Reports of Cases

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

28 November 2019 *

(Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on 2016 *ex ante* contributions – Action for annulment – Direct and individual concern – Admissibility – Essential procedural requirements – Authentication of the decision – Procedure for the adoption of the decision – Obligation to state reasons – Limitation in time of the effects of the judgment)

In Joined Cases T-377/16, T-645/16 and T-809/16,

Hypo Vorarlberg Bank AG, formerly Vorarlberger Landes- und Hypothekenbank AG, established in Bregenz (Austria), represented by G. Eisenberger and A. Brenneis, lawyers,

applicant,

supported by

Italian Republic, represented by G. Palmieri, acting as Agent,

intervener in Case T-645/16,

v

Single Resolution Board (SRB), represented by B. Meyring, S. Schelo, T. Klupsch and S. Ianc, lawyers,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment, first, of the Decision of the Executive Session of the SRB of 15 April 2016 on the 2016 ex-ante contributions to the Single Resolution Fund (SRB/ES/SRF/2016/06) and, second, of the Decision of the Executive Session of the SRB of 20 May 2016 on the adjustment of the 2016 ex-ante contributions to the Single Resolution Fund supplementing the Decision of the Executive Session of the SRB of 15 April 2016 on the 2016 ex-ante contributions to the Single Resolution Fund (SRB/ES/SRF/2016/13), to the extent that they concern the applicant,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

* Language of the case: German.

composed of A.M. Collins, President, M. Kancheva, R. Barents, J. Passer (Rapporteur) and G. De Baere, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 February 2019,

gives the following

Judgment

Legal framework

1 The present cases have been brought in connection with the second pillar of the banking union, with regard to the Single Resolution Mechanism (SRM), established by Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1). The purpose of establishing the SRM is to enhance the integration of the resolution framework in the euro area Member States and the non-euro area Member States which choose to participate in the single supervisory mechanism (SSM) ('the participating Member States').

2 Specifically, these cases concern the Single Resolution Fund (SRF) established by Article 67(1) of Regulation No 806/2014. The SRF is financed by contributions from institutions raised at national level by way, inter alia, of *ex ante* contributions, pursuant to Article 67(4) of that regulation. In accordance with Article 3(1), point (13) of Regulation No 806/2014, 'institution' means a credit institution, or an investment firm covered by consolidated supervision in accordance with Article 2(c) of that regulation. The contributions are transferred at EU level in accordance with the intergovernmental agreement on the transfer and mutualisation of contributions to the SRF, signed in Brussels on 21 May 2014 ('the IGA').

3 Article 70 of Regulation No 806/2014, entitled 'Ex-ante contributions', provides:

'1. The individual contribution of each institution shall be raised at least annually and shall be calculated pro-rata to the amount of its liabilities (excluding own funds) less covered deposits, with respect to the aggregate liabilities (excluding own funds) less covered deposits, of all of the institutions authorised in the territories of all of the participating Member States.

2. Each year, the Board shall, after consulting the ECB or the national competent authority and in close cooperation with the national resolution authorities, calculate the individual contributions to ensure that the contributions due by all of the institutions authorised in the territories of all of the participating Member States shall not exceed 12,5% of the target level.

Each year the calculation of the contributions for individual institutions shall be based on:

(a) a flat contribution, that is pro-rata based on the amount of an institution's liabilities excluding own funds and covered deposits, with respect to the total liabilities, excluding own funds and covered deposits, of all of the institutions authorised in the territories of the participating Member States; and

(b) a risk-adjusted contribution, that shall be based on the criteria laid down in Article 103(7) of Directive 2014/59/EU, taking into account the principle of proportionality, without creating distortions between banking sector structures of the Member States.

The relation between the flat contribution and the risk-adjusted contributions shall take into account a balanced distribution of contributions across different types of banks.

In any case, the aggregate amount of individual contributions by all of the institutions authorised in the territories of all of the participating Member States, calculated under points (a) and (b), shall not exceed annually the 12,5% of the target level.

…

6. The delegated acts specifying the notion of adjusting contributions in proportion to the risk profile of institutions, adopted by the Commission under Article 103(7) of Directive 2014/59/EU, shall be applied.

7. The Council, acting on a proposal from the Commission, shall, within the framework of the delegated acts referred to in paragraph 6, adopt implementing acts to determine the conditions of implementation of paragraphs 1, 2, and 3, and in particular in relation to:

(a) the application of the methodology for the calculation of individual contributions;

(b) the practical modalities for allocating to institutions the risk factors specified in the delegated act.'

4 Regulation No 806/2014 was supplemented, with regard to those *ex ante* contributions, by Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation No 806/2014 with regard to *ex ante* contributions to the SRF (OJ 2015 L 15, p. 1).

5 Moreover, Regulation No 806/2014 and Implementing Regulation 2015/81 refer to certain provisions contained in two other acts:

– first, 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);

– second, Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

6 The Single Resolution Board (SRB) was established as a Union agency (Article 42 of Regulation No 806/2014). It comprises a plenary session and an executive session (Article 43(5) of Regulation No 806/2014). The SRB, in its executive session, is to take all of the decisions to implement Regulation No 806/2014, unless that regulation provides otherwise (Article 54(1)(b) of Regulation No 806/2014).

7 By decision of 29 April 2015 (SRB/PS/2015/8), the SRB, in its plenary session, adopted the Rules of Procedure of the SRB in its Executive Session ('the RPES').

8 Article 9(1) to (3) of the RPES provide:

'1. Decisions may also be taken by written procedure, unless at least two Members of the Executive Session referred to in Article 3(1) participating in the written procedure object within the first 48 hours of the launch of the written procedure. In such case, the item shall be put on the agenda of the subsequent Executive Session.

2. A written procedure shall normally require not less than five working days for consideration by each Member of Executive Session. Where emergency action is required, the Chair may establish a shorter period for taking a decision by consensus. The reason for the shortening of the period shall be given.

3. If consensus is not reachable via a written procedure, the Chair may initiate a regular voting procedure in line with Article 8.'

Background to the dispute

9 The applicant, Hypo Vorarlberg Bank AG, formerly Vorarlberger Landes-und Hypothekenbank AG, is a credit institution established in a participating Member State.

10 By decision of 15 April 2016 on the 2016 ex-ante contributions to the SRF (SRB/ES/SRF/2016/06) ('the first contested decision'), the SRB, in its executive session, decided, pursuant to Article 54(1)(b) and Article 70(2) of Regulation No 806/2014, the amounts of the 2016 *ex ante* contributions for each institution, including the applicant. The annex to that decision contains, in a table, the amounts of the 2016 *ex ante* contributions for each institution, and a number of other sections, entitled, inter alia, 'Method (EA)' (Euro Area Method) and 'Risk adjustment factor in the EA environment'.

11 On the same day, the SRB provided the national resolution authorities ('the NRAs') with a copy of the data sheet concerning the institutions situated in the respective territories falling within their jurisdiction.

12 By a collection notice of 26 April 2016, the Finanzmarktaufsichtsbehörde (Financial Markets Supervisory Authority, Austria), in its capacity as the Austrian national resolution authority ('the Austrian NRA'), within the meaning of Article 3(1), point (3) of Regulation No 806/2014, ordered the applicant to pay, to one of its bank accounts and by 20 May 2016, a specific amount by way of *ex ante* contributions.

13 On 11 May 2016, the applicant requested the Austrian NRA to send it all of the calculations, decisions and other SRB documents concerning it.

14 The applicant paid its *ex ante* contribution for 2016 by bank transfer to the Austrian NRA's account on 19 May 2016.

15 By decision of 20 May 2016 on the adjustment of the 2016 ex-ante contributions to the SRF, supplementing the first contested decision (SRB/ES/SRF/2016/13) ('the second contested decision'), the SRB reduced the applicant's contribution.

16 The annex to that decision states, for each institution, the initial amounts of the 2016 *ex ante* contributions, the amounts of the 2016 *ex ante* contributions 'after IPS impact' (after the impact of the indicator concerning belonging to an institutional protection system) and the difference between those amounts, as well as, inter alia, the method (euro area) and the risk adjustment factor in the euro area environment.

17 On 22 May 2016, the SRB provided the NRAs with a copy of the data sheet concerning the institutions situated in the respective territories falling within their jurisdiction. In addition, the second contested decision was sent as an annex to a letter on the adjustment of the 2016 *ex ante* contributions which was signed by the vice-chair of the SRB and sent to all NRAs, together with a draft letter on the adjustment of the 2016 *ex ante* contributions in order to ensure consistent communication with all institutions, whilst allowing the NRAs the freedom to decide whether or not to communicate that letter.

18 On 23 May 2016, the Austrian NRA sent the applicant a second collection notice, entitled '*Information zum Beitrag zum Abwicklungsfonds 2016*' (information on the 2016 contribution to the SRF) by which it notified the applicant of the adjustment to its 2016 *ex ante* contributions. That notice was accompanied by a letter from the SRB dated 23 May 2016. According to that notice, the 2016 contribution had been calculated incorrectly and the contribution that the applicant had paid was too high. The notice also stated that that amount would not be reimbursed until 2017. The second contested decision was not attached to that notice.

19 In that regard, in the initial calculation of 2016 *ex ante* contributions (as approved by the SRB in the first contested decision), an indicator regarding membership of an IPS, as referred to in Article 5(1)(b) of Delegated Regulation 2015/63, was calculated incorrectly in respect of the adjustment of the risk profile provided for in Article 6 of Delegated Regulation 2015/63. That calculation error was rectified by the SRB in the second contested decision. Although the applicant is not a member of an IPS, the method used to calculate *ex ante* contributions also required a recalculation for all other institutions which pay a contribution based on a risk profile (such as the applicant). In respect of the applicant, the adjusted calculation resulted in a slightly lower payment obligation for its 2016 *ex ante* contribution. Since the applicant had already paid its 2016 *ex ante* contribution on the basis of the initial calculation, it was entitled to a refund.

20 The 2016 *ex ante* contributions had to be transferred by the participating Member States to the SRF by 30 June 2016 at the latest (see Article 3(2) of the IGA).

21 On 14 June 2016, the applicant again requested that the Austrian NRA send it certain documents, including the first and second contested decisions (together, 'the contested decisions') mentioned in the collection notices of 26 April and 23 May 2016. In addition, the applicant requested an immediate refund of the overpayment.

22 By letter of 28 June 2016, the Austrian NRA sent the applicant the second contested decision without its annex.

23 On 7 July 2016, the applicant asked the Austrian NRA once more to send it the documents requested and also sent that request to the SRB.

