Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 27 June 2018 [1]

**Case C-219/17**

**Silvio Berlusconi,**
**Finanziaria d'investimento Fininvest SpA (Fininvest)**
**v**
**Banca d'Italia,**
**Istituto per la Vigilanza Sulle Assicurazioni (IVASS),**
**third parties:**
**Ministero dell'Economia e delle Finanze,**
**Banca Mediolanum SpA,**
**Holding Italiana Quarta SpA,**
**Fin. Prog. Italia di E. Doris & C. s.a.p.a.,**
**Sirefid SpA,**
**Ennio Doris**

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling — Prudential supervision of credit institutions — Single supervisory mechanism — Acquisition of a qualifying holding in a credit institution — EU composite administrative procedures — Judicial review of composite administrative procedures — Jurisdiction to examine an action brought against measures adopted by a national authority — Principle of *res judicata*)

1. The banking union constitutes one of the most important achievements of the European integration process since the introduction of the single currency. In spite of its huge technical complexity, the legal framework for it was put in place extremely quickly, in response to the major financial crisis of 2008.

2. Member States have ceded competences to the European Union in relation to prudential supervision of credit institutions and the resolution of such institutions when they run into solvency problems. While most of the powers to exercise the competences transferred from Member States have gone to the European Central Bank ('the ECB'), national supervisory authorities remain an essential part of the single supervisory mechanism ('SSM') for banking.

3. The EU rules governing the SSM have established various administrative procedures involving the ECB and national supervisory authorities. Such procedures are not new in EU law: they already existed in areas such as structural funds, agriculture and the appointment of members of the European Parliament, for example. But the use made of them within the banking union is much more intensive and more frequent than in other areas.

1 Original language: Spanish.

4. The present proceedings offer the Court of Justice the chance to rule for the first time (if I am not mistaken) on one of these new procedures, namely the procedure governing authorisation to acquire or increase qualifying holdings in credit institutions.

5. The problem to be resolved in this reference for a preliminary ruling is to clarify who should conduct a judicial review of measures adopted as part of this procedure. Specifically, the issue is whether actions challenging certain proposed or draft decisions submitted by the national supervisory authorities to the ECB can be brought before the national courts, or whether their content and the subsequent final decision by the ECB can be reviewed only by the Court of Justice of the European Union.

## I. Legal framework

### *A. EU law*

6. The procedure under which the decisions being challenged in the referring court were adopted is addressed in the following rules of EU law:

– Articles 22 and 23 of Directive 2013/36/EU,[2] which incorporates into EU law the Basel III Accords adopted by the Basel Committee on Banking Supervision, which operates as part of the Bank for International Settlements.[3]

– Article 1(5) and Article 15 of Regulation (EU) No 1024/2013.[4]

– Articles 85 to 87 of Regulation (EU) No 468/2014.[5]

#### *1. CRD IV*

7. Article 22 ('Notification and assessment of proposed acquisitions') provides:

'1. Member States shall require any natural or legal person or such persons acting in concert (the "proposed acquirer"), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a credit institution or to further increase, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the credit institution would become its subsidiary (the "proposed acquisition"), to notify the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition, indicating the size of the intended holding and the relevant information, as specified in accordance with Article 23(4). …

2 Directive 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) (known as CRD IV).

3 The agreements referred to as Basel III are a set of measures developed by the Basel Committee on Banking Supervision in response to the financial crisis and adopted internationally. They are designed to strengthen the regulation, supervision and risk management of the banking sector. See the information available on the website of the Basel Committee on Banking Supervision, https://www.bis.org/bcbs/basel3.htm.

4 Council Regulation 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) ('the SSM Regulation').

5 Regulation 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 (SSM Framework Regulation) (OJ 2014 L 141, p. 1).

2. The competent authorities shall acknowledge receipt of notification under paragraph 1 or of further information under paragraph 3 promptly and in any event within two working days following receipt in writing to the proposed acquirer.

…

3. The competent authorities may, during the assessment period if necessary, and no later than on the 50th working day of the assessment period, request further information that is necessary to complete the assessment. Such a request shall be made in writing and shall specify the additional information needed.

… Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but shall not result in a suspension of the assessment period.

…

5. If the competent authorities decide to oppose the proposed acquisition, they shall, within two working days of completion of the assessment, and not exceeding the assessment period, inform the proposed acquirer in writing, providing the reasons. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to publish such information in the absence of a request by the proposed acquirer.

6. If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

7. The competent authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

8. Member States shall not impose requirements for notification to, or approval by, the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

…’

8. Article 23 (‘Assessment criteria’) provides:

‘1. In assessing the notification provided for in Article 22(1) and the information referred to in Article 22(3), the competent authorities shall, 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, assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition in accordance with the following criteria:

(a) the reputation of the proposed acquirer;

(b) the reputation, knowledge, skills and experience, as set out in Article 91(1), of any member of the management body and any member of senior management who will direct the business of the credit institution as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the credit institution in which the acquisition is proposed;

…

2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

…'

9. Paragraph 1 of Article 119 ('Inclusion of holding companies in consolidated supervision') provides:

'1. Member States shall adopt any measures necessary, where appropriate, to include financial holding companies and mixed financial holding companies in consolidated supervision.'

*2. The SSM Regulation*

10. Recital 11 states:

'A banking union should … be set up in the Union, underpinned by a comprehensive and detailed single rulebook for financial services for the internal market as a whole and composed of a single supervisory mechanism and new frameworks for deposit insurance and resolution. ...'

Within the framework of the SSM, this regulation confers specific competences on the ECB for the prudential supervision of credit institutions.

11. Article 1 ('Subject matter and scope') states:

'This Regulation confers on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.

…

This Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred on the ECB by this Regulation.'

12. Article 4 provides:

'1. Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:

…

(c) to assess 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;

…

3. 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 Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.

…'

13. Article 6(2) provides that both the ECB and the national competent authorities ('NCAs') are to be subject to a duty of cooperation in good faith and an obligation to exchange information, and that, without prejudice to the ECB's power to receive directly or have direct access to information reported, on an ongoing basis, by credit institutions, the NCAs are in particular to provide the ECB with all information necessary for the purposes of carrying out the tasks conferred on the ECB by the SSM Regulation.

14. Article 15 ('Assessment of acquisitions of qualifying holdings') states:

'1. Without prejudice to the exemptions provided for in point (c) of Article 4(1), any notification of an acquisition of a qualifying holding in a credit institution established in a participating Member State or any related information shall be introduced with the national competent authorities of the Member State where the credit institution is established in accordance with the requirements set out in relevant national law based on the acts referred to in the first subparagraph of Article 4(3).

2. The national competent authority shall assess the proposed acquisition, and shall forward the notification and a proposal for a decision to oppose or not to oppose the acquisition, based on the criteria set out in the acts referred to in the first subparagraph of Article 4(3), to the ECB, … and shall assist the ECB in accordance with Article 6.

3. The ECB shall decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law and in accordance with the procedure and within the assessment periods set out therein.'

*3. The SSM Framework Regulation*

15. The SSM Framework Regulation, which was adopted under Article 4(3) of the SSM Regulation, governs the framework for cooperation between the ECB and the NCAs within the SSM.

16. Article 85 ('Notification to NCAs of the acquisition of a qualifying holding') states:

'1. An NCA that receives a notification of an intention to acquire a qualifying holding in a credit institution established in that participating Member State shall notify the ECB of such notification no later than five working days following the acknowledgement of receipt in accordance with Article 22(2) of Directive 2013/36/EU.

2. The NCA shall notify the ECB if it has to suspend the assessment period due to a request for additional information. The NCA shall send any such additional information to the ECB within 5 working days following receipt thereof by the NCA.

3. The NCA shall also inform the ECB of the date by which the decision to oppose or not to oppose the acquisition of a qualifying holding has to be notified to the applicant pursuant to the relevant national law.'

17. Article 86 ('Assessment of potential acquisitions') provides:

'1. The NCA to which an intention to acquire a qualifying holding in a credit institution is notified shall assess whether the potential acquisition complies with all the conditions laid down in the relevant Union and national law. Following this assessment, the NCA shall prepare a draft decision for the ECB to oppose or not to oppose the acquisition.

2. The NCA shall submit the draft decision to oppose or not to oppose the acquisition to the ECB at least 15 working days before the expiry of the assessment period as defined by the relevant Union law.'

