Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

delivered on 11 May 2022*

(Economic and monetary policy – Prudential supervision of credit institutions – Specific supervisory tasks conferred on the ECB – Assessment of acquisitions of qualifying holdings – Opposition to the acquisition of a qualifying holding – Non-retroactivity – *Res judicata* – Application of national transposing provisions – Rights of the defence – Right of access to the file – Right to be heard – New plea in law – Primacy of EU law – Right to effective judicial protection)

In Case T-913/16,

Finanziaria d'investimento Fininvest SpA (Fininvest), established in Rome (Italy),

Silvio Berlusconi, residing in Rome,

represented by R. Vaccarella, A. Di Porto, M. Carpinelli, A. Saccucci, B. Nascimbene, N. Ghedini and A. Baldaccini, lawyers,

applicants,

v

European Central Bank (ECB), represented by C. Hernández Saseta and G. Buono, acting as Agents, and by M. Lamandini, lawyer,

defendant,

supported by

European Commission, represented by V. Di Bucci and A. Steiblytė, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU for annulment of Decision ECB/SSM/2016 – 7LVZJ6XRIE7VNZ4UBX81/4 of the ECB of 25 October 2016, whereby the ECB refused to authorise the acquisition of a shareholding by Fininvest and by Mr Silvio Berlusconi in the credit institution Banca Mediolanum SpA,

THE GENERAL COURT (Second Chamber, Extended Composition),

* Language of the case: Italian.

composed of S. Papasavvas, President, E. Buttigieg, F. Schalin, M.J. Costeira (Rapporteur) and A. Kornezov, Judges,

Registrar: M. Nuñez Ruiz, Administrator,

having regard to the written stage of the procedure and further to the hearing on 16 September 2021,

delivers the following

Judgment

I. Background to the dispute

1 Finanziaria d'investimento Fininvest SpA (Fininvest) is an Italian holding company owned as to 61.21% by Mr Silvio Berlusconi through shareholdings in four other companies governed by Italian law.

2 Mediolanum was a listed mixed holding financial company listed on the stockmarket which until 30 December 2015 held 100% of the capital of Banca Mediolanum SpA.

3 Fininvest held 30.1% of the share capital of Mediolanum and Fin. Prog. Italia held 26.5% of the capital of that company.

4 Following the entry into force of decreto legislativo n° 53 – Attuazione della direttiva 2011/89/UE, che modifica le direttive 98/78/CE, 2002/87/CE, 2006/48/CE e 2009/138/CE, per quanto concerne la vigilanza supplementare sulle imprese finanziarie appartenenti a un conglomerato finanziario (Legislative Decree No 53 implementing Directive 2011/89/EU, amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate) of 4 March 2014 (GURI No 76, of 1 April 2014, p. 1790), the Banca d'Italia (Bank of Italy) undertook a procedure for the assessment of the applicants, Fininvest and Mr Berlusconi, in their capacity as qualified shareholders of mixed financial holding companies.

5 By decision of 7 October 2014, the Bank of Italy considered that the 'good reputation' condition laid down in decreto ministeriale n° 144 – regolamento recante norme per l'individuazione dei requisiti di onorabilità dei partecipanti al capitale sociale delle banche e fissazione della soglia rilevante (Ministerial Decree No 144, Regulation laying down the rules defining the conditions of good reputation of holders of participations in the capital of banks and setting out the relevant thresholds), of 18 March 1998 (GURI No 109, of 13 May 1998, p. 101;, 'Ministerial Decree No 144'), was no longer fulfilled by Mr Berlusconi on the ground that he had been convicted of tax fraud and sentenced to a term of imprisonment following judgment No 35729/13 of the Corte suprema di cassazione (Supreme Court of Cassation, Italy), of 1 August 2013 ('the decision of 7 October 2014').

6 For that reason, the Bank of Italy ordered the suspension of the applicants' voting rights and the sale of their shares in excess of 9.99% in Mediolanum and rejected their requests to be authorised to hold a qualified holding.

7 The applicants challenged the decision of 7 October 2014 before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which, by judgment of 5 June 2015, dismissed the action.

8 On 30 December 2015, by a reverse merger transaction, Mediolanum was absorbed by its subsidiary, Banca Mediolanum.

9 On 3 March 2016, the Consiglio di Stato (Council of State, Italy) allowed the applicants' appeal against the judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) and annulled the decision of 7 October 2014.

10 Following the merger referred to in paragraph 8 above and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016 referred to in paragraph 9 above, the Bank of Italy and the European Central Bank (ECB) considered that a new request for authorisation concerning that qualified holding was required, in accordance with Article 22 et seq. of 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), and also Article 19 et seq. of decreto legislativo n. 385 – Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 – Single text of the laws on banking and credit matters), of 1 September 1993 (Ordinary Supplement to GURI No 230, of 30 September 1993; 'the TUB'), as amended by decreto legislativo No 72 (Legislative Decree No 72), of 12 May 2015.

11 By letter of 14 July 2016, the Bank of Italy invited Fininvest to submit a request for authorisation to acquire a qualified holding within two weeks. As no request was submitted within the prescribed period, the Bank of Italy decided, on 3 August 2016, to initiate of its own motion an administrative procedure against Fininvest, following which it communicated to the ECB, pursuant to Article 15(2) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63), a proposal for a decision, dated 23 September 2016, containing an unfavourable opinion concerning the reputation of the acquirers of the holding in question in Banca Mediolanum and inviting the ECB to oppose the acquisition.

12 By its decision ECB/SSM/2016 – 7LVZJ6XRIE7VNZ4UBX81/4 of 25 October 2016, the ECB opposed the applicants' acquisition of the qualified holding in Banca Mediolanum, on the grounds that they did not satisfy the condition as to reputation and that there were serious doubts as to their ability to ensure in the future a sound and prudent management of that financial institution ('the contested decision').

13 In particular, the ECB considered, in application of Articles 19 and 25 of the TUB and Article 1 of Ministerial Decree No 144, transposing Directive 2013/36, that, since Mr Berlusconi, the majority shareholder and effective proprietor of Fininvest, was the indirect acquirer of the shareholding in Banca Mediolanum and had been definitively sentenced to a term of four years' imprisonment for tax fraud, the condition of reputation imposed on the holders of qualified holdings, within the meaning of Article 23(1)(a) of Directive 2013/36, as transposed, was not satisfied. It also relied on the fact that Mr Berlusconi had committed other irregularities and had been the subject of other convictions, as had other members of the management bodies of Fininvest.

II. Procedure and forms of order sought

14 By application lodged at the Court Registry on 23 December 2016, the applicants brought the present action.

15 By document lodged at the Court Registry on 19 April 2017, the European Commission requested to intervene in the present proceedings in support of the form of order sought by the ECB.

16 By letter of 28 April 2017, the applicants submitted a request that the proceedings be stayed in application of Article 69(a) of the Rules of Procedure of the General Court, on which the ECB submitted its comments.

17 By decision of 15 June 2017, the President of the Second Chamber of the General Court authorised the Commission to intervene in support of the form of order sought by the ECB. On the same day, it was decided that the proceedings would not be stayed.

18 On a proposal from the Second Chamber, the Court decided, in application of Article 28 of the Rules of Procedure, to refer the case to a Chamber of extended composition.

19 On a proposal from the Judge-Rapporteur, the General Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure and, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, invited the parties to submit their comments on any conclusions that might be drawn from the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), for the present case. The parties complied with that request within the prescribed period.

20 By a document lodged at the Court Registry on 21 January 2019, the applicants raised new pleas in law on the basis of Article 84 of the Rules of Procedure, on which the ECB and the Commission made observations.

21 By decision of the President of the General Court of 7 May 2019, the present case was assigned to a new Judge-Rapporteur, sitting in the Second Chamber, Extended Composition.

22 Following the death of Judge Berke on 1 August 2021, the present case was assigned to a new Judge Rapporteur, sitting in the Ninth Chamber, Extended Composition, by decision of the President of the General Court of 12 August 2021.

23 By decision of the President of the General Court of 12 August 2021, a new Judge and President of Chamber was appointed to complete the composition of the Chamber.

24 The applicants claim that the Court should:

– annul the contested decision;

– order the ECB to pay the costs.

25 The ECB and the Commission contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

26 In support of their action, the applicants raise 10 pleas in law.

27 The first plea alleges, in essence, infringement of Article 4(1), Article 5(2) and Article 13(2) TEU, Article 127(6) TFEU, Article 1(5), Article 4(1)(c) and Article 15 of Regulation 1024/2013, Articles 86 and 87 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (OJ 2014 L 141, p. 1), and also of Articles 22 and 23 of Directive 2013/36, an error of law and misuse of powers, in that the ECB applied those provisions to persons already holding a qualified holding. The second plea, raised in the form of a plea of illegality, alleges that Directive 2013/36 is unlawful by reference to the principle of non-retroactivity of acts of secondary law. The third plea alleges breach of the principles of legal certainty and of the *res judicata* attaching to the judgment of the Consiglio di Stato (Council of State) of 3 March 2016. The fourth plea alleges, in essence, infringement of Article 4(3) of Regulation No 1024/2013, of Article 23(1) and (4) of Directive 2013/96 and breach of the general principles of legality, legal certainty and foreseeability. The fifth plea alleges an error of assessment and failure to state reasons by the ECB in the light of the criterion of the likely influence of the proposed acquirer on the credit institution within the meaning of Article 23(1) of Directive 2013/36. The sixth plea alleges breach of the principle of proportionality and infringement of Articles 16 and 17 of the Charter of Fundamental Rights of the European Union ('the Charter'). The seventh plea alleges breach of the rights of the defence and of the right of access to the file. The eighth plea, raised in the form of a plea of illegality, alleges that Article 31(3) of Regulation No 468/2014, which provides that the persons concerned are to have a period of three days within which to provide their comments in writing on the matters forming the grounds of the future decision of the ECB, is unlawful. The ninth plea alleges, in essence, that the preparatory acts adopted by the Bank of Italy are unlawful. The tenth plea, raised in the form of a plea of illegality, alleges that Article 4(3) and Article 15 of Regulation No 1024/2013, are unlawful, owing to their incompatibility with the right to effective judicial protection.

