Reports of Cases

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

1 June 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 – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Delegation of power – Obligation to state reasons – Principle of good administration – Article 20 of Regulation (EU) No 806/2014 – Right to be heard – Right to property)

In Case T-570/17,

Algebris (UK) Ltd, established in London (United Kingdom),

Anchorage Capital Group LLC, established in New York, New York (United States),

represented by T. Soames, N. Chesaites, lawyers, and R. East, Solicitor,

applicants,

v

European Commission, represented by L. Flynn and A. Steiblytė, acting as Agents,

defendant,

supported by

Single Resolution Board (SRB), represented by J. King and M. Fernández Rupérez, acting as Agents, and by B. Meyring, S. Schelo, F. Fernández de Trocóniz Robles, T. Klupsch and S. Ianc, lawyers,

and by

Banco Santander, SA, established in Santander (Spain), represented by J. Rodríguez Cárcamo, A. Rodríguez Conde, D. Sarmiento Ramírez-Escudero, lawyers, and G. Cahill, Barrister,

interveners,

* Language of the case: English.

APPLICATION based on Article 263 TFEU for annulment of Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español, S.A. (OJ 2017 L 178, p. 15),

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of M. van der Woude, President, M. Jaeger, V. Kreuschitz, G. De Baere (Rapporteur) and G. Steinfatt, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 24 June 2021,

gives the following

Judgment

Legal framework

1 Following the 2008 financial crisis, it was decided that a banking union should be set up in the European Union, underpinned by a comprehensive and detailed single rulebook for financial services, valid for the internal market as a whole and composed of a single supervisory mechanism and new frameworks for deposit insurance and resolution.

2 The first stage towards setting up the banking union consisted of the establishment of a single supervisory mechanism (SSM) by 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). According to recital 12 of that regulation, an SSM should ensure that the European Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations. To that end, Regulation No 1024/2013 confers specific tasks on the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the European Union and each Member State.

3 Thereafter, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190) was adopted. Recital 1 of that directive states the following:

'The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investment firms … Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned.

During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery and resolution framework is to obviate the need for such action to the greatest extent possible.'

4 The objective of Directive 2014/59 is to establish common rules for minimum harmonisation of national provisions governing the resolution of banks in the European Union and provides for cooperation between resolution authorities for deficiencies in cross-border banks. In that regard, Directive 2014/59 provides, inter alia, in Article 3(1) that each Member State is to designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.

5 However, given that, first, Directive 2014/59 did not lead to the centralisation of decision making in the field of resolution, that it essentially made resolution tools and common resolution powers available to the national authorities of each Member State, and that it left them a margin of discretion as regards the use of those tools and the use of national financing arrangements for resolution, and that, second, that directive did not completely avoid the taking of separate and potentially inconsistent decisions by Member States regarding the resolution of cross-border groups, it was decided to put in place a Single Resolution Mechanism (SRM).

6 Thus, the second stage towards the creation of the banking union consisted in the adoption 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).

7 Recital 12 of Regulation No 806/2014 states:

'Ensuring effective resolution decisions for failing banks within the Union, including on the use of funding raised at Union level, is essential for the completion of the internal market in financial services. Within the internal market, the failure of banks in one Member State may affect the stability of the financial markets of the Union as a whole. Ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States is in the best interests not only of the Member States in which banks operate but also of all Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal market. Banking systems in the internal market are highly interconnected, bank groups are international and banks have a large percentage of foreign assets. In the absence of the SRM, bank crises in Member States participating in the SSM would have a stronger negative systemic impact also in non-participating Member States. The establishment of the SRM will ensure a neutral approach in dealing with failing banks and therefore increase stability of the banks of the participating Member States and prevent the spill-over of crises into non-participating Member States and will thus facilitate the functioning of the internal market as a whole. The mechanisms for cooperation regarding institutions established in both participating and non-participating Member States should be clear, and no Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for financial services.'

8 Under the first paragraph of Article 1 of Regulation No 806/2014, the purpose of that regulation is to establish uniform rules and a uniform procedure for the resolution of the entities defined in Article 2, which are established in the participating Member States, namely banks whose home supervisor is the ECB or the national competent authority in Member States whose currency is

the euro or in Member States whose currency is not the euro which have established a close cooperation in accordance with Article 7 of Regulation No 1024/2013 (see recital 15 of Regulation No 806/2014).

9 The second paragraph of Article 1 of Regulation No 806/2014 provides that those uniform rules and that uniform procedure are to be applied by the Single Resolution Board (SRB), established in accordance with Article 42 of that regulation, together with the Council of the European Union and the European Commission, and the national resolution authorities, within the framework of the SRM established by that regulation. It is also provided that the SRM is to be supported by a single resolution fund (SRF).

10 Pursuant to Article 16(1) of Regulation No 806/2014, the SRB is to decide on a resolution action in relation to a financial institution established in a participating Member State, where the three conditions laid down in Article 18(1) of that regulation are satisfied.

11 The first condition requires that the entity is failing or is likely to fail. The assessment of that condition is carried out by the ECB, after consulting the SRB, or by the SRB, and is deemed to be satisfied if the entity is in one or more of the situations listed in Article 18(4) of Regulation No 806/2014.

12 The second condition requires there to be no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame.

13 The third condition requires that a resolution action is necessary in the public interest, that is to say that it is necessary in order to achieve one or more of the resolution objectives, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.

14 Article 14 of Regulation No 806/2014 defines the resolution objectives as follows: to ensure the continuity of critical functions; to avoid significant adverse effects on financial stability, in particular by preventing contagion; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors and investors; and to protect client funds and client assets.

15 Article 20(1) of Regulation No 806/2014 provides that, before deciding on resolution action or the exercise of the power to write down or convert relevant capital instruments, the SRB must ensure that a fair, prudent and realistic valuation of the assets and liabilities of the entity concerned is carried out by a person independent from any public authority, including the SRB and the national resolution authority, and from the entity concerned.

16 According to Article 20(15) of Regulation No 806/2014, the valuation is to be an integral part of the decision on the application of a resolution tool or on the exercise of a resolution power or the decision on the exercise of the write-down or conversion power of capital instruments.

17 Where the conditions laid down in Article 18(1) of Regulation No 806/2014 are satisfied, the SRB is to adopt a resolution scheme.

18 When acting under the resolution procedure, the SRB, the Council and the Commission must ensure that the resolution action is taken in accordance with certain principles set out in Article 15 of Regulation No 806/2014, which include the principle that the shareholders of the

institution under resolution are to bear first losses and the principle that no creditor is to incur greater losses than would have been incurred if the entity covered by the resolution action had been wound up under normal insolvency proceedings.

19 In the resolution scheme, the SRB is to determine the application of the resolution tools. Article 22(2) of Regulation No 806/2014 lists the various resolution tools available, namely the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool.

20 In the resolution scheme, the SRB may also exercise the power to write down or convert the capital instruments in the entity concerned in accordance with the conditions laid down in Article 21 of Regulation No 806/2014. Under Article 19 of Regulation No 806/2014, a resolution action may also involve the grant of State aid or use of the SRF.

21 According to Article 18(7) of Regulation No 806/2014, immediately after its adoption, the SRB is to transmit the resolution scheme to the Commission. Within 24 hours from the transmission of the resolution scheme by the SRB, the Commission must 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, namely compliance with the public interest criterion or a material modification of the amount of the SRF. As regards those discretionary aspects, within 12 hours from the transmission of the resolution scheme by the SRB, the Commission may propose to the Council to object to the resolution scheme adopted by the SRB on the ground that it does not fulfil the criterion of public interest or to approve or object to a material modification of the amount of the SRF provided for in the resolution scheme by the SRB. The resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB.

22 Article 18(9) of Regulation No 806/2014 states that the SRB is to ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme is to be addressed to those authorities and must instruct them to take all necessary measures to implement the scheme in accordance with Article 29 of that regulation by exercising resolution powers.

23 After a resolution action has been adopted, under Article 20(16) of Regulation No 806/2014, the SRB is to ensure that a valuation is carried out by an independent person in order to determine whether the shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings. Pursuant to Article 76(1)(e) of Regulation No 806/2014, that valuation may lead to the payment of compensation to shareholders or creditors if they have incurred greater losses under the resolution than they would have incurred in a winding up under normal insolvency proceedings.

Background to the dispute and events subsequent to the action being brought

24 The applicants, Algebris (UK) Ltd and Anchorage Capital Group LLC, are investment fund managers which held additional Tier 1 capital instruments and Tier 2 capital instruments issued by Banco Popular Español, SA ('Banco Popular') before a resolution scheme was adopted in respect of Banco Popular.

The situation of Banco Popular before the resolution scheme was adopted

25 The Banco Popular group, of which Banco Popular was the parent company, was the sixth largest banking group in Spain at the time of the resolution.

26 In 2016, Banco Popular undertook a capital increase of EUR 2.5 billion.

27 On 5 December 2016, the Executive Session of the SRB adopted a resolution plan for the Banco Popular group. The preferred resolution tool in that resolution plan was the bail-in tool provided for in Article 27 of Regulation No 806/2014.

28 On 3 February 2017, Banco Popular published its 2016 annual report in which it disclosed the need for extraordinary provisions in the sum of EUR 5.7 billion, leading to consolidated losses of EUR 3.485 billion, and the appointment of a new chairman.

29 On 10 February 2017, DBRS Ratings Limited (DBRS) (now DBRS Morningstar) downgraded Banco Popular's rating, with a negative outlook, in view of Banco Popular's weakened capital position following a net loss which was higher than that anticipated in its annual report, mentioned in paragraph 28 above, and the bank's struggle to reduce its elevated stock of non-performing assets.

30 On 3 April 2017, Banco Popular announced the results of internal audits, indicating that corrections to its 2016 annual report might be required. Those adjustments were made in Banco Popular's financial report for the first quarter of 2017.

31 At the general shareholders' meeting of Banco Popular on 10 April 2017, the Chairman of the Board of Directors announced that the bank envisaged either a further capital increase or a corporate transaction to address the group's capital position and its level of non-performing assets. The Chief Executive Officer (CEO) of Banco Popular was replaced after less than one year in his position.

32 Following the announcement of 3 April 2017 on the need to adjust the financial results of 2016, DBRS, on 6 April, downgraded Banco Popular's rating, again with a negative outlook. On 7 April, Standard & Poor's, and on 21 April 2017, Moody's Investors Service ('Moody's') also downgraded Banco Popular's rating with a negative outlook.

33 In April 2017, Banco Popular initiated a private sale process with a view to achieving its sale to a strong competitor, which would restore its financial situation. The deadline for potential purchasers interested in acquiring Banco Popular to submit their bids was initially set at 10 June 2017 and then delayed until the end of June 2017.

34 On 5 May 2017, Banco Popular presented its financial report for the first quarter of 2017, reporting losses of EUR 137 million.

35 On 12 May 2017, the liquidity coverage requirement of Banco Popular dropped below the minimum threshold of 80% set by Article 460(2)(c) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

36 By letter of 16 May 2017, Banco Santander, SA informed Banco Popular that it could not make a concrete bid in the context of the private sale process.

37 On 16 May 2017, in a communication of a relevant fact to the Comisión nacional del mercado de valores (CNMV) (National Securities Market Commission (CNMV), Spain), Banco Popular stated that potential purchasers had expressed an interest in the private sale process, but that it had not received any concrete bids.

38 On 19 May 2017, FITCH downgraded Banco Popular's long-term rating.

39 On 23 May 2017, the Chair of the SRB, Ms Elke König, granted an interview to the television channel Bloomberg, in which she was questioned, inter alia, on the situation of Banco Popular.

40 In May 2017, several press articles reported on the difficulties faced by Banco Popular. By way of example, it is worth mentioning an article of 11 May 2017, published on the website *elconfidencial.com*, entitled 'Saracho orders the urgent sale of Popular to JP Morgan and Lazard due to risk of insolvency' (*Saracho encarga la venta urgente del Popular a JP Morgan y Lazard por riesgo de Quiebra*). That article states that the Chairman of the bank had instructed JP Morgan and Lazard to organise the urgent sale of the bank due to a risk of insolvency, as a result of the massive outflow of deposits by private and institutional clients, and that he considered that the only way of ensuring the viability of the bank was the complete and imminent sale of the entire group. The article states that, 'in view of persistent deposit outflows and the closure of external sources of financing, the bank ran a serious risk of insolvency and that [its Chairman] was therefore forced to activate the most drastic measure and gradually refrain from selling its assets in order to improve its own fund ratios and meet the requirements of the ECB'.

41 On 15 May 2017, an article published on the website *elconfidencial.com*, entitled 'The ECB inspects Banco Popular for two months in full sales process' (*El BCE inspecciona a Banco Popular durante dos meses en pleno proceso de venta*), reported that the sales plan for Banco Popular, implemented by its Chairman, took place after the ECB's inspection, which had confirmed the gap in provisions. According to that article, the ECB inspectors had concluded that Banco Popular's difficulties were associated with its stock deficit to cover its property exposure and that it was necessary to avoid occasional withdrawals of deposits. The inspectors also expressed their dissatisfaction with the presentation of the 2016 accounts.

42 On 31 May 2017, Reuters news agency published an article entitled 'EU warned of wind-down risk for Spain's Banco Popular'. That article states inter alia that, according to an EU official who remained anonymous, one of Europe's top bank watchdogs had warned EU officials that Banco Popular may need to be wound down if it failed to find a buyer. According to that article, that official also stated that the Chair of the SRB had recently issued an 'early warning' and had declared that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention.

43 On the same day, the SRB published a press release disputing the content of that article.

44 In the first days of June 2017, Banco Popular had to face massive liquidity outflows.

45 On the morning of 5 June 2017, Banco Popular submitted an initial request for emergency liquidity assistance to Banco de España (Bank of Spain), then a second request, in the afternoon, containing an extension of the amount requested on account of extremely acute liquidity

movements. On the basis of a request from the Bank of Spain and following the ECB's assessment on the same day as Banco Popular's request for emergency liquidity assistance, the Governing Council of the ECB did not raise any objections to urgent liquidity assistance to Banco Popular for the period up to 8 June 2017. Banco Popular received part of that emergency liquidity assistance, then the Bank of Spain stated that it was not in a position to provide additional emergency liquidity assistance to Banco Popular.

46 On 6 June 2017, DBRS and Moody's downgraded Banco Popular's rating.

Other facts prior to the adoption of the resolution scheme

47 On 23 May 2017, the SRB hired Deloitte as an independent expert to carry out a valuation of Banco Popular in accordance with Article 20 of Regulation No 806/2014.

48 On 24 May 2017, on the basis of Article 34 of Regulation No 806/2014, the SRB asked Banco Popular to supply the information required in order to carry out its valuation. On 2 June 2017, Banco Popular was also asked to supply information about the private sale process and to be ready to provide access to the secure virtual data room that it had established in the context of that process.

49 On 3 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/06, addressed to the Fondo de Reestructuración Ordenada Bancaria (FROB) (Fund for Orderly Bank Restructuring (FROB), Spain), concerning the marketing of Banco Popular. The SRB approved the immediate launching of the marketing of Banco Popular by the FROB and informed the latter of the requirements concerning the sale, in accordance with Article 39 of Directive 2014/59. In particular, the SRB instructed the FROB to contact the five potential purchasers which had been invited to present non-binding offers in the context of the private sale process.

50 Of the five potential purchasers, two decided not to participate in the marketing process and one was excluded by the ECB for prudential reasons.

51 On 4 June 2017, the two potential purchasers which had decided to participate in the marketing process, Banco Santander and Banco Bilbao Vizcaya Argentaria, SA (BBVA), signed a non-disclosure agreement and on 5 June 2017 were given access to the virtual data room.

52 On 5 June 2017, the SRB adopted a first valuation ('valuation 1'), pursuant to Article 20(5)(a) of Regulation No 806/2014, which had the objective of informing the determination whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met.

53 On 6 June 2017, the ECB made a 'failing or likely to fail' assessment of Banco Popular, after consulting the SRB, in accordance with the second subparagraph of Article 18(1) of Regulation No 806/2014.

54 In that assessment, the ECB stated that over the preceding months, Banco Popular had experienced a substantial deterioration of its liquidity position, primarily driven by a significant depletion of its deposit base. Banco Popular was confronted with material cash outflows across all customer segments. The ECB listed the events which had led to the liquidity problems faced by Banco Popular.

