



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 May 2024¹

Joined Cases C-512/22 P and C-513/22 P

Finanziaria d'investimento Fininvest SpA (Fininvest)

v

**Silvio Berlusconi,
European Central Bank (ECB) (C-512/22 P)**

and

**Marina Elvira Berlusconi, Pier Silvio Berlusconi, Barbara Berlusconi, Eleonora Berlusconi
and Luigi Berlusconi, as legal heirs of Silvio Berlusconi,
Silvio Berlusconi**

v

Finanziaria d'investimento Fininvest SpA (Fininvest),

European Central Bank (ECB) (C-513/22 P)

(Appeal – Directive 2013/36/EU – Prudential supervision of credit institutions – Assessment of acquisitions of qualifying holdings – Regulation (EU) No 1024/2013 – Single Supervisory Mechanism – Powers of the European Central Bank – Earlier qualifying holding – Objection to the acquisition by the financial company Fininvest of a qualifying holding in Banca Mediolanum)

1. The judgment of the Court of Justice of 19 December 2018, *Berlusconi and Fininvest*,² clarified the conduct of judicial review of decisions of the European Central Bank (ECB) adopted in administrative procedures initiated for the purpose of assessing notifications of the acquisition and disposal of qualifying holdings in credit institutions.

2. Following that judgment, the General Court dismissed, in its judgment of 11 May 2022,³ the action brought against the Decision of the ECB of 25 October 2016,⁴ which opposed the acquisition of the qualifying holding in Banca Mediolanum SpA by Mr Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest).

3. In the present two joined appeals, the Court must address:

– the concept of the acquisition or increase of a qualifying holding in a credit institution;

¹ Original language: Spanish.

² C-219/17, 'the judgment of 19 December 2018, *Berlusconi and Fininvest*', EU:C:2018:1023.

³ Judgment of the General Court in *Fininvest and Berlusconi v ECB* (T-913/16, 'the judgment under appeal', EU:T:2022:279).

⁴ Decision ECB/SSM/2016 – 7LVZJ6XRIE7VNZ4UBX81/4 ('the contested decision').

- the application of the authorisation procedure to qualifying holdings that preceded the entry into force of the Single Supervisory Mechanism ('SSM').

I. Legal framework

A. European Union law

4. The provisions of EU law applicable to these appeals are, essentially, the same as those which I cited in my Opinion in Case C-219/17.⁵ I refer, therefore, to that Opinion without there being any need to reproduce those provisions again.

5. The provisions I cited at that time were:

- Directive 2013/36/EU;⁶
- Regulation (EU) No 1024/2013;⁷
- Regulation (EU) No 468/2014.⁸

B. National law

6. I refer also to the articles of the Consolidated Law on Banking⁹ and other provisions of Italian law which I cited in my Opinion in Case C-219/17.

II. Facts, procedure before the General Court and judgment under appeal

7. The background to the dispute is set out in paragraphs 1 to 13 of the judgment under appeal in the following terms:

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

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

⁵ Opinion of 27 June 2018 (EU:C:2018:502).

⁶ 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).

⁷ 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').

⁸ 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).

⁹ Decreto legislativo n. 385 – Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 – Single text of the laws on banking and credit matters) of 1 September 1993 (Ordinary Supplement to GURI No 230 of 30 September 1993)), as amended by decreto legislativo n. 72 (Legislative Decree No 72) of 12 May 2015 ('the TUB'), which transposed the content of Directive 2013/36 into Italian law.

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

4. Following the entry into force of decreto legislativo [n. 53¹⁰] the Banca d'Italia (Bank of Italy) undertook a procedure for the assessment of the applicants, Fininvest and Mr Berlusconi, in their capacity as qualified shareholders of mixed financial holding companies.

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

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

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

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

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

10. Following the merger referred to ... and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016 ..., the Bank of Italy and the European Central Bank (ECB) considered that a new request for authorisation concerning that qualified holding was required, in accordance with Article 22 et seq. of Directive 2013/36/EU ..., and also Article 19 et seq. of [the TUB].

11. By letter of 14 July 2016, the Bank of Italy invited Fininvest to submit a request for authorisation to acquire a qualified holding within two weeks. As no request was submitted ..., the Bank of Italy decided, on 3 August 2016, to initiate of its own motion an administrative procedure against Fininvest, following which it communicated to the ECB, pursuant to Article 15(2) of [Regulation No 1024/2013], a proposal for a decision, dated 23 September 2016, containing an unfavourable opinion concerning the reputation of the acquirers of the holding in question in Banca Mediolanum and inviting the ECB to oppose the acquisition.

¹⁰ Attuazione della direttiva 2011/89/UE, che modifica le direttive 98/78/CE, 2002/87/CE, 2006/48/CE e 2009/138/CE, per quanto concerne la vigilanza supplementare sulle imprese finanziarie appartenenti a un conglomerato finanziario (Legislative Decree No 53 implementing Directive 2011/89/EU, amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate) of 4 March 2014 (GURI No 76, of 1 April 2014, p. 1790).

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

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

8. That account can be supplemented by some of the facts that I set out in my Opinion in Case C-219/17. First, the boards of the two companies agreed a merger by 'reverse integration' by which Mediolanum would be incorporated into Banca Mediolanum.¹¹ 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 TUB. Secondly, 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, it confirmed the 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'.

