

# Composite Procedures and Judicial Review in the Single Resolution Mechanism: *Iccrea Banca*

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## Abstract

*Iccrea Banca* is a landmark ruling regarding judicial protection in composite decision-making procedures, whose importance extends not only to the Banking Union but also to EU administrative law more broadly. This paper argues that the Court's judgment in *Iccrea Banca* affirms the recent *Berlusconi and Fininvest* ruling regarding the Single Supervisory Mechanism and extends its *ratio decidendi* to the Single Resolution Mechanism. It further argues that *Iccrea Banca* leaves open a number of questions, notably as regards the irregularities affecting the national preparatory act or proposal that would be reviewed by the CJEU and the 'legal fate' of that national measure. Furthermore, we do not know which other composite procedures, whether within or beyond the Banking Union, would fall to be decided under the principles established in this case. It is likely that more litigation will follow on these matters, and that future case law will provide much-needed answers to the questions left open in *Iccrea Banca* and earlier rulings.

## Introduction

The establishment of the Banking Union has been an important milestone for the EU. Often described as the most ambitious project since the creation of the euro, it has centralised the arrangements for the supervision and resolution of banks in the Eurozone and beyond.<sup>1</sup> 'The key rationale for federalizing these powers is to strengthen an unbiased, neutral approach to bank oversight and resolution, thus mitigating forbearance and moral hazard, and to break the fatal link between sovereigns and their banks.'<sup>2</sup> As is normally the case for every new area of policy or new piece of legislation, there is a number of legal question marks hanging over the Banking Union. Despite the large volume of cases already brought before the Court of Justice of the EU (CJEU),<sup>3</sup> there remain important questions regarding judicial review in the Single Supervisory

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<sup>1</sup> The key pieces of EU legislation are: 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 [2013] OJ L287/63 (SSM Regulation); and Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1 (SRM Regulation).

<sup>2</sup> J. Gordon & W.-G. Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' [2015/5] *Columbia Law Review* 1297-1370, 1306.

<sup>3</sup> See the excellent overview provided by F. Della Negra & R. Smits, 'The Banking Union and Union Courts: Overview of Cases as at 1 June 2020' <[ebi-europa.eu/publications/eu-cases-or-jurisprudence/](http://ebi-europa.eu/publications/eu-cases-or-jurisprudence/)> accessed 27 July 2020.

Mechanism (SSM) and the Single Resolution Mechanism (SRM).<sup>4</sup> The Grand Chamber ruling in *Iccrea Banca* is of paramount importance in answering some of these questions.<sup>5</sup> It is important not only for the Banking Union but also for EU administrative law more broadly, notably as regards judicial review in composite procedures.

Composite decision-making procedures are defined as ‘multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically (between EU authorities and those of a Member State), horizontally (between authorities in two or more Member States), or in triangular relations (involving authorities of different Member States and of the EU). Final measures or decisions, whether issued by a Member State or an EU authority, are based on procedures involving more or less formalized input of the participants from the different levels.’<sup>6</sup> It is well-known that there is a host of questions or difficulties regarding judicial review in composite procedures, notably as regards the (national or EU) courts that have jurisdiction to review an act, the acts that may be subject to review, standing for private parties, whether any defects vitiating the national preparatory act can affect the validity of the final EU act, and so on.<sup>7</sup> More fundamentally, it is noted that ‘while EU administrative decision-making has abandoned the traditional dichotomy between direct and indirect administration, and is more and more often organised in a networked and multi-level system; the supervision and

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<sup>4</sup> See generally L. Wissink, T. Duijkersloot & R. Widdershoven, ‘Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection’ [2014/5] *Utrecht Law Review* 92-115; G. Ter Kuile, L. Wissink & W. Bovenschen, ‘Tailor-Made Accountability within the Single Supervisory Mechanism’ [2015/1] *CML Rev.* 155-90, esp. 180-87; T. Duijkersloot, A. Karagianni & R. Kraaijeveld, ‘Political and Judicial Accountability in the EU Shared System of Banking Supervision and Enforcement’, in: M. Scholten & M. Luchtman (Eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Cheltenham: Edward Elgar 2017), 28-52; J. Timmermans, ‘Guess Who? The SRB as the Accountable Actor in Legal Review Procedures’ [2019/1] *REALaw* 155-73; B. Budinska, ‘Judicial Review of Revocation Decisions in the Context of European Banking Supervision’ [2019/1] *REALaw* 175-93; A.H. Türk & N. Xanthoulis, ‘Legal Accountability of the European Central Bank in Bank Supervision: A Case Study in Conceptualising the Legal Effects of Union Acts’ [2019/1] *MJ* 151-64; G. Lo Schiavo (Ed.), *The European Banking Union and the Role of Law* (Cheltenham; Northampton: Edward Elgar 2019); T.M.C. Arons, ‘Judicial Protection of Supervised Credit Institutions in the European Banking Union’, in: D. Busch & G. Ferrarini (Eds), *European Banking Union* (2nd edn, Oxford: OUP 2020), 93-142; M. Lamandini & D. Ramos Muñoz, ‘SSM and SRB Accountability at European Level: What Room for Improvements?’ (6 April 2020) <[www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2020\)645711](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)645711)> accessed 13 August 2020, esp. 23-27.

