



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

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)

In Case C-298/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal), made by decision of 3 May 2022, received at the Court on 4 May 2022, in the proceedings

Banco BPN/BIC Português SA,

Banco Bilbao Vizcaya Argentaria SA, Portuguese branch,

Banco Português de Investimento SA (BPI),

Banco Espírito Santo SA (in liquidation),

Banco Santander Totta SA,

Barclays Bank plc,

Caixa Económica Montepio Geral – Caixa Económica Bancária SA,

Caixa Geral de Depósitos SA,

Unión de Créditos Inmobiliários SA, Establecimiento Financiero de Crédito, Sucursal em Portugal,

Caixa Central de Crédito Agrícola Mútuo CRL,

Banco Comercial Português SA

v

Autoridade da Concorrência,

* Language of the case: Portuguese.

intervening parties:

Ministério Público,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, Z. Csehi, and I. Jarukaitis, Judges,

Advocate General: A. Rantos,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 22 June 2023,

after considering the observations submitted on behalf of:

- Banco BPN/BIC Português SA, by C. Amorim, M. Gorjão-Henriques, F. Marques de Azevedo and A. Saavedra, advogados,
- Banco Português de Investimento SA (BPI), by M. de Abreu Castelo Branco, A. Lucena e Vale and C. Pinto Correia, advogados,
- Banco Santander Totta SA, by T.L. Faria, M. Lopes Martins, G. Neves Lima and N. Salazar Casanova, advogados,
- Barclays Bank plc, by S. Estima Martins and L. Seifert Guincho, advogados,
- Caixa Económica Montepio Geral – Caixa Económica Bancária SA, by D.N. Brito, P. Gouveia e Melo and J. Vieira Peres, advogados,
- Caixa Geral de Depósitos SA, by G. Banha Coelho, C. Homem Ferreira Morais, L.D. Silva Morais and L. Tomé Feteira, advogados,
- Unión de Créditos Inmobiliários SA, Establecimiento Financiero de Crédito, Sucursal em Portugal, by T.L. Faria, M. Lopes Martins and G. Neves Lima, advogados,
- Caixa Central de Crédito Agrícola Mútuo CRL, by C. Coutinho da Costa and N. Mimoso Ruiz, advogados,
- Banco Comercial Português SA, by R. Bordalo Junqueiro, N. Carrolo dos Santos and B. de Melo Alves, advogados,
- Autoridade da Concorrência, by A. Cruz Nogueira and S. Parodi, advogadas,
- Ministério Público, by P. Vieira, procurador,
- the Portuguese Government, by P. Barros da Costa, C. Chambel Alves and S. Ramos Moura, acting as Agents,
- the Greek Government, by K. Boskovits, acting as Agent,

- the Italian Government, by G. Palmieri, acting as Agent, and by G. Caselli, avvocato dello Stato,
- the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,
- the European Commission, by S. Baches Opi, P. Caro de Sousa and M. Domecq, acting as Agents,
- the EFTA Surveillance Authority, by M.-M. Joséphidès, M. Sánchez Rydelski and C. Simpson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 October 2023,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 101(1) and (3) TFEU.
- 2 The request has been made in proceedings between several credit institutions and the Autoridade da Concorrência (Competition Authority, Portugal) ('the Competition Authority') concerning the latter's decision to impose a fine on those institutions for an infringement of national competition law and of Article 101 TFEU, consisting of their participation in a concerted practice that has as its object the restriction of competition on the home loans market, the consumer credit market and the corporate lending market, in the form of an exchange of information on current and future conditions applicable to transactions, in particular credit spreads and risk variables, and on the individual production figures of the participants in that exchange.

Legal context

European Union law

- 3 Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), entitled 'Relationship between Articles [101 and 102 TFEU] and national competition laws', provides in paragraph 1 thereof:

'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 [101](1) [TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. ...'

Portuguese law

- 4 Notice of Banco de Portugal No 8/2009 was published on 12 October 2009 (*Diário da República*, 2nd series, No 197, part E).

5 Article 3(1) of that Notice, entitled ‘Price list’, states:

‘Credit institutions must have a comprehensive price list containing the general terms and conditions, having proprietary effects, for the performance of transactions and concerning the financial products and services marketed to the public.’

6 Article 4 of that Notice, entitled ‘Obligation to provide information regarding disclosure of the price list’, states, in paragraphs 1 and 2 thereof:

‘1 – The credit institutions covered by this act must keep their price list, organised in accordance with the preceding article, in all agencies and all places where they serve the public, in a visible and directly accessible place, in a manner allowing easy and direct consultation, in particular through the use of electronic means.

2 – All credit institutions with a website shall make the complete and up to date price list available in a prominent place on their website, to which there is direct and easily identifiable access, that does not require the pre-registration of interested parties.’