9. On 23 December 2016, Fininvest and Mr Berlusconi brought an action before the General Court for annulment of the Decision of the ECB of 25 October 2016.

10. The General Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure and, as a measure of organisation of procedure, invited the parties to submit their comments on any conclusions that should be drawn, in that case, from the judgment of 19 December 2018, *Berlusconi and Fininvest*.

11. On 21 January 2019, in the light of that judgment, the applicants raised new pleas in law in support of the action for annulment on the basis of Article 84 of the Rules of Procedure of the General Court, on which the ECB and the European Commission made observations.

12. The applicants claimed that the General Court should annul the contested decision and order the ECB to pay the costs; this was contested by the ECB and the Commission.

13. In the judgment under appeal, the General Court dismissed the action for annulment in its entirety, declared that Fininvest and Mr Berlusconi were to bear their own costs and ordered them to pay those incurred by the ECB, while the Commission was to bear its own costs.

¹¹ 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.

III. Forms of order sought by the parties and procedure before the Court of Justice

14. On 22 July 2022, Fininvest and Mr Berlusconi¹² lodged similarly worded appeals against the judgment under appeal.

15. In their appeals, Fininvest and Berlusconi claim that:

- the judgment under appeal should be set aside;
- consequently, the Decision of the ECB of 25 October 2016 should be annulled;
- in the alternative, the case should be referred back to the General Court for a ruling;
- the ECB should be ordered to pay the costs, including those incurred at first instance.

16. The ECB and the Commission contend that the Court should dismiss the appeals on the grounds that they are in part inadmissible or ineffective and, in any event, unfounded, and that the Court should, if appropriate, substitute a number of the grounds of the judgment under appeal. The Commission contends, in the alternative, that the action for annulment of the contested decision should be dismissed. The ECB and the Commission further contend that Mr Berlusconi and Fininvest should be ordered to bear the costs.

17. The two appeals were joined for the purposes of the written and oral stages of the proceedings and of the judgment.

18. The Court decided that it was not necessary to hold a hearing and that an Opinion should be drafted in connection with the first, second and ninth grounds of appeal.

IV. Admissibility of the appeals

19. The ECB pleads that the alleged ‘rehabilitation’ of Mr Berlusconi, on which a decision was adopted on 11 May 2018,¹³ allows it to seek a re-assessment of his good reputation, which the contested decision determined was lacking. It infers from this that the appellants have no interest in obtaining the annulment of that decision or the setting aside of the judgment under appeal.

20. That plea cannot be accepted, since the interest of Mr Berlusconi (now of his heirs) and of Fininvest in obtaining the annulment of the contested decision and the setting aside of the judgment confirming it, which they claim is harmful to their interests, continues to exist.

V. Preliminary considerations: the concept of acquisition or increase of a qualifying holding

21. Before I examine the grounds of appeal, it should be recalled that the aim of the procedure for authorising qualifying holdings is to ensure that only natural or legal persons who will not jeopardise the proper operation of the banking sector are able to access that sector.

¹² Following Mr Berlusconi’s death on 12 June 2023, his heirs took up his procedural position in the appeal in Case C-513/22 P.

¹³ That rehabilitation is referred to in the fourth ground of both appeals.

22. In particular, the assessment is intended to verify that the proposed acquirer has a good reputation and the necessary financial soundness, so that the institution in which that person is to acquire a holding continues to fulfil the prudential requirements. The assessment also contributes to preventing the financing of the transaction using funds raised from unlawful activities.¹⁴

23. 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 575/2013.¹⁵ According to that definition, “‘qualifying holding’ 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’.

24. Article 22(1) of Directive 2013/36 imposes a notification obligation on ‘... 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 ...’.¹⁶

25. It follows from a combined reading of those provisions that a ‘qualifying holding’ is a direct or indirect holding in a credit institution which:

- represents 10% or more of the capital or of the voting rights of the undertaking; or
- makes it possible to exercise a significant influence over the management of that undertaking; or
- results in the credit institution becoming the subsidiary of the proposed acquirer.

26. Article 22(1) of Directive 2013/36 lays down an obligation to give notice of acquisitions of holdings of that kind in a credit institution and equates direct or indirect increases of such holdings to acquisitions where the proportion of voting rights or of capital held reaches or exceeds 20%, 30% or 50%.

27. The conditions for the assessment of acquisitions and increases of qualifying holdings are set out in Articles 22 to 27 of Directive 2013/36. National legislation may not lay down more stringent requirements.¹⁷

¹⁴ See ECB, *Guide on qualifying holding procedures*, 2023, https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisory_guides230523_qualifyingholdingprocedure.en.pdf.

¹⁵ 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).

¹⁶ Articles 41 and 42 of Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ 2023 L 150, p. 40), lay down an assessment procedure (for the acquisition and increase of qualifying holdings in an issuer of an asset-referenced token) similar to that laid down in Directive 2013/36.

¹⁷ Pursuant to Article 22(8) of Directive 2013/36, ‘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’.

28. Article 23 of Directive 2013/36 harmonises the substantive criteria for assessment of the acquisition or increase of a qualifying holding.¹⁸ With a view to homogenising the practices of the Member States, the European supervisory authorities adopted joint guidelines in 2016.¹⁹

29. The procedure for the grant of that type of authorisation is governed by Article 4(1)(c), Article 6(4) and Article 15 of the SSM Regulation, as supplemented by Articles 85 to 87 of the SSM Framework Regulation. That procedure was examined exhaustively by the Court in the judgment of 19 December 2018, *Berlusconi and Fininvest*.

