Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 15 April 2021 [1]

Case C-662/19 P

NRW. Bank
v

Single Resolution Board

(Appeal – Banking union – Single resolution mechanism for credit institutions and certain investment firms – Setting of the *ex ante* contributions to the Single Resolution Fund for 2016 – Challengeable act – Partly confirmatory act – Time limit for bringing an action)

I. Introduction

1. By its appeal, NRW. Bank seeks annulment of the judgment of the General Court of the European Union of 26 June 2019, *NRW. Bank* v *SRB* (T-466/16, not published, EU:T:2019:445) ('the judgment under appeal') by which that court dismissed as being inadmissible its action seeking, first, annulment of the decision of the Single Resolution Board (SRB) in its executive session of 15 April 2016 on the 2016 *ex ante* contributions to the Single Resolution Fund (SRF) (SRB/ES/SRF/2016/06) ('the first contested decision') and, second, annulment of the decision of the SRB in its executive session 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') in so far as they concern the appellant (collectively, 'the contested decisions').

2. This case turns on the legal characterisation of the contested decisions and the relationship between those two decisions. The General Court found, in essence, that the second contested decision was partly confirmatory and had no bearing on the substantive issue raised by the appellant by the action brought before that court, namely whether the liabilities associated with the appellant's ancillary promotional activities should be excluded from calculation of its contribution.

3. By its appeal, the appellant contends, inter alia, that the second contested decision replaced the first contested decision and, in the alternative, that the modification of the first contested decision resulting from the second contested decision restarted the time limit for bringing an action not only in respect of the second contested decision but also in respect of the substantive issue raised in the action.

[1] Original language: French.

4. I must also make it clear that the fact that in this Opinion I use the terminology employed by the General Court according to which the case concerns two decisions, rather than two acts which form a whole, in the form determined by the subsequent act, does not in the slightest prejudge my position on the merits of the appellant's appeal. I am using that terminology for the convenience of those reading this Opinion and so that I can refer to the General Court's reasoning as set out in the judgment under appeal.

II. Legal context

A. Regulation (EU) No 806/2014

5. Article 54(1) of Regulation (EU) No 806/2014[2] provides:

'The Board, in its executive session, shall:

(a) prepare all of the decisions to be adopted by the Board in its plenary session;

(b) take all of the decisions to implement this Regulation, unless this Regulation provides otherwise.'

6. Article 67(4) of that regulation provides:

'Contributions referred to in Articles 69, 70 and 71 shall be raised from entities referred to in Article 2 by the national resolution authorities and transferred to the [SRF] in accordance with the Agreement.'

7. Article 70 of Regulation No 806/2014, entitled 'Ex-ante contributions', states, in paragraph 2:

'Each year, the Board shall, after consulting the [European Central Bank (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

[2] Regulation 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).

(b) a risk-adjusted contribution, that shall be based on the criteria laid down in Article 103(7) of Directive 2014/59/EU, [3] 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.'

B. Implementing Regulation (EU) 2015/81

8. Article 4 of Implementing Regulation (EU) 2015/81 [4] provides:

'For each contribution period, the Board shall calculate the annual contribution due from each institution, on the basis of the annual target level of the [SRF], after consulting the ECB or the national competent authorities and in close cooperation with the national resolution authorities. The annual target level shall be established with reference to the target level of the [SRF] referred to in Articles 69(1) and 70 of Regulation [No 806/2014] and in accordance with the methodology set out in Delegated Regulation (EU) 2015/63 [5].'

9. Article 5 of that implementing regulation provides:

'1. The Board shall communicate to the relevant national resolution authorities its decisions on calculation of annual contributions of the institutions authorised in their respective territories.

2. After receiving the communication referred to in paragraph 1, each national resolution authority shall notify each institution authorised in its Member State of the Board's decision on calculation of the annual contribution due from that institution.'

C. Delegated Regulation 2015/63

10. Article 5(1) of Delegated Regulation 2015/63 provides:

'The contributions referred to in Article 103(2) of Directive [2014/59] shall be calculated by excluding the following liabilities:

…

3 Directive 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).

4 Council Regulation of 19 December 2014 specifying uniform conditions of application of Regulation (EU) [No 806/2014] (OJ 2015 L 15, p. 1).

5 Commission Regulation of 21 October 2014 supplementing Directive [2014/59] (OJ 2015 L 11, p. 44).

(b) the liabilities created by an institution, which is member of an IPS [institutional protection scheme] as referred to in point (8) of Article 2(1) of Directive [2014/59] and which has been allowed by the competent authority to apply Article 113(7) of Regulation (EU) No 575/2013[6], through an agreement entered into with another institution which is member of the same IPS;

…'

III. Background to the dispute

11. NRW. Bank is the promotional bank of the Land Nordrhein-Westfalen (*Land* of North Rhine-Westphalia, Germany).

12. In essence the appellant carries on three types of activity: promotional activities, which account for two thirds of its assets, ancillary promotional activities, which represent approximately one third of its assets, and other activities, which account for the rest of its assets.

13. In 2015, before Regulation No 806/2014 came into force, under Directive 2014/59 as implemented by Delegated Regulation 2015/63, the German regulatory authority, the Bundesanstalt für Finanzmarktstabilisierung (Federal Agency for Financial Market Stabilisation, Germany) ('FMSA'), set the appellant's *ex ante* contribution for 2015, taking the view that both its promotional activities and its ancillary promotional activities should be excluded from calculation of that contribution.

14. In 2016, on the form entitled '*Ex ante* contributions to the [SRF] – Declaration form for 2016 contribution period', created by the SRB and which the FMSA sent to the appellant, the appellant declared the total of all its commitments relating to its promotional activities and to its ancillary promotional activities as liabilities to be excluded from calculation of its *ex ante* contributions for 2016 within the meaning of Article 5(1) of Delegated Regulation 2015/63.

15. However, after it had filed that form completed as described, the appellant was informed that according to the SRB ancillary development activity should not be excluded from the calculation. It therefore filed a corrected declaration form in which it declared as to be excluded from the calculation only the total value of its commitments associated with its promotional activities.

16. By the first contested decision, the SRB in its executive session determined the amount of the *ex ante* contribution of each of the entities referred to in Article 2 of Regulation No 806/2014, including the appellant, for 2016, under Article 54(1)(b) and Article 70(2) of that regulation.

17. By assessment notice of 22 April 2016, which the appellant received on 25 April 2016, the FMSA informed the appellant that the SRB had set its 2016 *ex ante* contribution to the SRF and indicated the amount to be paid ('the first assessment notice').

