Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2018 *

(Reference for a preliminary ruling — Approximation of laws — Prudential supervision of credit institutions — Acquisition of a qualifying holding in a credit institution — Procedure governed by Directive 2013/36/EU and by Regulations (EU) No 1024/2013 and No 468/2014 — Composite administrative procedure — Exclusive decision-making power of the European Central Bank (ECB) — Action brought against preparatory acts adopted by the national competent authority — Claim that the force of *res judicata* attaching to a national decision has been disregarded)

In Case C-219/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 23 February 2017, received at the Court on 25 April 2017, in the proceedings

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,

* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot (Rapporteur), A. Prechal, M. Vilaras, E. Regan, T. von Danwitz, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, J. Malenovský, E. Levits and L. Bay Larsen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2018,

after considering the observations submitted on behalf of:

– Mr Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest), by A. Di Porto, R. Vaccarella, A. Saccucci, M. Carpinelli, B. Nascimbene, R. Baratta and N. Ghedini, avvocati,

– the Banca d'Italia, by M. Perassi, G. Crapanzano, M. Mancini and O. Capolino, avvocati,

– the Spanish Government, by M.A. Sampol Pucurull, acting as Agent,

– the European Commission, by V. Di Bucci, H. Krämer, K.-P. Wojcik and A. Steiblytė, acting as Agents,

– the European Central Bank (ECB), by G. Buono, C. Hernández Saseta and C. Zilioli, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 256(1) and the first, second and fifth paragraphs of Article 263 TFEU.

2 The request has been made in proceedings brought by Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) against the Banca d'Italia (Bank of Italy) and the Istituto per la Vigilanza sulle Assicurazioni (Institute for the Supervision of Insurance (IVASS), Italy) relating to scrutiny of the acquisition of a qualifying holding in a credit institution.

Legal context

EU law

CRD IV

3 As set out in Article 22, headed 'Notification and assessment of proposed acquisitions', of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms,

amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338, corrigendum at OJ 2017 L 20, p. 1) (known as the Capital Requirements Directive; 'CRD IV'):

'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. 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.

The competent authorities shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 23(4) (the "assessment period"), to carry out the assessment provided for in Article 23(1) (the "assessment").

The competent authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

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.

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be suspended. The suspension shall not exceed 20 working days. 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.

4. The competent authorities may extend the suspension referred to in the second subparagraph of paragraph 3 up to 30 working days if the proposed acquirer is situated or regulated in a third country or is a natural or legal person not subject to supervision under this Directive or under Directive 2009/65/EC, 2009/138/EC, or 2004/39/EC.

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.

…'

4 Article 23 of CRD IV, headed 'Assessment criteria', states:

'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.

…'

5 Article 119 of CRD IV, headed 'Inclusion of holding companies in consolidated supervision', provides in paragraph 1:

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

The SSM Regulation

6 Recital 11 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) (known as the Single Supervisory Mechanism (SSM) Regulation; 'the SSM Regulation') 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. ...'

7 Article 1 of the SSM Regulation, headed ‘Subject matter and scope’, states:

‘This Regulation confers on the [European Central Bank (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.

…’

8 Article 4 of the SSM Regulation is worded as follows:

‘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.

…’

9 Article 6(1) of the SSM Regulation provides that the ECB is to carry out its tasks within a single supervisory mechanism which is composed of the ECB and national competent authorities (‘NCAs’) and for the effective and consistent functioning of which the ECB is to be responsible. Under Article 6(2), both the ECB and NCAs are to be subject to a duty of cooperation in good faith and an obligation to exchange information. 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.

10 Article 9 of the SSM Regulation, headed ‘Supervisory and investigatory powers’, provides in paragraph 1:

‘For the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law.

For the same exclusive purpose, the ECB shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation. In particular, the ECB shall have the powers listed in Sections 1 and 2 of this Chapter.

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.'

11 Article 15 of the SSM Regulation, headed '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 [NCAs] 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 [NCA] 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.'

