JUDGMENT OF THE COURT (Third Chamber)

23 November 2006 *

In Case C-238/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Tribunal Supremo (Spain), made by decision of 13 April 2005, received at the Court on 30 May 2005, in the proceedings

Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL,

Administración del Estado

v

Asociación de Usuarios de Servicios Bancarios (Ausbanc),

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, A. Borg Barthet, J. Malenovský, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: Spanish.

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 April 2006,

after considering the observations submitted on behalf of:

— Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL, by A. Creus Carreras and O. Amador Peñate, abogados,

— Asociación de Usuarios de Servicios Bancarios (Ausbanc), by L. Pineda Salido and M. Mateos Ferres, abogados, and also by M. Rodríguez Teijeiro, procuradora,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by F. Castillo de la Torre and E. Gippini Fournier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 81 EC.

2 The reference was made in proceedings between Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL ('Asnef-Equifax') and Asociación de Usuarios de Servicios Bancarios ('Ausbanc') concerning a register of information between financial institutions on the solvency of customers ('the register').

Legal context

Community rules

3 According to recital 4, Council Regulation (EC) No 1/2003 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) is intended, among other things, to confer on the competition authorities and courts of the Member States the power to apply not only Article 81(1) EC but also Article 81(3) EC.

4 Article 3(1) and (2) of Regulation No 1/2003 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.'

National rules

5 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'). As the Tribunal Supremo observes, the wording of Articles 1 and 3 of that law is, in substance, practically identical to the wording of Article 81(1) and (3) EC. According to 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.

Main proceedings and questions referred for a preliminary ruling

6 On 21 May 1998, Asnef-Equifax, to which the Asociación Nacional de Entidades Financieras (National Association of Financial Institutions) belongs, as an associate, submitted a request pursuant to Article 4 of the LDC for authorisation of the register, which was to be administered by it.

7 According to the rules drawn up for the operation of the register, its purpose '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 contained in the register is similar to that provided for in Circular 3/1995, which regulates the Central de Información de Riesgos (risk information centre; 'the CIR') operated by the Spanish central bank and already accessible to financial organisations in Spain. The information in question relates to the identity and economic activity of debtors, as well as to special situations such as bankruptcy or insolvency.

8 Contrary to the negative opinion of the Servicio de Defensa de la Competencia (administrative body responsible for the protection of competition), the Tribunal de Defensa de la Competencia, on 3 November 1999, authorised the register by virtue of the exemption criteria of Article 3 of the LDC for a period of five years, on condition, first, that it be accessible to all financial establishments on a non-discriminatory basis against payment of a corresponding fee and, secondly, that it not disclose the information which it contains on lenders. The decision of that tribunal does not address the question of the applicability of Article 81 EC.

9 Ausbanc lodged an application before the Audiencia Nacional for annulment of the decision of the Tribunal de Defensa de la Competencia. By the judgment under appeal in the main proceedings, the Audiencia Nacional granted that application. It considered that the register, by restricting free competition, is caught by Article 1 of the LDC and cannot be authorised under Article 3 of that law, as the conditions necessary for its application are not satisfied. It is clear from the grounds of the majority decision of the Members of the Audiencia Nacional that that court referred not only to Spanish law but also to the judgment of the Court of Justice in Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, and in particular to paragraphs 5, 10, 88 and 123 of that judgment.

10 On an appeal on a point of law brought by Asnef-Equifax, the Tribunal Supremo considered that there was a reasonable doubt as to whether, in a fragmented market, agreements concluded for the purpose of setting up credit information registers are potentially restrictive of competition in so far as they are capable of promoting or facilitating collusion and whether, if appropriate, they are nevertheless capable of being authorised on the ground that the exemption criteria provided for in Article 81(3) EC are satisfied.

11 In those circumstances, the Tribunal Supremo decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) 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?

(2) 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?'

The questions

Admissibility of the reference for a preliminary ruling

12 In the first place, the Commission of the European Communities, observing that the decision of the Tribunal de Defensa de la Competencia is based not on Article 81 EC but on Articles 1 and 3 of the LDC, questions the admissibility of the reference for a preliminary ruling. It expresses doubt as to whether the Tribunal Supremo, as a court seised of an appeal on points of law, can apply legal provisions other than those on which the courts below relied. Although the referring court asserts that Article 81 EC is applicable to the main proceedings, it does not explain the ground for such an assertion. The Commission further observes that the decision whose lawfulness is challenged in the main proceedings was adopted in 2001, that is, before Regulation No 1/2003 entered into force.

