Reports of Cases

Case T-393/21

(Publication by extracts)

Max Heinr. Sutor OHG
v
Single Resolution Board (SRB)

Judgment of the General Court (Eighth Chamber, Extended Composition) of 8 May 2024

(Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the Single Resolution Board (SRB) on the calculation of the 2021 *ex ante* contributions – Obligation to state reasons – Plea of illegality – Limitation of the temporal effects of the judgment)

1. *Economic and monetary policy – Economic policy – Single resolution mechanism for credit institutions and certain investment firms – Ex ante contributions to the Single Resolution Fund (SRF) – Inclusion of the fiduciary liabilities of a credit institution authorised to perform investment activities in the calculation of those contributions – Whether permissible (Commission Regulation 2015/63, Art. 5(1)(e); European Parliament and Council Directive 2014/59, Art. 2(2)(3))*

(see paragraphs 41, 45, 51, 147)

2. *Economic and monetary policy – Economic policy – Single resolution mechanism for credit institutions and certain investment firms – Ex ante contributions to the Single Resolution Fund (SRF) – Inclusion of the fiduciary liabilities of a credit institution authorised to perform investment activities in the calculation of those contributions – Exposure of those liabilities to the same risks as those of investment firms in the event of insolvency – No breach of the principle of equal treatment*
(European Parliament and Council Regulation No 806/2014, recital 12; Commission Regulation 2015/63, Art. 5(1)(e))

(see paragraphs 89-92, 95)

3. *Economic and monetary policy – Economic policy – Single resolution mechanism for credit institutions and certain investment firms – Ex ante contributions to the Single Resolution Fund (SRF) – Inclusion of the fiduciary liabilities of a credit institution authorised to perform investment activities in the calculation of those contributions – Principle of including those liabilities in the balance sheet of the institution concerned – Possibility of*

EN

derogation offered to Member States permitting institutions to disclose those liabilities off the balance sheet – No breach of the principle of equal treatment resulting from divergences existing between the national legislations
(European Parliament and Council Regulation No 806/2014, Art. 70(2), second subpara., point (b); European Parliament and Council Directive 2014/59, Art. 103(2); Council Directive 86/635, Art. 10(1))

(see paragraphs 98-100, 104, 106, 107)

Résumé

Hearing an action for annulment – which it upholds – the General Court annuls the decision of the Single Resolution Board (SRB) setting the 2021 *ex ante* contributions[1] to the Single Resolution Fund (SRF), on account of the failure to fulfil its obligation to state reasons as regards the determination of the annual target level. Furthermore, the Court rules on the scope of Article 5(1)(e) of Delegated Regulation 2015/63[2] and on the plea of illegality raised against that regulation. Lastly, it also examines the alleged infringement of Article 5(1)(e) of that regulation.

Max Heinr. Sutor OHG, the applicant, is a credit institution established in Germany. On 14 April 2021, the SRB adopted a decision in which it set[3] the 2021 *ex ante* contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant.

Findings of the Court

In the first place, as regards the scope of Article 5(1) of Delegated Regulation 2015/63, the Court recalls that, according to the case-law, the derogation provided for in that provision, which allows certain liabilities to be excluded from the calculation of *ex ante* contributions, must be interpreted strictly. It also points out that Article 5(1)(e) of that delegated regulation lays down three cumulative conditions for the exclusion of the liabilities concerned, namely that those liabilities must be held by an investment firm, that they must arise by virtue of holding client assets or client money and that the clients must be protected under the applicable insolvency law.

As regards the first condition, the Court observes that, according to Delegated Regulation 2015/63[4] and Directive 2014/59,[5] the derogation in Article 5(1)(e) of that delegated regulation did not apply, at the time of the adoption of the contested decision, to entities which were both a credit institution and an investment firm, as was the case with the applicant. It considers that if the European Commission had intended Article 5(1)(e) of Delegated Regulation 2015/63 to cover

[1] Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 *ex ante* contributions to the Single Resolution Fund ('the contested decision').

[2] 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).

[3] In accordance with Article 70(2) of 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).

[4] In Article 3(2).

[5] In accordance with point (3) of Article 2(1) of Directive 2014/59/EU 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).

credit institutions which are also investment firms, it would have referred in that provision to ‘institutions’ and not to ‘investment firms’,[6] whereas, in order to limit the application of an exception to certain entities, it used more precise wording.[7]

In that regard, the Court recalls that the definition of ‘investment firm’ in Directive 2014/59 was amended by Directive 2019/2034,[8] which refers, *in fine*, to the concept of ‘investment firm’ in Directive 2014/65. However, the amendment of that definition was applicable only from 26 June 2021.[9] Therefore, Article 5(1)(e) of Delegated Regulation 2015/63, in the version applicable at the time of the adoption of the contested decision on 14 April 2021, must be interpreted as not allowing liabilities held by credit institutions, such as the applicant, to be excluded from the calculation of liabilities used to determine their *ex ante* contribution. Thus, the applicant’s fiduciary liabilities do not satisfy the first of the three cumulative conditions laid down in Article 5(1)(e) of that delegated regulation and the Court rejects the plea in its entirety.