18. Article 87 ('ECB decision on acquisition') states:

'The ECB shall decide whether or not to oppose the acquisition on the basis of its assessment of the proposed acquisition and the NCA's draft decision. The right to be heard, as provided for in Article 31, shall apply.'

### *B. Italian law*

#### *1. Financial supervision legislation: the Consolidated Law on Banking*[6]

19. Article 19 of the Consolidated Law on Banking confers upon the Banca d'Italia ('the Bank of Italy') the power to issue authorisations to acquire special holdings in financial institutions. Specifically, Article 19(5) states that such authorisations are to be granted where 'conditions conducive to ensuring sound and prudent management of the bank are met, assessing the aptitude 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'.

20. Paragraph 1 of Article 25 ('Shareholders') provides that the owners of the holdings referred to in Article 19 must be of good reputation and satisfy criteria of competence and integrity in order to ensure the sound and prudent management of the bank.[7]

21. As a transitional measure, Article 2(8) of Legislative Decree No 72 of 2015 provided that the previous rules on the requirements concerning the good reputation of the owners of holdings in financial institutions would continue to apply.

22. Those rules were set out in Ministerial Decree No 144 of 18 March 1998.[8] Article 1 of the decree details the convictions that have a negative impact on a person's reputation, meaning that the requirement is not satisfied.

6 Decreto legislativo 1 settembre 1993, n. 385, Testo unico delle leggi in materia bancaria e creditizia (Testo unico bancario) (Legislative Decree No 385 of 1 September 1993 relating to the consolidated text of the laws on banking and credit ('the Consolidated Law on Banking')). At the material time, the rules on qualifying holdings in financial institutions were set out in Title II of the Consolidated Law on Banking as amended by Legislative Decree No 72 of 12 May 2015, which incorporated the contents of CRD IV into Italian law.

7 Article 25(2) referred to future regulations (to be adopted by the Ministero dell'Economia e delle Finanze (Ministry of Economic and Financial Affairs), following an opinion issued by the Bank of Italy) which would specifically determine these requirements, but the legislation has not been drafted.

8 Decreto 18 marzo 1998, 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 of 18 March 1998 laying down rules for the identification of the requirements of good reputation for holders of the share capital of banks and the fixing of the relevant threshold, 'Decree No 144 of 1998').

23. As a transitional measure, Article 2 of Decree No 144 of 1998 provided that, 'in the case of persons holding share capital of a bank on the date of entry into force of the present rules, failure to meet any requirement referred to in Article 1 that was not laid down in the previous rules shall be irrelevant as regards shareholdings already held, provided that the failure to meet the requirement occurred prior to that date'.

24. With regard to mixed financial holding companies, under Article 63 of the Consolidated Law on Banking qualifying members were made subject to the same obligations as members of banking institutions. Article 67bis(2) of the Consolidated Law on Banking states that the Bank of Italy and the Istituto per la Vigilanza Sulle Assicurazioni ('IVASS') are jointly responsible for ensuring compliance with those obligations where the companies in question have their seat in Italy and are the parent of a financial conglomerate that is wholly or partly Italian.

*2. Legislation on proceedings in the administrative courts*

25. The procedure governing proceedings in the Italian administrative courts provides for what is known as a 'giudizio di ottemperanza' (enforcement action), and it is in the context of such an action that the Consiglio di Stato (Council of State, Italy) has referred these questions for a preliminary ruling.

26. According to Article 21septies(1) of Law No 241 of 7 August 1990,[9] 'any administrative measure … adopted in breach or circumvention of a final judgment shall be invalid ...'.

27. Under Article 112(1) of the Code of Administrative Procedure,[10] 'decisions of the administrative courts must be implemented by the public authorities and the other parties'.

28. According to Article 112(2):

'An enforcement action may be brought to ensure the application:

…

(c) of judgments having the force of *res judicata* and other similar measures by the ordinary courts in order to secure observance of the public authorities' obligation to comply with the final judgment in respect of the matter that has been decided.

…'

29. Under Article 114(4)(b) of the Code of Administrative Procedure, where a court hearing an enforcement action upholds the action, 'it must declare void any measures adopted in breach or circumvention of the final judgment'.

30. Article 2909 of the Italian Civil Code provides that findings in a judgment having the force of *res judicata* are enforceable in their entirety against the parties, their heirs and their successors in title.

9 Legge 7 agosto 1990, n. 241, nuove norme in materia di procedimento amministrativo e di diritto di acceso ai documenti amministrativi, come modificata dalla legge 11 febbraio 2005, n. 15 (Law No 241 of 7 August 1990 concerning new provisions on administrative procedure and the right of access to administrative documents, as amended by Law No 15 of 11 February 2005).

10 Codice del processo amministrativo, decreto legislativo 2 luglio 2010, n. 104 (Code of Administrative Procedure, Legislative Decree No 104 of 2 July 2010).

## II. Main proceedings and questions referred

31. From the mid-1990s Mr Berlusconi held, through the company Fininvest, which he controlled, a qualifying holding of more than 30% in Mediolanum SpA ('Mediolanum'). Mediolanum was a listed mixed financial holding company that was the parent company of the Mediolanum financial group, which included Banca Mediolanum SpA, a wholly owned subsidiary of Mediolanum.

32. In judgment No 35729/13, the Corte Suprema di Cassazione (Court of Cassation, Italy) found Mr Berlusconi guilty of tax fraud and sentenced him to four years' imprisonment (three years of which he was not required to serve); it also disqualified him from holding public office and managing a corporation for a period of two years. The judgment became final on 1 August 2013.

33. Following the approval of Legislative Decree No 53 of 4 March 2014,[11] Fininvest (on behalf of Mr Berlusconi) filed an application for authorisation to possess qualifying holdings in Mediolanum.

34. In decision No 976145/14 of 7 October 2014, the Bank of Italy and IVASS refused that application, because they considered that Mr Berlusconi did not satisfy the reputation requirement for ownership of qualifying holdings in financial intermediaries.

35. In addition to refusing the application, the Bank of Italy ordered the suspension of voting rights and the sale of the shares in Mediolanum that exceeded the limit of 9.999% laid down in the legislation. However, it agreed to Fininvest's proposal to create a trust into which to transfer the shares in dispute, and it allowed Fininvest 20 days to notify its compliance with the conditions that had been imposed in order for the transfer to the trust to proceed.

36. Mr Berlusconi challenged that decision before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed the action in judgment No 7966/2015 of 5 June 2015.

37. Mr Berlusconi lodged an appeal before the Consiglio di Stato (Council of State) against the decision to dismiss his action (Fininvest filing an ancillary appeal). In these proceedings the Bank of Italy argued that the appellants lacked standing to bring proceedings, following the merger by 'reverse integration' of Mediolanum and Banca Mediolanum.

38. Indeed, during the course of the proceedings, the boards agreed a merger by 'reverse integration' by which Mediolanum would be incorporated into Banca Mediolanum.[12] The merger proposal was notified to the Bank of Italy on 26 May 2015 for the purpose of obtaining approval under Article 57 of the Consolidated Law on Banking. As a result, Fininvest acquired a qualifying holding in a financial institution.[13]

39. By decision No 7969932/21 of 21 July 2015, the Bank of Italy authorised the proposed merger. In its written notice of the decision, dated 23 July 2015, the Bank confirmed its decision of 7 October 2014 and clarified that the obligation to sell shares stipulated in the earlier decision should now be understood as 'relating to the shares in Banca Mediolanum which, as a result [of the] merger, will be allotted [to Fininvest] in exchange for its shares in Mediolanum'.

11 Decreto Legislativo 4 de marzo 2014, n. 53, attuazione della direttiva 2011/89/UE (Legislative Decree No 53 of 4 March 2014 transposing Directive 2011/89/EU [of the European Parliament and of the Council of 16 November 2011 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) (OJ 2011 L 136, p. 113]), which extended the application of the reputation requirements applicable to senior managers of banking institutions so as to cover mixed financial holding companies.

12 This involved an 'intra-group merger with a one-for-one share swap', the objective being corporate simplification and organisational rationalisation of the banking group, given that Banca Mediolanum was wholly owned by Mediolanum.

