Case C-339/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 April 2019

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

20 February 2018

Appellants:

SC Romenergo SA

Aris Capital SA

Respondent:

Autoritatea de Supraveghere Financiară

Subject matter of the main proceedings

Appeal lodged by the appellants SC Romenergo SA and Aris Capital SA (collectively, 'the appellants') against civil judgment No 1238 of 4 May 2015 and the order of 28 September 2015 of the Curtea de Apel București — Secția a VIII-a de contencios administrativ și fiscal (Court of Appeal, Bucharest — Eighth Chamber for administrative and tax matters, Romania) in proceedings between them and the respondent, the Autoritatea de Supraveghere Financiară (Financial Supervisory Authority, Romania) ('the ASF'), the institution which succeeded the Comisia Națională a Valorilor Mobiliare (National Securities Commission, Romania) ('the CNVM')

Subject matter and legal basis of the request for a preliminary ruling

An interpretation of Article 63 et seq. TFEU, read in conjunction with Article 2(2) of Directive 2004/25/EC and Article 87 of Directive 2001/34/EC, as replaced by

Article 2(1)(f) of Directive 2004/109/EC, is requested pursuant to Article 267 TFEU

Question referred

Must Article 63 et seq. TFEU, read in conjunction with Article 2(2) of Directive 2004/25/EC and Article 87 of Directive 2001/34/EC, be interpreted as precluding a national legislative framework (in the present case Article 2(3)(j) of CNVM Regulation No 1/2006) which establishes a legal presumption of concerted practice in respect of holdings in companies whose shares are admitted to trading on a regulated market and which are treated as alternative investment funds (known as 'financial investment companies') with regard to:

1. persons who have carried out or who are carrying out economic transactions together, whether related or unrelated to the capital market, and

2. persons who, in carrying out economic transactions, use financial resources which have the same origin or which originate from different entities which are involved persons?

Provisions of EU law relied on

Articles 63, 64 and 65 TFEU

Article 2(1)(d) and (2) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

Article 87 of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, as replaced by Article 2(1)(f) of Directive 2004/109/EC

Provisions of national law relied on

1. Legea nr. 297/2004 privind piețele de capital (Law No 297/2004 on capital markets), as subsequently amended

Article 2(1)(22)(a) and (c)

'1. For the purposes of this Law, the terms and expressions listed below shall have the following meaning: ...

22. involved persons:

(a) persons who control or are controlled by an issuer or who are subject to joint control;

...

(c) natural persons within the issuing company who perform management or supervisory functions'.

Article 2(1)(23)(a) and (c):

'23. persons acting in concert — two or more persons, bound by an express or tacit agreement, for the purpose of implementing a common policy vis-à-vis an issuer. In the absence of proof to the contrary, it shall be presumed that the following persons are acting in concert:

(a) involved persons:

...

(c) a commercial company with members of its board of directors and with involved persons, as well as those persons with each other;

...'

Article 286[1]

'(1) Any person may acquire in any capacity or hold, by himself or together with persons with whom he is acting in concert, shares issued by financial investment companies resulting from the transformation of private equity funds, in an amount not exceeding 5% of the share capital of the financial investment companies.

(2) The exercise of voting rights shall be suspended in respect of shares held by shareholders that exceed the limits laid down in paragraph 1.

...

(4) Within three months of the date on which the limit of 5% of the share capital of the financial investment companies is exceeded, shareholders who are in such a situation shall be obliged to sell shares which exceed the holding limit.'

2. Regulamentul CNVM nr. 1/2006 privind emitenții și operațiunile cu valori mobiliare (CNVM Regulation No 1/2006 on issuers and securities transactions)

Article 2(3)(j)

'(3) Under Article 2(1)(23) of Law No 297/2004, it is to be presumed, in the absence of proof to the contrary, that the following persons, inter alia, are acting in concert:

...

(j) persons who have carried out or who are carrying out economic transactions together, whether related or unrelated to the capital market.'

Brief outline of the facts and the main proceedings

1 ROMENERGO was a shareholder of the issuing financial investment company BANAT CRIȘANA SA, a company whose shares are traded on the capital market, with a share of 4.55498% of the voting rights attached to shares held in that company.

2 Subsequently, under draft terms of partial division, those shares were transferred in their entirety to ARIS CAPITAL SA.