7 Article 7 of Notice No 8/2009, entitled ‘Leaflet on interest rates’, states, in paragraph 1 thereof:

‘The information contained in the Leaflet on Interest Rates shall be updated in line with market conditions and will enable the public, in particular, to know the representative rates applied by credit institutions in their usual transactions, under conditions to be defined by Instruction of the Banco de Portugal.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 On 9 September 2019, the Competition Authority adopted a decision by which it imposed a fine on certain credit institutions (‘the participating credit institutions’) for having participated in a ‘standalone’ exchange of information, that is to say in an exchange that was not alleged to be ancillary to a concerted practice restrictive of competition. That exchange related to the conditions applicable to their credit transactions, in particular current and future credit spreads and risk variables, and to the individual production figures of the participants in that exchange, in infringement of Article 101 TFEU and various provisions of national law.

9 In reaching that conclusion, the Competition Authority considered that the exchange of information in question constituted a restriction of competition by object, which relieved the authority of the obligation to investigate the possible effects of that exchange on the market. However, the Competition Authority did not allege that the participating credit institutions had participated in any other form of practice restrictive of competition to which the exchange of information could be linked, such as a pricing or market-sharing agreement.

10 Most of the participating credit institutions brought an action against that decision before the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal), which is the referring court, on the ground that the exchange of information at issue could not be regarded as being, in itself, sufficiently harmful to competition. In their view, an examination of its effects is therefore required. In addition, they consider that the Competition Authority failed to take into account the economic, legal and regulatory context of the exchange while it was taking place, even though it was necessary to do so before it could be concluded that there was a restriction by object.

- 11 On 28 April 2022, the referring court delivered an interim judgment in which it indicated which of the facts contained in the Competition Authority's decision were to be regarded as established.
- 12 In its request for a preliminary ruling, the referring court summarised that interim judgment, dividing its description into five parts concerning, respectively, the nature of the information exchanged, the form of the coordination, the objective pursued, the legal and economic context, and the alleged existence of procompetitive effects.
- 13 First, the information exchanged related to the home loans market, the consumer credit market and the corporate lending market. Two types of information concerning those markets were exchanged:
 - current and future commercial 'conditions', namely charts of 'credit spreads', that is to say the difference between the rate applied to a borrower by the credit institution and the rate at which, in principle, that institution refinances itself, as well as risk variables to which, according to each level of 'customer' risk, determined on the basis of factors such as the income, financial contribution or cost of the property of the customer in question, a credit spread is attached in order to offset that risk. This information was not, given the level of completeness and systematic organisation of the information exchanged, in the public domain at the time of the exchange;
 - 'production volumes', that is to say individualised figures of the participating entities, showing the amount of the loans granted in the preceding month. Those data were communicated in a 'disaggregated' format, that is to say at the very least broken down into detailed subcategories, and were not available in that form from any other source at the time of the exchange or subsequently.
- 14 The summary of the interim judgment also states that the exchanges of information at issue were regular and organised in a confidential manner, so that only the participating credit institutions were aware of them. Furthermore, those exchanges concerned strategic information that was not publicly available or that was difficult to obtain or to organise. The information exchanged was different from the information provided to consumers by the participating credit institutions in accordance with their information obligations in that regard. Furthermore, that information was exchanged by those institutions in a disaggregated and individualised manner and related to current or future conduct. The information referred, *inter alia*, to proposed changes in strategic conduct for the near future and to existing commercial conditions.
- 15 Second, as regards the duration and form of that exchange of information, the referring court states that it took place between May 2002 and March 2013. It took the form of bilateral or multilateral contacts, carried out by means of telephone communications or emails and with the full knowledge of the management of the participating credit institutions.
- 16 Third, given that the exchange of information enabled each of the participating credit institutions to obtain detailed, organised, up-to-date and accurate information about their competitors' offers, those competitors also being participants, the referring court infers from this that the purpose of that exchange was to reduce uncertainty with regard to each other's strategic conduct and thus the risk of commercial pressure from those competitors.