The first plea, alleging, in essence, infringement of Article 4(1), Article 5(2) and Article 13(2) TEU, Article 127(6) TFEU, Article 1(5), Article 4(1)(c) and Article 15 of Regulation 1024/2013, Articles 86 and 87 of Regulation No 468/2014, and also of Articles 22 and 23 of Directive 2013/36, an error of law and misuse of powers

28 The applicants maintain, in essence, that the contested decision is contrary to Article 15(3) of Regulation No 1024/2013 and Articles 22 and 23 of Directive 2013/36, in so far as the ECB classified the merger by absorption of Mediolanum in Banca Mediolanum as the acquisition of a qualified holding within the meaning of those provisions. They submit that those provisions apply only to situations in which there are a prospective acquirer and a proposal to acquire a qualified holding and not to those in which the natural or legal persons concerned already own a qualified holding.

29 The applicants also claim that, in the present case, they were already, before the merger in question, formally and materially the owners of qualified holdings in Banca Mediolanum and they infer that the ECB was not entitled to initiate the procedure that led to the contested

decision. Furthermore, the applicants maintain that the powers conferred on the ECB by the Treaties and the specific tasks entrusted to it by Regulation No 1024/2013 and Regulation No 468/2014 did not allow it to undertake an assessment of a qualified holding already held in a credit institution, but only to decide whether to oppose a potential acquisition.

30 The ECB, supported by the Commission, disputes that line of argument.

31 In that regard, it must be recalled, that Article 4(1)(c) of Regulation No 1024/2013 provides that the ECB is to be exclusively competent to carry out the task of 'assess[ing] notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15' of that regulation.

32 Article 15(3) of Regulation No 1024/2013 provides that the ECB is to decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant EU law and in accordance with the procedure and within the assessment periods set out therein.

33 In addition, in the words of the first sentence of Article 4(3) of Regulation No 1024/2013, 'for the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant EU law, and where this EU law is composed of Directives, the national legislation transposing those Directives'.

34 It follows that the ECB is required, for the purpose of carrying out its tasks, to apply the provisions of Regulation No 1024/2013 and the provisions of national law transposing Directive 2013/36, read in the light of that directive (see, to that effect and by analogy, judgment of 24 April 2018, *Caisse régionale de crédit agricole mutuel Alpes Provence and Others* v *ECB*, T-133/16 to T-136/16, EU:T:2018:219, paragraphs 47 to 50).

35 The procedure for the assessment of acquisitions of qualifying holdings is laid down in Article 15 of Regulation No 1024/2013, Articles 85 to 87 of Regulation No 468/2014 and Article 22(1) of Directive 2013/36. Those provisions lay down the obligation, for any natural or legal person who has decided to acquire, directly or indirectly, a qualifying holding in a credit institution, or to increase such a holding, to notify, in writing and before the acquisition, the authorities with competence for the credit institution in which the person in question wishes to acquire or increase a qualifying holding, the proposed amount of that holding and the relevant specified information in accordance with Article 23(4) thereof.

36 Article 19 of the TUB, as amended by Legislative Decree No 72, which transposed the content of Directive 2013/16 into Italian law, confers on the Bank of Italy competence to grant authorisations to acquire qualifying holdings in credit institutions. Article 19(5) of the TUB provides, moreover, that those authorisations are to be granted 'on conditions apt to guarantee the sound and prudent management of the bank, assessing the quality of the potential acquirer and the financial soundness of the proposed acquisition on the basis of the following criteria: the reputation of the potential acquirer within the meaning of Article 25' of the TUB.

37 Article 25(1) of the TUB, entitled 'Capital shareholding', states that those owning the shareholdings referred to in Article 19 of the TUB must be of good reputation and satisfy the criteria of competence and integrity to ensure the sound and prudent management of the bank.

38 By way of a transitional provision, Article 2(8) of Legislative Decree No 72 provides that the provisions relating to the good reputation of those owning shareholdings in credit institutions in force before the adoption of that decree are to continue to apply.

39 The provisions in question were included in Ministerial Decree No 144, Article 1 of which sets out the convictions which have a negative effect on the reputation of the person concerned and thus mean that the requisite condition is not satisfied.

40 Article 2 of Ministerial Decree No 144 provides, by way of transitional provision, that, 'for holders of a holding in the capital of a bank on the date of entry into force of this Regulation, failure to satisfy the conditions laid down in Article 1 of [this] regulation which were not set out in the previous regulations shall have no impact, for the evidence produced before that date, solely with regard to the holdings acquired previously'.

41 As regards mixed financial holding companies, Article 63 of the TUB, adopted in accordance with Article 119 of Directive 2013/36, subjected their qualified associates to the same obligations as those imposed on the qualified associates of banking institutions.

42 The analysis of the first plea entails an assessment of whether, as the applicants claim, the ECB was wrong to consider, in application of Article 15 of Regulation No 1024/2013 and Article 22(1) of Directive 2013/36 and the Italian law adopted in order to transpose that provision, that they had acquired a qualified holding as a result of the merger in question and of the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, which removed, in particular, the limitation of the exercise of the voting rights attaching to their shareholding and the transfer of their shares in Mediolanum in excess of 9.99%.

43 For the purposes of that examination, it is appropriate, first, to interpret the concept of 'acquisition of a qualifying holding', and then to assess the legality of the ECB's classification of the merger as the acquisition of a qualifying holding within the meaning of Article 15 of Regulation No 1024/2013 and Article 22(1) of Directive 2013/36, as transposed into national law.

The interpretation of the concept of acquisition of a qualifying holding within the meaning of Article 15 of Regulation No 1024/2013 and Article 22(1) of Directive 2013/36

44 First, the Court has consistently held that, according to settled case-law, it follows, from the need for uniform application of European Union law and from the principle of equality, that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union (see judgment of 5 December 2013, *Vapenik*, C-508/12, EU:C:2013:790, paragraph 23 and the case-law cited; and judgment of 11 April 2019, *Tarola*, C-483/17, EU:C:2019:309, paragraph 36).

45 Article 15 of Regulation No 1024/2013 and Article 22 of Directive 2013/36 make no express reference to the laws of the Member States for the purpose of determining the meaning and scope of the concept of acquisition of a qualifying holding.

46 Admittedly, Article 4(3) of Regulation No 1024/2013 provides that, for the purpose of carrying out the tasks conferred on it by that regulation and with the objective of ensuring high standards of supervision, the ECB is to apply all relevant EU law and, where that EU law is composed of

directives, the national legislation transposing those directives. Where the relevant EU law is composed of regulations and where currently those regulations explicitly grant options for Member States, the ECB is to apply also the national legislation exercising those options.

47 However, although that provision contains a general reference to national law adopted in order to implement relevant provisions of EU law, it cannot be understood as making an express reference, for the interpretation of the concept of acquisition of a qualifying holding, to the law of the Member States within the meaning of the case-law referred to in paragraph 44 above.

48 If the applicability of the assessment of acquisitions of qualifying holdings depended on the interpretation of that concept in the national laws, the mandatory nature of that assessment would be undermined.

49 That concept must therefore be regarded, for the purposes of the application of Article 15 of Regulation No 1024/2013 and Article 22 of Directive 2013/36, as an autonomous concept of EU law which must be interpreted in a uniform manner throughout the Member States (see, to that effect and by analogy, judgment of 14 November 2019, *State Street Bank International*, C-255/18, EU:C:2019:967, paragraph 33).

50 Second, in the absence of any definition of that concept in EU law, it must, according to settled case-law, be determined by reference to the general context in which it is used and its usual meaning in everyday language. Moreover, in construing a provision of EU law, it is necessary to consider the objectives pursued by the legislation in question and its effectiveness (see, to that effect, judgment of 13 December 2012, *BLV Wohn- und Gewerbebau*, C-395/11, EU:C:2012:799, paragraph 25 and the case-law cited).

51 In that regard, it must be observed that, in everyday language, the concept of acquisition of securities and holdings is not confined to cash transactions but may also cover various types of transactions such as forward transactions or option transactions or share-for-asset swap transactions.

52 Next, as regards the context in which the authorisation procedure for acquisitions of a qualifying holding takes place and the objectives which it pursues, it must be recalled that, as stated in recital 22 of Regulation No 1024/2013, an assessment of the suitability of any new owner prior to the purchase of a significant stake in a credit institution is an indispensable tool for ensuring the continuous suitability and financial soundness of the owners of those institutions.

53 In addition, it follows from recital 23 of Regulation No 1024/2013 that compliance with EU rules requiring credit institutions to hold certain levels of capital against risks inherent to the business of credit institutions, to limit the size of exposures to individual counterparties, to publicly disclose information on credit institutions' financial situation, to dispose of sufficient liquid assets to withstand situations of market stress, and to limit leverage is a prerequisite for credit institutions' prudential soundness. Compliance with those rules is also highly dependent on the suitability of the owners of credit institutions and any person who envisages acquiring a significant holding in such an institution.

54 Last, Article 23(1) of Directive 2013/36 makes clear that the objective of the procedure for authorising acquisitions of qualifying holdings in credit institutions is to ensure the sound and prudent management of the credit institution in which an acquisition is proposed and the suitability of the proposed acquirer, having regard to the likely influence of the proposed acquirer on that credit institution.

55 Therefore, contrary to the applicants' contention, in the light of the context of which the procedure for authorisation of acquisitions of qualifying holdings and the objectives which it pursues are part, that concept cannot be interpreted restrictively as applying only to situations in which acquisitions arise solely from the purchase of shares on the market and excluding other types of transactions which allow a qualifying holding to be acquired, such as asset swaps.

56 In fact, such a restrictive interpretation would have the effect of allowing the assessment procedure to be circumvented, thus removing certain methods of acquiring qualifying holdings from the supervision of the ECB and thus undermining those objectives.

