Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

16 July 2015*

(Reference for a preliminary ruling — Agreements, decisions and concerted practices — Arrangement for sharing clients on a private pension fund market — Whether there is a restriction of competition within the meaning of Article 101 TFUE — Effect on trade between Member States)

In Case C-172/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Înalta Curte de Casație și Justiție (Romania), made by decision of 13 February 2014, received at the Court on 7 April 2014, in the proceedings

ING Pensii — Societate de Administrare a unui Fond de Pensii Administrat Privat SA

v

Consiliul Concurenței,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.-C. Bonichot, A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2015,

after considering the observations submitted on behalf of:

— ING Pensii — Societate de Administrare a unui Fond de Pensii Administrat Privat SA, by I. Hrisafi and R. Vasilache, avocați,

— the Consiliul Concurenței, by B. Chirițoiu, A. Atomi and A. Gunescu, acting as Agents,

— the Romanian Government, by R.-H. Radu, A. Buzoianu and A.-G. Văcaru, acting as Agents,

— the European Commission, by A. Biolan, M. Kellerbauer and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2015,

gives the following

* Language of the case: Romanian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1)(c) TFEU.

2 The request has been made in proceedings between ING Pensii — Societate de Administrare a unui Fond de Pensii Administrat Privat SA ('ING Pensii'), a company administering a private pension fund, and the Consiliul Concurenței (Competition Authority) concerning an application for annulment of a decision of the Competition Authority imposing a fine on that company for its participation in an agreement to restrict competition on the Romanian private pension fund market.

Legal context

3 Article 5 of Law No 21/1996 on competition, as amended (*Monitorul Oficial al României*, Part I, No 240 of 3 April 2014) ('Law No 21/1996') provides as follows:

'(1) Express or tacit agreements between economic operators or associations of economic operators, decisions adopted by associations of economic operators and concerted practices shall be prohibited where they have as their object or effect the restriction, prevention or distortion of competition on the Romanian market or any part thereof and, in particular, where they are directed towards:

…

(c) the sharing of markets or sources of supply …'

4 Law No 411/2004 on private pension funds, as amended (*Monitorul Oficial al României*, Part I, No 482 of 18 July 2007) ('Law No 411/2004'), governs the establishment, organisation, operation and monitoring of such pension funds. Where it is obligatory, affiliation to a private pension fund is subject to the supervision of the Casa Națională de Pensii și alte Drepturi de Asigurări Sociale (National fund for pensions and other welfare benefits) ('the CNPAS').

5 Eighteen private pension fund management companies were approved under Law No 411/2004 by the Comisia de Supraveghere a Sistemului de Pensii Private (Private Pensions Board) during the period from 25 July 2007 to 9 October 2007, each of those companies being entitled to manage a single private pension fund in Romania.

6 Article 30 of Law No 411/2004 states as follows:

'(1) Persons aged 35 years or under … who pay contributions to the public pension system, must belong to a pension fund.

…'

7 Paragraph 31 of that law states as follows:

'A person may not belong at the same time to more than one pension fund governed by the present Law and may have only one account with the pension fund to which he belongs …'

8 Article 32 of Law No 411/2004 provides as follows:

'(1) A person shall be recognised as registered with a pension fund upon signing an individual affiliation application, on his own initiative or following his allocation to the fund by the census authority.

(2) Upon signing the affiliation application, participants shall be informed of the conditions of the private pension scheme, in particular as regards the rights and obligations of the parties covered by the private pension scheme, the financial, technical and other risks, and the nature and allocation of those risks.

…'

9 Article 33 of Law No 411/2004 is worded as follows:

'(1) Any person who has not become affiliated to a pension fund within 4 months of the date on which the statutory obligation to do so arose shall be allocated on a random basis to a pension fund by the census authority.

(2) The random allocation of persons shall be carried out on a basis directly proportional to the number of participants in a pension fund as at the date of the allocation.

…'

10 Article 5 of Order No 18/2007 of the Committee for the Supervision of private pension schemes, concerning the initial affiliation and registration of participants in private pension funds, as amended (*Monitorul Oficial al României*, Part I, No 746 of 2 November 2007) ('Order No 18/2007'), provides as follows:

'(1) The choice of a private pension fund shall be an individual matter for the participant.

(2) Affiliation to a private pension fund shall be at the initiative of the individual participant or as a result of that person's random allocation to a fund by the CNPAS, where affiliation to a private pension fund is obligatory.