- 17 Fourth, as regards the legal and economic context of that exchange, the six largest credit institutions in Portugal all participated in the exchange of information. In 2013, those institutions managed 83% of all banking assets in the Portuguese banking sector as a whole.
- 18 From the second half of 2008, in contrast to the trend in Euribor, that is the index reflecting interbank interest rates within the eurozone, which had fallen sharply at that time, the credit spreads applied by the Portuguese financial institutions to new home loans increased significantly, which mitigated the fall in interest rates for end customers. By contrast, between 2010 and at least 2014, the volume of home loans granted to private individuals decreased. In parallel, in 2010 and 2011, the interest rate for consumer credit rose again, in line with a strong and sustained increase in spreads, which were higher at the beginning of 2012 than the peak reached in 2008. In 2012, those rates began to fall, reflecting a stabilisation of spreads and the decrease in Euribor. The spreads applied by the participating credit institutions nevertheless subsequently reverted to levels higher than in the periods prior to 2012.
- 19 Fifth, with regard to whether there were potentially positive or, at the very least, ambivalent effects on competition, the participating credit institutions had been unable to demonstrate that the exchanges of information had generated efficiencies, that those efficiencies had been passed on to consumers or that the restrictions of competition in question were indispensable. That exchange, *inter alia*, could not be equated to a competitive analysis (benchmarking) and the content of the information actually exchanged was not capable of preventing or resolving the problem of an asymmetry of information in the relationship between lender and borrower (problem of adverse selection), since it did not concern customers' individual risk profile, but focused rather on credit spreads and credit production volumes with no disaggregation by undertaking or connection to individual customers.
- 20 Although the referring court states that it is of the view, in the light of the foregoing, that the exchange of information at issue could contribute to reducing commercial pressure and uncertainty with regard to the strategic conduct of competitors on the market, which may lead to informal coordination restricting competition, it considers it necessary to ask the Court of Justice to clarify the conditions for the application of Article 101 TFEU, given the absence of precedents concerning standalone and informal exchanges of information.
- 21 In those circumstances, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Does Article 101 TFEU ... preclude the classification as a restriction of competition by object of a comprehensive, monthly exchange between competitors of information concerning commercial conditions (in particular, current and future credit spreads and risk variables) along with (monthly, individualised and disaggregated) production figures on home loan offers, corporate lending offers and consumer credit offers, exchanged regularly and in reciprocal fashion, in the retail banking sector, in the context of a concentrated market with barriers to entry, which has artificially increased transparency and reduced uncertainty with regard to the strategic conduct of competitors?
- (2) If the answer is in the affirmative, does Article 101 TFEU preclude such classification where it has been impossible to identify or establish any gain in efficiency or any uncertain or positive effect on competition resulting from that exchange of information?’

The procedure before the Court

- 22 The referring court requested that the present case be determined pursuant to an expedited procedure under Article 105(1) of the Rules of Procedure of the Court of Justice.
- 23 In support of its request it stated that ‘according to the preliminary assessment of when the limitation period will end, [liability arising from] the facts at issue in this case will become time-barred on 30 March 2023, leaving aside any possible suspension or interruption, to be assessed specifically.’ Moreover, ‘considerations of general and special prevention increase the need to obtain a rapid solution to the case’, given that the facts took place between 2002 and 2013.
- 24 In that regard, it follows from Article 105(1) of the Rules of Procedure that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules of procedure.
- 25 On 14 June 2022, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the referring court’s request that the present case be determined pursuant to an expedited procedure.
- 26 That decision was based on the fact that, in the first place, according to the referring court itself, the end of the limitation period, namely 30 March 2023, was determined ‘leaving aside any possible suspension or interruption, to be assessed specifically’. The referring court also indicated that it considered that, under the applicable national law, ‘the present reference for a preliminary ruling, entailing a stay of proceedings, constitutes a cause for suspension of the limitation period.’
- 27 In the second place, the fact that, although the case in the main proceedings was brought before the referring court on 22 October 2019, that court did not decide to refer the matter to the Court until 4 May 2022 puts into perspective the urgent nature of the dispute (see, by analogy, judgment of 11 November 2021, *Energieversorgungscenter Dresden-Wilschdorf*, C-938/19, EU:C:2021:908, paragraph 44).
- 28 Moreover, it is apparent from the case-law of the Court that the mere fact that the referring court is required to ensure that the case before it is settled rapidly, for whatever reason, is not in itself sufficient to justify the use of the expedited procedure under Article 105(1) of the Rules of Procedure (order of the President of the Court of 1 February 2017, *Air Serbia and Kondić*, C-476/16, EU:C:2017:170, paragraph 8).

Consideration of the questions referred

Preliminary observations

- 29 The applicants in the main proceedings, namely the participating credit institutions, devoted a substantial part of their written observations to challenging the referring court’s account of the facts in the main proceedings, going so far as to argue that the Court of Justice would be obliged to amend the factual circumstances described by the referring court in order to provide a useful response to that court.