13 In the second place, the Commission claims that the decision for reference provides no information on whether the register is capable of appreciably affecting trade between Member States, whereas, in order for the obligations arising under Article 3 of Regulation No 1/2003 or the judgment in Case 14/68 *Wilhelm and Others* [1969] ECR 1 to apply, Article 81 EC must be materially applicable.

14 At the outset, it must be observed that in the context of the procedure provided for in Article 234 EC, it is not for the Court, given the allocation of functions between itself and the national courts, to determine whether the decision to refer has been taken in accordance with the rules of national law governing the organisation of courts and their procedure (see Case C-10/92 *Balocchi* [1993] ECR I-5105, paragraphs 16 and 17, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 33).

15 Next, it must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 26).

16 However, the Court has also stated that, in exceptional circumstances, it must examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (*Manfredi*, paragraph 27). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 36).

17 It is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is

hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Bosman*, paragraph 61, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24).

18 In the present case, it is not obvious that the interpretation of Article 81 EC bears no relation to the actual facts of the dispute before the national court or to its purpose. That dispute is clearly not hypothetical.

19 Contrary to what the Commission implied at the hearing, it is clear from the decision for referral 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 [establishing] the European Economic Community, as interpreted in the case-law of the Court of Justice ...'.

20 It is not impossible for the same factual situation to fall within the scope of both Community law and national competition law, even if they consider the practices concerned from different points of view (see, to that effect, Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 19 and the case-law cited).

21 Furthermore, the Tribunal Supremo expressly stated that the reason for its request for a preliminary ruling was the need to preclude contradictory or divergent interpretations, stating, in particular, that its request was 'an embodiment of the duty of institutional cooperation between national courts and the Court of Justice'. Thus, the referring court seeks in essence to ensure respect for the primacy of Community law.

22 Furthermore, Ausbanc's arguments to the effect that the register has no appreciable effect on trade between Member States, so that the Court has no jurisdiction to entertain the request for a preliminary ruling, concern the substance of the questions referred to it. Since the determination of the existence of such an effect is a matter for the appraisal of the national court, those arguments are, in principle, of no relevance to the determination of the admissibility of the request.

23 Finally, as regards the extent of the indications in the decision for referral relating to a possible effect on trade between Member States, it must be borne in mind that the need for precision with regard to the factual and legislative context applies in particular in the area of competition, which is characterised by complex factual and legal situations (see Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 22, and also the order in Case C-190/02 *Viacom* [2002] ECR I-8287, paragraph 22).

24 Admittedly, in the present case the decision for referral provides no precise and detailed information concerning such an effect. However, that decision provided the Court with sufficient information to enable it to give a useful reply to the referring court, by interpreting the rules of Community law with regard to the situation forming the subject-matter of the main proceedings.

25 In those circumstances, the reference for a preliminary ruling must be held to be admissible.

Substance

26 By its two questions, which may appropriately be considered together, the referring court seeks in essence to ascertain whether Article 81 EC must be interpreted as

meaning that a credit information exchange system, such as the register, is caught by the prohibition laid down in paragraph 1 of that article and, if so, whether such a system may benefit from the exemption provided for in paragraph 3 of that article, by reason in particular of the possible existence of a benefit for consumers resulting from the implementation of that system.

27 Ausbanc maintains that the register restricts competition in that it presupposes an exchange of information normally regarded as constituting business secrets between competitors, thus eliminating the risk factors inherent in any business decision and facilitating a homogeneous reaction by credit institutions towards an applicant for credit. Asnef-Equifax, the Polish Government and the Commission contend, essentially, that a register such as that in issue in the main proceedings does not restrict competition.

28 Under Article 81(1) EC, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are incompatible with the common market.

29 The Court must therefore examine whether those conditions may be satisfied in the case before the national court.

30 As a preliminary point, it should be pointed out, first, that it is apparent from the case-file that the Asociación Nacional de Entidades Financieras forms part, as a member, of Asnef-Equifax, which was entrusted with the administration of the register, and, secondly, that the necessary participation of the credit institutions in that register inevitably entails a certain amount of cooperation between competitors in the form of an indirect exchange of credit information.