18. By the second contested decision, the SRB increased the appellant's contribution. The General Court has not set out the reason why that decision was adopted and the contribution increased. Nevertheless, it can be seen from paragraphs 70 and 71 of the judgment under appeal that, in the view of the General Court, that reason was distinct from the substantive issue to which the action related, namely whether the liabilities associated with the appellant's ancillary

[6] Regulation 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).

promotional activities should be excluded from calculation of its contribution. In the proceedings before the Court of Justice, the SRB stated that all that the second contested decision did was to rectify an accidental typing error in the calculation formula, relating to an incorrect indicator concerning membership of an institutional protection scheme: instead of the '–' sign established for the 'IPS Membership' risk indicator ('IPS indicator') in Step 4 of Annex 1 to Delegated Regulation 2015/63, a '+' sign had been assigned – and it did not involve any assessment of new facts or any new legal assessment.

19. By assessment notice of 10 June 2016, which the appellant received on 13 June 2016, the FMSA requested the appellant to pay the amount of the increase resulting from the second contested decision ('the second assessment notice').

IV. The proceedings before the General Court and the judgment under appeal

20. The appellant brought its action by document lodged at the Registry of the General Court on 23 August 2016. The SRB filed its defence on 2 November 2016.

21. By decisions of 10 and 11 January 2017, the President of the Eighth Chamber of the General Court granted the applications to intervene of the European Commission and the Council of the European Union.

22. A number of measures of organisation of procedure were adopted during the proceedings before the General Court in order to obtain full copies of the originals of the contested decisions from the SRB.

23. By the judgment under appeal of 26 June 2019, the General Court dismissed the action as inadmissible without ruling on the pleas in law relied upon by the appellant.

24. The General Court held, as a preliminary point, that the form of order sought by the appellant seeking annulment of the 'decision of the [SRB] setting [its] annual contribution to the [SRF] for the contribution year from 1 January to 31 December 2016' meant that the action concerned both the first and the second contested decisions. The Court stated that the appellant had specified that, in its view, this was a matter of an 'overall decision by the SRB' and that the appellant was therefore challenging the 'SRB's decision in the form it was given by the second decision', that is to say, the 'final version of the SRB's definitive decision'.

25. In relation to the first contested decision, the General Court found first of all that the national resolution authorities were the addressees of decisions of the SRB within the meaning of the fourth paragraph of Article 263 TFEU and that the contested decisions had been neither published nor notified to the appellant and were not addressed to it.

26. The General Court then noted that, in the absence of publication or notification, the period for bringing an action starts to run only from the point in time at which the person concerned acquired precise knowledge of the content and grounds of the decision, provided that it requested the full text of the decision within a reasonable period, and, with that proviso, that the period for bringing an action only runs from the time at which the third party concerned 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.

27. Last, the General Court found that the appellant acquired knowledge of the existence of the first contested decision when, on 25 April 2016, it received the first assessment notice, which it submitted to the FMSA in its request to inspect its file on 22 August 2016, that is to say, nearly four months from the date on which it received that first assessment notice. The General Court added that, in view of how the FMSA had implemented the contested decisions, there was nothing to suggest that the second contested decision had replaced the first contested decision. It found inter alia that, even assuming, first, that, from the time it received the letter of 23 May 2016 in which the FMSA informed the Bundesverband Öffentlicher Banken Deutschlands e.V. (Federal Association of German Public Banks, Germany) that it was to issue a new assessment notice, the appellant was entitled to assume that this letter was intended to cancel the first assessment notice and replace it with a new notice and, second, that it was therefore necessary to wait for that second notice to be issued, the appellant should have realised that its assumption was incorrect at the latest by 13 June 2016, the date on which it received the second assessment notice. However, the appellant allowed a further two months to pass before asking to be sent the first contested decision. The General Court also found that the second contested decision did not cancel the first contested decision but merely adjusted the amounts of the contribution set by the first contested decision. Since the appellant had not asked to be sent that decision and had neither relied on nor substantiated any act of God or force majeure allowing a derogation from the time limit for bringing an action, the General Court found that the action brought on 23 August 2016 was out of time in respect of the first contested decision.

28. As regards the second contested decision, the General Court noted first of all that it was common ground that the action had been brought within the time limit under the sixth paragraph of Article 263 TFEU. It then stated that the appellant alleged, in essence, that the SRB had infringed a number of provisions of the applicable legislation in so far as it had not excluded the liabilities associated with its ancillary promotional activities from its *ex ante* contribution to the SRF for 2016. The General Court also noted that the second contested decision contained no new factor on that point, that the SRB had not in any way reconsidered the assessment, already carried out in connection with adopting the first contested decision, of whether or not the liabilities associated with the appellant's ancillary promotional activities should be excluded from calculation of its contribution, and that the appellant had not made any request for reconsideration of that matter based on substantial new facts, either to the SRB or the FMSA. The General Court added that the appellant, who had been informed by the second assessment notice of the reasons for the adjustment made by the second contested decision, had not adduced any plea in law or argument challenging that decision. The General Court concluded from the foregoing that the action against the second contested decision was inadmissible on the grounds that, having regard to the subject matter of the dispute, the second contested decision merely confirmed the first contested decision and that the appellant had not adduced any plea in law or argument challenging the second contested decision.

V. The proceedings before the Court of Justice and the forms of order sought by the parties

29. The appellant claims that the Court of Justice should set aside the judgment under appeal and annul the SRB's decision relating to its annual contribution to the restructuring fund for the contribution period 2016 and order the SRB to pay the costs. In the alternative, in relation to the head of claim that the judgment should be set aside, the appellant claims that the Court should set aside the judgment under appeal and refer the case back to the General Court.

30. The SRB claims that the Court should dismiss the appeal as being inadmissible in part and, in any event, unfounded and should order the appellant to pay the costs. Should the Court find the appeal to be well-founded, the SRB claims that the Court should refer the case back to the General Court for final judgment and should reserve the costs of the appeal.

31. The Council, intervening in support of the SRB, claims that, in the event that the Court sets aside the judgment under appeal, it should find that there is nothing which casts doubt on the lawfulness or validity of Implementing Regulation 2015/81.

32. The Commission, intervening in support of the SRB, claims that the Court should dismiss the appeal and order the appellant to pay the costs.

33. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court decided not to hold a hearing.