- 30 However, it should be recalled that it is clear from the settled case-law of the Court that, in the context of proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts or tribunals and the Court of Justice, it is not for the Court but for the national court or tribunal to establish the facts which have given rise to the dispute (see, to that effect, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 35).
- 31 It follows that, since it is empowered solely to rule on the interpretation or validity of a provision of EU law, the Court cannot verify the accuracy of the facts set out by the national court or rule on the substance of the allegations of certain parties seeking to contest the relevance of the factual circumstances described by the referring court in its request for a preliminary ruling.
- 32 That said, as the Advocate General stated in point 20 of his Opinion, the interpretation which the Court is called upon to give to a provision of EU law in the factual context described by the referring court does not give rise to any presumption that that situation is indeed the situation at issue in the main proceedings. Accordingly, it is still ultimately for the referring court to verify that the facts which it submitted to the Court do indeed correspond to that situation and that those relating to the national legislation were complete and indeed applicable to that situation.
- 33 That conclusion cannot be called into question by the obligation on the national courts, to which the applicants in the main proceedings refer, to describe precisely the factual context in which the questions referred for a preliminary ruling have arisen, particularly in the field of competition, which is characterised by complex factual and legal situations (judgment of 3 March 2021, *Poste Italiane and Agenzia delle entrate – Riscossione*, C-434/19 and C-435/19, EU:C:2021:162, paragraph 77).
- 34 While such an obligation is intended to enable the Court to ensure that the reference for a preliminary ruling is not inadmissible, the fact remains that, according to settled case-law, in order for such a request to be inadmissible, the interpretation of EU law sought must bear no relation to the actual facts of the main action or to its purpose, the problem must be hypothetical or the Court must not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 19 April 2007, *Asemfo*, C-295/05, EU:C:2007:227, paragraph 31), which is not the situation in the present case.
- 35 Given that the review of the admissibility of requests for a preliminary ruling is thus limited to a manifest failure to meet the requirements referred to in the preceding paragraph of this judgment, it cannot be inferred from the obligation on the national courts to describe precisely the factual context of the questions referred for a preliminary ruling that the Court is obliged to verify that the situation described by the referring court does indeed correspond to the situation at issue in the main proceedings. In addition, in the present case, it is not obvious from the documents before the Court that those requirements have not been met.
- 36 Consequently, there is no need to rule on the criticisms made by the applicants in the main proceedings as to the relevance of the factual circumstances set out by the referring court in its questions, or on the requests they made for reformulation of the questions, in which they requested the Court to amend those factual circumstances.

The first question

- 37 It must be noted at the outset that it is apparent from the request for a preliminary ruling and from the observations of the applicants in the main proceedings that the dispute in the main proceedings relates principally to the legal classification of the restriction of competition ‘by object’.
- 38 It must therefore be considered that, by its first question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that a comprehensive and reciprocal monthly exchange of information between competing credit institutions, which took place in markets where concentration is high and there are barriers to entry, relating to the conditions applicable to transactions carried out on those markets, in particular current and future credit spreads and risk variables, and the individual production figures of the participants in that exchange, must be classified as a restriction of competition by object.

The conditions under which an agreement between undertakings, a decision by an association or a concerted practice may be classified as a restriction by object

- 39 Under Article 101(1) TFEU 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 internal market are incompatible with the internal market and are prohibited.
- 40 Accordingly, in order to find, in a given case, that an agreement, decision by an association of undertakings or a concerted practice is caught by the prohibition laid down in Article 101(1) TFEU, it is necessary to demonstrate, in accordance with the very wording of that provision, either that that conduct has as its object the prevention, restriction or distortion of competition, or that it has such an effect (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 98; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 158; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 85).
- 41 In that regard, while the fact that there is a precedent in which an exchange of information in the same form and in the same sector of activity as the exchange at issue in the main proceedings has been classified as a restriction by object is capable of facilitating proof that the latter exchange also establishes such a restriction, the absence of such a precedent, which, according to the referring court, is the case here, cannot prevent, where applicable, that exchange at issue being classified as such (see, to that effect, judgment of 25 March 2021, *Generics (UK) v Commission*, C-588/16 P, EU:C:2021:242, paragraph 79).
- 42 For the purposes of applying Article 101(1) TFEU, it is necessary, first of all, to examine the object of the agreement between undertakings, the decision by an association of undertakings or the concerted practice at issue. If, at the end of that examination, that agreement, decision or practice proves to have an anticompetitive object, it is not necessary to examine its effect on competition. Thus it is only where such an agreement, decision or practice cannot be regarded as having an anticompetitive object that it will be necessary to then examine that effect (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 99; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 159; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 86).

- 43 The Court has held that the concept of ‘restriction by object’, which the present question referred for a preliminary ruling exclusively concerns, must be interpreted strictly as referring solely to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects. Indeed, certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraphs 101 and 102; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 161 and 162; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraphs 88 and 89).
- 44 In order to determine, in a given case, whether an agreement, a decision by an association of undertakings or a concerted practice is a form of coordination which must be regarded, by its very nature, as being harmful to the proper functioning of normal competition, it is necessary to examine, first, the content of that agreement, decision or practice, second, the economic and legal context of which it forms a part and, third, its objectives (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 105; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 165; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 92).
- 45 First of all, in order to examine the content of the agreement, decision by an association of undertakings or concerted practice at issue, it is necessary to examine its various aspects in order to determine whether the collusion in question has characteristics enabling it to be linked to a form of coordination between undertakings which must be regarded, by its very nature, as harmful to the proper functioning of normal competition, which is in particular the case if any coordination exhibiting such characteristics is, precisely because of those characteristics, capable of creating conditions of competition which do not correspond to the normal conditions of the market in question (see, to that effect, judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraphs 115 and 120).
- 46 As regards, next, the economic and legal context of the agreement, decision by an association of undertakings or concerted practice at issue, since the concept of restriction by object refers only to agreements, decisions by associations of undertakings and concerted practices constituting a form of coordination that must be regarded, by its very nature, as harmful to the proper functioning of normal competition, it in no way requires that the effects of that agreement, decision or practice on competition, be they actual or potential, or negative or positive, be examined or, a fortiori, proven (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 106; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 166; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 93).
- 47 However, that does not preclude the need to take into consideration the nature of the goods or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 106; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 166; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 93).