24 On 2 August 2016, the applicant received a letter from the SRB confirming receipt of the request for the transmission of documents and apologising for its delayed response, citing the need for inter-service consultation.

25 On 20 September 2016, the SRB sent the applicant the first contested decision without its annex.

Procedure and forms of order sought

26 By documents lodged at the Registry of the Court on 14 July, 7 September and 18 November 2016, the applicant brought the actions registered under numbers T-377/16, T-645/16 and T-809/16.

27 By separate document lodged at the Registry of the Court on 16 September 2016, the applicant brought an application for interim measures seeking, first, that the first contested decision be suspended and second, that the SRB provisionally reimburse its contribution to it pending a ruling being given on the action for annulment.

28 By document lodged at the Registry of the Court on 22 December 2016, the Italian Republic applied for leave to intervene in support of the form of order sought by the applicant in Case T-645/16.

29 The application for interim measures was rejected by order of 6 February 2017, *Vorarlberger Landes – und Hypothekenbank* v *SRB* (T-645/16 R, not published, EU:T:2017:62), for lack of urgency. The costs were reserved.

30 By decision of 9 February 2017, the President of the Eighth Chamber of the General Court granted the Italian Republic leave to intervene in Case T-645/16.

31 As the main parties expressed their views on a possible joinder in the pleadings, the President of the Eighth Chamber decided, on 8 November 2018, to join the three abovementioned cases for the purposes of the oral part of the procedure and the decision which closes the proceedings, pursuant to Article 68 of the Rules of Procedure of the General Court.

32 By a first measure of organisation of procedure adopted on 9 October 2017 under Article 89 of the Rules of Procedure, the Court requested the SRB to submit the full copy of the originals of the contested decisions, including their annexes.

33 By document of 26 October 2017, the SRB stated that it was unable to comply with the measure of organisation of procedure adopted on 9 October 2017, mentioning, inter alia, the confidential nature of the data contained in the annexes to the contested decisions.

34 By an order for measures of inquiry of 14 December 2017 ('the first order'), the Court ordered the SRB, 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 non-confidential and confidential versions of the full copy of the originals of the contested decisions, including their respective annexes.

35 By document of 15 January 2018, the SRB replied to the first order and produced, in non-confidential and confidential versions, four documents: two documents for the first contested decision and two documents for the second contested decision, corresponding for each, first, as regards the text of the contested decision, to a two-page document in the form of a scanned copy, in PDF format, of a signed paper document and, second, to a document comprising a digital version, in PDF format, of digital data, forming the annex to the decision in question.

36 In the light of the SRB's reply to the first order, on 12 March 2018 the Court adopted a second measure of organisation of procedure and requested the SRB, first, to clarify the format of the annexes at the time when the contested decisions were adopted and, second, if those annexes had been presented in digital format, to explain why and to provide all the technical authentication features needed to prove that the PDF versions of the digital data produced before the Court correspond to what was actually presented for signature and adopted by the SRB in its executive session at its meetings of 15 April and 20 May 2016 and, third, to submit observations on the question of the existence in law of the contested decisions and the question of compliance with essential procedural requirements.

37 By document of 27 March 2018, the SRB replied to the second measure of organisation of procedure. With regard to the second request mentioned in paragraph 36 above, the SRB stated that it was unable to comply with the request since some of the documents it had been asked to produce were confidential and it requested that a measure of inquiry be adopted.

38 On 2 May 2018, the Court adopted a further order for measures of inquiry, ordering the SRB to comply with the second request contained in the measure of organisation of procedure of 12 March 2018 ('the second order').

39 By letter of 9 May 2018, which was added to the file by decision of 22 May 2018, the applicant submitted new evidence, namely 16 interim decisions of the SRB setting out the factors for the methodology for the calculation of the 2016 contributions.

40 By document of 18 May 2018, which was corrected on 29 June 2018, the SRB complied with the second order and produced, in confidential and non-confidential versions, a document entitled 'Technical information on identification', the text of four emails from the SRB of 13 April 2016 at 17.41, 15 April 2016 at 19.04 and at 20.06 and of 19 May 2016 at 21.25, together with a USB stick containing two files in XLSX format and two files in TXT format.

41 By decision of 12 July 2018, following the examination provided for in Article 103(1) of the Rules of Procedure, the Court removed from the file the confidential versions of the documents produced by the SRB in response to the first and second orders, with the exception of the files in TXT format which were on the USB sticks produced on 18 May 2018 by the SRB and which contained no confidential information. Those files have been included in the file in paper format.

42 On 12 July 2018, by a third measure of organisation of procedure adopted under Article 89 of the Rules of Procedure, the Court requested the applicant and the intervener to submit their observations on the SRB's responses to the measures of organisation of procedure and measures of inquiry referred to in paragraphs 32, 34, 36 and 38 above.

43 By document of 30 July 2018, the applicant submitted its observations. The intervener did not submit any observations.

44 On a proposal from the Eighth Chamber of the General Court, the Court decided, in accordance with Article 28 of the Rules of Procedure, to refer the cases to a Chamber sitting in extended composition.

45 In the action registered under number T-377/16, the applicant claims that the Court should:

– annul the contested decisions;

– in the alternative, annul the second contested decision in so far as it orders that the repayment of the overpaid contribution is to take place in the context of the setting of the contribution for the SRF for 2017;

– order the SRB to pay the costs.

46 In the action registered under number T-645/16, the applicant claims that the Court should:

– annul the first contested decision, at least in so far as that decision concerns it;

– order the SRB to pay the costs.

47 In the action registered under number T-809/16, the applicant claims that the Court should:

– annul the contested decisions, at least in so far as those decisions concern it;

– order the SRB to pay the costs.

48 The SRB contends that the Court should:

– in each of the three actions registered under numbers T-377/16, T-645/16 and T-809/16, declare the action inadmissible or, alternatively, dismiss the action as unfounded;

– in each of the three actions registered under numbers T-377/16, T-645/16 and T-809/16, in the alternative, in the event that the Court considers that one or more of the applicant's pleas in law should be upheld, limit the temporal effects of the declaration of invalidity which should not apply until six months after the judgment has become final in the present case;

– in each of the three actions registered under numbers T-377/16, T-645/16 and T-809/16, in any event, order the applicant to pay the costs and legal expenses incurred by the SRB;

– in Cases T-645/16 and T-809/16, in the event that the Court declares admissible all or part of the actions for annulment brought by the applicant in Cases T-377/16, T-645/16 and T-809/16, join those cases in accordance with Article 68 of the Rules of Procedure.

49 In Case T-645/16, the Italian Republic submits that the Court should:

– declare the action admissible;

– uphold the second plea in law, without the need to examine the other pleas.

Law

Admissibility

50 In the first place, the SRB recalls that an application for annulment is admissible only against an act which is intended to produce legal effects vis-à-vis third parties, which is not the case in respect of either the first or the second contested decisions. The approval of the amounts of the 2016 *ex ante* contributions and the subsequent transmission of the results to NRAs by the SRB in its executive session creates no obligation on the part of the institutions. Such an obligation arises only if, and when, the competent NRA adopts a legal act under national law.

51 In the second place, the SRB submits that its decisions are not addressed to the applicant (Article 70(2) of Regulation No 806/2014) and that the applicant is not directly concerned by the contested decisions. The SRB calculates the *ex ante* contributions due from each institution, in accordance with the method set out in Delegated Regulation No 2015/63 and in Implementing Regulation 2015/81, in close cooperation with the NRAs (Article 4 of Implementing Regulation 2015/81 and Article 70(2) of Regulation No 806/2014). The SRB's calculation does not create direct effect as regards the institution in the sense that the calculation itself does not affect the legal status of institutions. Although the SRB, like the NRAs, plays a role in the process behind the calculation of contribution amounts, the institutions are not directly affected until the NRAs collect the contributions. Only the NRAs, and not the SRB, have the power to ensure – and, if necessary to require – that the institutions pay their contributions in a proper fashion, in accordance with the applicable national procedural and substantive law.

52 By making the NRAs responsible for the collection of *ex ante* contributions, the EU legislature decided that those contributions, calculated by the SRB, are to be collected by the national authorities by virtue of the powers conferred on them by national procedural and substantive law. That is also consistent with the reasons underpinning the IGA. Therefore, the SRB states that the acts adopted by the NRAs under their national law must be challenged before the national courts and if, before a national court, questions arise as to the validity or interpretation of acts of EU institutions or agencies, that court may refer a question to the Court for a preliminary ruling under Article 267 TFEU. The fact that, in its judgment of 24 August 2016, the Bundesverwaltungsgericht (Federal Administrative Court, Austria) took the view that the Court alone had jurisdiction to hear an action for annulment concerning the calculation and collection of *ex ante* contributions is irrelevant since such a conclusion drawn by a national court has no bearing on the present case. Only the Court can determine whether it has jurisdiction.

53 In the third place, the SRB submits that it is for the Court to review of its own motion whether the time limit laid down in the sixth paragraph of Article 263 TFEU has been complied with and to dismiss the action if that is not the case. The SRB notes that the contested decisions have not been published, but were notified to the NRAs, as addressees, and that the applicant is not one of those addressees. However, the contested decisions have come to its knowledge by other means. Its action ought therefore to have been brought within two months of the date on which the decisions came to its knowledge, namely when it became aware of their main contents.

54 According to the SRB, the collection notice sent by the Austrian NRA on 26 April 2016 contained information that was sufficiently precise to enable the applicant to have the required knowledge of the first contested decision, so that the time limit for bringing proceedings began on 27 April 2016, the date on which that notice was received, and expired on 7 July 2016. Therefore, the three actions were brought after the prescribed time limit and are out of time in respect of the

first contested decision. That also affects the admissibility of the actions with regard to the second contested decision. Since the aim of that decision is solely to reduce the amount of the 2016 *ex ante* contribution, the applicant has no legal interest in challenging it separately. In addition, in the context of the action registered under number T-809/16, the SRB states that the collection notice sent by the Austrian NRA on 23 May 2016 was received by the applicant on 27 May 2016, so that that action, in particular, is also inadmissible because the time limit has been exceeded.

55 In the fourth place, with regard to the actions registered under numbers T-645/16 and T-809/16, the SRB submits that they are inadmissible in so far as they have the same subject matter and concern the same parties as the action registered under number T-377/16.

