Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 January 2018*

(Reference for a preliminary ruling — Prevention of the use of the financial system for the purpose of money laundering and terrorist financing — Directive 2005/60/EC — Scope — Article 2(1), point 3(c) and Article 3, point 7(a) — Business activity of an undertaking consisting in the sale of companies already entered in the Register of Companies and formed solely for the purposes of sale — Sale by means of the transfer of the undertaking's holding in the ready-made company)

In Case C-676/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 2 December 2016, received at the Court on 27 December 2016, in the proceedings

CORPORATE COMPANIES s.r.o.

v

Ministerstvo financí ČR,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, C.G. Fernlund, A. Arabadjiev, S. Rodin and E. Regan, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the European Commission, by M. Šimerdová and T. Scharf, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Czech.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1), point 3(c) and Article 3, point 7(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 (OJ 2005 L 309, p. 15).

2 The request has been made in proceedings between CORPORATE COMPANIES s.r.o. ('Corporate Companies') and Ministerstvo financí ČR (Ministry of Finance, Czech Republic) concerning an inspection initiated by the latter in respect of Corporates Companies' compliance with the requirements set out in the national law transposing Directive 2005/60.

Legal context

EU law

3 Recitals 1, 2, 5, 9, 10, 15 and 46 of Directive 2005/60 state:

'(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.

(2) The soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates either to disguise the origin of criminal proceeds or to channel lawful or unlawful money for terrorist purposes …

…

(5) Money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even [European Union] level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the [European Union] in this field should therefore be consistent with other action undertaken in other international fora. The [European Union] 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.

…

(9) [Council] Directive 91/308/EEC [of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77)] though imposing a customer identification obligation, contained relatively little detail on the relevant procedures. In view of the crucial importance of this aspect of the prevention of money laundering and terrorist financing, it is appropriate, in accordance with the new international standards, to introduce more specific and detailed provisions relating to the identification of the customer and of any beneficial owner and the verification of their identity. To that end a precise definition of "beneficial owner" is essential. Where the individual beneficiaries of a legal entity or arrangement such as a foundation or trust are yet to be determined, and it is therefore impossible to identify an individual as the beneficial

owner, it would suffice to identify the class of persons intended to be the beneficiaries of the foundation or trust. This requirement should not include the identification of the individuals within that class of persons.

(10) The institutions and persons covered by this Directive should, in conformity with this Directive, identify and verify the identity of the beneficial owner. …

…

(15) As the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for concealing the origin of the proceeds of crime and as such channels can be used for terrorist financing, the anti-money laundering and anti-terrorist financing obligations should cover life insurance intermediaries and trust and company service providers.

…

(46) Since the objective of this Directive [is] the prevention of the use of the financial system for the purpose of money laundering and terrorist financing …'

4 Article 2(1) of Directive 2005/60 delimits the group of persons falling within its scope as follows:

'This Directive shall apply to:

(1) credit institutions;

(2) financial institutions;

(3) the following legal or natural persons acting in the exercise of their professional activities:
(a) auditors, external accountants and tax advisors;
(b) notaries and other independent legal professionals …

…
(c) trust or company service providers not already covered under point (a) or (b);

…'

5 Article 3 of the directive provides:

'For the purposes of this Directive the following definitions shall apply:

…

(7) "trust and company service providers" means any natural or legal person which by way of business provides any of the following services to third parties:
(a) forming companies or other legal persons;

…'

Czech law

6 Law No 253/2008 on certain measures against money laundering and the financing of terrorism, as amended ('the anti-money laundering law'), transposes Directive 2005/60 into Czech law.

7 According to Paragraph 2(1)(h), point 1 of the anti-money laundering law, which transposed Article 2(1), point 3(c) in conjunction with Article 3, point 7(a) of Directive 2005/60 into national law, a 'relevant person' for the purposes of that law means 'any person … who … provides another person services consisting in forming legal persons'.

8 Paragraph 2(3) of the anti-money laundering law provides:

'A person who or which does not carry out the activities in Paragraph 2(1) by way of business, with the exception of the persons set out in Paragraph 2(2)(c) and (d), is not considered a relevant person.'