57 Furthermore, it follows from the very wording of Article 22(1) of Directive 2013/36 that the procedure for the assessment of acquisitions of qualifying holdings in a credit institution is to apply to both direct and indirect acquisitions. Thus, where, in the course of a specific transaction, an indirect qualifying holding becomes direct, or where the degree of indirect control of that qualifying holding is altered, notably where an indirect holding owned indirectly through two companies becomes indirectly owned through a single company, the legal structure of the ownership of a qualifying holding itself is altered, so that such a transaction must be regarded as the acquisition of a qualifying holding within the meaning of that provision. Any other approach could undermine the objectives of the EU legislation referred to in paragraphs 52 to 56 above.

58 Third, having regard to the wording of Article 15 of Regulation No 1024/2013 and of Article 22(1) and Article 23(1) of Directive 2013/36, and their context and objectives, the applicability of the authorisation procedure for the acquisition of a qualifying holding to a given transaction cannot be dependent on a change in the likely influence that may be exercised by the acquirers of a qualifying holding on the credit institution to which that transaction relates.

59 In fact, it follows from Article 23(1) of Directive 2013/36, entitled 'Assessment criteria', that the likely influence of a proposed acquirer on the credit institution in question is among the factors to be taken into account for the sole purposes of assessing the suitability of the proposed acquirer and the financial soundness of the proposed acquisition. Conversely, that factor is not mentioned in Article 22(1) thereof, which governs the notification of acquisitions of a qualifying holding. Accordingly, that factor is not relevant for the purposes of the classification of a transaction as the acquisition of a qualifying holding.

60 Therefore, contrary to the applicants' assertions, in essence, the applicability of the procedure for the authorisation of the acquisition of a qualifying holding is not dependent on a change in the likely influence that may be exercised by the proposed acquirer on the credit institution.

61 Fourth, the applicants maintain that Articles 22 and 23 of Directive 2013/36 must be interpreted strictly, as relating only to potential acquisitions of qualifying holdings in credit institutions. In their submission, the specific tasks within the meaning of Article 127(6) TFEU transferred to the ECB by Regulation No 1024/2013 must include only the task of determining whether to oppose potential acquisitions. In addition, the attribution to the ECB of the power to assess notifications

of acquisitions of qualifying holdings even with respect to smaller credit institutions like Banca Mediolanum would constitute an exception to the general criterion of the size of the credit institutions on which the division of powers between the ECB and the national supervisory authorities is based.

62 However, the objectives of the procedure for the assessment of acquisitions of qualifying holdings imply that the provisions which establish that procedure must not be interpreted strictly.

63 Admittedly, Article 15 of Regulation No 1024/2013 and Article 22 of Directive 2013/36 provide for an *ex ante* review of acquisitions of qualifying holdings in credit institutions, which is why the wording of those provisions refers to a 'proposed' acquisition and to a 'proposed acquirer'. However, those provisions cannot be interpreted as not applying to transactions that might be classified as acquisition of a qualifying holding solely because such a transaction has already been implemented, without the acquirers having informed the competent authorities and having awaited their authorisation. Such an interpretation would render the abovementioned provisions wholly ineffective and undermine the objective which they pursue.

64 Furthermore, it follows from Article 4(1)(c), Article 6(4) and Article 15 of Regulation No 1024/2013 that the EU legislature conferred on the ECB exclusive competence to assess the acquisition of qualifying holdings in all credit institutions. That competence cannot therefore be regarded as an exception to the general criterion of the size of the credit institutions.

65 Fifth, the applicants claim that the ECB's interpretation of Articles 22 and 23 of Directive 2013/36 would be contrary to Article 127(6) TFEU, which precludes the possibility of conferring on the ECB tasks relating to the prudential supervision of insurance companies.

66 However, the objectives of the provisions in question could not be satisfied if the mere fact that a credit institution also carries on insurance business had the effect of taking it outside the supervision of the ECB.

67 The assessment procedure in question therefore applies to acquisitions of qualifying holdings in a credit institution, irrespective of the fact that it also carries on insurance business and the ECB did not err in law in that respect.

The classification of the merger by absorption of Mediolanum by Banca Mediolanum as the acquisition of a qualifying holding within the meaning of Article 15 of Regulation No 1024/2013 and Article 22(1) of Directive 2013/36 and also of Italian law resulting from the transposition of that provision

68 It is necessary to ascertain whether, as the applicants claim, the ECB was wrong to consider that, following the merger by absorption of Mediolanum in Banca Mediolanum and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, the applicants had acquired a qualifying holding within the meaning of Article 15 of Regulation No 1024/2013 and Article 22(1) of Directive 2013/36 and of Italian law resulting from the transposition of that provision.

69 In that regard, it is common ground that the merger by absorption of Mediolanum in Banca Mediolanum consisted in an asset swap whereby Fininvest legally acquired shares in Banca Mediolanum when it did not have any before the merger.

70 In fact, before the merger and the decision of 7 October 2014 whereby the Bank of Italy suspended the applicants' voting rights and ordered them to sell their shares in Mediolanum in excess of 9.99%, Fininvest and Mr Berlusconi, through the intermediary of Mr Berlusconi, disposed of 30.16% of the shares of Mediolanum, which itself owned 100% of the shares of Banca Mediolanum.

71 In so far as the proportion of the voting rights that could be exercised indirectly, through Mediolanum, by Fininvest was above the threshold of 20% provided for in Article 22(1) of Directive 2013/36, Fininvest and, consequently, Mr Berlusconi indirectly held a qualifying holding in Banca Mediolanum, as they claim.

72 Following the decision of 7 October 2014 whereby the Bank of Italy suspended the applicants' voting rights, refused to grant authorisation allowing them to hold a qualifying holding in Mediolanum and ordered them to sell their shares in Mediolanum in excess of 9.99%, the applicants' indirect holding was no longer a qualifying holding.

73 Following the merger by absorption of Mediolanum by Banca Mediolanum, on 30 December 2015, Fininvest became the direct holder of 9.99% of the shares of Banca Mediolanum.

74 Fininvest, which is the central acquirer in the transaction in question, and of which Mr Berlusconi is the indirect majority shareholder, owned no shares in Banca Mediolanum before the reverse merger, then, following that transaction, became the holder of shares in Banca Mediolanum.

75 Thus, Fininvest's indirect holding in Banca Mediolanum became a direct holding.

76 Furthermore, following the annulment of the decision of 7 October 2014 by the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, Fininvest became the direct holder of 30.16% of the shares in Banca Mediolanum.

77 Therefore, as the ECB considered in the contested decision, Fininvest's indirect holding in Banca Mediolanum became, following the merger in question and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, a direct qualifying holding.

78 In so far as the entity controlled by Mr Berlusconi acquired a direct qualifying holding in Banca Mediolanum, the legal structure of Mr Berlusconi's indirect qualifying holding in Banca Mediolanum must also be considered to have been altered.

79 Whereas Mr Berlusconi held an indirect holding in Banca Mediolanum, first through Fininvest and then through Mediolanum, he now holds an indirect holding in Banca Mediolanum solely through Fininvest.

80 It follows that the merger in question had the effect, following the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, of modifying the legal structure of the applicants' qualifying holding in Banca Mediolanum and that, accordingly, the ECB was correct to classify that transaction as the acquisition of a qualifying holding within the meaning of Article 15 of Regulation No 1024/2013 and Article 22 of Directive 2013/36, even though the amount of the applicants' qualifying holding was unchanged from the amount which they previously owned through Mediolanum.

81 In that regard, the fact that the applicants already held a qualifying holding in Banca Mediolanum – as confirmed by the existence of a shareholders' agreement between Fininvest and Fin. Prog. Italia, which allowed them to exercise joint control of Mediolanum and Banca Mediolanum before the merger in question, and by the signature of a new agreement, concluded on 14 September 2016 following the merger in question and again establishing joint control of Fininvest and Fin. Prog. Italia over Banca Mediolanum – is not such as to show that the contested decision was wrong to find that the applicants had acquired a qualifying holding, in so far as those agreements do not call in question the fact that the legal structure of the applicants' qualifying holding was altered.

82 In those circumstances, the argument that the ECB carried out a review more than one year after the merger, contrary to Articles 22 and 23 of Directive 2013/36, which permit only a prospective assessment, must also be dismissed.

83 First, it should be borne in mind that the review procedure was initiated only a few months after the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, which had the effect of transforming the applicants' holding in Banca Mediolanum into a qualifying holding.

84 Second, and more fundamentally, since the alteration of the legal structure of the applicants' qualifying holding as a result of the merger and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016 must be classified as the acquisition of a qualifying holding in a credit institution subject to the authorisation provided for in Article 15 of Regulation No 1024/2013 and in Article 22 of Directive 2013/36, the fact that that transaction was completed without being authorised cannot have the effect of dispensing the applicants from the requirement to obtain authorisation.

85 Were that not so, the ECB would be prevented from intervening on the sole ground that the acquisition has already taken place, which would run counter to the objective of those provisions and to the mandatory nature of the assessment of qualifying holdings in a credit institution (see paragraph 63 above).

86 Furthermore, the applicants claim that, according to the national legislation and case-law, the merger did not entail the extinction of one entity or the creation of another. They infer that the merger did not entail the acquisition by them of a new holding in Banca Mediolanum.

87 However, as is apparent from paragraphs 48 and 49 above, the concept of acquisition of a qualifying holding in a credit institution is an autonomous concept that cannot depend on the definitions in Italian company law. Thus, although the event giving rise to a review by the ECB is the implementation of a merger by absorption carried out under Italian law, the effects of such a transaction must be assessed in the light of the criteria arising solely from the application of EU law. The parties cannot therefore rely on the fact that the application of Italian law in that regard would have the consequence that the merger in question would escape the procedure provided for in Article 15 of Regulation No 1024/2013 and Articles 22 and 23 of Directive 2013/36.

88 Furthermore, irrespective of whether the merger entailed the extinction of one entity and the creation of another entity under Italian law, that transaction in any event entailed a change in the legal structure of the applicants' holding.

89 The arguments which the applicants derive from Italian law or from the obligation to interpret Italian law in accordance with the directives on company law are therefore ineffective.

