BRUSSELS À JOUR

The Banks Strike Back

Markus Röhrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

In case you have ever wondered in which circumstances a "standalone" exchange of information may amount to a restriction of competition by object… or whether the exchange of recent production volumes can be a problem, you may want to look at AG Rantos's opinion in Banco BPN v BIC Português (Case C-298/22)[1]. It's also a good read to refresh your knowledge of the basics of by object infringements and information exchange more generally.

Summary of the Case

Banco BPN v BIC Português concerns a request for preliminary ruling from Portugal. The Autoridade da Concorrência, Portugal's national competition agency (NCA), had fined several banks for an infringement of national competition law and of Article 101(1) TFEU. According to the NCA, the country's six largest banks (comprising approx. 80% of the national market) had been engaged in the exchange of commercially sensitive information on home loans, consumer credit and corporate lending over the course of 11 years. Broadly speaking, the exchange covered two categories of information, i.e., (i) current and future commercial conditions such as, e.g., charts of credit spreads, borrowing capacities and risk variables, and (ii) monthly production figures for each bank, namely disaggregated data on loans granted in euros in the preceding month. None of that information was available in the public domain or any other source, particularly not in disaggregated form.

The NCA concluded that the exchange of information in question constituted a restriction of competition by object, which relieved it of the obligation to investigate its possible effects on the market. The NCA did not allege that the banks had participated in any other form of restrictive conduct such as, e.g., price fixing or market-sharing agreements.

The NCA's decision was appealed before the Portuguese Competition Court. The Court referred the matter to Luxembourg on the grounds that the ECJ's case-law on restric-

1 Advocate General *Rantos*, Opinion of 5 October 2023, Case C-298/22, *Banco BPN v BIC Português and Others*.

tions of competition by object and effect did not appear to offer any precedent in relation to the assessment of 'standalone' exchange of information within the framework of Article 101(1) TFEU.

A Jog Down Memory Lane

In AG *Rantos's* own words, the case at hand is an opportunity for the ECJ to develop its case-law on the exchange of information between competitors under Article 101(1) TFEU. His opening is a quick refresher of the concept of restriction of competition by object. He evokes the ECJ's consistent practice that, to determine whether an agreement between undertakings displays a sufficient degree of harm to be considered a restriction of competition by object, the analysis should focus on the content of its provisions, its objectives and the economic and legal context which it forms part of. He then reminds us of a few key concepts on by object infringements.

- The notion of by object infringements should be **interpreted restrictively**. If an agreement or concerted practice does not satisfy the (restrictive) criteria of a by object infringement, the analysis should switch to effects.
- While the ECJ has emphasized the need for there to be "reliable and robust experience" for a practice to be classified as a restriction of competition by object, the existence of **precedent is not indispensable**. The fact that the Commission did not take the view that a certain kind of agreement was, by virtue of its very object, restrictive of competition *in the past* does not, as such, prevent it from doing so *in the future* following an individual, detailed examination of the conduct at issue. In other words, companies "don't get one for free".
- The requirement to assess the **legal and economic context** of a given type of conduct in order to qualify it as a restriction by object is designed as a "basic reality check" (or a "failsafe test"). Its goal is to check whether specific legal and economic circumstances might cast doubt on the presumed harmful nature of the agreement. It is meant to weed out any false positives stemming from an excessively formalistic analysis of the exchange's content and objectives.

In AG *Rantos's* view, in essence, the difference between by object infringements and by effects infringements lies in the intensity with which they are examined. A by object infringement is easy to perceive and it must be possible to establish that it is capable of restricting competition without having to examine its effects. The significance of the distinction between restrictions by object and by effect is primarily evidential.

Exchange of Information as a by Object Infringement

AG *Rantos* points out that the ECJ has consistently held that an exchange of information which reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted, is contrary to Article 101(1) TFEU. The "problem", says AG *Rantos*, was that the Court has not been clear on whether this criterion indicated a restriction of competition in general, by effect or by object. According to AG *Rantos*, it is the former (restriction of competition in general), which should not be surprising because the distinction between object and effect restrictions was primarily evidential (as pointed out above).

