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Judgment of the Court in Case C-298/22 | Banco BPN/BIC Português and Others

### The exchange of information over a period of more than ten years between 14 credit institutions in Portugal could constitute a restriction of competition by object

*It is ultimately for the Portuguese competition court to determine whether that is the case*

In September 2019, the Portuguese Competition Authority (‘the Competition Authority’) imposed on 14 credit institutions (including the six largest in Portugal) <sup>1</sup> a fine totalling € 225 million. The Competition Authority took the view that those institutions had infringed national and EU competition law by participating in a comprehensive and reciprocal monthly exchange of sensitive information over a period of more than ten years between 2002 and 2013. The information exchanged concerned the home loans market, the consumer credit market and the corporate lending market. It related to certain current and future commercial conditions, in particular credit spreads and risk variables, and to the individual production figures of the participants in that exchange <sup>2</sup>.

That exchange of information was considered to be ‘standalone’ as the Competition Authority did not allege that it was linked to a concerted practice restrictive of competition, such as a pricing or market-sharing agreement. Nevertheless, the Competition Authority considered that it constituted a restriction of competition by object. That means that, according to that authority, that concerted practice was so serious that it was not necessary to examine its possible effects on the markets in question in order to conclude that it infringed competition law.

Most of the participating credit institutions <sup>3</sup> brought an action against the decision of the Competition Authority before the Portuguese competition court. They claim that the exchange of information at issue was not, in itself, sufficiently harmful for it to be classified as a restriction of competition by object. In their view, an examination of its effects is therefore required. They add that, in any event, the Competition Authority should have taken into account the economic, legal and regulatory context of the exchange.

The Portuguese court asks the Court of Justice whether and under what conditions an exchange of information may be classified as a restriction of competition by object.

The Court’s response is that **a standalone exchange of information between competitors may constitute a restriction of competition by object**. It is sufficient that that exchange constitutes a form of coordination which, by its very nature, is necessarily, in a context such that of this exchange, **harmful to the proper functioning of normal competition**. For a market to function under normal conditions, the operators on that market must **determine independently the policy** which they intend to adopt **and remain uncertain** as to the future conduct of other participants on that market. Accordingly, an exchange of information constitutes a form of coordination that may be classified as a restriction by object **where that exchange makes it possible to remove such uncertainty**. That is the case where the **information exchanged is confidential and strategic in the sense that it may reveal the future conduct of a competitor on the markets in question** <sup>4</sup>.

That could be the case in main proceedings <sup>5</sup>, since it appears from Portuguese court’s description of the facts at

issue that the information exchanged related, inter alia, to the **intentions** of the participants in that exchange **to alter credit spreads in the future**. In addition, if that should be the case, given that credit spreads constitute one of the parameters on the basis of which competition is established on a market, **such an exchange could only have had the objective of distorting competition on that market**. Nevertheless, it is for the Portuguese court to carry out the factual assessments necessary in order to determine whether the exchange at issue does indeed constitute a restriction by object.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>1</sup> Banco BPN/BIC Português; the Portuguese branch of Banco Bilbao Vizcaya Argentaria (BBVA); Banco Comercial Português (BCP); Banco Português de Investimento (BPI); Banco Espírito Santo (BES) (in liquidation); Banco Internacional do Funchal (BANIF); Banco Santander Totta (for the acts it committed and for the acts committed by Banco Popular); Barclays Bank; Caixa Económica Montepio Geral – Caixa Económica Bancária (Montepio); Caixa Geral de Depósitos (CGD); Caixa Central de Crédito Agrícola Mútuo (CCCAM); Deutsche Bank and the Portuguese branch of the Unión de Créditos Inmobiliarios (UCI). In 2013 the six largest credit institutions in Portugal managed 83% of all banking assets in the Portuguese banking sector.

<sup>2</sup> The credit spread is the difference between the rate applied to a borrower by the credit institution and the rate at which, in principle, that institution refinances itself. Risk variables are used to attach a credit spread 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, in order to offset that risk. Production volumes are individualised figures showing the amount of the loans granted by each of the participating entities in the preceding month. Those data were communicated in a disaggregated format, broken down into detailed subcategories, and were not available in that form from any other source at the time of the exchange or subsequently.

<sup>3</sup> All except BANIF and Deutsche Bank. Banco Popular was acquired by Banco Santander in June 2017.

<sup>4</sup> Confidential information is information not already known to any economic operator active on the market concerned. Strategic information is information that may reveal, once combined with other information that is already known, the strategy which some of the participants in an exchange of information 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. The Portuguese court notes that the exchanges at issue 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 the credit institutions are required provided to consumers. Furthermore, that information had been exchanged in a disaggregated and individualised manner and related to current or future conduct (inter alia, to proposed changes in strategic conduct for the near future and to existing commercial conditions).

<sup>5</sup> In issue is, first, information relating to credit spreads. These spreads relate to one of the parameters on the basis of which competition is established in the three markets in question (home loans, consumer credit and corporate lending), with the result that any information about the future intentions of the credit institutions to alter them constitutes strategic information. 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. Indeed, that information on risk variables, combined with the information on future intentions with regard to credit spreads, provides a more accurate view of the pricing strategies which the participants in the exchange intend to implement. So far as concerns the information relating to production volumes, it could be combined with other types of information exchanged or freely available in order to deduce the future intentions of the participants in the exchange in order to align their conduct in relation to one of the parameters on the basis of which competition is established on those markets.