Reports of Cases

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

23 September 2020*

(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 the calculation of the 2017 *ex ante* contributions – Action for annulment – Direct and individual concern – Admissibility – Essential procedural requirements – Authentication of the decision – Obligation to state reasons – Right to effective judicial protection – Plea of illegality – Limitation of the temporal effects of the judgment)

In Case T-411/17,

Landesbank Baden-Württemberg, established in Stuttgart (Germany), represented by H. Berger and K. Rübsamen, lawyers,

applicant,

v

Single Resolution Board (SRB), represented by A. Martin-Ehlers, S. Raes, T. Van Dyck and A. Kopp, lawyers,

defendant,

supported by

European Commission, represented by A. Steiblytė and K.-P. Wojcik, acting as Agents,

intervener,

ACTION pursuant to Article 263 TFEU for annulment of the decision of the Executive Session of the SRB of 11 April 2017 on the calculation of the 2017 *ex ante* contributions to the Single Resolution Fund (SRB/ES/SRF/2017/05), in so far as it concerns the applicant,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

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

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 12 December 2019,

gives the following

* Language of the case: German.

Judgment

Legal framework

1 The present case has been brought in the context of the second pillar of the Banking Union, concerning 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 SRM was established with the purpose of enhancing the integration of the resolution framework in the euro area Member States and those non-euro area Member States who choose to participate in the Single Supervisory Mechanism (SSM) ('the participating Member States').

2 In particular, this case concerns the Single Resolution Fund (SRF) established by Article 67(1) of Regulation No 806/2014. The SRF is funded by the contributions of institutions raised at national level by way of, inter alia, *ex ante* contributions pursuant to Article 67(4) of that regulation. Under Article 3(1)(13) of that regulation, the concept of 'institution' means a credit institution, or an investment firm covered by consolidated supervision in accordance with Article 2(c) thereof. The contributions are transferred at European Union level in accordance with the intergovernmental agreement on the transfer and mutualisation of contributions to the SRF, signed in Brussels (Belgium) on 21 May 2014.

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 Single Resolution Fund (OJ 2015 L 15, p. 1).

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

– 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), and

– Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59 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 European Union agency (Article 42 of Regulation No 806/2014). It comprises, inter alia, a plenary session and an executive session (Article 43(5) of Regulation No 806/2014). In its executive session, the SRB 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).

Background to the dispute

7 The applicant, Landesbank Baden-Württemberg, is a credit institution established in Germany. It is a member of the institutional protection scheme ('the IPS') of the Sparkassen-Finanzgruppe (Savings Banks Finance Group, Germany).

8 On 26 January 2017, the applicant sent its declaration for the purposes of the 2017 *ex ante* contribution to the German resolution authority, the Bundesanstalt für Finanzmarktstabilisierung (Federal Agency for Financial Market Stabilisation, Germany; 'the FMSA').

9 By decision of 11 April 2017 on the calculation of the 2017 *ex ante* contributions to the SRF (SRB/ES/SRF/2017/05; 'the contested decision'), the SRB, in its executive session, pursuant to Article 54(1)(b) and Article 70(2) of Regulation No 806/2014, determined the amount of the 2017 *ex ante* contribution in respect of each institution, including the applicant.

10 By assessment notice of 21 April 2017, received on 24 April 2017, the FMSA informed the applicant that the SRB had set its 2017 *ex ante* contribution to the SRF and set out the amount to be paid to the Restrukturierungsfonds (Restructuring Fund, Germany) ('the assessment notice'). The FMSA attached two documents to the assessment notice, namely a version in German of the text of the contested decision, without the annex to which that text refers, and a document entitled 'Details of the (risk-adjusted) calculation: 2017 *ex ante* contributions to the [SRF]' ('the document entitled "Details of the calculation"').

Procedure and forms of order sought

11 By document lodged at the Registry of the General Court on 30 June 2017, the applicant brought the present action.

12 By document lodged at the Court Registry on 29 September 2017, the European Commission sought leave to intervene in support of the form of order sought by the SRB.

13 By decision of 13 November 2017, the President of the Eighth Chamber of the Court (former composition) granted the Commission leave to intervene.

14 Acting on a proposal from the Eighth Chamber of the Court (former composition), the President of that Chamber decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to assign the case to a Chamber sitting in extended composition.

15 By measure of organisation of procedure adopted on 12 February 2019 pursuant to Article 89 of the Rules of Procedure, the Court, first, requested the SRB to produce the complete original copy of the contested decision, including the annex thereto, and all of the interim decisions it had taken and on the basis of which it had calculated the 2017 *ex ante* contribution. Second, the Court requested the SRB to set out the procedure for the adoption of the contested decision, providing supporting evidence. Third, the SRB was requested to specify, regarding the data in the table of intervals for the risk adjusting multiplier published on its website, referred to in paragraph 154 of the defence and paragraph 102 of the rejoinder, the date on which those data were first published. Fourth, the SRB was requested to set out the values of the multiplier in respect of the IPS indicator and those of the risk adjusting multiplier applied, in the contested decision, in the case of the other institutions referred to in Annex A.12 to the application.

16 By document of 20 March 2019, the SRB responded to that measure of organisation of procedure. As regards the request to produce documents, it stated, in essence, that it was unable to produce the documents for reasons of confidentiality. On that ground, it asked the Court to adopt a measure of inquiry.

17 By order of 10 April 2019, the Court ordered the SRB, under the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and Article 91(b), Article 92(3) and Article 103 of the Rules of Procedure, to produce non-confidential and confidential versions of the complete original copy of the contested decision, including the annex thereto, and all of the interim decisions it had taken and on the basis of which it had calculated the 2017 *ex ante* contribution, all the supporting evidence relating to the procedure for the adoption of the contested decision, and the values of the multipliers referred to in paragraph 15 above.