VI. Analysis

34. The appellant submits two grounds of appeal. I must point out here that the General Court dismissed the action as being inadmissible without ruling on the substance. Accordingly, neither of those grounds of appeal concerns the substantive issue addressed by the appellant in the pleas in law of its action, that is to say, whether or not, when the contested decisions were made, it was appropriate to exclude the liabilities associated with the appellant's ancillary promotional activities from calculation of its contribution.

35. The Council and the Commission have not submitted observations on the appellant's two grounds of appeal, confining themselves to making observations on its arguments in respect of the invalidity, interpretation and application of the relevant legislation.

36. In its action before the General Court, the appellant alleged that the relevant legislation had been infringed to the extent that ancillary promotional activities had not received preferential treatment and that, as a result, the *ex ante* contribution was set too high. According to the appellant, this resulted from a misinterpretation of Delegated Regulation 2015/63 or – more relevantly as regards the observations of the Council and the Commission – by the fact that Delegated Regulation 2015/63 itself had been adopted unlawfully, since it was at variance with higher ranking instruments.

37. At the stage of the proceedings before the Court of Justice, after summarising the grounds of appeal, the appellant states, in paragraph 101 of its appeal, that in all respects it is referring back to the observations it made before the General Court, in particular those to the effect that its ancillary promotional activities should be given preferential treatment in calculation of the contribution.

38. Had the appellant wished to submit other grounds challenging the judgment under appeal, it would have been unable to do so merely by referring back to its action before the General Court. As the Commission observes, those grounds would have to be dismissed as insufficiently substantiated and, consequently, clearly inadmissible.[7]

[7] See in particular, order of 5 February 1997, *Unifruit Hellas* v *Commission* (C-51/95 P, EU:C:1997:53, paragraph 33).

39. Accordingly, to my mind, the reference made in paragraph 101 of the appeal should be understood to mean that the appellant refers to its observations in case the Court of Justice sets aside the judgment under appeal and itself rules finally on the dispute.

40. I therefore believe that the grounds expressly submitted by the appellant in support of its appeal should be examined without addressing the substantive observations to which it refers in paragraph 101 of that appeal. In the judgment under appeal the General Court ruled only on whether the action was admissible, and not on the pleas in law relied upon by the appellant. In those circumstances, were it to be found that the Court of Justice could make a final ruling on the substance of the case, in the event of the judgment under appeal being set aside, the substance of the case would be examined by only one EU court.

A. The first ground of appeal

41. By its first ground of appeal, alleging infringement of the sixth paragraph of Article 263 TFEU and of Article 60 of the Rules of Procedure, the appellant asserts that the General Court erred in finding the action to be out of time in respect of the first contested decision. That ground has four parts.

1. First part

42. By the first part, the appellant argues, in essence, that the second contested decision replaced the first contested decision and that the appellant therefore complied with the time limit for bringing an action. In that part, the appellant asserts, on the one hand, that the General Court's assessment of the relationship between the contested decisions is inconsistent and contradictory and, on the other, that the second contested decision is a new decision and therefore not confirmatory.

(a) The allegedly inconsistent and contradictory assessment by the General Court

43. According to the appellant, the General Court's assessment of the relationship between the contested decisions is inconsistent and contradictory. First, the General Court stated, in paragraph 65 of the judgment under appeal, that the second contested decision had merely 'adjusted' the contribution amounts set in the first contested decision. Second, the General Court found, in paragraph 75 of that judgment, that, in respect of the subject matter of the dispute, the second contested decision was purely 'confirmatory' of the earlier decision. However, in respect of the two assessment notices, whose contents, the appellant submits, reflects that of the contested decisions, the General Court found in paragraph 63 of the judgment under appeal that the second notice was a 'modification' of the first.

44. The General Court's assessment of the relationship between the contested decisions, contained in paragraphs 65 and 75 of the judgment under appeal, should be found to be, in itself, neither inconsistent nor contradictory.

45. First, in paragraph 71 of the judgment under appeal, whilst not denying that in order to determine the adjustment to the appellant's contribution, as approved by the second contested decision, that contribution had to be recalculated, the General Court concluded from the case-law on confirmatory acts that no action could be brought against the second contested

decision in respect of the assessment 'already carried out by the SRB when it adopted the first contested decision as regards whether or not the appellant's liabilities associated with its ancillary promotional activities should be excluded from calculation of its contribution, which was the only issue in this action'. That assessment, according to paragraph 75 of the judgment under appeal, was 'the subject matter of the dispute'.

46. Second, the General Court appears to have found, in paragraph 74 of the judgment under appeal, that an action could be brought against the second contested decision in respect of the adjustment it made. However, the appellant did not submit a plea in law based on that adjustment, which therefore did not form part of the subject matter of the dispute.

47. It emerges from the passages cited that, according to the General Court's reasoning, the second contested decision is partly confirmatory in relation to the subject matter of the dispute, which concerns whether the appellant's liabilities associated with its ancillary promotional activities should have been excluded from calculation of its contribution. Whether or not the appellant's action is admissible should therefore be examined in the light of the subject matter of the dispute.

48. Under those circumstances, although without prejudging the merits of the underlying reasoning of the judgment under appeal, it is appropriate to reject the appellant's argument and proceed to examine the other arguments in the first part of the first ground of appeal.

(b) Substance of the argument that the second contested decision replaced the first contested decision

49. Referring to the General Court's case-law, which is also cited in the judgment under appeal, the appellant asserts that 'a decision is a mere confirmation of an earlier decision if it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier measure was addressed'. In the light of the two criteria that an act must meet in order to be 'confirmatory', the second contested decision, according to the appellant, is therefore not confirmatory of the first contested decision.

50. In that context the appellant asserts, first, that the annual contributions set for it are different in the contested decisions and that the second contested decision therefore cannot be regarded as merely confirmatory. The second contested decision altered and, more precisely, worsened, its legal situation. Furthermore, the appellant submits, the second contested decision was based on new factors, namely the altered assessment of an IPS indicator, and therefore did not merely correct a calculation error.

51. Second, the appellant asserts, at the outset, that the case-law on merely confirmatory acts cited by the General Court does not support the judgment under appeal. It maintains that the General Court misapplied the criteria that an act must satisfy in order to be 'confirmatory'. It should be noted that this thesis in essence reproduces the arguments advanced by the appellant and set out in point 50 of this Opinion.