The SSM Framework Regulation

12 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 (SSM Framework Regulation) (OJ 2014 L 141, p. 1,) which was adopted in accordance with Article 4(3) of the SSM Regulation, establishes the framework for cooperation, within the single supervisory mechanism, between the ECB and NCAs.

13 Article 85 of the SSM Framework Regulation, headed '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 [CRD IV].

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.'

14 Article 86 of the SSM Framework Regulation, headed 'Assessment of potential acquisitions', states:

'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.'

15 Article 87 of the SSM Framework Regulation, headed 'ECB decision on acquisition', is worded as follows:

'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.'

Italian law

Legislation on banking supervision

16 Article 19 of decreto legislativo n. 385 — Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 — Consolidated text of the laws on banking and credit) of 1 September 1993 (Ordinary Supplement to GURI No 230 of 30 September 1993), as amended by decreto legislativo n. 72 (Legislative Decree No 72) of 12 May 2015 ('the Consolidated Law on Banking'), which has transposed the content of CRD IV into Italian law, confers upon the Bank of Italy the power to issue authorisations to acquire qualifying holdings in financial institutions. Article 19(5) states that such authorisations shall be issued '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 …'.

17 Article 25 of the Consolidated Law on Banking, headed 'Shareholders', states in paragraph 1 that owners of the holdings that are referred to in Article 19 of the Consolidated Law on Banking must be of good reputation and satisfy criteria of competence and integrity in order to ensure the sound and prudent management of the bank.

18 By way of a transitional measure, Article 2(8) of Legislative Decree No 72 of 12 May 2015 lays down that the provisions concerning the reputation requirements for owners of holdings in financial institutions that were in force before that decree was adopted are to continue to apply.

19 The provisions in question were contained in decreto ministeriale n. 144 — regolamento recante norme per l'individuazione dei requisiti di onorabilità dei partecipanti al capitale sociale delle banche e fissazione della soglia rilevante (Ministerial Decree No 144 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) of 18 March 1998, Article 1 of which specifies the convictions that adversely affect the reputation of the person concerned and thus result in the requirement in question not being complied with.

20 Article 2 of Ministerial Decree No 144 of 18 March 1998 provides, by way of a transitional measure, 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'.

21 As regards mixed financial holding companies ('MFHCs'), Article 63 of the Consolidated Law on Banking, adopted in accordance with Article 119 of CRD IV, made their qualifying members subject to the same obligations as those imposed on members of banking institutions.

22 Article 67bis(2) of the Consolidated Law on Banking states that the Bank of Italy and IVASS are jointly responsible for ensuring compliance with those obligations when the companies in question have their seat in Italy and are the parent of a financial conglomerate that is wholly or partly Italian.

Rules relating to administrative proceedings

23 Provision is made, in the procedure governing proceedings before the Italian administrative courts, for an *azione di ottemperanza* (action for compliance).

24 In that regard, Article 21septies(1) of legge n. 241 — nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (Law No 241 concerning new provisions on administrative procedure and the right of access to administrative documents) of 7 August 1990, as amended by Law No 15 of 11 February 2005, states:

'Any administrative measure … adopted in breach or circumvention of a final judgment shall be invalid ...'

25 Article 112 of the Codice del processo amministrativo (Code of Administrative Procedure) provides:

'1. Decisions of the administrative courts must be implemented by the public authorities and the other parties.

2. An *azione di ottemperanza* 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.

…'

26 As set out in Article 114(4)(b) of the Code of Administrative Procedure, if the court before which the *azione di ottemperanza* has been brought upholds the action, it is to 'declare void any measures adopted in breach or circumvention of the final judgment'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

27 In the 1990s Mr Berlusconi acquired, through Fininvest, approximately 30% of Mediolanum SpA, which was at that time an MFHC controlling, inter alia, a bank, Banca Mediolanum SpA, and which was on that basis subject to supervision of qualifying holdings in Italy from 2014.