<sup>5</sup> Case C-414/18 (Grand Chamber) *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d’Italia* ECLI:EU:C:2019:1036.

<sup>6</sup> H.C.H. Hofmann, G.C. Rowe & A.H. Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 405-06. See also J. Mendes & C. Eckes, ‘The Right to be Heard in Composite Administrative Procedures: Lost in between Protection?’ [2011/5] *EL Rev.* 651-70, 651-52.

<sup>7</sup> Amongst the copious literature, see particularly H.C.H. Hofmann, ‘Composite Decision Making Procedures in EU Administrative Law’, in: H.C.H. Hofmann & A.H. Türk (Eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Cheltenham; Northampton: Edward Elgar 2009), 136-67; A.H. Türk, ‘Judicial Review of Integrated Administration in the EU’, in: *ibid.*, 218-56; O. Jansen & B. Schöndorf-Haubold (Eds), *The European Composite Administration* (Cambridge; Antwerp; Portland: Intersentia 2011); M. Eliantonio, ‘Judicial Review in an Integrated Administration: The Case of “Composite Procedures”’ [2014/2] *REALaw* 65-102, esp. 77-93; S. Alonso de León, *Composite Administrative Procedures in the European Union* (Iustel 2017); F. Brito Bastos, ‘Derivative Illegality in European Composite Administrative Procedures’ [2018/1] *CML Rev.* 101-34; P. Craig, *EU Administrative Law* (3rd edn, OUP 2018) 329-32.

accountability are still linked in a two-level system, with separate national and EU levels'.<sup>8</sup> This is equally evident in the SRM Regulation, against the backdrop of which the facts of *Iccrea Banca* materialised:

'...The Court of Justice has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability.'<sup>9</sup>

It is impossible to understand *Iccrea Banca* – or judicial review in composite procedures more generally – without placing the case in its proper context. Space precludes a detailed exegesis of the case law on composite procedures prior to *Iccrea Banca*, such that only the key staging posts will be mentioned. Nearly three decades ago, the Court held in *Borelli* – a ruling which remains good law – that it had no jurisdiction to rule on the lawfulness of a measure adopted by a national authority which formed part of a Community decision-making procedure whereby the national measure was binding on the Community decision-making authority and therefore determined the terms of the Community decision to be adopted.<sup>10</sup> In those circumstances, any irregularity that might affect the national measure could not affect the validity of the Community decision.<sup>11</sup> It was for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the impugned national measure.<sup>12</sup>

Composite procedures in the Banking Union formed the subject matter of the Court's recent ruling in *Berlusconi and Fininvest*.<sup>13</sup> In a case concerning the SSM, the Court

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<sup>8</sup> M. Eliantonio (n 7) 77.

<sup>9</sup> SRM Regulation, recital 120. See further M. Markakis, 'Political and Legal Accountability in the European Banking Union: A First Assessment', in: M. Szabó, P.L. Láncoš & R. Varga (Eds), *Hungarian Yearbook of International and European Law 2016* (The Hague: Eleven Publishing 2017), 535-58, esp. 547-52.

<sup>10</sup> Case C-97/91 *Oleificio Borelli SpA v Commission of the European Communities* ECLI:EU:C:1992:491, paras 9-10. See earlier in this journal, F. Brito Bastos, 'The *Borelli* Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice' [2015/2] *REALaw* 269-98.

<sup>11</sup> *Borelli*, para. 12.

<sup>12</sup> *Ibid*, para. 13.

<sup>13</sup> Case C-219/17 (Grand Chamber) *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* ECLI:EU:C:2018:1023, annotated by F. Brito Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: *Berlusconi*' [2019/5] *CML Rev.* 1355-78; S. Demková, 'The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism: Comments on Judgment of 27 June 2018, C-219/17 *Silvio Berlusconi v Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and others*, EU:C:2018:502' [2019/1] *REALaw* 209-20; P. Dermine & M. Eliantonio, 'Case Note: CJEU (Grand Chamber), Judgment of 19 December

distinguished between two scenarios. First, relying on *Borelli*, it held that an act of a national authority that is part of a decision-making process of the EU 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.<sup>14</sup> This may be termed as ‘the *Borelli* scenario’. Second, the Court held that the EU courts have exclusive jurisdiction to review the legality of acts adopted by the EU institutions 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.<sup>15</sup> This may be termed as ‘the reverse *Borelli* scenario’ or ‘the *Berlusconi and Fininvest* scenario’.<sup>16</sup> In such a situation, it also falls to the EU courts 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.<sup>17</sup> Crucially, the Court added that it follows from Article 263 TFEU read in the light of Article 4(3) TEU that acts adopted by national authorities in such a procedure cannot be subject to review by the national courts.<sup>18</sup> Both the type of national legal procedure employed in order to subject preparatory acts adopted by the national authorities to review by a national court and the nature of the heads of claim or pleas in law put forward for that purpose are immaterial.<sup>19</sup>