90 It follows that the arguments whereby the applicants allege an infringement of Articles 22 and 23 of Directive 2013/36, Article 1(5), Article 4(1)(c) and Article 15 of Regulation No 1024/2013, Articles 86 and 87 of Regulation No 468/2014, read with Article 4(1), Article 5(2) and Article 13(2) TEU and Article 127(6) TFEU must be dismissed.

The misuse of powers

91 As regards, last, the allegation of a misuse of powers, it should be borne in mind that, according to the case-law, a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (judgment of 10 March 2005, *Spain* v *Council*, C-342/03, EU:C:2005:151, paragraph 64).

92 Nonetheless, the applicants merely mention a misuse of powers in the title of their first plea, without further explanation of how the contested decision would constitute such a misuse and without relying on any objective evidence of such misuse within the meaning of the case-law cited in paragraph 91 above.

93 Therefore, it must be stated that the applicants are not in a position to establish that the ECB misused its powers.

94 Consequently, the first plea is unfounded.

The second plea, alleging, on the basis of Article 277 TFEU, that Directive 2013/36 is unlawful

95 The applicants claim that, if Articles 22 and 23 of Directive 2013/36 were to be interpreted as meaning that their scope covers capital holdings acquired more than 20 years ago, that directive would be unlawful, since the EU legislature would have failed to have regard to the principle of non-retroactivity of acts of secondary law.

96 The ECB, supported by the Commission, disputes that line of argument.

97 In that regard, Article 22 of Directive 2013/36, entitled 'Notification and assessment of proposed acquisitions', provides, in essence, that Member States are to require any person who has taken a decision to acquire, directly or indirectly, a qualifying holding in a credit institution to notify the competent authorities of that decision, in writing and in advance of the acquisition, and that that decision may be authorised only if that person satisfies the criteria set out in Article 23 of that directive.

98 It is thus clear that the scope of Articles 22 and 23 of Directive 2013/36 does not cover acquisitions of qualifying holdings that preceded its entry into force and, accordingly, were already held, but only decisions to acquire qualifying holdings proposed after its entry into force.

99 It follows that the EU legislature did not fail to have regard to the principle of non-retroactivity of acts of secondary law.

100 In so far as this plea seeks to challenge the application of Articles 22 and 23 of Directive 2013/36 to situations such as that in the present case, it is sufficient to observe that an alteration of the legal structure of a qualifying holding following a merger by share swaps and a judicial decision, such as, in the present case, the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, whereby the Finevest's sale of the shares in excess of 9.99% was annulled, must be classified as the acquisition of a qualifying holding within the meaning of those provisions.

101 Consequently, the second plea is unfounded.

The third plea, alleging, in essence, breach of the principles of legal certainty and res judicata

102 The applicants maintain, in essence, that the ECB breached the principle of *res judicata* attaching to the judgment of the Consiglio di Stato (Council of State) of 3 March 2016 and, consequently, the principle of legal certainty.

103 The ECB, supported by the Commission, disputes that line of argument.

104 In that regard, it must be recalled that, under Article 4(1)(c) of Regulation No 1024/2013, read with Article 15(3) of that regulation and with Article 87 of Regulation No 468/2014, the ECB is exclusively competent, subject to review by the Courts of the European Union, to decide whether to authorise the proposed acquisition at the close of the procedure provided for, in particular, in Article 15 of Regulation No 1024/2013 and in Articles 85 and 86 of Regulation No 468/2014.

105 The decision of a national court which has acquired the status of *res judicata* cannot therefor be relied on in order to impede the exercise of the exclusive competence of an institution of the European Union (see, to that effect and by analogy, judgment of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 62 and 63).

106 Accordingly, the legality of the contested decision adopted by the ECB in the exercise of its exclusive competence cannot be challenged in reliance on the judgment of the Consiglio di Stato (Council of State) of 3 March 2016.

107 It follows that the arguments alleging failure to have regard to the *res judicata* attaching to that judgment and breach of the principle of legal certainty, which is alleged to be its corollary, must be rejected.

108 Consequently, the third plea is unfounded.

The fourth plea, alleging infringement of Article 4(3) of Regulation No 1024/2013, Article 23(1) and (4) of Directive 2013/36 and breach of the general principles of legality, legal certainty and foreseeability

109 The applicants claim that the contested decision was adopted in breach of Article 4(3) of Regulation No 1024/2013 and of Article 23(1) and (4) of Directive 2013/36, in that (i) Article 23(1) thereof was not transposed into Italian law; (ii) the list referred to in Article 23(4) of that directive was not published in Italy, as required by that provision; and (iii) the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sectors, adopted by the European Banking Authority (EBA), the European Insurance

and Occupational Pensions Authority (EIOPA) and the European Financial Markets Authority (EFMA) ('the 2008 Joint Guidelines'), applied in the contested decision, cannot be relied on as against the applicants.

110 The ECB, supported by the Commission, disputes that line of argument.

The first complaint: Article 23(1) of Directive 2013/36 was not transposed into Italian law

111 The applicants maintain, in essence, that Article 23(1) of Directive 2013/36 was not transposed into Italian law and they infer that the ECB could not apply the criteria set out in that article in reliance, for the purpose of the application of those criteria as defined in Italian law, on Ministerial Decree No 144 and Ministerial Decree No 675 of 27 July 2011, adopted by the Minister for the Economy in his capacity as President of the Comitato Interministeriale per il Credito ed il Risparmio (Interministerial Committee for Credit and Savings), which were adopted before the directive.

112 The ECB thus erred in law by applying the provisions of Ministerial Decrees Nos 144 and 675, referred to in paragraph 111 above, which do not transpose Directive 2013/36.

113 In that regard, it should be borne in mind, in the first place, that, under Article 4(3) of Regulation 1024/2013, for the purpose of carrying out the tasks conferred on it by that regulation and with the objective of ensuring high standards of supervision, the ECB is to apply all relevant EU law and, where that EU law is composed of directives, the national legislation transposing those directives.

114 In the second place, it must be observed that, in accordance with Article 4(3) of Regulation No 1024/2013, the ECB applied, in the contested decision, a number of provisions of national law, including, in particular, Articles 19 and 25 of the TUB, together with Ministerial Decree No 144.

115 In the third place, it should be borne in mind that Directive 2013/36 was transposed into Italian law by the adoption of Legislative Decree No 72, amending the TUB.

116 The TUB provides, in Article 19, that the Bank of Italy is to grant authorisation to the acquisition of a qualifying holding in a credit institution where the conditions apt to guarantee the sound and prudent management of the bank, following an assessment of the qualities of the prospective acquirer and the financial soundness of the proposed acquisition, on the basis, in particular, of the criterion relating to the reputation of the prospective acquirer, are met.

117 As regards the criterion relating to reputation, Article 25 of the TUB provides that the conditions of reputation and the criteria of competence must be defined by a decree adopted by the Minister for the Economy and Finance.

118 On the date of adoption of the contested decision, the Decree of the Minister for the Economy and Finance defining the conditions of reputation and the criteria of competence, provided for in Article 25 of the TUB, had not been adopted.

119 However, Article 2(8) of Legislative Decree No 72 provided that, pending the entry into force of the procedures for application adopted under Article 25 of the TUB, that article in its previous version and the procedures for application relating to that article, in their previous version, were to continue to apply.

120 Those procedures for application relating to Article 25 of the TUB had been defined by the provisions of Ministerial Decree No 144, adopted in application of Article 25 of the TUB in the version applicable on 1 January 2004.

121 Ministerial Decree No 144 provided, in particular, in Article 1, that no holder of the capital of a bank holding more than 5% of its capital represented by voting shares could exercise the voting rights attached to the shares or to the excess parts, in particular where he or she had been convicted and sentenced by a judicial decision which had become final, without prejudice to the effects of rehabilitation, to a term of imprisonment of not less than one year for an offence or breach of trust against the public administration, an offence against property, a public order offence, an economic offence or a tax offence.

122 Accordingly, for the purposes of the transposition into Italian law of Article 23(1) of Directive 2013/36, Legislative Decree No 72 provided that the conditions relating to reputation to be assessed pursuant to that article were those defined in Article 1 of Ministerial Decree No 144, pending the adoption of the decree provided for in the new version of Article 25 of the TUB.

123 In that regard, the applicants claim that Ministerial Decree No 144 merely draws up an exhaustive list of convictions constituting grounds for the prohibition of the exercise of voting rights and not of the acquisition of qualifying holdings and, accordingly, that it cannot be viewed as an act transposing the provisions in question.

124 However, it is sufficient to state that, in application of Legislative Decree No 72, the list of convictions set out in Article 1 of Ministerial Decree No 144 also defines the criteria against which the reputation of a prospective acquirer of qualifying holdings in a credit institution is to be assessed.

125 It follows that, contrary to the applicants' assertion, the criteria defined in Article 23(1) of Directive 2013/36 were transposed into Italian law.

126 The ECB therefore did not err in law in applying the criteria set out in Article 23(1) of Directive 2013/36, as transposed by Articles 19 and 25 of the TUB, in reliance on Ministerial Decree No 144.

127 In the fourth place, the applicants claim in the reply that the automatic connection, provided for in Ministerial Decree No 144, between a conviction and a prohibition on the acquisition of a qualifying holding in a credit institution is incompatible with the purpose and the aim of Directive 2013/36 and the principle of proportionality.

128 In that regard, it must be borne in mind that, under Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

129 However, a plea which expands on a plea raised previously, whether explicitly or implicitly, in the application and which is closely connected with that plea must be declared admissible.

130 In order to be regarded as expanding on a plea or a complaint raised previously, a new argument must have a sufficiently close connection with the pleas or complaints initially raised in the application (judgment of 16 December 2010, *AceaElectrabel Produzione* v *Commission*,

C-480/09 P, EU:C:2010:787, paragraph 111; see also, to that effect, judgment of 12 November 2009, *SGL Carbon* v *Commission*, C-564/08 P, not published, EU:C:2009:703, paragraphs 20 to 34).

131 In the application, the applicants claimed, in essence, that Article 23(1) of Directive 2013/36 had not been transposed into Italian law.