55 In that regard, the ECB noted that, in February 2017, when presenting its annual accounts, Banco Popular had disclosed the need for extraordinary provisions in the sum of EUR 5.7 billion, leading to losses of EUR 3.485 billion for 2016, and replaced its long-standing chairman who had initiated a revision of the bank's strategy. The announcement of additional provisions and year-end losses led to Banco Popular's rating being downgraded by DBRS on 10 February 2017 and caused significant concerns on the part of Banco Popular's customer base, which were reflected by significant unexpected deposit withdrawals and a high frequency of customer visits to the bank's branches.

56 The ECB also stated that the release by Banco Popular of an ad hoc disclosure on 3 April 2017, reporting on the outcome of several internal audits with a potentially significant impact on the bank's financial statements, and the confirmation that the bank's CEO would be replaced after less than one year in office, triggered another wave of deposit outflows. The ECB noted that that wave was also fuelled by:

– a downgrade of Banco Popular's rating by Standard & Poor's on 7 April 2017;

– an announcement by Banco Popular, on 10 April 2017, that it would not pay dividends and that a capital increase or corporate transaction could be required due to its tight capital position and the necessary alignment of the non-performing assets' coverage to its peers;

– a downgrade of Banco Popular's rating by Moody's on 21 April 2017;

– the disclosure of worse-than-expected results for the first quarter of 2017;

– continuous negative media coverage such as the articles of 11 May and 15 May 2017, referred to in paragraphs 40 and 41 above, suggesting that the Chairman of Banco Popular had mandated an urgent sale of the bank due to the imminent risk of bankruptcy or illiquidity, and that the bank was facing a significant additional need for provisioning resulting from an on-site inspection by the supervisor.

57 The ECB also found that deposits lost since 31 May 2017 were particularly relevant, after disclosure in the media of the fact that the bank could face wind-down if the current sale process was not successful within a very short period.

58 In addition, the ECB noted that, while Banco Popular had developed various additional liquidity generating measures over the preceding weeks and started to implement them, the magnitude of the realised and still expected inflows was insufficient to remedy the depletion of Banco Popular's liquidity position on the date of the assessment. The ECB also stated that, even with the recourse to the emergency liquidity assistance in respect of which the Governing Council of the ECB had not raised any objections on 5 June 2017, the liquidity situation on that date did not suffice to ensure Banco Popular's ability to meet its liabilities by 7 June 2017 at the latest.

59 The ECB considered that the measures put in place by Banco Popular had not been sufficient to reverse the deterioration of its liquidity position. It stated that, as an alternative measure to ensure its capacity to meet all liabilities as they fell due, Banco Popular was trying to implement a corporate transaction, namely its sale to a stronger competitor. However, the ECB considered that, in view of the deterioration of Banco Popular's liquidity position and the lack of evidence of its capacity to turn around its liquidity situation in the near future, together with the fact that

negotiations had so far not led to a positive outcome, confirmation of such a private transaction was not foreseeable in a time frame that would allow Banco Popular to be able to pay its debts or other liabilities as they fell due.

60 The ECB considered that, at the same time, there were no available supervisory or early intervention measures that could immediately restore the liquidity position of Banco Popular and allow it sufficient time to implement a corporate transaction or other solution. The measures available to the ECB as the competent authority under the national transposition of Article 104 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and of Articles 27 to 29 of Directive 2014/59, or of Article 16 of Regulation No 1024/2013, could not ensure that Banco Popular would be in a position to pay its debts or other liabilities as they fell due, given the extent and pace of the liquidity deterioration observed.

61 In conclusion, taking into account, in particular, the excessive deposit outflows, the speed at which liquidity had been lost from the bank and the inability of the bank to generate further liquidity, the ECB considered that there were objective elements indicating that Banco Popular was likely, in the near future, to be unable to pay its debts or other liabilities as they fell due. The ECB concluded that Banco Popular was deemed to be failing, or in any case likely to fail in the near future, in accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

62 On 6 June 2017, the Board of Directors of Banco Popular informed the ECB that it had reached the conclusion that the bank was likely to fail.

63 On the same day, the FROB issued a letter containing information on the marketing process ('the process letter') setting the deadline for the submission of bids at midnight on 6 June 2017.

64 Still on the same date, BBVA, one of the two potential buyers of Banco Popular, informed the FROB that it would not be making a bid.

65 Also on 6 June 2017, Deloitte submitted a second valuation ('valuation 2') to the SRB, drawn up pursuant to Article 20(10) of Regulation No 806/2014. The purpose of valuation 2 was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and to inform the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool. That valuation, inter alia, estimated the economic value of Banco Popular at EUR 1.3 billion in the best-case scenario, at minus EUR 8.2 billion in the worst-case scenario and at minus EUR 2 billion for the best estimate.

66 On 7 June 2017, Banco Santander submitted a concrete bid.

67 By letter of 7 June 2017, the FROB informed the SRB that Banco Santander had submitted a bid at 3.12 a.m. on 7 June and that the price offered by Banco Santander for the sale of Banco Popular shares was EUR 1. The FROB stated that its governing committee had selected Banco Santander as awardee of the competitive sale process of Banco Popular and had decided to propose to the SRB to designate Banco Santander as buyer in the SRB's decision on the adoption of a resolution scheme in respect of Banco Popular.

The resolution scheme for Banco Popular of 7 June 2017

68 On 7 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/08 concerning a resolution scheme in respect of Banco Popular ('the resolution scheme') on the basis of Regulation No 806/2014.

69 According to Article 1 of the resolution scheme, given that the conditions provided for in Article 18(1) of Regulation No 806/2014 had been met, the SRB decided to place Banco Popular under resolution as of the resolution date.

70 Accordingly, the SRB considered, first, that Banco Popular was failing or was likely to fail, second, that there were no alternative measures that could prevent the failure of Banco Popular within a reasonable time frame and, third, that resolution action in the form of a sale of business tool in respect of Banco Popular was necessary in the public interest. In that regard, the SRB stated that the resolution was a necessary and proportionate way to meet the two objectives referred to in Article 14(2) of Regulation No 806/2014, namely to achieve the continuity of the bank's critical functions and to avoid significant adverse effects on financial stability.

71 In Article 5.1 of the resolution scheme, the SRB decided the following:

'The resolution tool to be applied to [Banco Popular] shall consist in the sale of business pursuant to Article 24 of [Regulation No 806/2014] for transferring shares to a purchaser. The write-down and conversion of capital instruments will be exercised immediately before the application of the sale of business tool.'

72 Article 6 of the resolution scheme concerns the write-down of capital instruments and the sale of business tool. In Article 6.1, the SRB set out the measures which it had adopted pursuant to its write-down power provided for in Article 21 of Regulation No 806/2014.

73 Accordingly, in Article 6.1 of the resolution scheme, the SRB decided:

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

– subsequently, to convert all the principal amount of the additional Tier 1 instruments issued by Banco Popular and outstanding as at the date of the decision relating to the resolution scheme into newly issued shares of Banco Popular ('the New Shares I');

– subsequently, to write down to zero the nominal amount of the 'New Shares I', resulting in the cancellation of 100% of those 'New Shares I';

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

74 Article 6.3 of the resolution scheme provides that those write-down and conversion measures are based on valuation 2, as corroborated by the results of an open and transparent marketing process conducted by the Spanish resolution authority (the FROB).

75 In Article 6.5 of the resolution scheme, the SRB stated that it was exercising the powers conferred on it by Article 24(1)(a) of Regulation No 806/2014 concerning the sale of business tool, and ordered that the 'New Shares II' be transferred to Banco Santander free and clear of any rights or liens of any third party, in consideration of a purchase price of EUR 1. It was specified that the purchaser had already consented to the transfer.

76 The SRB also stated that the transfer of the 'New Shares II' should be made on the basis of the purchaser's binding offer of 7 June 2017 and implemented by the FROB under Ley 11/2015 de recuperación y resolución de entidades de crédito y empresas de servicios de inversión (Law 11/2015 on the recovery and resolution of credit institutions and investment firms) of 18 June 2015 (BOE No 146 of 19 June 2015, p. 50797).

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

78 On 7 June 2017, at 6.30 a.m., the Commission adopted Decision (EU) 2017/1246 endorsing the resolution scheme for [Banco Popular] (OJ 2017 L 178, p. 15) ('the contested decision') and notified it to the SRB. Consequently, the resolution scheme entered into force on the same day.

79 Recital 4 of the contested decision states the following:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation (EU) No 806/2014.'

80 On the same day, the FROB adopted the necessary measures to implement the resolution scheme in accordance with Article 29 of Regulation No 806/2014. In that context, the FROB approved the transfer of Banco Popular's new shares resulting from the conversion of the Tier 2 instruments ('the New Shares II') to Banco Santander.

Facts subsequent to the adoption of the resolution decision

81 On 14 June 2018, Deloitte sent to the SRB the valuation of difference in treatment, provided for in Article 20(16) to (18) of Regulation No 806/2014, carried out in order to determine whether the shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings ('valuation 3'). On 31 July 2018, Deloitte sent to the SRB an addendum to that valuation, correcting some formal errors.

82 On 28 September 2018, following a merger by acquisition, Banco Santander became the universal successor of Banco Popular.

83 On 17 March 2020, the SRB adopted decision SRB/EES/2020/52 determining whether compensation needed to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular had been effected. A communication concerning that decision was published on 20 March 2020 in the *Official Journal of the European Union* (OJ 2020 C 91, p. 2). In that decision, the SRB considered that the shareholders and creditors who were affected by the resolution of Banco Popular were not entitled to compensation from the SRF under Article 76(1)(e) of Regulation No 806/2014.

Procedure and forms of order sought

84 By application lodged at the Court Registry on 17 August 2017, the applicants brought the present action.

85 By documents lodged at the Court Registry on 20 November and 18 December 2017, respectively, Banco Santander and the SRB applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. By orders of 12 April 2019, the President of the Eighth Chamber of the General Court granted the SRB and Banco Santander leave to intervene. The interveners submitted their statements in intervention, and the applicants submitted their observations on those statements within the prescribed time limits.

86 By letter of 6 July 2018, in the context of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure of the General Court, the Court put written questions to the main parties. The main parties complied with that request within the prescribed time limit.

87 By letter lodged at the Court Registry on 31 October 2019, the applicants produced new evidence pursuant to Article 85(3) of the Rules of Procedure. The Commission and the SRB lodged their observations within the prescribed time limit.

88 Following a change in the composition of the Chambers of the General Court, in accordance with Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was, accordingly, allocated.

89 Acting on a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

90 By letter lodged at the Court Registry on 16 October 2020, the applicants produced new evidence pursuant to Article 85(3) of the Rules of Procedure. The Commission, the SRB and Banco Santander lodged their observations within the prescribed period.

91 On 15 March 2021, the Court, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, invited the Commission to produce various documents. By letter of 30 March 2021, the Commission stated that it could not accede to the Court's request, but that it would be in a position to produce the documents requested by way of a measure of inquiry.

92 On 15 April 2021, the Court, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, invited the SRB to produce various documents. By letter of 20 April 2021, the SRB replied that the documents requested were in part confidential and that they could be produced if the Court adopted a measure of inquiry.

93 By order of 21 May 2021, the Court ordered the Commission, on the basis, first, of the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and, second, of Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, to produce the full versions of the resolution scheme, valuation 2 and the ECB's assessment of 6 June 2017 that Banco Popular was failing or was likely to fail. The Court also ordered the SRB to produce non-confidential and confidential versions of the letter from Banco Popular to the ECB dated 6 June 2017, including the annex thereto, and of the ECB's letter of 18 May 2017 sent to Banco Popular.

94 By letter lodged at the Court Registry on 4 June 2021, the applicants produced new evidence pursuant to Article 85(3) of the Rules of Procedure. The other parties were invited to submit their observations on that request at the hearing.

95 By order of 16 June 2021, the Court, first, removed from the case file the confidential versions of the documents produced by the Commission and the SRB pursuant to the order of 21 May 2021 and, second, sent the other parties the letter of 6 June 2017 from Banco Popular to the ECB without its annex.

96 Since two members of the Third Chamber, Extended Composition were unable to sit, the President of the General Court designated two other Judges to complete the Chamber.

97 The parties presented oral argument and answered oral questions put to them by the Court at the hearing on 24 June 2021.

98 The applicants claim that the Court should:

– annul the contested decision or, in the alternative, Article 1 thereof;

– order the Commission to pay the costs.

99 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

100 Banco Santander and the SRB contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

101 In support of their action, the applicants put forward six pleas in law. The first plea alleges that the Commission failed to examine the resolution scheme before endorsing it. The second plea alleges infringement of the obligation to state reasons. The third plea alleges breach of professional secrecy and of the obligation of good administration. The fourth plea alleges manifest errors of assessment in the application of Articles 14, 18, 20 to 22 and 24 of Regulation No 806/2014. The fifth plea alleges infringement of the right to property. The sixth plea alleges infringement of the right to be heard.

102 As a preliminary point, it should be noted that, as regards the scope of the review carried out by the Court, the applicants claim that the Court must carry out a full and thorough review of the resolution scheme.

103 The Commission submits that, in actions for annulment, the Courts of the European Union are required, when a complex technical question arises, to examine the accuracy of the findings of fact and law on which the contested measure is based, to verify that there has been no manifest error or misuse of powers and to verify that the defendant clearly did not exceed the limits of its discretion.

104 In that regard, it should be noted that the case-law has defined the scope of the review carried out by the Court both in situations in which the contested measure is based on an assessment of highly complex scientific and technical facts, and in the case of complex economic assessments.

105 First, with regard to situations in which the EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts, in order to determine the nature and scope of the measures which they adopt, review by the EU Courts is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU Courts cannot substitute its assessment of scientific and technical facts for that of the authorities of the European Union on which alone the FEU Treaty has placed that task (judgments of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, paragraph 60, and of 7 March 2013, *Bilbaína de Alquitranes and Others* v *ECHA*, T-93/10, EU:T:2013:106, paragraph 76; see, also, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 163 and the case-law cited).

106 Second, as regards the review by the EU Courts of the complex economic assessments made by the EU authorities, that review is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. In the context of this review, therefore, it is not for the EU Courts to substitute its economic assessment for that of the competent EU authority (see, to that effect, judgments of 11 July 1985, *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraph 34; of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 100 and the case-law cited; and of 16 January 2020, *Iberpotash* v *Commission*, T-257/18, EU:T:2020:1, paragraph 96 and the case-law cited).

107 Since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, it must be concluded that the principles stemming from the case-law referred to in paragraphs 105 and 106 above apply to the review which the Court is called upon to carry out.

108 However, while the SRB is recognised as having a margin of discretion with regard to economic and technical matters, that does not mean that the EU Courts must refrain from reviewing the SRB's interpretation of the economic data on which its decision is based. As the Court of Justice has held, even in the case of complex assessments, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it (see judgments of 22 November 2007, *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 57 and the case-law cited; of 26 March 2019, *Commission* v *Italy*, C-621/16 P, EU:C:2019:251, paragraph 104 and the case-law cited; and of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 115 and the case-law cited).

109 In that regard, in order to establish that the SRB committed a manifest error in assessing the facts such as to justify the annulment of the resolution scheme, the evidence adduced by the applicants must be sufficient to make the factual assessments used in that scheme implausible (see, by analogy, judgments of 14 June 2018, *Lubrizol France* v *Council*, C-223/17 P, not published, EU:C:2018:442, paragraph 39; of 12 December 1996, *AIUFFASS and AKT* v *Commission*, T-380/94, EU:T:1996:195, paragraph 59; and of 13 December 2018, *Comune di Milano* v *Commission*, T-167/13, EU:T:2018:940, paragraph 108 and the case-law cited).

First plea in law, alleging that the Commission failed to examine the resolution scheme before endorsing it

110 The applicants submit, in essence, that, in view of the short time frame available to the Commission to endorse the resolution scheme, it was not in a position to carry out an adequate assessment of the discretionary aspects of that scheme, in breach of the principles governing delegation of power established in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). The applicants submit that the Commission merely 'rubber-stamped' the resolution scheme, thereby unlawfully delegating the exercise of discretionary power to the SRB.

111 The Commission submits that from 2 May 2017, the date on which it was informed by the SRB that Banco Popular was experiencing liquidity problems and that resolution action might need to be taken, it was involved in preparations for all possible outcomes. The Commission is present as a permanent observer within the SRB's decision-making bodies. It had access to all the documents and its experts helped the SRB to draw up the resolution scheme. It claims that it could therefore have carried out the required assessment of that scheme within the time frame available to it.

112 It should be noted that, in paragraph 41 of the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18), the Court of Justice stated that, in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), it emphasised, in essence, that the consequences resulting from a delegation of powers were very different depending on whether it involved clearly defined executive powers the exercise of which could, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involved a 'discretionary power implying a wide margin of discretion which [could], according to the use which [was] made of it, make possible the execution of actual economic policy'.