…

(6) The initial procedure for affiliation to private pension funds shall commence on 17 September 2007 and end on 17 January 2008.'

11 Article 21 of Order No 18/2007 states as follows:

'(1) Where a person is named in a bi-monthly report by one or more administrators as having signed more than one individual affiliation document or it is ascertained that the validity of his application is deemed in an earlier report to be temporary, the CNPAS shall enter the name of that person in the electronic table of duplications.

(2) The CNPAS shall forward the electronic table of duplications to the administrators and the committee within three working days of receipt of the bi-monthly report.

…'

12 Article 23 of Order No 18/2007 provides as follows:

'…

(3) The persons who, when the initial affiliation process is completed, appear to the CNPAS to have signed more than one individual affiliation document shall be registered as "invalid" participants and shall be allocated on a random basis in accordance with the provisions of this regulation.'

13 Article 29 of Order No18/2007 states as follows:

‘On completion of the random allocation procedure, the CNPAS shall declare the affiliation of persons with each private pension fund to be valid and update the information in the register of participants.’

14 Article 30 of Order No 18/2007 is worded as follows:

‘(1) Within 5 working days of the entry in the register of participants of the persons allocated on a random basis, the CNPAS shall notify separately to each management company a list of persons allocated on a random basis and declared by it to be validly affiliated to the private pension fund.

…’

15 Article 31 of Order No 18/2007 provides as follows:

‘The management company to which participants are allocated by the CNPAS on a random basis shall be required to notify to those persons, within 15 calendar days of the date of their registration as participants in a private pension fund, the name of the private pension fund and of the company managing it.’

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

16 ING Pensii is a company which administers a private pension fund, inter alia on the obligatory private pensions market in Romania. In that capacity, it was the subject of an investigation carried out by the Consiliul Concurenței concerning possible infringement of Article 5(1) of Law No 21/1996 and Article 101 TFEU.

17 By Decision No 39/2010 of 7 September 2010, the Consiliul Concurenței imposed fines on 14 companies managing private pension funds, including ING Pensii, on the ground that agreements to share clients had been concluded between those companies. Those agreements related to persons who had signed two different private pension fund affiliation applications during the initial affiliation period. According to the Consiliul Concurenței, in concluding those agreements, the pension funds concerned shared those persons (‘duplications’) equally between them and thereby sought to avoid allocation of duplications by the CNPAS.

18 On 4 October 2010, before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest), ING Pensii sought the annulment of Decision No 39/2010 or, in the alternative, the partial annulment of that decision with a view to securing a reduction of the amount of the fine imposed. That company maintained that the agreements in question were not contrary to Article 5(1) of Law No 21/1996 and that the conditions for the application of Article 101 TFEU were not fulfilled.

19 ING Pensii argued in particular that the sharing of participants registered as duplications falls outside the definition of ‘agreements, decisions and concerted practices’. Thus, it had not been possible to establish that there has been any effect amounting to the restriction, prevention or distortion of competition on the Romanian obligatory private pension fund market or on any significant part of that market. ING Pensii also claimed that competition between those pension funds had not been eliminated, since the funds were in competition with each other during the initial affiliation period.

20 The Consiliul Concurenței observed that, in order to establish that the arrangements agreed between the pension funds concerned, which include ING Pensii, are anti-competitive, account must be taken of the legal framework used as the basis for the establishment and operation of the obligatory private pension fund management market and the specific features of the market on which those arrangements were agreed upon.

21 By judgment of 6 February 2012, the Curtea de Apel București dismissed ING Pensii's appeal. ING Pensii lodged an appeal in cassation before the referring court. It contended, inter alia, that choosing an algorithm for the calculation of duplications other than that provided for by the rules applicable did not constitute an infringement of Law No 21/1996 but, at most, an infringement of the specific legislation applicable to obligatory private pensions. Moreover, as the agreement in question was limited to the sharing of duplications, it could not have affected competition on the market in question, since duplications, which accounted for less than 1.5% of that market, were not the subject of competition between the pension funds.

22 ING Pensii also observed before the referring court that it had no practical or economic interest in the allocation of the duplications in equal shares, given that it already had, as at 15 October 2007, the greatest share of the market. Furthermore, the agreements at issue in the main proceedings had a positive outcome in that they made the obligatory private pension fund affiliation procedure more efficient by giving the participants a greater chance of being granted their choice than would have been the case with random allocation.

