General Court of the European Union
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Press and Information

Judgment in Case T-913/16
Fininvest and Berlusconi v ECB

The General Court upholds the decision by which the ECB refused to authorise Silvo Berlusconi's acquisition of a qualifying holding in Banca Mediolanum

He did not meet the reputation requirement applicable to those with qualifying holdings due to his conviction for tax fraud in 2013

In 2015, the financial holding company Mediolanum was absorbed by its subsidiary, Banca Mediolanum. Taking into account its shareholding in Mediolanum, Fininvest, a holding company incorporated under Italian law of which Silvio Berlusconi was a majority shareholder (together, 'the applicants'), became a shareholder of Banca Mediolanum. Specifically, that merger by absorption consisted of an exchange of shares by which Fininvest legally acquired shares in that credit institution.

Previously, in 2014, the Banca d'Italia (Bank of Italy) had decided, first, to order the suspension of the applicants' voting rights in Mediolanum and the transfer of their shares in that institution exceeding 9.99% and, second, to reject their application for authorisation relating to a qualifying holding in that institution, on the ground that Mr Berlusconi no longer met the reputation requirement due to his conviction for tax fraud in 2013. That decision of the Bank of Italy was annulled by the judgment of the Consiglio di Stato (Council of State, Italy) of 3 March 2016.

Following the absorption of Mediolanum by Banca Mediolanum and the judgment of the Council of State of 3 March 2016, the Bank of Italy and the European Central Bank (ECB) initiated a new procedure for assessing the applicants' acquisition of a qualifying holding in Banca Mediolanum. At the end of that procedure, **the ECB, having received a proposal from the Bank of Italy in that regard, took a decision by which it refused to authorise the acquisition of a qualifying holding in that credit institution.** [1] **One of the reasons it provided in order to justify its decision was that Mr Berlusconi did not meet the reputation requirement applicable to those with qualifying holdings.** [2]

The action for annulment of the ECB's decision is dismissed by the Second Chamber (Extended Composition) of the General Court. In its judgment, the General Court provides important clarifications concerning the acquisition of a qualifying holding in a credit institution by a person who does not meet the reputation criterion.

Findings of the General Court

[1] Decision ECB/SSM/2016 – 7LVZJ6XRIE7VNZ4UBX81/4 of 25 October 2016.
[2] Within the meaning of Article 23(1)(a) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on the 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).

First of all, after recalling the provisions of EU law governing the procedure for assessing acquisitions of qualifying holdings, [3] the General Court rules on **the concept of 'acquisition of a qualifying holding'.**

First, the General Court states that that concept **must be regarded as an autonomous concept of EU law,** which must be interpreted in a uniform manner throughout the Member States.

Secondly, in the absence of a definition of that concept in EU law, **it must be interpreted as taking into account, first, the general context of its use and its usual meaning in everyday language and, second, the objectives pursued by the provisions of EU law governing the procedure for authorising acquisitions of qualifying holdings as well as the effectiveness of those provisions.**

Thus, in the usual sense, **the concept of 'acquisition of securities or shareholdings' may cover different types of transactions, including share exchange transactions**. Next, as regards the context in which the procedure for authorising acquisitions of a qualifying holding is conducted and its objectives, **the General Court recalls that a prior assessment of the suitability of any new owner prior to the purchase of a stake in a credit institution is an indispensable tool for ensuring the suitability and financial soundness of those institutions' owners.** Furthermore, in order to ensure their prudential soundness, credit institutions are expected to comply with a set of EU rules in that area, and that compliance is also directly contingent on the suitability of their owners and of any new owner prior to the purchase of a significant stake in those institutions. Lastly, the procedure for authorising acquisitions of qualifying holdings is intended to ensure sound and prudent management of the institution concerned by the proposed acquisition, as well as the suitability of the proposed acquirer and the financial soundness of the proposed acquisition, having regard to the likely influence of that acquirer on the institution in question. Consequently, **the concept of 'acquisition of a qualifying holding' cannot be interpreted restrictively,** since that would have the effect of enabling the assessment procedure to be circumvented by removing certain types of acquisition of qualifying holdings from the ECB's control and, therefore, of jeopardising those objectives.

Furthermore, **the procedure for assessing acquisitions of qualifying holdings in a credit institution applies to both direct and indirect acquisitions. [4] Thus, where an indirect qualifying holding becomes direct or where the degree of indirect control of that qualifying holding is altered,** in particular where a holding indirectly owned through two companies becomes indirectly owned through one company, **the way in which the qualifying holding itself is held is altered in terms of its legal structure, with the result that such a transaction must be regarded as the acquisition of a qualifying holding**.

Thirdly, under the relevant provisions of EU law in the present case, [5] the applicability of the procedure for authorising the acquisition of a qualifying holding is not subject to a change in the likely influence that the proposed acquirer may have on the credit institution. Such influence is one of the factors to be taken into account for the sole purpose of assessing the suitability of that acquirer and of the financial soundness of the proposed acquisition. [6] However, that factor is not relevant for the purpose of characterising a transaction as an acquisition of a qualifying holding.

Next, in the light of those considerations, **the General Court recognises that the merger at issue, following the judgment of the Council of State of 3 March 2016, had the effect of altering the legal structure of the applicants' qualifying holding in the credit institution in**

[3] Article 15 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) ('the SSM Regulation'), Articles 85 to 87 of Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities ('the SSM Framework Regulation') (OJ 2014 L 141, p. 1), and Article 22(1) of Directive 2013/36.

[4] Article 22(1) of Directive 2013/36.

[5] Combined reading of Article 15 of the SSM Regulation and of Article 22(1) and Article 23(1) of Directive 2013/36.

[6] Article 23(1) of Directive 2013/36.

question. Thus, the ECB was fully entitled to conclude that the merger at issue constituted an acquisition of a qualifying holding.

Furthermore, the General Court rejects the applicants' arguments relating to the ECB's failure to assess the criterion of the likely influence of the proposed acquirer on the credit institution in question. The General Court clarifies, in that regard, that the reputation of the proposed acquirer does not depend on the extent of its likely influence on that institution. Since the ECB was not required to examine that criterion when assessing the reputation of the proposed acquirer, it cannot be accused of infringing the obligation to state reasons in respect of that criterion.

Lastly, the General Court rejects the applicants' allegations concerning the unlawfulness of a provision of the SSM Framework Regulation, under which the applicants were given a short time limit of three working days within which to provide their comments on the draft contested decision. [7] In that regard, the General Court notes that, in the context of a prudential supervisory procedure, such as the procedure for assessing the acquisition of a qualifying holding, there are several procedural arrangements which enable the parties concerned to be heard. Those parties may put forward all the relevant information in their application for the authorisation of an acquisition of a qualifying holding and have the opportunity to make their views on the ECB's notification known effectively. Moreover, observance of their right to be heard may also be ensured, where appropriate, by the ECB exercising its option to organise a meeting. It is for the ECB to use all the means at its disposal to ensure, in each specific case, that the right to be heard is observed.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

[7] Article 31(3) of the SSM Framework Regulation.