30. The ECB has exclusive competence to assess and decide on the acquisition and increase of qualifying holdings in all the financial institutions that are subject to the Single Supervisory Mechanism,²⁰ irrespective of whether or not they are significant and are under the direct supervision of the ECB or of the national authorities.

VI. First ground of appeal

A. Arguments of the parties

31. The appellants contest the arguments set out by the General Court as the basis for dismissal of the first plea for annulment raised before it. The appellants divide their first ground of appeal into six heads of complaint (A, B, C, D, E and F), in which they refer to the following matters:

- the joint control exercised by the applicants over Banca Mediolanum; incorrect assessment of the consequences;
- the status of Fininvest as a qualifying shareholder in Banca Mediolanum; distortion of the facts and a manifest error of law;
- the substitution of the General Court’s own reasons for those of the author of the contested decision; infringement of Articles 263 and 264 TFEU;
- the new concept under EU law of acquisition of a qualifying holding; failure to apply national law;
- the creation by the General Court of a category not provided for under EU law;

¹⁸ For those purposes, Article 23(1) provides that the competent authorities must, 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: the reputation of the proposed acquirer; the reputation and experience of the proposed new directors; the financial soundness of the proposed acquirer; whether the credit institution will be able to continue to comply with the prudential requirements; and the risk of links with money-laundering or terrorist-financing operations.

¹⁹ The European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority, *Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sectors*, Frankfurt, December 2016 (‘the Joint Guidelines’). Available at https://www.eiopa.europa.eu/system/files/2020-10/jc_qh_gls_en.pdf.

²⁰ Decision (EU) 2019/1376 of the European Central Bank of 23 July 2019 on delegation of the power to adopt decisions on passporting, acquisition of qualifying holdings and withdrawal of authorisations of credit institutions (ECB/2019/23) (OJ 2019 L 224, p. 1), lays down the criteria for the delegation to the heads of work units of the ECB of the power to adopt delegated qualifying holding decisions (Article 4).

- the distinction between indirect qualifying holdings and direct qualifying holdings: infringement of Article 22 of Directive 2013/36 and of Article 22 of the TUB.

32. The ECB and the Commission reject the arguments put forward by the appellants and claim that the ground of appeal should be dismissed.

B. Assessment

1. The first and second heads of complaint

33. Heads of complaint A and B of the first ground of appeal are based on the following arguments:

- The General Court (paragraph 81 of the judgment under appeal) accepted that Mr Berlusconi and Fininvest held a qualifying holding in Banca Mediolanum, which allowed them to exercise joint control of Mediolanum and Banca Mediolanum before the reverse merger.
- Having established that (that is, having acknowledged Fininvest's control of Banca Mediolanum before the merger), the General Court erred in its assessment of the consequences of a fact which it had accepted: since the control preceded the merger, the ECB should not have commenced an authorisation procedure for the acquisition of the qualifying holding. That qualifying holding existed before the entry into force of the provisions of the SSM.
- The General Court found (paragraph 70 of the judgment under appeal) that Fininvest and Mr Berlusconi, through Fininvest, held 30.16% of the shares of Mediolanum, which itself owned 100% of the shares of Banca Mediolanum. The General Court also found (paragraph 71 of the judgment under appeal) that, as the proportion of the voting rights that could be exercised indirectly, through Mediolanum, by Fininvest was above the threshold of 20%, Fininvest and, consequently, Mr Berlusconi indirectly held a qualifying holding in Banca Mediolanum.
- Those findings should have led the General Court to conclude that no acquisition took place as a result of the relationship between the merger and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, since Fininvest and Mr Berlusconi were already qualifying shareholders in Banca Mediolanum. The authorisation of the ECB therefore made no sense.
- By failing to draw the logical conclusions from its assessment of the facts, the General Court committed a number of errors of law.
- In paragraph 72 of the judgment under appeal, the General Court stated that, following the decision of 7 October 2014 (whereby the Bank of Italy suspended the applicants' voting rights, refused to grant authorisation allowing them to hold a qualifying holding in Mediolanum and ordered them to sell their shares in Mediolanum in excess of 9.99%), the applicants' indirect holding was no longer a qualifying holding.
- That finding is incorrect, since the qualifying holding was retained in its entirety until such time as the sale of shares took place. As regards the voting rights, the decision of 7 October 2014 does not entail, technically, the suspension of those rights, in view of Article 24 of the TUB.

- In paragraph 73 of the judgment under appeal, the General Court maintained that, following the merger by absorption of Mediolanum by Banca Mediolanum, on 30 December 2015, Fininvest became the direct holder of 9.99% of the shares of Banca Mediolanum.
- Again, in the appellants’ submission, that finding is incorrect, since Fininvest’s qualifying holding in Mediolanum was, and remained at all times, the same, that is 30.16% of the share capital.
- In paragraph 76 of the judgment under appeal, the General Court stated that, following the annulment of the decision of 7 October 2014 by the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, Fininvest became the direct holder of 30.16% of the shares in Banca Mediolanum.
- The appellants argue that that finding, which draws on the two previous findings, is also incorrect. The annulment of the decision of 7 October 2014 by the judgment of 3 March 2016 in no way altered the original status of the holdings. Therefore, Fininvest did not ‘recover’, as a result of that judgment, its holding of 30.16% in Banca Mediolanum, which it had never lost. That judgment is neutral as regards the amount of the holding.
- In summary, Fininvest’s holding of 30.16% was never reduced to 9.99% (by the Bank of Italy’s decision) and was never converted into a qualifying holding again (after the judgment of the Council of State). It has always been a qualifying holding of 30.16%.