18 By document of 3 May 2019, the SRB responded to the order of 10 April 2019. Regarding the contested decision, the SRB explained that the annex to that decision had been adopted in XLSX format. However, the document produced before the Court was in PDF format. Regarding the interim

decisions, the SRB produced, first, decisions relating to the calculation of the 2016 *ex ante* contributions, and, second, draft decisions and cover notes. Lastly, the SRB provided various particulars regarding the values of the multipliers referred to in paragraph 15 above.

19 In order to enable the SRB to supplement the response referred to in paragraph 18 above, the Court made a second order on 9 September 2019 relating to measures of inquiry.

20 By document of 26 September 2019, the SRB responded to the order of 9 September 2019 and produced a copy in PDF format of the text of the contested decision and, as regards the annex to that decision, a USB key containing non-confidential and confidential versions of a file in XLSX format. The SRB also produced non-confidential and confidential versions of 11 documents describing the procedure by which its executive session had approved the draft decisions contained in or annexed to the cover notes referred to in paragraph 18 above. Lastly, it produced an anonymised table of the values of the multipliers referred to in paragraph 15 above.

21 By order of 10 October 2019, following the examination provided for in Article 103(1) of the Rules of Procedure, the Court removed from the case file the confidential version of all the documents produced by the SRB in response to the orders relating to measures of inquiry of 10 April and 9 September 2019 and ruled that the non-confidential versions of the cover notes referred to in paragraph 18 above contained omitted passages that were both relevant to the dispute and non-confidential. As a result, it ordered the SRB to produce new non-confidential versions of those notes.

22 By document of 18 October 2019, the SRB complied with that order.

23 By letters of 6 November 2019, the applicant and the Commission lodged their observations in respect of the SRB's responses to the measure of organisation of procedure of 12 February 2019, the orders relating to measures of inquiry of 10 April and 9 September 2019 and the order of 10 October 2019.

24 The applicant claims, in essence, that the Court should:

– annul the contested decision in so far as it concerns the applicant;

– order the SRB to pay the costs.

25 The SRB contends, in essence, that the Court should:

– dismiss the action as inadmissible or as unfounded;

– in the alternative, if the Court decides to annul the contested decision, defer the effects of the annulment to six months after the judgment has become final;

– order the applicant to pay the costs.

26 The Commission did not lodge a statement in intervention within the prescribed period.

Law

Admissibility

27 In its submissions, the SRB has, in essence, disputed the applicant's standing to bring an action for annulment of the contested decision, arguing that the decision is not of direct and individual concern to the applicant, and that only the assessment notice is capable of affecting its position.

28 It must be pointed out that, in its judgment of 3 December 2019, *Iccrea Banca* (C-414/18, EU:C:2019:1036, paragraph 65), the Court of Justice held, in essence, that, although the decisions of the SRB on the calculation of the *ex ante* contributions to the SRF are addressed, in accordance with Article 5(1) of Implementing Regulation 2015/81, to the national resolution authorities ('the NRAs'), those decisions are, unquestionably, of direct and individual concern to the institutions which owe those contributions.

29 It follows that the applicant has standing to bring an action for annulment of the contested decision, which the SRB acknowledged at the hearing and a formal note of which was taken in the minutes of the hearing.

30 As for the SRB's argument that the action has been 'brought directly … against the regulations and directives which relate to the system of calculating *ex ante* contributions' and should, on that ground, be dismissed as inadmissible, it should be noted that the present action concerns the annulment of the contested decision only. Delegated Regulation 2015/63 is not the subject of an action for annulment, but constitutes the act of general application in respect of which the applicant raises a plea of illegality.

31 In that regard, it must be added that, in accordance with Article 277 TFEU, notwithstanding the expiry of the period laid down in the sixth paragraph of Article 263 TFEU, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the European Union is at issue, plead the grounds specified in the second paragraph of Article 263 TFEU in order to invoke before the Courts of the European Union the inapplicability of that act.

32 Therefore, in so far as the present action has been brought against a decision of the SRB adopted on the basis of an act of general application adopted by an EU institution, the action cannot be regarded as inadmissible, either wholly or in part, because of the simple fact that, in the context of that action, the applicant invokes the inapplicability of that act pursuant to Article 277 TFEU.

33 Moreover, in so far as it is settled case-law that the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (see judgment of 17 February 2017, *Islamic Republic of Iran Shipping Lines and Others* v *Council*, T-14/14 and T-87/14, EU:T:2017:102, paragraph 55 and the case-law cited), it is sufficient to note that the contested decision cites Delegated Regulation 2015/63 – against which the applicant raises a plea of illegality in respect of Articles 4 to 7 and 9 thereof and Annex I thereto (see paragraph 35 below) – as one of its legal bases. In addition, it is apparent from the case file that the applicant's 2017 *ex ante* contribution was calculated according to a 'risk-adjusted' method, therefore specifically in accordance with, inter alia, the provisions of Delegated Regulation 2015/63 referred to above.

34 It follows from the foregoing considerations that the present action is admissible as regards both the application for annulment of the contested decision and the plea of illegality relied on by the applicant.

Substance

35 In support of its action, the applicant raises six pleas in law, alleging:

– first, infringement of the second paragraph of Article 296 TFEU and of Article 41(1) and (2)(c) of the Charter of Fundamental Rights of the European Union ('the Charter') due to the fact that the contested decision fails to state adequate reasons;

– second, infringement of Article 41(1) and (2)(a) of the Charter due to the absence of an opportunity for the applicant to be heard;

– third, infringement of the first paragraph of Article 47 of the Charter due to the fact that the contested decision is not subject to review;

– fourth, infringement of Article 103(7)(h) of Directive 2014/59, of Article 113(7) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1), of the first sentence of Article 6(5) of Delegated Regulation 2015/63, of Articles 16 and 20 of the Charter and of the principle of proportionality, due to the application of the multiplier for the IPS indicator;

– fifth, infringement of Article 16 of the Charter and of the principle of proportionality, as a consequence of the application of the risk adjusting multiplier;

– sixth, illegality of Articles 4 to 7 and 9 of Delegated Regulation 2015/63 and of Annex I to that regulation.

