OXFORD

Journal of European Competition Law & Practice, 2024, 1–3

https://doi.org/10.1093/jeclap/lpae069

Current Intelligence

When exchanging information is a restriction of competition by object in violation of article 101(1) TFEU: case C-298/22 *Banco BPN/BIC Português SA*

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[‡]Judgement of 29 July 2024, *Banco BPN/BIC Português SA, Banco Português de Investimento SA (BPI), 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, and Banco Comercial Português SA, v Autoridade da Concorrência*, C-298/22, EU:C:2024:638.

[§]The Court of Justice ruled that a recurring and reciprocal exchange of information between competing credit institutions on current and future credit spreads applied by them must be classified as a restriction of competition by object under Article 101(1) TFEU.

1. Legal context

Article 101(1) TFEU prohibits an agreement, a decision by an association of undertakings or a concerted practice that has the object of appreciably preventing, restricting, or distorting competition within the internal market. It also prohibits exchanges of information between undertakings which, by their very nature, can be considered as being harmful to the proper functioning of normal competition due to their anti-competitive object.

This judgement concerns these exchanges of information, in particular of future credit spreads charged by competing credit institutions active in mortgage and consumer credit markets. A credit spread is the difference between the interest rate charged by a credit institution for a credit product and the risk-free rate. As the interest rate is one of the core components of a credit product's price structure (next to non-interest credit costs), exchanging information on future credit spreads is essentially sharing information on future product pricing.

Information on future credit spreads is highly strategic and normally not shared with competitors or the wider public. Its disclosure is not required under the Mortgage Credit Directive (Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L 60/34) or the Consumer Credit Directive (Directive (EU) 2023/2225 of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC [2023] OJ L 2023/2225), which require disclosure of *prices to consumers*. More granular information may be disclosed to national supervisory authorities under the Capital Requirements Directive (Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338), but this information is not shared with competitors.

In this judgement, the Court explains the application of Article 101(1) TFEU to the exchange of future credit spreads and why it violates the norms laid down in that article.

2. Facts

On 9 September 2019, the Portuguese Competition Authority (*Autoridade da Concorrência*, 'PCA') adopted a decision by which it imposed a fine of EUR 225 million on 14 credit institutions ('the banks') for having participated between 2002 and 2013 in an exchange of sensitive and confidential information regarding home loans, consumer credit, and corporate lending markets, in violation of Article 101(1) TFEU and national law. The exchanges were organized in a confidential manner and took the form of bilateral or multilateral contacts, carried out by means of telephone communications or emails.

More specifically, the banks shared information on (i) current and future commercial 'conditions', namely charts of 'credit spreads' and 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 and (ii) 'production volumes', i.e. the amount of the loans granted in the preceding month by each of the banks, broken down in detailed subcategories (para 13).

This information was not available to the public at the time of the exchange. According to the PCA, this conduct amounts to a 'standalone' restriction of competition by object, as it 'allows firms to know the market strategies of their competitors or to anticipate their moves, facilitating an alignment of market

Received: August 13, 2024. **Revised:** October 21, 2024. **Accepted:** November 6, 2024

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behaviours, thus impeding consumers from benefitting from the competition that would exist in the absence of such exchange of information'.

The banks brought an action against that decision before the Competition, Regulation, and Supervision Court of Portugal (*Tribunal da Concorrência, Regulação e Supervisão*), the court which referred the case to the Court of Justice ('CJEU'). They disputed the PCA's characterization of the exchange, required an examination of its effects and complained that the PCA failed to consider the economic, legal, and regulatory context of the exchange.

As to concentration and effect, the referring court remarked that (a) the six largest banks accounted for 83% of all banking assets in Portugal in 2013 and (b) following the 2008 crisis, credit spreads for new home loans increased significantly while Euribor decreased, meaning that the cost savings were not shared with Portuguese end consumers. On the basis of these facts, the referring court asked the CJEU whether Article 101(1) TFEU precludes the classification of a 'comprehensive, monthly exchange between competitors of information concerning commercial conditions [. . .] along with production figures [. . .], 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', as a restriction of competition by object.

The CJEU reframes the referring court's question. In its view, the referring court essentially asks 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.

3. Analysis

The CJEU answers that question affirmatively. Article 101(1) TFEU means that this exchange, taking place in that market context, must be classified as a restriction of competition by object, if the institutions intend to apply the exchanged spreads in the future (para 96). With its judgement, the CJEU adds to a significant body of case law involving restrictions of competition by object that are so harmful that examination of the effects is unnecessary, but the *novum* is its application to an exchange of information.