34. I believe that that complaint is well founded because, in line with the account of the facts it sets out, the General Court should have held that the ECB was not entitled to initiate the authorisation procedure for the qualifying holdings.

35. The starting point for my position is Article 15 of the SSM Regulation and Article 22 of Directive 2013/36. Both provide for an assessment of an acquisition or increase of qualifying holdings by the ECB from the time of entry into force of the SSM, which was 4 November 2014.

36. However, that assessment does not cover so-called ‘historic’ qualifying holdings, that is, holdings which existed before that date. If a so-called ‘historic’ holding in a financial institution is retained but not increased, the ECB’s scrutiny does not extend to that holding.

37. That is the basic argument which the appellants put forward when they rightly assert that the General Court did not draw the proper conclusions from its finding that the holding held by Mr Berlusconi and Fininvest in Mediolanum and, through it, in Banca Mediolanum was a historic qualifying holding which preceded the entry into force of the SSM and had remained unchanged.

38. The General Court took the view that that historic holding had been affected by three events: (a) the decision of 7 October 2014, which ordered the sale of Mr Berlusconi and Fininvest’s shares in Mediolanum in excess of 9.99%; (b) the absorption of Mediolanum by Banca Mediolanum, on 30 December 2015, as a result of which Fininvest became the direct holder of 9.99% of the shares of Banca Mediolanum; and (c) the annulment of the decision of 7 October 2014 by the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, following which Fininvest and Mr Berlusconi again fully owned their shares in Banca Mediolanum.

39. In relation to the merger, the General Court agreed that Mr Berlusconi at all times held a holding in Banca Mediolanum, ‘first through Fininvest and then through Mediolanum’.²¹ The General Court added, however, that the merger by reverse integration had the effect of modifying ‘the legal structure’ of that holding, which the ECB was entitled to categorise as an acquisition, ‘even though the amount of the applicants’ qualifying holding was unchanged from the amount which they previously owned through Mediolanum’.²²

40. In my examination of the fifth head of complaint in the first ground of appeal, I shall state my belief that that approach taken in the judgment under appeal, based on the concept of modification of the legal structure of the holding, is incorrect.

41. Further, the General Court’s line of reasoning in connection with the consequences it attaches to the decision of 7 October 2014, specifically as regards the reduction of the qualifying holding of Fininvest and Mr Berlusconi in Banca Mediolanum to 9.99%, does not appear to me to be correct either.

42. It is true that, by the decision of 7 October 2014, the Bank of Italy ordered the sale of Fininvest’s shares in Mediolanum in excess of 9.99%. The sale should have taken place within 30 months of the creation of a trust responsible for the sale. The sale of the shares did not take place because the Consiglio di Stato (Council of State) ordered, first, the suspension of enforcement of the Bank of Italy’s decision and then annulled that decision, with effect *ex tunc*, in the judgment of 3 March 2016.

43. It follows from that sequence of events that the shares representing Fininvest’s holding in Banca Mediolanum were held by that company at all times and were not transferred to any buyer.

44. Accordingly, contrary to the General Court’s finding (paragraph 72 of the judgment under appeal), the qualifying holding of Fininvest and Mr Berlusconi in Banca Mediolanum was not reduced to 9.99% and instead remained unchanged when the SSM started to operate and the ECB became competent to authorise the acquisition and increase of qualifying holdings. All that was limited for a short period of time were the voting rights linked to the shares subject to the obligation to sell.

45. That initial error led the General Court (paragraph 73 of the judgment under appeal) to commit another error by stating that, following the merger by absorption of Mediolanum by Banca Mediolanum, Fininvest became the direct holder of 9.99% of the shares of that bank.

46. However, since Fininvest already held a holding of 30.16% of Mediolanum, after the merger by absorption it still held the same qualifying holding of 30.16% (221 828 000 shares) in Banca Mediolanum directly, and not 9.99% as the General Court found.

47. Both those errors led the General Court to commit (paragraph 76 of the judgment under appeal) a further error, by arguing that, following the annulment of the decision of 7 October 2014 by the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, Fininvest became the direct holder of 30.16% of the shares in Banca Mediolanum.

²¹ Paragraph 79 of the judgment under appeal.

²² Paragraph 80 of the judgment under appeal. The General Court reiterated in paragraph 81 of the judgment that the applicants already held a ‘... a shareholders’ agreement between Fininvest and Fin. Prog. Italia, which allowed them to exercise joint control of Mediolanum and Banca Mediolanum before the merger in question, ...’.

48. That judgment of the Consiglio di Stato (Council of State) did not, contrary to the General Court's assertion, result in an increase in Fininvest's holding in Banca Mediolanum from 9.99% to 30.16%: that holding, I repeat, was not reduced as a result of the decision of 7 October 2014.

49. Those three errors of the General Court invalidate the conclusion which it reached in paragraph 77 of the judgment under appeal.²³

50. It follows from the considerations set out that the holding held by Fininvest and Mr Berlusconi in Banca Mediolanum was at all times a qualifying holding of 30.16%. Since there was no increase in that holding following the entry into force of the SSM, the ECB's authorisation was not necessary because it was a 'historic' qualifying holding.