113 The Court of Justice added that it also stated in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7), that a delegation of the first kind could not appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brought about an 'actual transfer of responsibility' (judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 42).

114 In order to assess the scope of the present plea, it is necessary to specify the procedure for adopting the resolution schemes established by Regulation No 806/2014 and, in particular, what the role conferred on the Commission is.

115 In that regard, it should be noted that the procedure for adopting resolution actions established by the legislature in Regulation No 806/2014 followed the observations made by the Council Legal Service in an opinion of 7 October 2013 on the Commission's proposal for a regulation, which

sought to assess the compatibility of the procedure initially laid down in the proposal for a regulation with the principles governing the delegation of powers, as interpreted in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

116 Originally, in the proposal for a regulation examined in that opinion, the division of powers between the Commission and the SRB differed from that ultimately adopted in Regulation No 806/2014. In particular, the Commission had the power to place an entity under resolution, to establish a framework for the use of resolution tools and to decide whether and how the powers to write down or convert capital instruments were to be used, and the SRB, in accordance with the framework established by the Commission, was competent to adopt decisions addressed to the national resolution authorities.

117 In its opinion, the Council Legal Service stated that certain measures which the SRB could include in a resolution decision were not defined with sufficient precision. The Council Legal Service considered that the general economy and structure of the proposal for a regulation, whereby the Commission would be endowed with the power to adopt the basic resolution decisions and the SRB would be held to act within the criteria laid down by the Commission itself, is in conformity with EU law as interpreted in the judgment of 13 June 1958, *Meroni* v *High* Authority (9/56, EU:C:1958:7). However, it considered that the powers of the SRB to implement resolution tools and decisions seem at certain instances to be of a rather discretionary nature, thus going beyond the exercise of purely technical powers. Therefore, it concluded that it would be necessary either to include in the regulation further specifications in order properly to frame the application by the SRB of resolution tools or to involve in the exercise of those powers an EU institution vested with executive competences.

118 The EU legislature, taking that opinion from the Council Legal Service into consideration, amended the mechanism for adopting resolution actions. Given that the adoption of a resolution action involves a margin of discretion, the legislature reserved that power to an institution and not to the SRB.

119 That is apparent, in particular, from recitals 24 and 26 of Regulation No 806/2014 which state:

> ‘(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 and the Commission, as institutions which may exercise implementing powers, in accordance with Article 291 TFEU. The assessment of the discretionary aspects of the resolution decisions taken by the [SRB] 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 [SRB] of the existence of a public interest and to assess any material change to the amount of the [SRF] to be used in a specific resolution action. …
>
> (26) … The [SRB], 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 [SRB] 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 [SRB] enters into force only if, within 24 hours after its adoption by the [SRB], 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 [SRB'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 [SRF] as proposed by the [SRB]. … As an observer to the meetings of the [SRB], the Commission should, on an ongoing basis, check that the resolution scheme adopted by the [SRB] complies fully with this Regulation, balances appropriately the different objectives and interests at stake, respects the public interest and that the integrity of the internal market is preserved. Considering that the resolution action requires a very speedy decision-making process, the Council and the Commission should cooperate closely and the Council should not duplicate the preparatory work already undertaken by the Commission …'

120 Thus, as regards the resolution procedure, Article 18(7) of Regulation No 806/2014 provides that the Commission must either endorse the resolution scheme or object to its discretionary aspects and that a resolution scheme may enter into force only if the Council or the Commission has not raised any objections within 24 hours of its submission by the SRB.

121 Therefore, pursuant to Article 18(7) of Regulation No 806/2014, it is necessary for an EU institution, namely the Commission or the Council, to endorse the resolution scheme with regard to its discretionary aspects in order for it to produce legal effects. The EU legislature thus conferred on an institution legal and political responsibility to determine the European Union's resolution policy, thereby avoiding an 'actual transfer of responsibility' within the meaning of the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

122 Accordingly, the Commission must have actually assessed discretionary aspects of the resolution scheme before its entry into force. Otherwise, as the applicants claim, the Commission unlawfully delegated its discretion to the SRB in breach of the principles governing the delegation of power stemming from the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

123 If, as the applicants maintain, the resolution scheme entered into force following the Commission's endorsement which was not based on an assessment, but on a mere validation, that would have the consequence that the SRB assessed only the discretionary aspects involving a choice of economic policy and therefore of the need to implement the resolution, which would not be consistent with the principles laid down in the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

124 In that regard, in recital 4 of the contested decision, the Commission stated that it was in agreement with the resolution scheme, in particular with the reasons put forward by the SRB to justify the need for resolution action in the public interest.

125 Thus, the Commission endorsed the SRB's decision to place Banco Popular under resolution, taking the view, inter alia, that the choice of the sale of business tool was necessary and proportionate in order to attain the objectives of ensuring the continuity of critical functions and to avoid significant negative effects on financial stability.

126 By their arguments, the applicants submit that, having regard to the course of the procedure, the Commission merely endorsed the resolution scheme, without examining it, unlawfully delegating the exercise of its discretionary power to the SRB.

127 In the first place, the applicants claim that the resolution scheme was transmitted to the Commission on 7 June 2017 at 5.13 a.m. and entered into force on the same day at 6.30 a.m. They submit that in the short time available it was simply impossible for the Commission to have discharged its duty to conduct a proper assessment of the discretionary aspects of the resolution scheme.

128 In the second place, the applicants state that the minutes of the Commission meeting of 7 June 2017 indicate that the resolution scheme was endorsed at the end of an urgent written procedure. According to the applicants, the Directorate-General for Financial Stability, Financial Services and the Capital Markets Union should have examined whether the SRB had reached appropriate conclusions with regard to the discretionary aspects of the resolution scheme and should then have made its recommendation to the Commission to endorse the resolution scheme. That recommendation should have been communicated to the Commissioners' cabinets, to all the Directorates-General and to the Legal Service, specifying a time frame within which objections had to be registered, and, in the absence of objections, the decision should have been deemed to have been adopted in accordance with Article 12 of the Rules of Procedure of the Commission. They argue that it is impossible for the Commission, by following that process in a period of just 77 minutes, to carry out any proper assessment of the discretionary aspects of the resolution scheme. Article 18(7) of Regulation No 806/2014 allows the Commission a period of 24 hours.

129 It should be noted that the applicants do not dispute that the resolution scheme had to be adopted as a matter of urgency.

130 It is apparent from Article 30 of Regulation No 806/2014, first, that the SRB is to inform the Commission of any action it takes in order to prepare for resolution and, second, that, in the exercise of their respective responsibilities under that regulation, the SRB and in particular the Commission are to cooperate closely, in particular in the resolution planning, early intervention and resolution phases, and that they are to provide each other with all information necessary for the performance of their tasks.

131 In addition, Article 43(3) of Regulation No 806/2014 provides that the Commission is to designate a representative entitled to participate in the meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that its representative is entitled to participate in the debates and is to have access to all documents.

132 As the SRB and the Commission state, the latter was involved in the various phases preceding the adoption of the resolution scheme from May 2017, in accordance with its obligations under Regulation No 806/2014.

133 In that regard, the Commission sets out in the defence the various phases of its participation in the preparatory stages for the adoption of the resolution scheme. It mentions, in particular, several meetings with the SRB from 22 May 2017 and daily meetings from 30 May 2017, the reception, on 6 and 7 June 2017, of preliminary resolution schemes sent by the SRB and the activity of its various services from 6 June 2017 at 5.30 p.m. until 7 June at 5.13 a.m.

134 The Commission also states that, as a permanent observer, it had access to all documents relevant to the preparation of the resolution scheme, in particular to those concerning the financial situation of Banco Popular, and that its experts participated in the preparation of the resolution scheme with the SRB, notably by drawing up a template resolution scheme. It adds that, as early as 6 June 2017, its experts were present on the SRB's premises in order to help the latter draw up the resolution scheme.

135 In that regard, in response to a measure of organisation of procedure, first, the Commission produced a list of minutes of meetings of executive sessions of the SRB in which it participated since 22 May 2017. That list attests to the Commission's participation in three meetings on 24 May, 2 June, and 6 and 7 June 2017. Second, the Commission produced a list of informal internal reports of its services in connection with the preparation of the resolution scheme, dated 22, 24 and 29 May, and 2 and 6 June 2017. Third, the Commission produced a number of emails exchanged between its services and the SRB, dated 1, 3, 6 and 7 June 2017, relating to the transmission of resolution models according to the sale of business tool scenario and preliminary drafts of the resolution scheme. Those emails attest, in particular, to the receipt by the Commission of preliminary drafts of the resolution scheme on 6 June 2017 at 6.59 p.m. and on 7 June 2017 at 12:33 a.m.

136 It follows that the Commission's services participated in several meetings with the SRB and that it had become aware of and participated in the drafting of the preliminary resolution schemes before 7 June 2017 at 5.13 a.m.

137 At the hearing, the applicants acknowledged that the Commission had participated in the preparatory stages of the adoption of the resolution scheme. However, they maintained that the Commission had not adduced any evidence that the discussions had focused on the final version of the resolution scheme.

138 In view of its participation in the preparatory stages leading to the adoption of the resolution scheme, the Commission was already aware of the difficulties encountered by Banco Popular, the measures envisaged by the SRB to remedy those difficulties and the essential content of the resolution scheme. The applicants cannot therefore maintain that it had not already had time to evaluate the resolution scheme. The fact that the discussions during the preparatory stages did not concern the final drafting of the resolution scheme is irrelevant in that regard.

139 It follows that this plea is based on an erroneous assumption on the part of the applicants that the Commission's intervention in the preparatory stages leading to the adoption of the resolution scheme was limited to the interval between the SRB sending the resolution scheme on 7 June 2017 at 5.13 a.m. and its endorsement by the Commission.

140 Therefore, in so far as it relies on an incorrect assumption, the applicants' argument that the Commission merely endorsed the resolution scheme without carrying out a proper assessment of the discretionary aspects of that scheme, in breach of the principles governing delegation of power, must be rejected.

141 That conclusion is not called into question by the other arguments put forward by the applicants.

142 As regards the applicants' argument that the details of the resolution scheme were different from those provided in the resolution plan, adopted under Article 8 of Regulation No 806/2014 and endorsed in December 2016, suffice it to state that that argument is ineffective. The resolution scheme adopted by the SRB and endorsed by the Commission is not based on that plan, as is stated in recitals 44 to 46 of the resolution scheme.

143 As regards the applicants' argument that Article 18(7) of Regulation No 806/2014 allows the Commission a period of 24 hours within which to adopt the resolution scheme, suffice it to state that this is a maximum period. As the Commission points out, a period of 24 hours is the longest period available to it when a resolution takes place at weekends. Where, as in the present case, a credit institution's failure occurs on a weekday, resolution action must be taken during the night in order to ensure the continuity of that institution's critical functions. Thus, the resolution scheme was to be adopted as a matter of urgency before 7 June 2017 at 7.00 a.m., when the markets opened.

144 Consequently, the first plea in law must be rejected as unfounded.

Second plea in law, alleging breach of the obligation to state reasons

145 The applicants submit that the reasons given in recital 4 of the contested decision are inadequate. First, they submit that the statement in recital 4 of the contested decision refers generally to the reasons put forward by the SRB, without identifying any particular reason or specific provision of the resolution scheme. Second, the 'reasons' relating to the public interest criterion do not disclose anything about the Commission's own assessment, but merely endorse the resolution scheme. Third, the contested decision contains no reasons regarding the discretionary aspects of the resolution scheme which the Commission was required to assess. The Commission merely stated that it endorsed the resolution scheme, without providing any further explanation or reasoning.

146 It is settled case-law of the Court of Justice that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgments of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraphs 85 and 87 and the case-law cited, and of 21 October 2020, *ECB* v *Estate of Espírito Santo Financial Group*, C-396/19 P, not published, EU:C:2020:845, paragraph 41 and the case-law cited).

147 Furthermore, the degree of precision of the statement of the reasons for a measure must be weighed against practical realities, and the time and technical facilities available for taking the measure (see judgments of 6 November 2012, *Éditions Odile Jacob* v *Commission*, C-551/10 P, EU:C:2012:681, paragraph 48 and the case-law cited, and of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 139 and the case-law cited; judgment of 27 January 2021, *KPN* v *Commission*, T-691/18, not published, EU:T:2021:43, paragraph 162).

148 It should be borne in mind that it is apparent from recital 4 of the contested decision that:

'The Commission agrees with the resolution scheme. In particular, it agrees with the reasons provided by the SRB of why resolution is necessary in the public interest in accordance with Article 5 of Regulation [No 806/2014].'

149 In addition, first, in recital 2 of the contested decision, the Commission referred to the fact that the SRB had stated in the resolution scheme that all the conditions for initiating a resolution procedure set out in the first subparagraph of Article 18(1) of Regulation No 806/2014 were satisfied so far as concerns Banco Popular and that it had assessed the reasons why resolution action was necessary in the public interest. Second, in recital 3 of the contested decision, the Commission stated that the resolution scheme, in accordance with Article 18(6) of Regulation No 806/2014, placed Banco Popular under resolution and determined the application of the sale of business tool, and that it also set out the reasons why all those elements were sufficient.

150 It follows that the Commission, in the contested decision, expressly referred to the reasons why the SRB had considered that the conditions for adopting the resolution scheme were met and that the sale of business tool should be applied. Thus, the endorsement of the resolution scheme set out in recital 4 of the contested decision must be read in the light of those other recitals and concerns all of those reasons. In that recital, the Commission expressly stated that it agreed with the reasons set out in the resolution scheme justifying the adoption of resolution action in respect of Banco Popular, in particular as regards the public interest criterion. Thus, contrary to the applicants' submission, the Commission expressly referred in the contested decision to the discretionary aspects of the resolution scheme, in particular compliance with the public interest criterion.

151 Thus, it must be concluded that the resolution scheme and its statement of reasons form part of the context in which the contested decision was adopted.

152 However, as the Commission points out, the applicants do not claim that the resolution scheme is not supported by an adequate statement of reasons.

153 In addition, it should be borne in mind that, pursuant to Article 18(7) of Regulation No 806/2014, the Commission must either 'endorse' the resolution scheme or object to its discretionary aspects.

154 It follows that, where, as in the present case, the Commission endorses the resolution scheme, the statement of reasons for its decision may be limited to indicating that it agrees with the reasons contained in the scheme. Any other additional justification for its endorsement could consist only of a repetition of the elements already contained in the resolution scheme. According to Article 18(7) of Regulation No 806/2014, the Commission does not have to repeat the SRB's analysis in its decision, but only endorse it.

155 Furthermore, in accordance with the case-law cited in paragraph 147 above, account must be taken of the very short period available to the Commission under Article 18(7) of Regulation No 806/2014 in which to adopt its decision from the transmission of the resolution scheme by the SRB.

156 It follows that a statement of reasons by which the Commission indicates that it agrees with the content of the resolution scheme and with the reasons put forward by the SRB to justify its adoption, must be considered sufficient to justify an endorsement.

157 Consequently, the second plea in law must be rejected as unfounded.

Third plea in law, alleging infringement of the obligations of professional secrecy and good administration

158 The applicants submit that there was a breach of the principle of confidentiality and professional secrecy, laid down in Article 339 TFEU, and of the right to good administration, enshrined in Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter').

159 According to the applicants, the interview given on 23 May 2017 by the Chair of the SRB to the Bloomberg television channel and the Reuters article of 31 May 2017, referred to in paragraph 42 above, constitute an infringement of the obligation of confidentiality and professional secrecy attributable to the SRB or the Commission. They submit that the disclosures of 23 and 31 May 2017 caused Banco Popular's serious liquidity crisis and, therefore, led to its resolution. The applicants rely on a counterfactual scenario according to which, in the absence of those disclosures and therefore of a liquidity crisis, the resolution scheme would not have been adopted or would have been different in content.

160 The Commission submits that, in order for a resolution scheme to be adopted and endorsed, it is sufficient that the conditions of the resolution are met and that the reasons which led to that situation do not affect the validity of the contested decision. The SRB also contends that the events criticised by the applicants cannot affect the lawfulness of the contested decision, in so far as the question of who or what caused Banco Popular's failure is irrelevant.

161 It should be noted that, even if the applicants had established that the SRB or the Commission had disclosed confidential information to the press, according to settled case-law, an irregularity of that kind may lead to the annulment of the decision at issue if it is established that the content of that decision would have differed if that irregularity had not occurred (see judgments of 6 July 2000, *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 283 and the case-law cited; of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 416 and the case-law cited; and of 3 March 2011, *Siemens* v *Commission*, T-110/07, EU:T:2011:68, paragraph 402 and the case-law cited).