52. The appellant then states that the case-law cited by the General Court concerns situations in which the action related to a confirmatory letter from the administration, sent in response to an individual request in respect of the statement of reasons of a decision that had been made. In the present case, however, the contested decision is not a 'confirmatory letter' from the SRB but the

SRB's final calculation, which appears only in the second contested decision. In the appellant's view, the SRB in fact recalculated the contribution at its own initiative, on the basis of an amended analysis of at least one partial indicator in the calculation procedure.

53. I struggle to understand the appellant's reasoning in its additional arguments on the case-law cited by the General Court. The appellant appears to consider on the one hand that this case-law is irrelevant and on the other that a more thorough examination of that case-law confirms the appellant's position on the legal characterisation of the second contested decision. I assume that those additional arguments should be understood in the sense that, according to the appellant, the second contested decision cannot be regarded as a confirmatory act because it was not adopted in response to a request for reconsideration.

54. Third, the appellant asserts that, if the second contested decision had been merely confirmatory, it would have been pointless to indicate the remedies available, in the second assessment notice, and that the fact that the FMSA did indicate those remedies confirms therefore that the second contested decision is a new decision.

55. Fourth, the appellant asserts that the reference in the titles of the second contested decision and the second assessment notice to the fact that they are amending ('supplementing') acts is irrelevant and that only the substance of those acts is significant.

56. The SRB maintains that the appellant's argument to the effect that the second contested decision is not a confirmatory act is inadmissible since it is in essence challenging the General Court's assessment of the facts.

57. Nevertheless, whether a contested decision is merely confirmatory of an earlier decision can, as a question of law, be reviewed by the Court of Justice in an appeal.[8] With all the more reason, the same must be true as regards whether, as the appellant alleges in its appeal, a decision has replaced an earlier decision. It is therefore appropriate to examine the arguments advanced by the appellant in support of the first part of the first ground of appeal.

(1) Relevance of the title of a subsequent act

58. It is necessary, first of all, to examine the appellant's argument to the effect that the legal characterisation of a 'confirmatory' act cannot depend on its title but must be based on its substance. The appellant seems here to be criticising the General Court for relying, incorrectly, on the title of the second ('supplementing') contested decision and of the second assessment notice in order to characterise that decision, instead of on their substance.

59. That thesis is based on a selective and, therefore, erroneous, construction of the judgment under appeal.

60. Admittedly, it is apparent from well-established case-law on the admissibility of actions for annulment that it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts.[9]

[8] See order of 29 June 2009, *Nuova Agricast* v *Commission* (C-225/08 P, not published, EU:C:2009:406, paragraph 37).

[9] See judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40, paragraph 52).

61. It should also be noted that the wording of paragraph 65 of the judgment under appeal may suggest that, in reaching the conclusion that the second contested decision had merely adjusted the amounts of the contribution set in the first contested decision, the General Court relied, in particular, on the title of the second contested decision.

62. Nevertheless, it can be seen from the decision under appeal, in particular paragraph 71, that the General Court also analysed the substance of the second contested decision and found, as regards whether the appellant's liabilities associated with its ancillary promotional activities should be excluded from calculation of its contribution, that the second contested decision contained no new factor. I infer from the foregoing that the General Court likewise relied on that finding when it concluded that the second contested decision did not replace the first contested decision but modified it in respect of the IPS indicator.

63. The appellant's argument that the General Court relied on the title of the second contested decision in ruling on its legal characterisation should therefore be rejected.

(2) Relevance of the indication of the remedies available

64. The appellant's argument based on the fact that the FMSA's second assessment notice indicates the remedies available should also be rejected.

65. Whilst I do not wish to express a view, at this stage, on any excusable error by the appellant as regards that indication,[10] it should be noted, first, that an indication of available remedies in an act issued by one body cannot affect the characterisation of an act issued previously by a different body.[11]

66. Second, the General Court found the second contested decision to be confirmatory not in respect of that decision in its entirety but in respect of the subject matter of the dispute. From that perspective, the fact that the available remedies were indicated in the FMSA's second assessment notice was therefore not irrelevant. Further, according to the case-law, even a merely confirmatory act can be challenged in legal proceedings where the act confirmed has not become final in relation to an applicant.[12] The second assessment notice was communicated to the appellant on 13 June 2016, less than two months after communication of the first notice on 25 April 2016. It is therefore arguable that, also in relation to the purportedly confirmatory factors in the second contested decision, it was meaningful to inform the appellant of the remedies available in the second assessment notice.

67. That argument must therefore be rejected. It is then necessary to examine, first, the appellant's arguments relating to the relevant case-law on confirmatory acts and, second, how that case-law has been applied, in order to assess the legal characterisation of the second contested decision as 'partly confirmatory' in the light of the relevant case-law.

[10] The argument relating to an excusable error by the appellant underpins the fourth part of the first ground of appeal. See point 122 of this Opinion.

[11] See, by analogy, order of 21 November 1990, *Infortec* v *Commission* (C-12/90, EU:C:1990:415, paragraph 10), in which the Court held that a letter from the department responsible for the affairs of the European Social Fund could have no effect on a decision adopted earlier by the Commission.

[12] Indeed, where the confirmed decision has not become final in relation to the person concerned, the person concerned is entitled to challenge either the confirmed decision, or the confirmatory decision, or both. See judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409, paragraph 35).

(3) Acts adopted on their authors' own initiative as confirmatory acts

68. It should be noted that the case-law relevant in this case, that is to say, the case-law on confirmatory acts, derives from decisions made in cases concerning the admissibility of actions brought against confirmatory acts adopted, in most cases, as a result of a request to reconsider an earlier act. [13]

69. It is therefore unsurprising that *CMB and Christof* v *Commission*, [14] which the General Court cites in paragraphs 67 to 69 of the judgment under appeal, concerns such a situation. It is also why that case-law often contains the observation [15] that 'the confirmatory or other nature of a measure cannot be determined solely by comparing its content with that of the previous decision which it confirms but must also be appraised in the light of the *nature of the request to which it constitutes a reply*'. [16]

70. In addition to listing the criteria that an act must satisfy in order to be 'confirmatory', [17] that case-law also sets out the premisses [18] that, first, only the existence of substantial new facts can justify the submission of a request for reconsideration of an earlier decision that has become final and, second, a fact that does not substantially alter the appellant's situation at the time of adoption of the earlier decision that has become final does not constitute a substantial new fact.