51. Accordingly, the first and second heads of complaint (A and B) of the first ground of appeal must be upheld, in so far as they show that the judgment under appeal erred in law regarding the conditions under which the ECB is entitled to impose the requirement of authorisation on the acquisition or increase of qualifying holdings in credit institutions.

2. Third head of complaint (C)

52. The appellants complain that the General Court used arguments which do not appear in the Decision of the ECB, thereby infringing Articles 263 and 264 TFEU.

53. The complaint is merely formulated in those terms and states that it will be developed in the subsequent heads of complaint. The complaint therefore lacks its own substantive content, from which it follows that it must be dismissed.

3. Fourth head of complaint (D)

54. The appellants submit that the General Court erred in law by finding that Article 4(3) of the SSM Regulation does not make an express reference to the law of the Member States for the purpose of defining the concept of acquisition of a qualifying holding in a bank.

55. In my opinion, the General Court did not infringe Article 4(3) of the SSM Regulation.²⁴ Admittedly, that provision lays down the law which must be applied by the ECB when it performs its supervisory tasks within the framework of the SSM. However, it does not refer to national law for the purpose of interpreting a concept laid down by an EU provision, such as the concept of acquisition of a qualifying holding.²⁵

56. As regards that concept, neither Article 15 of the SSM Regulation nor Article 22 of Directive 2013/36 makes an express reference to the law of the Member States.

²³ The General Court found that 'Fininvest's indirect holding in Banca Mediolanum became, following the merger in question and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, a direct qualifying holding'.

²⁴ That provision provides that, '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'.

²⁵ The ECB must apply national law (where it transposes a directive or exercises one of the options permitted to it under a regulation) but that does not mean that the very concept of acquisition and increase of a qualifying holding is left to the discretion of the Member States.

57. The concept of acquisition or increase of a qualifying holding is, as the General Court rightly held,²⁶ an autonomous concept of EU law which must be interpreted in a uniform manner throughout the Member States. If each Member State were able to define the concept at its own discretion, that uniformity would disappear.

58. That follows from the settled case-law of the Court: the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union.²⁷

59. In summary, the fourth head of complaint must be dismissed.

4. *Fifth head of complaint (E)*

60. The appellants complain that the General Court treated the concept of ‘acquisition of a qualifying holding’ as equivalent to that of ‘alteration of the legal structure of a holding’. The appellants contend that the latter concept, which the General Court uses in the judgment under appeal,²⁸ is unknown in EU law and may not be used in situations like this.

61. The appellants’ complaint about that part of the judgment under appeal is well founded. The ‘alteration of the legal structure’ of a holding is a concept which does not appear in Directive 2013/36 or in the SSM Regulation, for the purposes of assessing whether there has been an ‘acquisition or increase’ of a qualifying holding. Those provisions do not specify that a change of legal structure may be regarded as the acquisition of a holding.

62. The relevant point for the purpose of assessing an acquisition or increase is, as I shall argue below, the number of holdings acquired (or increased)²⁹ but not their ‘legal structure’, which is, moreover, a vague concept that creates some uncertainty as regards its application.

63. In any event, if it were accepted that alterations of the legal structure of a holding were relevant, that would apply only to alterations made after – and not to those made before – the creation of the SSM, as I have explained.

64. In the case of holdings preceding the creation of the SSM, the authorisation of the ECB would be required only if the acquisition of those holdings led to an increase in the acquirer’s level of control over the financial institution. The alteration of the legal structure of the holding (were the relevance of this new concept accepted, which is not the case) does not require the authorisation of the ECB if the qualifying holding remains stable and is not increased.

²⁶ Paragraph 49 of the judgment under appeal.

²⁷ Judgments of 11 April 2019, *Tarola* (C-483/17, EU:C:2019:309, paragraph 36); of 1 October 2019, *Planet49* (C-673/17, EU:C:2019:801, paragraph 47); and of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 81).

²⁸ Contrary to what the ECB and the Commission maintain, the use of that concept in the judgment under appeal, in which it is a key element of the line of reasoning, should not be devalued. It appears in paragraphs 57, 78, 80, 81, 84 and 88 of the judgment under appeal. In using it, the General Court does not merely ‘describe the context’ or ‘use essentially economic terms rather than legal terms’, as the ECB wrongly asserts (paragraph 20 of its response to the appeal).

²⁹ Or the fact that the acquisition makes it possible to exercise a significant influence over the management of the undertaking or results in the credit institution becoming the subsidiary of the proposed acquirer.

65. That is what occurred in these cases. Fininvest held a qualifying holding in Mediolanum and, therefore, in Banca Mediolanum at all times. The merger by reverse integration by which Mediolanum would be incorporated into Banca Mediolanum constituted an internal reorganisation of the legal structure of the group of companies, but did not change the level or degree of Fininvest's (or, indirectly, Mr Berlusconi's) control³⁰ over that financial institution.

66. In transactions like that at issue, in which the same persons and entities retain the same level of control and influence over a credit institution, no acquisition or increase of a qualifying holding takes place. In those circumstances, the ECB must not initiate the administrative authorisation procedure.

67. The fifth head of complaint must therefore be upheld.

5. Sixth head of complaint (F)

68. The appellants complain that the General Court erred in law by declaring that whether a holding is direct or indirect is a relevant factor for determining whether there has been an acquisition of a qualifying holding.

