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Court of Justice of the European Union

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Judgment in Case C-584/20 P and C-621/20 P
Commission v Landesbank Baden-Württemberg and Single Resolution Board

Annulment of the decision of the Single Resolution Board on the calculation of ex ante contributions to the Single Resolution Fund for 2017 as far as it concerns Landesbank Baden-Württemberg on the ground that the statement of reasons was inadequate

While coming, in that regard, to the same conclusion as the General Court, the Court of Justice sets aside the judgment of the General Court because it infringed the principle of audi alteram partem and erred in interpreting the scope of the obligation to state reasons

On 11 April 2017, the Single Resolution Board (SRB) adopted, in connection with the financing of the Single Resolution Fund (SRF), a decision fixing the amount of the ex ante contributions due to the SRF by each credit institution for 2017.¹ Those institutions included Landesbank Baden-Württemberg, a German credit institution.

In an action for annulment brought by Landesbank Baden-Württemberg, the General Court of the European Union annulled the decision at issue in so far as it concerned that institution.² It took the view that that decision did not satisfy the requirement of authentication and, in the interests of the sound administration of justice, found, moreover, that that decision had been taken by the SRB in breach of the obligation to state reasons. In that regard, it held, inter alia, that the decision at issue barely contained any information for calculating the ex ante contribution to the SRF and that the annex thereto did not contain sufficient information to verify the accuracy of that contribution.

Following appeals brought by the Commission (Case C-584/20 P) and by the SRB (Case C-621/20 P), the Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court. Giving final judgment in the matter, it annuls the decision at issue as far as it concerns Landesbank Baden-Württemberg on the ground that the statement of reasons was inadequate, but adopts a different approach from that of the General Court concerning the scope of the requirement to state the reasons for such a decision.

Findings of the Court

In the first place, the Court of Justice concludes that the General Court infringed the principle of audi alteram partem in so far as it did not give the SRB the opportunity effectively to state its position on the plea, raised by the General Court of its own motion, alleging a lack of sufficient evidence of the authentication of the decision at issue.

In that regard, it states that, in order to ensure effective compliance with the principle of audi alteram partem, the parties must first be invited to submit their observations on a plea which an EU court is considering raising of its own motion in circumstances which allow them to respond appropriately and effectively to that plea including, where necessary, by producing any evidence to that court which is necessary for it rule in full cognizance on that plea. It was therefore for the General Court to inform the parties that it was considering whether to base its decision on that plea alleging a lack of sufficient evidence of the authentication of the decision at issue and to invite

¹ Decision of the SRB in its executive session of 11 April 2017 on the calculation of the 2017 ex ante contributions to the Single Resolution Fund (SRB/ES/SRF/2017/05) ('the decision at issue').

² Judgment of 23 September 2020, Landesbank Baden-Württemberg v SRB ([T-411/17](#)).

them, as a result, to submit to it the arguments which they deemed appropriate for it to rule on that plea. In the present case, neither before nor at the hearing did the General Court give the SRB the opportunity to respond appropriately and effectively to that plea, in particular by adducing evidence relating to the authentication of the decision at issue.

Having thus found that the General Court had infringed the principle of *audi alteram partem*, the Court of Justice held that the SRB ensured, to the requisite standard, the authentication of the decision at issue in its entirety, both as regards its body and annex, in particular by using the computer software 'ARES'.

In the second place, the Court of Justice rules on the SRB's obligation to state reasons for the adoption of a decision such as the decision at issue.

First of all, it observes that the General Court did not correctly interpret the scope of that obligation in so far as it found that the SRB was required to include in the statement of reasons for the decision at issue information enabling Landesbank Baden-Württemberg to verify the accuracy of the calculation of its 2017 *ex ante* contribution to the SRF, irrespective of whether the confidentiality of some of those figures could affect that obligation.

First, the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator need not necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money. Second, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, as a general principle of EU law, not to disclose to the competitors of a private operator confidential information which that operator has provided.