132 The argument raised in the reply, that the provisions transposing Directive 2013/36 into Italian law are incompatible with the purpose and the aim of that directive and with the principle of proportionality, thus have a sufficiently close connection with the arguments in the application, as its purpose is also to take issue with the transposition of that directive into Italian law. That argument is therefore admissible.

133 However, it must be observed that the automatic connection between a conviction for an offence of particular gravity, such as a conviction and sentence by a judicial decision which has become final to a term of imprisonment of not less than one year for certain well defined offences, and the loss of the reputation required of shareholders of credit institutions is such as to enable the attainment of the objective of Directive 2013/36 of ensuring that persons holding a qualifying holding in a credit institution are of sufficiently good reputation.

134 In fact, it must be stated that holders of qualifying holdings in credit institutions who have been convicted of offences or breach of trust vis-à-vis the public administration, property offences, public order offences and economic offences or tax offences and sentenced to a term of imprisonment of not less than one year would be liable to jeopardise the sound and prudent management of those credit institutions and, consequently, affect the smooth operation of the banking system.

135 Furthermore, it should be emphasised that under Italian law only convictions and sentences imposed in judicial decisions which have become final are taken into account and only certain well defined offences of such a kind as to call a person's reputation in question are considered relevant for the purposes of the assessment of the reputation of the prospective acquirer.

136 Thus, in the light of the gravity of such convictions and their precise definition in Italian law, and contrary to the applicants' contention, the automatic connection between conviction of an offence of particular gravity, such as the offences provided for in Italian law, and the loss of the reputation required of shareholders in credit institutions is not likely to call in question the purpose and aim of Directive 2013/36, and does not go beyond what is necessary to achieve the objectives pursued by that legislation.

137 Therefore, the applicants' arguments must be dismissed.

138 In the fifth place, the applicants maintain, in the reply, that the ECB's assessment of Mr Berlusconi's conviction is flawed in national law, because he was the subject of a decision equivalent to rehabilitation.

139 In the application, the applicants did not raise any plea or argument alleging an error of assessment by the ECB concerning Mr Berlusconi's conviction and, in particular, the failure to take into account Decision No 2412/2015 of the Tribunale di sorveglianza di Milano (Surveillance Court, Milan, Italy), dated 9 April 2015 and notified on 14 April 2015, or of the

case-law of the Corte suprema di cassazione (Supreme Court of Cassation), which treats a decision of that type as a rehabilitation within the meaning of Article 1(1)(b) of Ministerial Decree No 144.

140 The argument alleging an error of assessment by the ECB concerning Mr Berlusconi's conviction therefore does not amplify an argument raised previously, whether directly or indirectly, in the application initiating the proceedings and having a close connection with that argument.

141 Furthermore, since the decision of the Tribunale di sorveglianza di Milano (Surveillance Court, Milan) referred to in paragraph 139 above and the case-law on which the applicants rely predate the contested decision, they cannot be considered to be new matters of law or of fact which came to light in the course of the procedure, within the meaning of Article 84 of the Rules of Procedure.

142 That argument is therefore inadmissible.

143 Consequently, the first complaint must be dismissed.

The second complaint: there was no publication by the Member State concerned of the list provided for in Article 23(4) of Directive 2013/36

144 The applicants claim, in essence, that the publication of the list of information necessary in order to carry out the assessment provided for in Article 23(4) of Directive 2013/36 had not taken place in Italy on the date on which the contested decision was adopted. Thus, since that list 'represents essential protection of legal certainty and legality', the contested decision is vitiated by an infringement of Article 4(3) of Regulation No 1024/2013 and Article 234(1) and (4) of Directive 2013/36.

145 In that regard, it must be recalled that, under Article 23(1) of Directive 2013/36, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, the competent authorities are to assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition.

146 In order to enable the competent authorities to carry out that assessment, Member States are to publish a list, provided for in Article 23(4) of Directive 2013/36, 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. It thus transpires that that list, while being intended to specify the necessary information that the credit institution concerned must provide to the national authorities to enable them to carry out that assessment, is not intended to define the actual criteria for the assessment of the reputation of proposed acquirers by the competent authorities.

147 In that regard, it should be observed that the criteria for the assessment of reputation were previously defined and published in Italian law by Ministerial Decree No 144, to which Article 25 of the TUB refers, read with Article 2(8) of Legislative Decree No 72, so that the applicants were deemed to know those criteria and were therefore in a position to put forward their views and to submit the relevant information in that regard. Accordingly, the applicants cannot allege a breach of the principles of legal certainty and foreseeability.

148 In addition, the applicants had the opportunity to submit the information that they considered relevant, so that the non-publication of the list of information that was necessary in order for the assessment to be carried out did not prevent them from submitting the information which they desired to submit.

149 In those circumstances, the failure by the Member State concerned to publish the list of information that was necessary to carry out the assessment cannot affect the legality of the assessment of the applicants' reputation that was carried out in the contested decision.

150 The complaint relating to the failure to publish the list of information that was necessary to carry out the evaluation is therefore ineffective.

The third complaint: the 2008 Joint Guidelines and the 1999 Circular of the Bank of Italy cannot be relied on as against the applicants

151 The applicants take issue with the ECB for having applied, for the purposes of its assessment, the 2008 Joint Guidelines and the 1999 Circular of the Bank of Italy and for having, in application of those provisions, taken into consideration judicial and administrative procedures that were in progress and penalties that were not definitive relating to Mr Berlusconi and members of Fininvest's Board of Directors and Board of Auditors in order to assess the applicants' reputation.

152 In that regard, it must be observed that the contested decision is based on the ground that, in application of Articles 19 and 25 of the TUB and Article 1 of Decree No 144, which transpose Directive 2013/36, the applicants do not satisfy the criterion of reputation because of Mr Berlusconi's definitive conviction and sentence to four years' imprisonment for tax fraud.

153 The contested decision is also based on other grounds relating, in essence, to the applicants' lack of reputation on the basis of the criteria laid down in the 2008 Joint Guidelines and the 1999 Circular of the Bank of Italy, in particular the multiple convictions and irregularities revealed with regard to Mr Berlusconi, another member of the Board of Directors and a member of Board of Auditors of Fininvest SpA and Fininvest itself.

154 Those are the grounds disputed by the applicants in the context of the third complaint in the fourth plea.

155 However, where some of the grounds in a decision on their own provide a sufficient legal basis for the decision, any errors in the other grounds of the decision have no effect on its operative part (judgment of 15 January 2015, *France* v *Commission*, T-1/12, EU:T:2015:17, paragraph 73).

156 In accordance with the applicable Italian legislation, the fact that Mr Berlusconi had been sentenced to a term of imprisonment of not less than one year is sufficient in itself to substantiate the conclusion that he did not satisfy the criterion of reputation.

157 That ground, which was not disputed in the application, therefore provides on its own a sufficient legal basis for the contested decision.

158 It follows that the complaint alleging that the 2008 Joint Guidelines and the 1999 Circular of the Bank of Italy cannot be relied on as against the applicant is ineffective, in so far as any errors in the grounds of the contested decision, based on the application of the 2008 Joint Guidelines and the 1999 Circular of the Bank of Italy, would in any event have no effect on the operative part of the contested decision.

159 Consequently, the third complaint must be dismissed, as must, accordingly, the fourth plea in its entirety.

The fifth plea, alleging an error of assessment and failure to state reasons by the ECB in the light of the criterion of the likely influence of the proposed acquirer, within the meaning of Article 23(1) of Directive 2013/36

160 The applicants assert that the ECB, first, breached the obligation to state the reasons for the criterion of the likely influence on Banca Mediolanum following the merger at issue, within the meaning of Article 23(1) of Directive 2013/36, and, second, made a manifest error of assessment in considering that that criterion was satisfied whereas, in essence, they would not in fact have any influence on Banca Mediolanum.

161 The ECB, supported by the Commission, disputes that line of argument.

162 In that regard, it must be recalled that it follows from Article 23(1) of Directive 2013/36 that the competent authorities are to assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition in accordance with the five criteria set out in that article, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on that credit institution.

163 It follows, as was observed in paragraph 58 above, that the criterion of the likely influence of a proposed acquirer must be taken into account for the purposes of the assessment of his qualities and not for the purpose of the classification of an acquisition as an acquisition of a qualifying holding.

164 In addition, likely influence is not a separate criterion, in addition to the five other criteria set out in Article 23(1)(a) to (e) of Directive 2013/36. The reference to likely influence appears in the sentence preceding the list of criteria set out in that provision, which merely shows that, when they assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition, the competent authorities are to 'have regard', in particular, to the likely influence of the proposed acquirer on the credit institution in question.

165 It must be observed that the effect of having regard to the likely influence of the proposed acquirer may vary according to the specific assessment criterion. Thus, the assessment of the criterion relating to the reputation of the proposed acquirer, provided for in Article 23(1)(a) of Directive 2013/36, is unlikely to lead to a different result according to the extent of the likely influence of that proposed acquirer on the credit institution in question. In fact, the reputation of the proposed acquirer does not depend on the extent of its likely influence on that institution.

166 The ECB was therefore not required to assess the likely influence of the proposed acquirer on the credit institution in question in order to assess its reputation.

167 In those circumstances, the applicants' arguments relating to the lack of significant economic and financial links between Fininvest and Banca Mediolanum and also to the methods of governance of Banca Mediolanum and to the internal control arrangements cannot demonstrate that the ECB made a manifest error of assessment.

168 Nor can the ECB be criticised for having failed to fulfil its obligation to state the reasons for the 'likely influence' criterion, since it was not required to examine it.

169 Consequently, the fifth plea must be dismissed in any event.

The sixth plea, alleging breach of the principle of proportionality and infringement of Articles 16 and 17 of the Charter

170 The applicants claim, in essence, that the contested decision is contrary to the principle of proportionality and to Articles 16 and 17 of the Charter, relating to respect for the right to property and to freedom to conduct a business, in that it has as a consequence, in application of Article 25 of the TUB, the forced divestiture of the applicants' excess holding, which amounts to an expropriation. They assert that the ECB ought to have taken that disproportionate effect of the contested decision into account.