69. The appellants submit that Article 22 of Directive 2013/36 and Article 22 of the TUB refer only to the direct or indirect acquisition of a qualifying holding. Moreover, Mr Berlusconi (on whose lack of good reputation the Decision of the ECB was based) held at all times, both before and after the merger and the judgment of the Consiglio di Stato (Council of State) of 3 March 2016, an indirect holding in the credit institution.

70. This complaint must also be upheld. It follows from Article 2(8) of the SSM Regulation, Article 4(1)(36) of Regulation No 575/2013 and Article 22 of Directive 2013/36 that the first criterion for determining whether there is direct or indirect acquisition or increase³¹ of a qualifying holding is quantitative.

71. The acquisition must represent 10% or more of the capital or of the voting rights of the undertaking³² while the increase must entail an increase in capital or voting rights equal to or in excess of 20%, 30% or 50%. The other two criteria (significant influence by the acquirer over the management of the undertaking and a credit institution which becomes a subsidiary of the acquirer) do not apply in these cases.

72. More specifically, for the purposes of Article 22 of Directive 2013/36, a qualifying holding in a credit institution may be acquired or increased directly or indirectly, while the use of either method (direct or indirect) of acquisition does not affect the outcome.

³⁰ Paragraphs 80 and 81 of the judgment under appeal.

³¹ Title II, Chapter 1, section 6, of the Joint Guidelines refers to two criteria for determining whether a holding is indirect: control and multiplication. The control criterion assumes that all natural or legal persons who exercise control of the holder of a qualifying holding in a supervised institution must be considered to be indirect acquirers of that qualifying holding. The multiplication criterion, which is applicable as the second step, consists of the multiplication of the percentages of the holdings across the corporate chain, starting with the holding held directly in the credit institution and continuing up that chain for as long as the result of the multiplication continues to be at least 10%.

³² Article 27 of Directive 2013/36 provides that, 'in determining whether the criteria for a qualifying holding as referred to in Articles 22, 25 and 26 are fulfilled, the voting rights referred to in Articles 9, 10 and 11 of Directive 2004/109/EC [of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38)] and the conditions regarding aggregation thereof set out in Article 12(4) and (5) of that Directive, shall be taken into account'.

73. The decisive point is not whether the qualifying holding is acquired directly or indirectly but rather whether that acquisition exists in either form and whether, as a result, a particular level of control or influence over the credit institution is attained.

74. Based on that premiss, the General Court misinterpreted Article 22(1) of Directive 2013/36, by attaching importance to the change of an indirect holding held by Fininvest in Banca Mediolanum to a direct holding, following the reverse merger by absorption.³³

75. As regards Article 22(1) of Directive 2013/36, the General Court held that ‘... where an indirect holding owned indirectly through two companies becomes indirectly owned through a single company, the legal structure of the ownership of a qualifying holding itself is altered, so that such a transaction must be regarded as the acquisition of a qualifying holding within the meaning of that provision’.³⁴

76. That line of reasoning, which is again based on the concept of ‘alteration of the legal structure of the holding’ (a concept which I have already categorised as inappropriate in this context), cannot be accepted. Its application to the facts which the General Court found to have been established is dependent on the initial error of approach.

77. I stated above that the General Court acknowledged that, following the merger, ‘... the amount of the applicants’ qualifying holding was unchanged from the amount which they previously owned through Mediolanum’.³⁵ In other words, the change from an indirect holding to a direct holding did not alter the situation as regards Fininvest’s control over Banca Mediolanum, because Fininvest held 30.16% of the shares at all times.

78. The same argument is applicable a fortiori to Mr Berlusconi’s holding, which was at all times an indirect qualifying holding in Banca Mediolanum.³⁶

79. That being so,³⁷ the irrelevance of a change from one type of holding (direct) to another (indirect) means, in a situation such as that under analysis here, that no (new) acquisition or increase of a qualifying holding took place. In those circumstances, there was no need for the involvement of the ECB.

80. In short, the sixth (and final) head of complaint of the first ground of appeal must be upheld.

³³ Paragraph 77 of the judgment under appeal.

³⁴ Paragraph 57 of the judgment under appeal.

³⁵ Paragraph 80 of the judgment under appeal.

³⁶ The General Court admits that fact in paragraph 79 of the judgment under appeal: ‘Whereas Mr Berlusconi held an indirect holding in Banca Mediolanum, first through Fininvest and then through Mediolanum, he now holds an indirect holding in Banca Mediolanum solely through Fininvest.’

³⁷ The appellants, the ECB and the Commission disagree about the amounts of the holdings and whether they are direct or indirect but, in an appeal, the version of the facts as set out by the General Court must take precedence.

VII. Second ground of appeal

A. Arguments of the parties

81. The appellants complain that the General Court dismissed the second plea for annulment, in which they claimed that the application of Articles 22 and 23 of Directive 2013/36 to capital holdings acquired more than 20 years ago failed to observe the principle of non-retroactivity.

82. The appellants argue that, although the General Court held in the judgment under appeal that Directive 2013/36 was not applicable to acquisitions of qualifying holdings which preceded its entry into force, in point of fact the General Court confirmed the retroactive application of that directive to the case before it. By the same token, the error complained of in the first ground of appeal is decisive for the purposes of the complaint in the second ground.