In the second place, as regards the infringement of Article 103(7) of Directive 2014/59, the applicant submits, first, that its fiduciary liabilities are risk free and, second, that the failure to exclude those liabilities from the calculation of the *ex ante* contribution entails a breach of the principle of equal treatment.

First, the Court observes, as a preliminary point, that the Commission enjoys broad discretion in determining the criteria for adjusting *ex ante* contributions in proportion to the risk profile, and that the review by the Courts of the European Union must be limited to examining whether the exercise of such discretion has been vitiated by a manifest error or a misuse of power, or whether the limits of that discretion have been manifestly exceeded. Principally, the Court recalls, first of all, that under Article 103(7) of Directive 2014/59, there are eight factors which the Commission must take into account for the purposes of adjusting those contributions in proportion to the risk profile of institutions. Next, there is nothing in that provision to indicate that the Commission is required to give precedence to one or more of those factors, such as the risk exposure of the institution, nor does it specify, moreover, how the Commission must take account of that exposure. Lastly, and in any event, the applicant has not established that the fiduciary liabilities were risk free in the event of resolution. First, in the event of insolvency, German law does not grant special protection to clients’ funds while they are in the collective account created by the applicant within itself and administered in its own name but on behalf of clients (‘the transit account’), and, second, in order for those funds to be protected by the deposit guarantee scheme, the European credit institutions concerned (‘the financial product institutions’) must have their registered office in a Member State and clients must not invest more than EUR 100 000 in such institutions. That protection is therefore limited both territorially and quantitatively.

Second, the Court states, as regards the subject matter and purpose of Directive 2014/59, Regulation No 806/2014 and Delegated Regulation 2015/63, that those acts fall within the scope of the Single Resolution Mechanism, the establishment of which seeks[10] to ensure, inter alia, a neutral approach in dealing with failing institutions. In order to examine whether credit institutions which are also authorised to perform investment activities, such as the applicant, are

[6] As it did in subparagraphs (a), (b) and (f) of that provision, by employing the term ‘institution’.

[7] Such as central counterparties, central securities depositories and investment firms.

[8] Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ 2019 L 314, p. 64).

[9] In accordance with the second subparagraph of Article 67(1) of Directive 2019/2034, read in the light of recital 39 of that directive.

[10] In accordance with recital 12 of Regulation No 806/2014.

in a situation comparable to that of the investment firms[11] as regards the taking into account of fiduciary liabilities for the purposes of calculating *ex ante* contributions, the Court points out, first of all, that those *ex ante* contributions are intended to finance resolution actions the adoption of which is subject to the condition that such action is necessary in the public interest.[12] Credit institutions and investment firms do not present a comparable risk as regards the adverse effects that their failure could have on financial stability, since investment firms do not have large portfolios of retail and corporate loans to individuals and undertakings and do not take deposits. That is all the more so since credit institutions and investment firms each have a different clientele.

In those circumstances, the likelihood of a credit institution, such as the applicant, being placed under resolution is higher than in the case of an investment firm. Those two categories of institution are therefore not in a comparable situation.

Similarly, their situation is not comparable as regards the treatment of fiduciary liabilities. Under German law, investment firms are required immediately to segregate funds received from clients in trust accounts opened with credit institutions. By contrast, credit institutions, such as the applicant, are not required to transfer those funds immediately from the transit account to the financial product institutions.

Therefore, the applicant has not established that the fiduciary liabilities held by investment firms were exposed to a level of risk comparable to that of the fiduciary liabilities held by credit institutions also authorised to perform investment activities.

Next, as regards the unequal treatment alleged to have resulted, in essence, from the fact that the SRB used the same method of calculating the basic annual contribution for all institutions, without taking account of the fact that certain Member States availed themselves of the derogation permitting them to disclose funds off the balance sheet liabilities which they administer in their own name but on behalf of third parties off the balance sheet,[13] the Court recalls that, as regards the determination of the liabilities to be taken into account for the purposes of calculating the *ex ante* contribution, Delegated Regulation 2015/63 defines ‘total liabilities’ as those defined in Directive 86/635 or in accordance with the International Financial Reporting Standards referred to in Regulation No 1606/2002.[14] Moreover, although funds which an institution administers in its own name but on behalf of third parties must, as a general rule and as is the case in Germany, be shown in that institution’s balance sheet if it acquires legal title to the assets concerned, some Member States have opted for the derogation laid down in Directive 86/635 which permits institutions to disclose those liabilities off the balance sheet. That situation follows from the joint application of the provisions of Regulation No 806/2014 and of Directive 2014/59, read in the light of Directive 86/635, the validity of which has not been challenged by the applicant in the light of the principle of equal treatment.