This case note is structured as follows. The discussion begins with the facts of the *Iccrea Banca* case. This is followed by an exegesis of the admissibility issues that were raised before the CJEU. The focus then shifts to the judgment rendered by the Court on the admissibility of the case. Thereafter, the analysis section will advance four key arguments. First, *Iccrea Banca* affirms the ruling delivered in *Berlusconi and Fininvest* and extends its *ratio decidendi* to the SRM. Second, given that *Iccrea Banca* relies heavily on *Berlusconi and Fininvest*, it gives rise to the same set of questions or ambiguities as the latter judgment. Third, we do not know which other procedures in the SSM and the SRM would fall to be decided under *Borelli* or, conversely, *Berlusconi and Fininvest* and *Iccrea Banca*. Fourth, the ‘reach’ of the principles established in *Berlusconi and Fininvest* and *Iccrea Banca* beyond the confines of the Banking Union remains unclear. The concluding section predicts not only that more litigation will follow but also that the subsequent case law will provide much-needed answers to the questions left open in *Berlusconi and Fininvest* and *Iccrea Banca*.

## Facts of the Case

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2018, C-219/17, *Silvio Berlusconi and Finanziaria d’investimento Fininvest SpA (Fininvest) v Banca d’Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* [2019/2] *REALaw* 237-53.

<sup>14</sup> *Berlusconi and Fininvest*, paras 45-46.

<sup>15</sup> *Ibid*, paras 42-43.

<sup>16</sup> F. Brito Bastos (n 13) 1370-75.

<sup>17</sup> *Berlusconi and Fininvest*, para. 44.

<sup>18</sup> *Ibid*, para. 47.

<sup>19</sup> *Ibid*, para. 51.

By way of introduction to the subject matter of the case, there is EU legislation (the Bank Recovery and Resolution Directive) which ensures that national authorities have the tools to intervene sufficiently early and quickly in an unsound or failing bank ('credit institution') so as to ensure the continuity of the institution's critical financial and economic functions while minimising the impact of its failure on the economy and financial system.<sup>20</sup> In addition, for those Member States that are currently participating in the Banking Union, the SRM Regulation has established a centralised power of resolution which is entrusted to the Single Resolution Board and to the national resolution authorities.<sup>21</sup> The Single Resolution Board (SRB or 'the Board'), which is a Union agency,<sup>22</sup> has taken over responsibility from the national resolution authorities for the resolution of 'significant' entities or groups, entities and groups directly supervised by the European Central Bank (ECB), as well as other cross-border groups.<sup>23</sup> Separate tasks are also conferred on the Council and Commission within the SRM governance structure.<sup>24</sup> The resolution activities of the Board are backed by the Single Resolution Fund (SRF), which is financed by bank contributions.<sup>25</sup> These bank levies are collected at the national level and then pooled at the EU level pursuant to an Intergovernmental Agreement that was signed by 26 EU Member States (bar the United Kingdom and Sweden).<sup>26</sup> In order to ensure a fair calculation of contributions and provide incentives for banks to operate under a model which presents less risk, contributions to the SRF take account of the degree of risk incurred by the bank in accordance with the Bank Recovery and Resolution Directive and with the delegated acts adopted pursuant thereto.<sup>27</sup>

The applicant in the main proceedings, Iccrea Banca, is a bank which heads a network of credit institutions and whose object is to support the operations, *inter alia*, of cooperative credit banks in Italy.<sup>28</sup> To that end, it provides those banks with various services and acts as a central funder for the cooperative credit system. It supplies to those banks a range of services for structured access to collateralised funding available from the ECB and on the market. Against that background, it formed a group of which around 190 cooperative credit banks became members, with the sole aim of participating in targeted long-term refinancing operations, established by the ECB.<sup>29</sup>

By means of decisions adopted between 2015 and 2017, the Bank of Italy sought from Iccrea Banca the payment of ordinary, extraordinary and additional contributions to the Italian national resolution fund. Moreover, by means of a communication, it sought from Iccrea Banca,

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<sup>20</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L173/190.

<sup>21</sup> SRM Regulation, recital 11.

<sup>22</sup> *Ibid*, Article 42(1).

<sup>23</sup> *Ibid*, Article 7(2).

<sup>24</sup> *Ibid*, recital 24. See generally D. Busch, 'Governance of the Single Resolution Mechanism', in: D. Busch & G. Ferrarini (Eds), *European Banking Union* (2nd edn, Oxford: OUP 2020), 343-402.

<sup>25</sup> SRM Regulation, recital 19.

<sup>26</sup> Intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund.

<sup>27</sup> SRM Regulation, recital 109.

<sup>28</sup> *Iccrea Banca*, para. 19.

