OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 29 June 2006 [1]

I — Introduction

1. The present case concerns a reference for a preliminary ruling in which the Tribunal Supremo (Supreme Court, Spain), in the course of examining whether a credit information register that is accessible by financial and credit institutions in Spain in return for payment is compatible with Article 81 EC, has referred two questions on the interpretation of that article.

2. By its questions, the Tribunal Supremo is essentially seeking to establish whether such a register is caught by Article 81(1) EC and, if so, whether it may be authorised by the authorities of a Member State under Article 81(3) EC, in which case it is the second condition in that paragraph (that consumers be allowed a fair share of the benefit) that is relevant.

3. Those questions were raised in an appeal on a point of law by Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL ('Asnef-Equifax') against the judgment of the Audiencia Nacional (National High Court) of 28 November 2001 annulling the authorisation of such a register under Spanish law.

II — Relevant legislation

A — *Community law*

4. According to recital 4, Regulation (EC) No 1/2003 [2] is intended to confer on the competition authorities and courts of the Member States the power to apply not only Article 81(1) EC and Article 82 EC, which have direct applicability by virtue

1 — Original language: French.

2 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

of the case-law of the Court of Justice of the European Communities, but also Article 81(3) EC.

5. Article 3(1) and (2) of that regulation provides:

'1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices.

...

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.'

B — *National law*

6. Spanish competition law is governed primarily by Law 16/1989 on the protection of competition (Ley 16/1989 de Defensa de la Competencia) of 17 July 1989 ('the LDC'). In substance, the wording of Articles 1 and 3 of the LDC is virtually identical to the wording of Article 81(1) and (3) EC.

7. Under Article 4(1) of the LDC, the Tribunal de Defensa de la Competencia (Competition Tribunal) may authorise the agreements, decisions, recommendations and practices referred to in Article 1 of that law, in the circumstances and on the conditions set out in Article 3.

III — The main proceedings and the questions referred for a preliminary ruling

8. The referring court describes the background to the dispute in the main proceedings as follows.

9. On 21 May 1998 Asnef-Equifax, an undertaking whose members include the Asociación Nacional de Entidades Financieras (National Association of Financial Undertakings), lodged an application under Article 4 of the LDC for authorisation of a credit information register to be administered by Asnef-Equifax ('the proposed register').

10. The purpose of the proposed register 'is to provide solvency and credit information through the computerised processing of data relating to the risks undertaken by participating organisations engaging in lending and credit activities'. The information in the proposed register would be very similar in substance to that set out in Circular 3/1995, which regulates the Central de Información de Riesgos (risk information centre) operated by the Central Bank of Spain, which is already accessible to financial institutions in Spain. The information in question relates to the identity and economic activity of borrowers and also to special situations such as bankruptcy or insolvency.

11. Contrary to the negative opinion of the Servicio de Defensa de la Competencia (an administrative body responsible for the protection of competition and coming under the Ministry of the Economy and Finance), the Tribunal de Defensa de la Competencia on 3 November 1999 authorised the proposed register for a period of five years, subject to the following express conditions: it must be accessible to all financial institutions on a non-discriminatory basis and upon payment of the appropriate fee; and the information on creditors contained in the register must not be disclosed.

12. By judgment of 28 November 2001, the Audiencia Nacional (National High Court) allowed the application of the Asociación de Usuarios de Servicios Bancarios (Association of Users of Banking Services; 'Ausbanc') for annulment of the decision of the Tribunal de Defensa de la Competencia. It considered that the proposed register, inasmuch as it restricted free competition, was caught by the prohibition in Article 1 of the LDC and could not be authorised under Article 3 of the LDC because the conditions necessary for the application of that article were not met. The Audiencia Nacional referred not only to Spanish law, but also to Community law, in particular the judgment in *John Deere*.[3]

13. Asnef-Equifax did not agree with that decision and lodged an appeal on a point of law before the Tribunal Supremo.

3 — Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111. The Audiencia Nacional referred in particular to paragraphs 5, 10, 88 and 123 of that judgment.

14. Being of the view that the dispute raised questions as to the interpretation of Community law, the Tribunal Supremo requested the Court to rule on the following questions:

'(A) May Article 81(1) [EC] be interpreted as meaning that agreements between financial institutions for the exchange of information on customer solvency and default may be regarded as compatible with the common market, if they affect the financial policies of the Union and the common market in credit and have the effect of restricting competition in the financial and credit institutions sector?

