Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

25 April 2013 *

(Prevention of the use of the financial system for the purposes of money laundering and terrorist financing — Directive 2005/60/EC — Article 22(2) — Decision 2000/642/JHA — Requirement to report suspicious financial transactions applicable to credit institutions — Institution operating under the rules on the freedom to provide services — Identification of the national financial information unit responsible for the collection of information — Article 56 TFEU — Obstacle to freedom to provide services — Overriding requirements in the public interest — Proportionality)

In Case C-212/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 21 March 2011, received at the Court on 9 May 2011, in the proceedings

Jyske Bank Gibraltar Ltd

v

Administración del Estado,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, Acting President of the Third Chamber, K. Lenaerts, E. Juhász, J. Malenovský and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2012,

after considering the observations submitted on behalf of:

— Jyske Bank Gibraltar Ltd, by M. Rubio de Casas, J. M. Olivares Blanco and J. de la Calle y Peral, abogados, and by D. Bufalá Balmaseda, procurador,

— the Spanish Government, by A. Rubio González and N. Díaz Abad, acting as Agents,

— the French Government, by N. Rouam and G. de Bergues, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Urbani Neri, avvocato dello Stato,

* Language of the case: Spanish.

— the Polish Government, by B. Czech and M. Szpunar, acting as Agents,

— the Romanian Government, by R. H. Radu, A. Wellman and R. Nitu, acting as Agents,

— the European Commission, by J. Baquero Cruz, E. Traversa, S. La Pergola and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 October 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 22(2) 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 (OJ 2005 L 309, p. 15).

2 The request has been made in proceedings between Jyske Bank Gibraltar Ltd ('Jyske'), a credit institution situated in Gibraltar operating in Spain under the rules on the freedom to provide services, and the Administración del Estado concerning the decision of the Consejo de Ministros (Spanish Council of Ministers) of 23 October 2009 which rejected the application for review brought against the decision of that Consejo de Ministros of 17 April 2009 imposing on Jyske two financial penalties for a total amount of EUR 1 700 000 and two public reprimands following a refusal or lack of diligence to provide the information requested by the Servicio Ejecutivo de la Comisión para la Prevención de Blanqueo de Capitales (Executive service for the prevention of money laundering) ('the Servicio Ejecutivo').

Legal context

European Union law

3 Article 6(1) and (2) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (OJ 2001 L 344, p. 76) ('Directive 91/308') provided:

'(1) Member States shall ensure that the institutions and persons subject to this Directive and their directors and employees cooperate fully with the authorities responsible for combating money laundering:

(a) by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering;

(b) by furnishing those authorities, at their request, with all necessary information, in accordance with the procedures established by the applicable legislation.

(2) The information referred to in paragraph 1 shall be forwarded to the authorities responsible for combating money laundering of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated by the institutions and persons in accordance with the procedures provided for in Article 11(1)(a) shall normally forward the information.'

4 Directive 91/308 was repealed and replaced by Directive 2005/60, recital 40 in the preamble to which is worded as follows:

‘Taking into account the international character of money laundering and terrorist financing, coordination and cooperation between [financial intelligence units (‘FIU’)] as referred to in Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [(OJ 2000 L 271, p. 4)], including the establishment of an EU FIU-net, should be encouraged to the greatest possible extent. To that end, the Commission should lend such assistance as may be needed to facilitate such coordination, including financial assistance.’

5 Under Article 5 of that directive, ‘[t]he Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing’.

6 Article 7 of that directive provides:

‘The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:

(a) when establishing a business relationship;

(b) when carrying out occasional transactions amounting to EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;

(c) when there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold;

(d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.’

7 Under Article 21 of that directive:

‘(1) Each Member State shall establish an FIU in order effectively to combat money laundering and terrorist financing.

(2) That FIU shall be established as a central national unit. It shall be responsible for receiving (and to the extent permitted, requesting), analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering, potential terrorist financing or are required by national legislation or regulation. It shall be provided with adequate resources in order to fulfil its tasks.

(3) Member States shall ensure that the FIU has access, directly or indirectly, on a timely basis, to the financial, administrative and law enforcement information that it requires to properly fulfil its tasks.’

8 Article 22 of Directive 2005/60 provides:

‘(1) Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:

(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;

(b) by promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.