In view of the logic of the system for financing the SRF and of the method for calculating *ex ante* contributions to the SRF, based, *inter alia*, on the use of confidential data relating to the financial situation of the institutions concerned by that calculation, the obligation to state reasons for the decision at issue must be balanced against the SRB's obligation to respect the business secrets of those institutions. However, the obligation to respect professional secrecy cannot be given so wide an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essence. For that purpose, giving reasons for a decision requiring a private operator to pay a sum of money without providing it with all the information needed to verify the exact calculation of the amount of that sum of money does not necessarily undermine, in every case, the substance of the obligation to state reasons.

Thus, the Court concludes that, in the present case, the obligation to state reasons is fulfilled where the persons concerned by a decision fixing *ex ante* contributions to the SRF, while not being sent professionally confidential data, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their *ex ante* contribution to the SRF, relative to the situation of all the other financial institutions concerned.

Next, the Court of Justice does not uphold the General Court's finding that the infringement of the SRB's obligation to state reasons stemmed, for the part of the calculation of the *ex ante* contributions to the SRF relating to the adjustment according to the risk profile of the establishments concerned, from the illegality of certain provisions of Delegated Regulation 2015/63.³

After setting out the mechanism for adjusting the *ex-ante* contributions to the SRF according to the risk profile, ensured in essence by allocating the establishments concerned on the basis of certain values to 'bins', which ultimately makes it possible to determine the adjustment multiplier according

³ Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44). In the judgment under appeal, the General Court made a declaration of illegality in respect of Articles 4 to 7 and 9 of and Annex I to that regulation, concerning the method for calculating *ex ante* contributions to the SRF.

to the risk profile, the Court states that the SRB may, without infringing its obligation to respect business secrets, disclose the limit values of each 'bin' and the related indicators. Such disclosure is intended to enable the financial institution concerned to satisfy itself, inter alia, that the profile attributed to it during the discretisation of the indicators in fact corresponds to its economic situation, that that discretisation was calculated consistently with the methodology set out in Delegated Regulation 2015/63 on the basis of plausible data and that all the risk factors were taken into account.

Furthermore, the other stages of the methodology for calculating ex ante contributions to the SRF are based on aggregate data from the institutions concerned, which may be disclosed in collective form without infringing the SRB's obligation to respect business confidentiality.

The Court therefore concludes that Delegated Regulation 2015/63 does not prevent the SRB from disclosing, in collective and anonymised form, sufficient information to enable an institution to understand how its individual situation was taken into account in the calculation of its ex ante contribution to the SRF relative to the situation of all the other institutions concerned. It is true that a statement of reasons based on the disclosure of relevant information, in collective and anonymised form, does not enable every institution to detect systematically any error made by the SRB in the collection and aggregation of the relevant data. However, it is sufficient to enable that institution to satisfy itself that the information which it provided to the competent authorities was indeed included in the calculation of its ex ante contribution to the SRF, in accordance with the relevant rules of EU law, to identify, on the basis of its general knowledge of the financial sector, any use of implausible or manifestly incorrect information, and to determine whether it is worthwhile to bring an action for the annulment of a decision of the SRB fixing its ex ante contribution to the SRF. The Court states, however, that that approach concerning the statement of reasons for a decision such as the decision at issue does not affect the power of the EU Courts, for the purpose of carrying out an effective judicial review in accordance with the requirements of Article 47 of the Charter of Fundamental Rights of the European Union, to request that the SRB produce data capable of justifying calculations the accuracy of which has been challenged before them, by ensuring, where necessary, the confidentiality of those data.

Lastly, the Court holds that the decision at issue does not contain an adequate statement of reasons since the information which it provided and that available on the SRB's website at the date of the decision covered only part of the relevant information that the SRB could have provided without compromising business confidentiality. In particular, neither the annex to that decision nor the SRB's website contained data on the limit values of each 'bin' and the values of the corresponding indicators. Consequently, the decision at issue is annulled in so far as it concerns Landesbank Baden-Württemberg.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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