(B) May Article 81(3) [EC] be interpreted as meaning that a Member State, acting through its competition authorities, may authorise agreements on the exchange of information between financial institutions through the establishment of a credit information register on their customers, on the ground that its establishment benefits the consumers and users of those financial services?'

15. Written observations were lodged by Asnef-Equifax, Ausbanc, the Polish Government and the Commission. A hearing was held on 26 April 2006.

IV — Assessment

A — *Admissibility*

16. Two types of questions relating to admissibility are raised, namely:

— it is national law that is applicable (the point raised by the Commission), and

— there is no effect on trade between Member States (the point raised by Ausbanc).

17. The Commission maintains that the decision of the Tribunal de Defensa de la Competencia is based not on Article 81 EC but on the equivalent provisions of Spanish law (Articles 1 and 3 of the LDC), which raises the question whether the present reference is admissible. Noting that the present reference was made in the context

of an appeal on a point of law, the Commission questions whether the Tribunal Supremo can apply provisions which were not applied by the lower courts (the Tribunal de Defensa de la Competencia and the Audiencia Nacional) in their decisions.

18. The Commission notes that although the referring court states in its decision making the reference that Article 81 EC is applicable in this case, it does not explain why. More specifically, the Commission observes that:

— a similar interpretation must be applied to national law (as in the case of *Leur-Bloem* [4]); in the Commission's view, that situation does not arise in this case; or

— Article 81 EC has no relevance in law in the present case and the interpretation provided would therefore be of no relevance to the referring court (as in the *Kleinwort Benson* case [5]); in such circumstances, the Court would not have jurisdiction to give a preliminary ruling on the questions referred; or

— even if Article 81 EC does not apply directly to this case, an interpretation might be necessary for the purpose of observing the primacy of Community law over national law.

19. As regards the latter possibility, the Commission makes clear that this would involve adjudicating on the lawfulness of a decision adopted in 2001, that is to say, at a time when the obligation arising under Regulation No 1/2003 was not yet in force.

20. In the light of the settled case-law, I take the view that this reference for a preliminary ruling must be regarded as admissible. According to that case-law, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of Community law and may refuse to give a ruling only if there is no connection between the requested interpretation of Community law and the actual facts of the main action or its purpose, where the problem is of a hypothetical nature or where the Court does not have before it the factual or legal material necessary to give an answer. [6]

4 — Case C-28/95 [1997] ECR I-4161.

5 — Case C-346/93 [1995] ECR I-615.

6 — See Case C-344/04 *IATA* [2006] ECR I-403, paragraph 24 and the case-law cited there. See also Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 16 and the case-law cited there.

21. In this case, the above reasons for declaring a reference for a preliminary ruling on the interpretation of Community law inadmissible clearly do not apply.

22. First, it is apparent from the decision making the reference that the Tribunal Supremo considers that 'the judgment [of the Audiencia Nacional] is founded on the legal principles laid down in Articles 1 and 3 of the LDC and on the application of the provisions of the former Article 85 of the Treaty on the European Economic Community, as interpreted in the case-law of the Court of Justice ...'.

23. In addition, the Tribunal Supremo stated that the aim of the reference for a preliminary ruling, which embodies the duty of cooperation between national courts and the Community judicature, was to preclude contradictory or divergent interpretations.

24. Therefore, although it may be open to discussion whether the Audiencia Nacional based its decision on Article 81 EC (referring to Community case-law for the sole purpose of interpreting the similar provisions of the LDC), the reference is admissible.

25. Secondly, with regard to the function of a court ruling on points of law, as I already mentioned in my Opinion in *Manfredi and Others*,[7] it is not for the Court to give a ruling on whether or to what extent the referring court has stepped outside the bounds of the action brought before it, as the Commission seems to suggest.

26. As regards Regulation No 1/2003 (the question of its application ratione temporis), there are clearly differences, or rather nuances, between the legal situation existing before and after that regulation entered into force.

27. The first difference is that, since its entry into force, the national authorities and courts have had jurisdiction to apply Article 81 EC in its entirety.

