Following a request for a preliminary ruling under article 267 TFEU from Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice of Romania), the Court of Justice of the European Union (Second Chamber) ruled on the 16th of July 2015 on the interpretation of Article 101(1)(c) TFEU.

The request was made in the context of the proceedings between ING Pensii – Societate de Administrare a unui Fond de Pensii Privat SA (hereinafter referred to as "ING Pensii"), a company administering a private pension fund, and Consiliul Concurenţei (the Romanian Competition Council, hereinafter referred to as "Consiliul Concurenţei") concerning an application for the annulment of a decision of Consiliul Concurenţei imposing a fine on ING Pensii for its participation in an agreement to restrict competition on the Romanian private pension fund market.

Background:

On 7 September 2010, Consiliul Concurenţei by Decision no. 39/2010 imposed fines on 14 companies managing private pension funds, including ING Pensii, on the grounds that agreements to share clients had been concluded between those companies, infringing thus the provisions of the Romanian and EU competition legislation, mainly article 5(1) of Law no. 21/1996 and article 101 TFEU.

Those agreements had as object the sharing by those companies of the persons who had signed two different private pension fund affiliation applications during the initial legal affiliation period described by the provisions of Law 411/2004 concerning private pension funds. Hence, the companies shared those persons (referred to by Consiliul Concurenţei as "duplications") equally between them, avoiding the random allocation of duplications according to the relevant legal provisions.

On 4 October 2010, ING Pensii sought the annulment or, in the alternative, the partial annulment of Consiliul Concurenţei's Decision before Curtea de Apel Bucureşti (Bucharest's Court of Appeal) arguing that the said agreements were not infringing the Romanian competition legislation and moreover that the conditions for the application of article 101 TFEU were not fulfilled. ING Pensii's request was dismissed by Curtea de Apel Bucureşti, ING Pensii appealing Curtea de Apel Bucureşti's judgment before Înalta Curte de Casaţie şi Justiţie.

Before Înalta Curte de Casaţie şi Justiţie, ING Pensii argued among other assertions, that the company had no economic interest in sharing the "duplications" as, on the 15th of October 2007, the company already had the greatest share of the relevant market.

Furthermore, ING Pensii argued that the duplications accounted to less than 1.5% of the said market, affecting a negligible percentage, percentage that could not have an impact on the market at EU level.

Consiliul Concurenţei reasoned that ING Pensii's assertions could not be taken into consideration by Înalta Curte de Casaţie şi Justiţie as the agreements related to the sharing of "duplications" infringed the relevant legal provisions and had negative effects on the market in question, such effects not being dependent on the number of clients actually shared.

In such a context, Înalta Curte de Casaţie şi Justiţie referred to the Court of Justice of the European Union for a preliminary ruling on the following question:

"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?"

The Court of Justice of the European Union ruled 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."*

In order to justify its ruling, the Court of Justice stated that *"agreements to share customers, like agreements on prices, clearly form part of the category of the most serious restrictions of competition"*, invoking thus the established case-law such as the judgment in Commission v. Stichting Administratiekantoor Portielje.

Furthermore, the Court of Justice considered important, when analysing such an agreement, to take into consideration the nature of the goods or services affected by the agreements, as well as the actual conditions of the functioning and structure of the relevant market or markets in question (in this case, the Romanian private pension fund market), invoking once again the established case-law, as resulting from the judgment CB v. Commission C-67/13.

The Court of Justice also addressed the issue of the ability of an agreement, decision or concerted practice extending over the entire territory of a Member State to affect the trade between Member States by citing its case-law on this matter and by appreciating again that such 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 interpretation which the FEU Treaty is designed to bring about*", due to the fact that it extends over the whole of the territory of a Member State (in the specific case in question, over the territory of Romania).

Last but not least, the Court of Justice also took into account the opinion of the Advocate General issued on the 23rd of April 2015 on this matter. Among his considerations, Advocate General also appreciated that the ability of a sharing agreement to produce negative effects on the market does not depend on the real number of clients shared out, *"but solely on the terms and objective aims of the agreement"*.

By ruling that article 101(1) TFEU must be interpreted as meaning that agreements to share clients constitute agreements with an anti-competitive object, irrespective of the number of clients affected, the Court of Justice has actually confirmed the Decision of Consiliul Concurenţei, as well as the its arguments before the national courts, as it leaves no doubt as to the anti- competitive nature of the agreements between the private pension funds and, thus, as to their incompliance with the provisions of the EU and Romanian competition law. However, as also stated in the opinion of the Advocate General, the Court of Justice is solely competent to enlighten the national Judge as to whether the agreements in question have an anti- competitive object or, should the answer be negative, anti- competitive results. The Înalta Curte de Casaţie şi Justiţie is the exclusively competent Court to rule on whether these agreements fall into the scope of the restrictions of the EU and Romanian competition law and, ultimately, on the request for annulment (or partial annulment) submitted by ING Pensii.

As already mentioned, the Court of Justice in its decision of the 16th July 2015 repeats and adheres to its established case- law concerning the agreements with the object of sharing clients between competitors and their incompliance with

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the EU competition legislation. It should be noted, however, that in the case in question, the scope of the agreements between the private pension funds was the allocation of clients who had signed two different private pension fund affiliation applications between them, in other words it concerned the sharing of clients who had already chosen freely between the possible private pension funds and not the sharing of clients who remained available for all the participants in the relevant market. Thus, although the agreements under consideration do have the object of sharing clients between competitors, they are not the common, simple type of client- sharing agreements, as they did not impede the free choice of the clients in the relevant market, but they only covered that part of the clientele which had already freely expressed their preference to be registered in one of the private pension funds participating in the agreements.

This *sui generis* nature of the agreements between the private pension funds is only examined by the Advocate General in its opinion of the 23rd April 2015, whereas the Court of Justice does not seem to take into account the fact that the allocation of the clients by the private pension funds on the basis of the agreements they had concluded took place only after the free choice of the potential clients (which was not limited by means of any other mechanisms, such as division of the geographic markets between the competitors, etc.). It seems that as far as this point is concerned, the Court of Justice accepts the opinion of the Advocate General, who, after examining the legal and economic context of the case, reached the conclusion that they were not *"such as to invalidate the conclusion that the sharing agreements have an anti- competitive object"* and that *"by entering in to those agreements, the fund managers colluded with each other in order to minimise the risks of competition"*.

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