71. Having regard to the passages cited from that case-law, it might be thought that the case-law on confirmatory acts aims to prevent the situation where a reconsideration is requested that, in practice, potentially gives rise to a new time limit for bringing an action in relation to a confirmed decision that has become final. That case-law would only apply, therefore, to situations in which the person concerned prompted the adoption of the subsequent act, with the effect that any subsequent act adopted by its author at its own initiative would be a new act that replaces the earlier act. With a new act of that nature, its author would have to bear the risk of triggering a new time limit for bringing an action. If that reasoning was correct, the second contested decision would have to be found to have replaced the first contested decision.

72. However, first, the case-law on merely confirmatory acts is based, on the one hand, on the premiss that the time limits for bringing an action and *res judicata* [19] are both intended to provide legal certainty by ensuring that EU measures which produce legal effects (especially final measures) are not called in question indefinitely, and on the other, on the requirements of the sound administration of justice and procedural economy. [20] An act that merely confirms an earlier act cannot afford the persons concerned an opportunity to reopen discussion on the lawfulness of the confirmed act. The definitive nature therefore concerns not only the measure itself, but also any later measure which is merely confirmatory. [21]

13 See, inter alia, order of 7 December 2004, *Internationaler Hilfsfonds* v *Commission* (C-521/03 P, not published, EU:C:2004:778, paragraph 47 and the case-law cited).

14 Judgment of 15 September 2011 (T-407/07, not published, EU:T:2011:477).

15 Reproduced in paragraph 68 of the judgment under appeal.

16 Emphasis added.

17 That is to say, that there is no new factor and no reconsideration of the situation of the person to whom the act is addressed. See point 49 of this Opinion.

18 Reproduced in paragraph 69 of the judgment under appeal.

19 See, inter alia, order of 29 June 2009, *Cofra* v *Commission* (C-295/08 P, not published, EU:C:2009:407, point 54).

20 See to that effect, judgment of 15 November 2018, *Estonia* v *Commission* (C-334/17 P, not published, EU:C:2018:914, paragraph 51).

21 See judgment of 18 October 2007, *Commission* v *Parliament and Council* (C-299/05, EU:C:2007:608, paragraphs 28 to 30).

73. The interest in upholding the principles of legal certainty, the sound administration of justice and procedural economy which underpins that case-law is not contingent on the fact that the person concerned prompted the adoption of a confirmatory act. The time limits for bringing an action are a matter of public policy. They have been established not for the benefit of the authors of challengeable acts (or at their risk) but in order to ensure the clarity and certainty of legal situations.

74. Second, the judgments of both the Court of Justice and the General Court confirm that the case-law on the inadmissibility of actions against confirmatory acts does apply to situations in which the person concerned did not prompt adoption of the subsequent act.

75. The Court of Justice, in its judgment in *Portugal* v *Commission*,[22] applied that case-law to a situation in which the act subsequent to an initial act of individual scope had been adopted at its author's own initiative. In that case, the subsequent act had not been subject to any amendment to either its content or presentation compared with the previous act notified to the applicant. According to the Court, it was therefore manifestly the case that the subsequent act merely confirmed the earlier decision.

76. The General Court, for its part, has held in several judgments that '*a measure is regarded as adopted after a re-examination of the circumstances, which prevents it from being confirmatory in nature*, where that measure was adopted either at the request of the person concerned, *or at the initiative of its author, on the basis of substantial factors which were not taken into account at the time of adoption of the preceding measure*'.[23]

77. The General Court's approach seems to correspond to that set out by Advocate General Mengozzi in his Opinion in *Internationaler Hilfsfonds* v *Commission*.[24] In his view, first, it follows from most of the case-law of the Court of Justice that the merely confirmatory nature of an act derives exclusively from the absence of any new factor or, more precisely, any substantial new fact as compared with the previous act which it confirms and, second, it is only the emergence of a (substantial) new factor or fact that justifies the reconsideration by the administration of a previous decision which has become definitive.[25]

78. Third, an act which contains no substantial new factor cannot qualify as 'confirmatory' where under the relevant regulatory framework the person concerned is entitled, with no additional requirement, to submit a new application or request for reconsideration.[26] Similarly, an act cannot be classed as 'confirmatory' where the relevant regulatory framework requires the author of the initial act, at its own initiative, to carry out a review at regular intervals.[27] In both those situations, the author of the initial act has an obligation to review that act and cannot claim that the outcome of that review is not a new act against which an action can be brought in respect of both the act as a whole and any element of it.

22 Judgment of 17 May 2017, *Portugal* v *Commission* (C-337/16 P, EU:C:2017:381, paragraphs 6, 48 and 51).

23 See judgments of 13 November 2014, *Spain* v *Commission* (T-481/11, EU:T:2014:945, paragraph 36); of 24 March 2017, *Estonia* v *Commission* (T-117/15, EU:T:2017:217, paragraph 60); and order of 28 June 2018, *TL* v *EDPS* (T-452/17, not published, EU:T:2018:418, paragraph 28).

24 C-362/08 P, EU:C:2009:553.

25 See Opinion of Advocate General Mengozzi in *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2009:553, points 150, 154 and 155). See to that effect, recently, judgment of 21 January 2021, *Germany* v *Esso Raffinage* (C-471/18 P, EU:C:2021:48, paragraph 98 and the case-law cited).

26 See judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40, paragraphs 57 and 59).

27 See by analogy, judgment of 18 January 2007, *PKK and KNK* v *Council* (C-229/05 P, EU:C:2007:32, paragraph 103). See also, Opinion of Advocate General Kokott in *PKK and KNK* v *Council* (C-229/05 P, EU:C:2006:606, point 91).

79. Likewise, the withdrawal of an unlawful measure is permissible, provided the withdrawal occurs within a reasonable time and regard is had to how far the person concerned might have been led to rely on the lawfulness of the measure.[28] If a measure is adopted following such a withdrawal, an action can be brought against that measure and is not limited to the elements which distinguish the subsequent measure from the withdrawn measure.

80. In contrast, and with the proviso of those three situations,[29] if there is no substantial new factor compared with an earlier act, the subsequent act is a confirmatory act. It is irrelevant that the subsequent act may have been adopted at its author's own initiative.

81. In view of the foregoing, the Court should reject the argument that the appellant seems to be making to the effect that the second contested decision cannot be classified as a 'confirmatory' act because it was not adopted in response to a request for reconsideration. It is in fact the presence of a substantial new factor that makes it possible to rule out the possibility that an act is confirmatory. It is in the light of that reasoning, drawn from the relevant case-law on confirmatory acts, that it is necessary to assess the merits of the appellant's line of argument relating to the legal characterisation of the second contested decision and its relationship with the first contested decision.

