

# The EU Courts as *juges de droit national*?

## Judicial review of composite procedures and the role of national law after *Berlusconi*

Jouke Tegelaar | EBI Young Researchers Virtual Workshop Session No. 8



Universiteit  
Leiden  
The Netherlands

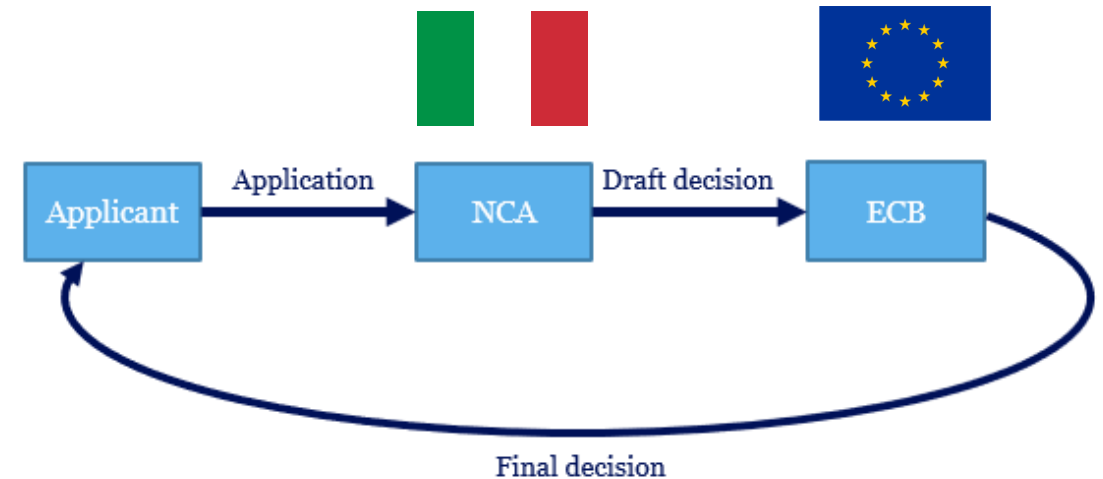
# Overview

1. Setting the scene
2. Concept of a 'composite procedure'
3. Judicial review of composite procedures
4. SSM composite procedures
5. Berlusconi and Fininvest v Bank of Italy
6. EU Courts as *juges de droit national*?
7. Conclusions

# Setting the scene

## *Berlusconi and Fininvest v Bank of Italy* (2018)

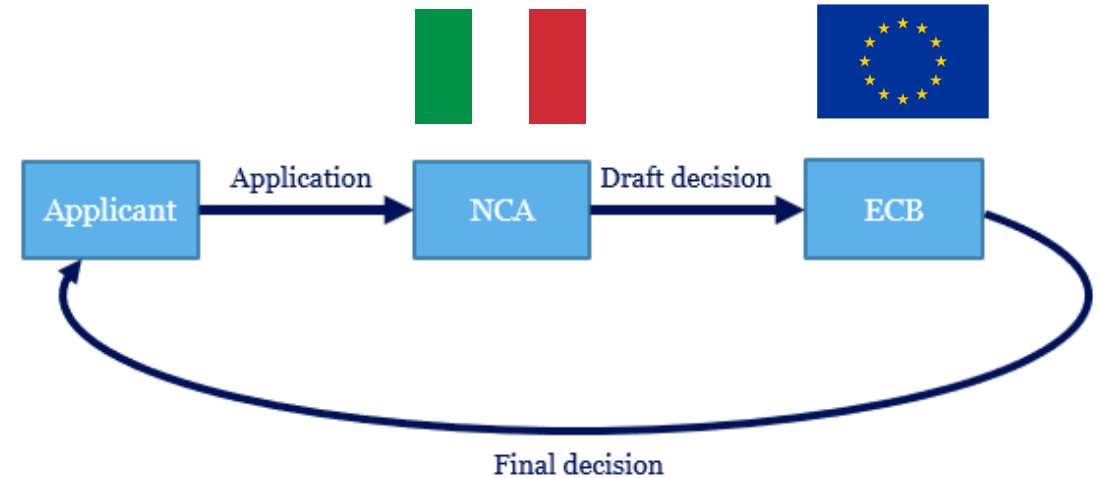
- More clarity on division of jurisdiction in judicial review of composite procedures
- ‘Single judicial review’
- Court has exclusive jurisdiction to review entire composite procedure, including national preparatory acts
- EU Courts as *juges de droit national*?



