Summary of the judgment in Case T-913/16 (Fininvest and Berlusconi v ECB); ECLI:EU:T:2022:279

Case T-913/16, ***Fininvest and Berlusconi v ECB***, *pending*
[request for annulment of ECB Decision of 25 October 2016 rejecting the acquisition by *Finanziaria d'investimento Fininvest S.p.A.* of a qualifying holding in Banca Mediolanum on the ground that the proposed acquirers did not meet the reputation requirements laid down by applicable legislation]
See also below, under 4. Preliminary ruling proceedings on EU Banking Law: Case C-219/17, *Berlusconi and Fininvest*

- Hearing scheduled for Thursday 16 September 2021
- Judgment scheduled for 11 May 2022

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At issue is the interpretation of the term 'acquisition of a qualifying holding' in the Capital Requirements Directive (CRD) and the scope of the ECB's powers to assess the suitability of a shareholder in a credit institution (hereafter shortened as: 'bank').

The **factual background** to the case is the condemnation of Mr. Silvio Berlusconi to a 4 year prison term for tax fraud following a judgment of the *Corte suprema di cassazione* of 1 August 2013 and the **reshuffle of shareholding in an Italian bank**, *Banca Mediolanum SpA* (hereafter: *Mediolanum*) in 2015; *Mediolanum* was thenceforth held by a bank holding company, *Fininvest*, in which the former Italian prime minister was a majority shareholder. Upon a proposal by the *Banca d'Italia*, the Italian NCA, **the ECB had refused to authorise the acquisition of a qualifying holding by *Fininvest* in *Mediolanum***. This decision of 25 October 2016 was challenged before the General Court by *Fininvest* and Mr. Berlusconi.

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In a decision of 2014, the *Banca d'Italia* had decided to suspend the voting rights of *Fininvest* and Mr. Berlusconi and to order the divestiture of shares above the 9.9% threshold (for a 'qualifying holding'), **a decision which the *Consiglio di Stato* (the Italian Council of State) annulled** on 3 March 2016. The contested decision, initiated by the *Banca d'Italia* and adopted by the ECB, followed this annulment: it had restored the voting rights of Mr. Berlusconi and annulled the requirement to sell shares in excess of 9.9%.

[An **earlier procedure** concerning this same supervisory procedure had resulted in a **preliminary ruling** of 19 December 2018, ECLI:EU:C:2018:1023, in Case C-219/17, *Berlusconi and Fininvest*. In it, the Court of Justice 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 context of the SSM: any defects resulting from a procedure initiated by an NCA, are to be scrutinised by European courts alone, when the ECB decision concluding the procedure is challenged (summary here)].

The **first head of claim** concerned an **error of law and abuse of power** ('*détournement de pouvoir*') by the ECB for assessing the share transactions as an acquisition of shares in a bank; only new acquisitions – not a reshuffling of shares in an existing one – are subject to prudential supervisory scrutiny.

After setting out the EU and Italian legislation applicable (paras 31-41), the General Court starts with a reference to the **uniform interpretation of an EU term as an autonomous concept** (para 44). As the **term 'acquisition of a qualifying holding'** is **not defined in EU law**, its interpretation is to be based on, first, "the general context of its use and its usual meaning in everyday language and, second, the objectives pursued by the provisions of EU law governing the procedure for authorising acquisitions of qualifying holdings as well as the effectiveness of those provisions"[1]. The Court emphasises that "a

[1] Text from the CJEU's press release No 80/22 of 11 May 2022; see: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-05/cp220080en.pdf.

prior assessment of the quality of any person who plans to take a stake in a credit institution is essential to guarantee the quality and financial solidity of the owners of these institutions" (para 52). Also in view of the purpose of the rule, "[**the notion of a qualifying holding] cannot be interpreted restrictively** so as to apply only to assumptions of acquisitions resulting from the purchase of shares on the market and to exclude other types of transactions allowing persons to acquire a qualifying participation such as an exchange of shares" (para 55) as "such a restrictive interpretation would have the effect of allowing the assessment procedure to be circumvented by removing from the control of the ECB certain methods of acquiring qualifying holdings and, therefore, of calling into question these objectives" (para 56). As, under Article 22 CRD, **both direct and indirect shareholdings** are subject to the assessment of the suitability of the ultimate shareholders, "where an indirect qualifying holding becomes direct or where the degree of indirect control of that qualifying holding is altered, in particular where a holding indirectly owned through two companies becomes indirectly owned through one company, the way in which the qualifying holding itself is held is altered in terms of its legal structure, with the result that such a transaction must be regarded as the acquisition of a qualifying holding"[2].