(2) The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated in accordance with the procedures provided for in Article 34 shall normally forward the information.'

9 As is apparent from Article 3(1) and (2)(f) of Directive 2005/60, the institutions referred to in Article 22 thereof also include branches within the meaning of Article 1(3) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1). A branch is defined in the latter provision as a place of business which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions.

10 Article 1 of Decision 2000/642 provides:

'(1) Member States shall ensure that FIUs, set up or designated to receive disclosures of financial information for the purpose of combating money laundering shall cooperate to assemble, analyse and investigate relevant information within the FIU on any fact which might be an indication of money laundering in accordance with their national powers.

(2) For the purposes of paragraph 1, Member States shall ensure that FIUs exchange, spontaneously or on request and either in accordance with this Decision or in accordance with existing or future memoranda of understanding, any available information that may be relevant to the processing or analysis of information or to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved.

(3) Where a Member State has designated a police authority as its FIU, it may supply information held by that FIU to be exchanged pursuant to this Decision to an authority of the receiving Member State designated for that purpose and being competent in the areas mentioned in paragraph 1.'

11 Under Article 4 of that decision:

'(1) Each request made under this Decision shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. The FIU shall specify in the request how the information sought will be used.

(2) When a request is made in accordance with this Decision, the requested FIU shall provide all relevant information, including available financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between Member States.

(3) An FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Member State or, in exceptional circumstances, where divulgation of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Member State concerned or would otherwise not be in accordance with fundamental principles of national law. Any such refusal shall be appropriately explained to the FIU requesting the information.'

12 Article 10 of that decision states that it shall apply to Gibraltar and that, to that effect, notwithstanding Article 2 thereof, the United Kingdom of Great Britain and Northern Ireland may notify to the General Secretariat of the Council of the European Union an FIU in Gibraltar.

National law

13 Directive 91/308 was transposed into Spanish law by Law 19/1993 on specific measures for preventing money laundering (Ley 19/1993 sobre determinadas medidas de prevención de blanqueo de capitales) of 28 December 1993 (BOE No 311 of 29 December 1993, p. 37327).

14 According to the second paragraph of Article 2(1) of Law 19/1993:

'The following shall be subject to the obligations laid down in this law:

(a) Credit institutions

…

Foreign persons or institutions conducting activities in Spain of the same type as those conducted by the aforementioned persons or institutions, whether through branches or by providing services without a permanent establishment.

The persons in question shall also be subject to the requirements laid down in this law for operations carried out through agents or other legal or natural persons acting as their intermediary.'

15 With regard to the information requirements, Article 3 of Law 19/1993 provided as follows:

'The persons referred to in the above article are subject to the following requirements:

…

(4) To cooperate with [the Servicio Ejecutivo] and, to that end:

(a) to notify it, on their own initiative, of any fact or transaction which is, or which shows indications of being, connected with the laundering of money deriving from the activities listed in Article 1. The notification shall normally be effected by the person or persons designated by the persons or institutions subject to the obligations hereunder in accordance with the procedures referred to in paragraph 7 of this Article. That person or those persons shall appear in all legal or administrative proceedings of whatever type concerning the information contained in the notification or any other supplementary information which may relate to it.

Specific circumstances or transactions of which [the Servicio Ejecutivo] must always be notified shall be defined by regulation.

Transactions which are obviously inconsistent with the nature, volume of activity or previous dealings of customers shall also be notified, provided that no financial, professional or business reason for such transactions emerges from the special examination referred to in paragraph 2, in relation to the activities listed in Article 1 of this law.

(b) to provide such information as [the Servicio Ejecutivo] requests in the performance of its function.

…'

16 Article 16(3) of that law provided:

‘In accordance with the guidelines established by the Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias, [the Servicio Ejecutivo] and, where appropriate, the Secretariat of [that commission] shall cooperate with the authorities performing a similar function in other States, seeking to obtain, in particular, the cooperation of the authorities of those States whose sovereignty extends to territory neighbouring that of [the Kingdom of] Spain …’

17 Law 19/1993 was repealed by law 10/2010 on the prevention of money laundering and the financing of terrorism (Ley de prevención del blanqueo de capitales y de la financiación del terrorismo) of 28 April 2010 (BOE No 103 of 29 April 2010, p. 37458), the purpose of which was to transpose Directive 2005/60 into Spanish law. Pursuant to Article 48(3) of that law, the Servicio Ejecutivo undertakes to collaborate with its equivalent bodies abroad. The exchange of information is to take place, in particular, in accordance with Decision 2000/642 and the principles of the informal group, where the FIUs of various states, including Member States, meet and which acts also as a forum for the exchange of information, and for cooperation between the various FIUs, known as the ‘Egmont group’.