13 Fininvest acquired control of approximately 30.124% of the capital of Banco Mediolanum but exercised effective control over only 9.999%, given that voting rights in the remaining 20.125% had been suspended and the Bank of Italy had ordered these shares to be sold.

40. In judgment No 882/2016 of 3 March 2016, the Consiglio di Stato (Council of State) upheld the appeals by Mr Berlusconi and Fininvest and annulled the Bank of Italy's decision of 7 October 2014.[14]

41. The Consiglio di Stato (Council of State) held that the decision of 7 October 2014 was unlawful because it breached the principle of non-retrospectivity in that it extended the rules on the assessment of qualifying holdings introduced into the Capital Requirements Directive by Directive 2007/44/EC[15] to holdings that existed before the new rules came into force. Directive 2007/44 applied to future holdings, while Article 2 of Decree No 144 of 1998 referred to 'shareholdings already held'.[16] As the events had occurred prior to the entry into force of the new regulations, the reputation requirements could not be applied to Fininvest.

42. In document No 491595/16 of 4 April 2016, the Bank of Italy explained to the ECB that, as a result of the merger of Banco Mediolanum and Mediolanum, Mr Berlusconi had acquired the status of a shareholder in the credit institution Banco Mediolanum, through Fininvest, which he controlled. It added that, following the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, both the requirement to dispose of that part of his shareholding that exceeded 9.999% of the bank's share capital and the related suspension of voting rights had ceased to have effect. The Bank of Italy therefore believed that Fininvest should submit an application for authorisation of its qualifying shareholding in Banco Mediolanum, in accordance with Article 22 et seq. of CRD IV and Article 19 et seq. of the Consolidated Law on Banking.

43. In accordance with instructions from the ECB (document of 24 June 2016), on 14 July 2016 the Bank of Italy ordered Fininvest to file an application for authorisation within 15 days. When Fininvest failed to comply, it decided on 3 August 2016 to initiate the administrative procedure on its own initiative, adding that the power to take a decision on the case lay with the ECB under Article 4 of the SSM Regulation.

44. Once it had received the documentation from Fininvest, under Article 15(2) of the SSM Regulation, the Bank of Italy submitted a proposal for a decision that contained an adverse opinion as to the reputation of the purchasers and invited the ECB to oppose the acquisition.

45. The ECB Supervisory Board accepted the arguments put forward by the Bank of Italy and approved a draft decision, which it forwarded to Fininvest and to Mr Berlusconi for comment. On completion of this procedure, the Supervisory Board approved the decision of 25 October 2016;[17] there were no subsequent objections from the Governing Council of the ECB.

46. In that decision, the ECB found that there were serious doubts as to the good reputation of the acquirers of the holding in Banco Mediolanum. Having regard to the fact that the holding in Banco Mediolanum was indirectly being acquired by Mr Berlusconi, who was the majority shareholder and effectively the owner of Fininvest, and that he had been sentenced in a final judgment to four years'

14 Regarding the objection of lack of standing to bring proceedings, raised by the Bank of Italy, the Consiglio di Stato (Council of State) held that the written notice of 23 July 2015 was merely confirmatory, in that it expanded on the asset disposal requirement that had previously been ordered in respect of the shares in Mediolanum, with no separate new assessment. It followed that any annulment of the decision confirmed would automatically entail the lapse of the confirmatory measure.

15 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/EC, 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).

16 The Consiglio di Stato (Council of State) held that the regulations had not been implicitly repealed as a result of Directive 2007/44. In order for implied repeal to occur, the situations governed by the rules in question must be the same; but in this case the rules applied to different situations: the EU rule applied to the acquisition of a holding, whereas Decree No 144 of 1998 referred to holdings previously acquired and thus already held.

17 ECB/SSM/20016-7LVZJ6XRIE7VNZ4UBX81/4 ('the 2016 ECB Decision').

imprisonment for tax fraud, the ECB considered that Mr Berlusconi did not satisfy the reputation requirement imposed by the national legislation on owners of qualifying holdings. Moreover, Mr Berlusconi had also committed other irregularities and been convicted of other offences, as had other members of Fininvest's senior management.

47. For all these reasons, the ECB concluded that the acquirers of the qualifying holding in Banco Mediolanum did not satisfy the requirement to be of good reputation and that there were serious doubts as to their ability to ensure the future sound and prudent management of this financial institution. The ECB therefore opposed the acquisition by Fininvest and Mr Berlusconi of the qualifying holding in Banco Mediolanum.

48. Fininvest and Mr Berlusconi challenged the 2016 ECB Decision by means of three court procedures:

– They brought an action before the General Court,[18] where proceedings have been stayed pending the decision in this reference for a preliminary ruling.

– Fininvest also applied to the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio) for the annulment of the acts of the Bank of Italy leading up to the ECB Decision.

– They filed an 'ottemperanza' action (enforcement action) with the Consiglio di Stato (Council of State), arguing that the aforementioned acts were void because they were in breach of final judgment No 882/2016 of 3 March 2016.

49. The Bank of Italy argues that the national court lacks jurisdiction to rule on this action, which is directed against preparatory acts that do not contain a decision and are intended to facilitate a ruling for which the ECB has sole competence. The final decision by this EU institution can be reviewed only by the Court of Justice.

50. After joining the applications of Mr Berlusconi and Fininvest, the Consiglio di Stato (Council of State) took the view that there are no specific precedents from the Court of Justice regarding the allocation of jurisdiction between national courts and the EU Courts in proceedings concerning the unlawfulness of measures adopted by NCAs as part of this type of procedure. It also considered that the matter is objectively open to debate, because it includes elements of both a single procedure (as argued by the Bank of Italy) and a composite procedure (as argued by Mr Berlusconi and Fininvest). It noted that, in any event, the procedural stage that takes place before the national authority does not end in a decision that is binding on the European authority that must give the final ruling.

51. Against this background, the Consiglio di Stato (Council of State) referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are the first, second and fifth paragraphs of Article 263 of the Treaty on the Functioning of the European Union, read in conjunction with Article 256(1) thereof, to be interpreted as meaning that the EU Courts have jurisdiction, or that the national courts have jurisdiction, in an action challenging decisions to initiate procedures, measures of inquiry and non-binding proposals (as specified in paragraph 1 of the present order) adopted by the competent national authority in the procedure governed by Articles 22 and 23 of Directive 2013/36/EU of the European Parliament and of the Council, by Articles 1(5), 4(1)(c) and 15 of Council Regulation (EU) No 1024/2013, by Articles 85 to 87 of Regulation (EU) No 468/2014 of the European Central Bank and by Articles 19, 22 and 25 of the Consolidated Law on Banking?

18 *Fininvest and Berlusconi* v *ECB* (T-913/16).

(2) In particular, may the jurisdiction of the EU Courts be asserted when the abovementioned measures are challenged, not in a general action for annulment, but in an action for a declaration of invalidity on the grounds of breach or circumvention of the ruling in Judgment No 882/2016 of 3 March 2016 of the Consiglio di Stato (Council of State) brought in accordance with Article 112 et seq. of the Italian Code of Administrative Procedure relating to compliance with a judgment (that is to say, in proceedings peculiar to Italian administrative procedural law), when the decision of the EU Courts involves the interpretation and identification, in accordance with national law, of the objective limits of the ruling given in the judgment in question?'

## III. Analysis of the questions referred

52. As the Commission has argued, some minor rewording of the questions put by the referring court is required to enable the Court of Justice to provide an appropriate response.

53. In principle, there is settled case-law to the effect that the Court of Justice has no jurisdiction to review the lawfulness of measures adopted by national authorities within the context of actions for annulment under Article 263 TFEU. [19]

54. Consequently, the first question posed by the referring court must be understood as a request for a ruling on whether the exclusive jurisdiction which Article 263 TFEU confers on the Court of Justice to review the legality of acts of the European Union prevents national courts from reviewing the legality of decisions to initiate procedures, measures of inquiry and non-binding proposals adopted at national level by an NCA as part of the procedure under Article 4(1)(c) and Article 15 of the SSM Regulation and Articles 85 to 87 of the SSM Framework Regulation, a procedure which culminates in a binding decision by the ECB.

55. In its second question, which is subsidiary to the first question, the referring court wishes to know whether the Court of Justice has jurisdiction to review the legality of national measures that are preparatory to the final decision by the ECB where those measures are challenged not in a 'general action for annulment', but in a (specific) action for a declaration of invalidity on the grounds of breach or circumvention of a ruling of a national court that has the force of *res judicata*, brought in the course of a *giudizio di ottemperanza*.

