



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

17 January 2019*

(Reference for a preliminary ruling — Settlement finality in payment and securities settlement systems — Directive 98/26/EC — Scope — Concept of ‘transfer order’ — Payment order sent by the holder of an ordinary current account to a credit institution subsequently declared insolvent)

In Case C-639/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā tiesa (Supreme Court, Latvia), made by decision of 8 November 2017, received at the Court on 15 November 2017, in the proceedings

SIA ‘KPMG Baltics’, acting as insolvency administrator of AS ‘Latvijas Krājbanka’,

v

SIA ‘Kipars AI’,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász and C. Vajda, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- SIA ‘KPMG Baltics’, acting as insolvency administrator of AS ‘Latvijas Krājbanka’, by J. Ozoliņš,
- the Latvian Government, by I. Kucina and E. Petrocka-Petrovska, acting as Agents,
- the Czech Government, by M. Smolek, J. Vlácil and O. Serdula, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and G. Rocchitta, avvocato dello Stato,
- the European Commission, by H. Tserepa-Lacombe and I. Rubene, acting as Agents,

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

* Language of the case: Latvian.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ 1998 L 166, p. 45), as amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 (OJ 2009 L 146, p. 37) ('Directive 98/26').
- 2 The request has been made in proceedings between SIA 'KPMG Baltics', acting as insolvency administrator of AS 'Latvijas Krājbanka', and SIA 'Ķipars AI', concerning the execution of a payment order given by the latter to Latvijas Krājbanka.

Legal context

- 3 Recitals 1 to 4 of Directive 98/26 state:
 1. Whereas the Lamfalussy report of 1990 to the Governors of the central banks of the Group of Ten Countries demonstrated the important systemic risk inherent in payment systems which operate on the basis of several legal types of payment netting, in particular multilateral netting; whereas the reduction of legal risks associated with participation in real time gross settlement systems is of paramount importance, given the increasing development of these systems;
 2. Whereas it is also of the utmost importance to reduce the risk associated with participation in securities settlement systems, in particular where there is a close connection between such systems and payment systems;
 3. Whereas this Directive aims at contributing to the efficient and cost effective operation of cross-border payment and securities settlement arrangements in the Community, which reinforces the freedom of movement of capital in the internal market; ...
 4. Whereas it is desirable that the laws of the Member States should aim to minimise the disruption to a system caused by insolvency proceedings against a participant in that system'.
- 4 Article 1 of that directive provides:

'The provisions of this Directive shall apply to:

 - (a) any system as defined in Article 2(a), governed by the law of a Member State and operating in any currency, the euro or in various currencies which the system converts one against another,
 - (b) any participant in such a system;
 - (c) collateral security provided in connection with:
 - participation in a system, or
 - operations of the central banks of the Member States or the European Central Bank in the context of their function as central banks.'

5 Article 2 of that directive states:

‘For the purposes of this Directive:

(a) “system” shall mean a formal arrangement:

- between three or more participants, excluding the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants,
- governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and
- designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

...

(b) “institution” shall mean:

- a credit institution as defined in Article 4(1) of [Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006, L 177, p. 1)] including the institutions listed in Article 2 of that Directive,
- an investment firm as defined in Article 4(1)(1) of [Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004, L 145, p. 1)] excluding the institutions set out in Article 2(1) thereof,
- public authorities and publicly guaranteed undertakings, or
- any undertaking whose head office is outside the [European Union] and whose functions correspond to those of the Community credit institutions or investment firms as defined in the first and second indent,

which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system.

...

(c) “central counterparty” shall mean an entity which is interposed between the institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;

- (d) “settlement agent” shall mean an entity providing to institutions and/or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and/or central counterparties for settlement purposes;
- (e) “clearing house” shall mean an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and/or a possible settlement agent;
- (f) “participant” shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system operator.

According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or carry out part or all of these tasks.

A Member State may decide that, for the purposes of this Directive, an indirect participant may be considered a participant if that is justified on the grounds of systemic risk. Where an indirect participant is considered to be a participant on grounds of systemic risk, this does not limit the responsibility of the participant through which the indirect participant passes transfer orders to the system;

- (g) “indirect participant” shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system operator with a contractual relationship with a participant in a system executing transfer orders which enables the indirect participant to pass transfer orders through the system, provided that the indirect participant is known to the system operator;

...

- (i) “transfer order” shall mean:

- any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank, a central counterparty or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or
- an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;

...

- (p) “system operator” shall mean the entity or entities legally responsible for the operation of a system. A system operator may also act as a settlement agent, central counterparty or clearing house.’

6 Under Article 3 of that directive:

‘1. Transfer orders and netting shall be legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant, provided that transfer orders were entered into the system before the moment of opening of such insolvency proceedings as defined in Article 6(1). This shall apply even in the event of insolvency proceedings against a participant (in the system concerned or in an interoperable system) or against the system operator of an interoperable system which is not a participant.

