Preliminary Ruling of the European Court of Justice in the ING Pensions case

By decision no. 39/2010 of 7 September 2010, the Romanian Competition Council imposed fines on 14 companies managing private pension funds, including ING Pensions, on the ground that agreements to share clients had been concluded between those companies. Following the dismissal of appeal lodged by ING Pensions before the Court of Appeal (the first court), this company referred to the High Court of Cassation and Justice (the final court). It stated that it had no practical or economic interest to allocate duplications of clients as it owned the greatest share of the market.

In so far the duplications of persons are concerned, it is common ground that ING Pensions and the other parties in the investigation colluded to share duplications on an equal basis among the private pension funds that participated in the collusive conduct. As found by the Romanian Competition Council, the bi-lateral agreements to share duplications concerned a limited group of undertakings, to the detriment of competitors.

Against the background of the case, the High Court of Cassation and Justice referred the following question to the European 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?”

It should be noted that the Romanian High Court of Cassation and Justice asked a question regarding the relevance of the number of persons affected, in the light of the condition relating to the existence of a restriction of competition on the internal market.

Following the Advocate General Nils Wahl’s Opinion in this case (C-172/14) and considering all the circumstances at issue, the European Court of Justice 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.” Agreements to share customers are considered agreements by object, which clearly form part of the most serious restrictions of competition.

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