Modification of the influence of an indirect shareholder is not a trigger for the assessment procedure; the likely influence of a prospective buyer on the credit institution is one of the elements to be taken into account pursuant to Article 23 CRD in assessing the suitability of the acquirer but is not mentioned in Article 22 CRD as an element triggering the procedure: thus, the argument that Mr. Berlusconi's influence would not change after the reshuffle is therefore rejected (para 60).

The applicants' reasoning according to which the CRD and the provisions underlying the ECB's supervisory powers (Article 127(6) TFEU and Article 4 SSM Regulation) permit it **to assess potential acquisitions only** is rejected: the terms used may refer to planned acquiring but limiting their applicability to these transactions and excluding transactions already concluded without the purchasers having informed the competent authorities and without having waited for their authorization "would deprive the aforementioned provisions of any useful effect and would compromise the objective they pursue" (para 63).

Reliance on the exception for insurance undertakings in Article 127(6) TFEU is not accepted either: the objectives of the rules would easily be undermined if they were inapplicable once a credit institution also undertook insurance activities.

The General Court extensively discusses, in paras 68-90, the transactions and whether these resulted in altering the legal structure of the applicants' qualifying holding in *Mediolanum* and, thus, constituted an acquisition of a qualifying holding. Finally, without specifying on what grounds the decision would amount to an abuse of powers, this element of the plea is rejected and the first plea is held unfounded.

The **second plea** on the **alleged illegality of the CRD applying retro-actively** to transactions effected twenty years ago, is rejected: Article 22 CRD clearly encompasses only transactions after its adoption, yet, "a change in the legal structure of a qualifying holding following a merger by exchange of shares and a court decision (…) the judgment of the *Consiglio di Stato*, by which the sale of shares exceeding 9.99% was cancelled, must be qualified as an acquisition of a qualifying holding" (paras 95-101).

Short shrift is given to the **third plea** that, by adopting its decision, the **ECB disregarded the principle of *chose jugée***: "the legality of the contested decision adopted by the ECB in the exercise of its

[2] *Ibidem*.

exclusive jurisdiction cannot be challenged by invoking the judgment of the *Consiglio di Stato* of 3 March 2016" (para 106).

A lack of implementation of EU law in Italian law is pleaded under the fourth head of claim but rejected by the General Court: even though the Italian ministerial rules specifying the criteria of honourability had not been adopted when the ECB took the contested decision, Italian law referred to previous legislation which did so specify this criterion of reputation, and included a reference to a conviction to a prison term of one year or more so that the Court concludes that the criteria of Article 23(1) CRD *have* been transposed (para 125). In their rejoinder the applicants had invoked the lack of proportionality of the Italian implementing legislation of the CRD: an automatic ban on acquiring a participation when convicted of a criminal offence, which the Court rejects (para 136): "the automatic link between conviction for a particularly serious offence, such as the offenses provided for by Italian law, and the loss of good repute required of shareholders of credit institutions is not such as to call into question the object and purpose of [the CRD] and does not go beyond what is necessary to achieve the objectives pursued by this law".

Further arguments, relying on the alleged rehabilitation on court of Mr. Berlusconi (paras 138-142), on the absence in Italian law of a "publish[ed] list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification" (Article 23(4) CRD) – which did not deprive the applicants of knowledge of the applicable criteria nor prevented them from submitting the information they wished to tender – (paras 144-150), and concerning an unjustified reliance by the ECB on "common guidelines of 2008 and the circular of 1999 of the Bank of Italy" (whereas "the sentencing of Mr Berlusconi to a prison term of not less than one year for tax evasion is sufficient, as such, to conclude that he does not satisfy the good repute test": paras 151-158) are all rejected. **The fourth plea is rejected outright**.

The **fifth plea** incurs alleged **lack of reasoning and a manifest error of assessment** by the ECB. The General Court recalls that the criterion of likely influence of a proposed acquirer must be taken into account for assessing its quality and not in order to qualify an acquisition as 'qualified' (para 163). The wording of Article 23 CRD makes clear that, when applying the five criteria therein, the competent authorities "have regard to" the likely influence of the proposed acquirer on the credit institution. This 'taking into account' ("having regard to") varies according to the criterion applied: whether a person acquiring a stake is reputable or not does not depend on the extent of his influence on the bank (para 165). The ECB therefore did not insufficiently motivate its decision.

