Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 14 January 2021[1]

**Case C‑790/19**

**Parchetul de pe lângă Tribunalul Braşov**
**v**
**LG,**
**MH,**
**joined parties:**
**Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Brașov**

(Request for a preliminary ruling from the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania))

(Reference for a preliminary ruling – Directive 2005/60/EC – Directive (EU) 2015/849 – Prevention of the use of the financial system for the purpose of money laundering and terrorist financing – Money laundering offences – Self-laundering – Active subject of the offence – Scope)

## I. Introduction

1. The present request for a preliminary ruling concerns the interpretation of Article 1(3)(a) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.[2]

2. This request was made in the context of criminal proceedings against LG and MH. It is alleged that on various dates between 2009 and 2013, they committed and participated in the criminal offence of money laundering. The question asked by the referring court concerns whether the perpetrator of a predicate offence from which the laundered money originates may also be the perpetrator of the offence of money laundering as that conduct is defined in Article 1(3)(a) of Directive 2015/849.

[1] Original language: English.

[2] OJ 2015 L 141, p. 73.

3. Nevertheless, in view of the date of the facts in dispute, it should be noted that the question will have to be analysed in the light of Article 1(2)(a) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.[3] Indeed, while Directive 2005/60 was the precursor to the present version of that directive – namely, Directive 2015/849 – it was Directive 2005/60 which was in force at the date those offences were apparently committed. It is, accordingly, that earlier directive alone to which we can turn in considering the present request for a preliminary ruling.

4. In addition, it must be noted that it appears from the request for a preliminary ruling that the defendant in the main proceedings has been convicted of the offence of money laundering referred to in Article 29(1)(a) of Lege nr. 656/2002 pentru prevenirea și sancționarea spălării banilor (Law No 656/2002 on the prevention and sanctioning of money laundering),[4] which transposed Directive 2005/60. As I have just observed, Directive 2015/849 was adopted subsequent to the period during which the offences at issue were committed. The referring court states, moreover, that the national law transposing Directive 2015/849 had not been published at the time the case was referred to the Court.

5. However, according to established case-law, in order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of European Union law to which the national court has not referred in its question.[5] In the context of the definition of money laundering, nothing really turns on this point so far as the present case is concerned as the definition of money laundering is substantially similar in both Directive 2005/60 and Directive 2015/849. It is against that general background that we can now turn to consider the relevant legal provisions.

## II. Legal context

### *A. International law*

6. Article 6(1) and (2) of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime signed in Strasbourg on 8 November 1990 (European Treaty Series, No 141) ('the Strasbourg Convention') states:

'1 Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

a the conversion or transfer of property, knowing that such property is proceeds [from criminal offences], for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

b the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds [from criminal offences];

[3] OJ 2005 L 309, p. 15.

[4] Published in the *Monitorul Oficial al României*, Part I, No 904, of 12 December 2002.

[5] See, to that effect, judgment of 25 April 2013, *Jyske Bank Gibraltar* (C-212/11, EU:C:2013:270, paragraph 38).

and, subject to its constitutional principles and the basic concepts of its legal system;

…

2 For the purposes of implementing or applying paragraph 1 of this article:

a it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

b it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

…'

7. Article 9(1) and (2) of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism signed in Warsaw on 16 May 2005 (Council of Europe Treaty Series, No 198) ('the Warsaw Convention') states:

'1 Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:

a the conversion or transfer of property, knowing that such property is proceeds [from criminal offences], for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

…

2 For the purposes of implementing or applying paragraph 1 of this article:

a it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

b it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;

…'

## *B. EU law*

### *1. Council Framework Decision 2001/500/JHA*

8. Article 1 of Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime [6] provides:

'In order to enhance action against organised crime, Member States shall take the necessary steps not to make or uphold reservations in respect of the following articles of the [Strasbourg Convention]:

…

(b) Article 6, in so far as serious offences are concerned. Such offences shall in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.'

### *2. Directive 2005/60*

9. Recitals 1 and 5 of Directive 2005/60 are worded as follows:

'(1) Massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market, and terrorism shakes the very foundations of our society. In addition to the criminal law approach, a preventive effort via the financial system can produce results.

