Judgment in case C-219/17, *Silvio Berlusconi and Another v Banca d'Italia and Others*

Summary

Federico Della Negra[1]

Facts

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

Following Mr Berlusconi's conviction for tax fraud, the Banca d'Italia and the Istituto per la Vigilanza sulle Assicurazioni (IVASS) determined in 2013 that he had ceased to fulfil the reputation requirement 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. 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 (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 national competent authority (NCA) forwarded to the ECB a proposal for a decision, which contained an adverse opinion as to the reputation of the acquirers and invited the ECB to oppose the acquisition.

On 25 October 2016, the ECB adopted a final decision opposing the acquisition by Mr Berlusconi and Fininvest of the qualifying holding in Banca Mediolanum on the ground that the acquirers did not meet that reputation requirement and that there were serious doubts as to their ability to ensure that that financial institution would be managed soundly and prudently in the future (hereinafter 'ECB Decision').

Mr Berlusconi and Fininvest, first, challenged this ECB Decision before the General Court of the European Union (*Fininvest and Berlusconi* v *ECB*, in case T-913/16). Second, Fininvest brought proceedings before the Tribunale amministrativo regionale per il Lazio for annulment of the Banca d'Italia's acts preparatory to the ECB's decision. Third, Mr Berlusconi and Fininvest both brought an *azione di ottemperanza* before the Consiglio di Stato.

In that last action, Mr Berlusconi and Fininvest submitted that the Banca d'Italia's proposal for the ECB Decision is void because it disregards the force of *res judicata* of the judgment of the Consiglio di Stato of 3 March 2016. By way of defence, the Banca d'Italia pleaded in particular that the national courts lack jurisdiction to hear the action, as it concerns preparatory acts, containing nothing in the nature of a decision, which are directed at the adoption of a decision falling within the exclusive competence of an EU institution and which, just like the final decision, come under the jurisdiction of the EU Courts alone.

Against this backdrop, the Consiglio di Stato referred to the CJEU two questions for a preliminary ruling. First, it asked whether Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in the procedure provided for in Articles 22 and 23 of the CRD IV, in Articles 4(1)(c) and 15 of the SSM Regulation and in Articles 85 to 87 of the the SSM Framework Regulation. Second, it asked whether the

[1] PhD in Law at the European University Institute and legal counsel at the European Central Bank (ECB). The views expressed are purely personal and do not represent the ones of the ECB.

answer to that question is different where a specific action for a declaration of invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision is brought before a national court.

Judgment

In line with the opinion of the Advocate General Campos Sánchez-Bordona, the CJEU held that Article 263 TFEU precludes national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in the procedure provided for in Articles 22 and 23 of the CRD IV, in Articles 4(1)(c) and 15 of the SSM Regulation and in Articles 85 to 87 of the SSM Framework Regulation and that it is immaterial in that regard that a specific action for a declaration of invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision has been brought before a national court.

According to the CJEU, it is necessary to distinguish between two situations in which the NCAs are involved in administrative proceedings which are concluded by an act adopted by EU institutions (paras 43-45): (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 is for 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, it is for the EU Courts 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.

The CJEU held that the procedure for the authorisation of the acquisition of a qualifying holding in a credit institution falls under the second situation described because within the framework defined by Article 15(1) and (2) of the SSM Regulation and in Articles 85 to 87 of the SSM Framework Regulation, only the ECB has the decision-making power, whereas the NCA's proposal is not binding on the ECB and does not produce legally effects on the applicant (para 55).

The CJEU motivated this conclusion with the following arguments.

First, where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution (para 48).

Second, it is necessary to ensure a single judicial review of acts adopted by EU institutions capable of producing binding legal effects (para 49). If national courts were to be allowed to review the NCA's proposal in this type of procedure, the risk of divergent judicial assessments would not be ruled out and, therefore, the EU courts' exclusive jurisdiction to rule on the legality of that final decision could be compromised, in particular where the EU institution's decision follows the analysis and the proposal of those authorities' (para 50).

Consequently, the CJEU held that 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 rendering unlawful the acts preparatory to that decision that were adopted by the Bank of Italy. That jurisdiction excludes any jurisdiction of national courts in respect of those acts, and it is irrelevant in that regard that an action such as the *azione di ottemperanza* has been brought before a national court (para 57).