Reports of Cases

Case T-395/22

Hypo Vorarlberg Bank AG
v
Single Resolution Board

Judgment of the General Court (Eighth Chamber, Extended Composition) of 29 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 *ex ante* contributions for the 2022 contribution period – Determination of the annual target level of the SRF – Ceiling provided for in the first and fourth subparagraphs of Article 70(2) of Regulation (EU) No 806/2014 – Article 291(2) TFEU – Article 70(7) of Regulation No 806/2014 – Implementing Regulation (EU) 2015/81 – Implementing powers conferred on the Council – Duly justified specific cases – Scope of the implementing powers – Limitation of the temporal effects of the judgment)

1. *Acts of the institutions – Regulations – Basic regulations and implementing regulations – Conferral on the Council of an implementing power provided for in the basic regulation – No justification in that regulation – Unlawfulness*
(Arts 291(2) and 296 TFEU; European Parliament and Council Regulation No 806/2014, Art. 70(7); Council Regulation 2015/81)

(see paragraphs 27, 28, 32, 34, 37, 39-42)

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) – Implementing power conferred on the Council – Method of calculation of those contributions provided for in a Council implementing regulation – Alteration by the implementing regulation of the method of calculation provided for in the basic regulation – Exceeding the limits of a power – Unlawfulness*
(European Parliament and Council Regulation No 806/2014, Art. 70(1) and (2), second subpara.; Council Regulation 2015/81, Art. 8(1); European Parliament and Council Directive 2014/59, Art. 103)

(see paragraphs 61, 65, 66, 69-72, 76, 77, 79, 82, 84)

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) – Annual ceiling of the aggregate amount of the individual contributions to the SRF fixed at 12.5% of the final target level – Scope – Application during the initial period*

(European Parliament and Council Regulation No 806/2014, Art. 70(2), first and fourth subparas)

(see paragraphs 98, 106)

4. *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) – Annual ceiling of the aggregate amount of the individual contributions to the SRF fixed at 12.5% of the final target level – Scope – Single Resolution Board (SRB) does not exceed that ceiling – Assessment criteria – Dynamic approach of the final target level (European Parliament and Council Regulation No 806/2014, Arts 69(1) and 70(2), first and fourth subparas)*

(see paragraphs 109, 113-116)

Résumé

Hearing an action for annulment against the decision of the Single Resolution Board (SRB) determining the 2022 *ex ante* contributions to the Single Resolution Fund (SRF),[1] which it upholds, the General Court upholds the plea of illegality in respect of Article 70(7) of Regulation No 806/2014,[2] on the ground that that regulation does not set out the reasons why the conferral of the implementing power on the Council of the European Union laid down in that provision, as regards the rules for calculating those contributions, constitutes a duly justified specific case within the meaning of Article 291(2) TFEU. In addition, it clarifies the scope of that power, by upholding the plea of illegality in respect of Article 8(1)(g) of Implementing Regulation 2015/81.[3]

Hypo Vorarlberg Bank AG, the applicant, is a credit institution established in Austria. On 11 April 2022, the SRB adopted the contested decision in which it set[4] the 2022 *ex ante* contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant. The applicant seeks the annulment of the contested decision in so far as that decision concerns it.

Findings of the Court

In the first place, the Court notes first of all that Regulation No 806/2014[5] does not provide any justification concerning the reasons why the EU legislature decided to confer the implementing power relating to the application of the method of calculating the *ex ante* contributions on the Council ('the power in question'). That regulation refers only to the purpose and the content of

[1] Decision SRB/ES/2022/18 of the Single Resolution Board of 11 April 2022 on the calculation of the 2022 *ex ante* contributions to the Single Resolution Fund ('the contested decision').

[2] 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).

[3] Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to *ex ante* contributions to the Single Resolution Fund (OJ 2015 L 15, p. 1).

[4] In accordance with Article 70(2) of Regulation No 806/2014.

[5] See recital 114.

the implementing acts to be adopted and to the decision to confer on the Council the power to adopt them, without providing any information as to the reasons why that power was conferred on the Council, rather than the European Commission.

Next, the Court observes that Regulation No 806/2014 does not contain any other reasoning capable of revealing the specific reasons justifying that conferral. In addition, although it is possible, in certain circumstances, for such a conferral to be justified by the context in which it occurs, the Court finds, first, that the parties did not rely on any specific circumstance arising from the context in which Regulation No 806/2014 was adopted that would be capable of revealing such reasons. Second, neither Regulation No 806/2014 nor any other legislative act of the European Union contains any reasoning capable of justifying the conferral of that power on the Council, on account of the specific role that that institution would be called on to perform in the field of calculating the *ex ante* contributions. Lastly, the Court rejects the argument raising 'political reasons' as the ground for conferring that power. No such justification is apparent from Regulation No 806/2014 and it does not satisfy, given its general nature, the requirements arising from case-law, since that justification is neither detailed nor related to the nature or the content of Regulation No 806/2014. Accordingly, the Court concludes that Regulation No 806/2014 does not contain any justification concerning the conferral of the power in question on the Council, rather than the Commission, and upholds the plea of illegality, declaring Article 70(7) of Regulation No 806/2014 inapplicable in the present case under Article 277 TFEU. Consequently, Implementing Regulation 2015/81, which was adopted by the Council on the basis of that provision and of which the contested decision is an implementing measure, is likewise inapplicable in the present case.