171 The applicants observe that, on 21 December 2016, the Bank of Italy notified Fininvest and Mr Berlusconi that it had initiated a procedure to implement the obligation, laid down in Italian law, to dispose of their excess holding following the contested decision.

172 In that regard, it should be stated, first, that, pursuant to the third subparagraph of Article 26(2) of Directive 2013/36, if a holding is acquired despite opposition by the competent authorities, Member States are, regardless of any other penalty to be adopted, to provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

173 Second, it must be stated that the contested decision contains no measure whereby the ECB orders the applicants to dispose of the excess holding in their possession.

174 Since the obligation to dispose of the excess holdings is not imposed by the contested decision, a breach of the principle of proportionality and an infringement of Articles 16 and 17 of the Charter cannot be found against the ECB on that ground.

175 Furthermore, pursuant to Article 4(3) of Regulation No 1024/2013, the ECB must, for the purpose of carrying out its task of assessing requests relating to qualifying holdings in a credit institution, apply the national legislation transposing Directive 2013/36.

176 Under the applicable Italian law, the ECB has nomargin of discretion. Indeed, after becoming aware that Mr Berlusconi had been definitively sentenced to four years' imprisonment for tax fraud, the ECB had no option but to find that, in application of Article 25 of the TUB and Article 1 of Ministerial Decree No 144, that conviction and sentence automatically meant that he could not satisfy the criterion of reputation.

177 The ECB therefore had no choice other than to reject the applicants' request to acquire a qualifying holding in Banca Mediolanum and it cannot be alleged to have committed a breach of the principle of proportionality (see, to that effect and by analogy, judgments of

25 September 2015, *VECCO and Others* v *Commission*, T-360/13, EU:T:2015:695, paragraph 73, and of 19 June 2018, *Le Pen* v *Parliament*, T-86/17, not published, EU:T:2018:357, paragraphs 198 to 202).

178 Nor, therefore, can it be considered to have committed a disproportionate breach of the right to property and freedom to conduct a business in Articles 16 and 17 of the Charter.

179 Furthermore, as regards the argument that the ECB ought to have envisaged adopting a decision authorising the acquisition subject to conditions, it must be stated that it is irrelevant, since no provision of EU law or of national law identified by the applicants provides for the possibility for the ECB to adopt such a decision (see, to that effect and by analogy, judgment of 25 June 2015, *CO Sociedad de Gestión y Participación and Others*, C-18/14, EU:C:2015:419, paragraphs 34, 37, 38 and 46).

180 Consequently, the sixth plea is unfounded.

The seventh plea, alleging breach of the rights of the defence and of the right of access to the file

181 The applicants maintain, in essence, that respect for their rights of defence, provided for in Article 22(1) of Regulation No 1024/2013 and Article 32(1) of Regulation No 468/2014, was not observed in the context of the procedure that led to the adoption of the contested decision.

182 The ECB, supported by the Commission, disputes that line of argument.

183 Pursuant to Article 22(1) of Regulation No 1024/2013, the ECB is to give the persons who are the subject of supervisory proceedings the opportunity to be heard before taking decisions and is to base its decisions only on objections on which the parties concerned have been able to comment.

184 As for Article 32(1) of Regulation No 468/2014, it provides that, after the opening of the ECB supervisory procedure, the parties are to be entitled to have access to the ECB's file, subject to the legitimate interest of legal and natural persons other than the relevant party, in the protection of their business secrets, and also provides that the right of access is not to extend to confidential information.

185 In the first place, the applicants claim that Article 22(1) of Regulation No 1024/2013 and Article 32(1) of Regulation No 468/2014 were not observed, on the ground that the Bank of Italy authorised them to have access to the documents in its file only from 14 September 2016, or the date of expiry of the period for submission of the evidence showing that the conditions for the acquisition of a qualifying holding were fulfilled.

186 In that regard, it should be borne in mind that the procedure was initiated by the Bank of Italy on its own initiative by a communication of 3 August 2016. The applicants were invited to produce the necessary documents to show that they had the necessary qualities by no later than 14 September 2016.

187 It was on that very day that access to the file was granted to the applicants by the Bank of Italy. On 6 October 2016, the ECB notified Fininvest and Mr Berlusconi through Fininvest of a proposed decision not to authorise the acquisition of a qualifying holding in Banca Mediolanum and informed them that they had a period of three days, namely until no later than 11 October 2016, to submit their comments.

188 Access to the file was thus granted to the applicants by the Bank of Italy more than three weeks before they were notified of the draft decision and were invited to submit their comments on that draft and they were put in a position to submit comments on the objections forming the basis of the contested decision before it was adopted.

189 In the present case, the ECB thus gave the applicants the opportunity to be heard before it adopted the contested decision, in accordance with Article 22(1) of Regulation No 1024/2013.

190 In addition, the applicants were able to access the ECB's file following the initiation of the procedure, in accordance with Article 32(1) of Regulation No 468/2014.

191 Consequently, they cannot take issue with the ECB for not having acted in accordance with those provisions.

192 If the applicants' argument is also to be understood as meaning that access to the administrative file was necessary in order to produce, before the deadline of 14 September 2016, the documents necessary to show that they fulfilled the conditions required by Directive 2013/36, it cannot succeed. No provision of Regulation No 468/2014 requires the ECB or the Bank of Italy to grant access to the file before those documents have been lodged. Nor have the applicants explained why prior access to the file was necessary in order for them to be able to produce those documents.

193 In the second place, the Court must examine the argument that, in refusing the applicants access to the Bank of Italy's letter of 4 April 2016 and the ECB's note of 24 June 2016, the ECB breached their right of access to the file and their rights of defence. In the applicants' submission, those refusals prevented them from participating effectively in the national phase of the complex procedure and from exercising in full their rights of defence.

194 It must be borne in mind, in that regard, that access to the Bank of Italy's letter of 4 April 2016 and the ECB's note of 24 June 2016 was refused on the ground that they were confidential documents, since they were internal communications in the context of the single supervisory mechanism, pursuant to Article 32(5) of Regulation No 468/2014, which provides that confidential documents may include internal documents of the ECB and national competent authorities and correspondence between the ECB and a national competent authority or between national competent authorities.

195 In fact, the two abovementioned documents are from an exchange between the ECB and the Bank of Italy concerning the problems in relation to the possible acquisition by the applicants of a qualifying holding in Banca Mediolanum.

196 In addition, since the ECB's proposal for a decision and the contested decision contained a clear and exhaustive statement of the grounds and the objections against the applicants and formed the basis of the contested decision, since the applicants were able to express their views on those grounds and those objections and since the ECB examined in detail all the arguments put forward

by the applicants, in particular in the annex attached to the contested decision, the failure to communicate those internal documents, exchanged at an early stage in the procedure, cannot, contrary to the applicants' claims, be considered to have prevented them from exercising their rights of defence in full.

197 In those circumstances, the argument that the refusal of access to those documents entailed a breach of the applicants' rights of defence must be dismissed.

198 Next, the applicants assert that the ECB's refusal of access contained no reasoning to justify confidentiality and that the ECB thus misapplied Article 32(1) and (5) of Regulation No 468/2014.

199 Since the failure to state reasons to which the applicants refer is aimed at the ECB's letter of 13 September 2016 and not at the contested decision, the question whether or not the refusal to grant the applicants access is reasoned is ineffective.

200 In those circumstances, the ECB cannot be criticised for having breached its obligation to state reasons or infringed Article 32(1) and (5) of Regulation No 468/2014.

201 Last, the applicants maintain that access to the Bank of Italy's letter of 4 April 2016 was justified a fortiori because that letter gave the ECB a distorted account of the content of the judgment of the Consiglio di Stato (Council of State) of 3 March 2016.

202 However, even on the assumption that Bank of Italy's letter of 4 April 2016 contained inaccurate or incomplete information, the opportunity granted to the applicants to submit observations on the ECB's proposal for a decision, which is based on the information contained in that letter, did in fact allow them to supplement or dispute the information contained in that proposal for a decision.

203 Having regard to the foregoing, and since, in any event, the applicants were informed of the ECB's position when they were notified of the proposal for a decision of 6 October 2016, their arguments relating to a refusal of access to the file are not capable of demonstrating that there was a breach of their rights of defence.

204 In the third place, the applicants claim that Mr Berlusconi was not in a position to submit his comments, since the proposal for a decision was not sent to him at the address of his private residence until the actual day on which the deadline for submitting comments expired. In addition, the period allowed for submitting comments was too short.

205 In that regard, it must be emphasised that the fact that it was impossible or difficult to submit comments has no impact on the validity of the contested decision where the outcome of the procedure could not have been different in the absence of that alleged irregularity (see, to that effect and by analogy, judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 105 and the case-law cited).

206 In addition, the Court of Justice has made clear that an applicant who relies on an infringement of his or her rights of defence cannot be required to show that the decision of the EU institution concerned would have been different in content, but simply that such a possibility cannot be totally ruled out (see, to that effect and by analogy, judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 106).

207 However, the applicants have not put forward arguments before the General Court of such a kind as to establish that it was not totally ruled out that the outcome of the procedure might have been different if Mr Berlusconi had been in a position to submit comments in addition to those submitted by Fininvest, but merely referred in the abstract to a breach of the right to be heard (see, to that effect and by analogy, judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 112).

208 In the fourth place, the applicants take issue with the ECB for having refused to hold a hearing, which they claim to have been necessary because it would have allowed them to convince the ECB to favour the grant of authorisation to acquire a qualifying holding subject to conditions.

209 In that regard, according to Article 31(1) of Regulation No 468/2014, the ECB, if it deems it appropriate, may give the parties the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in a meeting. Thus, the ECB has a broad discretion in that respect.

210 Having regard to the abundant comments submitted by the applicants, which are set out in the summary table annexed to the contested decision, it must be considered that the ECB did not make a manifest error of assessment when it deemed that it was not necessary to hold a hearing.