36 It is appropriate to begin by examining the plea relating to matters of public policy alleging infringement of essential procedural requirements, which the Courts of the European Union are required to raise of their own motion (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67; of 30 March 2000, *VBA* v *Florimex and Others*, C-265/97 P, EU:C:2000:170, paragraph 114; of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 143; and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 70 and the case-law cited).

37 An infringement of essential procedural requirements includes, inter alia, the failure to authenticate an act (see, to that effect, 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) and an absence of or inadequate statement of reasons (see judgment of 15 June 2017, *Spain* v *Commission*, C-279/16 P, not published, EU:C:2017:461, paragraph 22 and the case-law cited); that last issue is the subject of the first plea for annulment, which must be considered together with the third and sixth pleas.

Authentication of the contested decision

38 It should be borne in mind 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; of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 38; and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 74).

39 The authentication of the act is intended to guarantee legal certainty by ensuring that the text adopted by the author of 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; of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraphs 40 and 41; and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 75).

40 It has also previously been 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 (judgments of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 42, and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 76).

41 Checking compliance with the requirement of authentication and, thus, of 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 (judgments of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 46, and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 77).

42 If the Courts of the European Union find, on examining the act produced to them, that the act has not been properly authenticated, they must of their 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 (judgments of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 51, and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 78).

43 It is of little importance, in that 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 (judgments of 6 April 2000, *Commission* v *ICI*, C-286/95 P, EU:C:2000:188, paragraph 52, and of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822, paragraph 79; see also, to that effect, judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T-54/14, EU:T:2016:455, paragraph 47).

44 In the present case, in its response to the measure of organisation of procedure adopted on 12 February 2019, the SRB states that the contested decision was adopted by written procedure, pursuant to Article 7(5) and Article 9 of the Rules of Procedure of the SRB in its Executive Session, as adopted by the decision of the Plenary Session of the SRB of 29 April 2015 (SRB/PS/2015/8), initiated by sending documents to the members of the executive session of the SRB by email including, inter alia, a document in DOC format corresponding to the draft text of the contested decision and a document in XLSX format corresponding to the draft annex to which the text of the contested decision refers.

45 In that regard, it is apparent from the SRB's response to the order of 10 April 2019 that, on 11 April 2017, following the approval, also by email, of the two documents referred to in paragraph 44 above, as amended during the procedure, by all the members of the executive session, the secretariat of the SRB printed the document in DOC format (the text of the contested decision without the annex thereto) and the president of the SRB signed that document and the routing slip relating to the file. According to the SRB, the signed version of that document is stored at its premises.

46 In its response to the order of 10 April 2019, the SRB produced a copy of that signed version of the text of the contested decision and a copy of the routing slip.

47 However, it must be pointed out that the SRB has not produced any evidence that the annex to the contested decision was authenticated, that annex being an electronic document in XLSX format containing the amounts of the *ex ante* contributions and therefore constituting an essential component of that decision.

48 The SRB did not produce any electronically signed version of the annex to the contested decision, even though that annex is in no way inextricably linked to the text of the contested decision.

49 Regarding the routing slip referred to in paragraph 45 above, containing a reference to 'Attachment(s): (2)', which should theoretically mean that, when the president of the SRB signed it by hand, two documents were attached to that routing slip, namely the text of the contested decision and a printed version of the annex, it must be pointed out that, in actual fact, it does not prove that two documents – which it does not, moreover, even identify – were attached.

50 What is more, the SRB stated at the hearing that it had not printed the annex, which, as previously stated, is a document in XLSX format, that is, an electronic document. This means that that document could not have been signed except electronically and that document could not therefore have been attached physically to a routing slip in hard copy.

51 The SRB refers to a signature only in respect of the text of the contested decision. The SRB has not shown that the president of the SRB signed that annex electronically.

52 As for the argument put forward by the SRB at the hearing that the annex was available in a document management system known as ARES (Advanced Records System) when the routing slip was signed, it must be pointed out that it is a new argument and therefore inadmissible and, in any event, unsubstantiated.

53 In that regard, it should be noted that the routing slip does not contain any information proving that claim, let alone any information making it possible to show that there is an inextricable link between that slip, signed by hand by the president of the SRB, and a document allegedly available in ARES corresponding to the annex to the contested decision as produced before the Court.

54 Ultimately, the handwritten signature of a routing slip referring to two attachments without identifying them or being inextricably linked to those attachments subsequently, whereas there was in fact only one document attached to that slip, cannot be construed as authentication of another document – the annex in XLSX format – allegedly available in ARES.

55 It follows from the foregoing considerations that the requirement that the contested decision be authenticated is not met.

56 The Court considers it appropriate, in the interest of the proper administration of justice, to rule also on the first plea, alleging infringement of the obligation to state reasons, the third plea, alleging infringement of the applicant's right to effective judicial protection, and the sixth plea, alleging illegality of certain provisions of Delegated Regulation 2015/63, examining those various pleas together.

The first, third and sixth pleas, examined together, alleging infringement of the obligation to state reasons, infringement of the right to effective judicial protection and illegality of Delegated Regulation 2015/63, respectively

– *Arguments of the parties*

57 The applicant submits that the SRB infringed the obligation to state reasons and the applicant's right to effective judicial protection due to the fact that the contested decision fails to state adequate reasons.

58 It maintains that, according to case-law, a decision requiring the payment of a tax contains adequate reasons for the purposes of judicial review only when it contains an accurate and detailed statement of all the individual items comprised in the claim, payment of which was made enforceable by the decision.

59 In the present case, the requirement to state reasons is indeed stringent on account of the complexity of the risk adjustment, the scale of the financial burden imposed and the discretion allegedly available to the SRB.

