Reports of Cases

Joined Cases T-377/16, T-645/16 and T-809/16

Hypo Vorarlberg Bank AG, formerly Vorarlberger Landes- und Hypothekenbank AG
v
Single Resolution Board

Judgment of the General Court (Eighth Chamber, Extended Composition), 28 November 2019

(Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – SRB decision on 2016 *ex ante* contributions – Action for annulment – Direct and individual concern – Admissibility – Essential procedural requirements – Authentication of the decision – Procedure for adopting the decision – Obligation to state reasons – Limitation of the temporal effects of the judgment)

1. *Actions for annulment – Actionable measures – Concept – Measures producing binding legal effects – Preparatory measures – Not included – Decision of the Single Resolution Board (SRB) establishing ex ante contributions to the Single Resolution Fund (SRF) – Definitive nature – Included*
(Art. 263, fourth para., TFEU; Regulation No 806/2014, Arts 67(4) and 70(2))

(see paragraphs 61, 69, 70, 205)

2. *Actions for annulment – Natural or legal persons – Measures of direct and individual concern to them – Criteria – Decision of the Single Resolution Board (SRB) establishing ex ante contributions to the Single Resolution Fund (SRF) – Action brought by a credit institution to which the SRB decision is not addressed – Direct and individual concern – Admissibility*
(Art. 263, fourth para., TFEU; Regulation No 806/2014, Arts 67(4) and 70(2))

(see paragraphs 62-66, 71-79, 175, 205)

3. *Actions for annulment – Time limits – Point from which time starts to run – Decision neither published nor notified to the applicant – Precise knowledge of the content and reasons – Duty to request the full text of the decision within a reasonable period once its existence is known – Duty to act within a reasonable period – Criteria for assessment*
(Art. 263, sixth para., TFEU)

(see paragraphs 80-83, 89-91)

4. *Actions for annulment – Pleas in law – Infringement of essential procedural requirements – Failure to authenticate the contested decision – Not necessary to rely on harm or defects other than lack of authentication – Issue that must be raised of the Court's own motion*
(Art. 263 TFEU)

(see paragraphs 111-116, 118, 134)

5. *Actions for annulment – Pleas in law – Infringement of essential procedural requirements – Procedure for adopting the contested decision contrary to rules the aim of which is to ensure compliance with the essential procedural requirements of any electronic written procedure and any consensus-based adoption procedure – Issue that may be raised of the Court's own motion*
(Art. 263 TFEU)

(see paragraphs 152-158)

6. *Acts of the institutions – Statement of reasons – Obligation – Scope – Decision of the Single Resolution Board (SRB) establishing ex ante contributions to the Single Resolution Fund (SRF)*
(Art. 296 TFEU; Regulation No 806/2014, Arts 67(4) and 70(2))

(see paragraphs 172-174, 176, 177, 182, 197, 199, 206, 209, 210)

7. *Actions for annulment – Judgment annulling a measure – Effects – Limitation by the Court – Decision of the Single Resolution Board (SRB) establishing ex ante contributions to the Single Resolution Fund (SRF) – Annulment calling into question the charging of sums of money effected on the basis of the annulled measure – No risk of undermining legal certainty in respect of the interests at stake*
(Art. 264, second para., TFEU)

(see paragraphs 220-222)

Résumé

In its judgment of 28 November 2019, *Hypo Vorarlberg Bank* v *SRB* (T-377/16, T-645/16 and T-809/16), delivered in a chamber in extended composition, the Court upheld the action in Case T-377/16, which had been brought by a credit institution and sought annulment of two decisions of the Single Resolution Board (SRB), the first establishing the amount of the 2016 *ex ante* contributions to the Single Resolution Fund (SRF) and the second adjusting those contributions. By contrast, the Court dismissed the actions in Cases T-645/16 and T-809/16 as inadmissible on the ground of *lis pendens*.

This case was brought in connection with the second pillar of the banking union, with regard to the Single Resolution Mechanism established by Regulation No 806/2014.[1] Specifically, the case

[1] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

concerns the SRF established by that regulation.[2] The SRF is financed by contributions from institutions raised at national level by way, inter alia, of *ex ante* contributions.[3]

The applicant, Hypo Vorarlberg Bank AG, is a credit institution established in a Member State participating in the single supervisory mechanism. By decision of 15 April 2016, the SRB decided the amounts of the 2016 *ex ante* contributions for each institution, including the applicant. By a collection notice dated 26 April 2016, the Austrian national resolution authority (NRA) ordered the applicant to pay the specified amount. By decision of 20 May 2016, which was accompanied by an annex stating new amounts, the SRB reduced the applicant's contribution. By a second collection notice of 23 May 2016, the Austrian NRA informed the applicant that its contribution had been calculated incorrectly and that the contribution that it had paid was too high. The notice also stated that that amount would not be reimbursed until 2017. The applicant brought an action seeking annulment of the two decisions of the SRB, in so far as they concern the applicant.