<sup>29</sup> *Ibid*, para. 20.

for the year 2016, payment to the SRF of an *ex ante* contribution determined by a decision of the Board of 15 April 2016. The Bank of Italy later corrected through another communication the amount of the *ex ante* contribution, following a decision of the Board of 20 May 2016.<sup>30</sup>

Iccrea Banca brought an action against those decisions and communications by the Bank of Italy before the referring court. It further sought a determination of the appropriate means of calculating the sums actually payable by itself and repayment of the sums which it considered to have been wrongly paid.<sup>31</sup> In support of its action, it claimed, in essence, that the Bank of Italy misinterpreted the provisions of Commission Delegated Regulation 2015/63 which supplemented the Bank Recovery and Resolution Directive with regard to *ex ante* contributions to resolution financing arrangements by taking into account, in order to calculate the contributions at issue in the main proceedings, the liabilities linked to the relationships between Iccrea Banca and the cooperative credit banks.<sup>32</sup> It further claimed that this misinterpretation led the Bank of Italy to fail, in the communication of data to the Board, to identify the particular features of the integrated system in which Iccrea Banca operated and thus led to an error in the calculation of the *ex ante* contribution to the SRF.<sup>33</sup>

### **The Admissibility Issues Raised**

It was stated in the order for reference that the interpretation sought was necessary in order to clarify the precise rules governing how the Bank of Italy ought to have acted in the procedure of determining and raising the *ex ante* contributions to the SRF. The referring court considered that it had to give a ruling on such action both in the stage of the procedure *preceding* the adoption of the decisions of the Board on the calculation of those contributions, by determining, *inter alia*, what information ought to have been sent to the Board by the Bank of Italy; and in the stage of the procedure *following* the adoption of those decisions of the Board, when the raising of those contributions was to take place.<sup>34</sup> These two stages of the procedure give rise to distinct admissibility issues.

First, we have seen that, according to *Berlusconi and Fininvest*, acts adopted by the national authorities in 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 cannot be subject to review by the national courts. It instead falls to the EU courts to rule on the legality of the final decision adopted by the EU institution, body, office or agency concerned and to examine any defects vitiating the national preparatory acts or proposals that would be such as to affect the validity of that final decision. As such, the admissibility of the request for a preliminary ruling hinges, in part, on the nature of the procedure that was followed for the adoption of the acts of the Board regarding the calculation of the *ex ante* contributions to the SRF. If the Court were to hold that the impugned actions of the Bank of Italy were not

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<sup>30</sup> Ibid, para. 21.

<sup>31</sup> Ibid, para. 22.

<sup>32</sup> Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements [2015] OJ L11/44.

<sup>33</sup> *Iccrea Banca*, para. 23.

<sup>34</sup> Ibid, para. 36.

subject to control by the national courts by reason of the *Berlusconi and Fininvest* doctrine, the request for a preliminary ruling would be partly inadmissible.<sup>35</sup>

Second, in what may be termed as a ‘classic’ *TWD* scenario,<sup>36</sup> the Commission claimed that the request for a preliminary ruling should be declared partly inadmissible, since Iccrea Banca did not bring, in good time, an action for the annulment of the decisions of the Board on the calculation of its *ex ante* contribution to the SRF.<sup>37</sup> This means that it would have been open to Iccrea Banca to claim before a national court that the decisions of the Board were illegal only if it had also brought an action for the annulment of those decisions within the time limits prescribed.<sup>38</sup> It will be recalled that the *TWD* case concerns the relationship between Article 263 TFEU and Article 267 TFEU challenges or, to put it differently, the acts that may be admissibly challenged through the preliminary reference route. The *TWD* case concerned a State aid decision that the recipient of aid sought to challenge indirectly through the national courts, although it had been sent a copy of it and had explicitly been informed that it could bring an action against that decision before the CJEU. The Court held that it was not possible for a recipient of aid who could have challenged that decision and who had allowed the mandatory time-limit laid down in this regard to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision.<sup>39</sup> It was common ground that the applicant in the main proceedings was fully aware of the Commission’s decision and of the fact that it could without any doubt have challenged it under what is nowadays Article 263 TFEU.<sup>40</sup> The Court concluded that, in factual and legal circumstances such as those of the main proceedings in that case, the definitive nature of the decision taken by the Commission vis-à-vis the undertaking in receipt of the aid bound the national court by virtue of the principle of legal certainty.<sup>41</sup> Craig and de Búrca note that, ‘Where it is unclear whether the applicant would have had standing under Article 263 the Court is more willing to admit the indirect action.’<sup>42</sup> Furthermore, ‘The Court is also likely to be more receptive to actions under Article 267 where the applicant would not have known of the relevant measure in time to challenge it under Article 263.’<sup>43</sup> The *TWD* ruling was recently affirmed by the Court in *Georgsmarienhütte and Others*.<sup>44</sup>

## The Court’s Judgment

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<sup>35</sup> It will be recalled that the question referred for a preliminary ruling concerned not only the calculation of the contributions to the SRF but also the calculation of the contributions to the Italian resolution fund.

<sup>36</sup> Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* ECLI:EU:C:1994:90.

<sup>37</sup> *Iccrea Banca*, para. 31.

<sup>38</sup> *Ibid*, para. 63.

<sup>39</sup> *TWD*, para. 17.

<sup>40</sup> *Ibid*, para. 24.

<sup>41</sup> *Ibid*, para. 25.