60 However, the applicant submits that none of the documents with which it was provided along with the assessment notice contains the information it needs in order to assess whether the calculation of its contribution is correct, in respect of both the calculation of the basic annual contribution and the risk adjustment of that contribution.

61 The mere reproduction of information relating exclusively to the applicant is clearly insufficient.

62 The applicant adds that the SRB cannot rely on confidentiality obligations in respect of data concerning the other institutions, which are essential in order to review the calculation, as grounds for its failure to fulfil the obligation to state reasons. It refers to Article 84(3) of Directive 2014/59 and to the disclosure requirements of credit institutions laid down by Article 431 et seq. of Regulation No 575/2013.

63 The applicant submits that the SRB has therefore infringed, substantially and in various respects, the obligation to state reasons, which must result in the annulment of the contested decision. The reasons provided do not make it possible for either the institutions or the FMSA to verify and review the calculation of the contribution. It is not possible even for the Court to review the contested decision and, as a result, itself to fulfil the obligation to state reasons. The judgment that it would be led to hand down would inevitably infringe the guarantee of the right to a fair trial enshrined in the second paragraph of Article 47 of the Charter.

64 According to the applicant, the infringements of the obligation to state reasons reveal the possibility of substantive lacunae that cannot be determined precisely because of the failure to provide a full statement of reasons.

65 On those same grounds, the applicant submits that the SRB also infringed the applicant's right to effective judicial protection. Failing an adequate statement of reasons for the contested decision, the Court will not be able to satisfy itself that the decision was taken on a sufficiently solid factual basis, or even assess the cogency in the abstract of the data and values or the steps on which the calculation of the contribution at issue was based.

66 Lastly, the applicant, relying on Article 277 TFEU, claims that the contested decision must be annulled also on the ground that Articles 4 to 7 and 9 of Delegated Regulation 2015/63 and Annex I thereto themselves infringe the principle of effective judicial protection, in that they create a complex system

for determining contributions, characterised by a number of opportunities to exercise discretion and complete opacity and on the basis of which the SRB is not in a position to give verifiable and reviewable reasons for the individual burdens imposed on institutions.

67 The SRB, supported in essence by the Commission, disputes those arguments.

68 First of all, the SRB asserts that the statement of reasons given in the contested decision is adequate, not only in respect of the NRAs in order for them to understand the reasons for the calculation, but also generally.

69 Next, the SRB puts forward several contextual factors which, in its view, are likely to affect the scope of the obligation to state reasons.

70 First, the SRB contends that both the FMSA and the institutions were involved in the process of calculating the *ex ante* contributions.

71 Second, the methodology applicable to the calculation of the *ex ante* contributions is set out clearly in the applicable legislation, in particular in Article 70(1) and (2) of Regulation No 806/2014 and Section 2 of and Annex I to Delegated Regulation 2015/63.

72 Third, it is apparent from case-law that a decision which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions.

73 In addition, the SRB argues that its obligation to state reasons vis-à-vis the applicant – contrary to the applicant's assertions – does not extend to making it possible for the applicant to assess precisely whether the calculations are correct. This can be inferred from case-law relating to other fields of EU law, in particular the field of competition law.

74 Against that background, the SRB emphasises that the *ex ante* contributions of (approximately) 3 500 institutions are interconnected, in so far as the total of all the contributions must correspond to the annual target level and, consequently, the calculation of the applicant's contribution is based not only on the information given by the applicant, but also on that given by the 3 500 other institutions and connected to the specific nature of the activities, responsibilities and risks of those institutions, which the SRB assessed, in the context of the contested decision, as a relative ranking of the institutions. That information is confidential. Consequently, the obligation to state reasons must be weighed against the SRB's obligation to preserve professional secrecy in respect of all the institutions concerned.

75 What is more, it is apparent from case-law that the scope of the obligation to state reasons can also be restricted on account of overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations.

76 Lastly, sharing all the confidential information of all the institutions of the participating Member States with each NRA would go beyond what is required by Article 5(1) of Implementing Regulation 2015/81.

77 As a result, the level of detail chosen for the statement of reasons in the contested decision is sufficient.

78 In so far as the applicant claims that the right to effective judicial protection requires the Court to be in a position to recalculate the contribution, the SRB asserts that that interpretation of the review of legality is too broad and is inconsistent with the existing case-law on the subject. The right to effective judicial protection must be assessed within the context of the institutional balance created by Regulation No 806/2014 and Implementing Regulation 2015/81. The SRB is responsible for calculating *ex ante* contributions. Therefore, it is not for the Court to substitute its decision for that of the SRB by

recalculating the contribution. In the present case, it is possible for the Court to review the legality of the contested decision by taking into account the relevant legal framework. As a result, the applicant's right to effective judicial protection has not been infringed.

79 Whatever the case may be, the Court can, in its review, request that relevant information or evidence be produced for the purposes of such review, while weighing up confidentiality requirements against the need to guarantee sufficiently the right to effective judicial protection, and thus remedy any potential lack of information that might jeopardise that right.

80 For the same reasons, the plea of illegality relied on by the applicant in respect of the provisions of Delegated Regulation 2015/63 is unfounded.

81 In any event, the SRB contends that, given that the applicant has not produced any evidence relating to the alleged error in the calculation of the 2017 *ex ante* contributions, that calculation remains, in principle, valid. Therefore, the applicant has no legitimate interest in the annulment of the contested decision.

82 In its response to a question asked by the Court at the hearing, the SRB explained that the possibility provided for in Article 84(3) of Directive 2014/59, referred to by the applicant (see paragraph 62 above), and Article 88(1) of Regulation No 806/2014 of disclosing confidential information in summary or collective form so that the institutions cannot be identified cannot be contemplated in the present case. The SRB maintains that it has provided the applicant with the maximum amount of information possible under the current system.

– *Findings of the Court*

83 It is settled case-law that 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 of the European Union 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).

84 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, 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 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).