First of all, the Court rejected the objection of inadmissibility raised by the SRB alleging that the applicant did not have *locus standi* and the plea of inadmissibility claiming that the action for annulment was time-barred. By contrast, the Court accepted the argument concerning *lis pendens* on which the SRB relied.

Examining the applicant's *locus standi*, the Court held that, in spite of the fact that the NRAs are the only persons to whom the contested decisions are addressed within the meaning of the fourth paragraph of Article 263 TFEU, the institutions, including the applicant, are nevertheless individually and directly concerned by them because, first, the contested decisions mention each of the institutions by name and determine or, in the case of the second decision, adjust their individual contributions and, second, the NRAs have no discretion as to the amounts of the individual contributions and may not amend those amounts, which they are required to collect from the institutions concerned.

With regard to compliance with the period for bringing an action against decisions which have not been published or communicated to the applicant, the Court held that the applicant had, within a reasonable period from the time when the existence of the contested decisions became known, made several requests to be sent the full text of the decisions, which determines the starting point of the period for bringing proceedings under the sixth paragraph of Article 263 TFEU, corresponding to the moment at which the applicant acquires precise knowledge of the content of the decision in question and of the reasons on which it is based. In addition, the period for bringing proceedings under the sixth paragraph of Article 263 TFEU is different from the reasonable period in which a copy of the measures must be requested.

As regards *lis pendens*, after recalling that a subsequent action between the same parties, on the basis of the same submissions and seeking the annulment of the same measure must be dismissed as inadmissible, the Court pointed out that the condition relating to the parties being identical concerns the main parties and not the interveners and that the condition relating to the act being identical is satisfied where the subject matter of the subsequent case is included in the subject matter of the earlier case.

In the light of those considerations, the Court declared the action in Case T-377/16 admissible and the actions in Cases T-645/16 and T-809/16 inadmissible on the ground of *lis pendens*.

[2] Article 67(1) of Regulation No 806/2014.

[3] Article 67(4) of Regulation No 806/2014.

On the substance, examining the plea involving a matter of public policy which alleged an infringement of essential procedural requirements in the adoption of the acts, the Court held that, in the absence of proof by the SRB of the electronic signature of the contested decisions, the authentication requirement has not been satisfied. It therefore annulled those decisions.

In that regard, the Court recalled the case-law of the Court of Justice, according to which, since the intellectual component and the formal component form an inseparable whole, reducing the act to writing is the necessary expression of the intention of the adopting authority. The authentication of an act is intended to guarantee legal certainty by ensuring that the text adopted by the body which adopted the act becomes definitive. The Court of Justice has also held that it is the mere failure to authenticate the act which constitutes the infringement of an essential procedural requirement and it is not necessary also to establish that the act is vitiated by some other defect or that the lack of authentication resulted in harm to the person relying on it and that checking compliance with the requirement of authentication and, thus, of the definitive nature of the act is a preliminary to any other review, such as that of the competence of the author of the act, of compliance with the principle of collegiality or of the obligation to state reasons for the act. If the EU court finds, on examining the act produced to it, that the act has not been properly authenticated, it must of its own motion raise the issue of infringement of an essential procedural requirement through failure to carry out proper authentication and, in consequence, annul the act vitiated by that defect. It is of little importance that the lack of authentication has not caused any harm to a party to the dispute.

In addition, the Court held that the procedure for adopting the first contested decision was conducted in manifest disregard of the procedural requirements relating to the approval of that decision by the members of the executive session of the SRB and how that approval is gathered. As regards a procedure for the adoption of decisions by consensus, the Court noted that the decision cannot be adopted without it having been established, at the very least, that all the members of the competent body had been able to acquaint themselves with the draft decision at the outset. That procedure requires that a period is agreed to allow the members of that body to take a position on the draft. The Court held that those procedural rules, the aim of which is to ensure compliance with the essential procedural requirements of any consensus-based adoption procedure, have been infringed in the present case. It observed that those infringements have a direct impact on legal certainty since it is not established that the decision thus adopted has been approved by the competent body or even that all of the members of that body were aware of it before it was adopted. According to the Court, the failure to comply with such procedural rules which are necessary to express consent constitutes an infringement of essential procedural requirements which the Courts of the European Union may examine of their own motion.

Lastly, the Court held that the contested decisions should be annulled by reason of several infringements of the obligation to state reasons. The Court stated in that regard that it is the responsibility of the SRB, the author of those decisions, to state the reasons on which they are based. That obligation to state reasons cannot be delegated to the NRAs, nor can its infringement be remedied by them, otherwise there would be a failure to have regard to the status of the SRB as the author of those decisions and its responsibility in that respect and, in view of the diversity of the NRAs, a risk of unequal treatment of institutions with regard to the SRB's reasoning in its decisions.