162 In that regard, as the Commission and the SRB submit, a resolution scheme is validly adopted where the conditions laid down by Regulation No 806/2014 are satisfied, irrespective of the reasons that caused the entity in question to fail or to be likely to fail.

163 The applicants do not dispute that the conditions laid down in Article 18 of Regulation No 806/2014 were satisfied at the time the resolution scheme was adopted.

164 Thus, the SRB, having taken the view that the conditions laid down in Article 18(1) of Regulation No 806/2014 were satisfied, adopted the resolution scheme and the Commission, having considered that the resolution scheme was consistent with the provisions of Regulation No 806/2014, endorsed that scheme. The circumstances that led to Banco Popular fulfilling the conditions justifying the adoption of the resolution scheme, in particular the condition that it was failing or was likely to fail, are irrelevant.

165 Consequently, an alleged causal link, relied on by the applicants, between the disclosures of 23 and 31 May 2017 and Banco Popular's liquidity crisis is irrelevant and cannot lead to the annulment of the contested decision.

166 It follows that the argument raised by the applicants at the hearing that the Commission infringed the principle of good administration by approving the resolution scheme, even though the resolution of Banco Popular resulted from the infringement by the SRB of its obligations of confidentiality and professional secrecy, is also ineffective.

167 Moreover, the applicants cannot reasonably claim that the disclosures of 23 and 31 May 2017 caused the serious liquidity crisis in Banco Popular and that, if there had been no unlawful disclosure and therefore no liquidity crisis at the beginning of June 2017, Banco Popular's resolution would not have been required or would have been different.

168 Those arguments are based on a partial and erroneous presentation of the facts giving rise to Banco Popular's liquidity crisis and the causes that led to the situation in which it is failing or is likely to fail.

169 Thus, it must be recalled that, in its assessment of the situation in which Banco Popular is failing or is likely to fail, referred to in paragraphs 53 to 61 above, the ECB referred to the various events giving rise to the deterioration of Banco Popular's liquidity situation.

170 In recital 24 of the resolution scheme, the SRB cited other circumstances which had led to the rapid deterioration of Banco Popular's liquidity situation, that is to say:

– in February 2017, Banco Popular disclosed the need for extraordinary provisions amounting to EUR 5.7 billion leading to a consolidated loss of EUR 3.485 billion and appointed a new chairman;

– on 10 February 2017, DBRS downgraded Banco Popular's rating;

– on 3 April 2017, Banco Popular released an ad hoc public statement on the outcome of internal audits potentially having a significant impact on its financial statements and confirmed the replacement of its CEO less than one year after the latter took office;

– on 7 April 2017, Standard & Poor's and, on 21 April, Moody's, downgraded Banco Popular's rating;

– on 12 May 2017, Banco Popular breached the liquidity coverage requirement of 80% and was unable to re-establish compliance with the regulatory limit thereafter;

– continuous negative press coverage of Banco Popular's financial results and of the alleged imminent risk of bankruptcy or illiquidity resulted in an increase of deposit outflows;

– on 6 June 2017, DBRS and Moody's downgraded Banco Popular's rating.

171 The SRB stated that all those circumstances had caused significant withdrawals of deposits.

172 It is apparent from those facts, which are not disputed by the applicants, that Banco Popular's situation had already deteriorated well before 23 May 2017 and that Banco Popular's liquidity crisis was caused by multiple factors which originated in the bank's poor results announced in February and April 2017. In particular, the liquidity coverage requirement for Banco Popular had not been in compliance with the legal requirements since 12 May 2017.

173 It should be noted that the applicants cannot ignore all the objective circumstances that caused Banco Popular's liquidity problems, particularly since April 2017. They cannot reasonably argue that the declaration of 23 May 2017 and the article of 31 May 2017, even if they involved a breach of the principle of confidentiality on the part of the SRB or the Commission, were the cause of Banco Popular's liquidity crisis and that, had it not been for those statements, the resolution would not have been necessary.

174 It follows that the counterfactual scenario relied on by the applicants and contained in their expert report annexed to the application, seeking to establish that, if there had been no unlawful disclosure or leak and therefore no liquidity crisis at the beginning of June 2017, Banco Popular's resolution would not have been required or would have been different, is based on a false premiss.

175 In so far as the solutions envisaged in the expert report annexed to the application are based on the purely theoretical assumption that Banco Popular would not have had to face a liquidity crisis and envisage a situation in which Banco Popular would have had to face a capital shortage, it must be concluded that that counterfactual scenario is irrelevant.

176 It is also apparent that the new evidence lodged by the applicants with the Court Registry on 31 October 2019, pursuant to Article 85(3) of the Rules of Procedure, consisting of a letter of 30 May 2017 from Pacific Investment Management Company LLC (PIMCO) to Deutsche Bank, concerning the existence of an alternative solution to resolution in the context of that counterfactual scenario, is not relevant to the outcome of the case.

177 In any event, the applicants have not established the existence of an infringement of the obligation of confidentiality or of professional secrecy attributable to the Commission.

178 By their first complaint, the applicants claim that the EU legislature has conferred significant bank resolution powers on the SRB and that the mere suggestion that it is in the process of examining whether it must apply its powers to a particular entity constitutes a market significant event, leading investors, creditors and depositors to take protective steps to avoid loss. Therefore, strict observance by the SRB of the principle of professional secrecy is essential and Article 88(1) of Regulation No 806/2014 imposes an obligation of professional secrecy on the SRB and its officials.

179 In that regard, they submit that the interview given on 23 May 2017 by the Chair of the SRB to the television channel Bloomberg, according to which the SRB was 'watching' Banco Popular, constituted information that the SRB was examining the bank, within the meaning of recital 116 of Regulation No 806/2014, and is attributable to the SRB. Consequently, that statement constitutes an infringement by the SRB of the obligations of professional secrecy and good administration.

180 It should be noted that, by that complaint, the applicants allege an infringement of the obligations of professional secrecy and confidentiality on the part of the SRB and not the Commission. However, since the SRB is not a party to the present dispute, that complaint must be rejected as ineffective.

181 In that regard, by letter lodged at the Court Registry on 4 June 2021, the applicants submitted evidence concerning, first, an order of the Juzgado Central de Instruccion nº 4 de la Audiencia Nacional (Central Court of Preliminary Investigation No 4 of the National High Court, Spain) of 19 May 2021, providing for the Chair of the SRB to be heard in connection with her statements during the interview granted to Bloomberg and, second, an article from *elconfidencial* of

27 May 2021 in which it is stated that the President of the FROB in the same proceedings before the Audiencia Nacional (National High Court) complained about those statements of the Chair of the SRB.

182 Suffice it to state that since those documents concern the SRB, and not the Commission, they are not relevant to the outcome of the present dispute.

183 By their second complaint, the applicants submit that an article published by Reuters on 31 May 2017 citing an 'EU official', according to which the SRB was following Banco Popular 'with a view to possible intervention', constitutes an infringement of the obligation of professional secrecy attributable to the SRB or to officials of other EU institutions, such as the Commission, and an infringement of the right to good administration.

184 In that regard, for the same reason as the one set out in paragraph 180 above, the applicants' arguments seeking to impute to the SRB the comments attributed to an anonymous EU official, reported in that article, and to establish that that official acted in breach of Article 88 of Regulation No 806/2014, must be rejected as ineffective.

185 Article 339 TFEU provides:

'The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.'

186 According to the case-law, while this provision is mainly aimed at information collected from undertakings, the words 'in particular' show that it is a general principle which applies also to other confidential information (see, by analogy, judgment of 3 March 2011, *Siemens* v *Commission*, T-110/07, EU:T:2011:68, paragraph 400 and the case-law cited).

187 Furthermore, it is apparent from recital 116 of Regulation No 806/2014 that:

'Resolution actions should be properly notified and, subject to the limited exceptions laid down in this Regulation, made public. However, as information obtained by the [SRB], the national resolution authorities and their professional advisers during the resolution process is likely to be sensitive, before the resolution decision is made public, that information should be subject to the requirements of professional secrecy. The fact that information on the contents and details of resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action. However, information that the [SRB] and the national resolution authorities are examining a specific entity could be enough to have negative effects on that entity. It is therefore necessary to ensure that there are appropriate mechanisms for maintaining the confidentiality of such information, such as the content and details of resolution plans and the result of any assessment carried out in that context.'

188 It is appropriate to recall the content of the article published by Reuters on 31 May 2017, entitled 'EU warned of wind-down risk for Spain's Banco Popular'. That article states that, according to an anonymous EU official, one of Europe's top bank watchdogs had warned EU officials that Banco

Popular may need to be wound down if it failed to find a buyer and that the Chair of the SRB had recently issued an 'early warning'. According to that article, that official also stated that the Chair of the SRB had stated that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention, and it added that the bank's merger bid may be fruitless.

189 That Reuters article also states that, according to another source, also anonymous, general preparations were under way, although concrete steps had still not been taken. According to that article, a spokesperson for Banco Popular had stated that the bank was working on several plans, including a merger, a capital hike and asset sales.

190 It should also be noted that that article mentions the SRB's press release, dated the same day, in which the SRB stated that it was not commenting on the specific difficulties of a bank, that it could not confirm the interpretations regarding alleged quotes made by its Chair and that it never issued warnings about banks.

191 It must be concluded that the applicants have not put forward any argument capable of establishing that that article gave rise to a breach of the obligation of professional secrecy attributable to the Commission.

192 In the first place, the comments of that EU official, reported in that article, did not relate to confidential information which could be known only to Members of the Commission.

193 Thus, first, as regards the official's assertion that they had been informed that Banco Popular could be liquidated if it did not succeed in finding a purchaser, suffice it to note that that information was already public.

194 As is indicated in paragraphs 40 to 42 above, several press articles already mentioned in May the fact that Banco Popular was in difficulty and that it had initiated a private sale process.

195 It is apparent in particular from an article of 11 May 2017, published on the website *elconfidencial.com*, that the Chairman of Banco Popular had ordered the urgent sale of the bank because of a risk of insolvency. The reference in the article of 31 May 2017 to the fact that the EU officials were informed by 'one of Europe's top bank watchdogs' seems to correspond to the information given in that article, according to which, as a result of a serious risk of insolvency due, in particular, to the continued outflow of deposits, the Chairman of Banco Popular had been forced to implement the sale process in order to meet the ECB's requirements. In addition, an article of 15 May 2017, published on the website *elconfidencial.com*, stated that the plan to sell Banco Popular had been implemented by its Chairman after the ECB's inspection.

196 Second, the official mentioned an 'early warning' issued by the Chair of the SRB. Suffice it to state that it is not for the SRB to make such an assertion, a point which the SRB recalled, moreover, in its press release of 31 May 2017.

197 Third, as regards that official's assertion that 'the Chair of the SRB had stated that the SRB was following the (Banco Popular) procedure with particular attention with a view to a possible intervention', suffice it to state that those remarks reiterate what the Chair of the SRB had stated publicly during her interview on the television channel Bloomberg on 23 May 2017, that is to say that Banco Popular was being 'monitored'. Moreover, the interpretation given to those comments was contradicted by the SRB in its press release.

198 Furthermore, the fact that that article purports to report words of the Chair of the SRB is not sufficient to establish their authenticity, particularly since the person who was supposed to have reported those words is not identified.

199 Fourth, as regards that official's assertion that the bank's merger offer might be unfruitful, it is apparent from that article that Banco Popular itself had stated that it would have to postpone the deadline initially set for 10 June 2017 to submit bids in the private sale process.

200 Thus, the possibility that the private sale process launched in April 2017 might be unfruitful cannot be regarded as confidential information, but as a simple deduction from the circumstances, that is to say that, on 31 May 2017, Banco Popular still had not found a buyer in that process and that the date for the closure of the process had been postponed.

201 It follows therefore that, contrary to what the applicants claim, the comments of the EU official who remained anonymous, reported in that article, do not contain confidential information relating to the implementation of a resolution procedure concerning Banco Popular, such as that referred to in recital 116 of Regulation No 806/2014, which could be known only to Commission officials.

202 In the second place, the applicants have not established that the EU official referred to in that article is a Commission official.

203 The view must be taken that many people other than members of the SRB or officials of the Commission were likely to make such comments, having regard, in particular, to the possibilities of exchanging information provided for, inter alia, in Article 88(6) of Regulation No 806/2014.

204 In that regard, it should be noted that the applicants acknowledge that the leak of 31 May 2017 must be attributable to the SRB or to officials of other institutions, such as the Commission, who were aware of the information received from the SRB. In addition, the applicants merely assert that the attribution of the comments made in that article to an EU official is 'plausible'. The applicants cannot therefore rely on the case-law according to which the Court would attribute a leak to an EU institution or agency if it were obvious that it could come only from that institution or agency.

205 It is also necessary to reject the applicants' argument that, since the fact that Banco Popular was going to be placed under resolution was known only to a limited number of people within the SRB and the Commission, the only logical conclusion is that that information came from those institutions. Furthermore, the latter have not adduced any evidence to the contrary.

206 Even if the comments reported in that article came from a leak by an EU official and it could be inferred from that article that a resolution of Banco Popular was envisaged, since it has not been established that the Commission's departments are responsible for the leak of information shown by the press article to which the applicants refer, it is clear from the case-law that such a source of the leak cannot be presumed (see, to that effect, judgment of 15 March 2006, *BASF* v *Commission*, T-15/02, EU:T:2006:74, paragraph 605).

207 In addition, even if it is likely that the Commission may have been the source of that leak, that mere possibility is not sufficient, as the applicants claim, to place on the Commission the burden of proving the contrary (see, to that effect, judgment of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 412).

208 In the present case, there is no presumption that the Commission was the source of the alleged leak of information, and it is not for the Commission to demonstrate that it was not.

209 Therefore, the applicants' arguments relating to the fact that the Commission did not investigate the source of the leak of 31 May 2017 or adduce evidence to show that the leak was not imputable to it must be rejected as ineffective.

210 First, it cannot in any way be inferred from the absence of an internal investigation that the Commission has infringed its obligations of confidentiality. Second, the fact that the Commission did not carry out an internal investigation in order to determine the origin of potential leaks of information, after the resolution decision was adopted, is not relevant for the purpose of assessing the legality of the contested decision.

211 In that regard, by letter lodged at the Court Registry on 16 October 2020, the applicants produced new evidence pursuant to Article 85(3) of the Rules of Procedure. That evidence concerned two internal emails of the SRB of 10 and 18 August 2017 concerning a potential leak of information giving rise to the Reuters article of 31 May 2017. The applicants claim that that new evidence confirms that the SRB did not seek to investigate correctly the leak of 31 May, but merely, in essence, summarised the confidentiality measures in force within the SRB.

212 Since that new evidence relates solely to the SRB and does not establish that the alleged leak of information giving rise to the Reuters article of 31 May 2017 is imputable to the Commission, it must be regarded as not being relevant to the outcome of the dispute.

213 It follows from the foregoing that the applicants have not established that the Commission infringed the principle of confidentiality and professional secrecy.

214 Consequently, the third plea in law must be rejected.

Fourth plea in law, alleging manifest errors of assessment in the application of Articles 14, 18, 20 to 22 and 24 of Regulation No 806/2014

215 The applicants claim that valuation 2 carried out by Deloitte was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014. Accordingly, they argue that valuation 2 was incapable of supporting the contested decision and that the SRB and the Commission manifestly erred in their assessment that the resolution scheme met the requirements of Articles 14, 18, 20 to 22 and 24 of Regulation No 806/2014.

216 In their reply, the applicants explain that, by that plea, they claim that, since valuation 2 is manifestly incorrect in the light of Article 20 of Regulation No 806/2014, the resolution scheme adopted on the basis of that valuation is unlawful.

217 As the Commission states, the applicants have not put forward any specific argument concerning manifest errors which it allegedly committed in the application of Articles 14, 18, 21, 22 and 24 of Regulation No 806/2014.

218 It must therefore be held that, by that plea, the applicants merely submit that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014 and that, therefore, the Commission made a manifest error of assessment in approving the resolution scheme in so far as it is based on valuation 2.

219 In the present case, it should be noted that the valuation of Banco Popular, carried out before the adoption of the resolution scheme, comprises two reports which are annexed to the resolution scheme.

220 Valuation 1, dated 5 June 2017, was prepared by the SRB under Article 20(5)(a) of Regulation No 806/2014 and had the objective of informing the determination whether the conditions for resolution, as defined in Article 18(1) of Regulation No 806/2014, were met.

221 Valuation 2, dated 6 June 2017, was drawn up by Deloitte as an independent expert, in accordance with Article 20(10) of Regulation No 806/2014.