<sup>42</sup> P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020) 566.

<sup>43</sup> *Ibid*, 566.

<sup>44</sup> Case C-135/16 (Grand Chamber) *Georgsmarienhütte GmbH and Others v Bundesrepublik Deutschland* ECLI:EU:C:2018:582. See also most recently Case C-212/19 *Ministre de l’Agriculture et de l’Alimentation v Compagnie des pêches de Saint-Malo* ECLI:EU:C:2020:726.

The Court started its analysis with the stage of the procedure *preceding* the adoption of the decisions of the Board. Relying heavily on *Berlusconi and Fininvest*, it noted that Article 263 TFEU confers upon the CJEU exclusive jurisdiction to review the legality of acts adopted by the EU bodies, offices or agencies, one of which is the Board.<sup>45</sup> 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 body, office or agency exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities.<sup>46</sup> In such a situation, it falls to the EU courts to rule on the legality of the final decision adopted by the EU body, office or agency concerned 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.<sup>47</sup> It follows, moreover, from reading Article 263 TFEU in the light of the principle of sincere cooperation enshrined in Article 4(3) TEU that acts adopted by national authorities in such a procedure cannot be subject to review by the courts of the Member States.<sup>48</sup> 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.<sup>49</sup>

Shifting the focus to the procedure at hand, the Court held that the Board exclusively exercises the final decision-making power and that the role of the national resolution authorities is confined to providing operational support to the Board.<sup>50</sup> While the national authorities may be consulted by the Board in order to facilitate the determination of the amount of the *ex ante* contribution payable by an institution and while they must, in any event, cooperate with the Board to that end, the findings that they might make cannot in any way be binding on the Board.<sup>51</sup> Consequently, the EU courts alone have jurisdiction to determine, when reviewing the legality of a decision of the Board setting the amount of the individual *ex ante* contribution to the SRF of an institution, whether a preparatory act adopted by a national resolution authority is vitiated by defects capable of affecting the Board's decision, and no national court can review that national act.<sup>52</sup> The statement in the SRM Regulation that national judicial authorities should be competent to review the legality of decisions adopted by the national resolution authorities in the exercise of the powers conferred on them by that Regulation<sup>53</sup> must be understood, having regard to the division of jurisdiction arising from primary law, as pertaining only to national acts that are adopted as part of a procedure in which that Regulation has conferred on the national resolution authorities a specific decision-making power.<sup>54</sup>

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<sup>45</sup> *Iccrea Banca*, para. 37.

<sup>46</sup> *Ibid*, para. 38.

<sup>47</sup> *Ibid*, para. 39.

<sup>48</sup> *Ibid*, para. 40.

<sup>49</sup> *Ibid*, para. 42.

<sup>50</sup> *Ibid*, para. 47.

<sup>51</sup> *Ibid*, para. 47.

<sup>52</sup> *Ibid*, para. 48.

<sup>53</sup> See *supra* introduction.

<sup>54</sup> *Iccrea Banca*, paras 49-50.



The Court added, again building on *Berlusconi and Fininvest*, that a national court cannot properly issue to the national resolution authority any order as to how it is to act prior to the adoption of the Board's decision.<sup>55</sup> Underlining the need for a single judicial review of such decisions, the Court held that both the type of national legal procedure employed in order to subject preparatory acts adopted by the national authorities to review by a national court and the nature of the heads of claim or pleas in law put forward for that purpose have no bearing on the exclusive nature of the jurisdiction vested in the EU courts.<sup>56</sup> If a national court were to issue an order obliging a national resolution authority to behave in a particular way when intervening prior to the adoption of a decision of the Board on the calculation of the *ex ante* contributions to the SRF, that would undermine that concept of a single judicial review while creating a risk that findings, in one and the same procedure, of that national court might diverge from those of the EU courts which might, subsequently, be called upon to assess, as an ancillary matter, the legality of that intervention.<sup>57</sup> Having established that this is a *Berlusconi and Fininvest* type of case, the Court held that EU law precludes the referring court from giving a ruling on the legality of the action of the Bank of Italy in the stage of the procedure preceding the adoption of the decisions of the Board on the calculation of the *ex ante* contributions to the SRF.<sup>58</sup>

As regards the stage of the procedure *following* the adoption of the decisions of the Board on the calculation of those contributions, the Court held that the task of the national resolution authorities is solely to notify and give effect to those decisions.<sup>59</sup> Having regard to the specific powers of the Board, those authorities do not have the power to re-examine the calculations made by the Board in order to alter the amount of those contributions and they cannot therefore, after the adoption of the Board's decision, review, to that end, the extent to which an institution is exposed to risk.<sup>60</sup> Likewise, if a national court were to be able to annul the notification, by a national resolution authority, of a decision of the Board on the ground of an error in the evaluation of that institution's exposure to risk on which that calculation was based, that would call into question a finding made by the Board and would ultimately impede the execution of that decision of the Board in Italy.<sup>61</sup> The national resolution authorities, and the national courts called upon to review the actions of those authorities, cannot properly take decisions which conflict with decisions of the Board and which, in practice, deprive the latter decisions of their effects, by impeding the raising of those contributions.<sup>62</sup> However, where the outcome of proceedings pending before a national court depends on the validity of a Board's decision, that court may, as a general rule, refer to the Court a question for a preliminary ruling.<sup>63</sup>

The Court then moved on to examine the admissibility of this aspect of the request for a preliminary ruling in light of the principle established in the *TWD* case. It held that Iccrea Banca

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<sup>55</sup> Ibid, para. 51.