# Concept of a 'composite procedure'

EU administration as an integrated administration

Composite procedure specific type of integrated administration



## Definition

EU administrative procedure that involves procedural steps undertaken by national as well as EU authorities, leading to either a national final act or an EU final act

➡ Often argued that composite procedures are at odds with the 'dualistic' judicial system

# Concept of a ‘composite procedure’

Different roles for national authorities:

- Adopting binding preparatory acts that leave no discretion to the EU authority and thus predetermine the outcome at EU level
- Adopting preparatory acts, such as draft decisions, that will inform the decision-making by the EU authority but are not binding
- Serving as a ‘front desk’ for applications or documents which are forwarded to the EU level



National decisional dominance

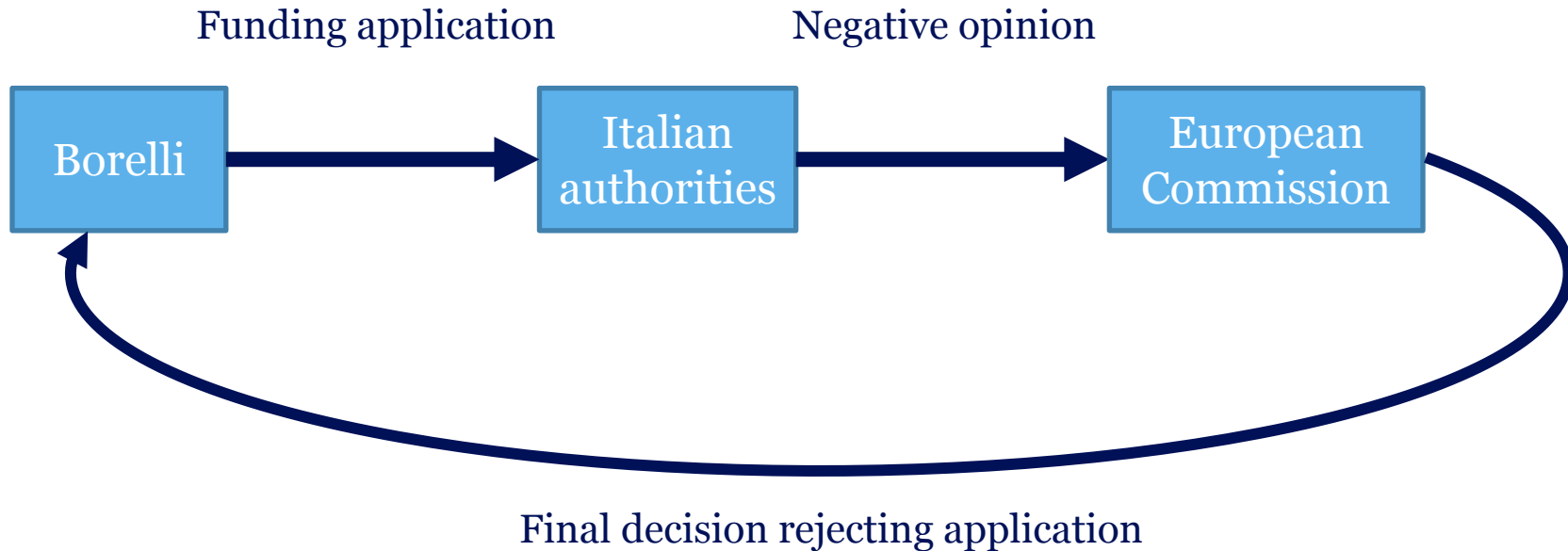
Shared decisional powers

No national decisional powers

 Qualification of national input decisive for division of jurisdiction in judicial review

# Judicial review of composite procedures

*Borelli* (1992) – procedure for granting of EU funding



- Negative opinion binding on Commission
- Determined the terms of the Commission decision: rejection
- National court has jurisdiction to review national act
- No direct action under Art. 263 TFEU available against the Commission decision

# Example of ‘composite procedures’

*Sweden v Commission* (2007) – procedure for access to documents



- Germany was ‘merely being given [...] a power to take part in the Community decision’
- ‘a decision-making procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed’
- ‘In such a case it is within the jurisdiction of the Community judicature to review [...] whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State’