31 It follows that Article 81(1) EC may apply to the conception and the implementation of the register, without there being any need to characterise precisely the form of the cooperation thus established between those institutions.

32 In effect, while that provision distinguishes between 'concerted practices', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibitions of that article catch different forms of coordination and collusion between undertakings (see Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 112). Accordingly, in the present case, a precise characterisation of the nature of the cooperation at issue in the main proceedings is not liable to alter the legal analysis to be carried out under Article 81 EC.

The effect on trade between Member States

33 The interpretation and application of the condition contained in Article 81(1) EC relating to the effect of agreements on trade between Member States must take as its starting-point the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of affecting trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off national markets or by affecting the structure of competition within the common market (see *Manfredi and Others*, paragraph 41).

34 For an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they 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 they might hinder the attainment of a single market between Member States (see Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22, and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 48). Moreover, that influence must not be insignificant (Case 22/71 *Béguelin Import* [1971] ECR 949, paragraph 16; Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16; and *Manfredi and Others*, paragraph 42).

35 Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 47, and Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 27). In order to assess whether an arrangement has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (see, to that effect, Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 37).

36 In that regard, the mere fact that the participants in a national arrangement include undertakings from other Member States is an important element in the assessment, but, taken alone, it is not so decisive as to permit the conclusion that the criterion of trade between Member States being affected has been satisfied (see *Manfredi and Others*, paragraph 44).

37 On the other hand, the Court has already held that the fact that an arrangement relates only to the marketing of products in a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected (see Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 33). An arrangement extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29, and *Manfredi and Others*, paragraph 45).

38 Furthermore, the fact that an agreement or practice encourages an increase in the volume of trade between Member States does not preclude the possibility that that agreement or practice may affect trade in the sense described at paragraph 34 of this judgment (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 341).

39 It is for the national court to determine whether, in the light of the characteristics of the market at issue, there is a sufficient degree of probability that the implementation of the register may have an influence, direct or indirect, actual or potential, on the supply of credit in Spain by operators from other Member States and that that influence is not insignificant.

40 However, when giving a preliminary ruling the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see, inter alia, Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 29, and *Manfredi and Others*, paragraph 48).

41 In the present case, it is apparent from the case-file that the register is in principle open to any institution active in the sphere of loans and credit, that is to say a large range of undertakings of various profiles. Unlike the CIR, administered by the Spanish Central Bank, there is no provision for minimum thresholds, so that the credit information on the register relates to a larger number of credit transactions than that contained in the CIR. In addition, the information from the register is transmitted electronically and thus more efficiently than that provided by the CIR.

42 Hence, the possibility of having access to the register, as well as the conditions laid down for that purpose, appear capable of having an appreciable significance in the choice of undertakings established in Member States other than the Kingdom of Spain as to whether or not to do business in that State.

43 According to settled case-law, and as follows from paragraph 34 of this judgment, Article 81(1) EC does not require that the arrangements referred to in that provision have actually affected trade between Member States, but it does require that it be established that those arrangements are capable of having that effect (see, to that effect, Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19; and *Bagnasco and Others*, paragraph 48).

44 Thus, it is necessary to take account of the foreseeable development in the conditions of competition and in the pattern of trade between Member States. On that point, it is for the referring court to take into consideration, for example, possible development in cross-border activities and the foreseeable impact of any policy or legislative initiatives designed to reduce legal or technical barriers to trade.

45 If the referring court considers that the register is capable of affecting trade between Member States in the sense described at paragraph 34 of this judgment, it must examine whether that register has as its object or effect the restriction of competition within the meaning of Article 81(1) EC.

The existence of a restriction of competition

46 It is common ground that the essential object of credit information exchange systems, such as the register, is to make available to credit providers relevant information about existing or potential borrowers, in particular concerning the way in which they have previously honoured their debts. The nature of the information available may vary according to the type of system in use. In the main proceedings, the register contains, as the Advocate General observed at points 46 and 47 of his

Opinion, negative information, such as non-payment, as well as positive information, such as outstanding credit balances, collateral, guarantees and security, leasing transactions or temporary disposal of assets.

47 Such registers, which, as the Polish Government observes, exist in numerous countries, increase the amount of information available to credit institutions on potential borrowers, reducing the disparity between creditor and debtor as regards the holding of information, thus making it easier for the lender to foresee the likelihood of repayment. In doing so, such registers are in principle capable of reducing the rate of borrower default and thus of improving the functioning of the supply of credit.