222 The resolution scheme states that, given the urgency, valuation 2 was carried out, in accordance with Article 20(10) of Regulation No 806/2014, with the purpose of assessing the value of the assets and liabilities of Banco Popular, providing an evaluation of the treatment that the shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings and informing the decision to be taken on the shares or instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool.

223 In valuation 2, Deloitte stated that it had relied on the requirements of Article 36 of Directive 2014/59 (corresponding to Article 20 of Regulation No 806/2014) and on Chapter 3 of the final draft of the Regulatory Technical Standards of the European Banking Authority (EBA) No 2017/05 and No 2017/06 of 23 May 2017 on valuation for the purposes of resolution and on valuation to determine difference in treatment following resolution under Directive 2014/59.

224 Article 36(15) of Directive 2014/59 authorises the EBA to develop draft regulatory technical standards to specify the criteria on the basis of which valuations carried out during a resolution procedure must be conducted.

225 Chapter 3 of the final draft regulatory technical standards for the EBA, cited in paragraph 223 above, relates to draft Regulatory Technical Standards No 2017/05 on valuation for the purposes of resolution ('the regulatory technical standards') and contains, inter alia, in accordance with Article 36(15) of Directive 2014/59, a draft Commission Delegated Regulation supplementing Directive 2014/59 with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities.

226 In addition, it should be noted that, at the date of the resolution, those regulatory technical standards were not binding, since the second subparagraph of Article 5(2) of Regulation No 806/2014 provides that the SRB, the Council and the Commission are to be subject to the binding regulatory technical and implementing standards drawn up by the EBA when they have been adopted by the Commission. Those regulatory technical standards were incorporated into Commission Delegated Regulation (EU) 2018/345 of 14 November 2017 supplementing Directive 2014/59 with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities (OJ 2018 L 67, p. 8).

227 In that regard, it should be noted that, in Article 6.3 of the resolution scheme, the SRB stated that, in order to decide on the write-down and conversion of Banco Popular's capital instruments, it had relied on valuation 2, as supplemented and corroborated by the results of the marketing process conducted by the FROB.

228 Since valuation 2 contains complex technical and economic assessments, it was necessary for the SRB to be allowed a broad discretion when it considered that valuation 2 constituted a valid basis for deciding on resolution actions, as it was for the Commission when that institution endorsed the resolution scheme.

229 Consequently, in accordance with the case-law cited in paragraphs 104 to 109 above, the review carried out by the Court is a limited review which is confined to verifying that there was no manifest error of assessment by the Commission when it endorsed the resolution scheme, in so far as it was based on valuation 2. It is for the applicants to adduce sufficient evidence to render valuation 2 implausible.

230 In support of their argument seeking to demonstrate that the Commission made a manifest error of assessment, the applicants raise, in essence, three complaints seeking to establish that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014. By their first complaint, they dispute the reliability and provisional nature of valuation 2. By the second and third complaints, they dispute Deloitte's assessment, first, on the ground that the adjustments to the Banco Popular balance sheet carried out by Deloitte were incorrect and, second, on the ground that the range used in valuation 2 was not reliable.

First complaint, relating to the reliability and provisional nature of valuation 2

231 In the first place, the applicants submit that Deloitte stated that valuation 2 was not reliable due to the compressed period of time that it had to prepare the valuation and the lack of available information.

232 In that regard, it should be noted that, in the letter accompanying the valuation 2 communication to the SRB, Deloitte stated that, given Banco Popular's difficult liquidity position, it had been asked to carry out its valuation within an extremely short period. The main work was limited to 12 days from the day on which it had access to the documentation, whereas normally such a project would take six weeks. Deloitte stated that there were a number of gaps and inconsistencies in the available information. Deloitte mentioned that the valuation had to be regarded as highly uncertain and provisional under Article 36 of Directive 2014/59 and that a buffer for additional losses had been included in the valuation in accordance with Article 36(9) of Directive 2014/59, which corresponds to Article 20(10) of Regulation No 806/2014.

233 Article 20(10) of Regulation No 806/2014 expressly provides for the situation in which, in view of the urgency of the situation, it is not possible to comply with the requirements laid down in paragraphs 7 and 9 of that article, in particular where it is not possible to complete the valuation with certain information contained in the accounting books and records. In addition, that provision recognises the existence of uncertainties inherent in any provisional valuation by providing, in its second subparagraph, that it should incorporate a buffer for additional losses.

234 Thus, in accordance with that provision, Deloitte merely stated that, given the limited time available to carry out the valuation, it had to rely on incomplete information and stated that the valuation which it had carried out had to be regarded as a provisional valuation under Article 36(9) of Directive 2014/59.

235 In addition, it is apparent from Article 20(13) of Regulation No 806/2014 that, in view of the urgency of the situation, the SRB could rely on valuation 2, carried out under Article 20(10) of Regulation No 806/2014, in order to adopt the resolution scheme.

236 The fact that Deloitte stated that, in view of the time limit available, certain information was incomplete is not sufficient to call into question the possibility of relying on valuation 2 in order to adopt the resolution scheme.

237 Furthermore, it should be noted, as the Commission observes, that, under Article 20(10) of Regulation No 806/2014, valuation 2, which was carried out in an emergency situation, had to comply with the requirements laid down in paragraphs 1, 7 and 9 only 'in so far as [was] reasonably possible in the circumstances'. Contrary to what the applicants maintain, by that argument, the Commission did not state that the SRB and the Commission could rely on a valuation that was not 'fair, prudent and realistic'.

238 Moreover, the uncertainties inherent in valuation 2 are highlighted in the regulatory technical rules from which it is apparent that, when assessing and updating the cash flows which the entity can expect from existing assets and liabilities, the valuer must rely on fair, prudent and realistic assumptions and take various factors and circumstances into account.

239 In particular, as regards estimates concerning the disposal value, Article 12(5) of the regulatory technical standards, reproduced in Article 12(5) of Delegated Regulation 2018/345, provides:

'The disposal value shall be determined by the valuer on the basis of the cash flows, net of disposal costs and net of the expected value of any guarantees given, that the entity can reasonably expect in the currently prevailing market conditions through an orderly sale or transfer of assets or liabilities. Where appropriate, having regard to the actions to be taken under the resolution scheme, the valuer may determine the disposal value by applying a reduction for a potential accelerated sale discount to the observable market price of that sale or transfer. To determine the disposal value of assets which do not have a liquid market, the valuer shall consider observable prices on markets where similar assets are traded or model calculations using observable market parameters, with discounts for illiquidity reflected as appropriate.'

240 Article 12(6) of the regulatory technical standards, reproduced in Article 12(6) of Delegated Regulation 2018/345, sets out various factors which the valuer is to take into account and which may influence the disposal values and disposal periods.

241 It follows that valuation 2 was based on assumptions and depended on multiple factors. Thus, in accordance with the regulatory technical standards, in order to determine Banco Popular's disposal value at the date of resolution, Deloitte relied on prospective estimates and assessments in valuation 2.

242 Accordingly, it must be concluded that, given the time constraints and the information available, some uncertainties and approximations are inherent in any provisional valuation carried out under Article 20(10) of Regulation No 806/2014 and that the reservations expressed by Deloitte cannot mean that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014.

243 It follows that, in view of the urgency of the situation, the Commission rightly considered that the SRB could rely on valuation 2, carried out under Article 20(10) of Regulation No 806/2014, in order to adopt the resolution scheme.

244 In the second place, the applicants dispute the fact that valuation 2 was provisional. That fact is contradicted by the SRB's confirmation that there would be no *ex post* definitive valuation under Article 20(11) of Regulation No 806/2014. In addition, Deloitte included a buffer for additional losses, which was an integral part of the valuation. Since valuation 2 must be regarded as definitive, it cannot include such a buffer.

245 It must be borne in mind, first, that Article 20(10) of Regulation No 806/2014 expressly provides that the provisional valuation includes a buffer for additional losses and, second, that, under Article 20(13) of that regulation, a provisional valuation such as valuation 2 is a valid basis for adopting the resolution scheme.

246 The fact that, after the contested decision was adopted, the SRB stated that there would be no *ex post* definitive valuation cannot have the effect of retroactively altering the requirements relating to the implementation of the valuation carried out under Article 20(10) of Regulation No 806/2014.

247 Lastly, in their observations on the SRB's statement in intervention, the applicants submit that the SRB set the parameters of the marketing process in the process letter on the basis of valuation 2 by inviting bidders to consider that the value of the assets was minus EUR 2 billion. The offer of EUR 1 was, in fact, a negative offer of minus EUR 2 billion.

248 In that regard, suffice it to note that that argument is purely speculative and is based on a factual error in so far as the process letter to which the applicants refer was drafted by the FROB.

249 Therefore, the first complaint must be rejected.

Second complaint, relating to the adjustments made by Deloitte

250 The applicants submit that the downward adjustments made by Deloitte in Banco Popular's balance sheet were incorrect and unjustifiably reduced the value of its net assets. Deloitte made adjustments which far exceeded the provision made by Banco Santander after its acquisition of Banco Popular and the assessment contained in valuation 2 could not also be different from the value used by Banco Santander. In their view, adopting Banco Santander's approach in all areas with the exception of non-performing assets and replacing its assessment of non-performing assets with Deloitte's baseline scenario leads to a positive valuation of Banco Popular of EUR 1 billion. They maintain that the estimate of the economic value of Banco Popular, made in their supplemental expert report of between EUR 4.5 billion and EUR 7.3 billion, is an accurate indication of the order of magnitude of the valuation. The differences between the values provided by their expert and those provided by Banco Santander are limited and reflect the fact that they were carried out for different purposes; the applicants' experts sought to determine the economic value of Banco Popular, while Banco Santander's valuation was prepared for accounting purposes.

251 On the basis of their supplemental expert report, the applicants dispute the analysis of the adjustments to Banco Popular's assets carried out by Deloitte relating to performing loans, provisions for legal contingencies, Banco Popular's deferred tax assets and Banco Popular's non-core assets in the form of joint ventures, subsidiaries and associates. They do not dispute the adjustment of Banco Popular's non-performing assets carried out in valuation 2, but the level of the adjustments made by Banco Santander. They submit that Deloitte did not attribute a correct value to Banco Popular's intangible assets.

252 As regards the methodology used, Deloitte stated in valuation 2 that the scenario used to determine the economic value was the sale of the bank under the sale of business tool. In accordance with Article 20(5)(f) of Regulation No 806/2014, the purpose of the valuation was to inform the decision to be taken in respect of the assets, rights, liabilities or instruments of ownership to be transferred, and the SRB's understanding of what constituted commercial terms for the purposes of Article 24(2) (b) of that regulation.

253 Deloitte explained that '[its] economic valuation [sought] to provide an estimate of the value which may be offered for the whole bank by a potential purchaser, following an open, fair, and competitive auction process (a "disposal value", as required by article 11 of the … Regulatory Technical Standards …)'.

254 It is apparent from recital 6 of the regulatory technical standards that the choice of the most appropriate measurement basis (the hold value or the disposal value) should be made for the particular resolution actions being considered by the resolution authority.

255 As regards the choice of the measurement basis, Article 11(4) of the regulatory technical standards, reproduced in Article 11(4) of Delegated Regulation 2018/345, states:

'Where the resolution actions referred to in Article 10(1) require that assets and liabilities are to be retained by an entity that continues to be a going concern institution, the valuer shall use the hold value as the appropriate measurement basis. The hold value may, if considered fair, prudent and realistic, anticipate a normalisation of market conditions.

The hold value shall not be used as the measurement basis where assets are transferred to an asset management vehicle pursuant to Article 42 of Directive [2014/59] or to a bridge institution pursuant to Article 40 of that Directive, or where a sale of business tool pursuant to Article 38 of Directive [2014/59] is used.'

256 In accordance with Article 12(4) of the regulatory technical standards, reproduced in Article 12(4) of Delegated Regulation 2018/345, 'where an entity's situation prevents it from holding an asset or continuing a business, or where the sale is otherwise considered necessary by the resolution authority to achieve the resolution objectives, the expected cash flows shall be referenced to disposal values expected within a given disposal period'.

257 The factors to be taken into account in determining the disposal value for the purposes of the sale of business tool are defined in Article 12(5) to (7) of the regulatory technical standards, reproduced in Article 12(5) to (7) of Delegated Regulation 2018/345.

258 In that regard, it should be noted that the applicants do not dispute the SRB's decision to apply the sale of business tool to Banco Popular. Thus, since valuation 2 was carried out taking into account the fact that the sale of business tool would be applied, the disposal value used by Deloitte was the correct methodology for assessing Banco Popular's value in the context of valuation 2.

259 It should be noted that, in challenging the valuation of Banco Popular's assets in valuation 2, the applicants rely, first, on their supplemental expert report annexed to the reply and, second, on the value used by Banco Santander.

260 First, with regard to the supplemental expert report annexed to the reply, Banco Santander submits that it is based on an incorrect methodology.

261 In that regard, the expert report annexed to the application states that 'in circumstances where the entire business is being sold and those assets will not be subject to separate disposal we consider that the hold value basis … is appropriate'. Moreover, as Banco Santander observes, the supplemental expert report annexed to the reply states:

'As noted above, when determining the economic value of each asset it is necessary to consider whether the appropriate basis is "hold value" … or "disposal value" … We consider that the fair value exercise described by Banco Popular is similar to that required to meet a valuation prepared on a "hold value" as defined in Article 1 of the [regulatory technical standards].'

262 The applicants claim that their expert reports provided an estimate of Banco Popular's assets in accordance with the guidelines laid down in the regulatory technical standards. They claim that their expert reports estimated the value of the bank on a going concern basis, by estimating the cash flows that the bank would generate from retaining or disposing of certain assets. They submit that, according to the expectations of the purchaser, different categories of assets should be assessed according to whether they are held or disposed of. The approach taken in the applicants' supplemental expert report is consistent with Article 11(4) of the regulatory technical standards, according to which, for the sale of business on a going concern basis, as in the present case, the valuer must use the hold value.

263 Thus, as the applicants acknowledge, their expert reports were based on the hold value and not on the disposal value in order to estimate the value of the various categories of assets of Banco Popular.

264 Suffice it to state that Article 11(4) of the regulatory technical standards, cited in paragraph 255 above, expressly provides that the hold value is not to be used as the measurement basis when the sale of business tool is applied.

265 In addition, it appears from the applicants' arguments that, in order to justify the method used in their expert report, they take account of the value at which the purchaser itself is prepared to transfer all or part of Banco Popular once it has been acquired.

266 Thus, in their observations on Banco Santander's statement in intervention, they explain why their expert reports made it possible to estimate the economic value of Banco Popular on a going concern basis. They state that, depending on the expectation of what the purchaser would do with the assets, different asset categories should be valued on an appropriate basis (either a hold or a disposal basis). They add that, for example, it would be possible to expect a purchaser to dispose of the non-performing assets within a given time frame, but that that purchaser would want to hold performing loans which generate income. Depending on the case, the assets must be assessed on the basis of the disposal value or the hold value.

267 Those arguments are based on a misunderstanding. The purpose of valuation 2 was to determine the value of Banco Popular in connection with the use of the sale of business tool, that is to say to determine the value at which a potential purchaser would be prepared to purchase Banco Popular on the date of resolution. Deloitte states, in the report of valuation 2, that its economic assessment is intended to provide an estimate of the value that could be provided for the whole bank by a potential purchaser. It was not, as the applicants seem to believe, a question of estimating the value of Banco Popular, once sold to the purchaser, on the basis of the assets that the purchaser would wish to sell or retain.

268 It follows that the methodology used in the expert reports provided by the applicants does not correspond to the methodology used by Deloitte in the valuation. In addition, as the Commission submits, the supplemental expert report relies on data that post-dates the acquisition of Banco Popular by Banco Santander, which are therefore not relevant for the purpose of assessing the estimate made in valuation 2, which was intended to determine the disposal value for a potential purchaser prior to resolution.

269 Therefore, it must be held that those expert reports are not relevant for the purpose of determining whether valuation 2 correctly estimated the value of Banco Popular's assets. In particular, the estimate of the economic value of Banco Popular, made in their supplemental expert report, of between EUR 4.5 billion and EUR 7.3 billion, is based on incorrect methodology and is therefore not relevant. The comparison made by the applicants of the results of the estimates of the various categories of assets contained, on the one hand, in their supplemental expert report and, on the other hand, in valuation 2, must be regarded as ineffective.

270 Second, the applicants refer to the adjustments made by Banco Santander after the acquisition of Banco Popular, when it presented Banco Popular's balance sheet. They submit that an estimate of Banco Popular's economic value in valuation 2 cannot be regarded as being 'fair, prudent and realistic', when it differs from the one adopted by the purchaser.