<sup>56</sup> Ibid, para. 52.

<sup>57</sup> Ibid, para. 53.

<sup>58</sup> Ibid, para. 54.

<sup>59</sup> Ibid, para. 57.

<sup>60</sup> Ibid, para. 58.

<sup>61</sup> Ibid, para. 59.

<sup>62</sup> Ibid, para. 60.

<sup>63</sup> Ibid, para. 61.

had standing to bring an Article 263 TFEU challenge.<sup>64</sup> Although the decisions of the Board were addressed to the Bank of Italy, those decisions were, unquestionably, of direct and individual concern to Iccrea Banca.<sup>65</sup> Since the first decision of the Board was challenged out of time and the second one was never challenged before the EU courts, it was not open for Iccrea Banca to claim before a national court that those decisions were invalid.<sup>66</sup> As such, the aspects of the question referred for a preliminary ruling which related specifically to the calculation of those contributions were declared inadmissible.<sup>67</sup> The question was found admissible only insofar as it related to the calculation of contributions to the Italian national resolution fund.<sup>68</sup> On the merits of the case, the Court ruled against Iccrea Banca.<sup>69</sup>

## Analysis

*Iccrea Banca* is another landmark ruling regarding judicial protection in composite administrative procedures, following in the footsteps of *Borelli* and *Berlusconi and Fininvest*. It will henceforth become a standard reference in EU administrative law books, articles and course syllabi. Its importance for the specific field the case concerned (i.e. the Banking Union) should not be overlooked either. This section advances four arguments. It will be seen that these are distinct albeit interrelated.

The first point to be made is as obvious as it is fundamental. *Iccrea Banca* affirms the ruling delivered in *Berlusconi and Fininvest* and the Court's 'two-track model ... in which the approach to judicial review of a composite procedure will depend on the level of administration at which the power to define the content of the final decision is located'.<sup>70</sup> In doing so, it extends the *Berlusconi and Fininvest*'s *ratio decidendi* to the SRM.<sup>71</sup> This is important for the stage of the procedure preceding the adoption of the Board's decisions. In the words of AG Campos Sánchez-Bordona, 'the logic of the judgment in *Berlusconi and Fininvest* should be applied to the SRB's decisions'.<sup>72</sup> Henceforth, the same principles governing judicial review in composite decision-making procedures will apply to both the SSM and the SRM. These principles build on the *Borelli* doctrine, as was complemented by the Court in *Berlusconi and Fininvest*.<sup>73</sup>

It bears mentioning that *Iccrea Banca* further provides clarity as regards the admissibility of the other aspect of the request for a preliminary ruling, namely the procedure *following* the adoption of the decisions of the Board, when those decisions were notified by the national resolution authority (Bank of Italy) to the institution concerned (Iccrea Banca) and the raising of those contributions was to take place. The *Iccrea Banca* judgment provides clarity as to whether the decisions of the Board regarding the calculation of the *ex ante* contributions to the SRF could

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<sup>64</sup> Ibid, para. 70.

<sup>65</sup> Ibid, para. 65.

<sup>66</sup> Ibid, paras 71-72.

<sup>67</sup> Ibid, paras 73-74.

<sup>68</sup> Ibid, para. 75.

<sup>69</sup> Ibid, paras 76-96.

<sup>70</sup> F. Brito Bastos (n 13) 1369.

<sup>71</sup> Concurring with this view, see M. Lamandini & D. Ramos Muñoz (n 4) 24.

<sup>72</sup> Case C-414/18 *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia* ECLI:EU:C:2019:574, Opinion of AG Campos Sánchez-Bordona, para. 31.

<sup>73</sup> See further F. Brito Bastos (n 13) 1370-75.

be admissibly challenged before the EU courts under Article 263 TFEU. Following the *Iccrea Banca* ruling, we know that although the decisions of the Board on the calculation of the *ex ante* contributions to the SRF may be addressed, in accordance with the applicable legislation, to the national resolution authority concerned, they are ‘unquestionably’ of direct and individual concern to the institution which owes those contributions.<sup>74</sup> As such, the credit institutions or investment firms concerned have standing to bring an action for annulment against the Board’s decisions (and unless they do so, they cannot challenge those decisions indirectly, after the time limit for an Article 263 TFEU challenge has expired, through the preliminary reference route). The General Court has already followed this ruling in a number of cases in which it annulled a decision of the Board on the calculation of the *ex ante* contributions to the SRF insofar as it concerned the applicants’ contributions.<sup>75</sup>