- 48 It may be that it is only where certain specific conditions are satisfied that it can be presumed that certain forms of coordination and, therefore, the agreements, decisions of associations and concerted practices forming part of them, are harmful to the proper functioning of normal competition. Therefore, as the Advocate General stated, in essence, in point 43 of his Opinion, the examination of the economic and legal context of those forms of coordination must make it possible to ascertain whether, where a form of agreement, decision by an association of undertakings or concerted practice is, by its very nature, harmful to competition only in certain circumstances relating, in particular, to the nature of the goods or services at issue, to the real conditions of the functioning of the market and to its structure, those circumstances exist. The purpose of taking the context into account is thus to ascertain that no particular circumstance surrounding the agreement, decision or concerted practice at issue is such as to rebut the presumption that the form of coordination to which it belongs is harmful to competition.
- 49 Lastly, as regards the aims pursued by the agreement, decision by an association of undertakings or concerted practice at issue, it is necessary to determine the objectives which that agreement, decision or practice is intended to achieve from a competition standpoint. Nevertheless, the fact that the undertakings involved acted without having a subjective intention to prevent, restrict or distort competition and the fact that they pursued certain legitimate objectives are not decisive for the purposes of the application of Article 101(1) TFEU (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 107; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 167; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 94).
- 50 An examination of all those factors must, in any event, show the precise reasons why the agreement, decision by an association of undertakings or concerted practice at issue reveals a sufficient degree of harm to competition such as to justify a finding that that agreement, decision or practice has as its object the prevention, restriction or distortion of competition (see, to that effect, judgments of 21 December 2023, *International Skating Union v Commission*, C-124/21 P, EU:C:2023:1012, paragraph 108; of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 168; and of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 98).

Interpretation of the concept of restriction of competition with regard to exchanges of information

- 51 As the Advocate General stated, in essence, in point 52 of his Opinion, it should be noted that, even if it is not accompanied by a cooperation agreement, an exchange of information between competitors may constitute a restriction of competition, including by object, within the meaning of Article 101(1) TFEU. As is apparent from paragraphs 43 to 49 of the present judgment, it is necessary that the exchange constitute 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 that exchange.
- 52 That entails, first of all, as regards its content, that the exchange of information has characteristics linking it to a form of coordination between undertakings that creates conditions of competition that do not correspond to the normal conditions of the market in question.
- 53 It must be borne in mind that 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, the Court has already recognised

that, in principle, transparency between economic operators is, at least on a non-oligopolistic market, likely to lead to intensification of competition between suppliers (see, to that effect, judgment of 2 October 2003, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 84).

- 54 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 (see, to that effect, judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 119) 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 (see, to that effect, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41, and of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraph 116).
- 55 Next, in so far as concerns 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 (see, to that effect, judgments of 28 May 1998, *Deere v Commission*, C-7/95 P, EU:C:1998:256, paragraph 87; of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 33; and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 120).
- 56 Lastly, as regards the ‘objective aims’ pursued by that exchange, it should be noted that that concept refers, in its legal sense, to the primary reason for the agreement, decision by an association of undertakings or concerted practice, that is to say, to the immediate and direct aims pursued by the coordination in question which led the undertakings concerned to participate in it. Therefore, an exchange of information which, although not formally presented as pursuing an anticompetitive object, 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 must be regarded as constituting a restriction by object.
- 57 In the light of the foregoing, given that each economic operator is under an obligation to determine independently the policy which it intends to adopt on the single market, an exchange of information must be regarded as having characteristics linking it to a form of coordination between undertakings that must be regarded, by its very nature, as being harmful to the proper functioning of normal competition where its content relates to information which, whatever its sensitive or confidential nature, is such that, in the context in which that exchange takes place, it can only lead the participants in that exchange, who are reasonably active and economically rational, tacitly to follow the same course of conduct as regards one of the parameters on the basis of which competition on the relevant market is established.
- 58 In order to make such an assessment it is necessary to take into account not only the nature of the information exchanged but also the economic context in which the exchange takes place. Although it can be assumed that undertakings participating in concerted actions and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (see, to that effect, judgments of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraphs 161 and 162; of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 51 and 52; and of 19 March 2015,

Dole Food and Dole Fresh Fruit Europe v Commission, C-286/13 P, EU:C:2015:184, paragraphs 126 and 127), the fact remains that reasonably active and economically rational undertakings will follow the same course of conduct only if, inter alia having regard to the context of that agreement, they do not have to fear, at that time, the reaction of their current and potential competitors and of the consumers. That is in principle the case if the exchange takes place between the main players in an oligopolistic or, at the very least, highly concentrated market and there are barriers to entry to that market (see, to that effect, judgment of 2 October 2003, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraphs 86 and 87).