28 Following judgment No 35729/13 of the Corte suprema di cassazione (Court of Cassation, Italy), which became final on 1 August 2013, and by which Mr Berlusconi was found guilty of tax fraud, the competent Italian supervisory authorities, namely the Bank of Italy and IVASS, conducted a procedure in relation to him which resulted in a decision determining that he had ceased to fulfil the reputation requirement laid down by the applicable legislation and that, accordingly, the part of Fininvest's holding in Mediolanum that exceeded the limit of 9.999% had to be divested.

29 Mr Berlusconi and Fininvest challenged that decision before the Italian courts, putting forward in particular a plea regarding the temporal application of the law, to the effect that the reason for the lack of good reputational standing that was the justification for opposing the acquisition of the qualifying holding at issue had arisen before the legislation imposing that requirement entered into force, and was not therefore covered by that legislation. Following the dismissal of their action at first instance, the applicants were successful before the Consiglio di Stato (Council of State, Italy), which held on 3 March 2016 that the legislation preceding the adoption of the reputation criteria, and upon which the applicants relied, had remained applicable despite arguments to the contrary seeking to show that it had to be regarded as implicitly repealed because it conflicted with EU law.

30 In the meantime, the MFHC Mediolanum was acquired, by merger, by its subsidiary Banca Mediolanum, as a result of which Fininvest became the owner of a qualifying holding no longer in an MFHC but directly in a credit institution. The Bank of Italy and the ECB took this to signify that a fresh application for authorisation, relating to that qualifying holding, was required, on the basis of Article 22 et seq. of CRD IV and Article 19 et seq. of the Consolidated Law on Banking.

31 In accordance with guidance provided by the ECB by letter of 24 June 2016, the Bank of Italy requested Fininvest on 14 July 2016 to submit an application for authorisation within 15 days. As that request was not acted upon, the Bank of Italy decided on 3 August 2016 to commence an administrative procedure on its own initiative, while specifying that the power to take a decision on the matter fell to the ECB under Article 4 of the SSM Regulation.

32 After receiving documentation from Fininvest, the Bank of Italy forwarded to the ECB, pursuant to Article 15(2) of the SSM Regulation, a proposal for a decision, dated 23 September 2016, which contained an adverse opinion as to the reputation of the acquirers of the holding at issue in Banca Mediolanum and invited the ECB to oppose the acquisition.

33 The ECB concurred with the Bank of Italy's arguments and approved a draft decision, which it forwarded to Mr Berlusconi and Fininvest for comment. The ECB adopted a final decision on 25 October 2016.

34 In that decision, the ECB found that there were justified doubts as to the reputation of the acquirers of the holding in Banca Mediolanum. Given the fact that Mr Berlusconi, the majority shareholder and effectively the owner of Fininvest, was the indirect acquirer of the holding in Banca Mediolanum and that he had been sentenced by final judgment to four years' imprisonment for tax fraud, the ECB took the view that the reputation requirement imposed by the national legislation on persons possessing qualifying holdings was not satisfied. The ECB also based its decision on the fact that Mr Berlusconi, like other members of Fininvest's management bodies, was stated to have committed other irregularities and to have been convicted of other offences.

35 On those grounds, the ECB found that the acquirers of the qualifying holding in Banca Mediolanum did not meet that reputation requirement and that there were serious doubts as to their ability to ensure that that financial institution would be managed soundly and prudently in the future. The ECB consequently opposed the acquisition by Mr Berlusconi and Fininvest of the qualifying holding in Banca Mediolanum.

36 Mr Berlusconi and Fininvest, first, challenged the ECB's decision of 25 October 2016 by bringing an action for annulment before the General Court of the European Union (*Fininvest and Berlusconi* v *ECB*, T-913/16). Second, Fininvest brought proceedings before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) for annulment of the Bank of Italy's acts preparatory to the ECB's decision. Third, Mr Berlusconi and Fininvest both brought an *azione di ottemperanza* before the Consiglio di Stato (Council of State).