(4) Legal characterisation of the second contested decision and the relationship between the two contested decisions

82. In reply to a question from the Court, the SRB stated that the correction made in the second contested decision related to the removal of an involuntary error in relation to the initial calculation. This was purely 'a typographical error in programming the calculation tool'. Furthermore, the correction of that error, according to the SRB, had no effect on whether the appellant's liabilities associated with its ancillary promotional activities should have been excluded from calculation of its contribution.

83. That approach concurs with that of the General Court in the judgment under appeal, according to which the second contested decision, on the one hand, 'adjusted' the contribution amounts set by the first contested decision and, on the other, is partly confirmatory in respect of the subject matter of the dispute, which concerns the ancillary promotional activities.

84. In contrast, the appellant submits that the second contested decision is based on new factors, namely an altered assessment of an IPS indicator, and did not merely correct a calculation error.[30]

85. Irrespective of whether the 'error' in the original act was involuntary and of how serious it was, an act by which the administration seeks to rectify that error cannot escape a review intended to establish whether the subsequent act is purely confirmatory of the initial act. The rectification of an initial act in fact amounts to adopting an act that potentially contains a substantial new factor.

[28] See judgment of 18 October 2012, *Jager & Polacek* v *OHIM* (C-402/11 P, EU:C:2012:649, paragraph 59). See also my Opinion in *Evonik Degussa* v *Commission* (C-162/15 P, EU:C:2016:587, point 183).

[29] The present case does not correspond to any of those situations. First, the second contested decision was made at the SRB's own initiative. Second, there is nothing to suggest that the SRB was obliged to adopt an act subsequent to the first contested decision in order to calculate the 2016 contributions. As can be seen from the second contested decision itself, under Article 70(2) of Regulation No 806/2014 the SRB calculates the individual contributions 'each year'. The first contested decision, which covered the period of the year 2016, was sufficient in itself to establish the amount of the appellant's ex ante contributions for that year. Third and last, there is nothing to indicate that the SRB withdrew the first contested decision because it was unlawful and that, therefore, it was replaced by the second contested decision.

[30] See point 50 of this Opinion.

As Advocate General Kokott [31] observed in relation to the correction of a translation error, it is clearly possible that, under the guise of correcting an error, the content of a prior legal act having the character of a decision may be changed to something entirely different from its content as originally issued.

86. In that context, a factor must be classified as 'new' both where that factor did not exist at the time of adoption of the earlier measure and where that factor already existed when the earlier measure was adopted but, for whatever reason, including a failure by the author of that measure to act diligently, was not taken into consideration at the time of its adoption. [32] To be substantial in nature, a factor must be capable of substantially altering the applicant's situation at the time the earlier measure that has now become final was adopted. [33]

87. It is clear, on the one hand, that the second contested decision does contain a new factor compared with the first contested decision in that the IPS indicator figure used in the second contested decision is different from that used in the first contested decision.

88. At the same time, as regards whether the new factor thus defined is substantial, the Court of Justice has held, in its order in *Pracsis and Conceptexpo Project* v *Commission and EACEA*, [34] that if correction of the calculation error affecting the score given to one of the tenderers in a tendering procedure leads to that score being increased, without changing the ranking of that tender's bid, the tender's situation cannot be found to have been substantially altered. The Court accordingly found that the decision making that correction was purely confirmatory.

89. I would note, however, that in that case correction of the error by the subsequent measure did not alter the result determined by the initial measure and indicated in the operative part of that measure. In the present case, in contrast, the SRB decisions setting the *ex ante* contributions contain a calculation which not only has the effect of triggering an obligation to pay the contribution but affects the amount of that contribution. Since that amount was changed as a result of adoption of the second contested decision, that decision must therefore be found to involve a substantial new factor.

90. It emerges from reading the judgment under appeal that this view is not entirely foreign to the reasoning which underpins that judgment. Indeed, the General Court first stated, in paragraph 71 of the judgment under appeal, that in order to determine the adjustment, as approved by the second contested decision, to the appellant's contribution, it had been necessary to recalculate that contribution. However, the General Court went on to find the second contested decision to be partly confirmatory and that the recalculation therefore did not give rise to a new time limit for bringing an action to challenge a different element in the calculation already established in the first contested decision.

91. Under those circumstances, it remains to be determined whether a subsequent act may be partly confirmatory and, if it may, what consequences that has on the time limit for bringing an action in relation to the original act.

[31] Opinion of Advocate General Kokott in Joined Cases *Italy* v *Commission* (C-138/03, C-324/03 and C-431/03, EU:C:2005:387, point 66).

[32] See, recently, order of 28 June 2018, *TL* v *EDPS* (T-452/17, not published, EU:T:2018:418, paragraph 29 and the case-law cited).

[33] See judgment of 15 November 2018, *Estonia* v *Commission* (C-334/17 P, not published, EU:C:2018:914, paragraph 47).

[34] See order of 11 April 2019 (C-794/18 P, not published, EU:C:2019:305, paragraph 8 of the Advocate General's position which was followed by the Court).

(5) Partly confirmatory subsequent acts

92. In *Paroc* v *OHIM (INSULATE FOR LIFE)*,[35] the General Court held, first of all, that determining whether and *to what extent* the second decision amounted to a mere confirmation of the first decision required the identification of the respective circumstances of the disputes which gave rise to those decisions. After stating that the subsequent decision was confirmatory of one of its components, which was of itself sufficient to produce the result established by the initial decision, the General Court found that it was not necessary to examine *whether the confirmatory nature of that decision also extended to every element of the first decision*.

93. I infer therefrom that the General Court did not in that judgment rule out the possibility of a subsequent act being partly confirmatory, although it did not lay down any specific criterion for establishing the extent to which an act is confirmatory. It is necessary to look at whether the Court of Justice has taken the same approach and, if it has, whether such criteria can be identified from its case-law.

(i) Brembati *v* Commission

94. In *Brembati* v *Commission*,[36] the Commission claimed, in support of its argument that the action brought against the subsequent measure was inadmissible, that the measure in question was partly confirmatory and, in so far as it made no changes in the objective legal position defined by the measure confirmed, could not be regarded as being any different from it.

