Case C-298/22

Request for a preliminary ruling

Date lodged:

4 May 2022

Referring court:

Tribunal da Concorrência, Regulação e Supervisão (Portugal)

Date of the decision to refer:

3 May 2022

Applicants:

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 Creditos Imobiliarios, SA – Estabelecimento Financeiro de Crédito SOC

Caixa Central de Crédito Agrícola Mútuo CRL

Banco Comercial Português, SA

Defendant:

Autoridade da Concorrência

Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court)
First Chamber – J1

[addresses of the national court and of the Court of Justice]

Reference: 353845 Action (administrative offence) 225/15.4YUSTR-W

Defendant: Autoridade da Concorrência
Applicants: Banco BIC Português, SA and Others
Date: 3 May 2022

Subject: Request for a preliminary ruling, together with a request for the expedited procedure (Article 105 of the Rules of Procedure of the Court of Justice)

The present request for a preliminary ruling is made pursuant to Article 267(a) of the Treaty on the Functioning of the European Union ('TFEU') and Article 19(3)(b) of the Treaty on European Union, in the following terms:

Parties

[identification of the parties' representatives]

REQUEST FOR A PRELIMINARY RULING

I. Subject matter of the dispute and relevant facts

In the context of these administrative offence proceedings, the Autoridade da Concorrência (Competition Authority) claimed that each of the entities concerned had committed an administrative offence as laid down and punished by Article 9 of the Lei da Concorrência [1] (Law No 19/2012 of 8 May 2012, 'the Law on

[1] Article 9

Agreements, concerted practices, and decisions of associations of undertakings

1. – The following shall be prohibited: agreements between undertakings, concerted practices between undertakings and decisions of associations of undertakings which have the object or effect of preventing, distorting or significantly restricting competition within the national market or part of it and which consist in:

(a) directly or indirectly fixing purchase or selling prices or other trading conditions;

(b) limiting or controlling production, markets, technical development or investment;

(c) sharing markets or sources of supply;

(d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

Competition') (previously, Article 4 of Law No 18/2003), Article 101 TFEU and Articles 68 and 69 of the Law on Competition, in respect of which it imposed on each of them a fine not exceeding 10% of their turnover in the financial year immediately preceding the final administrative decision.

Not accepting the decision finding against them, the applicants have brought an action before the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, 'the Competition Court'), which has full jurisdiction and has held a hearing for argument and judgment, in accordance with the principles of proximity, adversarial proceedings and publicity. [2]

At the request of all the parties to the proceedings, and by decision of the court, witness evidence and documentary evidence has been produced, statements have been taken from the legal representatives of the parties wishing to provide them, and statements have been provided by the authors of *economic studies*.

Closing oral submissions have been made and the court has given a final ruling regarding the facts it considers proved and those it considers unproven (Article 75(1) of the Regime Geral das Contra-ordenações (General rules applicable to administrative offences)).

The evidence having been produced and the parties having been heard, **the court considers the following matters to be proven:**

Nature of the information exchanged

The applicants engaged in an exchange of information in the area of home loans, consumer credit and corporate lending. The information concerned (i) current and future commercial conditions (complete charts of credit spreads, borrowing capacities and risk variables) which, given the exhaustive nature and the systematic organisation of the exchange, were not in the public domain at the time of the exchange, **and** (ii) monthly production figures for each bank, disaggregated data on loans granted in euros in the preceding month, which were not in the

(e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

(f) stipulating, in the context of the supply of accommodation goods and services in tourist resorts or local accommodation establishments, that the other contracting party or any other entity must refrain from offering, via an electronic platform or in a physical location, prices or other conditions of sale relating to the same goods or services that are more advantageous than those offered by an intermediary acting via an electronic platform.

2. – Except in cases held to be justified pursuant to the following article, agreements between undertakings and decisions of associations of undertakings prohibited by paragraph (1) shall be null and void.

[2] [procedural formalities]

public domain and not available in disaggregated form from any other source at the time of the exchange or subsequently.

The abovementioned commercial conditions exchanged between the applicants concerned current and future data.

Form of cooperation

In so far as concerns its duration and form, the exchange of information went on from May 2002 to March 2013 and followed a set modus operandi (relying on telephone and email communications), bilaterally and multilaterally, through institutionalised contacts effected by stable contact points, with the full knowledge of management and in reciprocal fashion.

Objective

The exchange of information provided the applicants with detailed, organised, up-to-date and accurate information about their competitors' offers, which reduced uncertainty with regard to the strategic conduct of competitors, reduced the risk of commercial pressure and facilitated alignment by means of informal coordination.