According to that case law, the assessment of harm is a very contextualized exercise, as AG Rantos remarks in his opinion (para 29). The elements to consider include the content of the agreement, its objectives, the economic and legal context, the nature of the goods or services, the actual conditions of the functioning and market structure, and even the intent of the parties. In its judgement, the CJEU starts with the first three elements (para 44).

The content of an exchange is harmful, if it 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' (para 52). Normal conditions require a market participant to determine its market policy independently and to be uncertain at least as to the timing, extent, and details of any future changes in the conduct of its competitors on the market. The CJEU points out that in the present case, the context can only create conditions that do not correspond to the normal operating conditions of this market (para 55). As to its objective, the CJEU considers that the exchange can only be explained as pursuing 'an objective contrary to one of the constituent elements of the principle of free competition' (para 56), given its form and its context.

The CJEU then elaborates on how the content can harm competition. More specifically, the content should relate to information which, in the context in which the exchange takes place, it can only lead the participants (who are reasonably active and economically rational) to **follow tacitly the same course of conduct** as regards one of the parameters of competition in the relevant market (para 57). They will do so 'if they do not have to fear, at that time, the reaction of their current and potential competitors and of the consumers', which *inter alia* depends on the context. If the exchange 'takes place between the main players in an oligopolistic or highly concentrated market and there are barriers to entry to that market, that is in principle the case' (para 58).

Where the exchange makes it possible to **remove** the uncertainty regarding the future conduct of their competitors with regards to one of the parameters of competition in that market, it is not even necessary to examine that the information will lead participants to follow the same course of conduct. This uncertainty is removed if the exchanged information is **confidential** and **strategic**. 'Confidential information' is information not already known to any economic operator active on the market concerned. 'Strategic information' is 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 regarding a parameter of competition. In the present case, the information was confidential and strategic; hence, this 'standalone' exchange must be classified as a restriction by object.

The CJEU subsequently provides some precisions in response to the banks' complaints, some of which are noteworthy. *First*, if the communication of the information would otherwise have been made mandatory by national legislation, the sharing of information cannot infringe Article 101 TFEU (under certain conditions). However, if the information goes beyond those requirements and was communicated before the mandatory time, the participant cannot use this defense. *Second*, recurrence is not a requirement: a single instance of contact may suffice to remove uncertainty. *Third*, exchanging information on best management or production methods (benchmarking) cannot be regarded as instituting a restriction by object, as it may favour competition. *Fourth*, sharing a single price component (here: the credit spread) is sufficient to harm competition, because consumers will make their initial selection using the offered total price (of which that component forms part).

4. Practical relevance

The judgement is extremely relevant to credit institutions across the European Union. Credit institutions often exchange information via multiple fora, such as industry associations, national working groups, and informal bilateral interactions. These exchanges can generate efficiency gains that promote overall welfare, but they may also imperil normal competitive conditions. Those conditions must be preserved because they are essential to promote market efficiency and desirable market outcomes, in particular competitive prices for credit products.

The judgement is testimony to the CJEU's commitment to safeguard these conditions, in line with its holdings in Case C-74/14 *Eturas*, EU:C:2016:42, and Case C-8/08 *T-Mobile Netherlands*, EU:C:2009:343. Effective price competition requires that credit

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institutions determine their prices independently and with uncertainty as to the future prices offered by competitors. Sharing information that removes this uncertainty upends these fundamental competitive dynamics. Relevant information includes future prices, price components (e.g. credit spreads) and sufficiently granular pricing strategies.

The judgement also raises new questions. For example, how should the court's assessment of the exchange change if the market is not concentrated but highly fragmented, the participants have a small aggregate market share and there are no significant barriers to entry? Presumably, this context changes the likelihood that participants will tacitly follow the same conduct. Economically rational participants may continue to fear the actions of other competitors and consumers and as they will not be able to remove or even reduce the uncertainty, they may not follow the same conduct.

Also, what if the exchange takes a more ambiguous form? Instead of sharing data, credit institutions may share third-party software that uses artificial intelligence to propose credit spreads for individual transactions. If the software is trained on customer data of one institution and is subsequently used by another institution, the second institution may be able to infer the future credit spreads of the first institution (depending on the third party's data policies). Such shared use could be considered 'data sharing' in the sense used by the European Commission (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/01), section 6).

These questions suggest that this case may not be the last ruling on the subject. Nevertheless, it should be concluded that the judgement fills an important legal void and is a welcome clarification of Article 101(1) TFEU.

Funding

None declared.

Conflict of interest

The author does not have funding or conflicts to declare and the views expressed are purely personal.

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