18 Article 5(2)(c) of Royal Decree 925/1995, approving the regulation implementing Law 19/1993, of 28 December 1993, on specific measures for preventing money laundering (Real Decreto 925/1995 por el que se aprueba el Reglamento de la Ley 19/1993, de 28 de diciembre, sobre determinadas medidas de prevención del blanqueo de capitales), of 9 June 1995 (BOE No 160, of 6 July 1995, p. 20521), requires that the Servicio Ejecutivo be informed of account transfers to or from tax havens.

19 Article 7(2)(b) of that royal decree provides as follows:

‘Persons or institutions subject to the obligations hereunder shall, in any event, notify the Servicio Ejecutivo on a monthly basis of:

…

(b) transactions with or by natural or legal persons who are resident in territories or countries which are designated for such purposes by order of the Ministro de Economía y Hacienda, or who are acting on behalf of such resident persons, and transactions involving transfers of funds to or from such territories or countries, regardless of the residence of the parties, provided that the value of such operations is in excess of EUR 30 000 or its equivalent in foreign currency.’

20 Territories regarded as tax havens and uncooperative territories were previously specified by Royal Decree 1080/1991 of 5 July 1991 (BOE No 167, of 13 July 1991, p. 233371), and by order ECO/2652/2002 of 24 October 2002 on the implementation of disclosure obligations in relation to operations with certain States to the Servicio Ejecutivo of the Commission for the prevention of money laundering and monetary offences (Orden ECO/2652/2002 por la que se desarrollan las obligaciones de comunicación de operaciones en relación con determinados países al Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias) (BOE No 260 of 30 October 2002, p. 38033). Gibraltar appears on this list.

21 According to the Tribunal Supremo, Article 5 of the Crime (Money Laundering and Proceeds) Act 2007, which transposes directive 2005/60, requires adherence to banking confidentiality.

The dispute in the main proceedings and the question submitted for a preliminary ruling

22 Jyske, a branch of the Danish bank NS Jyske Bank, is a credit institution established in Gibraltar, where it comes under the supervision of the Financial Services Commission.

23 According to the order for reference, Jyske operated, at the time of the facts in the main proceedings, in Spain under the rules on the freedom to provide services, that is to say, without being established there.

24 On 30 January 2007, the Spanish FIU, namely the Servicio Ejecutivo, informed Jyske that if it did not designate an agent authorised to deal with it, the Servicio Ejecutivo would have to investigate the structure of Jyske's organisation and procedures with regard to activities carried out by it in Spain under the freedom to provide services. At this time, the Servicio Ejecutivo asked Jyske to provide, by 1 March 2007, documents and information relating, in particular, to the identity of its customers.

25 That request was made following a report of the Servicio Ejecutivo of 24 January 2007, which stated that Jyske was carrying on in Spain a substantial operation comprising, inter alia, the grant of mortgages for the purchase of property in Spain. The report stated that 'in order to develop such an operation in Spain, the institution has dual support or backing, namely from the branch in Spain of the parent company and from two firms of lawyers in Marbella (Spain). According to information in the public domain, the proprietor of one of the two firms was investigated for money laundering offences and his name appears, as does the name of the other firm of lawyers mentioned above, in connection with a number of operations divulged to the Servicio Ejecutivo by other persons subject to a duty of disclosure regarding evidence of money laundering.' In the light of those facts, the Servicio Ejecutivo considered that there was a very high risk that Jyske was being used for money laundering operations in the context of its activities in Spain under the freedom to provide services. According to the report of the Servicio Ejecutivo of 24 January 2007, the mechanism used for this purpose consisted in creating in Gibraltar 'corporate structures ultimately intended to prevent detection of the identity of the actual and final owner of property acquired in Spain, essentially on the Costa del Sol, and of … the origin of the monies used for the purposes of such acquisition.'