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

9 Corporate Companies is a legal person established in Prague (Czech Republic), whose business activity consists in selling 'ready-made' companies, that is to say, companies already registered on the Register of Companies. Corporate Companies carries out these sales by transferring its shares in the capital of those companies to its clients.

10 Pursuant to a notice dated 18 August 2015, the Ministry of Finance initiated an inspection procedure concerning Corporate Companies' compliance with the requirements set out inter alia in the anti-money laundering law.

11 Taking the view that it was not a 'relevant person' within the meaning of that law, Corporate Companies brought an action before the Městský soud v Praze (Prague City Court, Czech Republic) seeking a declaration that the investigation carried out by the Ministry of Finance was unlawful.

12 In its judgment of 25 May 2016, the Městský soud v Praze (Prague City Court) held that Corporate Companies fell within Article 2(1)(h), point 1 of the anti-money laundering law. In that regard, that court pointed out that that provision applies to persons who, in the course of their business activity, form legal persons for their clients, irrespective of whether that is done at the client's request or whether the legal persons are formed in view of being included in a portfolio of offers for potential clients. The Městský soud v Praze (Prague City Court) therefore dismissed Corporate Companies' action.

13 Corporate Companies brought an appeal on a point of law against that decision before the referring court, claiming that it carries out the activity of forming companies on its own behalf and at its own expense. It submits that, since it does not handle the property of other persons when it forms companies, it cannot be a 'relevant person' within the meaning of Article 2(1)(h), point 1 of the anti-money laundering law. Furthermore, not only does Corporate Companies' business activity not, in itself, consist in forming companies for customers, but, even if it were considered that it engages in a similar activity, it cannot, however, be deemed a 'relevant person' within the meaning of that law, since it does not form those companies in the name or on behalf of a client, with the result that it cannot be accused of acting as a straw man for its clients.

14 In those circumstances the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do persons who, by way of their business activity, sell companies already entered in the Register of Companies and formed for the purposes of sale ("ready-made companies"), whose sale is realised by the transfer of a holding in the subsidiary company which they are selling, fall within the scope of Article 2(1), point 3(c) of [Directive 2005/60] in conjunction with [Article 3, point 7(a)] thereof?'

Consideration of the question referred

15 By its question, the referring court asks, in essence, whether Article 2(1), point 3(c) of Directive 2005/60, read in conjunction with Article 3, point 7(a) of that directive, must be interpreted as meaning that a person, such as that at issue in the main proceedings, whose commercial activity consists in selling companies which it formed itself, without any prior request on the part of its potential clients, for the purposes of sale to those clients, by means of a transfer of its shares in the capital of the company being sold, falls within the scope of those provisions.

16 In the present case, it is apparent from the order for reference that Corporate Companies forms legal persons, includes them in its portfolio in order to cede them to potential clients and, in the event of acquisition, transfers to the purchaser its shares in the capital of the company being sold. The companies thus formed do not carry out any activity. They are, therefore, 'empty shells', featuring only in a portfolio made by Corporate Companies in anticipation of a sale.

17 According to Article 2(1), point 3(c) of Directive 2005/60, the provision applies to trust or company service providers not already covered under point (a) or (b) of point 3. Article 3, point 7(a) of that directive provides that 'trust and company service providers' means any natural or legal person which by way of business provides, to third parties, services consisting in forming companies or other legal persons.

18 It is, therefore, apparent from the very wording of Article 3, point 7(a) of Directive 2005/60 that any natural or legal person whose activity consists in providing a client with a specific service, namely that of forming companies or other legal persons, is made subject to the obligations imposed by that directive.

19 As the Spanish Government has pointed out in its written observations, such a service is provided whether a third party relies on a natural or legal person to form a company in its own name and on its own behalf or a third party purchases a company formed in advance by that person for the sole purpose of its sale.

20 Contrary to what Corporate Companies claims, the fact that such a company was formed by that person at a client's request or that it formed the company in view of its subsequent sale to a potential client is not relevant for the purposes of applying that provision.

21 First of all, Article 3, point 7(a) of Directive 2005/60 does not distinguish between those two situations.

22 Next, there is nothing in that directive to suggest that the intention of the EU legislature was to exclude persons engaged in a commercial activity such as that of Corporate Companies from the scope of Article 3, point 7(a).