85 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 (see judgment of 15 July 2015, *Pilkington Group* v *Commission*, T-462/12, EU:T:2015:508, paragraph 21 and the case-law cited).

86 In addition, there is a close connection between the obligation to state reasons and the fundamental right to effective judicial protection (Opinion of Advocate General Kokott in *Housieaux*, C-186/04, EU:C:2005:70, point 32).

87 It is settled case-law that if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, as much as to enable that person to defend his or her rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action before the court having jurisdiction as to put that court fully in a position to exercise its power under the FEU Treaty to review the legality of that decision (see, to that effect, judgments of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraph 40 and the case-law cited, and of 13 March 2019, *AlzChem* v *Commission*, C-666/17 P, not published, EU:C:2019:196, paragraph 54 and the case-law cited).

88 As a preliminary point, it should be borne in mind that although, within the system created by Regulation No 806/2014 and Implementing Regulation 2015/81, the decisions determining the *ex ante* contributions are addressed to the NRAs, those decisions are of direct and individual concern to the institutions which owe those contributions, including the applicant (see paragraph 28 above).

89 Thus, any interest that those institutions might have in obtaining explanations must also be taken into account when assessing the scope of the obligation to state the reasons for the decisions at issue (judgments of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB*, T-377/16, T-645/16 and T-809/16, EU:T:2019:823, paragraph 176, and of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824, paragraph 164).

90 Moreover, the SRB is responsible for calculating and determining the *ex ante* contributions. Its decisions on the calculation of those contributions are to be addressed to the NRAs alone (Article 5(1) of Implementing Regulation 2015/81) and it is for the NRAs to communicate them to the institutions (Article 5(2) of Implementing Regulation 2015/81) and to raise the contributions from the institutions on the basis of those decisions (Article 67(4) of Regulation No 806/2014) (judgments of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB*, T-377/16, T-645/16 and T-809/16, EU:T:2019:823, paragraph 204, and of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824, paragraph 179).

91 Thus, when the SRB acts pursuant to Article 70(2) of Regulation No 806/2014, it adopts decisions that are definitive in nature and of direct and individual concern to the institutions (judgments of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB*, T-377/16, T-645/16 and T-809/16, EU:T:2019:823, paragraph 205, and of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824, paragraph 180).

92 As a result, it is for the SRB, the author of those decisions, to state the reasons for those decisions. That obligation cannot be delegated to the NRAs, nor can the failure to fulfil that obligation be remedied by those NRAs, without disregarding the role of the SRB as the author of those decisions and its liability in that respect and giving rise, given the diversity of the NRAs, to the danger that the institutions might be treated unequally as regards the reasons given for the SRB's decisions (judgments of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB*, T-377/16, T-645/16 and T-809/16, EU:T:2019:823, paragraph 206, and of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824, paragraph 181).

93 In the present case, as regards the text of the contested decision, the preamble refers to Regulation No 806/2014, Directive 2014/59, Implementing Regulation 2015/81, Delegated Regulation 2015/63 and the intergovernmental agreement referred to in paragraph 2 above as legal bases and contains several statements relating to the *ex ante* contributions raised in respect of 2015 and 2016 being taken into account. The preamble is followed by the main operative part of the contested decision ('[the SRB in its Executive Session] hereby approves the amounts of the … *ex-ante* contributions to the [SRF] for the 2017 contribution period as set out in the Annex') and 11 paragraphs setting out, in general terms, the procedure for calculating the *ex ante* contributions. Lastly, paragraph 12 specifies that '[the contested decision] will enter into force on the date of its adoption'.

94 As for the annex to the contested decision as produced by the SRB in its response to the order of 9 September 2019, it contains a table setting out, for each institution concerned, the participating Member State in which it is authorised, the type of method used for calculating the 'European' portion of the 2017 *ex ante* contribution, the amount of that contribution and, in the column entitled 'Risk adjustment factor (EA)', the amount of the 'European' risk adjusting multiplier (see Article 9 of Delegated Regulation 2015/63 and Article 8(1)(b) of Implementing Regulation 2015/81) applied in its case.

95 It is common ground that the contested decision contains barely any information regarding the calculation of the applicant's contribution, beyond the explanations in general terms contained in the text of the decision. That decision provides only the type of method and the amount of the risk adjusting multiplier applied to the applicant in order to calculate the 'European' portion of its contribution.

96 It should be added that it is apparent from Article 8(1)(b) of Implementing Regulation 2015/81 that the 'European' portion of the calculation of the contribution carried out by the SRB was only 60% of the calculation of the 2017 contribution, whereas the national portion was 40%.

97 As for the document entitled 'Details of the calculation' (see paragraph 10 above), assuming that it was in fact created by the SRB, as asserted by the latter at the hearing, it must be pointed out that, even though it sets out, in addition to the information referred to in paragraph 94 above, the type of method for calculating the 'national' portion of the contribution, the amount of the 'national' risk adjusting multiplier and other calculation factors, it does not, however, contain any information sufficient to verify the accuracy of the contribution.

98 In particular, that document does not contain any calculation factors specific to the other (approximately) 3 500 institutions, even though, pursuant to, inter alia, Articles 4 to 7 and 9 of Delegated Regulation 2015/63, the calculation of the applicant's contribution involves, first, a pro rata calculation of the amount of its liabilities (excluding own funds and covered deposits), with respect to the total liabilities (excluding own funds and covered deposits) of all of the other institutions, and, second, an assessment of its risk profile as compared with the risk profiles of those other institutions in accordance with the indicators set out in the legislation.

99 In order to explain the absence of that information, the SRB argues, in essence, that the information relating to the other institutions is confidential.

100 The Court does not dispute the confidential nature of the other (approximately) 3 500 institutions' data, but notes that, to the extent that the calculation of the applicant's contribution is based interdependently on those data, that calculation is inherently opaque.