56. Before analysing the two questions referred, I believe it is necessary to:

– review the case-law of the Court of Justice on judicial review of measures adopted in the course of composite or combined administrative procedures involving EU institutions and national authorities of Member States; and

– set out the characteristics of the administrative procedure used by the ECB and the NCAs in authorising acquisitions of or increases in qualifying holdings in credit institutions.

19 Judgments of 3 December 1992, *Oleificio Borelli* v *Commission* (C-97/91, EU:C:1992:491), paragraph 9; of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53), paragraph 62; of 18 December 2007, *Sweden* v *Commission* (C-64/05 P, EU:C:2007/802), paragraph 91; and of 17 September 2014, *Liivimaa Lihaveis* (C-562/12, EU:C:2014:2229), paragraph 48.

### *A. Judicial review of measures adopted in composite or combined administrative procedures in EU law*

57. As a general rule, it is for Member States' authorities to apply EU law. Where these authorities act through administrative procedures governed by domestic law, the review of their actions is a matter for the national courts, which are able to refer questions to the Court of Justice using the preliminary ruling procedure. In a small number of areas — generally ones where the European Union has exclusive competence — the administrative application of EU law is undertaken directly by EU institutions, bodies, offices or agencies, which carry out their own procedures, subject to judicial review by the General Court and the Court of Justice.

58. However, there is a growing number of situations in which EU law is applied under procedures involving institutions, bodies, offices or agencies of both the EU and Member States.[20] These procedures are not subject to rules of a general nature[21] under EU law, although they have been the subject of extensive analysis in legal scholarship.[22]

59. So far the Court of Justice has ruled[23] on a case-by-case and non-exhaustive basis on the judicial review of these composite procedures and of the decisions that bring them to a conclusion, and it has examined the question of determination of which court has jurisdiction in the light of the actions that can be challenged.[24] Addressing these procedures in the context of the banking union will be a milestone for the case-law on this subject.[25]

60. As a general rule, in order to identify which court has jurisdiction one has to determine who has the *real* decision-making power in the composite administrative procedure. Under this rule, the national courts will review the legality of administrative acts adopted by national authorities when they take the final decision in this type of procedure. In symmetrical fashion, the Court of Justice of the European Union will rule on the administrative acts of EU institutions that bring composite procedures to an end.

20 These types of procedures involve what is known in the literature as coadministration or integrated administration. See Ziller, J., 'Les concepts d'administration directe, d'administration indirecte et de coadministration et les fondements du droit administratif européen', in Auby, J.-B., and Dutheil de la Rochère, J. (ed.), *Traité de Droit Administratif Européen*, Bruylant, Brussels, 2014, p. 327 et seq.; Hofmann, H.C.H., 'Conclusions: Europe's integrated administration', in Hofmann, H.C.H., and Türk, A. (ed.), *EU Administrative Governance*, p. 583; Schmidt-Aßmann, E., 'Introduction', in Jansen, O., and Schöndorf-Haubold, B. (ed.), *The European Composite Administration*, Intersentia, Brussels, 2011, pp. 6 to 8.

21 An ambitious proposal in legal literature for codifying EU administrative procedures is to be found in Mir, O., Hofmann, H.C.H., Schneider, J.-P., Ziller, J., et al. (ed.), *Código ReNEUAL de procedimiento administrativo de la Unión Europea*, INAP, Madrid, 2015. Article I-4(4) of the ReNEUAL Code defines the 'composite procedure' as an administrative procedure in which the EU authorities and the authorities of one or more Member States are assigned different, but interdependent, functions. A procedure which combines two directly related administrative procedures is also classed as a composite procedure.

22 Alonso de León, S., *Composite administrative procedures in the European Union*, Iustel, Madrid, 2017; Della Cananea, G., 'I procedimenti amministrativi composti dell'Unione europea', in Bignami, F. and Cassese, S., (ed.), *Il procedimento amministrativo nel diritto europeo*, Milano, Giuffrè, 2004; Mastrodonato, G., *I procedimenti amministrativi composti nel diritto comunitario*, Bari, Cacucci, 2007; Hofmann, H.C.H., 'Composite decision-making procedures in EU administrative law', in Hofmann, H.C.H., Türk, A., *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, Cheltenham, 2009, p. 136.

23 A recent study can be found in Brito Bastos, F., 'Derivative illegality in European composite administrative procedures', *Common Market Law Review*, 2018, No 1, pp. 101 to 134.

24 Alonso de León, S., *Composite administrative procedures in the European Union*, Iustel, Madrid, 2017, pp. 273 to 318. See also the studies by Eliantonio, M., 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"', *Review of European Administrative Law*, 2014 No 2, pp. 65 to 102; and de Türk, A., 'Judicial Review of integrated administration in the EU', in Hofmann, H.C.H., and Türk, A., *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, Cheltenham, 2009, pp. 218 to 256, especially pp. 222 to 224.

25 See Prechal, S., Widdershoven, R., Jans, J., 'Introduction', in Jans, J., Prechal, S., Widdershoven, R. (ed.), *Europeanisation of Public Law*, Europa Law Publishing, Amsterdam, 2015, p. 33.

61. There are, however, two situations in which this rule may become less clear-cut in these types of procedures, namely:

– where a definitive measure adopted by EU institutions is based on prior, or preparatory, measures by national authorities, the legality of which is being disputed.

– conversely, where a definitive measure adopted by national authorities may be *contaminated* by allegedly unlawful action on the part of EU institutions, on which that measure is based.

62. The latter situation does not present any great difficulty: judicial review continues to lie with the national courts, although they must make a reference to the Court of Justice for a preliminary ruling on the validity of the action taken by the European Union if they consider that it may be invalid. [26]

63. By contrast, the problems raised by the former situation are more tricky. A decision on which court (national or EU) has jurisdiction to conduct judicial review will depend on the characteristics of the procedure at issue. More specifically, it will depend on how the decision-making power is distributed within that procedure. Using this criterion, the case-law of the Court of Justice enables us to identify two different situations:

– EU composite administrative procedures where the decision-making power lies with the national authorities (*Borelli* case-law).

– EU composite administrative procedures where the decision-making power lies with the EU institutions (*Sweden* v *Commission* case-law).

### *1.* Borelli *case-law*

64. The judgment in *Oleificio Borelli* v *Commission* [27] concerned a composite administrative procedure in which the decision-making power lay with the national authorities. The Court of Justice held that a project could receive EAGGF funding only if it had been approved by the Member State on whose territory it was to be carried out. Consequently, where the Member State issued an unfavourable opinion, the Commission could not examine the project nor, a fortiori, review the lawfulness of that opinion.

65. The Court of Justice concluded that it had no jurisdiction to rule on the lawfulness of a measure adopted by a national authority, even where that measure formed part of an EU decision-making procedure in which the measure in question was binding on the EU institutions. Any defects in the opinion issued by the national authority could not affect the validity of the decision made by the Commission, which refused the application for aid. [28]

66. The Court of Justice thus rejected the possibility that a measure adopted by the European Union may be affected by the illegality of a national measure in a composite procedure in which the decision-making power lies principally with the national authority. This apparently illogical solution was justified by the need to ensure that administrative acts of the European Union cannot be rendered invalid where the national courts annul national administrative acts on the ground of breach of national rules.

26 Judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452), paragraphs 14 and 15. See also judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10), paragraphs 27 and 30, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraph 95.

27 Judgment of 3 December 1992, (C-97/91, the '*Borelli* judgment', EU:C:1992:491).

28 *Borelli* judgment, paragraphs 9 to 12, and order of the President of the Court of 13 January 2009, *Occhetto and European Parliament* v *Donnici* (C-512/07 P(R) and C-15/08 P(R), EU:C:2009:3), paragraph 50.

67. To ensure there were no gaps in judicial review in such cases, the Court of Justice held that it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties. [29]

68. The Court of Justice has applied the same doctrine to composite procedures in which the decision-making power lies principally with national authorities in the case of management of structural funds, protection of geographical indications and appointment and removal of members of the European Parliament. I will refer to some of these below.