...

3. The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.

...'

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

- 7 On 17 November 2011, Ķipars AI, holder of an ordinary current account with Latvijas Krājbanka, submitted a payment order to the latter for the transfer of all the available funds from the current account to another account held with another bank. That order was entered into the internal system of Latvijas Krājbanka and the funds were debited from the current account held by Ķipars AI and registered in a Latvijas Krājbanka intermediary account for the purpose of transfer. However, the payment order was not finalised, since a few hours later the Finanšu un kapitāla tirgus komisija (The Financial and Capital Market Commission, Latvia) prohibited Latvijas Krājbanka from carrying out any transaction involving amounts above EUR 100 000 and, subsequently, that bank was declared insolvent. KPMG Baltics was appointed as insolvency administrator of Latvijas Krājbanka.
- 8 As the first instance and appeal courts upheld the action brought by Ķipars AI for the execution of the payment order, KPMG Baltics brought an appeal in cassation before the referring court. In those proceedings, Ķipars AI relied on, in particular, the provisions of Directive 98/26. Although the referring court takes the view, in principle, that that directive is not applicable to the relationship between individuals and credit institutions, and, therefore, to the payment order at issue in the main proceedings, it nonetheless has doubts concerning that point, considering that the concept of 'transfer order', within the meaning of that directive, may also cover such a payment order, having regard to the nature of the transfer of funds.
- 9 Accordingly, the Augstākā tiesa (Supreme Court, Latvia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
 - '(1) Does the term "transfer order", within the meaning of [Directive 98/26], include a payment order given by a depositor to a credit institution for the transfer of funds to another credit institution?
 - (2) If the answer to the first question referred is in the affirmative, must Article 3(1) of [Directive 98/26] which provides that "transfer orders and netting shall be legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant, provided that transfer orders were entered into the system before the moment of opening of such insolvency proceedings as defined in Article 6(1). This shall apply even in the event of insolvency proceedings against a participant (in the system concerned or in an interoperable system) or against the system operator of an interoperable system which is not a participant", be interpreted as meaning that an order such as that in the present case must be regarded as "entered into the system" and must be executed?'

The jurisdiction of the Court

- 10 KPMG Baltics and the Latvian Government contest, in essence, the jurisdiction of the Court to answer the questions referred, on the ground that the payment order at issue in the main proceedings does not come within the scope of Directive 98/26 and that, accordingly, the dispute in the main proceedings has no connection with EU law.

- 11 In that regard, first, it must be noted that, by its first question, the referring court seeks to ascertain specifically whether the payment order at issue in the main proceedings is covered by the concept of ‘transfer order’, within the meaning of Directive 98/26, and, therefore, the scope of that directive. Thus, the argument put forward by KPMG Baltics and the Latvian Government that the payment order does not come within the scope of that directive is inextricably linked to the answer to be given to the first question and consequently has no bearing on the Court’s jurisdiction to answer that question (see, by analogy, judgments of 10 September 2015, *Wojciechowski*, C-408/14, EU:C:2015:591, paragraph 29, and of 26 September 2018, *Staatssecretaris van Veiligheid en justitie (Suspensory effect of the appeal)*, C-180/17, EU:C:2018:775, paragraph 19 and the case-law cited).
- 12 Secondly, as regards the second question, it was referred only in the event that the answer to the first question is in the affirmative, that is to say in the event that the payment order at issue in the main proceedings were to come within the scope of Directive 98/26. Accordingly, the second question also cannot be regarded as falling outside the Court’s jurisdiction.
- 13 The Court therefore has jurisdiction to answer the questions referred.

Consideration of the questions referred

- 14 By its first question, the referring court asks, in essence, whether a payment order, such as that at issue in the main proceedings, given by the holder of an ordinary current account to a credit institution for a transfer of funds to another credit institution is covered by the concept of ‘transfer order’, within the meaning of Directive 98/26, and, therefore, comes within the scope of that directive.
- 15 As is apparent from recitals 1 to 4 thereof, that directive seeks to reduce systemic risk and to ensure the stability of payment and securities settlement systems, by minimising disruption to such a system caused by insolvency proceedings against one of its participants.
- 16 To that end, that directive provides, inter alia, in Article 3(1) thereof, that transfer orders are legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant, provided that they have been entered into the system before the insolvency proceedings were opened.
- 17 In the present case, the payment order at issue in the main proceedings was given by Ȳipars AI, holder of an ordinary current account with Latvijas Krājbanka, to the latter in order to transfer all the funds available in the current account to an account that Ȳipars AI held with another credit institution. In order to determine whether such a payment order is covered by the concept of ‘transfer order’, within the meaning of Directive 98/26, and, therefore, the scope of that directive, reference must be made to Article 1 of that directive, which relates to its scope, and to the definitions in Article 2 thereof.
- 18 In that regard, under Article 1 of Directive 98/26, the provisions of that directive are applicable to any system, as defined in Article 2(a), to any participant in such a system, and to collateral security provided in connection with the participation in such a system, or operations of the central banks of the Member States or the European Central Bank in their function as central banks.
- 19 Article 2(a) of that directive defines ‘system’ as relating, in essence, to a formal arrangement between three or more participants, with common rules and standardised arrangements for the clearing or execution of transfer orders between the participants.

