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Composite procedures and judicial protection: in Fininvest and Silvio Berlusconi v. European Central Bank (T-913/16) the General Court delivers a "Pilate's judgment", by Andrea Magliari

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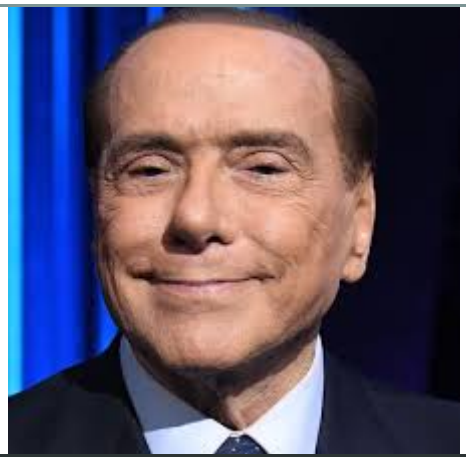
1 COMMENT



The decision rendered by the General Court on 11 May 2022 in case T-913/16[1] marks an important (and yet not final) step in the *Fininvest and Berlusconi* judicial saga. Essentially, the facts are quite well known: the European Central Bank (ECB) refused to authorise the acquisition of qualifying holdings in an Italian credit institution (Banca Mediolanum) by Fininvest s.p.a. on the ground that its controlling shareholder, Mr Silvio Berlusconi, did not meet the reputation requirement established by EU law due to his conviction for tax fraud in 2013. Fininvest and Berlusconi initiated judicial proceedings both before the Italian administrative courts requesting the annulment of the preparatory acts adopted by the Bank of Italy, and before the General Court (GC) of the EU challenging the ECB's final decision.

While the Italian *Consiglio di Stato* dismissed the case with a declaratory of lack of jurisdiction after raising a preliminary ruling to the European Court of Justice (ECJ), the General Court, with the judgment under analysis, upheld the decision of the ECB.

Among the many issues raised by this case, one seems to be particularly significant when observed from the perspective of the interaction between national and supranational legal systems: the contested decision is the result of what administrative law scholars (but not yet EU courts) qualify "composite procedures", i.e. administrative proceedings that take place partly before national administrations and partly before EU authorities. While the procedural structure might be shaped in numerous ways by the EU legislator (top-down; bottom-up etc.), composite procedures are invariably characterised by the fact that the final decision is the result of the combination of administrative acts carried out by administrative authorities belonging to both levels.

As is well known, composite procedures raise considerable problems as regards the judicial protection of private individuals. Unlike what is generally found in federal legal systems, the judicial protection architecture in the EU is based on a principle of clear separation between the national and supranational judicial orders. According to a "double exclusivity", EU courts have exclusive jurisdiction to review the legality of acts issued by EU bodies, while domestic courts have exclusive jurisdiction over legal acts adopted by national authorities.

This rule perfectly reflected the initial dichotomy between direct and indirect administration, but it no longer provides full and effective judicial protection in cases where the final decision is the result of the joint intervention of different acts adopted by national and supranational authorities (mixed or shared administration).

In this regard, one should recall that in the *Oleificio Borelli* judgment (C-97/91), the ECJ introduced some important principles for resolving disputes in which the final decision adopted by an EU institution was the outcome of a composite procedure initiated at national level. Although questionable, the solution offered by that judgment can be considered applicable to cases involving bottom-up composite procedures in which, however, the national preparatory act is binding on the EU authority. According to *Borelli*, in such cases only national judges can hear the case since EU courts cannot decide on the legality of national preparatory acts (procedural issue); moreover, an irregularity affecting the national preparatory act cannot affect the validity of the final decision adopted by an EU institution (substantive issue).

Quid iuris, however, in cases where the final act of the supranational authority is not bound by the national preparatory act? Which court has jurisdiction (procedural issue)? And if this is the EU court, can it decide on the unlawfulness of the national preparatory act and, if necessary, assess its impact on the final EU act (substantive issue)?

These questions were answered, at least in principle, by the ECJ in the *Berlusconi and Fininvest* (C-219/17), a decision rendered in 2018 upon a preliminary ruling requested by the Italian *Consiglio di Stato*. In that judgment, the ECJ clarified that, in relation to the acquisition of qualifying holdings in a credit institution under the Single Supervisory Mechanism (SSM), judicial review is only available before EU Courts, since the ECB is discharging functions that fall within its sole and exclusive competence as an EU institution. Under article 15 of Regulation 1024/2013 (the "SSM Regulation"), the EU legislature opted 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.

The involvement of national authorities during the procedure cannot affect the classification of the final act as an EU act where the activity of national authorities constitutes just 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. It follows that there must necessarily be a single judicial review, which must be conducted by the EU Courts alone (procedural issue).