56 In the fifth place, with regard to the action registered under number T-809/16, the SRB considers that the applicant's argument – that access to SRB decisions under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), is equivalent to a formal notification of those decisions to an addressee and constitutes a new starting point for the period for bringing an action for annulment – is incorrect. According to the SRB, the addressees of decisions are identified when they are adopted, on the basis of the applicable legal framework. The fact that those decisions are subsequently communicated to third parties does not mean that those third parties must be regarded as the addressees of the decisions. Therefore, the third action, which has exactly the same subject matter, concerns the same parties, has the same pleas in law and concerns the same decisions as the first two actions, must, in the SRB's view, be declared inadmissible.

57 The applicant disputes those arguments and takes the view that the three actions are admissible.

58 According to the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to that person, and against a regulatory act which is of direct concern to that person and does not entail implementing measures.

59 Thus, the fourth paragraph of Article 263 TFEU restricts actions for annulment brought by a natural or legal person to three categories of acts, namely, first, acts addressed to that person, second, acts not addressed to that person and which are of direct and individual concern to that person and, third, regulatory acts not addressed to that person, which are of direct concern to that person and which do not entail implementing measures (see order of 10 December 2013, *von Storch and Others* v *ECB*, T-492/12, not published, EU:T:2013:702, paragraph 29 and the case-law cited).

60 As regards the condition laid down in the first paragraph of Article 263 TFEU, it is settled case-law that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position are acts or decisions which may be the subject of an action for annulment (see order of 21 April 2016, *Borde and Carbonium* v *Commission*, C-279/15 P, not published, EU:C:2016:297, paragraph 37 and the case-law cited).

61 Moreover, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, a measure will be open to review only if it is a measure definitively laying down the position of the institution upon

conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (see order of 9 March 2016, *Port autonome du Centre et de l'Ouest and Others* v *Commission*, T-438/15, EU:T:2016:142, paragraph 20 and the case-law cited).

62 In addition, it is clear from the case-law that, where an action for annulment is brought by a non-privileged applicant against a measure that has not been addressed to it, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of that party by bringing about a distinct change in its legal position overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU (see order of 6 March 2014, *Northern Ireland Department of Agriculture and Rural Development* v *Commission*, C-248/12 P, not published, EU:C:2014:137, paragraph 33 and the case-law cited).

63 In that regard, it is settled case-law, first, that natural or legal persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them or, by reason of factual circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguishes them individually just as in the case of the person addressed (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 2 April 1998, *Greenpeace Council and Others* v *Commission*, C-321/95 P, EU:C:1998:153, paragraphs 7 and 28).

64 Second, it is settled case-law that the condition that the decision forming the subject matter of the proceedings must be of direct concern to a natural or legal person requires the contested measure to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other, intermediate rules (see judgment of 22 March 2007, *Regione Siciliana* v *Commission*, C-15/06 P, EU:C:2007:183, paragraph 31 and the case-law cited).

65 It is clear from the case-law that, even where the disputed act necessarily requires the adoption of implementing measures if it is to affect the legal situation of individuals, the condition of direct concern is nevertheless considered to be satisfied if the act imposes obligations on the addressee thereof for its implementation and if the addressee is automatically required to take measures that alter the applicant's legal situation (see, to that effect, judgment of 7 July 2015, *Federcoopesca and Others* v *Commission*, T-312/14, EU:T:2015:472, paragraph 38 and the case-law cited).

66 As Advocate General Wathelet recalled in his Opinion in *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2013:335, point 68 and the case-law cited), the absence of discretion on the part of the Member States overturns the apparent absence of a direct link between an act of the Union and the individual. In other words, in order to preclude direct concern, the discretion of the author of the intermediate act seeking to implement the act of the European Union cannot be purely formal. It must be the source of the legal effect on the applicant.

67 In the present case, in the first place, it is apparent from the applicable rules, in particular Article 54(1)(b) and Article 70(2) of Regulation No 806/2014, that the body which actually calculated the individual contributions and made the decision approving those contributions was the SRB. The fact that there may be cooperation between the SRB and the NRAs does not alter that finding (order of 19 November 2018, *Iccrea Banca* v *Commission and SRB*, T-494/17, EU:T:2018:804, paragraph 27).

68 The SRB alone is competent to calculate, 'after consulting the ECB or the national competent authority and in close cooperation with the [NRAs]', the *ex ante* contributions of the institutions (Article 70(2) of Regulation No 806/2014). Moreover, the NRAs have an obligation under EU law to raise those contributions as determined by the decision of the SRB (Article 67(4) of Regulation No 806/2014).

69 The SRB decisions determining the *ex ante* contributions, pursuant to Article 70(2) of Regulation No 806/2014, are therefore definitive in nature.

70 Consequently, the contested decisions cannot be classified as purely preparatory measures or as intermediate measures since they definitively lay down the position of the SRB, upon conclusion of the procedure, in respect of contributions.

71 In the second place, whatever terminological variations there may be between the linguistic versions of Article 5 of Implementing Regulation 2015/81, the bodies to which the SRB, which makes the decision determining the *ex ante* contributions, addresses that decision are the NRAs, not the institutions. The NRAs are, in practice and in implementation of the applicable rules, the only bodies to which the issuer of the decision in question is required to send it and, therefore, ultimately, the persons to which that decision is addressed within the meaning of the fourth paragraph of Article 263 TFEU (order of 19 November 2018, *Iccrea Banca* v *Commission and SRB*, T-494/17, EU:T:2018:804, paragraph 28).

72 The finding that the NRAs are the addressees of the SRB decision within the meaning of the fourth paragraph of Article 263 TFEU is moreover corroborated by the fact that, in the system established by Regulation No 806/2014 and under Article 67(4) of that regulation, they are responsible for raising the individual contributions decided on by the SRB from the institutions (order of 19 November 2018, *Iccrea Banca* v *Commission and SRB*, T-494/17, EU:T:2018:804, paragraph 29).

73 While the institutions are therefore not addressees of the contested decisions, contrary to the intervener's submissions, they are, nonetheless, individually and directly concerned by those decisions to the extent to which those decisions affect them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguish them individually just as in the case of the person addressed, and they affect directly their legal situation and leave no discretion to the addressees of that measure, which are entrusted with the task of implementing it.

74 In that regard, first, the contested decisions mention each of the institutions by name and determine or, in the case of the second contested decision, adjust their individual contributions. It follows that the institutions, of which the applicant is one, are individually concerned by the contested decisions.

75 Second, as regards direct concern, it should be noted that the NRAs, which are entrusted with the task of implementing the contested decisions, have no discretion concerning the amounts of the individual contributions determined in those decisions. The NRAs may not, in particular, modify those amounts and are required to collect them from the institutions concerned.

76 Moreover, with regard to the reference made by the SRB to the IGA in order to dispute the assertion that the applicant is directly concerned, it should be pointed out that that agreement does not concern the collection by the NRAs of the 2016 *ex ante* contributions from the institutions, but only the transfer of those contributions to the SRF.

77 As is apparent from the provisions of Regulation No 806/2014 (see recital 20 and Article 67(4) of that regulation) and the IGA (see recital 7, Article 1(a) and Article 3 of the IGA), the collection of contributions is carried out pursuant to EU law (namely Directive 2014/59 and Regulation No 806/2014), whereas the transfer of those contributions to the SRF is carried out pursuant to the IGA.

78 Thus, even though the legal obligation devolving on the institutions to pay, into the accounts indicated by the NRAs, the sums due by way of their *ex ante* contributions requires the adoption of national acts by the NRAs, the fact remains that those institutions are nonetheless still directly concerned by the SRB's decisions which determined the amount of their individual contributions.

79 It follows from the foregoing considerations that the applicant is individually and directly concerned by the contested decisions.

80 As regards the time limit for bringing proceedings, it should be recalled that, under the sixth paragraph of Article 263 TFEU, applications for annulment must be brought within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

81 In the present case, the contested decisions were neither published nor notified to the applicant, which is not the addressee thereof.

82 It is settled case-law that, in the absence of publication or notification, it is for the party which learns of a decision concerning it to request the whole text thereof within a reasonable period and the period for bringing an action can begin to run only from the moment at which the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based. With that proviso, the period for bringing proceedings can only run from the time at which the third party acquires precise knowledge of the contents of the decision in question and the reasons on which it is based in such a way that it can effectively exercise its right of action (see order of 19 November 2018, *Iccrea Banca* v *Commission and SRB*, T-494/17, EU:T:2018:804, paragraph 33 and the case-law cited).

83 The two-month period under the sixth paragraph of Article 263 TFEU, which, unless the measure amenable to an action for annulment has been published or notified, runs from the date on which it came to the knowledge of the applicant, is therefore different from the reasonable period in which that party can request a copy of the full text of that measure in order to acquire precise knowledge of it (see order of 19 November 2018, *Iccrea Banca* v *Commission and SRB*, T-494/17, EU:T:2018:804, paragraph 34 and the case-law cited).

84 In the present case, it should be noted that, as was the case for all the institutions concerned by the payment of a 2016 *ex ante* contribution to the SRF, the applicant received the necessary documents and questionnaires to provide the data to enable the SRB to calculate the individual contributions. Those documents and questionnaires informed the applicant of the applicable legal bases and of the fact that the contribution to the SRF was calculated by the SRB.

85 Subsequently, the existence of the first contested decision came to the knowledge of the applicant by the Austrian NRA's collection notice of 26 April 2016, notified on 27 April 2016, and the second contested decision by the collection notice from the Austrian NRA of 23 May 2016, received on 27 May 2016.

86 The applicant brought the first action, registered under number T-377/16, on 14 July 2016, being more than 2 months and 10 days after having received notification, on 27 April 2016, of the Austrian NRA's collection notice of 26 April 2016. By contrast, in that action, there is no question of the time limit possibly being exceeded in respect of the second contested decision.

87 However, it should be noted that the applicant had lodged that action as a precautionary measure, pending the disclosure of the contested decisions, which ought to have enabled it to acquire a precise knowledge of the content of those decisions.

88 In that regard, it must be recalled that, as set out in paragraphs 13, 21 and 23 above, the applicant had made several requests, first to the Austrian NRA and then to the SRB, to obtain the contested decisions. Therefore, it is necessary to determine whether those requests were made within the reasonable period referred to in paragraphs 82 and 83 above from the time when the existence of the contested decisions became known.

89 The 'reasonable period' in which to request communication of a decision after becoming aware of its existence is not a predetermined period that can automatically be inferred from the period for bringing an action for annulment, but one that depends on the circumstances of the particular case (see order of 19 November 2018, *Iccrea Banca* v *Commission and SRB*, T-494/17, EU:T:2018:804, paragraph 39 and the case-law cited).