- 59 Thus, particularly in that latter situation, the fact that, as is pointed out by the referring court in its question, the market is quite concentrated and there are barriers to entry must be regarded as relevant.
- 60 That said, in order to establish that an exchange of information constitutes a restriction by object, it is not always necessary to demonstrate that it relates to information which is such that, in the context in which that exchange takes place, it can only lead the participants in that exchange, who are reasonably active and economically rational, tacitly to follow the same course of conduct with respect to one of the parameters on the basis of which competition on the market in question is established, thus running counter to the obligation on each operator to determine independently the policy which it intends to adopt on the single market.
- 61 As is apparent from paragraph 54 of the present judgment, for a market to function under normal conditions, operators on that market must not only determine independently the policy which they intend to adopt on the single market, but also, and more generally, remain uncertain as to the future conduct of other participants on that market.
- 62 As a result, an exchange of information 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, without it even being 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, where that exchange makes it possible to remove such uncertainty. To that end, it is sufficient for the information exchanged to be, first, confidential and, second, strategic.
- 63 ‘Confidential information’ must be understood as information not already known to any economic operator active on the market concerned, while ‘strategic information’ must be understood as information that may reveal, 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 in the light of which competition on the market in question is established (see, to that effect, judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraph 117).
- 64 Furthermore, although, as the Advocate General observed in points 69 and 70 of his Opinion, any exchange of information relating to future prices, or some of the factors determining those prices, is inherently anticompetitive in the light, in particular, of the risk of harm to competition which they entail, the concept of strategic information is however broader and includes any data not already known to economic operators which, in the context of such an exchange, is likely to reduce the uncertainty of the participants as to the future conduct of the other participants 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.

- 65 Lastly, where the information exchanged relates not to the intentions to alter the conduct of the participants in the exchange on the relevant market, but to current or past events, that information must nevertheless be regarded as strategic if, by reason, *inter alia*, of the nature of the goods or services in question, the actual conditions in which the market functions, the cost structure or the production and management methods of the participants in that exchange, such a participant 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.

Classification as a restriction by object of an exchange of information that has characteristics such as those set out by the referring court in its question

- 66 Although it is for the referring court to determine whether the exchange at issue in the main proceedings constitutes a form of coordination between undertakings which must be regarded, by its very nature, as harmful to the proper functioning of normal competition and to carry out the factual assessments necessary for that purpose, the fact remains that the Court, when giving a preliminary ruling, may provide clarification designed to give that court guidance in its interpretation (see, to that effect, judgment of 18 January 2024, *Lietuvos notary rūmai and Others*, C-128/21, EU:C:2024:49, paragraphs 89 and 90).
- 67 In the present case, the referring court referred in the question to a comprehensive and reciprocal monthly exchange of information between competing credit institutions, which took place in markets where concentration is high and there are barriers to entry, relating to the conditions applicable to transactions carried out on those markets, in particular current and future credit spreads and risk variables, and their individual production figures.
- 68 First, it is apparent from the description given by the referring court that the information relating to credit spreads, which was exchanged on a confidential basis between the participating credit institutions, was not, to the same level of completeness and systematic organisation, in the public domain when the exchange took place and that that information related, mainly, to possible future actions. More specifically, it is apparent from the file before the Court that that information related to the intention to change the conditions applicable to transactions carried out on the market in question or, at the very least, to the changes adopted but not yet applied.
- 69 Second, given that the concept of ‘spread’ refers to the difference between the rate applied to a borrower by the credit institution and the rate at which, in principle, the latter refinances itself, that second rate being, in principle, known, a spread is such as to reveal the rate that credit institutions offer their clients prior to negotiation.
- 70 Since the spreads thus relate to one of the parameters on the basis of which competition is established in the three markets in question in the main proceedings, any information relating to the future intentions of credit institutions to alter those spreads must be regarded as constituting strategic information.
- 71 As a result, in the light of what has been found in paragraph 62 of the present judgment, an exchange of information which, like that described by the referring court in its question, is organised in a confidential manner and relates to the future intentions of credit institutions with

regard to credit spreads, serving to determine the rate offered to their customers, is a form of coordination between undertakings which must be regarded, by its very nature, as being harmful to the proper functioning of normal competition and, therefore, as establishing a restriction by object within the meaning of Article 101(1) TFEU.