211 In addition, having regard to the failure to fulfil the criterion of good reputation, the ECB was unable to grant an authorisation to acquire a qualifying holding subject to conditions. Consequently, to hear the applicants' views on that point would have been otiose.

212 Consequently, the seventh plea is unfounded.

The eighth plea, raised as a plea of illegality, alleging that Article 31(3) of Regulation No 468/2014 is unlawful

213 The applicants allege, by raising a plea of illegality based on Article 277 TFEU, that Article 31(3) of Regulation No 468/2014 is unlawful, on the ground that it constitutes a breach of the rights of the defence guaranteed by Article 41 of the Charter and of the general principles of law arising from the constitutional traditions common to the Member States.

214 They maintain that the three-day period provided for in Article 31(3) of Regulation No 468/2014 for the submission of comments on the proposal for a decision does not ensure respect for the *inter partes* principle and the effective exercise of the right to be heard on the facts and objections forming the basis of decisions on the acquisition of qualifying holdings.

215 In that regard, it should be borne in mind that the rights of the defence, which include the right to be heard, are among the fundamental rights forming an integral part of the EU legal order and are enshrined in the Charter (see, to that effect, judgments of 23 September 2015, *Cerafogli* v *ECB*, T-114/13 P, EU:T:2015:678, paragraph 32 and the case-law cited, and of 5 October 2016, *ECDC* v *CJ*, T-395/15 P, not published, EU:T:2016:598, paragraph 53).

216 The right to be heard is protected not only by Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also by Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration

includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (see, to that effect, judgment of 5 October 2016, *ECDC* v *CJ*, T-395/15 P, not published, EU:T:2016:598, paragraph 54 and the case-law cited).

217 That right requires that any person against whom a decision adversely affecting him or her may be taken must be afforded the opportunity to make known his or her views on the evidence used against him or her to substantiate the decision at issue (see, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 66, and of 19 January 2016, *Mitsubishi Electric* v *Commission*, T-409/12, EU:T:2016:17, paragraph 38). The person concerned must be given a sufficient period of time in which to do so (judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 37).

218 According to the case-law of the Court of Justice, fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes the very substance of the rights guaranteed (judgments of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraph 63; of 10 September 2013, *G. and R.*, C-383/13 PPU, EU:C:2013:533, paragraph 33; and of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 84).

219 As regards the right to be heard in the context of supervisory proceedings, Article 31 of Regulation No 468/2014 provides that, before the ECB may adopt a supervisory decision which would adversely affect a party, the party must be given the opportunity of commenting in writing to the ECB on the facts, objections and legal grounds relevant to the ECB supervisory decision. Pursuant to that article, if the ECB deems it appropriate it may also give the parties the opportunity to comment in a meeting.

220 It is also stated in Article 31 of Regulation No 468/2014 that the notification by which the ECB gives the parties the opportunity to provide their comments is to mention the material content of the intended ECB supervisory decision and the material facts, objections and legal grounds on which the ECB intends to base its decision.

221 Next, Article 31(3) of Regulation No 468/2014 provides that the time limit for submitting comments is, in principle, to be two weeks and that, in particular, in the situations covered by Articles 14 and 15 of and Regulation No 1024/2013, that period is to be shortened to three working days. On application of the party concerned, the ECB may extend those time limits, as appropriate.

222 Thus, it is apparent on reading the third subparagraph of Article 31(3) of Regulation No 468/2014 and Article 15 of Regulation No 1024/2013 that the proposed acquirer of a qualifying holding has the opportunity to comment in writing within a time limit of three days from receipt of a document setting out the facts, objections and legal grounds on which the ECB intends to base its decision.

223 Furthermore, pursuant to Article 22(1) of Directive 2013/36, proposed acquirers of a qualifying holding are to notify the competent authorities of the proposed acquisition, so that the ECB may adopt its decision on the basis of the material submitted by the applicant.

224 It follows from those provisions that different grounds make it possible, in the context of a supervisory procedure such as that at issue in the present case, to ensure respect for the right to be heard of the parties concerned.

225 First, the parties concerned are required to disclose the matters and arguments relating to a request for authorisation of a qualifying holding at the time when they submit their request.

226 In their request for authorisation of an acquisition of a qualifying holding, the persons concerned may therefore already put forward all the material necessary for the assessment of their request.

227 Second, the notification whereby the ECB must give the parties the opportunity to comment in writing must mention the material content of the intended decision, the facts, grounds and essential legal grounds on which it intends to base its decision. That notification also gives the party concerned the opportunity to make known its views on the material of which it was not aware, but also on all the evidence used against it as the basis for the decision at issue, and to put forward arguments. That opportunity may also be used by the ECB to take into account any objection which the parties concerned may have raised during the administrative procedure and to provide further particulars of all the matters of fact and of law used as a basis for the final decision.

228 Third, where the ECB intends to base its decision on considerations of fact and of law of which the applicant was not aware or on evidence other than that provided by the applicant, respect for the rights of the defence may be ensured because the ECB has the option of holding a meeting.

229 That possibility may also be used, moreover, to provide further particulars of the questions or objections raised by the party concerned when requesting authorisation to acquire a qualifying holding and on all matters that may be used against the applicant as the basis of the decision at issue.

230 Therefore, contrary to the applicants' contention, the brief length of the deadline set for submission of comments on the proposal for a decision, assessed in the light of the various procedural methods that allow the parties concerned to express their views on the matters intended to serve as the basis for the contested decision, cannot be considered to be contrary to the right to be heard. That is a fortiori the case since, where appropriate, that deadline may be extended by the ECB at the request of the party concerned.

231 In fact, in so far as there are several procedural methods that will allow the parties concerned to be heard, including the submission of their request for authorisation of an acquisition of a qualifying holding and the possibility of holding a meeting, their right to comment on the proposal for a decision seems to supplement those possibilities and the three-day time limit for submission of those comments, which may, where appropriate, be extended, must therefore be regarded as sufficient.

232 It is for the ECB, moreover, to use all available means to ensure actual respect for the right to be heard, which the General Court will verify in each given situation.

233 In that regard, it must also be emphasised, in any event, that the limitation of the right to be heard arising from the tight deadline for submitting comments under Article 31 of Regulation No 468/2014 pursues objectives of general interest, that it does not go beyond what is necessary

to attain those objectives and that, in the light of the aim pursued and the other procedural methods available, it does not constitute a disproportionate and intolerable interference with that right within the meaning of the case-law cited in paragraph 218 above.

234 In fact, confining the procedure within tight deadlines satisfies the need not to delay the adoption of a decision on the proposed acquisition of a qualifying holding in a credit institution, which may have significant financial consequences.

235 In addition, the second subparagraph of Article 22(2) of Directive 2013/36 provides that the assessment procedure must be completed within 60 working days. That provision was already to be found in Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/CE, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ 2007 L 247, p. 1), recital 7 of which explained that the imposition of an assessment period of no more than 60 days was justified by the need to ensure the clarity and predictability of the assessment procedure.

236 Consequently, the plea of illegality raised in respect of Article 31 of Regulation No 468/2014 must be dismissed, on the ground that that article, read with the other provisions governing the procedure for the authorisation of qualifying holdings and permitting the parties concerned to put forward their views, does not breach the right to be heard of the persons concerned, and the eighth plea must therefore be dismissed.

The ninth plea, alleging that the preparatory acts adopted by the Bank of Italy are unlawful

237 The ninth plea, raised in the course of the proceedings, may be broken down into six parts, alleging, respectively, (i) breach by the Bank of Italy of the principle of *res judicata* attaching to the judgment of the Consiglio di Stato (Council of State) of 3 March 2016; (ii) error or misuse of powers by the Bank of Italy; (iii) breach of the principles of protection of legitimate expectations, legal certainty and good administration; (iv) breach of the rights of the defence, of the *inter partes* principle and of the right to a fair hearing; (v) breach of the principle of legal certainty and of the principle that acts which have not been published or translated cannot be used against individuals; and (vi) breach of the principles of proportionality, legality and reasonableness.

238 The applicants maintain that the preparatory acts adopted by the Bank of Italy contain flaws of such a kind as to render the contested decision illegal.

239 The ECB, supported by the Commission, disputes that line of argument.

240 By this plea, the applicants maintain that the preparatory acts adopted by the Bank of Italy, and in particular the decision to initiate the procedure and the proposal for a decision submitted to the ECB, contain flaws of such a kind as to render the contested decision illegal.

241 This plea was raised following the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023).

242 In the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), the Court of Justice ruled, first, that Article 263 TFEU was to be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or

non-binding proposals adopted by competent national authorities in the procedure provided for in Articles 22 and 23 of Directive 2013/36 and Article 4(1)(c) and Article 15 of Regulation No 1024/2013, and also in Articles 85 to 87 of Regulation No 468/2014 (see the operative part of that judgment).

243 In the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), the Court of Justice held, second, that, in such a situation, where EU law does not aim to establish a division between two powers – one national and the other of the European Union – with separate purposes but, on the contrary, lays down that an EU institution is to have exclusive decision-making power, it fell to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU, to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision (see paragraph 44 and the operative part of that judgment).

244 Since this plea was raised after the application had been lodged, it must be ascertained whether, as the ECB and the Commission contend, this new plea must be regarded as inadmissible.

245 The applicants assert, in order to substantiate the admissibility of the plea, that it is closely connected with the pleas and arguments in the application and that the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), is a matter of law which came to light in the course of the procedure.

246 In the first place, it must be observed that in the application the applicants raise no plea or argument alleging that the preparatory acts adopted by the Bank of Italy were illegal.

247 In addition, in so far as the pleas in the application sought to demonstrate that the contested decision was illegal, this new plea, relating to the preparatory acts of the Bank of Italy, cannot be regarded as having a sufficiently close link with those pleas, since those pleas were aimed exclusively at an act of EU law and therefore had a different purpose.

248 Furthermore, the fact that the applicants included the documents relating to the domestic-law actions against the preparatory acts of the Bank of Italy in the annexes to the application cannot suffice to support the conclusion that that plea, which pursues the same aim as the domestic-law actions, had already been raised at the stage of the application.