28. The second difference that should be mentioned in that context is that the right to apply Community law has become an obligation (provided that the criterion of trade between Member States being affected is met). Provided that the conditions of applicability of Articles 81 EC and 82 EC are satisfied, the national authorities and courts are bound to apply those provisions to the disputes before them. Before that regula-

7 — Opinion of 26 January 2006 in Joined Cases C-295/04 to C-298/04, not yet published in the ECR, point 25.

tion entered into force, any conflict arising on account of the parallel application of Community law and national law had to be resolved by applying the principle that Community law takes precedence. [8] Regulation No 1/2003 now sets out a more specific convergence rule. Article 3(2) thereof provides that, if agreements, decisions and concerted practices are not prohibited by Article 81 EC, they cannot be prohibited by the competition law of the Member States.

29. Admittedly, when the Tribunal de Defensa de la Competencia and the Audiencia Nacional took their decisions, Regulation No 1/2003 was not applicable. The current situation is, however, governed by that regulation: in effect, the decision which will be taken will affect the functioning of the proposed register, either because the register has already been established (in which case it is worth ascertaining whether or not Article 81 EC precludes it), or because its creation has been delayed pending the forthcoming decision (if Article 81 EC does not preclude it, it will then be possible to establish it). [9]

30. Finally, Ausbanc's claims that the proposed register does not have an appreciable effect on trade between Member States concern the applicability of Article 81 EC to the facts of the main proceedings. Those claims are a matter for the national court and are irrelevant for the purpose of determining whether the questions referred to the Court are admissible. [10]

B — *Substance*

First question

31. The first question seeks to establish whether or not a system for the exchange of information between credit institutions constitutes an infringement of Article 81(1) EC.

32. The conditions that must be satisfied in order for Article 81 EC to be applicable are, first, trade between Member States must be affected and, secondly, competition must be restricted.

33. As to trade between Member States being affected, it is true that, as the Commission observes, the decision making

8 — See Case 14/68 *Wilhelm and Others* [1969] ECR 1.

9 — It is unclear whether the register is already operational.

10 — See *Bronner* (cited in footnote 6 above), paragraph 21

the reference does not explain in detail how the proposed register might affect trade between Member States. In my view, it is clear that the referring court implicitly considers that that condition is met, not only because it focuses its questions on the second condition but also because the questions referred are worded to that effect. Since (a) the apparent intention is to apply the proposed register throughout Spain and (b) the finance sector operates increasingly on a trans-border scale, I consider that that condition is indeed met. Nevertheless, it is for the referring court to determine whether that is in fact the case.

34. In that regard, the Court has consistently held that it need only be established that an agreement, decision or concerted practice is capable of affecting trade between Member States. [11] It also follows from the case-law that the condition that trade between Member States must be affected is satisfied if it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that an agreement, decision or concerted practice may have an influence, whether direct or indirect, actual or potential, on the pattern of trade between Member States. [12] The decision making the reference does not contain any precise indication of the geographical or personal scope of the supposed agreement, decision or concerted practice. However, it may be assumed that participation in the proposed register is open to all lending institutions operating on the Spanish market, irrespective of their place of establishment. [13] In any event, it is also settled case-law that the mere fact that an agreement between undertakings concerns only those operators situated in a single Member State does not mean that it would not be capable of influencing intra-Community trade. [14] The Court has also held on a number of occasions that an agreement, decision or concerted practice extending over the whole territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby hindering the economic interpenetration which the Treaty is designed to bring about. [15]

35. Turning to the second 'condition', in order for an agreement or concerted practice to be contrary to Article 81(1) EC, it must 'have as [its] object or effect the prevention, restriction or distortion of competition within the common market'. It must therefore be determined first of all whether the agreement or concerted practice in question has an anti-competitive object. If it has, the prohibition in Article 81(1) EC applies, independently of any effect. If the object is not to restrict or distort competition, the agreement or concerted practice must be examined in order to establish whether or not it has the effect of doing so. [16]

11 — See Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15.

12 — See, inter alia, Case 5/69 *Völk* [1969] ECR 295, paragraph 5; Case 99/79 *Lancôme and Cosparfrance Nederland* [1980] ECR 2511, paragraph 23; and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22.

13 — That was confirmed by Asnef-Equifax's representative at the hearing.

14 — Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117.

15 — Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 95 and the case-law cited there.

16 — See, by way of illustration, Case 56/65 *Société technique minière* [1966] ECR 235; Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 39; and Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 13.