Second, seeing to it that the Court in *Iccrea Banca* relies heavily on *Berlusconi and Fininvest*, its ruling gives rise to the same set of questions or ambiguities as *Berlusconi and Fininvest* did. We do not (yet) know which irregularities affecting the national preparatory act or proposal that forms part of the decision-making procedure that led to the adoption of the EU act would be reviewed by the CJEU. More specifically, it is not clear whether (all) irregularities under *national* law would fall to be examined by the CJEU in a *Berlusconi and Fininvest / Iccrea Banca* situation.<sup>76</sup> In the case of the Banking Union, there is an additional layer of complexity: the ECB is empowered, for the purpose of carrying out the tasks conferred on it by the SSM Regulation, to apply all relevant Union law, and where this Union law is composed of Directives, the *national* legislation transposing those Directives. In addition, 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.<sup>77</sup> It will be recalled that AG Campos Sánchez-Bordona opined in *Berlusconi and Fininvest* that ‘EU Courts will have to decide whether preparatory measures ... contained defects that rendered them void in a way that has inevitably contaminated the entire procedure’ and that the ECB’s new mandate to apply national law was ‘underpinning the extension of the jurisdiction of the Court of Justice to review such cases’.<sup>78</sup> However, it remains unclear whether the CJEU would

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<sup>74</sup> *Iccrea Banca*, para. 65. See further *ibid*, paras 66-69 as to why those decisions were of direct and individual concern to Iccrea Banca.

<sup>75</sup> Case T-411/17 *Landesbank Baden-Württemberg v Single Resolution Board* ECLI:EU:T:2020:435; Case T-414/17 *Hypo Vorarlberg Bank AG v CRU* ECLI:EU:T:2020:437; Case T-420/17 *Portigon AG v CRU* ECLI:EU:T:2020:438. See further L. Wissink, ‘The SRB’s Decision-Making Process under Scrutiny Again’ (24 September 2020) <[eulawlive.com/analysis-the-srbs-decision-making-process-under-scrutiny-again-by-laura-wissink/](http://eulawlive.com/analysis-the-srbs-decision-making-process-under-scrutiny-again-by-laura-wissink/)> accessed 24 September 2020.

<sup>76</sup> P. Dermine & M. Eliantonio (n 13) 249-51; F. Brito Bastos (n 13) 1375-77. For a view on this, see S. Demková (n 13) 214-20.

<sup>77</sup> SSM Regulation, Article 4(3). See further F. Coman-Kund & F. Amtenbrink, ‘On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism’ [2018/2] *Banking & Finance Law Review* 133-72. It should be noted that the relevant provision in the SRM Regulation (Article 5) provides *inter alia* that: ‘The Board, the Council and the Commission and, where relevant, the national resolution authorities, shall take decisions subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative acts, including those referred to in Articles 290 and 291 TFEU.’

<sup>78</sup> Case C-219/17 *Silvio Berlusconi and Finanziaria d’investimento Fininvest SpA (Fininvest) v Banca d’Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* ECLI:EU:C:2018:502, Opinion of AG Campos Sánchez-Bordona, paras 111-14.

review irregularities under national law in this scenario. In this connection, Brito Bastos argues (with respect to *Berlusconi and Fininvest*) that:

‘...only time will tell if the ECJ will consider the ECB’s new mandate as an expansion of its own jurisdiction in order to apply national law, or if it will continue to follow the previous understanding that national law is beyond its reach. In the former case, the ECJ will have revolutionized the boundaries of its jurisdiction and even abandoned the old tenet of the autonomy of EU law that EU measures cannot be invalid on grounds of national law. In the latter case, it will have rendered the ECB immune to judicial control whenever it applies national law in one of the SSM’s decision-making procedures.’<sup>79</sup>

What is more, the ‘legal fate’ of the national measure affecting the legality of the final EU act remains unclear.<sup>80</sup> In this connection, Dermine and Eliantonio argue that ‘on the basis of the principle of loyal cooperation, national authorities would have the duty to ensure that an invalid national preparatory measure is no longer applied and – if needed – to adopt a new, valid, measure’.<sup>81</sup> *In casu*, in the framework of the Banking Union, it seems that this problem could be solved by means of decisions/instructions provided by the EU institution or agency to the relevant national authority, as the case may be.<sup>82</sup>

Third, we do not yet know which other procedures in the SRM or the Banking Union more generally would constitute a *Berlusconi and Fininvest / Iccrea Banca* scenario, such that this line of case law could also be applied to them. This is not the place for an exhaustive analysis of the composite decision-making procedures found in the legal framework of the SRM. Nevertheless, it could be observed that *Iccrea Banca* seems to be applicable whenever the Board is acting after consulting the national resolution authorities or on the basis of a national preparatory measure or proposal. By way of example, this seems to be the case when the Board draws up and adopts resolution plans for the entities and groups within its remit (Art. 8 SRM Regulation) or when the Board applies simplified obligations in relation to the drafting of resolution plans or waives the obligation of drafting those plans (Art. 11 SRM Regulation).