37 In that last action, Mr Berlusconi and Fininvest submitted that the Bank of Italy's proposal for a decision referred to in paragraph 32 of the present judgment is void because it disregards the force of *res judicata* of the judgment of the Consiglio di Stato (Council of State) referred to in paragraph 29 of the present judgment, delivered in the proceedings relating to their qualifying holding in Mediolanum. By way of defence, the Bank of Italy pleaded in particular that the national courts lack jurisdiction to hear the action, as it concerns preparatory acts, containing nothing in the nature of a decision, which are directed at the adoption of a decision falling within the exclusive competence of an EU institution and which, just like the final decision, come under the jurisdiction of the EU Courts alone.

38 After joining the applications of Mr Berlusconi and Fininvest, the Consiglio di Stato (Council of State) took the view that the procedure at issue may be equated both to a 'single procedure', whose acts would be subject to review by the EU Courts alone, and to a 'composite procedure', those of whose acts that fall within the national phase could be subject to judicial review at national level, even though that national phase is brought to a close by an act that is not binding on the EU authority competent to adopt the final decision.

39 It was in that context that the Consiglio di Stato (Council of State) decided to stay proceedings and to refer the following questions to the Court 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, preparatory acts and non-binding proposals … adopted by the [CNA] in the procedure governed by Articles 22 and 23 of [CRD IV], by Articles 1(5), 4(1)(c) and 15 of [the SSM Regulation], by Articles 85 to 87 of [the SSM Framework Regulation] and by Articles 19, 22 and 25 of the [Consolidated Law on Banking]?

(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 [the j]udgment … 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?'

Consideration of the questions referred

40 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by CNAs in the procedure provided for in Articles 22 and 23 of CRD IV, in Articles 4(1)(c) and 15 of the SSM Regulation and in Articles 85 to 87 of the SSM Framework Regulation, and whether the answer to that question is different where a specific action for a declaration of invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision is brought before a national court.

41 It is necessary, first of all, to explain the effects on the division of jurisdiction between EU Courts and courts of the Member States that result from the involvement of national authorities in the course of a procedure, such as that at issue in the main proceedings, which leads to the adoption of an EU act.

42 Article 263 TFEU confers upon the Court of Justice of the European Union exclusive jurisdiction to review the legality of acts adopted by the EU institutions, one of which is the ECB.

43 Any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities (see, to that effect, judgment of 18 December 2007, *Sweden* v *Commission*, C-64/05 P, EU:C:2007:802, paragraphs 93 and 94).

44 In such a situation, where EU law does not aim to establish a division between two powers — one national and the other of the European Union — with separate purposes, but, on the contrary, lays down that an EU institution is to have an exclusive decision-making power, it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU (see, by analogy, judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 17), to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.

45 Nonetheless, an act of a national authority that is part of a decision-making process of the European Union does not fall within the exclusive jurisdiction of the EU Courts where it is apparent from the division of powers in the field in question between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution (see, to that effect, judgment of 3 December 1992, *Oleificio Borelli* v *Commission*, C-97/91, EU:C:1992:491, paragraphs 9 and 10).

46 It then falls to the national courts to rule on any irregularities that may vitiate such a national act — making a reference to the Court for a preliminary ruling where appropriate — on the same terms as those on which they review any definitive act adopted by the same national authority which is capable of adversely affecting third parties and moreover, in the light of the principle of effective judicial protection, to regard an action brought for that purpose as admissible even if the national rules of procedure do not so provide (see, to that effect, judgments of 3 December 1992, *Oleificio Borelli* v *Commission*, C-97/91, EU:C:1992:491, paragraphs 11 to 13; of 6 December 2001, *Carl Kühne and Others*, C-269/99, EU:C:2001:659, paragraph 58; and of 2 July 2009, *Bavaria and Bavaria Italia*, C-343/07, EU:C:2009:415, paragraph 57).

47 That point having been explained, it must be stated that it is apparent from reading Article 263 TFEU in the light of the principle of sincere cooperation between the European Union and the Member States enshrined in Article 4(3) TEU that acts adopted by national authorities in a procedure such as that referred to in paragraphs 43 and 44 of the present judgment cannot be subject to review by the courts of the Member States.