95. Having regard to that claim, it should be noted that this case concerned two joined cases relating to actions brought against two decisions: an implied decision of rejection resulting from the Commission's failure to give any reply to a request through official channels in so far as concerned, first, the classification of the applicant (who was seeking to be assigned grade A4, step 5 instead of grade A4, step 4, to which he had been promoted) and, second, his seniority in grade and step, and a subsequent decision, likewise relating to the applicant's classification and seniority. According to the Commission, the second decision had changed only the date on which the applicant's promotion to grade A4, step 4 took effect and the action against that decision was inadmissible.

96. In its judgment, the Court first found the action against the subsequent decision to be admissible, and stated that the subsequent decision, although it did not satisfy the applicant's claims, did, however, alter his seniority of grade and step in some respects.[37] Then, after examining both actions, the Court annulled both the contested decisions to the extent that they refused to classify the applicant on his promotion to grade A4, step 5, without any seniority in step.

97. In order to elucidate the underlying reasoning of that judgment, I propose to read it in the light of the Opinion delivered by Advocate General Gand.[38]

[35] Judgment of 8 February 2011, *Paroc* v *OHIM (INSULATE FOR LIFE)* (T-157/08, EU:T:2011:33, paragraphs 32 and 40).

[36] Judgment of 9 July 1970, *Brembati* v *Commission* (59/69 and 71/69, not published, EU:C:1970:70, p. 626 for the Commission's arguments and paragraphs 4 and 5).

[37] Judgment of 9 July 1970, *Brembati* v *Commission* (59/69 and 71/69, not published, EU:C:1970:70, paragraph 4).

[38] Opinion of Advocate General Gand in Joined Cases *Brembati* v *Commission* (59/69 and 71/69, not published, EU:C:1970:56).

98. In his Opinion, the Advocate General likewise proposed that the Court should reject the Commission's objection of inadmissibility, taking the view that 'to say that the second decision represents a partial confirmation of the first is to admit thereby that it amends it in part. What is unchanged is the promotion to Grade … and the classification on Step …. The amendment applies to the date on which that promotion took effect and, therefore, to the seniority in the step concerned. It is this seniority which was disputed. It is therefore the first application which has become pointless. On the other hand, the second decision which replaces the first on the point originally contested may perfectly well form the subject matter of an application'. [39]

99. Although the first decision refused to grant the applicant the classification he was seeking and the second decision 'alter[ed] his seniority of grade and step in some respects' without affecting the refusal relating to the classification, the Court did not find the subsequent act to be partly confirmatory. On the contrary, the Court annulled both the decisions on the grounds that they had refused the classification being sought by the applicant.

100. I infer from the foregoing that, in the Court's view, the classification resulting from the applicant's promotion, the date on which that promotion took effect and the seniority of grade and step were interdependent factors which, in combination, determined the applicant's legal situation, with the effect that the modification of one of those factors by a subsequent act did not mean that the other factors could be considered to be confirmed.

101. Applying that reasoning to the contested decisions in the present case would mean declining to characterise the second contested decision as a 'partly confirmatory' act.

102. Indeed, neither the IPS indicator nor the amount of an institution's liabilities can be taken in isolation. The overall amount of the *ex ante* contribution can only be determined if all those factors are taken into account. That is all the more so given that, in relation to the contested decisions and as the appellant asserts, the SRB has not disclosed the stages of the calculation and has not indicated where it obtained the figures set for the appellant. The SRB submits that the *ex ante* contributions are determined, inter alia, on the basis of data that the institutions themselves provide to the national resolution authorities using a declaration form created and provided by the SRB. However, as emerges from this case, the IPS indicator is not an item of data provided directly by the appellant.

(ii) Commission *v* Parliament and Council

103. The conclusion that it is necessary to decline to characterise the second contested decision as partly confirmatory is also corroborated by the case-law on confirmatory acts to the extent that it has been developed in the context of legislative measures.

104. Nevertheless, it is necessary, first of all, to determine whether that case-law is applicable, either directly or by analogy, to individual acts. The parties have in fact aired that point in relation to the second part of the first ground of appeal, on which the appellant relies in the alternative. [40]

[39] Opinion of Advocate General Gand in Joined Cases *Brembati* v *Commission* (59/69 and 71/69, not published, EU:C:1970:56, point 2).

[40] See also point 119 of this Opinion.

105. The appellant seeks to rely on that case-law, in particular the judgment in *Commission* v *Parliament and Council*,[41] according to which 'where a provision in a regulation is amended, a fresh right of action arises, not only against that provision alone, but also against all the provisions which, even if not amended, form a whole with it.' The SRB, for its part, considers that case-law not to be applicable in the present case. It infers from the expression 'by contrast' in paragraph 30 of that judgment that the views expressed by the Court in the context of legislative measures are not transposable to individual measures.

106. However, it should be noted, first of all, that, in contrast to the SRB's submission, the expression 'by contrast' was used not to distinguish between individual measures and legislative measures but to distinguish the principle applicable when the measures concerned are confirmatory measures (paragraph 29 of that judgment) from the principle that applies where they are not (paragraph 30 of that judgment).

107. Second, in the same judgment the Court indicated that the approach according to which no right of action lies against a merely confirmatory measure applies both to individual measures and to those which have a legislative character, such as a regulation.[42] It seems therefore that the Court itself equated individual measures with legislative measures.

108. Third, I believe that, since the decisions at issue in this case were taken at their author's own initiative, the case-law developed in the context of legislative measures is even more relevant. Legislative measures, in principle, are also taken at their authors' own initiative. I note that, in support of its argument that the case-law on confirmatory acts does apply to acts taken at their authors' own initiative,[43] the SRB itself relies on a judgment delivered in the context of legislative measures, that is to say, the judgment in *United Kingdom* v *Commission*.[44]

109. The guidance contained in the case-law developed in the context of legislative measures can therefore inform evaluation of the appellant's argument that the second contested decision is not partly confirmatory.

110. Since alteration of one of the elements involved in calculating the *ex ante* contribution alters the overall amount of that contribution and since the overall amount of that contribution can only be determined if all the elements for calculating the *ex ante* contribution are taken into account, it must be found that all the elements in that calculation, and the resulting overall amount, constitute a 'whole' within the meaning of the case-law examined in points 104 to 108 of this Opinion. The alteration of one of the elements involved in calculating the *ex ante* contribution, such as the IPS indicator, therefore gives rise to a fresh time limit for bringing an action not only to challenge that element but also to challenge all the elements, even those which are unchanged, that form a whole together with it, including the matter of the appellant's liabilities.