69. In the judgment in *Liivimaa Lihaveis*, [30] the Court of Justice held that a programme 'manual' adopted by a monitoring committee in the context of an operational programme under Regulation (EC) No 1083/2006 [31] and intended to promote European territorial cooperation between two Member States did not constitute an act of an institution, body, office or agency of the European Union and, in consequence, the Court of Justice did not have jurisdiction to review its validity. This administrative act could, however, be appealed against in the national courts, which could make a reference for a preliminary ruling in order to ascertain whether the act was compatible with EU law. [32]

70. The field of protection for geographical indications also provides examples of composite administrative procedures in which national authorities have the main role. [33] In the judgment in *Carl Kühne and Others*, [34] the Court of Justice held that the division of responsibilities between the Commission (which registers the designation applied for) and the national authorities (which have previously ruled on it and assessed whether it satisfies the requirements of the regulation) means that any unlawfulness of the national administrative act does not affect the legality of Regulation No 590/1999. [35]

71. As in the *Borelli* judgment, the Court of Justice added that it is for the national courts to rule on the lawfulness of an application for registration of a designation on the same terms as those on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting the rights of third parties under EU law and, consequently, to regard an action brought for that purpose as admissible, even if the domestic rules of procedure do not provide for this in such a case. [36]

29 *Borelli* judgment, paragraph 13. According to the judgment, the national court should regard an action brought in such a case as admissible even if the domestic rules of procedure do not provide for this.

30 Judgment of 17 September 2014 (C-562/12, EU:C:2014:2229), paragraph 56.

31 Council Regulation of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

32 The Court of Justice held that 'Regulation No 1083/2006, read in conjunction with Article 47 of the Charter, must be interpreted as precluding a provision of a programme manual adopted by a monitoring committee in the context of an operational programme established by two Member States and intended to promote European territorial cooperation where that provision does not provide that a decision of that monitoring committee rejecting an application for aid can be subject to appeal before a court of a Member State' (judgment of 17 September 2014, *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229, paragraph 76).

33 Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1) introduced a composite procedure in which producer associations submit applications for registration of a PDO or PGI to their national authorities. Those authorities must check that the application is justified and, if they consider that the requirements of the regulation are met, they must forward the application to the Commission, which will merely conduct a formal examination in order to verify whether the requirements are satisfied.

34 Judgment of 6 December 2001 (C-269/99, EU:C:2001:659), paragraphs 57 and 58. See also judgment of 2 July 2009, *Bavaria and Bavaria Italia* (C-343/07, EU:C:2009:415), paragraphs 55 to 57.

35 The case involved registration of the designation 'Spreewälder Gurken', which was carried out in accordance with Commission Regulation (EC) No 590/1999 of 18 March 1999 supplementing the Annex to Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation (EEC) No 2081/92 (OJ 1999 L 74, p. 8).

36 Judgment of 6 December 2001, *Carl Kühne and Others* (C-269/99, EU:C:2001:659), paragraphs 57 and 58. On this point, see also judgment of 2 July 2009, *Bavaria and Bavaria Italia* (C-343/07, EU:C:2009:415), paragraphs 64 to 67.

72. Composite procedures in which national authorities have the principal role are also laid down for the election of members of the European Parliament. Having delimited the respective responsibilities of the Parliament and the national authorities in verifying the credentials of MEPs, the Court ruled that it was for the national authorities to declare the results drawn up pursuant to national provisions that are in accordance with EU law. Consequently, under Article 12 of the 1976 Act, the European Parliament was required to take note of that declaration and did not have the power to depart from it on account of any alleged irregularities affecting that national measure. [37]

*2.* Sweden *v* Commission *case-law*

73. The Court of Justice has also ruled on composite administrative procedures in which the final decision-making power is conferred on EU institutions and national authorities are involved in the preliminary or preparatory stages.

74. In these cases, responsibility for taking the final decision, which brings the procedure to an end, lies with the EU institution and, therefore, judicial review of such decisions must necessarily be undertaken by the General Court and the Court of Justice. Moreover, measures of national authorities in such procedures are of a purely preparatory nature, and therefore as a general rule they will not need to be reviewed either by national courts or by the Court of Justice. [38]

75. In the judgment in *Netherlands* v *Commission*, [39] the Court of Justice drew a distinction between composite procedures where the decision-making power lies with the EU institutions and those where the involvement of national authorities is decisive. Specifically, it held that the common organisation of the market in bananas was not based on a decentralised management of the tariff quota in respect of which the Member States had been given a decision-making power. [40]

76. Another composite procedure where the final decision-making power lies with the EU institutions was the procedure examined in the judgment in *Greenpeace France and Others*; [41] specifically, the case involved authorisation for a type of genetically modified maize under Directive 90/220. [42] The Court of Justice held that, where the national court finds that, owing to irregularities in the conduct of the examination of the notification by the competent national authority provided for in Article 12(1) of Directive 90/220, it was not proper for that authority to forward the dossier with a favourable opinion to the Commission as provided for in Article 12(2), the court cannot review the validity of the decision taken by the Commission, as this power is reserved to the Court of Justice through the indirect route of a preliminary ruling on the question of validity. [43]

37 This is what occurred in the case of the declarations by the Italian Electoral Office that were the subject of the judgment of 30 April 2009, *Italy and Donnici* v *Parliament* (C-393/07 and C-9/08, EU:C:2009:275), paragraphs 74 and 75, and of the order of the President of the Court of 13 January 2009, *Occhetto and Parliament* v *Donnici* (C-512/07 P(R) and C-15/08 P(R), EU:C:2009:3). By declaring — contrary to that declaration — Mr Donnici's mandate invalid and by ratifying Mr Occhetto's mandate, the contested decision infringed Article 12 of that act.

38 Judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264), paragraph 12, and of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656).

39 Judgment of 17 October 1995 (C-478/93, EU:C:1995:324), paragraphs 34 to 40.

40 Member States had been given no powers, either by the Council or by the Commission, to take decisions in regard to management of the import quota, but were required to assume a number of technical functions on behalf of and subject to the control of the Commission (such as drawing up the list of operators and the average quantities of bananas that each operator had sold over the three most recent years for which figures were available). The role of the Member States in the collection and transmission of information could not, however, prevent the Commission, which was required to ensure the daily management of the common organisation of the markets, from checking the accuracy of that information and revising it if there was a danger that the double counting of quantities might distort the basis of the import system.

41 Judgment of 21 March 2000 (C-6/99, EU:C:2000:148).

42 Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15), as amended by Commission Directive 97/35/EC of 18 June 1997 adapting to technical progress for the second time Directive 90/220 (OJ 1997 L 169, p. 72). In order to obtain authorisation for genetically modified seeds, an application had to be submitted to the competent national authority. Once the competent national authority had examined the impact on human health and the environment, it forwarded the application to the Commission with a favourable opinion. The Commission, in turn, notified all Member States of the application to enable them to raise objections. If the Commission took a 'favourable decision' under Article 13(4) of the directive, the competent authority had to issue the 'written consent' enabling the product to be marketed.

43 Judgment of 21 March 2000, *Greenpeace France and Others* (C-6/99, EU:C:2000:148), paragraph 57.

77. Finally, in the judgment in *Sweden* v *Commission*[44] the Court of Justice addressed another type of composite procedure controlled by the EU authorities. This procedure concerned application for access to documents held by the institutions originating from Member States, as provided for in Articles 4 and 5 of Regulation No 1049/2001.[45] The EU institution takes the decision to refuse or allow access to the requested document, following authorisation from the originating Member State.

78. The Court of Justice held that this was a procedure involving the EU institution and the Member State in order to determine whether access to a document should be refused under one of the substantive exceptions in Article 4(1) to (3) of that regulation.

79. It held that, in such a case, 'it is within the jurisdiction of the Community judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. From the point of view of the person concerned, the Member State's intervention does not affect the Community nature of the decision that is subsequently addressed to him by the institution in reply to the request he has made for access to a document in its possession.'[46]

### *B. Administrative procedure for obtaining authorisation for qualifying holdings in credit institutions*

80. The requirement to obtain authorisation for qualifying holdings is intended to ensure that only natural or legal persons who will not jeopardise the proper operation of the banking sector can become part of that sector. In particular, the purpose of the assessment is to check that the proposed acquirer enjoys a good reputation and has the necessary financial soundness, so that the institution in which the stake is to be acquired continues to meet its prudential requirements. The assessment also helps to ensure that the transaction is not financed by the proceeds of illegal activities.