Therefore, it follows that, even where competitors exchange strategic information which is capable of reducing uncertainty in the market, their conduct does not automatically qualify as a restriction by object. Instead, the exchange of information between competitors amounts to a by object infringement only if, based on an analysis of its content, objectives and legal and economic context, it can be established that there is a sufficient degree of harm to competition. On the other hand, the fact that the exchange of information is not associated with broader cartel conduct does not, as such, call into question the finding of a restriction by object. The "**standalone**" **exchange of information** can qualify as "by object", provided it displays a sufficient degree of harm.

If It Looks Like a Duck

AG *Rantos* concludes his opinion with an assessment of the two categories of information which the Portuguese banks had exchanged.

- **Commercial conditions of loans (credit spreads)** – Those, according to AG *Rantos*, were clearly of a strategic and commercially sensitive nature. Credit spreads were an essential element of pricing and there was "*sufficiently reliable and robust experience*" to support the view that such exchanges concerning future pricing (or certain parameters of pricing) were inherently anticompetitive, particularly in view of the especially high risk of collusion which they entailed. Given the nature of the information, the purpose of the exchange could be no other than to restrict competition. In terms of the legal and economic context, AG *Rantos* points out that the exchange took place in a highly concentrated market and in a closed loop, which created an information asymmetry to the disadvantage of non-participating banks. The fact that credit spread information was exchanged only sporadically was irrelevant. Therefore, according to AG Rantos, the exchange of information on credit spreads amounted to a restriction by object.
- **Production volumes** – The banks had exchanged individualized, disaggregated figures showing the amount of loans granted by each of them in the preceding month. According to AG *Rantos*, production volumes can, in principle, constitute strategic and sensitive information the exchange of which may restrict competition within the meaning of Article 101(1) TFEU. However, he takes a cautious view on whether and how likely the exchange of production data might have an anticompetitive object. The exchange of production volumes, even from the preceding month, did not relate to future conduct and, in principle, the exchange of past (or historic) data was unlikely to lead to a collusive outcome and was less harmful from the point of view of competition law, as it was unlikely to be indicative of competitors' future conduct or to provide a common understanding on the market. Therefore, says AG *Rantos*, although it could not be ruled out that exchanges relating to past events could also constitute restrictions by object, that would seem improbable. To establish an anticompetitive object, one needed to show that "*the exchange of recent individualized information on strategic variables [i.e., past production volumes], the awareness of which would be capable of reducing or eliminating the parties' uncertainty as to their future intentions on the market, in which case such an exchange could be equivalent to the exchange of information on future data [revealed trends]*", arguably a relatively restrictive test.

Unfortunately, AG *Rantos* misses to opportunity to weigh in on some of the more controversial and unclear issues that often arise in that context, namely when data becomes "historic" (i.e., how old does the data need to be and what the minimum time lag is between the reference period the data pertains to and its release) and in which circumstances data is "genuinely aggregated" (i.e., across how many companies data needs to be aggregated, whether there is a magic number that offers a safe harbor, three, five or even higher). However, he does conclude that the facts before him (set out in the reference request) are **insufficient to establish a restriction by object**. Interestingly, these facts include:

(i) The **monthly** exchange of **individualized** production volumes, i.e., disaggregated data on loans granted in euros in the **preceding month**;

(ii) Between Portugal's **six** largest banks;

(iii) With approx. **80% market coverage**;

(iv) In a **highly concentrated market** with the top 4 banks accounting for a combined share of 69%, the top 5 banks even of 75%.

Obviously, the above is not to say that the exchange of production volumes may never amount to a restriction by object and, in any case, it might still have restrictive effects (which is beyond AG *Rantos's* opinion and the issues referred to the ECJ in this case).

Until Next Time

It remains to be seen what ECJ's take on the reference request will be, particularly whether it may seize the opportunity to offer guidance on some of the key issues that practitioners come across when they assess information exchange systems under Article 101(1) TFEU (age of data, minimum aggregation, time lag for release, etc.). While we are not expecting an overhaul of the Commission's newly minted Horizontal Guidelines, we are eagerly awaiting what the ECJ has to say.

Until next time, careful who you talk to and don't forget to follow us on LinkedIn for your favorite EU Competition Law topics!

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