23 Finally, such an exclusion would not be consistent with the objective of the directive.

24 In that regard, it should be noted, as is apparent both from the title and the preamble of that directive, that its aim is the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (see, to that effect, judgment of 25 April 2013, *Jyske Bank Gibraltar*, C-212/11, EU:C:2013:270, paragraph 46).

25 As is apparent from recitals 1 and 2 of the directive, those criminal activities may have a significant negative impact on the soundness, integrity, stability and reputation of the financial sector and, ultimately, on the single market.

26 The provisions of Directive 2005/60 are, therefore, 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.

27 In that context, Directive 2005/60 aims to impose on certain persons, due to their involvement in the execution of a transaction or a financial activity, a certain number of obligations, namely, inter alia, to identify and verify the identity of the client and the beneficial owner, to obtain information on the purpose and intended nature of the business relationship and to report any indication of money laundering or terrorist financing to the competent authorities.

28 Since, first, a company is an appropriate structure for carrying out both money laundering and terrorist financing, in so far as it enables the concealment of unlawfully obtained resources, which will be laundered through that company, and the financing of terrorism through that company, and, second, the identification of the client is crucial to the prevention of those activities, as stated in recital 9 of Directive 2005/60, it seems reasonable for the EU legislature to make the creation of such a structure by a person or an undertaking in the name of a third party subject to the controls provided for by that directive, by thus establishing an initial barrier to deter any person intending to use a company for the purpose of facilitating that type of activity.

29 Such controls are all the more important since the forming of a company is in itself a transaction which, by its very nature, presents a high risk of money laundering and terrorist financing, on account of the financial transactions that are typically included in that transaction, such as a contribution of capital and, where appropriate, of property, on the part of the person forming the company. Such transactions may facilitate the introduction by the latter of illegal income into the financial system, so that it is important to verify the identity of the client and of any beneficial owner in that transaction and, therefore, that persons who, in the course of their business, form a company on behalf of a third party are made subject to the obligations imposed by Directive 2005/60.

30 It should be noted that such risks arise not only where a company is formed by a person, in the course of its business, on behalf and in the name of a third party, but also where, as in the present case, a company formed in advance by a person, in the course of its business, solely for the purposes of sale to potential clients, is actually sold to a client, by means of the transfer to the latter of the person's shares in the capital of that company.

31 An interpretation of Article 3, point 7(a) of Directive 2005/60 in the sense submitted by Corporate Companies, namely that a person whose commercial activity consists in selling this type of shelf company does not fall within that provision, would offer money launderers and terrorist financers an ideal tool for circumventing the initial barrier that the EU legislature took care to establish in order to prevent the use of these companies for those activities.

32 The absence of obligations in respect of the prevention of money laundering and terrorist financing imposed on a person such as Corporate Companies, in particular the obligation to verify the identity of the client and the beneficial owner, would, first, help the actual purchasers of the companies sold or the persons acting on their behalf to remain anonymous and, secondly, would enable the masking of the origin and purpose of the property transfers passing through those companies.

33 In other words, such an interpretation of Article 3, point 7(a) of Directive 2005/60 would, ultimately, encourage that which Directive 2005/60 is intended specifically to prevent.

34 In the light of the foregoing considerations, the answer to the question referred is that Article 2(1), point 3(c) of Directive 2005/60, read in conjunction with Article 3, point 7(a) of that directive, must be interpreted as meaning that a person, such as that at issue in the main proceedings, whose commercial activity consists in selling companies which it formed itself, without any prior request on the part of its potential clients, for the purposes of sale to those clients, by means of a transfer of its shares in the capital of the company being sold, falls within the scope of those provisions.

Costs

35 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 (First Chamber) hereby rules:

Article 2(1), point 3(c) 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, read in conjunction with Article 3, point 7(a) of that directive, must be interpreted as meaning that a person, such as that at issue in the main proceedings, whose commercial activity consists in selling companies which it formed itself, without any prior request on the part of its potential clients, for the purposes of sale to those clients, by means of a transfer of its shares in the capital of the company being sold, falls within the scope of those provisions.

[Signatures]