48 As registers such as that in issue in the main proceedings do not thus have, by their very nature, the object of restricting or distorting competition within the common market within the meaning of Article 81(1) EC, it is for the national court to determine whether they have the effect of doing so.

49 In that regard, it should be emphasised that the appraisal of the effects of agreements or practices in the light of Article 81 EC entails the need to take into consideration the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 31; Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10; and *Javico*, paragraph 22).

50 However, while Article 81(1) EC does not restrict such an assessment to actual effects alone, as that assessment must also take account of the potential effects of the

agreement or practice in question on competition within the common market, an agreement will, however, fall outside the prohibition in Article 81 EC if it has only an insignificant effect on the market (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7; *John Deere* v *Commission*, paragraph 77; and *Bagnasco and Others*, paragraph 34).

51 According to the case-law on agreements on the exchange of information, such agreements are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (*John Deere* v *Commission*, paragraph 90, and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 81).

52 In effect, it is inherent in the Treaty provisions on competition that every economic operator must determine autonomously the policy which it intends to pursue on the common market. Thus, according to that case-law, such a requirement of autonomy precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and also the volume of the market (see *Commission* v *Anic Partecipazioni*, paragraphs 116 and 117, as well as the case-law cited).

53 However, that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors (*John Deere* v *Commission*, paragraph 87; *Commission* v *Anic Partecipazioni*, paragraph 117; and *Thyssen Stahl* v *Commission*, paragraph 83).

54 Accordingly, as follows from paragraph 49 of this judgment, the compatibility of an information exchange system, such as the register, with the Community competition rules cannot be assessed in the abstract. It depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged — be that, for example, public or confidential, aggregated or detailed, historical or current — the periodicity of such information and its importance for the fixing of prices, volumes or conditions of service.

55 As indicated at paragraph 47 of this judgment, registers such as the one at issue in the main proceedings, by reducing the rate of borrower default, are in principle capable of improving the functioning of the supply of credit. As the Advocate General observed, in substance, at point 54 of his Opinion, if, owing to a lack of information on the risk of borrower default, financial institutions are unable to distinguish those borrowers who are more likely to default, the risk thereby borne by such institutions will necessarily be increased and they will tend to factor it in when calculating the cost of credit for all borrowers, including those less likely to default, who will then have to bear a higher cost than they would if the institutions were in a position to evaluate the probability of repayment more precisely. In principle, registers such as that mentioned above are capable of reducing such a tendency.

56 Furthermore, by reducing the significance of the information held by financial institutions regarding their own customers, such registers appear, in principle, to be capable of increasing the mobility of consumers of credit. In addition, those registers are apt to make it easier for new competitors to enter the market.

57 None the less, whether or not there is in the main proceedings a restriction of competition within the meaning of Article 81(1) EC depends on the economic and legal context in which the register exists, and in particular on the economic conditions of the market as well as the particular characteristics of the register.

58 In that regard, first of all, if supply on a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if supply is fragmented, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market (see, to that effect, *Thyssen Stahl* v *Commission*, paragraphs 84 and 86). In the present case, it is common ground, as may be seen from paragraph 10 of this judgment, that the referring court premissed its reference for a preliminary ruling on the existence of 'a fragmented market', which it is for that court to verify.

59 Secondly, in order that registers such as that at issue in the main proceedings are not capable of revealing the market position or the commercial strategy of competitors, it is important that the identity of lenders is not revealed, directly or indirectly. In the present case, it is apparent from the decision for referral that the Tribunal de Defensa de la Competencia imposed on Asnef-Equifax, which accepted it, a condition that the information relating to lenders contained in the register not be disclosed.

60 Thirdly, it is also important that such registers be accessible in a non-discriminatory manner, in law and in fact, to all operators active in the relevant sphere. If such accessibility were not guaranteed, some of those operators would be placed at a disadvantage, since they would have less information for the purpose of risk assessment, which would also not facilitate the entry of new operators on to the market.

61 It follows that, provided that the relevant market or markets are not highly concentrated, that the system does not permit lenders to be identified and that the conditions of access and use by financial institutions are not discriminatory, an information exchange system such as the register is not, in principle, liable to have the effect of restricting competition within the meaning of Article 81(1) EC.