As a **sixth plea**, **lack of proportionality and violation of** Articles 16 (**Freedom to conduct a business**) and 17 (**Right to property**) of the **Charter of Fundamental Rights of the European Union** are invoked. The General Court recalls that Article 26 CRD requires a suspension of voting rights, or an annulment of votes, by way of sanction for a participation opposed by the competent authorities (para 172), whilst the ECB did not require the applicants to divest (para 173). Moreover, Italian law did not leave the ECB any choice: "the existence of a final condemnation of Mr Berlusconi to four years' imprisonment for tax evasion, (…) automatically implied that he could not satisfy the criterion of good repute" (para 176).

The **seventh plea**, on the **violation of the rights of defense and the right of access to the file** is likewise rejected: an in-depth discussion of the steps regarding access to file and the refusal to share documents between the ECB and the NCA (paras 181-211), the possibility that the decision would have been different had Mr. Berlusconi personally been able to submit observations on the draft decision, the absence of a hearing (Article 31 SSM Framework Regulation) is provided. These lines include the following: "in the light of the extensive observations of the applicants, which are set out in the summary table ['Comments Table'] annexed to the contested decision, it must be held that the ECB

did not commit a manifest error of assessment in considering that [there was no need to organise a hearing]" (para 210). Moreover, a conditional authorisation of the acquisition was impossible in view of the non-compliance with the reputability criterion (para 211).

An **eighth plea of inapplicability** (Article 277 TFEU) **of the SSM Framework Regulation is invoked**, also referring to Article 41 (**Right to good administration**) Charter, arguing that "the three-day period provided for in Article 31(3) of [the SSM Framework Regulation] for submitting observations on the draft decision is not such as to guarantee compliance with the adversarial principle and the effective exercise of the right to be heard on the facts and grievances on which decisions on the acquisition of qualifying holdings are based. (para 214)". Referring to the time limits for making observations on a draft decision under the SSM Framework Regulation and requirement for parties notifying an acquisition under Article 22 CRD, the Court concludes that "that various means make it possible, in the context of a supervisory procedure such as that at issue in the present case, to ensure compliance with the right to be heard of the parties concerned." (paras 219-224) It begins with the applicants: "In their request for authorization to acquire a qualifying holding, the persons concerned can therefore already submit all the elements necessary for the assessment of their request. (para 226)"; a next opportunity presents itself upon the notification by the ECB of the draft decision whilst, thirdly, "in the event that the ECB intends to base its decision on factual or legal considerations of which the applicant was unaware or on evidence other than that provided by the applicant, respect for the right to be heard can be ensured thanks to the possibility, which the ECB has, of organizing a meeting" (para 228). The brevity of the period for making observations does not amount to a violation of the right to be heard (para 230). The Court invokes that participation in a credit institution can have significant financial consequences (para 234) whilst the CRD provides for a 60-day period in which the participation is to be assessed. **The eighth plea is rejected**.

The issue which had come to Luxembourg before, **alleged irregularities in the proceedings before the *Banca d'Italia***, which the Court of Justice had held to be exclusively for European courts to decide on, comes back in the **nineth plea**. This plea is new, introduced after the judgment in Case C-219/17, and is **considered inadmissible** for a number of legal reasons, including the declaratory and not 'constitutive' character of a preliminary ruling[3], and the adage ***nemo censetur ignorare legem*** (nobody is thought to be ignorant of the law), assuming that the interpretation given by the CJEU in the earlier *Berlusconi* case would have been known to the parties (as it merely confirmed what was already law).

A **tenth plea**, in which **provisions of the SSM Regulation are held to be inapplicable** under Article 277 TFEU, is likewise considered inadmissible for reasons similar to those summarised immediately above.

The applicants bring in the appeal by Mr. Berlusconi before the **European Court of Human Rights** (ECtHR) (8683/14) back in 2013 which has led to correspondence of the ECtHR to the Italian government in May 2021 (!) and a subsequent appeal before the ECtHR in 2021 and exchanges with the Italian Government in 2021 (23554/14)[4], as well as a judgment of the *Corte suprema di cassazione* (Court of cassation), n° 21970/21 of 30 July 2021– the General Court considers whether these documents bear relevance to the case at hand and considers them irrelevant or inadmissible.

RS, 3 July 2022

[3] Which imply that the effects of such a judgment date back, in principle, to the date of entry into force of the rule interpreted (para 252).

[4] See also the statement by the ECHR's Registrar ECHR 265 (2014) 23.09.2014;