90 Moreover, it should be noted, first, that the Court has held, in some cases, that a two-month period, calculated from the date on which a party became aware of the existence of a decision in order to request its communication, exceeded what was reasonable (see, to that effect, orders of 5 March 1993, *Ferriere Acciaierie Sarde* v *Commission*, C-102/92, EU:C:1993:86, paragraph 19, and of 10 November 2011, *Agapiou Joséphidès* v *Commission and EACEA*, C-626/10 P, not published, EU:C:2011:726, paragraphs 131 and 132).

91 Second, the Court has considered, in other cases, that a request to be sent the full text of a decision, made more than four months after the applicant became aware of the existence of the measure, had to be regarded as not having been made within any period that could be considered reasonable (see, to that effect, orders of 15 July 1998, *LPN and GEOTA* v *Commissio*n, T-155/95, EU:T:1998:167, paragraph 44, and of 18 May 2010, *Abertis Infraestructuras* v *Commission*, T-200/09, not published, EU:T:2010:200, paragraph 63).

92 In the light of the circumstances of the present case, there is no reason to make a finding different from that reached by the Court of Justice and the General Court.

93 In the present case, the requests for the disclosure of the contested decisions made to the Austrian NRA on several occasions and to the SRB on 7 July 2016, as described in paragraphs 13, 21 and 23 above, were issued within a reasonable period.

94 It is true that, on 28 June 2016, the Austrian NRA sent the applicant the second contested decision without its annex and, on 20 September 2016, the SRB sent the applicant the first contested decision without its annex. The applicant was therefore unable on those dates to inspect the

parts of annexes to the contested decisions concerning it. It was only following the two orders for measures of inquiry adopted by the Court which are mentioned in paragraphs 34 and 38 above that the applicant had access to the parts of the annexes to the contested decisions concerning it.

95 Since, first, the requests for the disclosure of the contested decisions were issued within a reasonable period and, second, the three actions registered under numbers T-377/16, T-645/16 and T-809/16 were brought before the applicant had access to the contested decisions, including the parts of the annexes that concern it, it must be concluded that the three actions were not brought out of time.

96 However, as regards the argument concerning *lis pendens*, on which the SRB relies, in essence, to support its assertion that the actions registered under numbers T-645/16 and T-809/16 must be declared inadmissible since they have the same subject matter and concern the same parties as the action registered under number T-377/16, it is necessary to recall the settled case-law of the Court, according to which an action brought subsequently to another which is between the same parties, is brought on the basis of the same submissions and seeks annulment of the same legal measure must be dismissed as inadmissible on the ground of *lis pendens* (judgment of 24 November 2005, *Italy* v *Commission*, C-138/03, C-324/03 and C-431/03, EU:C:2005:714, paragraph 64; see also, to that effect, judgment of 22 September 1988, *France* v *Parliament*, 358/85 and 51/86, EU:C:1988:431, paragraph 12).

97 The two actions registered under numbers T-377/16 and T-645/16 were brought as a precautionary measure before the contested decisions were disclosed, in the event that the time limit laid down in the sixth paragraph of Article 263 TFEU for bringing an action for annulment might already have started to run from the time when the collection notice relating to the first contested decision was received.

98 As regards the third action, registered under number T-809/16, in so far as, according to the applicant, the SRB granted it access to the contested decisions on 20 September 2016, it considers that that date constitutes a starting point for bringing an action for annulment and, therefore, that action is not out of time. In the light of that interpretation, the applicant concedes that the actions for annulment which were brought as a preventive measure may possibly have been brought too early. However, it submits that, since the wording of the contested decisions was not brought to its attention until 20 September 2016, it became apparent at a later stage that the contested decisions might be inseparably related, which was not likely to have been known, in the applicant's view, when the first two actions for annulment were lodged. To ensure that it had a means of judicial protection available to it, the applicant therefore brought a third action against the contested decisions.

99 In its view, the action in Case T-809/16, is not identical to the actions in Cases T-377/16 and T-645/16, both on account of its independent subject matter and the fact that the situation changed, as a result of the disclosure of the two contested decisions without their annexes on 20 September 2016.

100 In the present case, the three actions are between the same parties, with the exception of Case T-645/16 which includes an intervener. However, the condition of inadmissibility on the ground of *lis pendens* relating to the parties being identical concerns the main parties and not the interveners, so that that condition is satisfied.

101 In addition, the three actions seek the annulment of the same legal acts, with the exception of Case T-645/16 which seeks the annulment solely of the first contested decision. Since the subject matter of Case T-645/16 is included in the subject matter of the other two cases, T-377/16 and T-809/16, which seek the annulment of the two contested decisions, the condition of inadmissibility on the ground of *lis pendens* relating to the contested acts being identical is also satisfied in the present case.

102 Finally, as regards the condition of inadmissibility on the ground of *lis pendens* relating to the pleas in law being identical, it should be noted that the actions in Cases T-645/16 and T-809/16 are supported by two pleas in law which the applicant had already raised in the context of its first action, in Case T-377/16, in which four pleas in law were raised. The pleas relied on in Cases T-645/16 and T-809/16, which are more recent, are therefore included in the first action in Case T-377/16.

103 In the light of the foregoing considerations, the action in Case T-377/16 must be declared admissible and the two actions in Cases T-645/16 and T-809/16 must be declared inadmissible on the ground of *lis pendens*.

Substance

104 The applicant raises four pleas in law in support of its action for the annulment of the contested decisions. According to the applicant, by adopting the contested decisions, the SRB has committed infringements of essential procedural requirements, first, by infringing its obligation to state reasons (first plea) and, second, on account of an incomplete notification of the contested decisions (second plea). In addition, the applicant puts forward two pleas in law alleging, first, that its contribution for 2016 was the subject of corrections which were too minor (third plea) and, second, that it is unlawful not to reimburse the overpayment until 2017 (fourth plea).

105 As a preliminary point, it should be observed that the applicant's complaints against the procedure relating to the adoption of the contested decisions are raised only in two letters dated 9 May and 30 July 2018 which were sent to the Court following receipt of the SRB's responses to the first and second orders. The arguments raised by the applicant in that regard are mainly put forward in support of its line of argument seeking to demonstrate the infringements of essential procedural requirements set out in the pleas in law alleging infringement of the obligation to state reasons and failure to disclose fully the contested decisions.

106 It is necessary to examine, first, the complaints relating to the infringement of procedural rules and the plea alleging infringement of the obligation to state reasons.

Compliance with the procedural requirements relating to the adoption of the contested decisions

107 First, in its letters of 9 May and 30 July 2018, the applicant stated that the signatures on the contested decisions were absolutely identical and that the SRB had not explained how the authenticity of any instruction issued by the Chair of the SRB to use the electronic signature is guaranteed. Moreover, the applicant noted that the annexes to the decisions had been sent in digital format, by email, to the members and observers of the executive session, whereas, in its letter of 13 September 2016, the SRB had flatly refused, for security reasons, to send the applicant those same documents electronically or by post. In the letter of 9 May 2018, the applicant

requested that the Court adopt measures of organisation of procedure in accordance with the first paragraph of Article 24 of the Statute of the Court of Justice, read in conjunction with Article 89(3)(a) and (b) of the Rules of Procedure, with the aim, inter alia, of questioning the SRB about procedural matters.

108 Second, in its letter of 30 July 2018, the applicant remarked upon a series of procedural irregularities relating to the first contested decision. First of all, it noted that the emails sent by the members of the executive session of the SRB in response, which should show that they agreed to a decision being adopted by written procedure, had not been submitted to the Court. The applicant then noted, after having pointed out an inaccuracy in the calculations, that the decision taken by written procedure had been amended on the evening of 15 April 2016 by interpreting the members' silence as constituting their consent, with no time limit for expressing any objections having been provided in the SRB's communications with the members of the executive session. The applicant observed that those messages were not sent to one member of the executive session in particular, with no explanation or evidence of that member having been notified by other means having been submitted to the Court. According to the applicant, that process of adopting the decision is contrary both to the principle of good administration identified in the case-law and set out in Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') and to the RPES, in particular Article 9(1) and (2) and Article 11 of the RPES. Finally, the applicant criticised the format of the draft decisions sent on 15 April and 19 May 2016, namely the electronic distribution of documents, which were mainly in the form of XLSX files. It stated that the calculation ought to not to be made in an XLSX document in which it is possible to change all of the values given or intermediate values at any point, either inadvertently or intentionally. Moreover, in the absence of a verifiable electronic signature which could guarantee that the amounts determined for the contributions had not been amended or falsified, it is impossible to know which DOCX, XLSX or PDF document is the 'signed original' of the amounts determined for each of the institutions.

109 In its letter of 27 March 2018, the SRB stated that the procedure for adopting the contested decisions had not infringed essential procedural requirements. In its letter of 6 June 2018, the SRB stated that the security of email traffic was always guaranteed and had no impact on the content or the lawfulness of the calculation of the *ex ante* contributions. Therefore, that aspect is not relevant to the outcome of the action.

110 Moreover, as regards the application for measures of organisation of procedure made by the applicant, the SRB requested, in essence, by letter of 11 September 2018, that the Court dismiss that application on account of an infringement of Article 88(2) of the Rules of Procedure since the applicant did not explain how those measures would be useful for the purposes of the proceedings and relevant to the outcome of the action.

111 It should be recalled that the Court has held that, since the intellectual component and the formal component form an inseparable whole, reducing the act to writing is the necessary expression of the intention of the adopting authority (judgments of 15 June 1994, *Commission* v *BASF and Others*, C-137/92 P, EU:C:1994:247, paragraph 70, and of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 38).

112 The authentication of an act is intended to guarantee legal certainty by ensuring that the text adopted by the body which adopted the act becomes definitive and constitutes an essential procedural requirement (judgments of 15 June 1994, *Commission* v *BASF and Others*, C-137/92 P, EU:C:1994:247, paragraphs 75 and 76, and of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraphs 40 and 41).

113 The Court has also held that it is the mere failure to authenticate the act which constitutes the infringement of an essential procedural requirement and it is not necessary also to establish that the act is vitiated by some other defect or that the lack of authentication resulted in harm to the person relying on it (judgment of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 42).

114 Checking compliance with the requirement of authentication and, thus, the definitive nature of the act is a preliminary to any other review, such as that of the competence of the author of the act, of compliance with the principle of collegiality or of the duty to provide reasons for the act (judgment of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 46).