26 On 23 February 2007, Jyske sent a communication to the Servicio Ejecutivo informing it that it had applied to its supervisory authority, the Financial Services Commission, for an opinion to establish whether it was entitled to provide such information without infringing Gibraltar legislation on banking confidentiality and the protection of personal data. On 14 March 2007, that commission requested the Servicio Ejecutivo to enter into a process of mutual cooperation. By letter of 2 April 2007, the Servicio Ejecutivo informed that commission that Jyske was subject to obligations in relation to its activities in Spain.

27 On 12 June 2007, Jyske sent the Servicio Ejecutivo some of the information requested. However, it refused to provide the data on the identity of its clients, relying on the banking secrecy rules applicable in Gibraltar. Nor did the information include documentation on suspicious transactions carried out by Jyske since 1 January 2004 in the context of its activities under the freedom to provide services in Spain.

28 Consequently, on 25 October 2007, the general secretariat of the Servicio Ejecutivo opened an investigation into Jyske, accusing it, in particular, of having infringed the provisions of Law 19/1993.

29 Following that investigation, on 17 April 2009, the Consejo de Ministros determined that Jyske had, by failing to fulfil its disclosure obligations under Law 19/1993, committed a very serious offence, defined as follows: '[the] refusal or lack of diligence to supply precise information requested in writing by the Servicio Ejecutivo' and '[the] failure to comply with its obligation to supply information relating to specific cases established by way of a regulation (systematic reports)'. Consequently it made an order against Jyske for two public reprimands and two financial penalties for a total amount of EUR 1 700 000.

30 On 30 April 2009, Jyske brought an appeal against that decision before the Consejo de Ministros, which was dismissed by the latter on 23 October 2009. Jyske then brought an administrative appeal before the Tribunal Supremo. Jyske claims, in support of that appeal, that, under Directive 2005/60, it

is only subject to an obligation of disclosure vis-à-vis the Gibraltar authorities, and that, in so far as the Spanish legislation extends that obligation to credit institutions operating in Spain under the freedom to provide services, it does not comply with the provisions of that directive.

31 It is in those circumstances that the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 22(2) of Directive 2005/60/EC … permit a Member State to make it a mandatory requirement that the information which must be provided by credit institutions operating in its territory without a permanent establishment be forwarded directly to its own authorities responsible for the prevention of money laundering, or, on the other hand, must the request for information be directed to the [FIU] of the Member State in whose territory the addressee institution is situated?'

The question referred for a preliminary ruling

Admissibility

32 The Kingdom of Spain considers that the question referred is inadmissible because it is purely hypothetical and has no connection with the subject-matter of the main proceedings, to the extent that it concerns the interpretation of Article 22(2) of Directive 2005/60, which should have been transposed by 15 December 2007 at the latest, although the requests for information sent to Jyske took effect between 30 January and 12 June 2007.

33 In that regard, it must be borne in mind that, according to settled case-law, 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 European Union law, the Court is in principle required to give a ruling (Case C-416/10 *Križan and Others* [2013] ECR, paragraph 53 and the case-law cited).

34 It follows that questions concerning European Union law 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 European Union law that is sought is unrelated to the actual facts of the main action or its purpose, 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 to it (Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 36; and Case C-509/10 *Geistbeck* [2012] ECR, paragraph 48).

35 Directive 2005/60, interpretation of which is requested, entered into force on 15 December 2005, that is to say, before the requests for information sent by the Servicio Ejecutivo to Jyske on 30 January and 12 June 2007. Moreover, although, admittedly, the period allowed for transposition of that directive expired only on 15 December 2007, the main proceedings concern nevertheless the lawfulness of the decision adopted against Jyske by the Consejo de Ministros on 23 October 2009, that is to say, after the expiry of that period for transposition.

36 It follows that the request for a preliminary ruling is admissible.

Substance

37 By its question, the referring court asks, in essence, whether Article 22(2) of Directive 2005/60 must be interpreted as precluding a Member State's national legislation which requires credit institutions carrying on their activities under the freedom to provide services in that Member State to communicate information required for the purpose of combating money laundering directly to the FIU of that Member State.

38 It should be noted, first of all, that, 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 (Case C-230/06 *Militzer & Münch* [2008] ECR I-1895, paragraph 19).