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

49 In order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone, only once the decision of the EU institution bringing the administrative procedure to an end has been adopted, a decision which is, alone, capable of producing binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his legal position.

50 If national remedies against preparatory acts or proposals of Member State authorities in this type of procedure were to exist alongside the action provided for in Article 263 TFEU against the decision of the EU institution bringing the administrative procedure established by the EU legislature to an end, the risk of divergent assessments in one and the same procedure would not be ruled out and, therefore, the Court's exclusive jurisdiction to rule on the legality of that final decision could be compromised, in particular where the EU institution's decision follows the analysis and the proposal of those authorities.

51 Given that need for a single judicial review, both the type of national legal procedure employed in order to subject preparatory acts adopted by the national authorities to review by a court of a Member State and the nature of the heads of claim or pleas in law put forward for that purpose are immaterial.

52 It is in the light of those considerations that the Court should examine the nature of the procedure in the course of which the acts of the Bank of Italy that are before the Consiglio di Stato (Council of State) in the main proceedings were adopted.

53 That procedure is laid down in the context of the banking union's single supervisory mechanism, for the effective and consistent functioning of which the ECB is responsible, pursuant to Article 6(1) of the SSM Regulation. The procedure is intended to implement Article 22 of CRD IV, which, in the interests of the proper operation of the banking union, provides for prior authorisation of any acquisition of, or increase in, a qualifying holding in a credit institution, on the basis of harmonised assessment criteria listed in Article 23 of that directive.

54 Under Article 4(1)(c) of the SSM Regulation, read in conjunction with Article 15(3) thereof and Article 87 of the SSM Framework Regulation, the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition, at the end of the procedure laid down, in particular, in Article 15 of the SSM Regulation and Articles 85 and 86 of the SSM Framework Regulation.

55 Within the framework of relations governed by the principle of sincere cooperation by virtue of Article 6(2) of the SSM Regulation, the national authorities' role, as is apparent from that provision, Article 15(1) and (2) of the SSM Regulation and Articles 85 and 86 of the SSM Framework Regulation, consists in registering applications for authorisation and in assisting the ECB, which alone has the decision-making power, in particular by providing it with all the information necessary for carrying out its tasks, by examining such applications and then by forwarding to the ECB a proposal for a decision, which is not binding on the ECB and which, moreover, EU law does not require to be notified to the applicant.

56 Thus, the procedure to which the acts challenged before the referring court belong is among those to which the considerations set out in paragraphs 43 and 44 of the present judgment relate.

57 Consequently, it must be held that the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision of 25 October 2016 is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by the Bank of Italy. That jurisdiction excludes any jurisdiction of national courts in respect of those acts, and it is irrelevant in that regard that an action such as the *azione di ottemperanza* has been brought before a national court.

58 In that last regard, as the Commission has observed, the ECB's exclusive competence to decide whether or not to approve the acquisition of a qualifying holding in a credit institution, and the corresponding exclusive jurisdiction of the EU Courts to review the validity of such a decision and, as an incidental matter, to determine whether the preparatory national acts are vitiated by defects such as to affect the validity of the ECB's decision, preclude a national court from being able to hear an action contesting the compliance of such an act with a national provision relating to the principle of *res judicata* (see, by analogy, judgment of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 62 and 63).

59 Therefore, the answer to the questions referred is that Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by CNAs in the procedure provided for in Articles 22 and 23 of CRD IV, in Articles 4(1)(c) and 15 of the SSM Regulation and in Articles 85 to 87 of the SSM Framework Regulation and that it is immaterial in that regard that a specific action for a declaration of invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision has been brought before a national court.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 263 TFEU must be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by competent national authorities in the procedure provided for in Articles 22 and 23 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, in Articles 4(1)(c) and 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 in 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 (SSM Framework Regulation). It is immaterial in that regard that a specific action for a declaration of invalidity on the ground of alleged disregard of the force of *res judicata* attaching to a national judicial decision has been brought before a national court.

[Signatures]