



Reports of Cases

Case C-298/22

**Caixa Geral de Depósitos SA
and Banco Português de Investimento SA (BPI)
and Caixa Central de Crédito Agrícola Mútuo CRL
and Banco Santander Totta SA
and Banco Comercial Português SA
and Banco BPN/BIC Português SA
and Banco Bilbao Vizcaya Argentaria SA, Portuguese branch
and Barclays Bank Plc
and Caixa Económica Montepio Geral – Caixa Económica Bancária SA
and Unión de Creditos Inmobiliarios SA – Estabelecimento Financeiro de Crédito SOC
and Banco Espírito Santo SA (in liquidation)**

v

Autoridade da Concorrência

(Request for a preliminary ruling
from the Tribunal da Concorrência, Regulação e Supervisão)

Judgment of the Court (Fifth Chamber) of 29 July 2024

(Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Adverse effect on competition – Prohibition of restrictive practices – Article 101 TFEU – Agreements between undertakings – Restriction of competition by object – Exchanges of information between credit institutions – Information concerning commercial conditions and production values – Strategic information)

1. *Agreements, decisions and concerted practices – Adverse effect on competition – Criteria for assessment – Distinction between restrictions by object and by effect – Restriction by object – Whether sufficiently harmful – Sufficient degree of harm revealed (Art. 101(1) TFEU)*

(see paragraphs 33, 35, 36)

2. *Agreements, decisions and concerted practices – Adverse effect on competition – Criteria for assessment – Content and objective of a cartel and economic and legal context of its development – Distinction between restrictions by object and by effect – Intention of the parties to an agreement to restrict competition – Not a necessary criterion – Infringement by object – Whether sufficiently harmful – Criteria for assessment – No need to examine the effects of the anticompetitive conduct on competition (Art. 101 TFEU)*

(see paragraphs 37-43)

3. *Agreements, decisions and concerted practices – Concerted practice – Definition – Coordination and cooperation incompatible with the obligation on each undertaking to determine independently its conduct on the market – Exchange of confidential and strategic information between credit institutions – Exchange capable of removing uncertainty as to the intended conduct of the undertakings concerned – Restriction by object – No need to demonstrate that the information was actually taken into account by the participants in the exchange*
(Art. 101(1) TFEU)

(see paragraphs 44-57, 63, 64, 66, 70-72, 75-77, 79, 81, 84, 85, 88)

Résumé

Having received a reference for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal), the Court of Justice rules on the conditions under which a ‘standalone’ exchange of information, that is to say an exchange which is not ancillary to a concerted practice restrictive of competition, may be classified as a ‘restriction by object’ within the meaning of Article 101(1) TFEU.

In the present case, the Autoridade da Concorrência (Competition Authority, Portugal; ‘the Competition Authority’) found that several credit institutions had infringed national competition law and Article 101 TFEU by participating, between May 2002 and March 2013, in a concerted practice having as its object the restriction of competition on the home loans market, the consumer credit market and the corporate lending market.

That concerted practice took the form of a ‘standalone’ exchange of information on conditions applicable to credit transactions, in particular current and future credit spreads and risk variables, and on the individual production figures of the participants in that exchange.

As a result, by decision of 9 September 2019, the Competition Authority imposed a fine on those credit institutions. Most of those credit institutions brought an action against that decision before the referring court.

Taking the view that that exchange of information, which took place in markets where concentration is high and there are barriers to entry, could contribute to reducing commercial pressure and uncertainty with regard to the strategic conduct of competitors on the market, which could lead to informal coordination restricting competition, the referring court decided to ask the Court whether such an exchange was compatible with Article 101 TFEU.

Findings of the Court

As a preliminary point, the Court recalls that an exchange of information between competitors may constitute a restriction of competition, including by object, within the meaning of Article 101(1) TFEU, if it constitutes a form of coordination which must be regarded, by its very nature, as harmful to the proper functioning of normal competition in the context of the exchange in question.

First of all, as regards its content, this implies that that exchange has characteristics linking it to a form of coordination between undertakings that is capable of creating conditions of competition which do not correspond to the normal conditions of the market in question. The proper functioning of normal competition on a market presupposes a degree of transparency with regard to the current market circumstances. It is only then that a market is capable of being efficient. Accordingly, transparency between economic operators is, at least on a non-oligopolistic market, likely to lead to intensification of competition between suppliers. However, in order for a market to operate under normal conditions, each operator must, first, be obliged to determine independently the policy which it intends to adopt on the single market and, second, be uncertain at least as to the timing, extent and details of any future changes in the conduct of its competitors on the market.

Next, regarding the context of the exchange of information at issue, it is necessary that in that context any coordination with characteristics similar to those of that exchange is capable of creating only conditions of competition which do not correspond to the normal operating conditions of the market in question, regard being had to the nature of the products or services in question, the actual conditions in which the market functions and the structure of that market.

Lastly, as regards the 'objective aims' pursued by that exchange, the latter may constitute a restriction by object where, even if it is not formally presented as pursuing an anticompetitive object, that exchange cannot, in the light of its form and the context in which it occurred, be explained other than by the pursuit of an objective contrary to one of the constituent elements of the principle of free competition.

It follows that, in so far as each economic operator is under an obligation to remain uncertain as to the future conduct of other participants on the market, an exchange of information which makes it possible to remove such uncertainty may be regarded as constituting a form of coordination between undertakings which, by its very nature, is harmful to the proper functioning of normal competition.

In that regard, it is not even necessary to establish that, in the context of that exchange, the information exchanged can only lead the participants, who are reasonably active and economically rational, tacitly to follow the same course of conduct with regard to one of the parameters on the basis of which competition on the market in question is established.

It is sufficient for the information exchanged to be, first, confidential, that is to say not already known to any economic operator active on the market concerned and, second, strategic, namely capable of revealing, in some circumstances, once combined with other information already known to the participants in an information exchange, the strategy which some of those participants intend to implement with regard to what constitutes one or more parameters on the basis of which competition on the market in question is established.

More specifically, the concept of 'strategic information' is broad and includes any data not already known to economic operators which, in the context of such an exchange, is likely to reduce the uncertainty as to the future conduct of the other participants on that market with regard to what constitutes, by reason of the nature of the goods or services in question, the actual conditions in which the market functions and the structure of that market, one or more parameters on the basis of which competition on the market in question is established.

Where the information exchanged relates not to the intentions of the participants in the exchange to alter their conduct on the relevant market, but to current or past events, it must also be classified as strategic information if a participant in the exchanges in question may infer with sufficient precision the future conduct of the other participants in that exchange or their reactions to a possible strategic move on the market.

In the light of these considerations, the Court finds that an exchange of information which took place between credit institutions in markets where concentration is high and there are barriers to entry, relating to the conditions applicable to credit transactions carried out on those markets, must be classified as a restriction of competition by object where it involves, *inter alia*, strategic information relating to the future intentions of other participants in that exchange concerning one of the parameters on the basis of which competition is established on those markets.