115 If the Court finds, on examining the act produced before it, that the act has not been properly authenticated, it must of its own motion raise the issue of infringement of an essential procedural requirement through failure to carry out proper authentication and, in consequence, annul the act vitiated by that defect (judgment of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 51).

116 It is of little importance in this regard that the lack of authentication has not caused any harm to a party to the dispute. Authentication of acts is an essential procedural requirement within the meaning of Article 263 TFEU that is crucial for legal certainty; infringement of that requirement results in annulment of the defective act without there being any need to establish the existence of such harm (judgment of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 52; see also, to that effect, judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T-54/14, EU:T:2016:455, paragraph 47).

117 In the present case, the fact remains that the applicant does not present the lack of authentication in a formal plea in law in support of its action for annulment, but nevertheless has doubts as to the authenticity of the Chair of the SRB's signature on the contested decisions.

118 In any event, it follows from the case-law cited in paragraph 115 above that this is a matter which the EU courts must raise of their own motion.

119 In that regard, it must be noted that, in response to the first order, requiring it to produce the full copy of the originals of the contested decisions including their single annexes, the SRB produced, on 15 January 2018, for each decision, in the case of the text, a two-page document in the form of a scanned copy, in PDF format, of a signed paper document, which suggested that those pages were indeed copies of the original, that is to say copies of the document which was formally presented for signature and adopted by the SRB in its executive session. In the case of the annexes to the contested decisions, the SRB did not produce any copies of the original, but merely, for each decision, a document in the form of a computer generation, in PDF format, of digital data, which did not contain any information allowing its authenticity to be guaranteed.

120 By a second measure of organisation of procedure, and subsequently by the second order, the Court requested the SRB to clarify the format of the annexes at the time of the adoption of the contested decisions and, in the event that those annexes had been presented in digital format, to explain that fact and to provide all of the technical authenticating evidence necessary to prove that the documents generated in PDF format, produced before the Court, corresponded to what had in fact been presented for signature and adopted by the SRB in its executive session at its meetings on 15 April and 20 May 2016. The Court also asked the SRB to submit its observations on the question of the existence in law of the contested decisions and the question of compliance with essential procedural requirements.

121 In its responses of 27 March and 18 May 2018 to the second measure of organisation of procedure and the second order, the SRB argued, for the first time, that the contested decisions had been adopted, not at a meeting of the members of the executive session of the SRB, but by means of the written procedure, in electronic format, in accordance with Article 7(5) of the RPES – according to which all communications and documents relevant for the executive session must, in principle, be effected electronically, respecting the confidentiality rules in accordance with Article 15 of the RPES – and Article 9 of the RPES.

122 In particular, with regard to the procedure for the adoption of the first contested decision, it is apparent from the case file that, by email of 13 April 2016 sent at 17.41 by the SRB to the members of the executive session and containing three attachments, including a document in PDF format entitled 'Memorandum2_Final results.pdf', the executive session of the SRB was asked formally to approve the 2016 *ex ante* contributions by12.00 on 15 April 2016.

123 By email of 15 April 2016 sent at 19.04, the SRB indicated that an error had been made in the calculation of the contributions, announced that an amended version of the document entitled 'Memorandum 2' would be sent and stated that, unless any of the addressees objected, the approval already given would be treated as also covering the corrected amounts.

124 By email of 15 April 2016 sent at 20.06, the document mentioned was sent in XLSX format, under the designation 'Final results15042016.xlsx'.

125 As regards the procedure for adopting the second contested decision, the SRB has stated that, on 19 May 2016 at 21.25, it had sent an email to the members of the executive session to initiate a written procedure, requesting approval of the adjustment of the results of the calculation of the 2016 *ex ante* contributions and containing, as an annex, a file in XLSX format entitled 'Delta' depicting the results of the adjusted calculations. Approval was requested – 'on account of the urgency of the case' – by 20 May 2016 at 17.00.

126 Finally, the SRB stated, in its letter of 6 June 2018, that the instruments embodying the contested decisions had been electronically signed by the Chair of the SRB.

127 It must however be held that, far from providing or even offering to provide proof of such assertion, consisting, in principle, of the production of digital instruments and electronic signature certificates guaranteeing their authenticity, the SRB has produced evidence which, in reality, contradicts that assertion.

128 With regard to the text of the contested decisions, the SRB has produced PDF documents, the last page of which contain the likeness of a handwritten signature which appears to have been appended by 'copying and pasting' an image file and which do not contain electronic signature certificates.

129 As for the annexes to the contested decisions, which contain the amounts of contributions and of adjustments thereto and which, as a result, constitute an essential element of the decisions, these also do not contain any electronic signatures, even though they are in no way inextricably linked to the text of the contested decisions.

130 In order to establish the authenticity of the annexes to the contested decisions, the SRB has produced, in response to the second order, documents in TXT format seeking to demonstrate that the hash values of those annexes are identical to the hash values of the documents in XLSX format attached to the email of 15 April 2016 sent at 20.06, and the email of 19 May 2016 sent at 21.25.

131 However, it must be observed that, in order to prove that the annexes to the contested decisions had been the subject of an electronic signature, as is maintained by the SRB (see paragraph 126 above), the SRB ought to have produced electronic signature certificates linked to those annexes and not TXT documents containing a hash value. The production of such TXT documents suggests that the SRB was not in possession of electronic signature certificates and that the annexes to the contested decisions were therefore not, contrary to its assertions, the subject of an electronic signature.

132 In addition, the documents in TXT format produced by the SRB are in no way objectively and inextricably linked to the annexes in question.

133 Finally, it should be noted, for the sake of completeness, that the authentication required is not, in any event, that of the drafts submitted for approval by the email of 15 April 2016 sent at 20.06, and by email of 19 May 2016 sent at 21.25, but that of the instruments which are supposed to have come into existence after that approval. It is only following the approval that the instrument comes into existence and is authenticated by the appending of a signature.

134 It follows from the foregoing considerations that the requirement for authentication of the contested decisions is not satisfied.

135 In addition to those findings concerning the failure to authenticate the contested decisions, which in itself requires, according to the case-law referred to in paragraphs 113 to 116 above, the contested decisions be annulled, the Court considers it appropriate to set out certain considerations relating, in particular, to the procedure for the adoption of the first contested decision.

136 In the present case, as indicated in paragraph 122 above, the written procedure for the adoption of the first contested decision was initiated by an email of 13 April 2016 sent at 17.41, which gave the members of the executive session of the SRB until 15 April 2016 at 12.00 to approve the draft decision, thus a period of less than two working days, whereas the period provided for by Article 9(2) of the RPES is 'normally … not less than five working days'. Contrary to the requirements of the RPES, the email of 13 April 2016 does not give any reason for the shortening of the period. Nor does it refer to Article 9(2) of the RPES.

137 Furthermore and for the sake of completeness, it should be pointed out that the SRB has not proved that there was a pressing need to take a decision on 15 April 2016 rather than 20 April 2016, a date which would have ensured compliance with the procedural rules. In that regard, it should be observed that 15 April 2016 is not a date that is imposed by the rules. That shortening of the period for the adoption of the decision constitutes a first procedural irregularity.

138 In addition, Article 9(1) of the RPES provides that decisions may be taken by written procedure, unless at least two members of the executive session object within the first 48 hours following the launch of the written procedure.

139 In that regard, it transpires that the SRB also infringed the RPES in so far as the period of time set for the written procedure was six hours shorter than the 48 hours allowed for objecting to the use of the written procedure. On the assumption that it was necessary to adopt the decision on 15 April 2016, there was nothing to prevent the deadline for responding being set at 18.00 on that day. That constitutes a second procedural irregularity.

140 The SRB errs in attempting to justify those infringements of the RPES on the basis that no objections were expressed by the members of the executive session of the SRB. It is sufficient to observe, first, that the SRB is obliged to apply the rules governing its decision-making process, which specifically allow for the shortening of the time periods provided that certain rules are respected and, second, that the alleged absence of objections in no way eliminates the infringement committed initially when the SRB imposed a time limit contrary to the requirements of the RPES.

141 Next, while the email of 13 April 2016 requested the members of the executive session of the SRB to provide their formal approval by email to the mailbox of the SRB, the SRB has produced no approval emails. The only evidence referring to an approval is the statement by the SRB, in its email of Friday 15 April 2016 sent at 19.04, that such approval had been given.

142 Moreover, in that email on Friday 15 April 2016 sent at 19.04, which, in the first instance at least, was not addressed to all the members of the executive session (A, a member of the executive session of the SRB, was not an addressee of the email, which was sent to him 21 minutes later), the SRB noted an error in the calculation of the *ex ante* contributions and announced that an amended version of 'Memorandum 2' would be sent by separate email. The email sent at 19.04 added, without providing a time limit for a possible response, that, in the absence of any objection by the members of the executive session of the SRB, the approval already given by them would be regarded as also applying to the amended contribution amounts. In so doing, the SRB initiated a procedure for adoption based on the failure to object, a procedure which is admittedly not unknown in the provisions of the RPES but which was nonetheless used in practice in irregular circumstances, given, in particular, that no time limit was stated for the adoption of the decision. In addition to the two irregularities already identified in paragraphs 136 and 139 above, that constitutes a third procedural irregularity.

143 It should be noted that, in an annex to its letter of 11 September 2018, the SRB adduced proof that the email sent at 19.04 was sent to A at 19.25, that is to say 21 minutes later. A stated, by email sent on the same day at 19.34, that he had no objection to the minor amendments of which the SRB had informed him in the email sent at 19.25, forwarding the email sent at 19.04. Although that email did state the amended amounts for the calculations for three specific institutions, it did not contain the amended amounts for the remaining institutions whose contributions would be slightly reduced.

144 It is clear from that evidence that A gave his consent even before he was able to access the amended version of the contributions of all the institutions, which was sent at a later stage, although not to him, as described in paragraph 145 below. That document sets out the amounts as finally adopted by the first contested decision.

145 Then, on the same day, at 20.06, a separate email was sent from the SRB with the attachment of an XLSX document entitled 'Final results15042016.xlsx'. Once again, that email was not sent to A. The latter circumstance constitutes a fourth procedural irregularity.

146 In addition, it follows from the date of the first contested decision (15 April 2016), that, even though no time limit was stated in the email of 15 April 2016 sent at 19.04, consensus was deemed to have been reached on the same day, and therefore logically at midnight. Admittedly, the SRB had stated, in its email of 13 April 2016 (attached to the email of 15 April 2016 sent at 19.04) that it was aiming to adopt the decision on 15 April. On the assumption that that information was sufficient to indicate that any objection had to be expressed before midnight on 15 April 2016, the fact remains that, in the present case, a consensus-based approval procedure was put into effect at 19.04 on a Friday evening with a view to it being concluded that same evening by midnight. Those circumstances compound the effects of the third procedural irregularity established in paragraph 142 above.