…

(5) Money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the Community in this field should therefore be consistent with other action undertaken in other international fora. The Community action should continue to take particular account of the Recommendations of the Financial Action Task Force (hereinafter referred to as the FATF), which constitutes the foremost international body active in the fight against money laundering and terrorist financing. Since the FATF Recommendations were substantially revised and expanded in 2003, this Directive should be in line with that new international standard.'

10. Article 1(1) and (2) of Directive 2005/60 states:

'1. Member States shall ensure that money laundering and terrorist financing are prohibited.

[6] OJ 2001 L 182, p. 1.

2. For the purposes of this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:

(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

(c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

(d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points.'

### *3. Directive 2015/849*

11. According to recital 1 of Directive 2015/849:

'Flows of illicit money can damage the integrity, stability and reputation of the financial sector, and threaten the internal market of the Union as well as international development. Money laundering, terrorism financing and organised crime remain significant problems which should be addressed at Union level. In addition to further developing the criminal law approach at Union level, targeted and proportionate prevention of the use of the financial system for the purposes of money laundering and terrorist financing is indispensable and can produce complementary results.'

12. Article 1 of Directive 2015/849 provides:

'1. This Directive aims to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing.

2. Member States shall ensure that money laundering and terrorist financing are prohibited.

3. For the purposes of this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:

(a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;

(c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity;

(d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c).

…'

### *4. Directive 2018/1673*

13. According to recital 11 of Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law,[7] 'Member States should ensure that certain types of money laundering activities are also punishable when committed by the perpetrator of the criminal activity that generated the property ("self-laundering"). In such cases, where, the money laundering activity does not simply amount to the mere possession or use of property, but also involves the transfer, conversion, concealment or disguise of property and results in further damage than that already caused by the criminal activity, for instance by putting the property derived from criminal activity into circulation and, by doing so, concealing its unlawful origin, that money laundering activity should be punishable'.

14. Article 3 of Directive 2018/1673, entitled 'Money laundering offences' provides:

'1. Member States shall take the necessary measures to ensure that the following conduct, when committed intentionally, is punishable as a criminal offence:

(a) the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity;

(c) the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity.

2. Member States may take the necessary measures to ensure that the conduct referred to in paragraph 1 is punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity.

…

5. Member States shall take the necessary measures to ensure that the conduct referred to in points (a) and (b) of paragraph 1 is punishable as a criminal offence when committed by persons who committed, or were involved in, the criminal activity from which the property was derived.'

[7] OJ 2018 L 284, p. 22.

### *C. Romanian law*

15. On the date of the relevant facts, Article 29(1) of Law No 656/2002 on the prevention and sanctioning of money laundering, as amended, was worded as follows:

‘The following shall constitute the offence of money laundering, punishable by a custodial sentence of between 3 and 12 years:

(a) the conversion or transfer of property, knowing that such property is derived from the commission of criminal offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting the author of the offence from which such property is derived in avoiding prosecution, trial or execution of a sentence;

(b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from the commission of a criminal offence;

(c) the acquisition, possession or use of property, knowing that such property is derived from the commission of a criminal offence.’

## III. The facts of the main proceedings

16. On 15 November 2018, the Tribunalul Brașov (Regional Court of Brașov, Romania) sentenced the defendant LG to a term of imprisonment of one year and nine months, with a conditional suspension of execution of the sentence following his conviction in respect of the offence of money laundering provided for in Article 29(1)(a) of Law No 656/2002 on the prevention and sanctioning of money laundering.

17. That court found that the defendant LG, acting as company director, had committed the offence of tax evasion and that he had also laundered the money obtained therefrom. That court also found that during the period between 2009 and 2013, LG failed to record tax documents proving the receipt of income in the accounts of a company of which he was the manager. This omission was held to constitute the offence of tax evasion.

18. The sums of money resulting from the tax evasion were subsequently transferred to the account of another company, represented by MH, and then withdrawn by LG and MH. This transfer was carried out on the basis of a contract of assignment of debt concluded between LG, the company of which he was manager and the company of which MH was manager. Pursuant to this contract, the sums owed to LG by the company of which he was manager were paid by clients of the said company into the account of the company managed by MH.

19. The Tribunalul Brașov (Regional Court of Brașov) also ordered that criminal proceedings against the defendant LG for tax evasion be closed, LG having made good the relevant loss. The other co-defendant, MH, was, however, acquitted by that court. It considered that it had not been established that she had been aware of the fact that the defendant LG had laundered money derived from tax evasion.