23 Lastly, ING Pensii argues that, in the present case, there is no evidence of any partitioning of the national market for obligatory private pension funds as a result of a different algorithm being chosen for the calculation of duplications. It is clear that the actual or potential effects of agreements affecting a marginal percentage of the Romanian market in question are negligible and not at all of the kind to have any impact on the market at EU level.

24 The Consiliul Concurenței contends that ING Pensii's appeal should be dismissed, submitting that the agreements for the sharing of duplications are capable of distorting competition on the obligatory private pensions market and, as such, pursued an anti-competitive object. The ability of an agreement to produce negative effects and the finding of an infringement consisting in the sharing of markets and sources of supply are not dependent on the number of clients actually shared, which is a factor relevant to the actual effects of an agreement.

25 In those circumstances, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In relation to a practice by virtue of which clients are shared out, is the specific and definitive number of those clients relevant in deciding whether the condition of a significant distortion of competition for the purposes of Article 101(1)(c) TFEU is fulfilled?'

Consideration of the question referred

26 It should be noted, first, that the referring court has asked a question concerning the relevance of the number of persons affected by agreements to share clients in the light of one of the conditions laid down in Article 101(1) TFEU, whereby, in order to fall within the scope of that provision, an agreement must, inter alia, be capable of restricting competition in the internal market.

27 Having regard to the facts of the main proceedings, the question referred is to be understood as seeking to ascertain whether Article 101(1) TFEU must be interpreted as meaning that agreements to share clients, such as the agreements concluded between the private pension funds in the main proceedings, constitute an agreement, decision or concerted practice having an anti-competitive object and whether the number of clients affected by such agreements is relevant in the light of the condition relating to the existence of a restriction of competition on the internal market.

28 It should be noted in that regard that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must be capable of affecting trade between Member States and have as its 'object or effect' the prevention, restriction or distortion of competition within the internal market.

29 With regard to the distinction to be made between concerted practices having an 'anti-competitive object' and those having an 'anti-competitive effect', it should be recalled that those are not cumulative, but alternative, requirements.

30 According to settled case-law established by the judgment in *LTM* (56/65, EU:C:1966:38), the alternative nature of those requirements, indicated by the conjunction 'or', leads to the need to consider, in the first place, the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, an analysis of the terms on which the concerted practice is conducted does not reveal a sufficient degree of harm to competition, the effects of the concerted practice should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see judgments in *Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 15, and *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 28).

31 With regard to the concept of restriction 'by object', it should be noted that certain types of coordination between undertakings reveal, by their very nature, a sufficient degree of harm to the proper functioning of normal competition so that there is no need to examine their effects (see, to that effect, judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49 and 50 and the case-law cited).

32 It is established case-law that agreements whose object, as will be apparent from the very nature of such agreements, is to share customers for services constitute forms of collusion that are particularly injurious to the proper functioning of normal competition. Accordingly, agreements to share customers, like agreements on prices, clearly form part of the category of the most serious restrictions of competition (see, to that effect, judgment in *Commission* v *Stichting Administratiekantoor Portielje*, C-440/11 P, EU:C:2013:514, paragraphs 95 and 111).

33 The Court has also stated that, in order to determine whether an agreement between undertakings or a decision by an association of undertakings has those characteristics, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question (see judgment in *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53 and the case-law cited).

34 It follows that, in order to determine whether, in the main proceedings, the practices in question were capable of constituting, by their 'object', such a restriction, they must be assessed in the light of the case-law cited above.

35 In so far as concerns, first, the terms of the agreement at issue in the main proceedings, it is common ground that ING Pensii colluded with other companies on the basis that an indeterminate number of persons concerned, that is, the duplications, was to be shared on an equal basis between the private pension funds participating in that collusive conduct.

36 As observed by the Consiliul Concurenței and as is apparent from the documents before the Court, the agreements at issue in the main proceedings were conceived and concluded even before the procedure for the affiliation of the persons concerned to one of the private pension funds had been implemented. Those companies had anticipated that a great number of people would affiliate themselves, not to one, but to several pension funds.

37 As regards, in the second place, the objective pursued by the private pension funds concerned, it should be noted that the purpose of the bi-lateral agreements to share duplications was to affiliate the persons concerned to a limited group of operators, contrary to the statutory rules applicable, and thus to the detriment of other companies operating in the economic sector concerned in the main proceedings.

38 The purpose of the agreement established was, therefore, to strengthen the position, on the market concerned, of each of those private pension funds by comparison with that of their competitors not participating in the collusive conduct in question.

39 Accordingly, in line with the considerations set out at paragraph 32 above, those agreements pursued an objective that was clearly at odds with the proper functioning of normal competition.