36. According to settled case-law, in order to determine whether an agreement must be regarded as prohibited because it has the effect of altering competition, it is necessary to assess competition in the real context in which it would take place in the absence of such an agreement. For the purposes of such an assessment, the agreement's actual as well as potential effects on competition must be taken into account. [17] Furthermore, an agreement's conformity with the competition rules cannot be assessed in the abstract. That assessment must be carried out in the relevant economic and legal context of the case, account being taken of the nature of the product or service, the structure of the market and the actual conditions in which it functions. [18] However, an agreement falls outside the prohibition in Article 81 EC when it has only an insignificant effect on the market. [19]

37. Furthermore, it is important to point out that the fundamental principle underlying Article 81(1) EC is the independence of operators in their conduct on the market. [20]

38. As regards, more specifically, the exchange of information, it is worth pointing out, in my view, that an exchange of that kind may occur in the context of an agreement, a decision by an association of undertakings or a concerted practice. The information exchange may be ancillary to or constitute the objective pursued. In the case of such an arrangement relating, for instance, to prices — an arrangement where the exchange of information is ancillary — the limitation of independence is the consequence of that price agreement. It is also possible for the exchange of information itself to have the effect of altering the operation of competition.

39. Nevertheless, agreements to exchange information are not prohibited automatically, but only in certain circumstances.

40. The dissemination and exchange of information between competitors and the creation of a transparent market may be neutral or even positive for the competitive structure of the market. It is common knowledge that associations of undertakings regularly gather information on prices, returns, capacity and investments in order to distribute it among their members, which may use it to organise their own corporate strategy. As stated in the case-law, 'where there is a truly competitive market, transparency between traders is in principle likely to lead to the intensification of competition between suppliers ...'. [21]

17 — See *Société technique minière* and *Delimitis* (both cited in the previous footnote).

18 — Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10, and Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 31.

19 — *Völk* (cited in footnote 12 above), paragraph 7.

20 — See, for example, *John Deere* v *Commission* (cited in footnote 3 above), paragraph 86, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 116.

21 — Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, paragraph 51; *John Deere* v *Commission* (cited in footnote 3 above), paragraphs 88 to 90; and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 84.

41. It is self-evident that an exchange of information can have negative effects. In general, the distinction between a lawful and an unlawful exchange of information depends on the following factors: (1) the nature and substance of the information exchanged (aggregate or detailed information) and (2) the structure of the market concerned (oligopolistic or atomised). The frequency with which the information is exchanged is also relevant.

42. With regard to the first element, an exchange of statistical or historical information is, in general, less problematic than an exchange of recent or future information. Aggregate market information is, in principle, lawful provided that it does not make it possible to identify an individual competitor or become aware of its business strategy. Whether it is possible, by virtue of the degree of aggregation involved, to become aware of competitors' strategies depends ultimately on the number of competitors. In any event, it should be noted that each trader involved in an information exchange must act independently and autonomously.

43. With regard to the structure of the market, it is clear that in an oligopolistic market undertakings are more likely to adopt uniform conduct. The exchange of information might then increase the probability of collusion. It is for that reason that the exchange of some information is considered unlawful on an oligopolistic or, even if not oligopolistic, highly concentrated market, but not on a truly competitive (fragmented) market. [22]

44. In the case at issue, the parties undertake to exchange information on the solvency of borrowers.

45. I should like to point out that in almost all countries there is some form of credit information system, that is to say, a register administered by a public institution, a private body or even by an institution which is part public and part private. Such registers contain negative data (covering debtors that present specific risks: bad payers) and/or neutral or positive data (for example, information on the level of indebtedness of all borrowers). The underlying reason why a country introduces or encourages such a system is to help to prevent consumer over-indebtedness and to limit the risks for lenders.

46. The proposed register comprises negative elements (such as on non-payment) and positive elements (such as on outstanding credit balances, collateral, guarantees and

22 — *Thyssen Stahl* v *Commission* (cited in the previous footnote), paragraph 86

security, leasing transactions or temporary disposal of assets). Moreover, there is already an information register administered by the Bank of Spain. It would seem that both registers contain more or less the same data, except that the proposed register is an 'online' register (the information is transmitted by computerised means, thus more quickly) and that it also contains information on small borrowers, since no minimum thresholds are applied.

47. At first sight, it seems that the agreement (to establish the proposed register) does not in itself have the object of limiting the autonomy of conduct on the market of either applicants for loans or lenders. Since the register does not therefore seem to have as its object the restriction of competition, it must be ascertained whether it has the effect of restricting or distorting competition.

48. As stated above, the sharing of information for individual use is not automatically an activity having an anti-competitive effect.