- 72 The same is true of information relating to future changes to the risk variables applied to spreads according to the individual risk profile of customers, since, combined with information on the future intentions of credit institutions with regard to credit spreads, that information is such as to enable the participants in the exchange to have a more accurate view of the pricing strategies which the other participants intend to implement.
- 73 As regards the information relating to ‘production volumes’, it should be noted that, admittedly, that type of information is in principle capable of revealing, in particular where, as in the case in the main proceedings, that information is communicated in a disaggregated and individualised form by those participants, any conduct on the part of one of them which departs from any balance prevailing on the market.
- 74 Consequently, the existence of an exchange of such information could constitute, in certain circumstances, a form of coordination which must be regarded, by its very nature, as harmful to the proper functioning of normal competition, of which it is a component.
- 75 However, in the case at issue in the main proceedings, it is apparent from the information provided by the referring court that the Competition Authority criticised the applicants for having participated in a ‘standalone’ exchange of information, not in an exchange which was ancillary to a concerted practice restrictive of competition.
- 76 As regards a ‘standalone’ exchange of information, where, as in the present case, such information relates to past sales volumes, it seems unlikely that, considered in isolation and in the absence of particular circumstances, that information would be such as to reveal the future intentions of the credit institutions concerned or to lead the participants in the exchange, who are reasonably active and economically rational, tacitly to follow the same course of conduct as regards one of the parameters on the basis of which competition is established on one of the markets in question.
- 77 That being so, it is necessary to assess how harmful a form of information exchange is by also taking into account the possibility of cross-referencing the different categories of information exchanged.
- 78 Thus, a ‘standalone’ exchange of information, in so far as it relates in particular to production volumes, could constitute part of a form of coordination between undertakings which must be regarded, by its very nature, as harmful to the proper functioning of normal competition if that information was, in particular, combined with other types of information exchanged and, as the case may be, with other information already freely available, in such a way that a reasonably active and economically rational undertaking could infer therefrom, in the light of the nature and the actual conditions of the functioning of the markets in question as well as the structure of those markets, the future intentions of the other participants or be led tacitly to follow, with them, the same course of conduct as regards one of the parameters on the basis of which competition on those markets is established.

- 79 In any event, an exchange of information such as that described by the referring court in its question must be regarded as constituting a restriction by object, since the information exchanged relates, inter alia, to the intentions of the participants in that exchange to change credit spreads in the future.
- 80 Such a conclusion can be confirmed by an examination of the objective aims pursued by an exchange of such information, which is also relevant for assessing the existence of a restriction by object, as is apparent from paragraph 49 of the present judgment. Indeed, an exchange of information on the future intentions of the participants in that exchange regarding one of the parameters on the basis of which competition is established on a market, such as credit spreads, cannot pursue any objective aim other than that of distorting competition on that market.
- 81 In the case in the main proceedings, the applicants nevertheless seek, by putting forward several arguments, to demonstrate that the exchange of information at issue does not constitute a restriction of competition by object.
- 82 In the first place, they submit that they were subject, under consumer law, to tariff transparency obligations and, in accordance with the accounting and financial rules applicable to them, or even, in some circumstances, because of their status as a company whose securities are admitted to trading on a regulated market, to obligations to communicate their sales volumes, market shares and average spreads. As a result of those various legal obligations, any participant in the markets in question could gather the commercial terms of the participating credit institutions by going into the branches of those institutions or by consulting their website.
- 83 In that regard, it must indeed be pointed out that an exchange of information the communication of which would otherwise have been made mandatory by national legislation cannot infringe Article 101 TFEU, in so far as such an exchange is not capable of having an influence on the market beyond that already caused by compliance with that legislation and for which the undertakings concerned cannot be held liable (see, by analogy, judgments of 11 November 1997, *Commission and France v Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33, and of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraphs 52 and 53).
- 84 However, the participants in an exchange of information cannot rely on such a situation if the information exchanged goes beyond that which must be made public by any credit institution active on the three markets in question in the context of its regulatory obligations and was exchanged before those obligations required the participants in the information exchange to make information of that kind public, which is, however, for the referring court to determine.
- 85 In the second place, the applicants in the main proceedings submit that an exchange of information the frequency of which, like the exchange at issue in the main proceedings, is very sporadic, that is to say once or twice a year, cannot constitute a restriction by object. However, it should be borne in mind that such frequency does not, in itself, preclude the anticompetitive object of an exchange of information. A single instance of contact may suffice to remove uncertainty in the minds of the parties concerned as to the future conduct of the other undertakings concerned on the market in question (see, to that effect, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 59 and 62).
- 86 In the third place, the applicants in the main proceedings dispute the fact that an exchange of information, such as that described by the referring court in its question, may constitute a form of coordination which is, by its very nature, harmful to the proper functioning of normal

competition, where that exchange is capable of facilitating benchmarking by the participants in that exchange, enabling them to compare their respective offers while reducing the costs associated with such a comparison exercise, since the same exchange may then have favourable effects on competition.