147 It is still less settled that that consensus procedure was lawful given that, in addition to the fact that the email of 20.06 was not sent to A (see paragraph 145 above), a failure which, in itself, vitiates the procedure, the SRB has not proved that the other members of the executive session of the SRB became aware either that the email of 20.06 (or, for that matter, the email of 19.04) had been sent, or of its content. The SRB produced certain evidence of verification seeking to establish that the emails sent at 19.04 and 20.06 had reached the recipients' mailboxes. However, regardless even of the fact that that verification, carried out by questionnaire, does not concern all the members of the executive session of the SRB, it does not in any way prove that the members of the executive session of the SRB actually became aware even of the fact that those emails had been sent before midnight on the same evening.

148 In the light of the very nature of a consensus procedure whereby approval is inferred from the absence of objections, such a procedure, necessarily and as a minimum, requires that it be established, before the adoption of the decision, that the persons participating in the consensus-based approval procedure have been informed of that procedure and have been able to examine the draft submitted for their approval. In the present case, the first contested decision was adopted, in view both of the statements appearing in the text of that decision and of the fact that the data sheets relating to that decision were sent to the NRAs on the same day (see paragraph 11 above), at midnight on 15 April 2016 at the latest. However, the SRB has not proved that it had been established, before midnight, that the members of the executive session of the SRB had been able to read the amended draft decision or even merely to apprise themselves of the existence of the emails of 19.04 and 20.06.

149 In addition, and by way of an incidental point, it should be pointed out that, while the annex to the first contested decision presented for approval on 13 April 2016 was a digital document in PDF format (see paragraphs 122 and 136 above), the annex presented for approval on the evening of 15 April 2016 was a digital document in XLSX format (see paragraphs 124 and 145 above).

150 Thus, it should be observed that, if the error referred to in the emails of the evening of 15 April 2016 (see paragraph 123 above) had not arisen, a digital document in PDF format would have been adopted as the annex to the first contested decision, and not an XLSX file.

151 The Court cannot but find, with regard to that difference, that the SRB, although obliged to ensure the unity and formal coherence of the documents submitted for approval and thereafter adopted, used different electronic formats. The consequences of that imprecision are more than purely procedural, inasmuch as the information conveyed by a PDF file does not provide any detail in respect of the formula cells of an XLSX file and such a PDF file contains, in the present case at least, rounded values, unlike an XLSX file. Thus, with regard to the only risk adjustment factor appearing in the first contested decision, namely that relating to the European context, it is apparent from the information contained in the SRB's responses that the value provided in the first contested decision, as produced in response to the first order, that is in a PDF file, is not the exact value appearing in the XLSX file – which contains fourteen decimal places – but a figure rounded to two decimal places which cannot be used to verify the calculation of the contribution.

152 It follows from the foregoing considerations that, even over and above the lack of authentication established in paragraph 134 above, which requires that the contested decisions be annulled, the procedure for the adoption of the first contested decision was conducted in clear breach of procedural requirements relating to the approval of that decision by the members of the executive session of the SRB and to the securing of that approval.

153 In that regard, it should be observed that the fact that natural or legal persons may not rely on a breach of rules which are not intended to ensure protection for individuals, but the purpose of which is to organise the internal functioning of services in the interests of good administration (see, to that effect, judgment of 7 May 1991, *Nakajima* v *Council*, C-69/89, EU:C:1991:186, paragraphs 49 and 50) does not, however, mean that an individual can never successfully plead infringement of a rule governing the decision-making process leading to the adoption of an act of the European Union. Among the provisions governing the internal procedures of an institution, a distinction must be made between, on the one hand, those in respect of which natural and legal persons cannot plead infringement, because they concern only the rules governing the internal functioning of the institution and can have no effect on the legal situation of those persons, and, on the other hand, those provisions which, if infringed, may, on the contrary, be relied on as they create rights and are a factor contributing to legal certainty for those persons (judgment of 17 February 2011, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods* v *Council*, T-122/09, not published, EU:T:2011:46, paragraph 103).

154 In the present case, an analysis of the course of the procedure followed for the adoption of the first contested decision reveals a significant number of breaches of the rules relating to the organisation of an electronic written procedure for the adoption of decisions. Although Article 9 of the RPES does not expressly make provision to that effect, it goes without saying that any written procedure necessarily involves sending the draft decision to all members of the decision-making body concerned by that procedure. In the case, in particular, of a procedure for the adoption of decisions by consensus, as in the present case (see paragraphs 142 to 148 above), the decision cannot be adopted unless it is established, at the very least, that all the members had been able to read the draft decision beforehand. Finally, that procedure requires that a time limit be stated which allows the members of that body to adopt a position on the draft.

155 Those rules of procedure, which seek to ensure compliance with the essential procedural requirements inherent in any electronic written procedure and in any consensus-based adoption procedure, were not respected in the present case. Those infringements have a direct effect on legal certainty, since they have led to the adoption of a decision in respect of which it has not been established not only that it was approved by the competent body but even that all its members had read it beforehand.

156 Failure to comply with such procedural rules necessary for the expression of consent constitutes an infringement of essential procedural requirements which the EU Courts may examine of their own motion (judgments of 24 June 2015, *Spain* v *Commission*, C-263/13 P, EU:C:2015:415, paragraph 56, and of 20 September 2017, *Tilly-Sabco* v *Commission*, C-183/16 P, EU:C:2017:704, paragraph 116).

157 Finally, as regards the second contested decision, it should be noted that it does not replace the first contested decision, which determined the contribution amounts, but merely makes an adjustment to those amounts on the basis of a limited technical point. The annulment of the first contested decision necessarily entails the annulment of the second.

158 It follows from all of the foregoing considerations that the contested decisions must be annulled, there being no need to give a ruling on the alleged infringement of Article 11 of the RPES and the application for measures of organisation of procedure made by the applicant in its letter of 9 May 2018 mentioned in paragraph 107 above.

159 Beyond that conclusion, the Court considers it appropriate, in the interest of the proper administration of justice, to also give a ruling on whether the obligation to state reasons has been complied with in the present case.

The first plea in law, alleging infringement of the obligation to state reasons

160 The applicant takes the view that in the contested decision, the SRB has infringed the obligation to state reasons, laid down in the second paragraph of Article 296 TFEU. The fact that those decisions are not addressed to the applicant does not prevent it from relying on that plea in so far as the interest which parties to whom an act is of direct and individual concern may have in obtaining explanations must be taken into account when assessing the extent of the obligation to state reasons.

161 The applicant recalls that, according to the case-law, the reasons must appear in the actual legal act which is at issue and must also be comprehensible to individuals. The statement of reasons must disclose the main matters of law and fact on which the decision is based and which are necessary to understand the reasoning which led to the adoption of that decision.

162 Moreover, the fact that it participated in the collection of information does not enable the applicant to obtain sufficient information since its contribution is not calculated on the sole basis of the data it submitted, but also on the basis of the relationship existing between the data for all of the institutions concerned.

163 With regard to the SRB's submission that it was impossible to state the reasons for the decision without divulging the business secrets of the other institutions, the applicant relies on the case-law of the Court, according to which the obligation to safeguard business secrets cannot be

interpreted so broadly that it renders nugatory the obligation to state reasons, to the detriment of the right of the operators concerned to be heard. In the present case, the disclosure of the information requested by the applicant was systematically refused from the outset.

164 Lastly, the applicant disputes the SRB's argument that, even if the Court were to find that the statement of reasons to be insufficient, the SRB's calculation would remain valid. According to the applicant, it cannot automatically be presumed that a new, identical decision would be adopted in the event of annulment.

165 The SRB maintains that it did not have to provide the applicant directly with a detailed statement of reasons since its decisions were addressed not to the applicant but to the Austrian NRA. In addition, it relies on the case-law according to which the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the interest which the addressee of the measure in question may have in obtaining explanations.

166 Furthermore, even if the contested decisions were of direct concern to the applicant, the SRB takes the view that the conditions laid down in the second paragraph of Article 296 TFEU are satisfied. Since the addressee of the SRB's decisions is the Austrian NRA and not the applicant, the statement of reasons must be sufficient for that NRA to be able to understand the facts and legal considerations underpinning the calculation, which is so in the present case. In support of its line of argument, the SRB cites the case-law according to which the participation of interested parties in the procedure for drawing up an act may reduce the requirement to state reasons, since it contributes to informing them and the question whether the statement of reasons for a decision meets the requirements of the current 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.

167 The contested decisions were adopted in a context which was well known to the applicant. Although the legal framework alone does not enable a precise amount to be calculated, it provides clear indications as to the most important criteria taken into account for the calculation.

168 The SRB maintains that, in accordance with Article 70(2) of Regulation No 806/2014, the calculation procedure is based on close cooperation between the SRB and the NRAs. For that reason, the Austrian NRA had knowledge of the method for calculating the 2016 *ex ante* contributions. That is particularly true since the 2015 *ex ante* contributions were calculated and raised by the NRAs themselves, in accordance with Delegated Regulation 2015/63. Therefore, the SRB's view is that the statement of reasons for the contested decisions was sufficient for the Austrian NRA, which, like all the remaining NRAs, was closely involved in the calculation of 2016 *ex ante* contributions.

169 Moreover, the SRB takes the view that the applicant goes beyond the conditions laid down in the second paragraph of Article 296 TFEU when it argues that it ought to be able to calculate its own *ex ante* contributions on the basis of the SRB's statement of reasons. Part of the information required to calculate the applicant's 2016 *ex ante* contribution is confidential information from other institutions. Under Article 339 TFEU, the SRB is required to protect all confidential data of the institutions. That obligation is also laid down in Article 41(2)(b) of the Charter, Article 14(7) of Delegated Regulation 2015/63, Article 88 of Regulation No 806/2014 and Article 84 of Directive 2014/59.

170 According to the SRB, the applicant fails to mention that it received an extremely detailed explanation of the calculation in the Austrian NRA's collection notice of 26 April 2016 and that it was informed in detail of the reasoning followed.