20. The Parchetul de pe lângă Tribunalul Brașov (Public Prosecutor of the Regional Court of Brașov, Romania) ('the Public Prosecutor'), the defendant LG and the Agenția Națională de Administrare Fiscală, Direcția Generală Regională a Finanțelor Publice Brașov (national tax administration agency, regional directorate general of public finances Brașov, Romania) ('the civil party') appealed against that judgment before the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania) ('the referring court').

21. The Public Prosecutor takes issue with the judgment, arguing in particular that there were no grounds for acquitting the defendant MH. The civil party takes issue with the judgment because its civil-law claims were partly dismissed. LG has subsequently withdrawn his appeal.

22. The referring court explains that it is seeking an interpretation of Directive 2015/849 – even though it has not been transposed into Romanian law within the prescribed period – since that directive defines the offence of money laundering in the same way as Directive 2005/60, which was in force at the material time and was transposed into Law No 656/2002 on the prevention and sanctioning of money laundering.

23. According to the referring court, it is necessary to submit a reference for a preliminary ruling because there are conflicting interpretations of Article 29(1) of Law No 656/2002 on the prevention and sanctioning of money laundering, inasmuch as diverging solutions are to be found in judicial practice. In those circumstances, the present dispute could potentially be resolved in various diametrically opposed ways, depending on whether or not the Court takes the view that the essential feature of the typical character of the offence is present.

24. In the referring court's view, the same person cannot be guilty both of the money-laundering offence, in one or other of its forms, and also of the predicate offence. The referring court notes that such an interpretation would derive not only from the preamble, but also from a grammatical, semantic and teleological analysis of Article 1(3) of Directive 2015/849. In addition, according to the referring court, to consider that the active subject of the predicate offence could also be the active subject of the money laundering offence would be to disregard the *ne bis in idem* principle.

## IV. The request for a preliminary ruling and procedure before the Court

25. It is in those circumstances that, by decision of 14 October 2019, received at the Court on 24 October 2019, the Curtea de Apel Brașov (Court of Appeal, Brașov) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 1(3)(a) of Directive 2015/849 be interpreted as meaning that the person who commits the act which constitutes the offence of money laundering must always be a person other than the person who commits the predicate offence (the alleged offence from which is derived the money that is laundered)?'

26. After the Court posed a question concerning the possible impact of the withdrawal of LG's appeal on the rest of the proceedings, the referring court confirmed by a letter received at the Court on 16 January 2020, that, in view of the appeals lodged by the Public Prosecutor and the civil party, this withdrawal had no consequences for the relevance of the reference for a preliminary ruling. Any examination of those appeals would require the referring court to rule on the existence of the elements relating to the adequacy between the facts complained of and the facts

alleged against LG, and also against MH, the unlawfulness and imputability, with regard to the offence of money laundering, so that any resolution of the merits of the case itself would depend on the answer given by the Court.

27. Written observations were submitted by the Public Prosecutor, the Czech, Polish and Romanian Governments, and by the European Commission.

28. At the end of the written part of the procedure, the Court considered that it had sufficient information to proceed to judgment without a hearing, in accordance with Article 76(2) of the Court's Rules of Procedure.

## V. Analysis

### *A. Admissibility of the request for a preliminary ruling*

29. In its written observations, the Romanian Government invokes three grounds of inadmissibility. First, there is a doubt as to the admissibility of the reference due to the withdrawal of LG's appeal. Second, it cannot be asserted that the Court has all of the information necessary to give its answer. Third, there are no divergent interpretations in national case-law and the Court's judgment would therefore not be useful to the referring court.

30. According to settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling. It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. [8]

31. In the present case, it is apparent from the request for a preliminary ruling and from the answer of the referring court to the Court's question that a dispute is still pending before the referring court and that, in order to resolve that dispute, that court will have to rule, in substance, on the question whether the active subject of the money laundering offence can be that of the predicate offence in the light of Directive 2005/60. Consequently, it is not apparent that the interpretation of EU law sought is unrelated to the reality or the subject matter of the main proceedings or that the problem is of a hypothetical nature.

[8] See, to that effect, judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraphs 18 to 20), and of 23 January 2019, *M.A. and Others* (C-661/17, EU:C:2019:53, paragraphs 48 to 50).