81. Article 2(8) of the SSM Regulation refers to the definition of 'qualifying holding' in point 36 of Article 4(1) of Regulation (EU) No 575/2013.[47] It therefore means 'a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking'.

82. Article 22 of CRD IV imposes a mandatory requirement for authorisation for an acquisition of or increase[48] in a qualifying holding. All supervisory authorities in the European Union, both in Member States that are members of the banking union and in those that are not, must follow the authorisation procedure.

44 Judgment of 18 December 2007 (C-64/05 P, EU:C:2007:802).

45 Regulation (EC) of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

46 Judgment of 18 December 2007, *Sweden* v *Commission* (C-64/05 P, EU:C:2007:802), paragraph 94; see also order of the President of the Court of 13 January 2009, *Occhetto and Parliament* v *Donnici* (C-512/07 P(R) and C-15/08 P(R), EU:C:2009:3), paragraph 53.

47 Regulation of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

48 Article 22 of CRD IV treats in the same way the acquisition of a qualifying holding and an increase, whether direct or indirect, in a qualifying holding as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or the credit institution would become the acquirer's subsidiary.

*1. Criteria for granting authorisation*

83. Article 23 of CRD IV harmonises the substantive criteria for assessing an acquisition of or increase in a qualifying holding.[49] This harmonisation is, however, only partial, as the directive does not detail the precise elements required in order to satisfy each of the criteria, which must be assessed in accordance with national rules.

84. In order to standardise practice across Member States, in 2016 the European supervisory authorities adopted joint guidelines on the prudential assessment of acquisitions of and increases in qualifying holdings in the financial sector.[50] As far as banking institutions are concerned, the legal basis for these guidelines is provided by Article 16(1) of Regulation No 1093/2010,[51] which states that the European Banking Authority, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of EU law, is to issue guidelines and recommendations addressed to competent authorities or financial institutions.

85. While the guidelines are non-binding legal acts, Member States undertake to make every effort to comply with them (and with the recommendations) under a procedure known as 'comply or explain'.[52] According to the information provided at the hearing, the Italian authorities decided to apply the 2016 guidelines in a decision of the Comitato Interministeriale per il Credito ed il Risparmio (Interministerial Committee for Credit and Savings) adopted in 2017.

*2. Authorisation procedure*

86. The procedure for granting this type of authorisation is governed by Article 4(1)(c), Article 6(4) and Article 15 of the SSM Regulation, supplemented by Articles 85 to 87 of the SSM Framework Regulation.

87. Under Article 4(1)(c) of the SSM Regulation, read in conjunction with Article 6(4), the ECB is exclusively competent to assess and decide on acquisitions of and increases in qualifying holdings in all financial institutions that come under the single supervisory mechanism, irrespective of whether the institutions are more or less significant and of whether they are under the direct supervision of the ECB or the NCAs.

88. This situation highlights the fact that the SSM Regulation has created 'a truly integrated supervisory mechanism', in which the key processes are, in general terms, identical for all credit institutions, whether 'significant' or 'less significant', and involve both the ECB and the NCAs.

89. The common administrative procedures introduced by the SSM Regulation are used both to grant or revoke authorisations to take up the business of a banking institution and also to assess acquisitions of or increases in qualifying holdings.

49 These are: the reputation of the proposed acquirer; the reputation and experience of the proposed new members of the senior management; the financial soundness of the proposed acquirer; influence over the institution; and the risk of links with money laundering or terrorist funding activities.

50 Joint guidelines by the EBA, EIOPA and ESMA on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (JC/GL/2016/01), pp. 21 to 31. The various language versions are available on the website of the Joint Committee of the European Supervisory Authorities at https://esas-joint-committee.europa.eu/Pages/Guidelines/Joint-Guidelines-on-the-prudential-assessment-of-acquisitions-and-increases-of-qualifying-holdings-in-the-banking,-insuranc.aspx.

51 Regulation (EU) of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12; 'the EBA Regulation').

52 The second subparagraph of Article 16(3) of the EBA Regulation provides that 'within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons'.

90. Specifically, the ECB exercises its competence to review acquisitions of and increases in qualifying holdings in the terms laid down in Article 15 of the SSM Regulation, supplemented by Articles 85 to 87 of the SSM Framework Regulation. In the procedure to be followed for these purposes, the ECB is the decision-making authority and the NCAs are responsible for the preparatory work for the decisions.

91. The procedure is as follows:[53]

– The applicant entity notifies the acquisition of or increase in a qualifying holding to the relevant NCA, which is the NCA of the Member State where the institution being acquired is established.

– The NCA notifies the ECB of receipt of notification of an intention to acquire or increase a qualifying holding no later than five working days following its acknowledgement of receipt to the applicant. The procedure cannot be finalised until the required information has been submitted. Applicants should therefore ensure that their applications are complete and well structured. If the first review of an application reveals omissions or inconsistences, the receiving NCA is immediately to ask the applicant to make the necessary amendments.

– Once the application has been submitted and its completeness verified, it is subject to a complementary assessment by the receiving NCA, the ECB and any other NCAs concerned. The assessment seeks to ensure that all relevant parties gain a thorough understanding of the business model and its viability. To this end, the assessment covers all the criteria set out in relevant national and EU laws.

– The NCA will propose a draft decision to the ECB to oppose or not to oppose the acquisition of or increase in qualifying holdings. From this point, the final decision on the approval or rejection of the application is the sole responsibility of the ECB. If an application is to be rejected or additional conditions need to be imposed, the applicant will be entitled to a hearing.

– The final decision lies with the ECB, which follows the usual procedures for taking decisions under the banking union, to be found in Article 26(6) and (8) of the SSM Regulation: the ECB Supervisory Board submits the full draft decision to the Governing Council and the decision is deemed to be adopted unless the Governing Council objects within a period of time that may not exceed 10 days.

– Once the final decision has been adopted, the ECB notifies the applicant. If the acquisition is refused or if the proposed acquirer considers that the decision is detrimental to it in any way, it may ask for it to be reviewed by the ECB Administrative Board of Review provided for in Article 24 of the SSM Regulation.

### *C. First question referred: judicial review of national preparatory measures in the procedure for authorising acquisitions of qualifying holdings in credit institutions*

92. As I have just described, the procedure for authorising acquisitions of or increases in qualifying holdings in financial institutions is a composite procedure, because it involves both the ECB, as the decision-making authority, and the NCAs, as bodies responsible for undertaking the preparatory work for the decisions. I will deal first with the questions regarding competence to take the decision, and will then examine judicial review of the final decision that has to be taken.

53 ECB, *Guide to banking supervision*, 2014, pp. 27 to 30.

*1. Competence to take the final decision*

93. After the application has been submitted, the NCA's involvement is limited to verifying compliance with the conditions required in order for the transaction to be authorised, which are laid down by EU and national law. Their role culminates in the submission of a draft or proposed decision to the ECB, which is in any case not bound by the proposal.

94. Once the proposal has been submitted, the decision-making stage of the composite procedure starts. This is the sole responsibility of the ECB which, in the end, must grant or refuse the application to acquire or increase the qualifying holding. In my opinion, the ECB has an exclusive decision-making power, as the following reasons show.

95. First, Article 87 of the SSM Framework Regulation provides that 'the ECB shall decide whether or not to oppose the acquisition on the basis of its assessment of the proposed acquisition and the NCA's draft decision'. As the Bank of Italy states, it can be inferred from this provision that the ECB has total power to assess the matters of fact and law when it comes to take its final decision. The proposal submitted to it by the NCA is one more element in that assessment, but not necessarily the only one. There is nothing to prevent the ECB from performing its own independent investigation and research activities [54] and arriving at a different conclusion from that proposed by the NCA, which is not binding on it. [55]

96. I should stress that, in legal terms, the draft submitted by the NCA does not determine the subsequent decision by the ECB. Depending on its merits, it may influence that decision to a greater or lesser extent, but such a situation is also to be found in other processes (such as a non-binding opinion, for example) in any procedure. The NCA has no specific decision-making power, beyond its responsibility for conducting the first stage of the procedure once an application for authorisation has been submitted. This is not, therefore, a case of a codecision procedure involving the NCA and the ECB, as Mr Berlusconi appears to believe in his written observations.