101 The applicant can, admittedly, examine the methodology for calculating the *ex ante* contribution as defined in the legislation and set out in the text of the contested decision. It can, if need be, dispute certain aspects and their implementation in relation to it, such as, for example, the SRB's assessment of its data under Article 5(1) of Delegated Regulation 2015/63.

102 Nevertheless, other than such targeted disputes, given that the applicant's contribution was calculated interdependently and on the basis of non-communicable information, the method of calculation adversely affects the applicant's ability to dispute the contested decision effectively.

103 Those considerations are indirectly corroborated by the SRB in its response to the fourth and fifth pleas. In those pleas, the applicant disputes specific parts of the calculation of its contribution, relying on, inter alia, its allegedly good risk profile as evidenced by the comparison it carried out of its financial data with data of other institutions. The SRB rejects that comparison on the ground that it is

not equivalent to the comprehensive analysis that it carried out in accordance with the legislation. The Court must hold, concerning the SRB's response, that, in fact, it is impossible for the applicant to access the specific and comprehensive data that would enable it to carry out such an analysis.

104 In addition, to the extent that, in its response to the fifth plea, the SRB emphasises that the amounts of the risk adjusting multiplier applied in the applicant's case 'remain within the limits prescribed by Article 9(3) of Delegated Regulation [2015/63], namely between 0.8 and 1.5', it should be noted that this emphasis does not address the applicant's concerns. Those concerns do not relate to whether the multiplier remains within the limits referred to above, which can be determined from the statement of reasons provided, but relate to whether that multiplier contains an error within those limits, taking into account the fact that, according to the contents of the document entitled 'Details of the calculation', the range set out in the provision referred to above represents, as regards the amount of the applicant's contribution, a difference of [*confidential*].[1]

105 As for the table published by the SRB on its website and also referred to by the SRB in its response to the fifth plea, it does not add anything in that regard. That table sets out the number of institutions to which each interval of the amounts of the risk adjusting multiplier in the euro area has been applied, between 0.8 and 0.9, between 0.9 and 1.0, and so on, until the interval between 1.4 and 1.5. Like the annex to the contested decision, that table provides only part of the information on the calculation of the *ex ante* contribution, as it concerns only the European risk adjusting multiplier. That table – which was, moreover, published after the present action was brought – does not make it possible to verify the accuracy of the calculation of that multiplier in the applicant's case or, as a result, of its contribution.

106 It is, indeed, not disputed by the SRB that an institution such as the applicant cannot know the specific reasons why its contribution increases, decreases or remains constant from one year to the next, since those changes or lack of changes are the result of a relative position and – by definition – it is unaware of the terms thereof. An institution might thus see its contribution increase although its own risk profile has decreased, and vice versa, without having access to the information on which that change is based, as that information is confidential.

107 Article 296 TFEU provides that legal acts must state the reasons on which they are based and, according to case-law, the obligation to state reasons applies to all acts which may be the subject of an action for annulment (judgment of 1 October 2009, *Commission* v *Council*, C-370/07, EU:C:2009:590, paragraph 42).

108 Moreover, it is apparent from case-law that the obligation to preserve professional secrecy cannot justify deficiencies in the statement of reasons. The obligation to preserve business secrets cannot be given so wide an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essential content (see, to that effect, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 48 and the case-law cited).

109 In the present case, the statement of reasons given to the applicant does not enable it to verify the amount of its contribution, although that is the essential part of the contested decision in so far as the applicant is concerned. The decision puts the applicant in a position where it cannot know whether that amount has been calculated correctly or whether it should dispute the amount before the Court without however being able, as it is nonetheless required to do in the context of a legal challenge, to identify, with regard to that amount, the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded (see, to that effect, judgment of 8 December 2011, *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraph 132).

1 Confidential information omitted.

110 It follows that the SRB has infringed the obligation to state reasons.

111 That finding is not called into question by the other arguments put forward by the SRB.

112 As regards the reference to the involvement of the applicant in the decision-making process, it should be noted that that involvement is restricted to the institution providing the SRB with information in accordance with Article 14 of Delegated Regulation 2015/63 and in the formats and representations set out by the SRB pursuant to Article 6 of Implementing Regulation 2015/81. It does not provide the institution with any means of verifying the accuracy of its contribution.

113 The same applies, for the reasons set out in paragraphs 101 and 102 above, to the SRB's reference to the fact that the method of calculation is set out in the applicable legislation.

114 As regards the SRB's argument based on the case-law relating to decisions which fit into a well-established line of decisions and which may be reasoned in a summary manner, the following should be noted.

115 That case-law is irrelevant in so far as it does not relate to the question at issue in the present case of the omission of data due to their confidential nature.

116 Moreover, to the extent that it is apparent from the case file that the SRB uses information technology (XLSX files, emails) for the purpose of calculating *ex ante* contributions and adopting decisions on those contributions, which makes it possible to draft and circulate large amounts of information easily and quickly, it cannot be claimed that material or technical considerations or considerations relating to time limits, sometimes relied on as the reason for a summary statement of reasons, could apply in the present case.

117 Lastly and in any event, it cannot be said that the decision in the present case fits into a well-established line of decisions. As observed by the applicant, it was only for the second time that, in 2017, the SRB determined the *ex ante* contributions to the SRF. What is more, the SRB's decision determining the *ex ante* contributions to the SRF for 2016 was annulled (judgments of 28 November 2019, *Banco Cooperativo Español* v *SRB*, T-323/16, EU:T:2019:822; of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB*, T-377/16, T-645/16 and T-809/16, EU:T:2019:823; and of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824).

118 With regard to the argument based on the case-law relating to statements of reasons in the field of competition law, it is true that it is settled case-law in that field that the obligation to state reasons does not require the Commission to set out, in its decision, the figures relating to the method of calculating fines (see judgment of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T-214/06, EU:T:2012:275, paragraph 100 and the case-law cited).