171 Lastly, the SRB submits that the infringement of the second paragraph of Article 296 TFEU does not render the calculations invalid. Therefore, even if the Court were to annul the contested decisions on that ground, that calculation would remain valid and the SRB would be able to adopt identical decisions once more without delay. As the Court held in the judgment of 6 July 1983, *Geist* v *Commission* (117/81, EU:C:1983:191, paragraph 7), an applicant has no legitimate interest in securing the annulment of a decision for a formal defect where the administration has no discretion and is bound to act as it did.

172 According to settled case-law, the statement of reasons required under 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 that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its jurisdiction to review legality (see judgment of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission*, C-70/16 P, EU:C:2017:1002, paragraph 59 and the case-law cited).

173 The requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the act, the nature of the reasons given and the interest which the addressees of the act, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for an act 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 judgment of 7 March 2013, *Acino* v *Commission*, T-539/10, not published, EU:T:2013:110, paragraph 124 and the case-law cited).

174 Moreover, the statement of the reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying that measure (judgment of 15 July 2015, *Pilkington Group* v *Commission*, T-462/12, EU:T:2015:508, paragraph 21 and the case-law cited).

175 As a preliminary point, it should be recalled that although, under the system established by Regulation No 806/2014 and Implementing Regulation 2015/81, decisions determining *ex ante* contributions are notified to the NRAs, the institutions which are liable to pay those contributions, including the applicant, are, contrary to the SRB's assertions, individually and directly concerned by those decisions (see paragraphs 73 to 79 above).

176 Therefore, the interest that those institutions may have in receiving explanations must also be taken into account when assessing the extent of the obligation to state the reasons for the decisions in question. In addition, it should be noted that the purpose of the statement of reasons is also to enable the EU Courts to exercise their power of review.

177 In the present case, it should be noted that the SRB has committed a number of infringements of the obligation to state reasons.

178 First, with regard to the wording of the first contested decision, it contains only a reference to Regulation No 806/2014, in particular Article 70(2) thereof, a reference to consultations and cooperation with certain bodies (European Central Bank (ECB) and national authorities) and the fact that the calculation is made so that the aggregate of the individual contributions does not exceed a certain level (namely 12.5% of the target level provided for in Article 69(1) of Regulation No 806/2014). It contains no information regarding the successive steps in the calculation of the applicant's contribution, or the figures related to those various steps.

179 Admittedly, a reading of Article 70 of Regulation No 806/2014, referred to in the first contested decision, and in particular Article 70(6), enables it to be understood that *ex ante* contributions are calculated by the SRB in accordance, inter alia, with 'the delegated acts specifying the notion of adjusting contributions in proportion to the risk profile of institutions, adopted by the Commission under Article 103(7) of Directive 2014/59/EU', that is to say, in the present case, Delegated Regulation 2015/63.

180 In addition, Delegated Regulation 2015/63 contains detailed rules which the SRB must apply when it calculates the contributions.

181 However, that evidence is not sufficient to understand how the SRB applied those rules in the applicant's case in order to arrive at the amount of the contribution concerning it set out in the annex to the first contested decision.

182 It should be added that the first contested decision does not mention the interim decisions taken by the SRB for the purposes of implementing the legislation concerning the calculation of contributions ('the interim decisions'), namely, at the very least, the following interim decisions:

– Decision of the Executive Session of the SRB of 14 September 2015 on the definition of the 'additional risk indicators to be determined by the resolution authority' pillar (SRB/ES/SRF/2015/00);

– Decision of the Executive Session of the SRB of 30 November 2015 on the common rules for the calculation of 2016 ex-ante contributions to the SRF as regards covered deposits (SRB/ES/SRF/2015/01);

– Decision of the Executive Session of the SRB of 30 November 2015 on the common rules for the calculation of 2016 ex-ante contributions to the SRF as regards newly supervised institutions (SRB/ES/SRF/2015/02);

– Decision of the Executive Session of the SRB of 30 November 2015 on the common rules for the calculation of 2016 ex-ante contributions to the SRF as regards the discretisation in Step 2 (SRB/ES/SRF/2015/03);

– Decision of the Executive Session of the SRB of 30 November 2015 on the additional assurance of data provided for the calculation of the 2016 ex-ante contributions to the SRF (SRB/ES/SRF/2015/04);

– Decision of the Executive Session of the SRB of 30 November 2015 on the common rules for the calculation of 2016 ex-ante contributions to the SRF as regards the State aid reference date (SRB/ES/SRF/2015/05);

– Decision of the Executive Session of the SRB of 24 February 2016 on the treatment of missing data after submission of the final data sets (SRB/ES/SRF/2016/00/A);

– Decision of the Executive Session of the SRB of 10 March 2016 on the negative balances for the 2016 contribution period, resulting from the adjustment of the 2016 ex-ante contributions, in case of restatements or revisions of information submitted in relation to the 2015 ex-ante contributions (SRB/ES/SRF/2016/02);

– Decision of the Executive Session of the SRB of 10 March 2016 on the deduction of 2015 ex-ante contributions from 2016 ex-ante contributions (SRB/ES/SRF/2016/03);

– Decision of the Executive Session of the SRB of 10 March 2016 on [the] simplified method for investment firms (SRB/ES/SRF/2016/03A);

– Decision of the Executive Session of the SRB of 6 April 2016 on the treatment of the deduction of the 2015 ex-ante contributions in case of loss of banking licence (SRB/ES/SRF/2016/05);

– Decision of the Executive Session of the SRB of 6 April 2016 on the modification of the treatment of missing data after submission of the final data sets (SRB/ES/SRF/2016/05/A);

– Decision of the Executive Session of the SRB of 6 April 2016 on the 2015 covered deposits data (SRB/ES/SRF/2016/05/B);

– Decision of the Executive Session of the SRB of 13 April 2016 on the exclusion of liabilities relating to promotional loans (SRB/ES/SRF/2016/05/C);

– Decision of the Executive Session of the SRB of 15 April 2016 on the calculation base of the irrevocable payment commitments for 2016 ex-ante contributions period (SRB/ES/SRF/2016/10);

– Decision of the Executive Session of the SRB of 15 April 2016 on the Irrevocable Commitment and Collateral Arrangement Agreement (SRB/ES/SRF/2016/11).

183 As stated in paragraph 39 above, the applicant disclosed those 16 interim decisions to the Court by letter dated 9 May 2018, after having received them, at the applicant's request, from the SRB. In its letter of 15 January 2018, the SRB mentioned the fact that, before the contested decisions were adopted, it had already separately determined various factors for the calculation method and the calculation process. In response to that letter, the applicant requested disclosure of those documents and, on 20 April 2018, it received from the SRB, by post, 16 interim decisions which were used as the basis for calculating its 2016 contribution and which the SRB classifies as intermediate steps taken into account in the calculation process.

184 Since those 16 interim decisions were neither published in the *Official Journal of the European Union* nor notified to the applicant, the applicant considers that they must be declared legally non-existent and cannot constitute a legislative basis for taxation of the contested contributions. Moreover, if those interim decisions were to be regarded by the SRB as purely preparatory measures and not acts in their own right, their content ought to have been included in the recitals of the decision setting the 2016 *ex ante* contribution.

185 By letter of 6 June 2018, the SRB replied that the submission of that new evidence was inadmissible under Article 85 of the Rules of Procedure, since the applicant had not justified the delay in submitting the evidence and, in any event, the applicant was aware of the existence of internal documents reflecting the SRB's 'separate determinations' with regard to the collection process and the methodology for the calculation of contributions. The SRB states that it had granted the applicant access to a number of similar documents by letter of 13 September 2016, that is to say almost two years before the new evidence was submitted.

186 In any event, according to the SRB, the documents concerning the methodology for calculation were not intended to have any external legal effect. The applicant was not the addressee of the documents concerning the methodology for calculation and the SRB was therefore not required to notify it of those measures. The content of those documents had been notified to the NRAs and had been the subject of detailed discussions with them in good time within the framework of the Contributions Committee before the calculations of the *ex ante* contributions were adopted. In addition, those documents concerning the methodology for calculation are neither necessary for, nor relevant to, the outcome of the case. From the SRB's perspective, the new evidence submitted has no probative value in respect of the facts alleged by the applicant.

187 As far as the admissibility of the new evidence provided by the applicant by letter of 9 May 2018 is concerned, it should be noted that what is involved is new information which the applicant could not have known before the SRB mentioned, in its letter of 15 January 2018, that it had already separately determined various factors for the calculation method and the calculation process before the contested decisions were adopted.

188 As regards the SRB's argument that, in any event, the applicant had been aware of the existence of internal documents reflecting the SRB's 'separate determinations' with regard to the collection process and the methodology for the calculation of contributions since the SRB's letter of 13 September 2016, the content of that letter should be examined.

189 In that letter, the SRB replied to a request made by the applicant on 7 July 2016 to access to all of the decisions concerning it. By that letter, the SRB authorised the applicant to consult, at its premises, in addition to the contested decisions and the calculation files, the following five interim decisions:

– Decision of the Executive Session of the SRB of 10 March 2016 on the 2016 target level of the SRF (SRB/ES/SRF/2016/01);

– Decision of the Executive Session of the SRB of 14 December 2015 on the 2016 policy for irrevocable payment commitments (SRB/ES/SRF/2015/06);

– Decision of the Plenary Session of the SRB of 30 September 2015 on the 2016 contributions reporting form (SRB/PS/SRF/2015/01);

– Decision of the Plenary Session of the SRB of 23 October 2015 amending the 2016 contributions reporting form (SRB/PS/SRF/2015/02);

– Decision of the Executive Session of the SRB of 6 April 2016 amending the 2016 contributions reporting form (SRB/ES/SRF/2016/04).

190 According to that reply, the applicant could reasonably have believed that no other interim decisions of the SRB concerned it. However, the decisions sent on 13 September 2016 included none of the sixteen interim decisions sent to the applicant two years later.

191 Moreover, in its letter of 13 September 2016, the SRB states that the contested decisions refer to the final three interim decisions mentioned in paragraph 189 above. However, there is no reference to those interim decisions in the contested decisions.

192 It follows from the foregoing that that new evidence must be declared admissible.

193 It should be noted that the interim decisions referred to in both paragraphs 182 and 189 above are documents not addressed to the applicant, so that the SRB was not required to notify them to it.

194 Nevertheless, it must be stated, first, that those interim decisions determine elements of the calculation procedure, as well as the actual calculation of contributions. Second, those interim decisions not only implement, but also, as far as some of them are concerned, supplement the applicable legislation. Since those interim decisions were not published or otherwise made known to the institutions, the SRB's argument that the statement of reasons for the first contested decision was sufficient on the ground that Regulation No 806/2014, Delegated Regulation 2015/63, Implementing Regulation 2015/81 and Directive 2014/59 set out in detail the method to be applied to calculate *ex ante* contributions (see paragraph 167 above) cannot, in any event, succeed.