97. Second, the ECB may decide to amend its final decision and to depart from a proposal by an NCA that it previously adopted, following the intervention of the Administrative Board of Review, [56] if an appeal by a potential acquirer is upheld in whole or in part. [57] In addition, the final decision by the ECB may include conditions for the authorisation of the acquisition of or increase in a qualifying holding that do not appear in the proposal from the NCA.

98. Third, the fact that the initial stage of the procedure takes place before the NCA does not mean that the ECB is not involved. Article 85(1) of the SSM Framework Regulation provides that an NCA that receives a notification of an intention to acquire a qualifying holding in a credit institution is to notify the ECB no later than five working days following the acknowledgement of receipt. In addition, Article 6(2) of the SSM Regulation states that both the ECB and the NCAs are to be subject to a duty of cooperation in good faith, and an obligation to exchange information.

54 In the present case, the ECB altered some paragraphs in the draft decision submitted by the Bank of Italy, in response to comments made by Fininvest at the hearing before the ECB. This is evidence, if any were needed, of the independence of the ECB when it is required to take a final decision in this type of procedure.

55 On this point, see Lackhoff, K., *Single Supervisory Mechanism. A Practitioner's Guide*, Beck, Hart, Nomos, Munich, 2017, p. 172: the procedure for authorising qualifying holdings 'does not consist in a two-step procedure (with a national and an ECB part) as the authorisation procedure but is in its entirety an ECB supervisory procedure'.

56 Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ 2014 L 175, p. 47). On the operation of this internal administrative review body, see Brescia Morra, C., Smits, R. and Magliari, A., 'The Administrative Board of Review of the European Central Bank: Experience After 2 Years', *European Business Organisation Law Review*, 2017, pp. 567 to 589.

57 At the hearing, the ECB confirmed that this is not what usually happens.

99. Fourth, the NCA does not notify the applicant of the draft decision submitted by it to the ECB, thus confirming that this is merely an internal procedure preparatory to the final decision by the ECB, of no legal significance to the applicant or to third parties. [58]

100. Fifth, the procedure for authorising an acquisition of or increase in a qualifying holding is different from other similar procedures, such as the procedure for an authorisation to carry on banking activities. In the latter case, under Article 14(2) of the SSM Regulation [59] the NCA has power to decide on its own to reject an application for authorisation, and it notifies the applicant of its decision, which is effective as against the applicant and against third parties. It is a definitive measure, amenable to review by the national courts, which may make a reference to the Court of Justice for a preliminary ruling. By contrast, under the procedure for authorising acquisitions of qualifying holdings the NCAs do not have these powers.

101. Sixth, under Article 22(6) of CRD IV, if the competent authorities do not oppose the proposed acquisition in writing within the assessment period, it shall be deemed to be approved. In order to ensure that inaction on the part of the NCA does not operate as a form of approval on grounds of administrative silence, the ECB may intervene (pursuant to the third subparagraph of Article 9(1) of the SSM Regulation) [60] and instruct the NCA to express its view on the application for authorisation of an acquisition of or increase in a qualifying holding. This makes clear that the ECB is involved in that procedure from the start and that it is the ECB that exercises sole control over the procedure.

*2. Judicial review of decisions in these procedures*

102. Having established that authorisation to acquire or increase qualifying holdings in financial institutions is handled under a composite procedure in which the final decision is a matter solely for the ECB, it is necessary to clarify the question of judicial review of decisions made in this procedure.

103. With regard to determining the applicable system of judicial review, both the *Borelli* case-law and the *Sweden* v *Commission* case-law address the specific distribution of competences between the national authorities and the EU institutions. Where the decision-making power lies with national authorities, the *Borelli* case-law applies; where it rests with the EU authority, the *Sweden* v *Commission* case-law applies.

58 The draft decision by the NCA is always submitted to the ECB in English, as this is the language used in communications between the NCAs and the ECB within the SSM (Article 23 of the SSM Framework Regulation). In contrast, the final decision by the ECB is translated into the language of the applicant.

59 This provision states that 'if the applicant complies with all conditions of authorisation set out in the relevant national law of … the Member State, the national competent authority shall take, within the period provided for by relevant national law, a draft decision to propose to the ECB to grant the authorisation. The draft decision shall be notified to the ECB and the applicant for authorisation. In other cases, the national competent authority shall reject the application for authorisation.'

60 The exact wording of the provision is as follows: 'To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.'

104. The SSM is a complex, multi-layered structure formed by the ECB and the NCAs, in which the ECB holds a key position, is responsible for the operation of the system, and controls the body of tasks required by the mechanism. [61] To achieve these objectives, the ECB has exclusive powers within the SSM framework. The NCAs' involvement reflects the logic of the decentralised exercise of these powers, rather than a distribution of competences between the ECB and the national authorities. [62]

105. In the procedure for authorising qualifying holdings, sole power to take the final decision is concentrated in the ECB, as it is in most composite administrative procedures within the banking union. Symmetrically, sole jurisdiction to conduct a judicial review of the exercise of that concentrated power must lie with the General Court and the Court of Justice. [63]

106. In my view, it is hard to argue against this assertion. Indeed, Fininvest has lodged an application, which is currently before the General Court (T-913/16), for annulment of the ECB's decision to refuse the acquisition of the qualifying holding in Banco Mediolanum.

107. The preparatory nature of the measures taken by the NCAs during the initial stage of the procedure confirms, if confirmation were needed, that the Court of Justice has an exclusive power of judicial review both over decisions on the authorisation of acquisitions or increases of qualifying shares in banking institutions and over the proposals that precede those decisions.

108. According to the established case-law of the Court of Justice, the validity of acts adopted by EU institutions, whatever their nature or form, can be challenged only where they are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position. Consequently, in the case of acts or decisions adopted by a procedure involving several stages, an act is open to review only if it is a measure definitively laying down the position (usually, of the Commission or the Council) on the conclusion of that procedure. In contrast, intermediate or provisional measures intended to pave the way for the final decision are not open to challenge. [64]

109. This case-law can be extrapolated to apply to procedures in which the purely auxiliary, preparatory intervention is made by a national authority. Where the act of that authority is limited to a proposal which, by definition, is not a decision, that act cannot affect the legal situation of any natural or legal person. Consequently its nature is not such that would enable it to be challenged in its own right. Moreover, any errors committed during the preparation of the proposal could be asserted as part of a challenge to any final decision that incorporates the contents of the proposal.

110. In summary, national courts cannot rule on purely preparatory acts adopted by NCAs as part of a composite procedure in which the decision lies exclusively with the ECB. Otherwise, the national courts would in practice undertake review of the substance of decisions that are a matter for the ECB rather than the NCAs; such a situation could, moreover, lead to paradoxical situations. [65]

61 See the analyses by Chiti, E., and Recine, F., 'The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position', *European Public Law*, 2018, No 24, pp. 103 to 108, and by Lamandini, M., and Ramos Muñoz, D., *EU Financial Law*, CEDAM Legal Studies, Wolters Kluwer, 2016, pp. 183 to 212.

62 The General Court has drawn attention to this idea in its judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB* (T-122/15, EU:T:2017:337), paragraph 54, against which an appeal is pending (Case C-450/17 P). See the commentaries by D'Ambrosio, R., and Lamandini, M., 'La "prima volta" del Tribunale dell'Unione europea in materia di Meccanismo di Vigilanza Unico', *Giurisprudenza commerciale*, 2017, pp. 594 to 599, and by Adalid, S., 'Le MSU, nouveau sous-système de droit de l'Union européenne', *Revue des affaires européennes*, 2017, No 2, pp. 373 to 370.

63 Judgment of 18 December 2007, *Sweden* v *Commission* (C-64/05 P, EU:C:2007:802), paragraphs 93 and 94; see also order of the President of the Court of 13 January 2009, *Occhetto and European Parliament* v *Donnici* (C-512/07 P(R) and C-15/08 P(R), EU:C:2009:3), paragraph 53.

64 See, in particular, the judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264), paragraphs 9 and 10; of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission* (C-506/13 P, EU:C:2015:562, paragraph 16); and of 20 September 2016, *de Mallis and Others* v *Commission and ECB* (C-105/15 P to C-109/15 P, EU:C:2016:702), paragraph 51.