119 Nevertheless, it should be emphasised that it is apparent from that case-law that fines constitute an instrument of the Commission's competition policy and the Commission must be allowed a margin of discretion when setting them in order that it may channel the conduct of undertakings towards observance of the competition rules. Thus, the Commission cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own power of assessment. If the Commission were required to indicate in its decision the figures relating to the method of calculating the amount of fines, the deterrent effect of those fines would be undermined (see, to that effect, judgments of 2 October 2003, *Salzgitter* v *Commission*, C-182/99 P, EU:C:2003:526, paragraph 75; of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraphs 335 and 336; and of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB*, T-377/16, T-645/16 and T-809/16, EU:T:2019:823, paragraph 198 and the case-law cited).

120 However, such considerations are not applicable to the present case.

121 The present case does not form part of a set of rules providing for a margin of discretion in order to channel the conduct of undertakings, but relates to an objective calculation that, theoretically, does not allow the person carrying out that calculation any such margin of discretion.

122 Moreover, the present case does not concern a penalty procedure warranting the preservation of a deterrent aspect, but concerns a procedure similar to a taxation procedure. In those circumstances, there is no reason to deprive the debtor of the opportunity to verify the accuracy of its contribution. In that regard, and contrary to the SRB's assertions, the applicant is correct to rely on the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7, pp. 142 and 143), in which the Court held that the legal basis of the contested decision in that case, having the effect of an *ex officio* assessment, required an accurate and detailed statement of all the individual items comprised in the claim, payment of which was made enforceable by the decision, that only an account of that kind could make it possible for the Court to review that decision and that, as those items were not accounted for, that decision did not contain an adequate statement of reasons (see also judgment of 16 December 1963, *Macchiorlati Dalmas* v *High Authority*, 1/63, EU:C:1963:58, p. 313).

123 As regards the reference made by the SRB to the order of 22 February 2005, *Hynix Semiconductor* v *Council* (T-383/03, EU:T:2005:57, paragraph 35), that order is clearly irrelevant in the present case. That order did not concern the obligation to state the reasons for an act, but merely the requirement for a party applying for a confidentiality order in proceedings before the Court to state the reasons for its application.

124 As regards the references made by the SRB to cases concerning public procurement and State aid, the Court held in the cases in question that the omission of economic data in the non-confidential version of the decision at issue had not prevented the applicants from understanding the reasoning followed by the Commission or hindered their ability to challenge that decision before the Court and had not prevented the Court from exercising its judicial review in the action concerned (judgment of 8 January 2015, *Club Hotel Loutraki and Others* v *Commission*, T-58/13, not published, EU:T:2015:1, paragraphs 73 to 77), and that the applicants had sufficient knowledge of the relative advantages of the other successful tenderers' bids (judgment of 8 July 2015, *European Dynamics Luxembourg and Others* v *Commission*, T-536/11, EU:T:2015:476, paragraph 47 and paragraph 50 *in fine*).

125 In the present case, by contrast, and as has already set out in paragraphs 93 to 106 and 109 above, the statement of reasons given to the applicant, even taking into account the document entitled 'Details of the calculation' (see paragraph 10 above), does not enable the applicant to verify whether the amount of its contribution complies with the applicable legislation and, therefore, decide in full knowledge of the circumstances whether it is worthwhile to bring an action before the court having jurisdiction and in what terms.

126 As for the reference made by the SRB to case-law relating to combating terrorism, which acknowledges that overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations can militate against certain parts of a statement of reasons being communicated (see, to that effect, judgment of 14 October 2009, *Bank Melli Iran* v *Council*, T-390/08, EU:T:2009:401, paragraph 81), it is sufficient to note that the subject of the banking union is not in any way related to the issues connected with combating terrorism.

127 Lastly, and contrary to the SRB's assertions, it must be pointed out that the fact that it is possible for the Court to request that the SRB adduce information for the purposes of its review of the legality of the contested decision cannot alter, in the present case, the finding that there has been an infringement of the obligation to state reasons; nor can it guarantee that the applicant's right to effective judicial protection is respected.

128 The contested decision had to state adequate reasons when it was adopted and, in any event, before the action for annulment was brought. The failure to state reasons cannot be remedied after the action has been brought before the Court, in particular following measures of organisation of procedure or measures of inquiry ordered by the Court.

129 As regards the plea of illegality relied on by the applicant, it is necessary to reject the argument raised by the Commission at the hearing that it cannot dispute the legality of the contested decision since the methodology for calculating its contribution, based on the interdependence of the contributions and the reliance on confidential data, does not stem from Delegated Regulation 2015/63, but rather from Regulation No 806/2014 and Directive 2014/59, in respect of which the applicant did not raise a plea of illegality. As is apparent from the considerations set out below, the fact that the calculation of the applicant's *ex ante* contribution is opaque and that the applicant is therefore not in a position to verify the accuracy thereof is a consequence, at least in part, of the method of calculation defined by the Commission itself, that is, without that method having been imposed on it by Regulation No 806/2014 or Directive 2014/59, in Delegated Regulation 2015/63.

130 Pursuant to Article 70(2) of Regulation No 806/2014 and Article 103(2) of Directive 2014/59, there are two stages, in essence, to the calculation of an institution's *ex ante* contribution.

131 First, a 'flat contribution' is calculated (in actual fact, for the largest institutions, including the applicant, a 'basic annual contribution' within the meaning of Delegated Regulation 2015/63, see recital 5 of that regulation) 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.

132 The 'basic annual contribution' is then adjusted in proportion to the risk profile of the institution.

133 The criteria for that adjustment are laid down in Delegated Regulation 2015/63, adopted by the Commission on the basis of the second subparagraph of Article 103(2) and Article 103(7) of Directive 2014/59 and applicable in the context of Regulation No 806/2014 pursuant to Article 70(6) thereof.

134 However, it is not apparent from Article 103(7) of Directive 2014/59, which is the legal basis for Delegated Regulation 2015/63, that the adjustment in proportion to the risk profile must necessarily use a method of calculation that is interdependent and based on third-party confidential data.