Moreover, to ensure full and effective judicial protection, the ECJ also held that EU courts have jurisdiction to determine, as an incidental matter, whether the legality of the final decision is affected by any defects rendering unlawful the national preparatory act (substantive issue). In this respect, the ECJ further specified that both the type of national legal procedure employed to subject preparatory acts to review and the nature of the heads of claim or pleas in law put forward for that purpose are immaterial. EU judges can therefore assess the validity of the EU final decision also in light of national law, including national procedural law.

Building on a principle of unity of the judicial review, the Court opened the door for an incidental or direct control of national acts by EU judges; in doing so, the Court of Justice introduced a significant exception to the rigidity of the aforementioned principle of double exclusivity.

The principles contained in that judgment are extremely relevant and, in our view, quite innovative regarding the relationship between national and supranational judicial orders. The recognition of the substantive unity of the administrative composite procedure within the SSM led the Court to state the necessity of a single judicial review, which, albeit (directly) addressed to the final decision, can be (incidentally) extended to national preparatory acts and to pleas in law that are based on national legislations.

It was therefore reasonable to await the EU General Court's ruling on the ECB's final decision with particular interest and curiosity. After all, it is about assessing how the EU courts would have put into practice the tenets laid down in the *Berlusconi and Fininvest* preliminary ruling.

It should be recalled that the applicants claimed, *inter alia*, that the preparatory acts adopted by the Bank of Italy were flawed to such an extent as to lead to the unlawfulness of the final decision. More specifically, they submitted that, under Italian law, the preparatory act was to be considered void for breach of *res judicata* in relation to a judgment rendered in 2016 by the Italian *Consiglio di Stato*, which ruled on the effects of the merger authorisation previously issued by the Banca d'Italia in relation to Fininvest's holding in the target company. They also alleged infringements of the principle of legal certainty and proportionality, misuse of powers, and the violation of the right to be heard. The pleas in law were, thus, also addressed to the national preparatory act and some of them were drawn directly by national law (see, in particular, the plea regarding the '*nullità per violazione o elusione del giudicato*').

Despite high expectations, the answer provided by the GC on these unusual issues is quite disappointing.

The Court observes that the pleas addressed to the national preparatory act had been introduced after the submission of the application for judicial review, i.e. after the aforementioned *Berlusconi and*

Fininvest judgment (C-219/17). They are therefore considered as new pleas in law within the meaning of article 84 of the Rules of Procedure of the GC, which provides that "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".

In the Court's opinion, such new pleas are to be considered precluded to the applicants since they are not based on an element which became known in the course of the procedure, but rather on a preliminary judgment of the Court of Justice confirming a legal situation which is presumed to be known to the applicants when they brought the action. According to settled case-law, a preliminary ruling does not create or alter the law; it is purely declaratory as it only provides an interpretation *ex tunc* of a legal provision already in force. It follows that the principles contained in the aforementioned *Berlusconi and Fininvest* judgment are considered merely confirmatory and cannot be regarded as a new matter allowing a fresh plea to be raised.

Such restrictive interpretation raises some doubts. It is certainly true that preliminary rulings provide an interpretation of EU law, but it seems hard to deny that sometimes the interpretation provided by the ECJ is highly innovative and, to some extent, capable of creating or altering existing EU law. Suffice it to mention that one of the landmark principles of EU law, the principle of primacy, was first introduced by the Court of Justice in a preliminary ruling (*Costa v Enel*, case 6/64).

As noted above, although not radically new, the principles established by the ECJ in case C-219/17 should be regarded as a substantive evolution of the case-law on composite procedures and, as such, capable of justifying the introduction of new pleas in law during the procedure.

Moreover, due to the same procedural issue, another delicate and interesting question has remained unanswered. The applicants also claimed that the principles established in C-219/17 would amount to a violation of the right to an effective judicial review since EU courts are not endowed with the power to perform constitutional control over national law, nor can they raise the issue before national constitutional courts. Since the entire case must be brought before the EU courts, it follows that the applicants would be deprived of the opportunity to challenge the non-constitutionality of those national rules that the ECB is mandated to apply according to article 4(3) of the SSM regulation. This question too very well exemplifies the still current lack of adequate coordination tools between the judicial protection offered by national judges and that provided by EU courts vis-à-vis composite procedures and, more generally, European shared administration.

In conclusion, the General Court's decision appears quite unsatisfactory if regarded from the perspective of judicial protection in composite procedures. With a "Pilate's judgment", the Court "decided not to decide" on the thorniest issues, relying on an easy way out: with a *commodus discessus* provided by a narrow and mechanical interpretation of the procedural rules on the new pleas in law.

But curiosity – as well as hope – is the last to die. All that remains, therefore, is to patiently wait for the next chapter of the saga and read the final judgment that the Court of Justice will deliver on the appeal lodged by the applicants.[2]

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[1] Judgment of the General Court (Second Chamber, Extended Composition), 11 May 2022, *Finanziaria d'Investimento Fininvest S.p.A. (Fininvest) and Silvio Berlusconi v. European Central Bank*, Case T-913/16. **English translation not available at the time of writing this post.**

[2] See Case C-512/22 P. Further information on the application not yet available at the time of writing.

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