271 It must be stated, as the SRB did, that the accounting records of Banco Santander's acquisitions cannot be compared to the results of valuation 2, since they do not serve the same purpose and do not use the same methodology.

272 In that regard, the applicants acknowledge in the reply that the valuation carried out by Banco Santander met an objective that differed from that of their experts and that it did not seek to estimate the economic value of Banco Popular, but its accounting value.

273 Furthermore, the purpose of valuation 2 was to determine the disposal value of Banco Popular for any potential purchaser. As the SRB states, Banco Santander's accounting records attribute a particular value to Banco Popular's assets and liabilities following the integration of Banco Popular into its operations under the accounting rules.

274 In any event, it must be concluded that the economic value attributed to Banco Popular by Banco Santander on the date the resolution scheme was adopted is the value stated in its acquisition bid, that is to say EUR 1.

275 In addition, the applicants' arguments seeking to challenge the adjustments concerning non-performing assets made by Banco Santander after the resolution must be rejected as ineffective.

276 In the alternative, the applicants submit in their observations on the statements in intervention that, even if Banco Popular's assets should have been valued on the basis of the disposal value of the individual assets which Banco Popular was to continue to hold as a going concern, Banco Popular's value would be between EUR 1.5 and EUR 4.3 billion.

277 In that regard, the applicants merely provide a table of figures containing a comparison of the values of Banco Popular estimated by Deloitte in valuation 2, by Banco Santander and in their expert report with and without adjustment. However, providing the results of the calculations of their experts after adjustment, without further explanation of the method used and the nature of the adjustments made, does not enable the Court to understand the scope of that argument.

278 For example, it is apparent from that table that the line corresponding to the 'adjustment to asset values' in the supplemental expert report led to a range from EUR 5.2 billion to EUR 7.9 billion and that the same 'adjusted' value is from EUR 8.2 billion to EUR 11 billion. The applicants provide no explanation for such differences.

279 Third, in the reply, the applicants raise specific arguments challenging the method used by Deloitte for the valuation of certain categories of assets.

280 As regards the performing loans, the applicants claim that Deloitte acknowledged in valuation 2 that it did not use the discounted cash flows method and that it adopted a method which was not suitable, namely the IFRS 9 (International Financial Reporting Standard) which deals with the way in which financial instruments are accounted for.

281 In valuation 2, concerning loans and receivables, Deloitte stated:

'… it has not been possible to carry out a full discounted cash flows (DCF) modelling approach to the book that would be sufficiently robust. Instead, with the data, and in the time available, we have taken two approaches to valuation:

A "bottom-up", adjusted expected losses (EL) approach, taking the bank's underlying exposure at default, lifetime probability of default (estimated from the point-in-time probability of default (PDs) provided) and loss given default data and adjusting the parameters based on market benchmarks, Bank of Spain benchmarks for loss given default (LGD), and Deloitte analysis, all on a conservative basis. This approach essentially mirrors the way in which a bank acquiror would manage portfolios in the future …'

282 Deloitte observed that its method for calculating the economic value of loans and receivables consisted of estimating the expected loss of credit, and it explained the parameters chosen to determine the exposure to default and the probabilities of default.

283 It must be concluded that that method complies with the regulatory technical standards.

284 In that regard, it should be noted that the valuation of loans and receivables is subject to uncertainty which is explained in Article 8(a) of the regulatory technical standards, reproduced in Article 8(a) of Delegated Regulation 2018/345, according to which:

'The valuer shall particularly focus on areas subject to significant valuation uncertainty which have a significant impact on the overall valuation. For those areas the valuer shall provide the results of the valuation in the form of best point estimates and, where appropriate, value ranges, as laid down in Article 2(3). Those areas shall include:

(a) loans or loan portfolios, the expected cash flows of which depend on a counterparty's ability, willingness or incentive to perform on its obligation, where those expectations are driven by assumptions relating to delinquency rates, probabilities of default, loss given default, or instrument characteristics, especially where evidenced by loss patterns for a portfolio of loans'.

285 In addition, on pages 4 to 11 of the annex to valuation 2, Deloitte explained the adjustments which it had made concerning the valuation of the loans and receivables, in particular in the light of the risks of non-payment. The applicants do not put forward any argument to challenge those adjustments.

286 Furthermore, the applicants admit that, in view of the limited period available to Deloitte, it could not carry out a complete and robust analysis of the discounted cash flows.

287 As regards the arguments that the IFRS 9, which is an accounting standard, was not suitable, suffice it to note that Deloitte stated in valuation 2 that 'although we understand that the new IFRS 9 will imply an increase in provisions, this will not change the calculations done here'. It follows that Deloitte did not use that method and that the applicants' arguments are ineffective.

288 As regards the valuation of the adjustments to the provisions for legal contingencies, it must be concluded that the comparison made by the applicants between valuation 2 and valuation 3, carried out after the contested decision was adopted, is not relevant. Suffice it to state that valuation 3 was carried out using a method and for a purpose that differed from those of valuation 2. Similarly, the comparison with the assessment carried out by Bankia on the basis of a press article is not relevant, particularly since it is not stated whether that assessment covered all the legal contingencies analysed in valuation 2, or whether the results were truly comparable.

289 As regards the valuation of deferred tax assets, the applicants admit that it is uncertain and strongly depends on the purchaser. They claim that the range chosen by Deloitte is too narrow, which should have indicated to the SRB and the Commission that Deloitte's approach was not appropriate, and that that range does not correspond to the adjustment made by Banco Santander.

290 Deloitte stated, inter alia, on page 32 of the annex to valuation 2 that the valuation of non-protected deferred tax assets depended on the purchaser, and in particular on whether it is a Spanish or a foreign entity and that, in the case where the purchaser is a Spanish bank, their recoverability and their recognition in the balance sheet would depend on Banco Popular's business plan and that of the purchaser. The annex to valuation 2 states that Deloitte's assessment takes account of those different situations.

291 The applicants do not explain how the uncertainties highlighted by Deloitte justified different adjustments being made in the best- and worst-case scenarios. In that regard, in the supplemental expert report annexed to the reply, the expert merely notes the 'surprising' nature of that range. Furthermore, it must be borne in mind that the comparison with the adjustments made by Banco Santander is irrelevant.

292 As regards the valuation of the intangible assets, the applicants submit that Deloitte did not attribute any economic value, on the one hand, to the core deposit intangibles, when the withdrawals likely concerned the less stable deposits, or, on the other, to Banco Popular's trade mark, when it recognised Banco Pastor's trade mark as having a minimal value. According to the applicants, that approach was sufficient to conclude that valuation 2 was not reliable.

293 First, in valuation 2, as regards the core deposit intangibles, Deloitte estimated that a potential purchaser would not attribute any value to them because of the significant withdrawals of deposits on the date of the assessment.

294 It should be noted that, in view of the extent of the liquidity outflows at the time when valuation 2 was carried out, there is no evidence to support the applicants' claim that the majority of the stable deposits had remained in the bank.

295 Second, Deloitte explained, in relation to Banco Popular's goodwill, that a potential buyer would not attribute any value to pre-existing goodwill since it was not an identifiable asset in the context of a business combination. It stated that, given the strong presence of the Banco Pastor trade mark in Galicia, Spain, that trade mark would be of value for a third party and that it had estimated the value range by applying the relief from royalty method, which is the most commonly used trade mark valuation method.

296 The applicants do not put forward any specific argument capable of calling those explanations into question.

297 As regards the valuation of joint ventures, subsidiaries and associates, the applicants merely assert that, on the basis of contemporaneous analyst reports and actual or rumoured transactions, the amount used by Deloitte appears to be an undervaluation and that a reasonable estimate would be EUR 1.5 billion.

298 Suffice it to state, first, that the applicants have not established the basis for that estimate and, second, that those arguments do not make it possible to identify the errors committed by Deloitte in valuation 2.

299 Furthermore, it should be noted that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure of the General Court, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law, it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (see judgments of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the

case-law cited, and of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 92 (not published) and the case-law cited). Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see judgments of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the case-law cited, and of 24 September 2019, *Netherlands and Others* v *Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraph 114 and the case-law cited; see also, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraph 41 and the case-law cited).

300 In the absence of any argument in the reply, the applicants' general references to the supplemental expert report annexed to the reply cannot be examined.

301 It should be noted that in valuation 2 Deloitte explained, for each of the categories of assets, the method used for their valuation and the uncertainties justifying the adjustments made. It follows from the foregoing that the applicants' arguments do not call into question the adjustments made by Deloitte in valuation 2 concerning the different categories of assets of Banco Popular and do not support the conclusion that valuation 2 was not 'fair, prudent and realistic' in accordance with Article 20(1) of Regulation No 806/2014.

302 In the alternative, the applicants also claim that the assessment carried out by Deloitte in valuation 2 with regard to four key elements, which they claim are not impacted by the methodology applicable to the valuation, resulted in an undervaluation of Banco Popular's value of EUR 4.8 to EUR 5 billion. The applicants refer to the adjustment of the deferred tax assets, the failure to take into account intangible assets, notably the core deposit intangibles, the overestimation of the legal contingencies and the underestimation of the value of joint ventures, subsidiaries and associates, appearing in valuation 2.

303 In that regard, suffice it to state, first, that the applicants merely make a comparison between the estimates in valuation 2 and those in their supplemental expert report. Second, they do not explain how, for the assessment of those four categories of assets, the valuation method is irrelevant.

304 Accordingly, the second complaint must be rejected.

Third complaint, relating to the range used in valuation 2

305 The applicants submit that the breadth of the range in valuation 2 and the fact that it departed from the recent valuations of Banco Popular's net assets should have alerted the SRB and the Commission to the fact that that valuation was not a 'fair, prudent and realistic valuation' and did not provide a reliable basis for adopting the resolution scheme.

306 In that regard, it must be borne in mind that, in valuation 2, Deloitte stated that the outcome of its assessment was in a range of between EUR 1.3 billion and minus EUR 8.2 billion, with the best estimate within that range being minus EUR 2 billion.

307 In the first place, the applicants claim that the breadth of the range indicated in valuation 2 shows that it was not reliable.

308 It should be noted that the breadth of the range is justified by the method used in valuation 2.

309 In that respect, with regard to the methodology used in valuation 2, Deloitte stated that it had adopted a category-by-category approach, adjusting the book values of each class of assets and liabilities in order to estimate profits and losses, and other adjustments that any purchaser would apply to the value. It produced a valuation range for each class of assets and liabilities.

310 That method complies with Article 2(3) of the regulatory technical standards, set out in Article 2(3) of Delegated Regulation 2018/345, according to which:

'The valuer shall provide the best point estimate of the value of a given asset, liability, or combinations thereof. Where appropriate, the results of the valuation shall also be provided in the form of value ranges.'

311 Thus, the addition of the lowest values for each class of assets and liabilities provided the low estimate of the range and the addition of the highest values provided the high estimate of the range. That method therefore explains the breadth of the range used in valuation 2. In addition, it must be borne in mind that it is apparent from the analysis of the first complaint that the determination of the disposal value is based on estimates which involve some uncertainties justifying the choice of the presentation of the results in the form of a range.

312 Moreover, as the Commission submits, given the size of Banco Popular's total balance sheet, with a figure exceeding EUR 130 billion, the difference between the two values in the range represented only around 7% of the balance sheet.

313 In the reply, the applicants submit that that comparison is not relevant and that the breadth of the range, that is to say EUR 9.5 billion, should be compared with the value of Banco Popular's net assets, that is to say EUR 10.78 billion.

314 In that regard, it should be noted, first, that the Commission's reference to the size of Banco Popular's balance sheet is not intended to assess the accuracy of the range, but only to qualify its breadth. Second, the difference between the best- and the worst-case valuation scenario used by Deloitte is not comparable to the book value of Banco Popular's net assets.

315 In the second place, the applicants submit that Banco Popular had taken the 2016 stress test and that, although Banco Popular faced liquidity problems, on 31 March 2017, its net assets amounted to EUR 10.78 billion, and its core small-medium enterprises (SMEs) franchise remained profitable.

316 In that regard, first, suffice it to state that Banco Popular's stress test of 2016, published in July 2016, therefore concerns Banco Popular's situation at a date several months before the date on which the resolution scheme was adopted and cannot be regarded as giving any indication of the financial development of Banco Popular. Second, the reference to net assets is not relevant, since they reflect only the book value of Banco Popular and not the disposal value on the date of the resolution.

317 Therefore, the third complaint must be dismissed.

318 It follows from all of the foregoing that the applicants have not shown that valuation 2 was not 'fair, prudent and realistic' within the meaning of Article 20(1) of Regulation No 806/2014.

319 It must be concluded that the Commission did not commit a manifest error of assessment in approving the resolution scheme in so far as it was based on valuation 2.

320 Consequently, the fourth plea in law must be rejected as unfounded.

Sixth plea in law, alleging infringement of the right to be heard

321 The applicants claim that the Commission infringed their right to be heard by adopting the contested decision without affording them the opportunity to make representations. They submit that they were not heard during the resolution procedure, even though their interests were individually and directly affected by the contested decision. The Commission is required to ensure that the applicants are heard in accordance with Article 41 of the Charter, even though Regulation No 806/2014 does not so provide.

322 They submit that, if the SRB and the Commission had respected their right to be heard, they could have made representations effectively, even within a short period of time. The applicants could have addressed the issue of the correct valuation of Banco Popular and, in view of the evidence put forward under the fourth plea, it is likely that the SRB or the Commission would have had a different opinion on the valuation of Banco Popular, which would have led to the adoption of a resolution scheme different from the one endorsed by the contested decision.

323 The Commission contends that the procedure provided for in Article 18 of Regulation No 806/2014 leads to the adoption of a measure of general application as regards the shareholders and creditors of the institution under resolution and that Article 41 of the Charter is not applicable. It submits, in the alternative, that the applicants' lack of opportunity to be heard is justified under Article 52(1) of the Charter.

324 It should be recalled that Article 41(2)(a) of the Charter provides that the right to good administration includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken.

325 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. In addition, it should be stated that the right to be heard pursues a dual objective. First, it enables the case to be examined and the facts to be established in as precise and correct a manner as possible, and second, it ensures the effective protection of the person concerned. 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).

326 It should be noted that the Court of Justice has affirmed the importance of the right to be heard and its very broad scope in the EU legal order, taking the view that that right must apply to any procedure which is liable to culminate in a measure adversely affecting a person. In accordance with the case-law of the Court of Justice, 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 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 67 and the case-law cited; and of 7 November 2019, *ADDE* v *Parliament*, T-48/17, EU:T:2019:780, paragraph 89 and the case-law cited).

327 Therefore, in the light of its character as a fundamental general principle of EU law, the application of the principle of the rights of the defence, which include the right to be heard, cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle (see judgment of 18 June 2014, *Spain* v *Commission*, T-260/11, EU:T:2014:555, paragraph 62 and the case-law cited).

328 First of all, it should be noted that the resolution scheme adopted by the SRB has as its purpose the resolution of Banco Popular which must therefore be regarded as the person with regard to whom an individual measure is adopted and to whom the right to be heard is guaranteed by Article 41(2)(a) of the Charter.

329 Thus, it must be borne in mind that the applicants are not addressees of the resolution scheme, which is not an individual decision taken against them, or of the contested decision approving that resolution scheme.

330 However, it must be stated that, in accordance with Article 21(1) of Regulation No 806/2014, the SRB exercised the power to write down or convert the capital instruments in Banco Popular.

331 Therefore, the procedure followed by the SRB to adopt the resolution scheme, even though it does not constitute an individual procedure initiated against the applicants, may lead to the adoption of a measure liable to have an adverse effect on their interests in their capacity as holders of capital instruments in Banco Popular.

332 The case-law of the Court of Justice, cited in paragraph 326 above, adopted a broad interpretation of the right to be heard as being guaranteed to every person in proceedings that are liable to culminate in a measure adversely affecting that person.

333 In addition, first, according to recital 121 of Regulation No 806/2014, that regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, including the right of defence, and should be implemented in accordance with those rights and principles. Second, no provision of Regulation No 806/2014 expressly excludes or restricts the right to be heard of shareholders or holders of capital instruments in the entity concerned in the course of the resolution procedure.

334 In that regard, it should be noted that the applicants do not raise a plea of illegality against Regulation No 806/2014 in that it does not provide for the holders of capital instruments to be given a prior hearing before a resolution scheme is adopted. They submit that they should be recognised as having the right to be heard in the resolution procedure for Banco Popular pursuant to Article 41(2)(a) of the Charter.