135 The factors to be taken into account for the risk adjustment, listed in Article 103(7) of Directive 2014/59, all relate exclusively to the institution concerned, namely: first, the risk exposure of the institution, including the importance of its trading activities, its off-balance sheet exposures and its degree of leverage; second, the stability and variety of the company's sources of funding and unencumbered highly liquid assets; third, the financial condition of the institution; fourth, the probability that the institution enters into resolution; fifth, the extent to which the institution has previously benefited from extraordinary public financial support; sixth, the complexity of the structure of the institution and its resolvability; seventh, the importance of the institution to the stability of the financial system or economy of one or more Member States or of the European Union; and eighth, the fact that the institution is part of an institutional protection scheme.

136 As regards the assertion that interdependence and reliance on confidential data from the other institutions stem from Article 69(1) of Regulation No 806/2014, which determines, by means of the target level, a level of funding of the SRF to be reached by the end of the initial period, and from Article 70(2) of that regulation, which provides that the aggregate amount of individual contributions must not exceed annually 12.5% of that target level, it must be pointed out that those two provisions do not impose, by means of the thresholds they set, an opaque risk adjustment system for the institutions concerned, including the applicant.

137 First, Article 69(1) of Regulation No 806/2014 does not define the target level as a specific upper limit on the funding to be provided to the nearest euro cent, but only as a minimum level ('at least 1%').

138 Second, that target level is defined in proportion to the amount of the covered deposits of all the credit institutions concerned at the end of the 'initial' period, that is to say, an amount that cannot be expressed in figures before the end of 2023.

139 Third, although Article 70(2) of Regulation No 806/2014 requires that the *ex ante* contributions raised in respect of the year in question do not exceed 12.5% of that target level, this does not mean that it is absolutely necessary to determine, for each year, a specific amount that must then be distributed, in the calculation of the *ex ante* contributions, between all the institutions concerned. Beyond the fact that the rate of 12.5% itself relates to the target level which is defined as a minimum and in respect of an amount that cannot be expressed in figures before the end of 2023, that provision does not prohibit a cumulation of *ex ante* contributions that might potentially amount to less than 12.5% of the target level for the year in question.

140 It follows that, since Directive 2014/59 and Regulation No 806/2014 did not require the Commission to adopt, by way of Delegated Regulation 2015/63, an opaque risk adjustment method for the applicant, and the Commission has acknowledged that, from a financial standpoint, it was possible to assess the risk profile of an institution solely on the basis of its own data (see, to that effect, judgment of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824, paragraph 156), the fact that the applicant restricted its plea of illegality to Delegated Regulation 2015/63 alone in no way prevents the Court from concluding that the methodology for calculating the *ex ante* contributions in the light of the requirements of Article 296 TFEU is unlawful, at least as regards the part of that methodology relating to the risk adjustment set out in that delegated regulation.

141 It must therefore be found that the infringement of the obligation to state reasons established in the present case in paragraph 110 above stems, in respect of the part of the calculation of the *ex ante* contribution relating to the risk adjustment, from the illegal nature, alleged by means of a plea in law, of Articles 4 to 7 and 9 of and Annex I to Delegated Regulation 2015/63.

142 Moreover and in any event, since the requirement to provide a sufficiently specific statement of reasons, enshrined in Article 296 TFEU, is one of the fundamental principles of EU law, compliance with which it is for a court to ensure by, of its own motion if need be, raising an issue of failure to fulfil that obligation (see paragraphs 36 and 37 above) and that, in breach of that obligation, the applicant does not have sufficient information to verify the accuracy of its contribution, the SRB cannot remedy such a breach by relying on secondary legislation.

143 Having regard to all the foregoing considerations, it must be held, having upheld the plea alleging infringement of the requirement that acts be authenticated, that the contested decision must also be annulled on the ground that the obligation to state reasons has been infringed, as has the right to effective judicial protection, without it being necessary to examine the other pleas relied on by the applicant.

Limitation of the temporal effects of the judgment

144 The SRB contends, in essence, that if the Court were to decide to annul the contested decision, it would be necessary to defer the effects of the annulment to six months after the judgment has become final.

145 The applicant has made no submissions on that point.

146 Judgments by which the Court annuls a decision taken by an institution or body of the European Union take, in principle, immediate effect in that the annulled act is eliminated retroactively from the legal order and is deemed never to have existed. Nevertheless, on the basis of the second paragraph of Article 264 TFEU, the Court may provisionally maintain the effects of an annulled decision (see judgment of 2 April 2014, *Ben Ali* v *Council*, T-133/12, not published, EU:T:2014:176, paragraph 83 and the case-law cited).

147 In the present case, it follows from the foregoing that the SRB cannot replace the contested decision without again infringing the obligation to state reasons and the applicant's right to effective judicial protection before the legal framework, in particular Delegated Regulation 2015/63, is amended.

148 In those circumstances, in accordance with the form of order sought by the SRB, the effects of the contested decision must be maintained for six months from the day on which the present judgment becomes final.

Costs

149 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 applicant has applied for costs and the SRB has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the applicant.

150 The Commission is to bear its own costs, in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the Executive Session of the Single Resolution Board (SRB) of 11 April 2017 on the calculation of the 2017 *ex ante* contributions to the Single Resolution Fund (SRB/ES/SRF/2017/05), in so far as it concerns Landesbank Baden-Württemberg;**

2. **Maintains the effects of Decision SRB/ES/SRF/2017/05, in so far as it concerns Landesbank Baden-Württemberg, for six months from the day on which the present judgment becomes final;**

3. **Orders the SRB to bear its own costs and to pay those incurred by Landesbank Baden-Württemberg;**

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

Collins Kancheva Barents

Passer De Baere

Delivered in open court in Luxembourg on 23 September 2020.

[Signatures]