# SSM composite procedures

SSM structure qualifies as an integrated administration, comprising of the NCAs and the ECB

SSM composite procedures:

- Procedure for granting authorisation
- Procedure for withdrawal of authorisation
- Procedure for the assessment of qualifying holdings in credit institutions

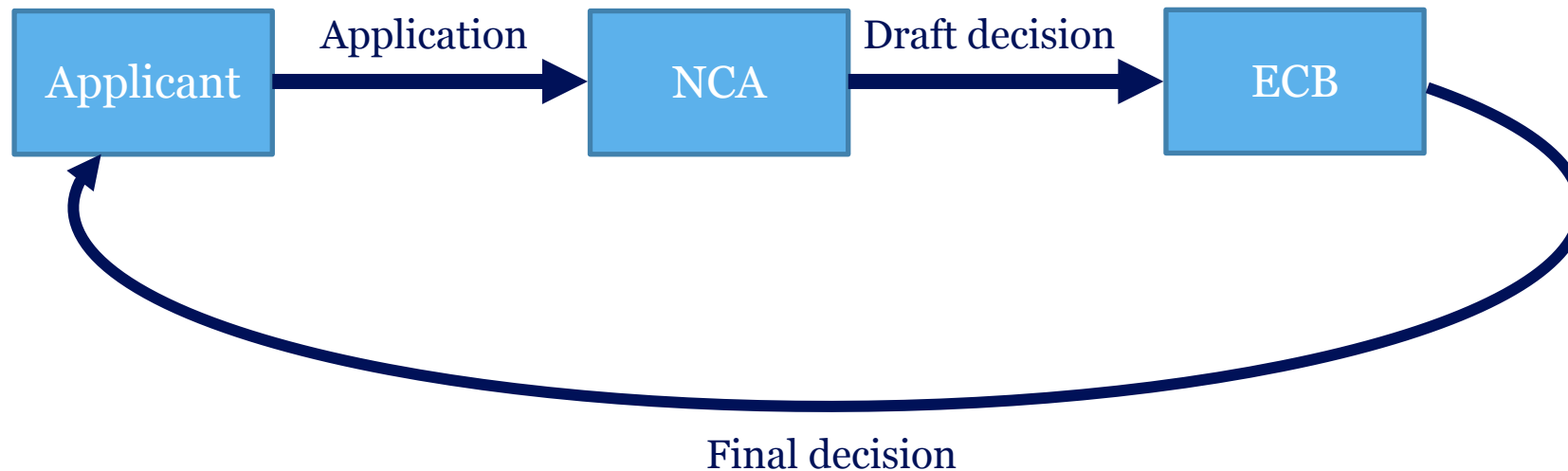
 Single Rulebook, but partly transposed in national law



# SSM composite procedures

Procedure for the assessment of qualifying holdings in credit institutions

- Art. 15 SSM Regulation and Art. 85-88 SSM Framework Regulation
- ECB is exclusively competent with regard to this task (Art. 4(1)(c) SSM Regulation)



# Berlusconi and Fininvest v Bank of Italy

## Article 263, first subpara, TFEU

### Preliminary question

Should Article 263 TFEU be interpreted as meaning that EU Courts have jurisdiction or as meaning that national courts have jurisdiction to review the NCA draft decision preceding the final ECB decision?

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

# Berlusconi and Fininvest v Bank of Italy

## The Court

Two types of composite procedures:

- a) Procedures where an EU authority has the 'exclusive decision-making power' without being bound by national preparatory acts or proposals
- b) Procedures where an EU authority has only a limited or no discretion, so that the national act is binding on the EU institution