65 In the case of a preparatory act by the NCA that had the same content as the ECB decision, the judgments of the national court and the Court of Justice could diverge. That situation would arise in the present case if there were to be a judgment of the Italian court and a separate judgment by the General Court that reached contradictory conclusions.

111. Consequently, I believe that jurisdiction to review all acts adopted as part of a procedure to authorise acquisitions of and increases in qualifying holdings in banking institutions must be ascribed to the EU Courts rather than to national courts.

112. Naturally, this allocation of jurisdiction is not without difficulty. In order to safeguard the right of interested parties to an effective remedy, where this objection is raised before them the EU Courts will have to decide whether preparatory measures taken by NCAs that are subsequently adopted by the ECB contained defects that rendered them void in a way that has inevitably contaminated the entire procedure.

113. From this perspective, the question of whether the proposal by the Bank of Italy is unlawful should be examined by the General Court in the action for annulment brought against the ECB's final decision (Case T-913/16), because the ECB had discretion as to whether or not to adopt the proposal submitted by the NCA.

114. Moreover, this solution is also consistent with the provision in Article 4(3) of the SSM.[66] Under that provision, the ECB is entrusted with applying national law that transposes directives and, in exceptional cases, regulations that deal with the banking union, underpinning the extension of the jurisdiction of the Court of Justice to review such cases.[67]

115. On the basis of the above arguments, I believe that Article 263 TFEU:

– confers on the Court of Justice exclusive jurisdiction to review the legality of measures adopted as part of the procedure provided for in Article 4(1)(c) and Article 15 of the SSM Regulation and Articles 85 to 87 of the SSM Framework Regulation; and

– prevents national courts from reviewing the legality of decisions to initiate procedures, measures of inquiry and proposals adopted at national level by the national competent authority in the course of that procedure, which culminates in a binding decision by the ECB.

### *D. Second question referred: impact of national judgments having the force of res judicata on the judicial review of national preparatory measures*

116. The answer to the second question can be inferred logically from my recommended response to the first question. When one argues that the General Court and the Court of Justice have *exclusive* jurisdiction to carry out a judicial review of the measures adopted in these procedures, and that the national courts have no such jurisdiction, the fact that the national courts may be called on to make a ruling through the *giudizio di ottemperanza* or any other procedural mechanism of their domestic law is irrelevant.

66 The wording of this provision is as follows: '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 Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.'

67 Even in areas of banking supervision that are regulated by rules of Member States' domestic law that are not explicitly mentioned in EU law, the ECB considers it has competence to exercise supervisory functions and it effects a detailed application of national rules. This is set out in a letter to the NCAs: ECB, *Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law*, letter SSM/2017/0140 of 31 March 2017 (available at https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?abdf436e51b6ba34d4c53334f0197612). See the commentaries by Smits, R., 'Competences and alignment in an emerging future. After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop', *ADEMU Working Papers Series* 2017/077, pp. 16 to 24.

117. Indeed, the conferral of jurisdiction is an essential prerequisite in order for subsequent court proceedings to be valid. If a court does not have jurisdiction, it simply cannot act, whatever the procedural route used. The *giudizio de ottemperanza* is one of those routes, through which Italian procedural law seeks to ensure that the final and binding nature of an earlier court decision is respected. [68]

118. Mr Berlusconi and Fininvest seek to avail themselves of this route, citing the judgment delivered on 3 March 2016 by the Consiglio di Stato (Council of State) as grounds for the nullity of the proposed decision forwarded to the ECB by the Bank of Italy during the authorisation procedure. But if, as I have already argued, the Italian courts lack jurisdiction to rule on the preparatory measures agreed by NCAs, that argument will have to be asserted before the General Court (as has happened in Case T-913/16) rather than before the national courts.

119. Thus, in my opinion it is not possible to invoke the procedural autonomy of the Italian State as a ground for arguing that the (potential) *res judicata* effect of the judgment of 3 March 2016 confers jurisdiction on a national court to review the legality of the actions of the Bank of Italy in connection with the preparation of the final decision by the ECB.

120. I do not believe, therefore, that the Court of Justice should go any further and become involved in the as yet undecided issue of the impact of that judgment on this case. However, purely in the alternative, I shall explain why I believe that neither the parties to nor the subject matter of the proceedings resolved by the judgment of 3 March 2016 would be the same as those in the present proceedings (which is a requirement in order for *res judicata* to apply).

121. With regard to whether the subject matter is the same:

– The previous action concerned decision No 976145/14 of 7 October 2014 of the Bank of Italy and IVASS, which held that Mr Berlusconi did not satisfy the reputation requirement for ownership of qualifying holdings in financial intermediaries.

– The present proceedings concern the legality of the proposal put forward by the Bank of Italy (subsequently incorporated into the 2016 ECB Decision) opposing the acquisition of the qualifying holding in Banco Mediolanum achieved indirectly by Mr Berlusconi through Fininvest. The reason for that opposition lies in the sentence of four years' imprisonment for tax fraud contained in a final judgment, referred to in the judgment by the Consiglio di Stato (Council of State). However, in reaching the conclusion that the requirement for the acquirers to be of good reputation was not satisfied, both the Bank of Italy and the ECB took other additional factors into account, some of which post-date the judgment of 3 March 2016. [69]

122. With regard to whether the parties are the same:

– The ECB did not, and could not, take part in the proceedings that gave rise to the judgment of 3 March 2016, whereas it plays a key role in the present proceedings.

68 As the Commission noted during the hearing, in response to the resolute defence of the unique nature of this Italian procedural instrument mounted by Mr Berlusconi's lawyers, the fact is that many Member States have legal mechanisms that seek to preserve the final and binding nature of court rulings.

69 In point 2.2.1 of its 2016 decision, the ECB took into account the criminal or sanctioning procedures that had been commenced or in which judgments — some final, some not — had been given against Ubaldo Livolsi, Ferdinando Superti Furga and Silvio Berlusconi, and against Fininvest, as the basis for stating that the acquirers of the qualifying holding did not satisfy the requirement to be of good reputation under the rules of Italian and EU law, applied in accordance with the Joint guidelines by the EBA, EIOPA and ESMA on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.

– The 2016 ECB Decision notes that the acquirers do not satisfy the reputation requirement, which it says is true not only of the 'controlling shareholder and indirect acquirer, Mr Berlusconi, but also of another member of the management board and a member of the supervisory board of Fininvest SpA, as well as Fininvest itself'.[70]

123. In addition, the acquisitions of qualifying holdings are different, the applicable legislation is different and the procedure has changed, with exclusive competence for the decision now resting with the ECB.

124. As neither the subject matter nor the parties in the proceedings resolved by the final judgment of the Consiglio di Stato (Council of State) of 3 March 2016 are the same as those in the present proceedings, it is hard to see how the principle of *res judicata* would apply.

125. Finally, in the alternative to the alternative, the principle of *res judicata* cannot be invoked in order to enforce judgments that are clearly contrary to the rules of EU law,[71] such as judgments that may interfere with the exclusive competence of the ECB to authorise acquisitions of qualifying holdings.

## IV. Conclusion

126. In accordance with the reasoning set out above, I suggest that the Court of Justice should reply as follows to the questions referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy):

(1) Article 263 TFEU, read in conjunction with Article 4(1)(c) and Article 15 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, and with Articles 85 to 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:

– confers on the Court of Justice of the European Union exclusive jurisdiction to review the legality of measures adopted in the course of the procedure provided for in the aforesaid articles of the two regulations for the purpose of authorising acquisitions of and increases in qualifying holdings in banking institutions; and

– prevents national courts from reviewing the legality of decisions to initiate procedures, measures of inquiry and proposed decisions adopted by the competent national authorities as part of that procedure, in which the final decision is a matter for the European Central Bank.

(2) The lack of jurisdiction of the national courts to review the legality of the measures adopted in the aforesaid procedure cannot be defeated by bringing an action for a declaration of invalidity (*giudizio di ottemperanza*) which invokes an alleged breach or circumvention of the *res judicata* effect of an earlier judgment of a national court.

70 The final part of point 2.2.2 of the 2016 ECB Decision.

71 In the judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434), the Court of Justice ruled, in essence, that EU law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of EU law which has been found to be incompatible with the common market in a decision of the European Commission which has become final (judgments of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 25; of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 61; and of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 45).