That exchange falsely increased market transparency and resulted in a significant gap between the way in which the information exchanged with competitors was processed by the entities concerned, which was comprehensible, organised and simple, and the manner in which that same information was disseminated in the market and made available to consumers, which was incomplete, complex and fragmented.

Legal and economic context

The applicants are *credit institutions, undertakings whose business consists in receiving deposits or other repayable funds from members of the public and granting loans in their own behalf*. They are subject to specific rules on the taking up and pursuit of banking activities (prudential rules) and on their conduct in the market (rules of conduct).

The Banco de Portugal, in cooperation with the European Central Bank, is responsible for the prudential supervision of credit institutions and for supervising their conduct on the market.

In 2013, 30 credit institutions were operating in Portugal. However, approximately 78% of all national bank assets were concentrated in the five largest credit institutions operating in the country, namely the applicants Caixa Geral de Depósitos, Banco Comercial Português, Banco Espírito Santo, Banco Português de Investimento and Banco Santander Totta.

The C4 index, which indicates the size of the four largest credit institutions, in terms of total assets, stands at 69%, representing more than half of the entire

market. The C5 index exceeds the 75% threshold, standing at approximately 78% of the national banking system.

If the sixth largest credit institution, Caixa Económica Montepio Geral, is taken into account, the C6 index reaches a degree of concentration of 83%.

The activity indicator and the assets of the credit institutions shows that the six largest credit institutions operating in the national territory controlled more than 80% of the total assets of the national banking system. [3]

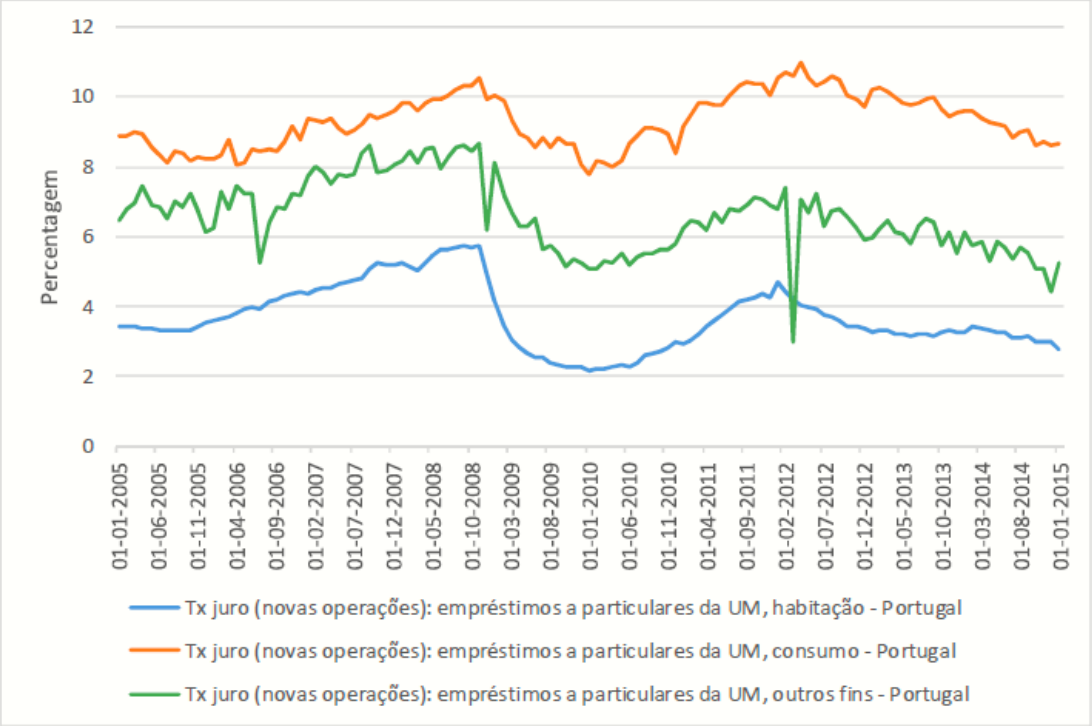
Graph I: Historic interest rates for new home loans, consumer credit and other loans granted by other monetary financial institutions [4] established in Portugal to private individuals residing in the euro zone, from January 2005 to January 2015. [5]

[3] The study entitled *Mobilidade no Setor da Banca a Retalho em Portugal* (Mobility in the retail banking sector in Portugal), Autoridade da Concorrência, Banco de Portugal, December 2009, concluded that there were obstacles to the mobility of current account customers, including search costs, transaction costs and administrative costs associated with the closing and opening of bank accounts.