3 On 18 March 2014, on the basis of an analysis by the specialised directorate and the decision adopted at the meeting of 18 March 2014, the ASF decided to issue the following individual acts:

(i) ASF Decision No A/209 of 18 March 2014, which declared that: 'it is presumed that XV, YW, ZX, SC ROMENERGO SA, SMALLING LIMITED and GARDNER LIMITED are acting in concert as regards Banat Crișana SA, under Article 2(1)(22)(a) and (c) and (23)(a) and (c) of Law No 297/2004, read in conjunction with Article 2(3)(j) of [CNVM] Regulation No 1/2006 and Article 3(2)(f) of Instrucțiunea nr. 6/2012 [emisă în aplicarea prevederilor art.286[1] din Legea nr. 297/2004 (Instruction No 6/2012, issued pursuant to Article 286[1] of Law No 297/2004)]';

(ii) ASF Decision No A/210 of 18 March 2014, which stipulated that: 'SC DEPOZITARUL CENTRAL SA (Central Securities Depository, a fundamental institution of the Romanian capital market which arranges the clearing and settlement of stock exchange transactions and maintenance of the registers of issuing companies) is obliged to take the necessary measures to enter in its registers the suspension of the exercise of voting rights over shares issued by BANAT CRIȘANA SA which exceed 5% of the voting rights and are held by XV, YW, SC ROMENERGO SA, SMALLING LIMITED and GARDNER LIMITED';

(iii) ASF Decision No A/211 of 18 March 2014, which stipulated that: 'the Board of Directors of Banat Crișana SA is obliged to take the measures necessary so that the group formed by the shareholders XV, YW, SC ROMENERGO SA, SMALLING LIMITED and GARDNER LIMITED, which is presumed to be acting in concert vis-à-vis the issuing financial investment company BANAT CRIȘANA SA, may not exercise the voting rights attached to the position held in breach of Article 286[1](1) of Law No 297/2004, as subsequently amended and supplemented.'

4 As can be seen from the content of the individual acts set out above, it is presumed that SC ROMENERGO SA acted in concert with XV, YW, and the

companies SMALLING LIMITED and GARDNER [LIMITED], within the meaning of Article 2(1)(22)(c) and (23)(a) and (c) of Law No 297/2004 and Article 2(3)(j) of [CNVM] Regulation No 1/2006.

5 As a result of the findings, the ASF ordered as follows:

(i) that the shareholders presumed to have acted in concert must, within a period of three months, sell the shares held in the issuing company, on a pro rata basis, in such a way that all the persons concerned fall within the 5% threshold laid down by law;

(ii) that the Central Securities Depository must suspend the exercise of the voting rights of the persons deemed to have acted in concert, within the limits of the 5% threshold, and that the Board of Directors of BANAT CRIȘANA [must] adopt the measures necessary to prevent the persons concerned from exercising the voting rights pertaining to the shares held in excess of the threshold laid down by law.

6 The appellants brought an administrative action against the respondent, by which they requested:

1. annulment of Article 2(3)(j) of CNVM Regulation No 1/2006 on issuers and securities;

2. annulment of ASF Decision No A/419 of 22 May 2014 ruling on the complaint filed previously against Article 2(3)(j) of CNVM Regulation No 1/2006 on issuers and securities.

7 The Curtea de Apel București (Court of Appeal, Bucharest, Romania) dismissed as unfounded both the action brought by the appellants and the plea of no interest in bringing proceedings raised by the respondent.

8 The appellants appealed against the judgment of the Curtea de Apel București by an appeal lodged with the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), the referring court.

9 Subsequently, they claimed that the referring court should submit a request for a preliminary ruling to the Court of Justice.

Essential arguments of the parties to the main proceedings

10 Throughout the proceedings before the administrative and judicial authorities, the appellants claimed that Article 2(3)(j) of CNVM Regulation No 1/2006 is unlawful in that it infringes, in particular, the principle of the free movement of capital.

11 The setting in Article 286[1] of Law No 297/2004 of the holding limit of 5% of the share capital constitutes, in the view of the appellants, a situation which has no

equivalent in EU law since the EU legislature has laid down no rules enabling the national legislature to set statutory limits on the holding in the capital of a company admitted to trading on a regulated market. Furthermore, the appellants claim that the concept of a 'concerted practice' in EU law is linked solely to the legal institution of the binding public takeover bid since the legislature presumes that persons who are controlled or who control others act in concert and that, together, they seek to assume control of the issuing company through the execution of the bid or the frustration thereof. EU law provides for only one presumption of that kind, in Article 2(2) of Directive 2004/25/EC, that is to say, in the case of persons controlled by another person through a majority interest.