39 In the present case, the answer to the question submitted does not depend solely on the interpretation of Article 22(2) of Directive 2005/60, but requires that account be taken, also, first, of all of the provisions of that directive, and of Decision 2000/642, and, secondly, of Article 56 TFEU.

Directive 2005/60

40 Concerning Article 22(2) of Directive 2005/60, it is expressly apparent from the wording thereof that the institutions and persons subject to the requirements arising from the latter must forward information necessary to prevent money laundering and terrorist financing to the FIU of the Member State in whose territory they are situated.

41 Contrary to what the Spanish Government claims, the wording 'the Member State in whose territory the institution or person forwarding the information is situated', cannot be interpreted as referring, in the case of an activity carried out by the entity concerned under the rules on the freedom to provide services, to the territory of the host Member State where the activity is performed.

42 First, that reading does not correspond to the ordinary meaning of the words in question. Secondly, Article 22(2) of that directive does not make a distinction between services provided in the Member State where the entity is situated and those performed in other Member States under the rules on the freedom to provide services, nor, a fortiori, does it state, with regard to services provided under the rules on the freedom to provide services, that the competent FIU must be that of the Member State in which those services are provided.

43 It follows that Article 22(2) of that directive must be interpreted as meaning that the entities referred to must forward the requested information to the FIU of the Member State in whose territory they are situated, that is to say, in the case of operations performed under the rules on the freedom to provide services, to the FIU of the Member State of origin.

44 It is, however, necessary to consider whether that provision none the less precludes the host Member State from requiring a credit institution carrying out activities in its territory under the rules on the freedom to provide services to forward the information referred directly to its own FIU.

45 It should be noted in that regard, first, that the wording of Article 22(2) of Directive 2005/60 does not expressly prohibit such a possibility.

46 Secondly, it should be pointed out that whilst, admittedly, Directive 2005/60 was 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 also 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, and from the fact that it was

adopted, like its predecessor, Directive 91/308, 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.

47 Consequently, legislation, such as that at issue in the main proceedings, which seeks to allow the competent authorities of the host Member State to obtain information necessary to more effectively combat money laundering and terrorist financing, pursues an aim similar to that of Directive 2005/60.

48 Third, Directive 2005/60 does not deprive the authorities of the Member State where suspicious operations or transactions are carried out of their competence to investigate and pursue cases of money laundering. Such is the case where operations are carried out by means of the freedom to provide services.

49 It follows that Article 22(2) of Directive 2005/60 does not, in principle, preclude Member State legislation which requires credit institutions carrying out activities in its territory under the rules on the freedom to provide services to forward the required information directly to its own FIU, in so far as such legislation seeks to strengthen, in compliance with European Union law, the effectiveness of the fight against money laundering and terrorist financing.

50 Therefore, such legislation cannot compromise the principles established by Directive 2005/60 concerning the reporting requirements on the part of entities subject to them, nor can it impair the effectiveness of existing forms of cooperation and exchange of information between the FIUs, as provided for by Decision 2000/642.

51 In that regard, it should be noted, first, that the adoption by a Member State of legislation requiring financial institutions situated in another Member State and operating under the freedom to provide services in its territory to forward directly to their own FIU information necessary to combat money laundering and terrorist financing cannot relieve credit institutions covered by Directive 2005/60 of their obligation to supply the required information to the FIU of the Member State in whose territory they are situated, in compliance with Article 22 of that directive.

52 Concerning, secondly, coordination and cooperation between the FIUs, as provided for by Directive 2005/60 and Decision 2000/642, it is apparent from recital 40 in the preamble to that directive that '[t]aking into account the international character of money laundering and terrorist financing, coordination and cooperation between FIUs as referred to in … Decision 2000/642 …, including the establishment of an EU FIU-net, should be encouraged to the greatest possible extent'.

53 In that regard, it should be noted, first of all, that, whilst Directive 2005/60 lays down numerous concrete and detailed requirements on customer due diligence, on disclosure and keeping of records, which the Member States must impose on the financial institutions covered, it does not, concerning cooperation between the FIUs, itself lay down any requirements or procedures, but merely states, in Article 38, that the 'Commission shall lend such assistance as may be needed to facilitate coordination, including the exchange of information between FIUs within the Community'.