[11] Such as those referred to in Article 5(1)(e) of Delegated Regulation 2015/63.

[12] As mentioned in Article 14(2)(b) of Regulation No 806/2014, by avoiding inter alia the significant adverse effects that the liquidation of an institution would have on financial stability, in particular, by preventing contagion, including to market infrastructures, and by maintaining market discipline.

[13] Under the third sentence of Article 10(1) of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ 1986 L 372, p. 1).

[14] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1).

As regards the failure to take account of the differences between the accounting rules of the various Member States as regards the inclusion of fiduciary liabilities in the balance sheet of institutions, the Court points out that the principle of equal treatment cannot empower the Commission, when it adopts delegated acts, to act beyond the delegated powers conferred on it by the EU legislature. In the present case, neither Directive 2014/59 nor Regulation No 806/2014 empowered the Commission to harmonise the national accounting rules in that regard. Thus, it cannot be claimed that the Commission breached the principle of equal treatment by not addressing those differences. Moreover, the prohibition on discrimination is not concerned with divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it. In the present case, the applicant has not claimed, let alone demonstrated, that the German legislation did not affect equally all persons subject to it. Furthermore, the adoption of EU legislation within a particular field of activity may affect certain traders in different ways because of their individual situation or the national rules to which they are subject; that fact cannot be regarded as a breach of the principle of equal treatment if that legislation is based on objective criteria which are adapted to meet the aims pursued by the legislation. No evidence has been submitted to the Court showing that Article 3(11) of Delegated Regulation 2015/63 was not based on objective criteria adapted to the aims pursued by Delegated Regulation 2015/63.

Lastly, as regards unequal treatment between the applicant and the credit institutions which draw up their balance sheets in accordance with international accounting standards, while, under German law, only parent companies may use that method, the Court points out, first, that that situation is the consequence of the application of a rule of German law and not of Delegated Regulation 2015/63 and, second, that the applicant could have prepared accounts in accordance with those accounting standards, but chose not to do so for administrative and financial reasons. The applicant cannot therefore rely on a difference in treatment on that basis.

In the third and last place, as regards the infringement of Article 5(1)(e) of Delegated Regulation 2015/63, in so far as that regulation does not allow the applicant's fiduciary liabilities to be excluded from the calculation of its *ex ante* contribution, the Court considers, first, that the SRB did not err in law by not excluding the amount of those liabilities from that calculation.

Second, it recalls that it has already been held by the Court of Justice that Article 5(1)(e) of Delegated Regulation 2015/63 does not confer any discretion on the competent authorities to exclude certain liabilities when adjusting *ex ante* contributions in proportion to risk, but rather lists precisely the conditions governing whether certain liabilities can be so excluded. Consequently, the SRB did not err in law when it did not apply, by analogy, Article 5(1)(e) of that delegated regulation. In addition, as regards the taking into account of the principle of equal treatment, that delegated regulation distinguished situations that have significant and specific features, directly linked to the risks inherent in the liabilities at issue. In the light of those considerations, the non-application by analogy of Article 5(1)(e) of that delegated regulation does not breach the principle of equal treatment. The same is true as regards the principle of proportionality, in respect of which the General Court considers that the applicant has merely made unsubstantiated assertions.

Third, as regards the complaint that the taking into account the applicant's fiduciary liabilities in the calculation of its *ex ante* contribution would lead to those liabilities being counted twice, the Court finds, first of all, that the applicant does not explain which specific method of calculating *ex ante* contributions would be less onerous for the institutions, while being appropriate to achieve, in an equally effectively manner, the objectives pursued by the regulation. Furthermore, and in any

event, no evidence capable of challenging the SRB’s assertion relating to the conditions for entitlement to protection under the deposit guarantee scheme has been adduced. Lastly, no argument has been put forward to show that the Commission intended to eliminate entirely any form of double counting of liabilities.

Fourth, as regards the argument that the inclusion of the applicant’s fiduciary liabilities in the calculation of its *ex ante* contribution does not satisfy the criterion of necessity, since, in the event of insolvency, its clients would be entitled to the segregation of the fiduciary assets managed by it, which shows that there are adequate guarantees of protection for those clients, the Court states that the applicant has not established that its clients’ assets and money would be covered in the event of insolvency by guarantees comparable to those covering client assets and client money at investment firms,

Fifth, the Court observes that no specific evidence has been submitted to show that the inclusion of the fiduciary liabilities in the calculation of the *ex ante* contribution would lead to disadvantages which are manifestly disproportionate to the objectives of Directive 2014/59.