

- (b) the support to energy-efficient district heating/cooling networks,
- (c) the support to heat/cooling storage facilities,
- (d) the support to the production of CHP electricity in existing highly efficient gas-fired CHP installations in the district heating sector, and
- (e) the reduced CHP surcharge for hydrogen producers

constitute State aid under the KWKG 2020; and

— order the defendant to pay the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on a single plea in law. According to the applicant, the European Commission erred in law in its interpretation and application of Article 107(1) TFEU by determining that the undertakings concerned by the notified measures had received aid granted by the State or through State resources. The applicant submits that the European Commission, first, erred in assuming that the fiscal nature of a surcharge of itself implies that the funds raised have the characteristic of State resources within the meaning of Article 107(1) TFEU. The applicant submits that the European Commission, secondly, erred in assuming that the CHP-surcharge under the Gesetz für die Erhaltung, die Modernisierung und den Ausbau der Kraft-Wärme-Kopplung 2020 ('the Law on Combined Heat and Power Generation; 'the KWKG') actually constitutes a tax within the meaning of the case-law of the European Court of Justice. The applicant submits that the European Commission, thirdly, erred in assuming that the resources received by the transmission system operators are under public control and are thus at the disposal of the State.

Action brought on 9 July 2021 — Norddeutsche Landesbank — Girozentrale v SRB

(Case T-412/21)

(2021/C 368/45)

Language of the case: German

Parties

Applicant: Norddeutsche Landesbank — Girozentrale (Hanover, Germany) (represented by: D. Flore and J. Seitz, lawyers)

Defendant: Single Resolution Board (SRB)

Form of order sought

The applicant claims that the Court should:

- annul the decision of the defendant of 14 April 2021 (SRB/ES/2021/22) including the annexes thereto, in particular Annex I concerning the 'Results of the calculation with respect to all institutions falling within the scope of calculation of the 2021 ex-ante contributions set separately (per institution) in the Harmonized Annexes', in so far as they are each relevant to the applicant;
- order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

In support of the action, the applicant relies on the following pleas in law:

1. First plea in law, alleging an infringement of the right to be heard

- The defendant failed to hear the applicant before adopting the contested decision, thereby infringing Article 41(1) and (2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter').

2. Second plea in law, alleging an infringement of procedural rules
 - The contested decision is invalid because it was adopted in breach of general procedural requirements deriving from Article 41 of the Charter, Article 298 TFEU, general principles of law and the defendant's Rules of Procedure.
3. Third plea in law, alleging a failure to state reasons for the contested decision
 - Contrary to Article 296 TFEU, the contested decision does not contain a sufficient statement of reasons; in particular, it lacks a statement of reasons relating to the individual case and a description of the fundamental considerations in the context of proportionality and discretion.
 - Moreover, the calculation of the annual contribution is not comprehensible, in particular due to the use of inconsistent terms and the failure to show key intermediate steps.
4. Fourth plea in law, alleging an infringement of the fundamental right to effective judicial protection for lack of verifiability of the contested decision
 - The failure to state reasons for the contested decision makes judicial review considerably more difficult.
 - In particular, the defendant infringed the principle of *audi alteram partem*, according to which the parties must be able to discuss both the factual and legal circumstances which are decisive for the outcome of the proceedings.
5. Fifth plea in law, alleging that the application of the IPS (Institutional Protection Scheme) indicator infringes higher-ranking law
 - In applying the IPS indicator, the significance of the applicant's membership of the institutional guarantee scheme of the Sparkassen-Finanzgruppe (Savings Banks Finance Group) was misjudged.
 - Under the second sentence of Article 6(5) of Delegated Regulation (EU) 2015/63, ⁽¹⁾ the defendant should also have taken account of the low probability of the institution concerned being resolved and thus of the use of the Single Resolution Fund and should have observed the principle of proportionality.
6. Sixth plea in law, alleging that the failure to take account of the MREL (Minimum Requirements for Own Funds and Eligible Liabilities) within the framework of the 'risk exposure' pillar infringes Delegated Regulation (EU) 2015/63
 - In accordance with Article 6(1)(a) and (2)(a) of Delegated Regulation (EU) 2015/63, the defendant should have taken account of the applicant's higher-than-average MREL ratio of 67,6 %, which significantly exceeded the minimum ratio of 8 % set by the Single Resolution Board.
7. Seventh plea in law, alleging that the application of the risk-adjustment multiplier infringes Delegated Regulation (EU) 2015/63, which must be interpreted in the light of higher-ranking law
 - When setting the risk-adjustment multiplier, the defendant should have taken into account the applicant's low probability of default and higher-than-average MREL ratio in accordance with the principle of orientation towards the risk profile and the fundamental right to entrepreneurial freedom under Article 16 of the Charter.
8. Eighth plea in law (in the alternative), alleging that the second sentence of Article 7(4) of Delegated Regulation (EU) 2015/63 infringes higher-ranking law
 - By providing for a relativisation of the IPS indicator, the second sentence of Article 7(4) of Delegated Regulation (EU) 2015/63 infringes the general principle of equality under Article 20 of the Charter and the principle of proportionality, since institutions which are subject to the same institutional guarantee and thus have the same probability of default may be treated differently.

⁽¹⁾ 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).