In the second place, with regard to the plea of illegality in respect of Article 8(1) of Implementing Regulation 2015/81, the Court finds, first, that it follows from the wording of Regulation No 806/2014[6] that the method of calculating the basic annual contribution of the institutions concerned is based on the determination of the net liabilities of each institution concerned as a proportion of the total net liabilities of all of the institutions authorised 'in the territories of all of the participating Member States'. Thus, the data from all of those institutions are taken into account to calculate the *ex ante* contribution of each institution, at the very least as regards its first component, namely the basic annual contribution. Second, the method of calculation introduced by Regulation No 806/2014, and in particular the rule determining the base of the data to be taken into account for the purposes of that method, applies fully to each year of the initial period, including the 2022 contribution period.

However, the very purpose of the 'adjusted methodology', introduced by Implementing Regulation 2015/81,[7] is to provide that a proportion of the *ex ante* contributions is calculated, for almost the entirety of the initial period, in accordance with a different database from that provided for in Regulation No 806/2014. Thus, in accordance with Implementing Regulation 2015/81, read in conjunction with Directive 2014/59,[8] for the purpose of the calculation of a proportion of the *ex ante* contributions for that period, only the data communicated by institutions which are authorised in the territory of the participating Member State concerned are taken into account, to the exclusion of those communicated by institutions authorised in the territories of the other

[6] See Article 70(1) and point (a) of the second subparagraph of Article 70(2).

[7] See Article 8(1).

[8] 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).

participating Member States, whereas the method of calculation in Regulation No 806/2014 specifically takes into account those latter data for the purpose of the calculation of the basic annual contribution. It follows that Implementing Regulation 2015/81 changes the very basis of the method of calculating *ex ante* contributions provided for in Regulation No 806/2014, by altering the base of the data to be taken into account in the context of that method. As a result, the amounts of the institutions' *ex ante* contributions, calculated according to the 'adjusted methodology', are necessarily different from those which would have resulted from the application of the method in Regulation No 806/2014. The extent of that alteration is exacerbated by the fact that it covers seven of the eight years of the initial period, and therefore that method is deprived of its full effects for almost the entirety of that period.

Secondly, the Court observes that, when the institution concerned adopts implementing measures on the basis of Article 291(2) TFEU, it must simply specify the basic act without altering its legislative content. Thus, assuming that, by introducing the 'adjusted methodology', the Council pursued the objective of preventing distortions between banking sector structures of the Member States,[9] it had to comply with the limits imposed on the implementing power conferred on it, by simply specifying the method of calculation in Regulation No 806/2014.

Thirdly, the General Court recalls that the calculation of the *ex ante* contributions to the SRF is governed by Article 70 of Regulation No 806/2014 and not by Article 103 of Directive 2014/59, which concerns the *ex ante* contributions to the national resolution financing arrangements. It is true that, in accordance with that regulation, the adjustment of the *ex ante* contributions in proportion to the risk profile must be based on the criteria laid down in Directive 2014/59. In addition, under that regulation, the Council is to adopt the implementing acts 'within the framework of the delegated acts' adopted by the Commission pursuant to Directive 2014/59 in order to specify the concept of adjustment of the contributions in proportion to the institutions' risk profile. However, Regulation No 806/2014 refers only to the concept of adjustment of the *ex ante* contributions in proportion to the risk profile as provided for in Directive 2014/59. In that context, even if the Council were required to take into account both that concept of adjustment of the contributions in proportion to the risk profile and the delegated acts adopted by the Commission to specify that concept, it is not apparent from Regulation No 806/2014, Directive 2014/59 or those delegated acts that the Council was empowered to introduce an adjusted method of calculation, in the context of which a proportion of the basic annual contributions was calculated on the national base,[10] that is to say, that defined in Directive 2014/59.

Fourthly, the General Court finds that there is no provision of Regulation No 806/2014 or of Directive 2014/59 under which the Council is empowered to introduce a method for calculating the *ex ante* contributions based on a gradual abolition of the method of calculation based on the national base and its gradual replacement with the method based on the union base.[11] Although the Council could thus pursue the legitimate objective of preventing distortions between banking sector structures of the Member States and it is not ruled out that the adjusted methodology is necessary to that end, the fact remains that it was for the EU legislature to provide for the gradual replacement of the method based on the national base with that based on the union base

[9] See point (b) of the second subparagraph of Article 70(2) of Regulation No 806/2014.

[10] That is to say, on the basis of the data communicated by institutions authorised in the territory of the participating Member State concerned.

[11] That is to say, on the basis of the data communicated by all of the institutions authorised in the territories of all of the participating Member States.

and, if appropriate, to empower the Council to specify the rules for its application in an implementing act. The Council could not therefore provide for such a transition without exceeding the limits imposed on its implementing power.

The Court therefore observes that Implementing Regulation 2015/81 alters the legislative content of Regulation No 806/2014 as regards the method of calculating the *ex ante* contributions and considers that, by adopting Article 8(1) of Implementing Regulation 2015/81, the Council exceeded the implementing powers conferred by Regulation No 806/2014, read in conjunction with Article 291(2) TFEU.

In view of the heads of illegality which vitiate the contested decision, the General Court annuls the contested decision in so far as it concerns the applicant. Nonetheless, in the circumstances of the present case, it has decided to maintain the effects of that decision until the entry into force, within a reasonable period which cannot exceed 12 months from the date of delivery of the present judgment, of the measures necessary to comply with the judgment.