54 It must be noted, next, that national legislation, such as that at issue in the main proceedings, does not infringe any provisions of Decision 2000/642 where the FIU of the Member State which adopted such legislation is in no way exempted from its requirement to cooperate with the FIUs of other Member States and, reciprocally, retains, unchanged, the right to require them to forward documents or information for the purpose of combating money laundering.

55 Such legislation does not undermine the mechanism for cooperation between the FIUs provided for by Decision 2000/642, but envisages, outside the context of the latter, a means for the FIU of the Member State concerned to obtain directly information in the specific case of an activity carried out under the freedom to provide services in its territory.

56 It follows from the foregoing that Article 22(2) of Directive 2005/60 does not preclude national legislation, such as that at issue in the main proceedings, where it complies with the conditions set out in paragraphs 49 to 51 and 54 of this judgment.

Article 56 TFEU

57 In order to determine whether European Union law has been complied with for the purposes of paragraph 49 of this judgment, it is necessary again to consider whether Article 56 TFEU precludes national legislation, such as that at issue in the main proceedings, according to which a credit institution which provides services in the territory of the Member State concerned without being established there is required to forward directly to the FIU of that host Member State its reports on suspicious operations and information that that authority requests from it.

58 It is settled case-law of the Court of Justice that Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33, and Case C-577/10 *Commission* v *Belgium* [2012] ECR, paragraph 38 and the case-law cited).

59 Legislation of one Member State, such as that at issue in the main proceedings, which requires credit institutions operating in the territory of that Member State under the freedom to provide services from the territory of another Member State to provide information directly to the FIU of the first Member State, constitutes a restriction on the freedom to provide services, in so far as it gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be additional to the controls already conducted in the Member State where the institution at issue is situated, thus dissuading the latter from carrying out such activities.

60 Nevertheless, according to the Court's established case-law, where national legislation falling within an area which has not been completely harmonised at European Union level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets an overriding requirement relating to the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the aim which it pursues and does not go beyond what is necessary in order to attain it (see *Arblade and Others*, paragraphs 34 and 35, and Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041, paragraph 37).

61 The combating of money laundering has not been completely harmonised at European Union level. Directive 2005/60 provides for a minimum level of harmonisation and, in particular, Article 5 thereof allows Member States to adopt stricter provisions, where those provisions seek to strengthen the combating of money laundering or terrorist financing.

– Overriding reasons in the public interest

62 The prevention of and the combating of money laundering and terrorist financing are legitimate aims which the Member States have endorsed both at the international and European Union levels.

63 As is stated in the first recital in the preamble to Directive 2005/60, which seeks to implement at European Union level the Recommendations of the FATF, '[m]assive 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'. Likewise, the third recital in the preamble to that directive notes that '[i]n order to facilitate their criminal activities, money launderers and terrorist financers could try to take advantage of the freedom of capital movements and the freedom to supply financial services'.

64 The Court has moreover already accepted that the combating of money laundering, which is related to the aim of protecting public order, constitutes a legitimate aim capable of justifying a barrier to the freedom to provide services (see, to that effect, Case C-212/08 *Zeturf* [2011] ECR I-5633, paragraphs 45 and 46).

– Suitability of the national legislation at issue for attaining the aims it pursues

65 Since the host Member State authorities have exclusive jurisdiction with regard to the criminalisation, detection and eradication of offences, such as money laundering and terrorist financing, committed on its territory, it is justified that information concerning suspicious transactions carried out on the territory of that Member State be forwarded to the FIU thereof. National legislation, such as that at issue in the main proceedings, enables the Member State concerned to require, any time where there is reasonable doubt as to the legality of a financial transaction, the forwarding of any information which it deems necessary for the national authorities to accomplish their duty and, where appropriate, to pursue and punish those responsible.

66 Furthermore, as the Advocate General has pointed out in point 109 of his Opinion, such legislation enables the Member State concerned to supervise all financial transactions carried out by credit institutions in its territory, and whatever the manner in which those institutions have chosen to provide their services, whether by establishing a registered office or branch, or under the freedom to provide services. In this way, in accordance with the Court's established case-law, which states that national legislation is appropriate for ensuring attainment of the aim pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55), all the operators are subject to similar obligations, since they are carrying out their activities in the same national territory and offering similar financial services which may, to a greater or lesser degree, be used for the purposes of money laundering or terrorist financing.