The same study concluded that, in 2003, 2006 and 2007, the rate of transfer of existing home loan contracts between Portuguese banks was very low, standing at two transfers per 100 home loans, whereas the average of the EU 27 is 14 transfers per 100 contracts.

[4] The sub-sector of other monetary financial institutions comprises banks, savings banks and mutual agricultural credit banks as well as real estate market funds.

[5] Source: Autoridade da Concorrência, on the basis of data from Banco de Portugal on interest rates for new home loans, consumer credit and other loans granted by other monetary financial institutions established in Portugal to individuals residing in the euro zone.



The credit institution fixes the credit spread freely for each contract, taking into account the ratio between the amount of the loan and the value of the property to be purchased or built (the loan-to-value ratio) and the customer's credit risk. Depending on the commercial strategy of the credit institution concerned, the spread may be reduced if other optional products are purchased (associated sales). [6]

Home loans have been a very important product for the Portuguese banking sector, given the very significant proportion they represent of all lending to private individuals (representing approximately 89% of financing solutions for private individuals over the last decade). [7]

Unlike Euribor, the credit spreads applied by financial institutions to new home loans increased significantly from mid-2008 onwards.

The sharp drop in Euribor corresponds to a sustained increase in average credit spreads, which attenuates the fall in interest rates that would result from the sharp drop in Euribor.

6 *Ibidem.*

7 See: *Estatísticas Monetárias e Financeiras* (Monetary and financial statistics), Banco de Portugal, 2015, Table B.4.1.4, available at https://www.bportugal.pt/publications/banco-de-portugal/2015/123 and https://www.bportugal.pt/sites/default/files/anexos/pdf-boletim/bedez15.pdf, consulted on 4 September 2019, pp. 88060 to 88106v.

The volume of home loans granted to individuals decreased from the end of 2010 to at least December 2014.

In 2010 and 2011, the interest rate for consumer credit rose again, in line with a strong and sustained increase in credit spreads, which were higher at the beginning of 2012 than the peak reached in 2008.

In 2012, that rate began a downward trend, reflecting the stabilisation of credit spreads (albeit remaining at higher levels than in the period prior to 2012) and the decrease in Euribor.

The exchange of information regarding credit spreads was more intense during the period when Euribor fell sharply, from 2008 to 2010, and when interest rates fell as a result. After this fall in Euribor, there was a significant and generalised increase in the credit spreads applied by the banks in question, which resulted in a rise in interest rates, the increase in credit spreads making it possible to attenuate the decrease in Euribor.

Between 2002 and 2013, the entities concerned exchanged strategic information that was not publicly available or was difficult to obtain or to organise. The information exchanged was in disaggregated, individualised form by undertaking. It included current and future data and it was exchanged on a regular basis.

The information exchanged included references to proposed changes in strategic conduct for the near future and currently applicable conditions, which the entities concerned were able to use in order to define their own commercial strategies.

The information exchanged was distinct from the information which credit institutions provide in order to comply with their duties of information provision and transparency with regard to the advertising of their financial products and services [8] or to comply with their obligations to provide information during the negotiation, conclusion and currency of loan agreements [9] or when deposits are taken and while they are held. [10]

The regulatory obligations in force concerning the grant of home loans, namely the obligation to provide a standard information sheet (*ficha de informação normalizada* (*FIN*, which subsequently became the *ficha de informação normalizada europeia*, *FINE* (European standard information sheet)) setting out in detail information on the terms of the loan agreement (*TAEG* (annual percentage

8 See Notice No 10/2008 of the Banco de Portugal.

9 See Notice No 10/2008 of the Banco de Portugal concerning home loan contracts and associated lending; Notice No 16/2012 of the Banco de Portugal concerning loan agreements secured by mortgage or other rights over immovable property; Instruction No 12/2013 concerning consumer credit contracts.

10 See Notice No 4/2009 concerning simple deposits and Notice No 5/2009 concerning indexed and dual deposits.

rate of charge (APR)), *TAN* (nominal annual rate of charge) and other costs, such as commissions, insurance and fees), the maturity, the instalment amounts based on the current situation and on the situation where Euribor is at a 20-year high, bear no relation to the comparative analyses of the various offers of competing banks which were exchanged between the credit institutions concerned.

The scope of the activities of the institutions in question extends throughout the national territory and is liable to impede the entry of new undertakings established in other Member States, especially in the retail banking sector.

The commercial information exchanged between the applicants remained within a closed circuit, with the result that any new entrant, excluded from that circuit, was at a disadvantage in terms of information.

The information exchanged related to resident and non-resident customers.

The exchange of information contributed to the isolation of the domestic market, reinforcing national barriers and impeding economic penetration.