335 However, if the shareholders and creditors of the entity covered by the resolution action can rely on the right to be heard as part of the resolution procedure, the exercise of that right may be subject to limitations, in accordance with Article 52(1) of the Charter.

336 Article 52(1) of the Charter states:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

337 However, the Court of Justice has held that fundamental rights, such as observance of the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see judgments of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33 and the case-law cited, and of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraph 50 and the case-law cited).

338 It follows that the failure to hear the applicants, in their capacity as holders of capital instruments in Banco Popular, as part of the resolution procedure, whether by the SRB or by the Commission, could be justified.

339 It should be recalled that, in Article 4.2 of the resolution scheme, the SRB took the view that the resolution of Banco Popular was in the public interest in so far as it was necessary and proportionate to the achievement of two objectives referred to in Article 14(2) of Regulation No 806/2014, namely to avoid significant negative effects on financial stability and to ensure the continuity of the critical functions of Banco Popular. It stated that winding up Banco Popular under normal insolvency proceedings would not achieve those objectives to the same extent. In the contested decision, the Commission expressly approved the reasons put forward by the SRB to justify the need for resolution action in the public interest.

340 In the present case, the restriction of the applicants' right to be heard may be justified, first, by the objective of stability of the financial markets and, second, by the need to ensure the effectiveness of the resolution of Banco Popular, which had to be carried out speedily.

341 In the first place, it should be noted that several recitals in Regulation No 806/2014, in particular recitals 12, 58 and 61, state that the stability of the financial markets is one of the objectives pursued by the resolution mechanisms established by that regulation.

342 Furthermore, in accordance with Article 18(5) of Regulation No 806/2014, a resolution action is to be treated as being 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 of that regulation, and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent. The resolution objectives referred to in Article 14 of Regulation No 806/2014 include, inter alia, '[avoiding] significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline', and '[protecting] public funds by minimising reliance on extraordinary public financial support'.

343 In that regard, the Court of Justice noted that financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. Furthermore, banks are often closely interconnected and many of them operate at an international level. For that reason, the failure of one or more banks risks spreading rapidly to other banks either in the Member State concerned or in other Member States. That is liable, in turn, to produce negative spill-over effects in other sectors of the economy (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 50; of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 72; and of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 108).

344 The Court of Justice has held that the objective of ensuring the stability of the financial system while avoiding excessive public spending and minimising distortions of competition constitutes an overriding public interest (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 69).

345 In addition, the European Court of Human Rights ('the ECtHR') held, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799, § 6), that, in delicate economic areas such as the stability of the banking system, the States enjoyed a wider margin of appreciation and that, therefore, the impossibility for a shareholder to participate in the proceedings leading to the sale of the bank was not disproportionate to the legitimate aims of protecting the rights of creditors and safeguarding the proper administration of the bank's bankruptcy estate.

346 Reference should also be made to the judgment of 8 November 2016, *Dowling and Others* (C-41/15, EU:C:2016:836), delivered in response to a request for a preliminary ruling concerning the interpretation of Articles 8, 25 and 29 of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of [the second paragraph of Article 54 TFEU], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1). That case concerned an exceptional measure by the national authorities aimed at preventing, by means of an increase in capital, the failure of a company which, according to the referring court, threatened the financial stability of the European Union. The Court of Justice held that the protection conferred by Second Directive 77/91 on the shareholders and creditors of a public limited liability company, with respect to its share capital, did not extend to a national measure of that kind that is adopted in a situation where there is a serious disturbance of the economy and financial system of a Member State and that is designed to overcome a systemic threat to the financial stability of the European Union, due to a capital shortfall in the company concerned (judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 50). The Court of Justice added that the provisions of Second Directive 77/91 did not therefore preclude an exceptional measure affecting the share capital of a public limited liability company taken by the national authorities where there was a serious disturbance of the economy and financial system of a Member State, without the approval of the general meeting of that company, with the objective of preventing a systemic risk and ensuring the financial stability of the European Union (see judgment of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 51 and the case-law cited).

347 Those considerations apply, by analogy, to the situation of former owners of capital instruments in a bank which has been placed under resolution pursuant to Regulation No 806/2014, such as the applicants.

348 It follows from the foregoing that the resolution procedure, established by Regulation No 806/2014 and described in Article 18, pursues an objective in the general interest within the meaning of Article 52(1) of the Charter, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard.

349 In the present case, it should be noted that the applicants do not dispute that the procedure for the resolution of Banco Popular complied with the objective of ensuring financial stability referred to in Article 14 of Regulation No 806/2014.

350 In that regard, in Article 4.4.2 of the resolution scheme, the SRB explained that it had concluded that Banco Popular's situation gave rise to an increased risk of significant adverse effects on financial stability in Spain on the basis of various elements. Those elements include, first, the size and relevance of Banco Popular which was the parent undertaking of the sixth largest banking group in Spain, with total assets of EUR 147 billion, and which was classified by the Bank of Spain in 2017 as a significant institution of a systemic nature. The SRB noted, inter alia, that Banco Popular was one of the main market participants in Spain, with a significant market share in the segment of small and medium-sized entreprises (SMEs) and that it had a relatively high market share of deposits (almost 6%) and a large number of retail clients (approximately 1.4 million) throughout Spain. Second, the SRB took into account the nature of Banco Popular's business, which was structured around commercial banking activities and focused primarily on offering financing, savings management and financial services to individuals, families and companies (particularly SMEs). According to the SRB, the similarity between Banco Popular's business model and that of other Spanish commercial banks contributes to the potential for indirect contagion to those banks which might have been perceived as facing the same difficulties.

351 Furthermore, it should be noted that the second objective pursued by the resolution scheme, namely to ensure the continuity of the critical functions of Banco Popular, also contributes to the general interest objective of protecting the stability of the financial markets.

352 Under Article 2(1)(35) of Directive 2014/59, the critical functions of an institution are defined as 'activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations'.

353 In that regard, Article 6(1) of Commission Delegated Regulation (EU) 2016/778 of 2 February 2016 supplementing Directive 2014/59 with regard to the circumstances and conditions under which the payment of extraordinary *ex post* contributions may be partially or entirely deferred, and on the criteria for the determination of the activities, services and operations with regard to critical functions, and for the determination of the business lines and associated services with regard to core business lines (OJ 2016 L 131, p. 41), lays down the criteria for determining critical functions. It is a function provided by an institution to third parties who are not affiliated to the institution or group, the sudden disruption of which would likely have a material negative impact on those third parties, would give rise to contagion or would undermine the general confidence of market participants due to the systemic relevance of the function for third parties and the systemic relevance of the institution or group in providing that function.

354 Thus, the objective of ensuring the continuity of the critical functions of the entity concerned by a resolution action, provided for in Article 14(2)(a) of Regulation No 806/2014, is intended to prevent a break in those functions which could lead to disruption, not only on the market concerned, but also for the overall financial stability of the European Union.

355 Accordingly, since resolution action is intended to preserve or restore the financial situation of a credit institution, in particular in so far as it constitutes an alternative to its liquidation, it must be regarded as effectively meeting an objective of general interest recognised by the European Union (see, by analogy, judgment of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 108).

356 In that regard, in Article 4.2 of the resolution scheme, the SRB stated that the resolution of Banco Popular was necessary and proportionate to achieving, inter alia, the objective of ensuring the continuity of the critical functions of Banco Popular. In Article 4.4 of the resolution scheme, the SRB identified three critical functions of Banco Popular, within the meaning of Article 6 of Delegated Regulation 2016/778, namely deposit taking from households and non-financial corporations, lending to SMEs, and payment and cash services.

357 The applicants have not put forward any argument to dispute those findings.

358 It follows from the foregoing that the resolution procedure for Banco Popular pursued an objective of general interest, within the meaning of Article 52(1) of the Charter, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard.

359 In the second place, the general interest of the European Union, in particular the pursuit of the objectives of maintaining the stability of the financial markets and ensuring the continuity of the critical functions of Banco Popular, requires that, once the conditions laid down in Article 18(1) of Regulation No 806/2014 have been fulfilled, resolution action must be adopted as soon as possible.

360 In that regard, a number of recitals in Regulation No 806/2014 imply that, when a resolution action becomes necessary, it must be adopted quickly. Those are, inter alia, recitals 26, 31 and 53, and especially recital 56 of that regulation which states that, in order to minimise disruption to the financial market and to the economy, the resolution process should be accomplished in a short time.

361 The Court of Justice has held that the objective of Regulation No 806/2014 is to establish, in accordance with recital 8, more efficient resolution mechanisms, which must be an essential instrument to avoid damage that has resulted from failures of banks in the past and that 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 (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).

362 Thus, Article 18(1) of Regulation No 806/2014 states, inter alia, that, where the ECB considers that an entity is failing or is likely to fail, it is to communicate that assessment without delay to the Commission and the SRB. According to paragraph 2 of that article, where the SRB itself carries out an assessment, it is to be communicated to the ECB without delay. If the conditions laid down in paragraph 1 are met, the SRB must adopt a resolution scheme which, pursuant to Article 18(7) of Regulation No 806/2014, is to be transmitted to the Commission immediately after its adoption. The Commission then has 24 hours in which to endorse a resolution scheme or raise objections.

363 It follows that once the entity satisfies the conditions for the adoption of a resolution action, that is to say, first, that it is failing or is likely to fail, second, that there is no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable time frame and, third, that its resolution is necessary to achieve one or more of the objectives referred to in Article 14 of Regulation No 806/2014, Article 18 of that regulation provides that a decision must be adopted within a very short time frame.

364 Thus, in the present case, since the ECB found that Banco Popular was failing or was likely to fail and the SRB considered that the conditions laid down in Article 18 of Regulation No 806/2014 had been met, the resolution scheme had to be adopted as soon as possible.

365 That rapid decision was justified by the need to ensure the continuity of the critical functions of Banco Popular and to avoid the significant negative effects of Banco Popular's situation on the financial markets, by preventing, inter alia, contagion risks. In the present case, since Banco Popular's failure occurred on a weekday, it was necessary to complete the process and to adopt the decision before the opening of the markets on the morning of 7 June 2017.

366 As Advocate General Campos Sánchez-Bordona made clear, in point 80 of his Opinion in Joined Cases *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:16), the speed with which those institutions and agencies of the European Union must take their decisions is necessary in order to ensure that the resolution of the banking institution does not have an adverse impact on the financial markets and that need for speed also requires them to have the decision 'prepared' before they launch the procedure in order to take advantage of the financial markets being closed.

367 Speed in taking a decision was therefore a condition of its effectiveness.

368 Thus, the Court of Justice has already ruled that the urgency requiring immediate action by the competent authority justified a limitation of the right to be heard of the persons concerned by measures adopted in the field of environmental liability (see, to that effect, judgment of 9 March 2010, *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 67) and in the field of agriculture (see, to that effect, judgment of 15 June 2006, *Dokter and Others*, C-28/05, EU:C:2006:408, paragraph 76).

369 Moreover, in the field of fund-freezing measures, the Court of Justice has held that the communication of the grounds on which the initial inclusion of the name of a person or entity in the list of persons subject to restrictive measures is based, prior to that inclusion, would be liable to jeopardise the effectiveness of the freezing of funds and economic resources imposed by EU law. In order to attain the objective pursued by the applicable regulation, such measures must, by their very nature, take advantage of a surprise effect and apply with immediate effect (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraphs 338 to 340; of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 61, and of 12 February 2020, *Amisi Kumba* v *Council*, T-163/18, EU:T:2020:57, paragraph 51).

370 Nor are the EU authorities bound to hear the appellants before their names are included for the first time in the list of persons subject to restrictive measures, for reasons also connected to the objective pursued by EU law and to the effectiveness of the measures provided by that law (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 341, and of 25 April 2013, *Gbagbo* v *Council*, T-119/11, not published, EU:T:2013:216, paragraph 103).

371 That is all the more true in cases such as the present one where the restriction on the right to be heard concerns, not the entity covered by the resolution procedure, namely Banco Popular, but the applicants in their capacity as holders of capital instruments in that institution.

372 It should also be noted that, in its decision of 1 April 2004, *Camberrow MM5 AD v. Bulgaria* (CE:ECHR:2004:0401DEC005035799), the ECtHR found that the sale of the bankrupt bank as a going concern had been effected in order to achieve the prompt and more certain satisfaction of its creditors, who had been waiting for years to receive their dues, and the quick completion of the bankruptcy proceedings. Therefore, the need for simplicity and speed in the procedure leading to the sale of the bank was of paramount importance. If the law provided that the bankruptcy court was under an obligation to consult with all shareholders and creditors of the bank, that would have led to a substantial slowing down of the proceedings and, consequently, to a further delay in the payment of the creditors' dues and in the completion of the bankruptcy proceedings.

373 In the judgment of 24 November 2005, *Capital Bank AD v. Bulgaria* (CE:ECHR:2005:1124JUD004942999, § 136), the ECtHR held that, in such a sensitive economic area as the stability of the banking system and in certain situations, there may be a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole.

374 Furthermore, the fact that the resolution scheme may lead to an interference with the applicants' right to property cannot justify an obligation to grant them a right to be heard before it is adopted.

375 In that regard, the General Court has already highlighted in paragraph 282 of the judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others* (T-680/13, EU:T:2018:486) that the applicable provisions must offer the person concerned a reasonable opportunity of putting his or her case to the competent authorities. In order to ensure compliance with that requirement, which constitutes a requirement inherent in Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, a comprehensive view must be taken of the applicable procedures (see, to that effect, judgments of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 368 and the case-law cited; of 25 April 2013, *Gbagbo* v *Council*, T-119/11, not published, EU:T:2013:216, paragraph 119, and ECtHR, 20 July 2004, *Bäck v. Finland*, CE:ECHR:2004:0720JUD003759897, § 56). Therefore, that requirement cannot be interpreted as meaning that the interested person must, in all circumstances, be able to make his or her views known to the competent authorities prior to the adoption of measures infringing his or her right to property (see, to that effect, ECtHR, 19 September 2006, *Maupas and Others v. France*, CE:ECHR:2006:0919JUD001384402, §§ 20 and 21).

376 The General Court considered that that was the case, in particular where, as in the present case, the measures at issue did not constitute a penalty and were implemented in a context of particular urgency. On that last point, the General Court noted that it concerned prevention of an imminent risk of collapse of the banks concerned in order to protect the stability of the financial system of a Member State and, therefore, to prevent contagion to other Member States of the euro area. The establishment of a prior consultation procedure, in the context of which the thousands of depositors and shareholders of the banks concerned could have usefully made their views known prior to the adoption of the harmful provisions, would inevitably have delayed the application of measures seeking to prevent such a collapse. The achievement of the objective consisting in protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486 paragraph 282 and the case-law cited).

377 That assessment was confirmed by the Court of Justice which held that the General Court had correctly based its reasoning on the judgment of the ECtHR of 21 July 2016, *Mamatas and Others v. Greece* (CE:ECHR:2016:0721JUD006306614), from which it is clear that the requirement that any restriction on the right to property must be provided for by law cannot be interpreted as meaning that the persons concerned should have been consulted before the adoption of that law, in particular where such prior consultation would inevitably have delayed the application of the measures designed to prevent the collapse of the banks concerned (judgment of 16 December 2020, *Council and Others* v *K. Chrysostomides & Co. and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028, paragraph 159).

378 Furthermore, it must be concluded that the need to act swiftly without informing the shareholders and creditors of an entity that a resolution procedure concerning that entity is imminent is intended to avoid the worsening of that entity's situation which would undermine the effectiveness of the resolution action. Informing the shareholders or bondholders of the bank that it might be under resolution, and therefore that it was considered to be failing or likely to fail, could encourage them to sell their securities on the markets and also lead to a massive withdrawal of deposits, which would have the effect of exacerbating the bank's financial situation and making it more difficult, or even impossible, to adopt a solution likely to prevent its liquidation.

379 In that respect, as is apparent from recital 116 of Regulation No 806/2014, cited in paragraph 187 above, any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or on any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action.

380 It should be noted that, in the application, the applicants accept that the mere suggestion that the SRB is in the process of considering whether to use its powers with respect to a particular entity would inevitably be a market significant event leading investors, creditors or depositors to take protective steps to avoid loss.

381 It must therefore be concluded that hearing the applicants before the resolution scheme was adopted or before the contested decision was adopted would have entailed a substantial slowdown in the procedure and, therefore, would have compromised both the attainment of the objectives of the action and its effectiveness.

382 In that regard, the applicants submit that the Commission and the SRB examined the potential need for resolution action for several weeks before the contested decision was adopted, which would have given the Commission sufficient time to hear the applicants.

