Analysis

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"SRB's calculations for SRF's contributions got annulled due to methodological reasons"

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On 24th January 2024, the Court of Justice delivered three judgments concerning three distinct –yet connected– cases (T-347/21; T-348/21; T-405/21). The Court's decisions, prompted by a French and two Austrian banks, are important in that they shed light on the legality of the Single Resolution Board's calculations concerning the *ex ante* contributions to the Single Resolution Fund imposed upon credit institutions. Amongst its duties, the Single Resolution Board must calculate yearly the banks' individual contributions to the Single Resolution Fund, pursuant to Article 70 of Regulation 806/2014 (so-called SRMR). The Single Resolution Fund, in turn, is instrumental for an efficient application of the resolution tools. Nevertheless, the proceedings relate to the degree of leeway that the SRB can actually avail itself of when carrying out such calculations.

In particular, the cases concern the 2021 contributions, which, according to the three banks, had been calculated in violation of Article 69(2) SRMR as well as Articles 296(2) of TFEU and 41 of the Charter of Fundamental Rights, inasmuch as, respectively, they did not conform to the prescribed methodology of calculation and no sufficient justification had been provided for it.

Article 69 SRMR envisages that contributions should be imposed – over an eight-year period starting from 1st January 2016 – in such a way as to let the Fund reach 1% of the amount of covered deposits of all credit institutions authorised in the Member States participating in the banking union by 31st December 2023. Paragraph 2 of Article 69 SRMR also lays down that the funds should be spread out in time as evenly as possible although still taking due account of business cycles and the impact that pro-cyclical contributions may have on the financial position of the banks.

The SRB issued a document – the 'Fact Sheet 2021' – whereby it explained why it had set a higher 1.35% rather than strictly abiding by the 1% coefficient for the covered deposits of the previous year, as dictated by Delegated Regulation 2015/63, in view of a reported rise of those deposits. Estimations had induced the agency to assume that the figures would further increase until the end of 2023 by between 4% and 7%, although projections by the ECB and the Commission had suggested that the rise would be lower than that of 2020. Based upon these

forecasts, the SRB adopted a 'prudent approach' and set a higher amount for the contributions.

In fact, the Court of Justice found that the SRB's reasoning had been finistically built in reverse by first identifying a prognosticated final level. It had done so by adding 4% to the average number of covered deposits for 2020 and then subtracting the amount already collected from the final figure. Only then had the SRB divided the figure by three, *i.e.* the remaining years of the eight-year period.

As for the lack of motivation, the Court of Justice, having recalled that a decision concerning *ex ante* contributions must provide the institutions involved with the method of calculation (see *Commission v Landesbank Baden-Württemberg and SRB* (C-584/20 P)), found large discrepancies between the methodology disclosed in the Fact Sheet 2021 and the one actually applied. Inconsistencies have also been found within the very document, as the results were at odds with the methodology displayed therein too.

The foregoing led the Court of Justice to argue that, although the SRB did not in fact have an obligation to share confidential figures, the change of methodology rendered impossible for both the credit institutions and the Court to grasp the technical reasons behind the figures of the annual target level. Thus, the SRB's decision was annulled. The effects will remain in force until a new determination of the amount, which shall take place within no more than six months from the date of the rulings, will be made.

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