62 While in those conditions such systems are capable of reducing uncertainty as to the risk that applicants for credit will default, they are not, however, liable to reduce uncertainty as to the risks of competition. Thus, each operator could be expected to act independently and autonomously when adopting a given course of conduct, regard being had to the risks presented by applicants. Contrary to Ausbanc's contention, it cannot be inferred solely from the existence of such a credit information exchange that it might lead to collective anti-competitive conduct, such as a boycott of certain potential borrowers.

63 Furthermore, since, as the Advocate General observed, in substance, at point 56 of his Opinion, any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection. In the main proceedings, it is apparent from the documents before the Court that, under the rules applicable to the register, affected consumers may, in accordance with the Spanish legislation, check the information concerning them and, where necessary, have it corrected, or indeed deleted.

The applicability of Article 81(3) EC

64 Only if the referring court finds, in the light of the considerations set out at paragraphs 58 to 62 of this judgment, that there is indeed in the dispute before it a restriction of competition within the meaning of Article 81(1) EC will it be necessary for that court to carry out an analysis by reference to Article 81(3) EC in order to resolve that dispute.

65 The applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. First, the arrangement

concerned must contribute to improving the production or distribution of the goods or services in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; thirdly, it must not impose any non-essential restrictions on the participating undertakings; and, fourthly, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products or services in question (see, to that effect, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 61, as well as *Remia and Others* v *Commission*, paragraph 38).

66 It is clear from the documents before the Court, and in particular from the second question referred by the national court, that that court seeks an answer from the Court in respect of, in particular, the second of those conditions, which provides that consumers are to be allowed a fair share of the profit resulting from the agreement, decision or practice in question. The national court asks, in essence, whether, where all consumers do not derive a benefit from the register, the register might none the less benefit from the exemption provided for in Article 81(1) EC.

67 Apart from the potential effects described at paragraphs 55 and 56 of this judgment, registers such as the one at issue in the main proceedings are capable of helping to prevent situations of overindebtedness for consumers of credit as well as, in principle, of leading to a greater overall availability of credit. In the event that the register restricted competition within the meaning of Article 81(1) EC, those objective economic advantages might be such as to offset the disadvantages of such a possible restriction. It would be for the national court, if necessary, to verify that.

68 Admittedly, in principle it is not inconceivable that, as Ausbanc suggests, certain applicants for credit will, owing to the existence of such registers, be faced with increased interest rates, or even be refused credit.

69 However, without its being necessary to decide whether such applicants would none the less benefit from a possible credit discipline effect or from protection against overindebtedness, that circumstance cannot in itself prevent the condition that consumers be allowed a fair share of the benefit from being satisfied.

70 Under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers.

71 Moreover, as follows from paragraphs 55 and 67 of this judgment, registers such as the one at issue in the main proceedings are, under favourable conditions, capable of leading to a greater overall availability of credit, including for applicants for whom interest rates might be excessive if lenders did not have appropriate knowledge of their personal situation.

72 In the light of all of the foregoing, the questions referred to the Court should be answered as follows:

— Article 81(1) EC must be interpreted as meaning that a system for the exchange of information on credit between financial institutions, such as the register, does not, in principle, have as its effect the restriction of competition within the meaning of that provision, provided that the relevant market or markets are not highly concentrated, that that system does not permit lenders to be identified and that the conditions of access and use by financial institutions are not discriminatory, in law or in fact.

— In the event that a system for the exchange of information on credit, such as that register, restricts competition within the meaning of Article 81(1) EC, the applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. It is for the national court to determine whether those conditions are satisfied. In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable.

Costs

73 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 (Third Chamber) hereby rules:

1. **Article 81(1) EC must be interpreted as meaning that a system for the exchange of information on credit between financial institutions, such as the register of information on customer solvency at issue in the main proceedings, does not, in principle, have as its effect the restriction of**

competition within the meaning of that provision, provided that the relevant market or markets are not highly concentrated, that that system does not permit lenders to be identified and that the conditions of access and use by financial institutions are not discriminatory, in law or in fact.

2. **In the event that a system for the exchange of information on credit, such as that register, restricts competition within the meaning of Article 81(1) EC, the applicability of the exemption provided for in Article 81(3) EC is subject to the four cumulative conditions laid down in that provision. It is for the national court to determine whether those conditions are satisfied. In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable.**

[Signatures]