67 Consequently, national legislation, such as that at issue in the main proceedings, which requires that information be forwarded to the host Member State FIU concerning activities carried on under the freedom to provide services on the territory of that Member State appears to be suitable so as to attain, effectively and coherently, the aim pursued by that national legislation.

– Proportionality

68 According to established case-law, measures which restrict the freedom to provide services may be justified by the aim which they pursue only if they are suitable for securing the attainment of that aim and do not go beyond what is necessary in order to attain it (see, to that effect, Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 44 and the case-law cited).

69 In order to effectively combat money laundering and terrorist financing, a Member State must be able to obtain the information necessary to enable it to identify and pursue possible infringements in that regard which take place in its territory or which involve persons established on that territory.

70 National legislation, such as that at issue in the main proceedings, which requires credit institutions operating under the freedom to provide services in its territory to provide that information directly to their own FIU will however be proportionate only where the mechanism provided for in Article 22(2)

of Directive 2005/60, together with Decision 2000/642, does not already allow that FIU to obtain that information through the FIU of the Member State where the credit institution is situated and to combat money laundering and terrorist financing just as effectively.

71 The receipt, by the FIU of the host Member State, of necessary information from the FIU of the Member State of origin involves, for the credit institution concerned, a lower administrative and financial burden than the requirement to provide that information directly to the FIU of the host Member State. First, it is possible that the FIU of the Member State of origin already has the information requested since the credit institution is required to forward the information to it in accordance with Article 22(2) of Directive 2005/60. Secondly, where the FIU of the Member State in which the credit institution is situated in turn requests that information from the said institution, the administrative burden would also be lower, to the extent that the credit institution would be required to answer to only one interlocutor.

72 It is necessary, therefore, to consider whether the mechanism for cooperation and exchange of information created by Decision 2000/642 enables the host Member State in all circumstances effectively to combat money laundering and terrorist financing in relation with the activities of credit institutions operating under the freedom to provide services in its territory.

73 In that regard, it must be noted that that mechanism for cooperation between FIUs suffers from certain deficiencies.

74 First of all, it should be pointed out that Decision 2000/642 provides for important exceptions to the requirement for the requested FIU to forward the information requested to the applicant FIU. Thus, Article 4(3) of that decision provides that an FIU may refuse to divulge information which could hinder a judicial inquiry carried out in the Member State of which requisition is made or where divulging information would have consequences which are clearly disproportionate in the light of the legitimate interests of a natural or legal person or the Member State concerned, or also where divulging such information would result in an infringement of the fundamental principles of national law, without, however, defining those concepts.

75 Likewise, it is not disputed that, when combating money laundering or terrorist financing, and, a fortiori, preventing those activities, authorities must act as quickly as possible. Article 22(1) of Directive 2005/60 states expressly that the information referred to must be provided promptly by the credit institutions, whether it concerns spontaneous disclosure of suspicious operations or necessary information requested by the competent FIU. Consequently, the forwarding of necessary information directly to the FIU of the Member State in whose territory the operations were carried out appears to be the most appropriate means of ensuring efficient combating of money laundering or terrorist financing.

76 Next, Decision 2000/642 does not lay down a time-limit for information to be forwarded by the requested FIU, nor does it provide for sanctions in case of unjustified refusal on the part of the requested FIU to forward the requested information.

77 Finally, it must be pointed out that recourse to the mechanism of cooperation between the FIUs in order to obtain information necessary for combating money laundering or terrorist financing raises specific difficulties with regard to activities carried out under the freedom to provide services.

78 First, in that context, it is the FIU of the host Member State in whose territory the criminal financial transactions are carried out which is best acquainted with the risks associated with money laundering and terrorist financing in its own country. It is aware of all the facts likely to be linked to criminal financial activity in that country, not only in relation to the credit institutions and persons referred to

in Directive 2005/60, but also in relation to all the national authorities responsible for the detection and eradication of financial crime, whether the administrative, judicial or enforcement authorities or the supervisory bodies for stock markets or financial derivatives markets.

