses as being inadmissible the claim by the European Commission that the Court should replace the reasoning set out in paragraph 34 of the orders of the General Court of the European Union of 6 May 2019, *ABLV Bank* v *ECB* (T-281/18, EU:T:2019:296), and of 6 May 2019, *Bernis and Others* v *ECB* (T-283/18, not published, EU:T:2019:295), the subject of those appeals;**

3. **Orders ABLV Bank AS to pay the costs in Case C-551/19 P;**

4. **Orders Mr Ernests Bernis, Mr Oļegs Fiļs, OF Holding SIA and Cassandra Holding Company SIA to pay the costs in Case C-552/19 P;**

5. **Orders the European Commission to bear its own costs.**

Prechal Lenaerts Wahl

Biltgen Rossi

Delivered in open court in Luxembourg on 6 May 2021.

A. Calot Escobar
Registrar

A. Prechal
President of the Third Chamber