83. The ECB and the Commission refute those arguments.

B. Assessment

84. The General Court rightly confirms that the scope of Articles 22 and 23 of Directive 2013/36 does not cover acquisitions of qualifying holdings that preceded its entry into force and, accordingly, were already held, but only decisions to acquire qualifying holdings proposed after its entry into force.³⁸

85. As the appellants maintain, that statement of principle becomes inoperative if, as the examination of the first ground of appeal has made clear, those provisions of Directive 2013/36 are applied to a qualifying holding, such as that of Fininvest in Banca Mediolanum, which did not undergo any real changes (regarding its level of control and influence over the credit institution) before or after the entry into force of that directive.

86. The second ground of appeal must therefore be upheld.

VIII. Ninth ground of appeal

A. Arguments of the parties

87. The appellants claim that the General Court erred in law in ruling that the two new pleas in law raised before it, alleging the illegality of the preparatory acts adopted by the Bank of Italy, were inadmissible.³⁹

88. The appellants claim that the error of law arose in the application of Article 84 of the Rules of Procedure of the General Court in relation to the new pleas in law put forward following the judgment of 19 December 2018, *Berlusconi and Fininvest*.

³⁸ Paragraph 98 of the judgment under appeal.

³⁹ Paragraphs 237 to 266 of the judgment under appeal.

89. This, they argue, involved a manifest error of assessment concerning the existence of a ‘new matter of law’, in addition to which they plead inadequate reasoning, the manifestly illogical nature of the statement of reasons, and a failure by the General Court to state reasons for its failure to examine the new pleas in law of its own motion. In the light of the foregoing, they allege failure to observe the principle of effective judicial protection and infringement of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

90. The appellants rely on the following arguments to develop the ground of appeal:

- The ‘new’ pleas in law in support of the action for annulment had a close material connection to the pleas in law which had already been raised.
- The judgment of 19 December 2018, *Berlusconi and Fininvest*, includes criteria for interpretation that are highly innovative in scope and go further than simply confirming earlier case-law, as claimed. That judgment interprets for the first time *erga omnes* the ECB’s powers in that field, ruling on issues that are totally new and extremely complex.
- The declaration of inadmissibility of those new pleas in law infringes the appellants’ right to effective, full judicial protection. In the interests of that protection, the General Court is also entitled to examine those pleas of its own motion, in accordance with Article 84 of its Rules of Procedure.

91. The ECB and the Commission contest those arguments.

B. Assessment

92. In the judgment of 19 December 2018, *Berlusconi and Fininvest*, the Court held that:

- Article 263 TFEU precludes national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by competent national authorities in the procedure for authorising the acquisition or increase of qualifying holdings;⁴⁰
- 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, to rule on the legality of the final decision adopted by the ECB 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.⁴¹

93. Following the publication of that judgment and having been invited by the General Court to submit comments on any consequences it may have had for the action,⁴² the applicants put forward two new pleas in law through which they sought to contest the legality of the preparatory acts adopted by the Bank of Italy (in particular, the decision to initiate the procedure and the proposal for a decision submitted to the ECB).

⁴⁰ The judgment of 19 December 2018, *Berlusconi and Fininvest*, operative part.

⁴¹ *Ibid.*, paragraph 44.

⁴² Paragraph 19 of the judgment under appeal.

94. The General Court ruled that both new pleas in law were inadmissible, on the grounds that: (a) those pleas in law were not closely connected with the pleas in law set out in the application; and (b) the judgment of the Court of Justice could not be regarded as a matter of law that came to light in the course of the procedure, within the meaning of Article 84(1) of the Rules of Procedure of the General Court.⁴³

95. I believe that the appellants' arguments are well founded.

96. As regards the lack of a close connection between the new pleas in law and the pleas originally raised in the application, I believe that the judgment under appeal should have found that there was such a connection.

97. It is true that the original application did not call into question the legality of the preparatory acts adopted by the Bank of Italy. As the Court held in the judgment of 19 December 2018, *Berlusconi and Fininvest*, the authorisation of the acquisition or increase of qualifying holdings in credit institutions is part of a complex administrative procedure, in which the national authorities and the ECB participate. The ECB has the final decision-making power, which means that the General Court and the Court of Justice have exclusive jurisdiction to examine the legality of acts adopted in such procedures.

98. Accordingly, it cannot be denied that a close, direct connection exists between the preparatory acts adopted by the national authorities and the final act adopted by the ECB, since they are elements of the same complex administrative procedure. The examination of the validity of the final act (of the ECB) may be affected by substantial defects in the preparatory acts (of the national authorities), which the appellants sought to plead before the General Court.

99. As regards whether or not the judgment of 19 December 2018, *Berlusconi and Fininvest*, may be regarded as a new matter of law that came to light in the course of the procedure and is capable of justifying the introduction of new pleas in law in support of the action for annulment, the General Court's reasoning is also incorrect.

100. In the judgment under appeal, the General Court:

- relies on the case-law of the Court of Justice⁴⁴ to the effect that a judgment which merely confirms a legal position known to the appellant at the time when an action is brought cannot be regarded as a matter allowing a new plea in law to be raised;
- adds that '... a judgment delivered in the course of the procedure cannot be relied on as a new matter since that judgment gave, in principle, only an *ex tunc* interpretation of EU law ...';⁴⁵
- refers to the fact that an interpretation contained in a preliminary ruling does not create the law but is declaratory and *ex tunc*;⁴⁶

⁴³ In accordance with that provision, 'no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'.