49. In that context, it must be emphasised that the identity of the lender must not be disclosed, either directly or indirectly, to the undertakings with access to the register, as otherwise an undertaking would be able to know its competitors' position or business strategy. The condition imposed by the Tribunal de Defensa de la Competencia and accepted by Asnef-Equifax ensures that data on lenders are not disclosed.

50. It is also essential for the system to be available to all traders operating in that field. Otherwise, it would place some traders at a disadvantage, because those without access to the register have less information on which to assess the risk, and it would not facilitate the entry of new traders onto the market. [23]

51. Since the exchange of information has no connection with the identity of creditors, and accepting that the lending institutions with access to that register use that information by basing their decisions on maximum risk exposure and according to their business policy, it remains to ascertain whether that type of information exchange might lead to other anti-competitive effects, such as the adoption of collusive conduct.

23 — That requirement appears to be met. In its written observations, Asnef-Equifax stated: '... those involved in creating this register include bodies and operators in the financial sector having very different size and operations ...', and '... customers with extremely diverse profiles, ranging from banks and savings banks to real estate companies and vehicle rental and leasing companies, superstores, small commercial establishments, etc.'

52. At first sight, it seems that such a system does not consist in setting a common interest or collectively excluding certain categories of customer. The objective of a system for the exchange of information about credit is to limit the risks (risk management). That is connected with the disparate nature of the information that credit institutions may obtain from their (potential) customers. Such a system may have a positive effect on the management of the risks associated with that economic activity.

53. In that context, I would emphasise that the case-law does not prohibit all elimination of uncertainty generally, but only certain types of uncertainty, in particular uncertainty about the conduct of competitors on the market. The uncertainty at issue here is uncertainty about the solvency of a customer.

54. Lending consists in making capital available temporarily to a third party in return for payment (the interest). The interest varies, in particular, according to a risk factor connected with the possibility that the other party will not properly fulfil its obligations. As the Commission observed, with reference to economic theory, the remuneration sought by the financial institution is made up, in part, of a premium insuring against the risk of default. The absence of information about that risk leads to a problem of disparity of information. In such a case, it is impossible to assess the risk properly and consequently there is a tendency to impose the same price on each borrower, a price which is too high for the category presenting the lowest risk of default.

55. As long as any trader determines autonomously the policy that it intends to pursue on the common market and the conditions that it intends to apply to its customers, the establishment of a register like that envisaged in this case will not present any problems from the aspect of competition law.

56. Any problems concerning the sensitivity of personal data can be resolved by other instruments, such as data protection legislation. It is clear that there must be some way of informing the borrowers concerned of what data are recorded and of granting them the right to check the data concerning them and to have them corrected where necessary. It appears that this point is settled, regard being had to the relevant Spanish legislation and also to clause 9 of the rules governing the register.

Second question

57. The second question concerns whether Article 81(3) EC permits a competent body of a Member State to authorise agreements for the exchange of information of the type at issue here, on the ground that the users, that is, the clients of the financial institutions, benefit from them.

58. Although that question has already received an implied answer above, I shall return to it briefly here.

59. As I stated above, since the entry into force of Regulation No 1/2003, the national courts and authorities have had jurisdiction to apply Article 81 EC in its entirety. Under that regulation, no prior decision is required where an agreement is caught by Article 81(1) EC and satisfies the cumulative conditions of Article 81(3) EC.

60. A number of Member States have altered their national competition law so that a system of statutory derogation applies in the national context. In contrast, other Member States still have a system that requires authorisation. Be that as it may, provided that Article 81 EC is applicable — even where national law is applied too — an agreement which satisfies the conditions of Article 81(3) EC must be authorised as a matter of law.

61. The referring court focuses in particular on the second condition laid down in Article 81(3) EC, that 'consumers' must obtain 'a fair share of the resulting benefit'.

62. As I have already explained, a more precise assessment of the risks may result in a general reduction in the cost of lending, which, in general, benefits consumers. However, better knowledge of the risk involved can result in a distinction being made between good borrowers (less risk and therefore less interest) and bad borrowers (who pay more or who may be refused credit).

63. However, it is not necessary that each individual consumer should benefit from that practice. What matters is that the overall effect on consumers is favourable.

V — Conclusion

64. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal Supremo as follows:

Article 81(1) EC must be interpreted as meaning that an agreement between financial institutions for the exchange of information on customer solvency and default, which does not permit lenders to be identified and which establishes non-discriminatory conditions on access to the system in question and its use by traders operating on the credit market, does not in principle have as its effect the restriction of competition.