195 It is sufficient to cite two examples, namely, first, interim decision SRB/ES/SRF/2016/01 (cited in paragraph 189, first indent, above), Article 1 of which sets the target level for 2016, which is a factor computed in the calculation of the applicant's *ex ante* contribution (see Article 4 of Implementing Regulation 2015/81 and Annex I, Step 6, to Delegated Regulation 2015/63), and, second, interim decision SRB/ES/SRF/2015/00 (cited in paragraph 182, first indent, above) which implemented Article 6(1)(d) of Delegated Regulation 2015/63 with regard to the determination by the SRB of the additional risk indicators comprising risk pillar IV.

196 Although the interim decisions referred to in paragraphs 182 and 189 were communicated to the applicant by the SRB, that was not until 20 April 2018 and 13 September 2016 respectively, therefore after the action had been brought.

197 In that regard, it should be recalled that the observance of the duty to state reasons must be assessed in the light of the information available to the applicant at the time the application was brought (see judgment of 12 November 2008, *Evropaïki Dynamiki* v *Commission*, T-406/06, not published, EU:T:2008:484, paragraph 50 and the case-law cited).

198 As for the SRB's argument referring to the case-law on the calculation of fines in respect of a cartel, according to which the Commission is not required to include a more detailed account or figures relating to the method used to calculate the fine in so far as it indicates the factors which enabled it to measure the gravity and the duration of the infringement committed, it should be noted, first, that, in the present case, the interim decisions were not published, unlike the methodology for calculating fines, nor were they brought to the applicant's attention before the action was brought. Second, the subject matter of the present case, which concerns the SRB's determination of the *ex ante* contributions to be paid by institutions for the purposes of financing of the SRF, is inherently different from the calculation of fines imposed on a cartel, in

particular because of their dissuasive effect (see, to that effect, judgment of 17 December 2014, *Pilkington Group and Others* v *Commission*, T-72/09, not published, EU:T:2014:1094, paragraphs 247 and 248). Therefore, that argument has no application to the present case.

199 In conclusion, since the interim decisions were not brought to the applicant's attention by the SRB before the action was brought, the SRB has infringed the obligation to state reasons.

200 In addition, with regard to the annex to the first contested decision, it should be noted that, even though it contains an amount for the risk adjustment factor in the European context, it contains no similar indication concerning the risk adjustment factor for the part of the calculation made in the national context. Similarly, while it specifies the type of calculation method used in the European context, it provides no indication as to the calculation method used by the SRB with reference to the national context.

201 However, as is clear from Article 8(1)(a) of Implementing Regulation 2015/81, the proportion of the calculation of contributions made by the SRB with reference to the national context, is, in 2016, 60% of the calculation of the contributions by institutions and the European part makes up only 40%. The statement of reasons in the first contested decision therefore appears, in that regard, to be insufficient.

202 It should be added that the inadequacy of the statement of reasons of the first contested decision cannot be compensated for by the content of the letter from the Austrian NRA of 26 April 2016.

203 Irrespective even of the fact that that letter does not contain substantial evidence capable of making up for the inadequacy of the statement of reasons for the first contested decision, the fact remains that, in any event, it is for the SRB, as the maker of the decision on *ex ante* contributions, to provide reasons for that decision.

204 In that regard, under the system established by the applicable legislation, it is the SRB which calculates and determines *ex ante* contributions. The SRB's decisions on the calculation of those contributions are addressed only to the NRAs (Article 5(1) of Implementing Regulation 2015/81) and it is for the NRAs to communicate them to institutions (Article 5(2) of Implementing Regulation 2015/81) and to raise the contributions from institutions on the basis of those decisions (Article 67(4) of Regulation No 806/2014).

205 Accordingly, when the SRB acts in accordance with Article 70(2) of Regulation No 806/2014, it adopts decisions which are definitive and are of direct and individual concern to the institutions.

206 Consequently, it is the responsibility of the SRB, the author of those decisions, to state the reasons on which they are based. That obligation cannot be delegated to the NRAs, nor can an infringement of that obligation be remedied by them, if the status of the SRB as the author of those decisions and its responsibility in that respect is not to be disregarded and, if, in view of the diversity of the NRAs, a risk of unequal treatment of institutions with regard to the SRB's reasoning in its decisions is not to arise.

207 In any event, it should be noted that the data in the annex to the collection notice of 26 April 2016 from the Austrian NRA are not identified as being SRB data. On the contrary, they are presented as an integral part of the collection notice, which is a measure under Austrian law, so that it is not possible to distinguish between the elements originating from the Austrian NRA and those originating, as appropriate, from the SRB.

208 Furthermore, it should be noted that, even though the risk adjustment factor must necessarily include all of the required decimals, if the calculation is not to be approximate, the adjustment factor in the annex to the collection notice of 26 April 2016 (with two decimal places) does not correspond to the adjustment factor (with fourteen decimal places) in the annex to the first contested decision as communicated to the Court in response to the second order.

209 It follows from the foregoing that, in adopting the first contested decision, the SRB has infringed the obligation to state reasons.

210 As regards the second contested decision, it should be noted that the decision itself infringes the obligation to state reasons, for the same reasons as those stated in respect of the first contested decision and for the additional reason that it provides no reason for the adjustment which it makes.

211 It is true that the reasons for that adjustment were set out in the letter of 23 May 2016 from the Austrian NRA to the applicant, to which was annexed a letter from the SRB to the applicant which was also dated 23 May 2016.

212 However, the SRB's letter of 23 May 2016 contains only general explanations as to the reasons for the adjustment made by the second contested decision.

213 With regard to the reasons contained in the letter from the Austrian NRA, reference is made to the considerations set out in paragraphs 202 to 206 above.

214 Finally, the SRB's argument referred to in paragraph 171 above must be rejected. While it follows from the case-law that an applicant has no legitimate interest in the annulment of a decision on the ground of a procedural defect, absence of reasons or inadequate statement of reasons for a decision where annulment of the decision can only lead to the adoption of another decision which is identical in substance to the decision annulled (see, to that effect, judgment of 4 May 2017, *Schräder* v *CPVO – Hansson (SEIMORA)*, T-425/15, T-426/15 and T-428/15, not published, EU:T:2017:305, paragraph 109 and the case-law cited), the fact remains that, in the present case, it cannot be ruled out that the annulment of the contested decisions gives rise to the adoption of different decisions. In the absence of full information on the SRB's interim determinations and calculations and all of the data relating to the other institutions, despite the interdependence between the applicant's contribution and the contribution of each of the other institutions, neither the applicant nor the Court is in a position to verify, in the present case, whether the annulment of those decisions would necessarily give rise to the adoption of a new decision which is identical in substance.

215 It follows from the foregoing that the first plea in law must be upheld.

216 It must be concluded that the contested decisions must be annulled, there being no need to examine the second, third and fourth pleas in law put forward by the applicant.

Limitation of the temporal effects of the judgment to be delivered

217 The SRB submits that, if the Court were to annul the first or second contested decision in so far as they concern the applicant, the temporal effects of that annulment ought to be limited, that annulment not applying until six months after the judgment has become final in the present case.

218 The SRB states that the reason for that request is that it will have to re-approve the applicant's 2016 *ex ante* contributions. As the applicant does not dispute that it is obliged to contribute to the SRF, a reimbursement pending the adoption of a new decision would be inappropriate, in the SRB's view.

219 The applicant did not express an opinion on that point.

220 In that regard it must recalled that, in accordance with the case-law, where it is justified by overriding considerations of legal certainty, the second paragraph of Article 264 TFEU confers on the Court a discretion to decide, in each particular case, which specific effects of such a measure must be regarded as definitive (see, by analogy, judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 121).

221 In accordance with that case-law, the Court has limited the temporal effect of a declaration that a Union measure is invalid where overriding considerations of legal certainty involving all the interests, public as well as private, at stake in the cases concerned precluded the calling into question of the charging or payment of sums of money effected on the basis of that measure in respect of the period prior to the date of the judgment (judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 122).

222 In the present case, the SRB has not demonstrated how, following the present judgment, the reimbursement of the sums received from the applicant in respect of its 2016 *ex ante* contribution would jeopardise overriding considerations of legal certainty involving all the interests, public as well as private, at stake in the present case. The mere fact that a refund pending the adoption of a new decision is inappropriate does not constitute a ground akin to overriding considerations of legal certainty.

223 Consequently, it is not appropriate to limit the temporal effects of the present judgment.

Costs

224 Under Article 134(1) of the Rules of Procedure, 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 SRB has been unsuccessful in the action registered under number T-377/16, it must be ordered to bear its own costs as well as those incurred by applicant, in accordance with the form of order sought by the latter, in that case. Since the other two actions, registered under numbers T-645/16 and T-809/16 have been declared inadmissible and the application for interim measures, registered under number T-645/16 R, has been rejected, the applicant must be ordered to bear its own costs as well as those incurred by the SRB, in accordance with the form of order sought by the latter, in those cases.

225 In accordance with Article 138(1) of the Rules of Procedure, the Italian Republic shall bear its own costs in Case T-645/16.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **In Cases T-645/16 and T-809/16, dismisses the actions as inadmissible;**

2. **In Case T-377/16, annuls the Decision of the Executive Session of the Single Resolution Board (SRB) of 15 April 2016 on the 2016 ex-ante contributions to the Single Resolution Fund (SRB/ES/SRF/2016/06) and the Decision of the Executive Session of the SRB of 20 May 2016 on the adjustment of the 2016 ex-ante contributions to the Single Resolution Fund, supplementing the Decision of the Executive Session of the SRB of 15 April 2016 on the 2016 ex-ante contributions to the Single Resolution Fund (SRB/ES/SRF/2016/13), to the extent that they concern Hypo Vorarlberg Bank AG;**

3. **Orders the SRB to bear its own costs and pay those incurred by Hypo Vorarlberg Bank in Case T-377/16;**

4. **Orders Hypo Vorarlberg Bank to bear its own costs and pay those incurred by the SRB in Cases T-645/16 and T-809/16 and in Case T-645/16 R;**

5. **Orders the Italian Republic to bear its own costs.**

Collins Kancheva Barents

Passer De Baere

Delivered in open court in Luxembourg on 28 November 2019.

[Signatures]