- 87 It is true that the exchanges of information concerning the best management or production methods to be implemented may be such as to favour competition and cannot therefore be regarded as instituting a restriction by object. However, that cannot be the case for exchanges of confidential information relating, specifically, to the future intentions of the participants in those exchanges with regard to one of the parameters on the basis of which competition on the market in question is established.
- 88 In the fourth place, the applicants in the main proceedings maintain that the credit spreads did not reflect the overall price of the credit services offered, but rather only one of its components, in particular because the amount of commissions and other charges was not mentioned. Moreover, at least on the home loans market, the credit rates offered to customers, which fall within those spreads, correspond not to the final interest rates applied, but to indicative rates that were used as a starting point for individual negotiations with each customer taking into account his or her particular risk profile. As a result, an exchange of information on credit spreads, even one relating to the future intentions of participating credit institutions, cannot be considered to be introducing a restriction by object.
- 89 However, as the Advocate General stated in points 74 and 75 of his Opinion, in order to fall within the concept of restriction by object, it is not necessary for a concerted practice to cover every parameter on the basis of which competition in the market is established or, in the case of pricing information, that that information covers all the components of the final price charged. Therefore, an exchange of information may constitute a form of coordination between undertakings which must be regarded, by its very nature, as harmful to the proper functioning of normal competition, even if it concerns only one of those parameters (see, to that effect, judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraph 204).
- 90 The rate used as the starting point for individual negotiations with each customer on the basis of his or her risk profile reflects one of the parameters of competition in the markets concerned since, on the basis of that rate, potential customers will make an initial selection from among the credit offers proposed by credit institutions in order to enter into negotiations only with some of those institutions.
- 91 In the fifth place, the applicants in the main proceedings dispute the fact that, in the circumstances of the case in the main proceedings, the information communicated on credit spreads concerned future conduct, knowledge of which was likely to procure an advantage for the parties participating in the exchange of information. First of all, according to the applicants, that information related to changes that were about to enter into force, either on the same day or, at the latest, when the communication took place on Friday, on the next working day. Next, the rates offered prior to negotiation were indicated on the website and in the credit simulators of the credit institution concerned shortly after the exchange on the changes to spreads took place, or even concurrently. Lastly, in any event, several weeks were necessary for a credit institution to change its own spreads, with the result that the participants in that exchange could not react immediately to the information they received.

- 92 In that regard, it must be borne in mind that the mere fact that information relating to credit spreads is exchanged before that information becomes effective or public is sufficient to establish that that exchange had the capacity to reduce uncertainty in the minds of the participants in the information exchange as to the future conduct of the participating credit institutions, even if the uncertainty which would have affected the other competitors was dispelled shortly afterwards. Even if it were to be considered that it was impossible for the participants in such an exchange to take that information into account immediately in order to change their conduct on the market immediately, the fact remains that any exchange relating to future intentions not already disclosed enabled those participants to react in any event faster than the normal operation of the market in question would have allowed.
- 93 In the sixth place, the applicants in the main proceedings state that the documents before the Court do not mention any instance in which one of the participating credit institutions amended its price list after receiving information that the credit spreads of another participant were going to be changed. However, such a circumstance cannot be regarded as relevant, since it is not necessary to prove that an exchange of information has any actual effects on the market in question, or even that the information was actually taken into account by the participants in the exchange, in order to apply the concept of restriction by object to it.
- 94 In the seventh place, the applicants in the main proceedings submit that the concept of ‘risk variable’, as used by the referring court, refers to evaluation tables in which a level of risk is attributed to a category of customers on the basis of factors such as income, financial contribution or property cost, to which a credit spread is applied in order to offset that risk. Those factors which underlie each level of risk were in no way disclosed during the exchange of information, as is apparent from the testimonies reproduced in the interim judgment, with the result that the exchange of those tables is not capable of constituting an exchange of strategic information.
- 95 In that regard, it is for the referring court to determine whether, having regard in particular to the information available to the participants in the exchange and to the methodology generally used to construct that type of table, the information contained in such a table was sufficiently intelligible to enable those participants, once they had combined it with the credit spreads on the basis of which a rate was offered to customers prior to negotiation and with the sales volumes achieved, to reduce their uncertainty as to the future conduct of the other participants in that exchange with regard to what constitutes, by reason of the nature of the services at issue, the actual conditions in which the market functions and the structure of that market, one or more parameters on the basis of which competition is established on the markets in question.
- 96 In the light of all the foregoing considerations, the answer to the first question is that Article 101(1) TFEU must be interpreted as meaning that a comprehensive and reciprocal monthly exchange of information between competing credit institutions, which took place in markets where concentration is high and there are barriers to entry, relating to the conditions applicable to transactions carried out on those markets, in particular current and future credit spreads and risk variables, and individual production figures of the participants in that exchange, in so far as, at the very least, the spreads thus exchanged are those which those institutions intend to apply in the future, must be classified as a restriction of competition by object.

The second question

- 97 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

- 98 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that a comprehensive and reciprocal monthly exchange of information between competing credit institutions, which took place in markets where concentration is high and there are barriers to entry, relating to the conditions applicable to transactions carried out on those markets, in particular current and future credit spreads and risk variables, and individual production figures of the participants in that exchange, in so far as, at the very least, the spreads thus exchanged are those which those institutions intend to apply in the future, must be classified as a restriction of competition by object.

[Signatures]