



The Court of Justice alone has jurisdiction to determine whether the legality of the ECB's decision opposing the acquisition by Fininvest and Mr Berlusconi of a qualifying holding in Banca Mediolanum is affected by any defects vitiating the preparatory acts by the Banca d'Italia

From the 1990s, Mr Silvio Berlusconi held, through Fininvest, approximately 30% of Mediolanum, a financial holding company that controlled, inter alia, the bank Banca Mediolanum.

Following Mr Berlusconi's conviction for tax fraud, the Banca d'Italia (Bank of Italy) and the Istituto per la Vigilanza sulle Assicurazioni (Institute for the Supervision of Insurance, Italy) determined in 2013 that he had ceased to fulfil the reputation requirement laid down by the applicable national legislation and that, accordingly, the part of Fininvest's holding in Mediolanum that exceeded the limit of 9.999% had to be divested. Mr Berlusconi and Fininvest brought proceedings before the Italian administrative courts and were successful before the Consiglio di Stato (Council of State, Italy). By final judgment of 3 March 2016, the Consiglio di Stato annulled the Banca d'Italia's decision on account of breach of the principle of non-retroactivity, since it had extended the application of the new national legislation adopting reputation criteria to holdings which preceded that legislation's entry into force.

In the meantime, Banca Mediolanum acquired Mediolanum by merger, as a result of which Fininvest became the owner of a qualifying holding in the capital of a bank.

The Banca d'Italia and the European Central Bank ('the ECB') then took the view that an application for authorisation to acquire a qualifying holding in Banca Mediolanum was necessary. As no application was submitted, the Banca d'Italia commenced an administrative procedure on its own initiative for that purpose. Subsequently, the Banca d'Italia, as the competent national authority ('CNA'), forwarded to the ECB a proposal for a decision, which contained an adverse opinion as to the reputation of the acquirers¹ and invited the ECB to oppose the acquisition.

On 25 October 2016, the ECB adopted a final decision opposing that acquisition. It found, in particular, that there were justified doubts as to the acquirers' reputation because Mr Berlusconi had been convicted of tax fraud and, like other members of Fininvest's management bodies, had committed other irregularities.

Mr Berlusconi and Fininvest challenged the ECB's decision.² At the same time, they challenged the acts of the Banca d'Italia before the Consiglio di Stato. They both brought before it an 'azione di ottemperanza' (action for compliance), in which they submit that the Banca d'Italia's proposal for a decision is void on account of infringement of the judgment of 3 March 2016 (which, as a final judgment, has acquired the force of *res judicata*).

¹ Fininvest is the direct acquirer, while Mr Berlusconi, as Fininvest's majority shareholder, is the indirect acquirer.

² Fininvest and Mr Berlusconi brought an action for annulment of the ECB's decision before the General Court [T-913/16](#), *Fininvest and Berlusconi v ECB*. The proceedings before the General Court have been stayed pending the outcome of the present reference for a preliminary ruling.

In that context, the Consiglio di Stato asked the Court of Justice whether it is for the national courts or for the EU Courts³ to review the legality of decisions to initiate procedures, measures of inquiry or proposals adopted by an NCA (in the present instance, the Banca d'Italia) in an authorisation procedure relating to the acquisition of a qualifying holding in a banking institution. The Consiglio di Stato also asked the Court whether the answer to that question is different where it is an 'azione di ottemperanza' that is brought before the national court.

By today's judgment, the Court finds that Article 263 of the Treaty on the Functioning of the European Union ('TFEU') confers upon the EU Courts exclusive jurisdiction to review the legality of acts adopted by an EU institution, such as the ECB.

The Court observes that sometimes the act of the EU institution is adopted following a decision-making process in which the acts of an NCA constitute intermediate stages.

The Court draws a clear distinction between two situations: (i) the situation where the EU institution has only a limited or no discretion, so that the NCA's act is binding on the EU institution, and (ii) the situation where the EU institution exercises, alone, the final decision-making power without being bound by an NCA's act. In the first case, it falls to the national courts to rule on any irregularities that may vitiate such a national act, making a reference to the Court for a preliminary ruling where appropriate. In the second case, on the other hand, **it falls to the EU Courts – that is to say, the courts within the Court of Justice– not only to rule on the legality of the final decision adopted by the EU institution but also to examine any defects vitiating the preparatory acts or the proposals of the NCA that would be such as to affect the validity of that final decision.**

In that regard, the Court stresses that, in order for a process involving exclusive decision-making power of an EU institution to be effective, there must **necessarily be a single judicial review** in order to avoid risks of divergent assessments of the legality of the final decision, in particular where that decision follows the NCA's analysis and proposal. In addition, it follows from Article 263 TFEU and the principle of sincere cooperation between the EU and the Member States⁴ that acts adopted by an NCA in that type of process cannot be subject to review by the courts of the Member States.

The Court observes that **the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition** at the end of the procedure at issue, which is laid down in the context of the banking union's single supervisory mechanism, for the effective and consistent functioning of which the ECB is responsible.⁵ Consequently, **the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision of 25 October 2016 is affected by any defects of the preparatory acts adopted by the Banca d'Italia. The legality of those acts cannot be reviewed by the national courts.** It is irrelevant in that regard that an action such as the 'azione di ottemperanza' has been brought before a national court.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

³ That is to say, the Court of Justice as a judicial institution comprising two courts: the Court of Justice and the General Court.

⁴ A principle referred to in Article 4(3) of the Treaty on European Union ('TEU').

⁵ The procedure at issue is governed by 'CRD IV' (Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338)), by the regulation on the single supervisory mechanism (the **SSM Regulation**) (Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63)) and by the **SSM Framework Regulation** (Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and NCAs and with national designated authorities (OJ 2014 L 141, p. 1)).

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Press contact: Jacques René Zammit ☎ (+352) 4303 3355

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