79 Secondly, to be able to carry out a request for information through the mechanism for cooperation between the FIUs provided for by Decision 2000/642, the FIU must already be in possession of information indicating suspicion of money laundering or terrorist financing. Since disclosure relating to suspicious transactions is carried out, pursuant to Article 22(2) of Directive 2005/60, at the FIU of the Member State of origin and Decision 2000/642 does not provide for the requirement to forward them automatically to the FIU of the host Member State, the latter will only rarely have information corroborating the suspicions necessary so as to send a request for information to the FIU of the Member State of origin.

80 Furthermore, while a requirement for disclosure to the FIU of the host Member State gives rise to additional expenses and administrative burdens on the part of credit institutions operating under the freedom to provide services, they are relatively limited where those credit institutions are already required to establish infrastructure necessary for information to be forwarded to the FIU of the Member State where they are situated.

81 In those circumstances, national legislation of a host Member State, such as that at issue in the main proceedings, complies with the requirement for proportionality to the extent that it requires credit institutions situated in another Member State to forward, concerning operations carried out under the freedom to provide services, information necessary for combating money laundering and terrorist financing directly to the FIU of the host Member State, only where there is no effective mechanism ensuring full and complete cooperation between the FIUs and allowing money laundering and terrorist financing to be combated just as effectively.

82 In the present case, the Spanish legislation at issue in the main proceedings requires credit institutions which carry out activities in Spain, either through branches or under the freedom to provide services without a permanent establishment, to forward directly to the Spanish FIU operations involving transfers of funds from or towards certain territories, on condition that the amount of the operations covered exceeds EUR 30 000.

83 Such legislation, which requires not that all operations in any way carried out under the freedom to provide services in Spain be communicated, but merely those which, in accordance with objective criteria laid down by the national legislature, must be considered suspicious, does not appear to be disproportionate.

84 Finally, as the Advocate General has pointed out in point 115 of his Opinion, that legislation, in so far as it subjects to its requirements all credit institutions as well as all foreign persons or bodies which carry out activities in Spain through a principal establishment, branches or under the freedom to provide services, does not appear to be discriminatory.

85 It follows from all the above considerations that the answer to the question submitted is that:

— Article 22(2) of Directive 2005/60 must be interpreted as not precluding legislation of a Member State which requires credit institutions to communicate the information required for the purpose of combating money laundering and terrorist financing directly to the FIU of that Member State where the institutions carry out their activities in that State under the freedom to provide services, to the extent that that legislation does not compromise the effectiveness of that directive and of Decision 2000/642;

— Article 56 TFEU must be interpreted as not precluding such legislation if the latter is justified by overriding reasons in the public interest, secures the attainment of the aim in view and does not go beyond that which is necessary in order to attain it, and is applied in a non-discriminatory manner, which it is for the national court to ascertain taking account of the following considerations:

— such legislation is appropriate to attain the aim of preventing money laundering and terrorist financing if it enables the Member State concerned effectively to supervise and suspend suspicious financial transactions concluded by credit institutions offering their services in the national territory and, if appropriate, to pursue and punish those responsible;

— the obligation imposed by that legislation on credit institutions carrying out their activities under the freedom to provide services may constitute a proportionate measure in pursuit of that aim in the absence, at the time of the facts in the main proceedings, of any effective mechanism guaranteeing full and complete cooperation between FIUs.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 22(2) 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 legislation of a Member State which requires credit institutions to communicate the information required for the purpose of combating money laundering and terrorist financing directly to the FIU of that Member State where the institutions carry out their activities in that State under the freedom to provide services, to the extent that that legislation does not compromise the effectiveness of that directive and of Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information**.

2. **Article 56 TFEU must be interpreted as not precluding such legislation if the latter is justified by overriding reasons in the public interest, secures the attainment of the aim in view and does not go beyond that which is necessary in order to attain it, and is applied in a non-discriminatory manner, which it is for the national court to ascertain taking account of the following considerations**:

— **such legislation is appropriate to attain the aim of preventing money laundering and terrorist financing if it enables the Member State concerned effectively to supervise and suspend suspicious financial transactions concluded by credit institutions offering their services in the national territory and, if appropriate, to pursue and punish those responsible;**

— **the obligation imposed by that legislation on credit institutions carrying out their activities under the freedom to provide services may constitute a proportionate measure in pursuit of that aim in the absence, at the time of the facts in the main proceedings, of any effective mechanism guaranteeing full and complete cooperation between financial intelligence units.**

[Signatures]