249 In fact, it is not for the General Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (judgments of 7 November 1997, *Cipeke* v *Commission*, T-84/96, EU:T:1997:174, paragraph 34, and of 21 March 2002, *Joynson* v *Commission*, T-231/99, EU:T:2002:84, paragraph 154).

250 In the second place, the applicants claim that the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), must be regarded as a matter of law which came to light in the course of the procedure and must therefore justify the submission of new pleas in law, in accordance with Article 84(1) of the Rules of Procedure.

251 In that regard, it follows from the case-law that a judgment which merely confirms a legal position known to the applicant at the time when an action is brought cannot be regarded as a matter allowing a new plea in law to be raised (see, to that effect, judgments of 14 October 2014, *Buono and Others* v *Commission*, C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraphs 58 and 60, and of 20 September 2018, *Spain* v *Commission*, C-114/17 P, EU:C:2018:753, paragraph 39).

252 According to settled case-law, a preliminary ruling does not create the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force (see judgment of 8 September 2011, *Q-Beef and Bosschaert*, C-89/10 and C-96/10, EU:C:2011:555, paragraph 48 and the case-law cited).

253 It may be emphasised, in that regard, that the Court of Justice did not decide to limit in time the effects of the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), and that settled case-law is therefore fully applicable.

254 It follows that the effects flowing from the interpretation of Article 263 TFEU given by the Court of Justice in the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), go back to the date on which that article entered into force.

255 In a similar vein, the General Court has already held that a judgment delivered in the course of the procedure cannot be relied on as a new matter since that judgment gave, in principle, only an *ex tunc* interpretation of EU law (see, to that effect and by analogy, judgment of 27 February 1997, *FFSA and Others* v *Commission*, T-106/95, EU:T:1997:23, paragraph 57).

256 The interpretation given by the Court of Justice must thus be considered to have been known by the applicants at the time when they brought their action, in application of the principle that ignorance of the law is no defence (see, to that effect, judgment of 12 July 1989, *Binder*, 161/88, EU:C:1989:312, paragraph 19, and order of 22 June 2009, *Nijs* v *Court of Auditors*, T-371/08 P, EU:T:2009:215, paragraph 28).

257 In those circumstances, the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), cannot be regarded as a matter of law that came to light in the course of the procedure, within the meaning of Article 84(1) of the Rules of Procedure.

258 Consequently, the ninth plea must be dismissed as inadmissible.

The tenth plea, alleging, in the form of a plea of illegality based on Article 277 TFEU, that Article 4(3) and Article 15 of Regulation No 1024/2013 are unlawful

259 By the tenth plea, which was raised in the course of the procedure, the applicants allege, by raising a plea of illegality, that Article 4(3) and Article 15 of Regulation No 1024/2013 are unlawful, in that the reference to national law in those articles and the exclusive jurisdiction of the EU Courts to review the legality of preparatory national acts which follows from the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), give rise to a breach of the right to effective judicial protection.

260 In the applicants' submission, in essence, there is a breach of the right to effective judicial protection because that system prevents the effective review of the constitutionality of national preparatory acts provided for in Italian constitutional law, for which the EU Courts do not have

jurisdiction. Those acts are therefore immune to any review of constitutionality, in so far as the EU Courts cannot review their conformity to the Italian Constitution and in so far as they cannot refer the matter to the Corte costituzionale (Constitutional Court, Italy) for that purpose.

261 The ECB, supported by the Commission, disputes that line of argument.

262 Since this plea was submitted after the application had been lodged, it is appropriate to ascertain whether, as the ECB and the Commission claim, this new plea in law must be considered inadmissible.

263 As regards, in the first place, the existence of a sufficiently close link between this plea and the pleas in law or the arguments in the application, it must be stated that the application contains no plea in law or argument alleging that Article 4(3) and Article 15 of Regulation No 1024/2013 are illegal.

264 In so far as only the eighth plea consisted in a plea of illegality, and in so far as it referred to Article 31(3) of Regulation No 468/2014, this new plea, which refers to other articles, cannot be considered to have a sufficiently close link with the pleas in the application.

265 In the second place, for the reasons stated in paragraphs 251 to 257 above, the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), cannot be regarded as a matter of law which came to light in the course of the procedure, within the meaning of Article 84 of the Rules of Procedure.

266 Consequently, the tenth plea must be dismissed as inadmissible.

The new offers of evidence made by the applicants and by the ECB

267 By way of preliminary point, it must be recalled that Article 85(3) of the Rules of Procedure provides that 'the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure or before the decision of the General Court to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified'.

268 In the first place, on 17 July 2021 the applicants asked the General Court to place on the file Mr Berlusconi's application to the European Court of Human Rights ('the ECtHR'), registered as No 8683/14, of 28 December 2013, the letter from the ECtHR of 3 May 2021 communicating that application to the Italian Government and also a statement of the facts and the questions relating to that case by the ECtHR of 17 May 2021.

269 They justified the production of that evidence, in essence, by the connection between the contested decision, which is based, in particular, on Mr Berlusconi's conviction and sentence for the offence of tax fraud, and that action before the ECtHR, the purpose of which is to dispute the proceedings that led to that conviction and sentence.

270 When questioned at the hearing, the ECB and the Commission did not object to that evidence being placed on the file.

271 In that regard, it should be stated, first, that Mr Berlusconi's application of 28 December 2013 to the ECtHR, registered as No 8683/14, predates the introduction of the present action and that the applicants put forward no justification for the delay in submitting that document.

272 That document must therefore be dismissed as inadmissible.

273 Second, the letter of 3 May 2021 from the ECtHR communicating the application to the Italian Government, and the statement of the facts and the questions relating to that case by the ECtHR of 17 May 2021 was issued after the end of the written part of the procedure, so that the delay in submitting them may be considered to be justified.

274 Those materials must therefore be considered admissible.

275 However, as is apparent from paragraphs 138 to 142 above, the applicants have raised no plea in the application seeking to challenge the assessment of the conviction and sentence in question by the ECB.

276 It follows that those materials are of no relevance for the present action.

277 In the second place, on 17 July 2021, the applicants asked the General Court to place on the file the judgment of the Corte suprema di cassazione (Supreme Court of Cassation) No 10355/2021, of 9 March 2021, dismissing their appeal against the judgment of the Consiglio di Stato (Council of State) of 3 May 2019, whereby the latter court declared inadmissible the actions to implement judgment No 882 of the Consiglio di Stato (Council of State) of 3 March 2016, in application of the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023).

278 When questioned at the hearing, the ECB and the Commission did not object to the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), being placed on the file.

279 Since the date of that judgment is after the end of the written part of the proceedings, it must be considered that its belated production by the applicants is justified and, accordingly, that that document is admissible.

280 However, the applicants offer no explanation or argument capable of showing the link between the judgment of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023), and the pleas raised in the context of the present action. Nor does that judgment support any argument or plea in law raised by the applicants.

281 It therefore has no relevance to the present action.

282 In the third place, on 6 August 2021 the applicants asked the General Court to place on the file Mr Berlusconi's application of 13 March 2014 to the ECtHR, registered as No 23554/14, the ECtHR's letter of 3 May 2021 communicating the application to the Italian Government, a statement of 6 April 2021 by the ECtHR of the facts and the questions relating to that case and the defence dated 26 July 2021 submitted by the Italian Government in that case.

283 They justified the production of that evidence by the close link between the present action and that case before the ECtHR, which concerns a civil dispute in which the applicants were, in essence, wrongly declared to bear civil liability for offences of corruption although Mr Berlusconi had been acquitted of those offences in criminal proceedings.

284 When questioned at the hearing, the ECB and the Commission did not object to those documents being placed on the file.

285 In that regard, it should be stated, first, that Mr Berlusconi's application of 13 March 2014 to the ECtHR, registered as No 23554/14, predates the introduction of the present action and that the applicants put forward no matter to justify the delay in the submission of that document.

286 That document must therefore be dismissed as inadmissible.

287 Second, the ECtHR's letter of 3 May 2021 communicating the application to the Italian Government, a statement of the facts and of the questions relating to that case by the ECtHR of 6 April 2021 and the defence submitted by the Italian Government in that case on 26 July 2021 postdate the end of the written part of the proceedings, and the delay in submitting them is therefore justified.

288 Those documents must therefore be considered admissible.

289 However, the applicants have raised no plea in the application seeking to challenge the ECB's assessment of the civil dispute.

290 It follows that those documents have no relevance for the present action.

291 In the fourth place, on 10 September 2021 the ECB requested the General Court to place judgment No 21970/21 of the Corte suprema di cassazione (Supreme Court of Cassation) of 30 July 2021 on the file, on the ground that that judgment confirmed, in essence, the ECB's interpretation of a merger in Italian law.

292 When questioned at the hearing, the applicants did not object to judgment No 21970/21 of the Corte suprema di cassazione (Supreme Court of Cassation) of 30 July 2021 being placed on the file.

293 In the present case, since judgment No 21970/21 of the Corte suprema di cassazione (Supreme Court of Cassation) of 30 July 2021 was delivered after the end of the written part of the proceedings, it must be considered that its belated production by the ECB is justified and, accordingly, that that new offer of proof is admissible.

294 However, as is clear from paragraphs 87 to 89 above, for the purposes of the application of Articles 22 and 23 of Directive 2013/36, the effects of the merger in question must be interpreted in application of EU law.

295 It follows that judgment No 21970/21 of the Corte suprema di cassazione (Supreme Court of Cassation) of 30 July 2021 has no relevance for the present action.

296 Consequently, the action must be dismissed in its entirety.

IV. Costs

297 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs incurred by the ECB, in accordance with the form of order sought by the latter.

298 Under of Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Finanziaria d'investimento Fininvest SpA (Fininvest) and Mr Silvio Berlusconi, in addition to bearing their own costs, to pay those incurred by the European Central Bank (ECB);

3. Orders the European Commission to bear its own costs.

Papasavvas Buttigieg Schalin

Costeira Kornezov

Delivered in open court in Luxembourg on 11 May 2022.

[Signatures]