⁴⁴ The General Court cites, in paragraph 251 of the judgment under appeal, the judgments of the Court of Justice of 14 October 2014, *Buono and Others v Commission* (C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraphs 58 and 60), and of 20 September 2018, *Spain v Commission* (C-114/17 P, EU:C:2018:753, paragraph 39).

⁴⁵ Paragraph 255 of the judgment under appeal.

⁴⁶ Paragraph 252 of the judgment under appeal.

- states that ‘the interpretation given by the Court of Justice [was] known by the applicants at the time when they brought their action’ for annulment;⁴⁷
- indicates that the judgment of 19 December 2018, *Berlusconi and Fininvest*, ‘cannot be regarded as a matter of law that came to light in the course of the procedure, within the meaning of Article 84(1) of the Rules of Procedure [of the General Court]’.⁴⁸

101. I do not agree with that reasoning or with the conclusion that the General Court draws from it.

102. The General Court has held in other judgments that, for the purpose of introducing fresh pleas in law in support of an action for annulment, a judgment of the Court of Justice given in the course of the procedure, which includes new clarifications about the applicable provisions, is relevant.⁴⁹

103. It is true that judgments which merely reiterate previous case-law do not justify the introduction of new pleas in law. That is not the case of judgments of the Court of Justice which develop previous case-law or which lay down new case-law: in such cases, the judgments concerned may be used to introduce new pleas in law in pending actions for annulment.

104. The Court of Justice has ruled to that effect in the specific context of Directive 2013/32/EU.⁵⁰ The Court has declared that a judgment of the Court is liable to come within the concept of new element, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of that directive.⁵¹ That is not precluded by the fact that judgments given in preliminary ruling proceedings take effect *ex tunc*.⁵²

105. The judgment of 19 December 2018, *Berlusconi and Fininvest*, included important (and new) declarations concerning judicial review in the complex administrative procedures created in the context of the banking union, notable among which is the procedure for authorising acquisitions of qualifying holdings. That judgment cannot be regarded as simply confirming earlier case-law.

106. When they brought their actions, Fininvest and Mr Berlusconi could not have known in advance that the preparatory acts adopted by the Bank of Italy in the procedure for authorising the acquisition of qualifying holdings should have been challenged exclusively before the General Court, not the Italian courts.

107. Accordingly, the General Court erred in law by ruling that the two new pleas in law in support of the action for annulment were inadmissible.

⁴⁷ Paragraph 256 of the judgment under appeal.

⁴⁸ Paragraph 257 of the judgment under appeal.

⁴⁹ Judgments of 22 March 2018, *Stavitskiy v Council* (T-242/16, EU:T:2018:166, paragraph 125), and of 24 September 2019, *Yanukovych v Council* (T-301/18, EU:T:2019:676, paragraphs 78 to 80), in relation to the judgment of 19 December 2018, *Azarov v Council* (C-530/17 P, EU:C:2018:1031).

⁵⁰ Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

⁵¹ Judgment of 8 February 2024, *Bundesrepublik Deutschland (Admissibility of a subsequent application)* (C-216/22, EU:C:2024:122, paragraph 40). That is the case ‘... irrespective of whether that judgment was delivered before or after the adoption of the decision on the previous application or whether it finds that a national provision on which that decision was based is incompatible with EU law or is limited to the interpretation of EU law, including that already in force at the time when the said decision was adopted’.

⁵² *Ibid.*, paragraph 41: ‘The circumstance ... that the effects of a judgment by which the Court, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, interprets a rule of EU law take effect, in principle, from the date of entry into force of the rule interpreted, is ... irrelevant’.

108. In those circumstances, the ruling of inadmissibility infringed the appellants' right to effective legal protection, enshrined in Article 47 of the Charter, since it prevented the appellants from pleading any defects vitiating the legality of the preparatory acts leading to the final decision so that they could be examined by the General Court.

109. Therefore, the ninth ground of appeal should be upheld, which, together with the fact that the first (in part) and second grounds of appeal should also be upheld, means that the judgment under appeal should be set aside.

IX. Determination of the action for annulment before the General Court

110. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where an appeal is well founded the Court must quash the decision of the General Court. In that situation, the Court may itself give final judgment in the matter, where the state of the proceedings so permits.

111. In these cases, the Court has the information necessary to give final judgment on the action for the annulment of the Decision of the ECB of 25 October 2016.

112. For the reasons set out above, the first plea in law raised by the appellants in support of the action for annulment should be upheld and the Decision of the ECB of 25 October 2016 should be annulled in its entirety.

X. Costs

113. In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

114. Pursuant to Article 138(1) of those rules, applicable to the appeal proceedings in accordance with Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

115. The appellants have applied for the ECB to be ordered to pay the costs. If, as I suggest, the appeals are upheld, the ECB must be ordered to pay the costs and the Commission must bear its own costs

XI. Conclusion

116. In the light of the foregoing considerations I propose that the Court of Justice should:

- uphold the appeals and set aside the judgment of the General Court of 11 May 2022, *Fininvest and Berlusconi v ECB* (T-913/16, EU:T:2022:279);
- annul the Decision of the European Central Bank ECB/SSM/2016 – 7LVZJ6XRIE7VNZ4UBX81/4, of 25 October 2016;

- order the European Central Bank to pay the costs, and declare that the European Commission is to bear its own costs.