- 20 As regards the concept of ‘transfer order’, it follows from Article 2(a), (b) and (i) of Directive 98/26, that the latter covers only instructions entailing financial obligations given by participants in such a system, in connection with the system, to other participants, which are responsible for executing them. On the other hand, that concept does not cover instructions entailing financial obligations issued by third parties, outside of such a system.
- 21 That meaning of the concept of ‘transfer order’ is corroborated by Article 3(1) of that directive, which makes the protection provided for in that provision for transfer orders contingent on the condition that they have been ‘entered into the system’.
- 22 Moreover, and above all, that meaning is confirmed by the fact that, as is apparent from paragraph 15 of the present judgment, that directive pursues an objective which is well-defined and circumscribed, namely to reduce systemic risk and to ensure the stability of the systems covered by that directive, by limiting the impact of insolvency proceedings on those systems. As long as an instruction entailing financial obligations has not been entered into such a system by one of its participants, the fact that it has not been executed due to insolvency proceedings does not create systemic risk and does not affect the stability of such a system. Extending the protection provided for by that directive for transfer orders issued by participants in such systems, within those systems, to instructions entailing financial obligations issued by third parties, outside such systems, would therefore go beyond what is necessary to attain the objective pursued by Directive 98/26.
- 23 Thus, in order to determine whether a payment order, such as that at issue in the main proceedings, comes within the scope of Directive 98/26, it is necessary to determine whether it can be regarded as having been issued in connection with a system, as defined in Article 2(a) of that directive, by one of its participants.
- 24 Article 2(f) of Directive 98/26 provides an exhaustive list of the entities covered by the concept of ‘participant’. These may be an ‘institution’, a ‘central counterparty’, a ‘settlement agent’, a ‘clearing house’ or a ‘system operator’. Those entities are defined precisely in Article 2(b) to (e) and (p) of that directive.
- 25 It follows from the definitions laid down in those provisions, as set out in paragraph 5 of the present judgment, that the holder of an ordinary current account, such as Kipars AI, does not correspond to any of those entities. In particular, such a current account holder is not covered by the concept of ‘institution’, as that concerns, in accordance with Article 2(b) of that directive, only the entities that may be responsible for discharging the financial obligations arising from transfer orders within a system, which include, *inter alia*, credit institutions and investment firms.
- 26 Admittedly, Article 2(f), third indent, of Directive 98/26 allows Member States to decide that, for the purposes of that directive, an indirect participant may be considered a participant if that is justified on the grounds of systemic risk. However, it cannot be inferred from the evidence before the Court that the Latvian Republic has made use of that option. In any event, it follows from the definition of the concept of ‘indirect participant’ in Article 2(g) of that directive that entities which may come within that concept are the same as those covered by the concept of ‘participant’, as set out in paragraph 24 of the present judgment, the difference between a participant and an indirect participant being that the former is connected to the system directly, while the second is connected only through a contractual relationship with a participant. As an ordinary current account holder, such as Kipars AI, does not correspond to any of those entities, it cannot be regarded as an indirect participant, within the meaning of Article 2(f) of that directive.

- 27 Thus, a payment order given by such an ordinary current account holder cannot be considered as an order issued by a participant in a system, within the meaning of Article 2(a) and (f) of Directive 98/26. It follows that, as maintained by all the parties that submitted observations to the Court, such a payment order is not covered by the concept of ‘transfer order’, within the meaning of that directive and does not, therefore, come within the scope of that directive.
- 28 In the light of the foregoing considerations, the answer to the first question is that a payment order, such as that at issue in the main proceedings, given by the holder of an ordinary current account to a credit institution for a transfer of funds to another credit institution is not covered by the concept of ‘transfer order’, within the meaning of Directive 98/26, and does not, therefore, come within the scope of that directive.
- 29 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

- 30 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 (Fourth Chamber) hereby rules:

A payment order, such as that at issue in the main proceedings, given by the holder of an ordinary current account to a credit institution for a transfer of funds to another credit institution is not covered by the concept of ‘transfer order’, within the meaning of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, as amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009, and does not, therefore, come within the scope of that directive.

[Signatures]