40 In the third place, with regard to the economic and legal context of the agreements at issue in the main proceedings, it should be observed, first, that the new obligatory private pension fund market was established during a relatively short period, namely four months, at the end of which the market share of each of the funds was determined.

41 Next, it should be observed that the national legislation in question made it obligatory for the persons concerned to be affiliated to one of the 18 private pension funds approved for that purpose and their affiliation was recognised as valid in law only when registered with the CNPAS.

42 Moreover, under that legislation, persons who had registered with more than one private pension fund manager were regarded as not validly affiliated and had to be allocated among those funds in direct proportion to the number of persons whose affiliation had been validated for each of those funds.

43 Furthermore, that legislation provided that a person whose affiliation to one of the approved private pension funds had been validated could not, without having to pay significant charges, alter his affiliation until a period of two years had expired.

44 Lastly, as a result of their collusion, the private pension funds concerned deliberately circumvented statutory rules which provided for duplications to be affiliated, following intervention by the competent national authorities, and to be allocated on a random basis.

45 In those circumstances, in determining the economic and legal context of an agreement in accordance with the case-law cited at paragraph 33 above, it is necessary to take account of the nature of the services affected, as well as the actual conditions of the functioning and the structure of the market concerned.

46 In the present case, the nature of the service concerned, which is characterised in particular by the statutory obligation the persons in question are under to affiliate themselves to a private pension fund, was defined by national law. Thus, the insurance product in question in the main proceedings could be easily identified by potential customers and there was therefore strong competition for their custom between the various private pension funds authorised to offer that product.

47 It follows that the purpose of such collusion on the part of the private pension funds concerned was to enable them to influence the structure and actual conditions of the functioning of the new obligatory private insurance market at a key stage in the formation of that market.

48 Lastly, in order for the condition that an agreement within the meaning of Article 101(1) TFEU must be capable of affecting trade between Member States to be fulfilled, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law and of fact, that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (see judgments in *Javico*, C-306/96, EU:C:1998:173, paragraph 16; *Bagnasco and Others*, C-215/96 and C-216/96, EU:C:1999:12, paragraph 47; and *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 90).

49 As regards the ability of an agreement, decision or concerted practice extending over the whole of the territory of a Member State to affect trade between Member States, it is settled case-law that such an agreement, decision or concerted practice has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the FEU Treaty is designed to bring about (see judgments in *Vereeniging van Cementhandelaren* v *Commission*, 8/72, EU:C:1972:84, paragraph 29; *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 48; and *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 95).

50 In the present case, it is apparent from the documents submitted to the Court that the services in question could be cross-border in nature as the persons under an obligation to affiliate themselves to one of the approved funds and their employers might be established in other Member States and the pension funds established in Romania might belong to companies situated in other Member States.

51 While it is true that access to that new obligatory private pension fund market was restricted to companies authorised for that purpose in Romania, the agreement at issue in the main proceedings made it more difficult for companies established outside Romania which were also seeking to offer services in the economic sector concerned to penetrate the Romanian market.

52 That situation must be regarded as capable of affecting trade within the EU internal market.

53 It follows that the agreements at issue in the main proceedings may be classified as restricting competition by reason of the very object of those agreements within the meaning of Article 101(1) TFEU.

54 Accordingly, the number of persons actually affected by the agreements to share clients at issue in the main proceedings is irrelevant for the purpose of determining whether there is such a restriction of competition.

55 Indeed, as the Advocate General observed at point 83 of his Opinion, a finding that an agreement to share clients has an anti-competitive object — in particular a finding that the agreement may have a negative impact on the market — does not depend on the actual number of clients who are in fact shared out but simply on the terms and the objective aims of the agreement, considered in the light of the economic and legal context in which the agreement was concluded.

56 It follows from all the foregoing considerations that Article 101(1) TFEU must be interpreted as meaning that agreements to share clients, such as those concluded between the private pensions funds in the main proceedings, constitute agreements with an anti-competitive object, the number of clients affected by such an agreement being irrelevant for the purpose of assessing the requirement relating to the restriction of competition within the internal market.

Costs

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

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

Article 101(1) TFEU must be interpreted as meaning that agreements to share clients, such as those concluded between the private pensions funds in the main proceedings, constitute agreements with an anti-competitive object, the number of clients affected by such an agreement being irrelevant for the purpose of assessing the requirement relating to the restriction of competition within the internal market.

[Signatures]