12 In particular, under Article 87 of Directive 2001/34/EC, as replaced by Article 2(1)(f) of Directive 2004/109/EC, the presumption of concerted practice is based on the idea of control exercised by a shareholder within the issuing company though the holding of the majority of voting rights, the right to supervise or remove a majority of the members of management and supervisory bodies, or the direct control of the majority of the shareholders' or members' voting rights, under an agreement concluded with other shareholders or members of the undertaking.

13 In the light of those factors, the appellants argue that EU law in no way allows the establishment of a presumption of concerted practice generally supported by 'economic' reasons. Nor does it recognise the idea of a concerted practice generally based on the mere existence of persons who, in carrying out economic transactions, use financial resources which have the same origin or which originate from different entities which are involved persons. Moreover, according to the interpretation provided by the appellants, the idea of concerted practice set out in Article 2(3)(j) of CNVM Regulation No 1/2006 cannot exist without the mandatory condition of the shareholder seeking to acquire control of the issuer.

14 Arguing the diametric opposite, the ASF contends that the presumptions of concerted practice laid down in [CNVM] Regulation No 1/2006 fully reflect the provisions of EU law, which are not limited to the case of public bids.

Succinct presentation of the reasons for the reference

15 The Court of Justice is asked to establish whether Article 286[1](1) to (4) of Law No 297/2004 infringes the fundamental right to free movement of capital (Article 63 TFEU) in so far as it prohibits the appellants from holding over 5% of the voting shares within a Romanian investment fund (financial investment company) or whether the legislative restrictions in question are proportionate and necessary to achieve a legitimate public policy objective.

16 The referring court invokes Article 2(1)(d) and (2) of Directive 2004/25/EC and Article 87 of Directive 2001/34/EC, as replaced by Article 2(1)(f) of Directive 2004/109/EC.

17 That court also recalls the judgment of 14 October 1999, *Sandoz GmbH* (C-439/97, EU:C:1999:499), in which the Court held that the Treaty provisions relating to the free movement of capital have direct effect and must be recognised by the legislature and courts of the Member States of the European Union and [recalled] that, according to the case-law of the Court of Justice, a system of prior administrative approval conforms to the principle of proportionality if it is based on objective, non-discriminatory criteria which are known in advance to the undertakings in question and if all the persons affected by a restrictive measure of that kind have a legal remedy.

18 The principle of proportionality has been invoked before the Court of Justice in a number of cases which concerned the infringement of certain fundamental rights enshrined in the Treaty, in particular the right to free movement of capital, in which the Court has held that a measure prejudicial to a fundamental right enshrined in the Treaty must have a legitimate objective and, as regards the way in which the fundamental right in question is restricted, must not exceed what is necessary to achieve the objective of that measure.

19 It is necessary to assess, on the basis of that case-law, whether the legislative measures set out in Article 286[1](1) to (4) [of Law No 297/2004] are proportionate to achieving a legitimate legislative objective, whether the investors are duly informed, and whether they have legal remedies to contest overly onerous requirements.

20 Banat Crișana SA and the other financial investment companies initially established by Legea nr. 133/1996 [pentru transformarea Fondurilor Proprietății Private în societăți de investiții financiare (Law No 133/1996 for the transformation of Private Equity Funds into financial investment companies)] are joint stock companies owned entirely by private investors as a result of a mass privatisation process in respect of which the legislature sought to provide for and maintain, including after completion of the privatisation process, a maximum holding of 5% (originally 1%). A restriction on concerted holdings was also introduced and the ASF listed, in Article 2 of [CNVM] Regulation No 1/2006, a number of situations which it classified as presumptions of concerted practices.

21 Therefore, the question arises as to whether holding thresholds established by States for private law entities in connection with privatisation processes may be considered to infringe the free movement of capital and whether the introduction, through a law, of restrictions on holdings, either directly or together with other persons, to 5% of the share capital in the case of private companies (as in the case of Article 286[1] of Law No 297/2004 and subsequent legislation), which have been privatised for about 20 years and have no strategic importance, constitutes an infringement of the free movement of capital.