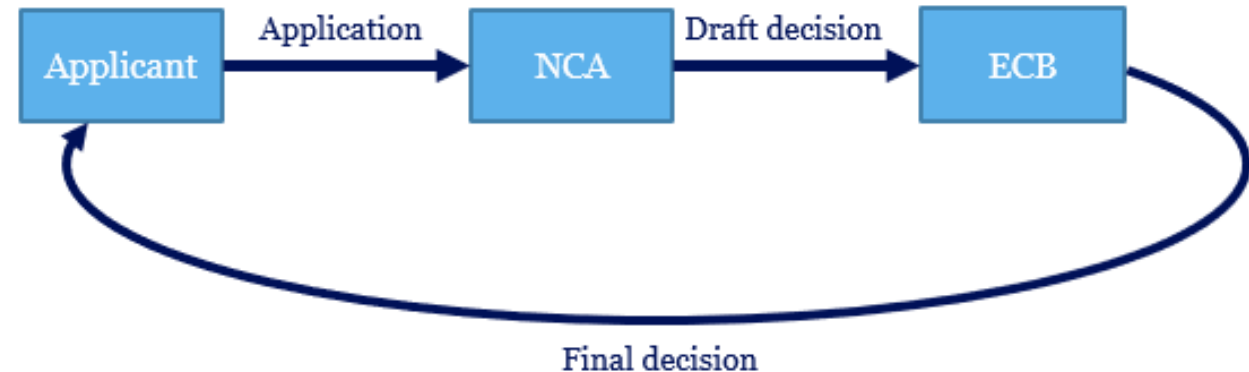


'Single judicial review'

# Berlusconi and Fininvest v Bank of Italy

## 'Single judicial review'

- rule on the legality of the final EU decision
- 'examine any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that decision'
- national courts are forbidden from reviewing non-binding national acts



—————> EU Courts as *juges de droit national*?

# EU Courts as *juges de droit national*?

## Two issues

Are the EU Courts competent to apply national law?

How should the EU Courts establish the content of national law?

## Risks

Violations of national law beyond review

Uniformity of national law

# EU Courts as *juges de droit national*?

Is the Court competent to apply national law?

In principle not:

98. That judgment may appear to be harsh but it is based on very sound reasons which, in my view, preclude any possibility of calling it into question. It is impossible to see how the Community Court, which has sole jurisdiction to declare a Community act invalid, could form an opinion as to the existence of an irregularity with respect to national law when it has no jurisdiction to interpret or apply that law in the context of the jurisdiction conferred on it under Articles 173 of the EC Treaty (now, as amended, Article 230 EC) and 177 of the Treaty.

But: Art. 4(3) SSM Regulation?

GC 24 April 2018 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB*

- 48 Therefore, pursuant to Article 4(3) of Regulation No 1024/2013, the ECB was required to apply not only Article 13(1) of Directive 2013/36 but also the provision of national law transposing it, namely, the second paragraph of Article L. 511-13 of the CMF.
- 49 Thus, Article 4(3) of Regulation No 1024/2013 necessarily requires the Court to assess the legality of the contested decisions in the light of both Article 13(1) of Directive 2013/36 and the second paragraph of Article L. 511-13 of the CMF.



GC considers itself competent to apply national law as referred to in Art. 4(3) SSM Regulation

AG Mischo in *Association Greenpeace France*

# EU Courts as *juges de droit national*?

Is the Court competent to apply national law?

Limitations to the competence to apply national law:

- Limited scope of ‘national law’ as referred to in Art. 4(3) SSM Regulation

And limitations to the effect on the validity of the EU final act of violations of national law?

- ‘examine any **defects** vitiating the preparatory acts or the proposals of the national authorities **that would be such as to affect the validity of that [EU] decision**’



EU case law: only defects that would qualify as an irregularity **on grounds of EU law**

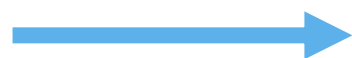
# EU Courts as *juges de droit national*?

How should the EU Courts establish the content of national law?

GC 13 December 2017 *Crédit mutuel Arkéa v ECB*, para 132:

Starting point: ‘the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts’

No such case law? ‘[I]n the absence of decisions by the competent national courts, it is for the Court to rule on the scope of those provisions’



More judicial cooperation? Reverse preliminary reference procedure?



# Conclusions

- *Berlusconi* introduced ‘single judicial review’ at EU level for composite procedures
- EU Courts on the eve of their role as *juges de droit national*
- But are embedded in a system that did not anticipate such a role:
  - Jurisdictional limits
  - Underdeveloped system of reverse judicial cooperation
- Risking a gap in judicial review

All eyes on the Court

# Thank you!

Jouke Tegelaar, LLM  
PhD candidate Financial Law  
[j.t.tegelaar@law.leidenuniv.nl](mailto:j.t.tegelaar@law.leidenuniv.nl)



Universiteit  
Leiden  
The Netherlands