(6) Assessment of the present case

111. In the light of the foregoing, my view is that the first part of the first ground of appeal, alleging error in the legal characterisation of the second contested decision and its relationship with the first contested decision, is well-founded. The second contested decision is not

41 Judgment of 18 October 2007 (C-299/05, EU:C:2007:608, paragraph 30).

42 See judgment of 18 October 2007, *Commission* v *Parliament and Council* (C-299/05, EU:C:2007:608, paragraphs 15 and 29).

43 See points 68 to 77 of this Opinion.

44 Judgment of 29 November 2012 (C-416/11 P, not published, EU:C:2012:761, paragraph 33).

confirmatory in respect of whether the appellant's liabilities associated with its ancillary promotional activities should have been excluded from calculation of its contribution. The appellant was therefore entitled, in its action, to challenge both that point and the overall amount of the *ex ante* contribution.

112. First, that conclusion emerges from application of the criteria, as laid down by the Court in its case-law, that an act must satisfy in order to be 'confirmatory'. It is only if all the elements involved in calculating the *ex ante* contribution are taken into account that the overall amount of that contribution can be determined, with the effect that modifying one of those elements in a subsequent decision does not mean that the other elements are confirmed. [45]

113. Thereafter, that conclusion and the guidance contained in the case-law developed in the context of legislative measures can inform evaluation of the appellant's argument that the second contested decision is not partly confirmatory. Any element of that calculation, together with the resulting overall amount, forms a 'whole' within the meaning of the case-law referred to. [46]

114. Next, it needs to be noted that, from the perspective of the need to uphold the principles of the sound administration of justice and procedural economy, which underpin the case-law on confirmatory acts, [47] it may be appropriate to find a particular act to be partly confirmatory. However, the principle of legal certainty is also fundamental to that case-law. Neither that principle nor the right to effective judicial protection may be jeopardised in the process of ensuring the effectiveness of Article 263 TFEU and the time limit it lays down and of other interests from which that case-law derives. The underlying reasoning of the analysis I am setting out in this Opinion, inspired by the judgments in *Brembati* v *Commission* [48] and *Commission* v *Parliament and Council* [49] respectively, is intended to uphold that principle and that right.

115. Last, I note for the sake of completeness that the foregoing reasoning cannot be called into question by relying on, against the appellant, the subject matter of the dispute as defined in the judgment under appeal.

116. According to the General Court the subject matter of the dispute concerns whether the appellant's liabilities associated with its ancillary promotional activities should have been excluded from calculation of its contribution. The General Court appears to have found the subject matter of the dispute defined in that way to be unconnected with the second contested decisions and to have dissociated it from the overall amount of the *ex ante* contribution for 2016.

117. Admittedly, in the action it brought before the General Court, the appellant alleged in essence that the SRB had misconstrued the relevant legal framework since the ancillary promotional activities had not received preferential treatment. [50]

[45] See point 102 of this Opinion.

[46] See points 109 and 110 of this Opinion.

[47] See point 72 of this Opinion.

[48] Judgment of 9 July 1970, *Brembati* v *Commission* (59/69 and 71/69, not published, EU:C:1970:70).

[49] Judgment of 18 October 2007, *Commission* v *Parliament and Council* (C-299/05, EU:C:2007:608).

[50] Moreover, I note that under the second ground of appeal the appellant asserts that it also raised pleas in law in respect of the second contested decision. However, first, the examples on which the appellant relies in asserting that it raised those pleas relate to its written submissions subsequent to the action brought before the General Court. Second, the appellant does not in any event seem to be claiming that those pleas are unconnected with the subject matter of the dispute, as defined by it in its action.

118. However, in the action brought before the General Court, as can be seen from paragraph 31 of the judgment under appeal, the appellant sought annulment of 'the decision of the [SRB] setting [its] annual contribution', specifying that this was a matter of an 'overall decision by the SRB' and that it was challenging that decision 'in the form it was given by the second contested decision', that is to say, the 'final version of the SRB's definitive decision'. It challenged not only the amount established in the first contested decision or the difference between the amounts in the contested decisions but the overall amount of the contribution as contained in the second contested decision.

2. Second to fourth parts

119. The appellant relies on the second part of the first ground of appeal in the alternative, in case the Court were to refute (or not endorse) the reasoning relied on in support of the first part, according to which the second contested decision replaced the first contested decision. The appellant adduces in that respect the case-law developed in relation to legislative measures.

120. However, in view of my analysis of the first part of the first ground of appeal, it is not necessary to examine the second part. In any event, in that analysis I have already expressed a view on the relevance of the case-law relied on by the appellant. [51]

121. By the third part, relied upon in the alternative, the appellant asserts that, even assuming that the second contested decision merely modifies the first contested decision and did not give rise to a new time limit for bringing an action in relation to the first contested decision, the General Court erred in finding the action against that decision to be out of time. The appellant contends that the time limit for bringing an action never began to run because it never acquired precise knowledge of the contents of the contested decisions and the reasons on which they were based.

122. By the fourth part, likewise relied on in the alternative, the appellant asserts that, in the light of the principles of the protection of legitimate expectations and excusable error, the time limit for bringing proceedings must be found to have been complied with.

123. Nevertheless, as is clear from my analysis of the first part of the first ground of appeal that the General Court erred in finding that the second contested decision was partly confirmatory, it is not necessary to examine the third and fourth parts of the first ground for appeal in which the appellant claims that, even if the Court of Justice were to find the General Court's characterisation in the judgment under appeal of the second contested decision and its relationship with the first contested decision to be correct, its action was not brought out of time in respect of the first contested decision.

B. The second ground of appeal

124. By its second ground of appeal the appellant asserts that the General Court erred in law and infringed its right to be heard enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union by finding that the appellant had not submitted any plea in law or argument challenging the second contested decision.

[51] See points 104 to 109 of this Opinion.

125. Since I am proposing that the first part of the first ground of appeal should be upheld and since it is sufficient that the first part be upheld in order to set aside the judgment under appeal in its entirety, it is not necessary to examine the merits of the second ground of appeal.

VII. Conclusion

126. In the light of the foregoing, I believe that the first part of the first ground of appeal relied upon by the appellant in support of the first head of claim in the appeal is well-founded and must be upheld. I therefore propose that the Court should set aside the judgment of the General Court of the European Union of 26 June 2019, *NRW. Bank* v *SRB* (T-466/16, not published, EU:T:2019:445) and refer the case back to the General Court for judgment on the substance, and that costs should be reserved.