32. It must, moreover, be noted that the facts presented in the request of the referring court enable an understanding of what is at stake in the case and have, in any event, enabled the governments of the Member States and the Commission to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. Finally, it might be also added that it is not for the Court, in the context of a preliminary ruling, to rule on the reality or on the scope of the different interpretations of national law relied on by the referring court.

33. In those circumstances, I consider that the request for a preliminary ruling should be considered to be admissible.

### *B. Analysis of the question asked*

34. By its question, the referring court asks, in substance, whether the person who commits an act constituting money laundering, as defined by Article 1(2)(a) Directive 2005/60, may be the perpetrator of the offence from which the laundered money derives. I propose now to consider this issue.

#### *1. Preliminary remark on the scope of Directive 2005/60*

35. First of all, it must be noted that while, admittedly, Directive 2005/60 is founded on a dual legal basis (namely, Article 47(2) EC [now Article 53(1) TFEU], and Article 95 EC [now Article 114 TFEU]), and seeks therefore to ensure the proper functioning of the internal market, its main aim is the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, as is apparent both from its title and the preamble.[9] In that context, it is clear that, while Article 1(1) of Directive 2005/60 provides that Member States must ensure that money laundering and terrorist financing are prohibited, this provision does not establish an obligation to impose criminal penalties for the conduct defined in Article 1(2) of the same directive.

36. Indeed, the provisions of this directive are not measures of a penal nature – unlike Directive 2018/1673. On the contrary, as stated above, the provisions of Directive 2005/60 are essentially preventive in nature, in so far as they seek to establish, taking a risk-based approach, a body of preventive and dissuasive measures to combat money laundering and terrorist financing effectively and to safeguard the soundness and integrity of the financial system. Those measures are intended to prevent or, at the very least, to restrict as far as possible those activities, by establishing, for that purpose, barriers at all stages which those activities may include, against money launderers and terrorist financers.[10] While imposing the prohibition of certain conduct constituting money laundering, Directive 2005/60 nevertheless leaves Member States free to choose the means by which effect is given to this prohibition. It does not, as such, require that Member States criminalise such conduct, although, of course, they are free – in principle, at least – to do so.

37. In those circumstances, it is clear that Directive 2005/60 does not require Member States to impose criminal sanctions on the perpetrator of money laundering as defined in Article 1(2)(a) of Directive 2005/60 – namely, the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of

[9] See, to that effect, judgment of 25 April 2013, *Jyske Bank Gibraltar* (C-212/11, EU:C:2013:270, paragraph 46).

[10] See, to that effect, judgment of 17 January 2018, *Corporate Companies* (C-676/16, EU:C:2018:13, paragraph 26).

concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action – where he or she is also the perpetrator of the predicate offence.

38. Having said that, it must be recalled that, according to settled case-law of the Court, the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins.[11] However, all these factors of interpretation lead me to the conclusion that, while Article 1(2)(a) of Directive 2005/60 does not require a criminal sanction in the circumstances described in the previous point, neither does it preclude the enactment of such penal legislation by the Member States.

### *2. Whether Member States may criminalise money laundering where the perpetrator of this offence is also the perpetrator of the predicate offence*

39. It should be noted, first, that the wording of Article 1 of Directive 2005/60 does not expressly prohibit Member States from enacting legislation which criminalises the offence of money laundering where its perpetrator is also the perpetrator of the predicate offence.

40. Indeed, as I have already explained in my preliminary remark, the only obligation incumbent on the Member States under Article 1(1) of Directive 2005/60 is one (which taken in conjunction with paragraph (2)(a) of the same article) which is to prohibit 'the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action'. While the wording of Article 1 of Directive 2005/60 therefore does not require Member States to criminalise the conduct described in paragraph 2(a), it does not prevent them from doing so, irrespective of the fact that the perpetrator of that conduct is also the perpetrator of the predicate offence from which the laundered money originates.