Uncertain and positive effects on competition

From the documents in these court proceedings and at the hearing for argument and judgment, **it was not proven that** (i) the agreement had enabled improvements in efficiency to be achieved (causal link), (ii) the alleged improvements in efficiency had been passed on to the consumer, (iii) the restrictions of competition were necessary.

It was not proven that there were any improvements in efficiency liable to create an overall positive effect for the benefit of consumers, in the form of lower prices, better quality offers or more diverse offers, or an increase in innovation.

The exchange of information concerned data of a commercial nature. It was not a ‘benchmarketing’ practice aimed at identifying production costs which might be eliminated in order to help reduce the prices proposed to customers.

The content of the information actually exchanged was not such as to prevent or to solve the problem of *adverse selection*, since it did not concern the individual risk profiles of customers (banking behaviour, financial position, repayment defaults), but instead concerned credit spreads and credit production volumes, with no disaggregation by customer or relationship to individual customers.

No positive effects for competition were found to have resulted from the information exchange that might have benefited consumers, in terms of transparency.

2. Applicable legal provisions

Article 101 TFEU (formerly Article 81 TEC)

Article 9 of the Law on Competition (Article 4 of Law No 18/2003)

3. Grounds for the reference for a preliminary ruling

The legal classification of the facts as constituting a restriction of competition by object is disputed in these proceedings.

The applicants dispute such classification. They submit that the exchange of information was not sufficiently prejudicial as to restrict competition.

The nature of the information exchanged (which was sensitive and strategic), the duration of the exchange (from 2002 to 2013), the relative concentration of the market (six banks representing more than 80%) and the significance of the commercial variables exchanged (**current and future prices and production volumes**) suggest that the information exchange helped to reduce commercial pressure and uncertainty regarding the strategic conduct of competitors, which amounts to informal coordination restricting competition.

However, in the case-law of the Court on the restriction of competition *by object and effect*, there does not appear to be any *precedent* which concerns the exchange of 'standalone' information and that case-law offers no direct guidance regarding the situation at issue (informal coordination between banking institutions which, by means of the exchange of information, achieve practical coordination). The present request is therefore relevant.[11]

The applicants have been requesting a reference for a preliminary ruling since the beginning of these legal proceedings. However, in order for a reference to be possible, it proved necessary for the case to be argued and, in particular, that the court should determine which facts have been proved and which remain unproven, the latter mainly concerning the uncertain and positive effects on competition arising from the exchange of information, which have not been demonstrated in court.

4. Request for the expedited procedure (Article 105): Possible time bar

On 8 April 2022, the administrative offence proceedings which led to the present request for a preliminary ruling were deemed urgent because of an imminent risk of time-barring.

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

[11] See judgments of 2 April 2020, *Budapest Bank and Others*, C- 228/18, EU:C:2020:265; of 11 September 2014, *CB* v *Commission*, C- 67/13 P, EU:C:2014:2204; of 4 June 2009, *T-Mobile Netherlands and Others*, C- 8/08, EU:C:2009:343; and of 2 February 2022, *Scania and Others* v *Commission*, T- 799/17, EU:T:2022:48.

30 March 2023, leaving aside any possible suspension or interruption, to be assessed specifically.

In addition to the present reference for a preliminary ruling, the following steps in the case should also be taken into account: judgment by the Competition Regulation and Supervision Court (first instance), in which the law will be applied to the facts; an appeal to the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) (second instance); an appeal to the Tribunal Constitucional (Constitutional Court).

Although it is considered that the present reference for a preliminary ruling, entailing a stay of proceedings, constitutes a cause for suspension of the limitation period (pursuant to Article 27A(1)(a) of [Legislative Decree No 433/82]), the limitation period is already in dispute, at this stage of the proceedings, and it appears that the present reference will be characterised by the parties as not constituting a cause for suspension of the limitation period, which will raise other contentious issues that this court or a superior court will have to decide at a later stage.

In addition, the facts occurred between 2002 and 2013, such that **considerations of general and special prevention increase the need to obtain a rapid solution to the case** (the case was judged and decided, at first instance, between 6 October 2021 and 28 April 2022). Moreover, the small number of questions referred for a preliminary ruling, clarified by what took place at the hearing for argument and judgment, in particular, in light of the facts that have been proved and those that remain **unproven**, also appears to warrant rapid clarification on the part of the Court of Justice.

5. Questions referred for a preliminary ruling

1. *Does Article 101 TFEU (formerly Article 81 TEC) 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?*

[formalities]

[repetition of the request for the expedited procedure and grounds of that request]

[signature]