As argued above, whether a said procedure would be governed by the principles established in *Borelli* or the reverse principles found in *Berlusconi and Fininvest / Iccrea Banca* would depend on the level of administration (national or EU) at which the power to define the content of the final decision is located. However, it is observed in the relevant literature that, as regards the area of Banking Union, ‘the division of competence between the national and EU authorities is not crystal clear’.<sup>83</sup> This was equally visible in the *Iccrea Banca* case: did the Bank of Italy act as a mere intermediary between the Board and the credit institutions or did it play an active and decisive role both during the stage of determining the amount of those contributions

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<sup>79</sup> F. Brito Bastos (n 13) 1376-77.

<sup>80</sup> P. Dermine & M. Eliantonio (n 13) 251-52.

<sup>81</sup> *Ibid*, 252.

<sup>82</sup> See also F. Coman-Kund & F. Amtenbrink (n 77) 164-65. As regards specifically the SRM, see notably Articles 29 and 31 of the SRM Regulation.

<sup>83</sup> M. Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (OUP 2020) 178.

and during the stage of raising those contributions?<sup>84</sup> We may know that the test to be used in order to settle doubts as to the jurisdiction of the EU and national courts focuses on the level where discretion lies, but we may be unsure as to the choices made by the EU legislature regarding where that discretion lies. It may thus be unclear whether the EU legislature sought to establish between the EU and national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU authority or not. There will almost inevitably be more litigation on this point in the future.<sup>85</sup> In the meantime, considerable legal uncertainty will persist – an uncertainty which was highlighted by AG Campos Sánchez-Bordona himself in his Opinion in *Iccrea Banca*.<sup>86</sup> Unless there is CJEU case law clarifying the nature of the specific procedure in question (as is now the case with *Berlusconi and Fininvest* concerning the acquisition of a qualifying holding in a credit institution or *Iccrea Banca* regarding the calculation of *ex ante* contributions to the SRF), litigants in future cases are likely to bring proceedings before both national and EU courts and challenge all relevant legal acts or omissions, as the case may be.<sup>87</sup>

Fourth, the ‘reach’ of *Berlusconi and Fininvest* and *Iccrea Banca* principles beyond the confines of the Banking Union remains unclear. As such, we could only make an educated guess on the basis of the criteria developed by the Court in these rulings as to which other composite procedures lying beyond the Banking Union would fall to be decided under these rulings or, conversely, under *Borelli*. In this connection, the plethora of different types of composite procedures that exists<sup>88</sup> (some of which are not structurally similar to those that formed the object of litigation in *Berlusconi and Fininvest* and *Iccrea Banca*) is particularly important.<sup>89</sup> And so is the CJEU’s case law concerning those procedures, which in some cases has shifted over time.<sup>90</sup> Further litigation will most likely ensue in those other areas as well. Whatever the future answers rendered by the Court may be, it is important that there be no gaps in legal protection for litigants.

## Conclusion

*Iccrea Banca* constitutes a landmark ruling for judicial review of composite decision-making procedures (notably, in the area of the Banking Union). It was argued in this paper that the Court’s judgment affirms *Berlusconi and Fininvest* and extends the latter ruling’s *ratio decidendi* to the SRM. Moreover, it was argued that it leaves open a number of questions, notably as regards the irregularities affecting the national preparatory act or proposal that would fall to be reviewed by the CJEU and the ‘legal fate’ of the said national measure. In this connection, the

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<sup>84</sup> See *Iccrea Banca*, para. 24.

<sup>85</sup> P. Dermine & M. Eliantonio (n 13) 252.

<sup>86</sup> *Iccrea Banca*, Opinion of AG Campos Sánchez-Bordona, para. 51.

<sup>87</sup> T.M.C. Arons (n 4) paras 3.95-3.96 notes that this is a problem more generally in the Banking Union, where the national authorities adopt decisions addressed to individual credit institutions, acting on the instructions of the ECB and the Board.

<sup>88</sup> For a typology of composite procedures, see M. Eliantonio (n 7) 69-77; F. Brito Bastos (n 7) 105-08.

<sup>89</sup> For a view on this, see P. Dermine & M. Eliantonio (n 13) 252-53.

<sup>90</sup> See, e.g., F. Brito Bastos (n 7) 122-23 concerning the regime on access to documents held by the EU institutions which originate from a Member State.

related differences between the SSM and the SRM frameworks add an interesting twist to these questions. Furthermore, we do not know which other composite procedures, whether within or beyond the Banking Union, would fall to be decided under *Iccrea Banca* (and *Berlusconi and Fininvest*) or, conversely, under *Borelli*. It is likely that more litigation will follow on these matters, and that future case law will provide much-needed answers to the questions left open in *Iccrea Banca* (and *Berlusconi and Fininvest*) in the interests of the rule of law, legal certainty, and legal accountability. It would further be interesting to see whether the solutions crafted would be unique to the Banking Union (notably, in light of the ECB's mandate to apply national law) or whether they would shape EU administrative law doctrine more broadly.<sup>91</sup>

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<sup>91</sup> Brito Bastos also discusses the possibility that the SSM may differ from other areas of EU law in this respect: F. Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-Making and Non-Justiciable National Law' [2020/1] *EuConst* 63-90, 84-85.