41. In addition, it cannot be overlooked that Article 5 of Directive 2005/60 expressly admits that the Member States may adopt or retain in force stricter provisions in the field covered by this directive to prevent money laundering and terrorist financing. As the Court has previously held, that provision is included in Chapter I of the directive, headed 'Subject matter, scope and definitions', and applies therefore to *all the provisions* in the field covered by Directive 2005/60 in order to prevent money laundering and terrorist financing.[12]

42. Finally, contrary to the views that have been expressed by the referring court, I do not think that the specification in Article 1(2)(a) of Directive 2005/60 that the perpetrator of money laundering as defined in that provision must 'know … that such property is derived from criminal activity' necessarily contradicts that interpretation. Indeed, this very precise prohibition in itself indicates that the EU legislature was at pains to ensure that only intentional acts were prohibited, as specified in the first sentence of Article 1(2) of Directive 2005/60. While this condition will necessarily be met where the perpetrator is one and the same person, it is useful to bear this in mind in the event that the two offences – namely, the predicate offence and the money laundering

[11] See, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 113).

[12] See, to that effect, judgment of 10 March 2016, *Safe Interenvios* (C-235/14, EU:C:2016:154, paragraph 78).

offence – are committed by two distinct persons. In passing, I would note, moreover, that the EU legislature has considered it appropriate to keep this precision in Article 1(3)(a) of Directive 2015/849 and Article 3(1)(a) of Directive 2018/1673, even though, in this latter directive, the Member States are for the first time expressly obliged to create the criminal offence of self-money laundering.

43. Secondly, the criminalisation of self-laundering is also in line with the objectives of Directive 2005/60. Indeed, as already mentioned, this directive is based in particular on Article 95 EC (now Article 114 TFEU) which relates to the proper functioning of the internal market. This is readily explained as money laundering is likely to distort financial markets and competition.[13] In that context, self-laundering can indeed be considered as an unfair competitive behaviour and its criminalisation can protect the functioning of the internal market.[14] I repeat, therefore, that it was in principle open to Romania to provide for such an offence in its national law.

44. Thirdly, it must be pointed out that Directive 2005/60 was adopted in an international context, in order to apply and make binding in the European Union the recommendations of the 'Financial Action Task Force' (FATF), which is the main international body combating money laundering.[15] As expressly specified in recital 5 of Directive 2005/60, 'the FATF Recommendations were substantially revised and expanded in 2003 [and] this directive should be in line with that new international standard'.

45. However, according to the first of these FATF Recommendations, countries *may* provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law. Given the way this possibility is formulated, the non-criminalisation of self-laundering should be seen as an exception. In those circumstances, the absence of an explicit specification on the prohibition of self-laundering – as in Directive 2005/60 – must be considered as an (implicit) authorisation to criminalise such conduct.[16]

46. In addition, in this international context, one cannot ignore the Strasbourg Convention, which was transposed into the legal order of the European Union by Council Framework Decision 2001/500/JHA. In that regard, it can be observed that Article 6(1)(a) of the Strasbourg Convention is worded in a similar manner to Article 1(2)(a) of Directive 2005/60 and that – as the FATF Recommendations provide – Article 6(2)(b) of the Strasbourg Convention does not prohibit the criminalisation of self-laundering but indicates on the contrary that it *may* be provided that the offences set forth in Article 6(1) of the same Convention do not apply to persons who committed the predicate offence.[17] However, Article 1 of Council Framework Decision 2001/500/JHA expressly provides that Member States shall take the necessary steps not to make or uphold reservations in respect of Article 6 of the Strasbourg Convention, in so far as serious offences are concerned.

[13] See, to that effect, Hyttinen, T., 'A European Money Laundering Curiosity: Self-Laundering in Finland', vol. 8, *EuCLR*, Nomos, 2018, pp. 268-293, esp. p. 273.

[14] On this question, see Maugeri, A.-M., 'Self-laundering of the proceeds of tax evasion in comparative law: Between effectiveness and safeguards', vol. 9(1), *New Journal of European Criminal Law*, SAGE Journals, 2018, pp. 83-108, esp. p. 84 and references in footnote 5.

[15] See, to that effect, judgment of 25 April 2013, *Jyske Bank Gibraltar* (C-212/11, EU:C:2013:270, paragraph 46) and recital 5 of Directive 2005/60.

[16] See, to that effect, Hyttinen, T., 'A European Money Laundering Curiosity: Self-Laundering in Finland', vol. 8, *EuCLR*, 2018, pp. 268-293, esp. p. 277.

[17] The same was provided for in Article 9(1) and (2) of the Warsaw Convention in 2005.

47. Consequently, in the light of the forgoing considerations, I conclude that, having regard to the wording of Article 1(2)(a) of Directive 2005/60, the objective pursued by that directive and the international and legislative contexts in which it is situated, Article 1(2)(a) of Directive 2005/60 must be interpreted as not precluding the enactment of national legislation providing that the person who committed the predicate offence from also being convicted of the money laundering derived from that predicate offence.