383 Suffice it to note that, before 6 June 2017, the date on which the ECB found that Banco Popular was failing or was likely to fail, and before the SRB's decision to implement the resolution procedure, Banco Popular's resolution was merely a possibility. In addition, the applicants do not explain when the Commission ought to have consulted the holders of capital instruments in Banco Popular, and it is appropriate to bear in mind that their identity could change given that the capital instruments can be traded on the markets.

384 It follows, first, that a prior hearing of the applicants, informing them of the existence of a potential resolution action, would have led to a risk of them adopting conduct on the market that exacerbated the financial situation of Banco Popular. Such a hearing could thus have undermined the effectiveness of the resolution envisaged.

385 Second, in view of the urgent need to adopt the resolution scheme, it was not possible to consult the applicants beforehand in the same way as the other shareholders or holders of capital instruments in Banco Popular, not only because of the difficulties associated with identifying them, but also because it was impossible to analyse effectively their observations before the adoption of the resolution scheme or the contested decision.

386 It follows from all of the foregoing that hearing the applicants, before the adoption of the resolution scheme or the contested decision, would have undermined the objectives of protecting the stability of the financial markets and the continuity of the entity's critical functions, and the requirements of speed and effectiveness of the resolution procedure.

387 Therefore, the failure to hear the applicants in the context of the resolution procedure for Banco Popular constitutes a limitation on the right to be heard which is justified and necessary in order to meet an objective of general interest and respects the principle of proportionality, in accordance with Article 52(1) of the Charter.

388 Consequently, the sixth plea in law must be rejected as unfounded.

Fifth plea in law, alleging infringement of the right to property

389 The applicants submit that the resolution scheme endorsed by the contested decision infringes their right to property, enshrined in Article 17(1) of the Charter. They argue that the resolution scheme endorsed by the contested decision expropriated them of their capital instruments. The write-down of capital instruments decided by the resolution scheme is an unlawful expropriation which does not meet the requirements of Article 17(1) of the Charter, in that it does not comply with the conditions 'provided for by law' and does not provide for fair compensation.

390 Article 17(1) of the Charter states the following:

'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions except in the public interest and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

391 According to settled case-law, the right to property guaranteed by Article 17(1) of the Charter is not absolute and its exercise may be subject to limitations justified by objectives of general interest pursued by the European Union. Consequently, as is apparent from Article 52(1) of the Charter, restrictions may be imposed on the exercise of the right to property, provided that the restrictions genuinely meet objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed (see judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 69 and 70 and the case-law cited; judgments of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 85, and of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraph 100).

392 It follows that the right to property is not an absolute right, but that, in accordance with Article 52(1) of the Charter, cited in paragraph 336 above, it may be subject to limitations if they are provided for in the applicable texts, are necessary for the pursuit of a general objective and are proportionate to that objective.

393 It should be recalled that, in Article 6 of the resolution scheme, the SRB decided, pursuant to Article 21 of Regulation No 806/2014, to write down and convert the capital instruments in Banco Popular in accordance with the detailed rules set out in paragraph 73 above.

394 In addition, it is apparent, first, from recital 61 of Regulation No 806/2014 that restrictions on the rights of shareholders and creditors should comply with the principles set out in Article 52(1) of the Charter and, second, from recital 62 of that regulation that infringements of property rights should not be disproportionate.

395 According to Article 15(1)(a) of Regulation No 806/2014, concerning the general principles governing resolution, the shareholders of the institution under resolution are the first to bear the losses.

396 In that regard, the Court of Justice has held that, as regards the shareholders of banks, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, they must fully bear the risk of their investments (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 73).

397 The Court of Justice has held in the field of State aid that, since the shareholders are liable for the debts of the bank up to the amount of its share capital, the fact that points 40 to 46 of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ 2013 C 216, p. 1) require that, in order to remedy the capital shortfall of a bank, prior to the grant of State aid, those shareholders should contribute to the absorption of the losses suffered by that bank to the same extent as if there were no State aid, cannot be regarded as adversely affecting their right to property (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 74).

398 It must be held, by analogy, that the decision in the resolution scheme to write down and convert capital instruments in Banco Popular held by the applicants is the consequence of the fact that the shareholders of an entity must bear the risks inherent in their investments and of the fact that, since that entity is under resolution because of its failure, they must bear the economic consequences of that.

399 In that regard, the General Court has already held that a measure consisting in the reduction of the nominal value of the shares in a Cypriot bank was proportionate to the objective pursued by that measure. It noted, first of all, that that measure was intended to contribute to the recapitalisation of the bank and that that measure was appropriate for the objective of ensuring the stability of the Cypriot financial system and the euro area as a whole. Next, it found that that measure did not exceed the limits of what was appropriate and necessary in order to achieve that objective, since less restrictive alternatives were not feasible or would not have enabled the expected results to be achieved. Finally, it considered that, in the light of the importance of the objective pursued, the measure did not create disproportionate disadvantages. It recalled, in that

regard, that the shareholders of banks bear the full risk of their investments (judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 330).

400 In those circumstances, the General Court concluded that it cannot be considered that the reduction of the nominal value of the shares of that bank constituted disproportionate and intolerable interference, impairing the very substance of the shareholders' right to property (judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 331).

401 In addition, it should be recalled that it is apparent from the case-law, cited in paragraph 343 above, that financial services play a central role in the EU economy and that the failure of one or more banks is likely to spread rapidly to other banks either in the Member State concerned or in other Member States.

402 The Court of Justice has already ruled that, in view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the banks concerned would have been exposed if those banks had failed, certain restrictions on the right to property may be justified (see, to that effect, judgment of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 74).

403 The Court of Justice has also held that, although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 91, and of 8 November 2016, *Dowling and Others*, C-41/15, EU:C:2016:836, paragraph 54).

404 It must be recalled that, in Article 4.2 of the resolution scheme, the SRB considered that resolution was necessary and proportionate to the objectives laid down in Article 14(2)(a) and (b) of Regulation No 806/2014, seeking to ensure the continuity of critical functions and to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline. It stated that the liquidation of Banco Popular under normal insolvency proceedings would not achieve those objectives to the same extent. In the contested decision, the Commission expressly endorsed the reasons put forward by the SRB to justify resolution action in the public interest.

405 Thus, the resolution scheme in so far as it was intended to preserve or restore the financial situation of Banco Popular and, in particular, in so far as it constituted an alternative to its liquidation, met an objective of general interest within the meaning of Article 52(1) of the Charter, namely to ensure the stability of the financial markets.

406 The applicants state that they do not call into question the compatibility of the Single Resolution Mechanism as provided for in Regulation No 806/2014 with the Charter and that they accept that the resolution of a failing bank in accordance with the provisions of that regulation, intended to protect the stability of the banking system, lawfully pursues a public interest.

407 In the first place, the applicants submit that the decision to write down and convert the capital instruments in Banco Popular which they held is contrary to the requirements of Article 17(1) of the Charter in so far as it did not comply with the conditions laid down by law. The resolution scheme and the contested decision do not comply with the general principles of EU law or the provisions of Regulation No 806/2014 on the grounds set out in their other pleas.

408 In that regard, suffice it to state that it is clear from the analysis of the other pleas that the Commission did not commit a manifest error of assessment in the application of the provisions of Regulation No 806/2014, nor did it breach general principles of law.

409 In addition, first, it must be noted that, in their other pleas, the applicants do not dispute that the conditions laid down in Article 18 of Regulation No 806/2014 justifying the adoption of the resolution scheme were satisfied. Second, the applicants do not put forward any specific arguments seeking to establish that the write down and conversion of the capital instruments decided on by the SRB, which is the measure capable of infringing their right to property, is not consistent with the provisions of Article 21 of Regulation No 806/2014 and that the Commission therefore should not have endorsed it.

410 It follows that the applicants have not put forward any argument capable of calling into question, first, the fact that the SRB's decision to write down and convert the capital instruments in Banco Popular complied with the conditions laid down in Regulation No 806/2014 and, second, the fact that that decision was necessary for the pursuit of a general objective capable of justifying a restriction on the right to property.

411 In the second place, the applicants submit that the resolution scheme and the contested decision infringe Article 17(1) of the Charter in that they do not provide for the grant of any compensation to them.

412 It should be noted that Article 15(1)(g) of Regulation No 806/2014 establishes that no creditor will incur greater losses than would have been incurred if the entity under resolution had been wound up under normal insolvency proceedings.

413 In order to determine whether the shareholders and creditors would have benefited from better treatment if the entity concerned had been subject to normal insolvency proceedings, Article 20(16) of Regulation No 806/2014 provides that a valuation is to be carried out after resolution. According to Article 20(17) of Regulation No 806/2014, that valuation establishes whether there is a difference between the treatment that shareholders and creditors would have received if the institution had entered normal insolvency proceedings at the time when the decision on resolution action was taken and the actual treatment which they received under the resolution.

414 If, following that valuation, it is established that the shareholders or creditors have incurred greater losses under the resolution than those they would have incurred in a winding-up under normal insolvency proceedings, Article 76(1) of Regulation No 806/2014 provides that the SRB may use the SRF to pay them compensation.

415 It follows that Regulation No 806/2014 establishes a mechanism to ensure fair compensation for the shareholders or creditors of the entity under resolution, in accordance with the requirements of Article 17(1) of the Charter.

416 In addition, contrary to the applicants' submission, the fact that they did not receive compensation on the date of the resolution scheme is not sufficient to establish an infringement of their right to property, since Article 17(1) of the Charter does not provide for the payment of compensation concomitant with the restriction of the right to property, but for payment in good time.

417 Furthermore, as regards the applicants' arguments challenging valuation 3 raised in the reply, relating to Deloitte's lack of independence and the infringement of their right of access to the file, suffice it to state that they are ineffective. Those arguments concern valuation 3 which was carried out after the adoption of the contested decision and a separate procedure, and they are therefore not capable of calling into question the lawfulness of the contested decision.

418 In the third place, in the reply, the applicants submit that compensation determined on the basis of the difference in treatment of creditors under resolution action and in normal insolvency proceedings does not constitute fair compensation within the meaning of Article 17(1) of the Charter. They submit that, had the Commission complied with EU law, the contested decision would not have been adopted or the resolution scheme would have taken a different form, and therefore the payment of compensation under Article 76(1) of Regulation No 806/2014 does not constitute fair compensation. The true measure of compensation must be measured by reference to the proper counterfactual scenario, which is no resolution followed by a private solution or, alternatively, resolution action based on a proper valuation of Banco Popular.

419 It should be borne in mind that the purpose of the 'no creditor worse off' principle, referred to in Article 15(1)(g) of Regulation No 806/2014, is to ensure that, if the infringement of the applicants' right to property resulting from the resolution scheme is greater than that which they would have suffered if Banco Popular had been wound up under normal insolvency proceedings, they would be entitled to compensation.

420 In the present case, the SRB stated in the resolution scheme that the conditions laid down in Article 18(1) of Regulation No 806/2014 were satisfied, namely that Banco Popular was failing or was likely to fail, that no alternative private sector or supervisory action could prevent its failure having regard to timing and that the resolution action was necessary in the public interest. It should be borne in mind that the applicants do not dispute that those conditions were satisfied in the present case.

421 It follows that, if the resolution scheme had not been adopted, the alternative was the liquidation of Banco Popular under normal insolvency proceedings, which the applicants acknowledged at the hearing.

422 In addition, it is apparent from the analysis of the third plea in law that the counterfactual scenario relied on by the applicants and included in their supplemental expert report, consisting in Banco Popular not being placed under resolution, followed by a private solution, is not relevant.

423 Furthermore, contrary to what the applicants submit, the value of their investment must not be calculated having regard to the situation before the adoption of the resolution scheme, but rather relates to a situation in which the resolution scheme was not adopted, which equates to a situation in which Banco Popular is liquidated under normal insolvency proceedings.

424 In that regard, in the field of State aid, the Court of Justice has held that the scale of losses suffered by shareholders of distressed banks will, in any event, be the same, regardless of whether those losses are caused by a court insolvency order because no State aid is granted or by a procedure for the granting of State aid which is subject to the prerequisite of burden-sharing (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 75).

425 The Court of Justice noted that paragraph 46 of the Banking Communication provides that 'the "no creditor worse off" principle should be adhered to' and that 'thus, subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted' (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 77).

426 According to the Court of Justice, it follows from that paragraph that the burden-sharing measures on which the grant of State aid in favour of a bank showing a shortfall is dependent cannot cause any detriment to the right to property of subordinated creditors which those creditors would not have suffered within insolvency proceedings that followed such aid not being granted. In those circumstances, it cannot reasonably be maintained that burden-sharing measures, such as those laid down by the Banking Communication, constitute interference in the right to property of the shareholders and the subordinated creditors (judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 78 and 79).

427 Furthermore, as regards securities, the amount of the compensation payable is calculated in relation to the true market value of those securities at the time of the adoption of the contested regulation, and not in relation to its nominal value or the amount the owner thereof hoped to receive at the time of its acquisition (see judgment of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others*, T-680/13, EU:T:2018:486, paragraph 314 and the case-law cited).

428 It must therefore be held, by analogy, that the application in the present case of the 'no creditor worse off' principle, as provided for in Article 15(1)(g) of Regulation No 806/2014, guarantees the applicants fair compensation in accordance with the requirements of Article 17(1) of the Charter.

429 It follows from all of the foregoing, first, that Banco Popular was failing or was likely to fail and that there were no alternative measures capable of preventing that situation, second, that without resolution, Banco Popular would have entered into normal insolvency proceedings and, third, that the shareholders of Banco Popular had to bear the risk of their investments and Regulation No 806/2014 provides for the possible payment of compensation in accordance with the 'no creditor worse off' principle. Accordingly, it must be concluded that the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute a disproportionate and intolerable interference impairing the very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction on their right to property, in accordance with Article 17(1) and Article 52(1) of the Charter.

430 Moreover, it should be noted that the applicants submit that the treatment under normal insolvency proceedings is the correct yardstick for determining compensation where a bank has been legally resolved. In the present case, they claim that, since the resolution scheme did not comply with the provisions of Regulation No 806/2014, the compensation due to them should be based on the position they would have been in but for the unlawful acts.

431 It must be held that such an argument is not intended to establish an infringement of the right to property, but is in fact a claim for compensation for harm suffered as a result of an unlawful act committed by an EU institution, which may be awarded in the context of an action for damages.

432 Consequently, the fifth plea in law must be rejected.

The applications for measures of organisation of procedure

433 In the application, the applicants submit requests for measures of organisation of procedure requesting the Court to order the Commission, the SRB and the ECB to produce certain documents.

434 It should be noted that, by its order for measures of inquiry of 21 May 2021, pursuant to Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, the Court ordered the Commission and the SRB to produce certain documents referred to in paragraph 93 above. By order of 16 June 2021, the Court held that the documents produced by the Commission and the SRB in their confidential version were not relevant to the outcome of the dispute. On the other hand, the letter from Banco Popular to the ECB of 6 June 2017, without its annex, was communicated to the other parties.

435 As regards applications made by a party for measures of organisation of procedure or measures of inquiry, it must be recalled that the Court is the sole judge of any need to supplement the information available to it in respect of the cases before it (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13P, EU:C:2017:50, paragraph 117 and the case-law cited; judgment of 12 November 2020, *Fleig* v *EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 53).

436 In the present case, it must be noted that the elements in the case file and the explanations provided during the hearing are sufficient to allow the Court to give a ruling, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings, and in the light of the documents lodged by the parties.

437 It follows that the applicants' requests for measures of organisation of procedure must be rejected.

438 In the light of all the foregoing, the action must be dismissed in its entirety, without it being necessary to rule on the admissibility of the applicants' alternative head of claim seeking annulment of Article 1 of the contested decision.

Costs

439 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission and Banco Santander, in accordance with the form of order sought by the latter.

440 Under Article 138(1) of the Rules of Procedure, Member States and institutions which intervene in the proceedings are to bear their own costs. Under Article 1(2)(f) of the Rules of Procedure, the term 'institutions' means the institutions of the European Union referred to in Article 13(1) TEU and the bodies, offices or agencies established by the Treaties, or by an act adopted in implementation thereof, which may be parties before the General Court. According to Article 42(1) of Regulation No 806/2014, the SRB is an EU agency. The SRB shall therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Algebris (UK) Ltd and Anchorage Capital Group LLC to bear their own costs and to pay those incurred by the European Commission and Banco Santander, SA.;**

3. **Orders the Single Resolution Board (SRB) to bear its own costs.**

Van der Woude Jaeger Kreuschitz

De Baere Steinfatt

Delivered in open court in Luxembourg on 1 June 2022.

E. Coulon G. De Baere
Registrar President

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