48. In view of the wording of Article 1 of Directive 2005/60, while this is ultimately a matter for the Member States, I see no reason why a Member State should not elect to transpose the obligation provided for by this provision by means of national law providing for criminal offences of this kind.

49. It remains to be seen, however, whether this interpretation does not contravene the *ne bis in idem* principle, as argued, in particular, by the referring court.

### *3. Considerations on the* ne bis in idem *principle*

50. It is not disputed that Law No 656/2002 on the prevention and sanctioning of money laundering transposes Directive 2005/60 into Romanian law. Article 29(1) of this law constitutes, in particular, implementation of Article 1(1) and (2) of Directive 2005/60 and, therefore, of EU law for the purposes of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Therefore, the Romanian law must respect the fundamental right guaranteed by Article 50 of the Charter which provides that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. [18]

51. As clearly stated by the Court, it follows from the very wording of Article 50 of the Charter that it prohibits prosecuting or imposing criminal sanctions on the same person more than once for the same offence. According to the Court's case-law, the relevant criterion for the purposes of assessing the existence of the same offence is the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned. [19]

52. However, in the case of the criminalisation of money laundering, I do not think that the constituent act of the laundering offence as provided for in Article 1(2)(a) of Directive 2005/60 and the material fact of the predicate offence – which is the precondition for it – are identical in the sense indicated in the previous point, that is to say, 'a fact which is in substance the same'. [20] Indeed, from the moment when the facts of the offence differ, even if they are committed by a single person on, or from, a single object, there is nothing to prevent them from being prosecuted separately. [21]

[18] See, to that effect, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 21).

[19] See, to that effect, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraphs 34 and 35).

[20] My translation (in the original language 'un fait en substance le même'). See Michiels, O., 'Le cumul de sanctions: le principe *non bis in idem* à l'aune de la jurisprudence de la Cour de justice et de la Cour européenne des droits de l'homme', in *L'Europe au présent ! Liber amicorum Melchior Wathelet*, Bruylant, 2018, pp. 555-578, esp. p. 565.

[21] See, to that effect, Beaussonie, G., 'Quelques observations à partir de (et non sur) l'"auto-blanchiment"', N°4, *Actualité Juridique Pénale*, 2016, p. 192.

53. While the mere possession or use of property derived from criminal activity is referred to in Article 1(2)(c) of Directive 2005/60, money laundering, however, as defined in subparagraphs (a) and (b) of this provision, concerns the conversion or transfer of property for the purpose of concealing or disguising its illicit origin and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of such property. In so far as Article 1(2)(a) and (b) of Directive 2005/60 is concerned, money laundering activity therefore does indeed involve the conversion and transfer of illicitly obtained assets and their concealment and disguise through the financial system. As such, these activities therefore clearly constitute an additional criminal act distinguishable from the predicate offence and which, moreover, cause additional or a different type of damage than that already caused by the predicate offence.

54. This is illustrated in the context of tax evasion. One offence may be committed by the wrongful concealment of taxable income. A further – and, critically, different – offence may be committed where the self-same taxpayer endeavours to launder the proceeds of this offence through the financial system.

55. This is, moreover, the restrictive choice made by the EU legislature with regard to the criminalisation of self-laundering. Indeed, it may be noted in passing that while the mere acquisition, possession or use of property derived from criminal activity is now to be punished as a criminal offence under Article 3(1)(c) of Directive 2018/1673, such acts are excluded from the obligation to criminalise the self-laundering in Article 3(5) of the same directive. [22]

56. Consequently, in the light of the forgoing considerations, I uphold the conclusion that, without contravening the *ne bis in idem* principle, Article 1(2)(a) of Directive 2005/60 must be interpreted as not precluding that the person who commits the act which constitutes the offence of money laundering be the same person as the person who commits the predicate offence.

## VI. Conclusion

57. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the question referred by the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania) as follows:

Article 1(2)(a) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing must be interpreted as not precluding national legislation which provides that the person who commits the act which constitutes the offence of money laundering may be the same person as the person who commits the predicate offence.

[22] See also recital 11 of Directive 2018/1673 and Explanation of Article 3 of the Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law (COM(2016) 826 final).