Case C-790/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 October 2019

Referring court:

Curtea de Apel Brașov (Romania)

Date of the decision to refer:

14 October 2019

Defendants:

LG

MH

Other parties to the proceedings:

Parchetul de pe lângă Tribunalul Brașov

Agenția Națională de Administrare Fiscală, Direcția Generală Regională a Finanțelor Publice Brașov

Subject matter of the main proceedings

Appeals brought by the Parchetul de pe lângă Tribunalul Brașov (Public Prosecutor's Office, Regional Court, Brașov, Romania, 'the Public Prosecutor'), by the defendant LG and by the Agenția Națională de Administrare Fiscală, Direcția Generală Regională a Finanțelor Publice Brașov (National Agency for Fiscal Administration – Regional Directorate-General of Public Finances of Brașov, Romania, 'the Tax Authority') against the criminal judgment of 15 November 2018 of the Tribunalul Brașov (Regional Court, Brașov, Romania, 'the Regional Court')

Subject matter and legal basis of the request for a preliminary ruling

Pursuant to Article 267 TFEU, the referring court seeks interpretation of Article 1(3)(a) of Directive 2015/849

Question referred

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

Provisions of EU law cited

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, Article 1(1) and (2)(a) to (d)

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Article 1(1), (2) and (3)(a) to (d)

Provisions of national law cited and relevant case-law

Article 29 of Lege nr. 656/2002 pentru prevenirea și sancționarea spălării banilor (Law No 656/2002 on the prevention and sanctioning of money laundering), published in the *Monitorul Oficial al României*, Part I, No 904, of 12 December 2002, as amended

On the date of the relevant facts, Article 29(1) was worded as follows:

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

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

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

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

Judgment No 418 of 19 June 2018 of the Curte Constituțională (Constitutional Court, Romania, ‘the Constitutional Court’), concerning a plea of non-

constitutionality regarding the provisions of Article 29(1)(c) of Law No 656/2002 on the prevention and sanctioning of money laundering and establishing measures to prevent and combat the financing of terrorism, as interpreted in Judgment No 16 of 8 June 2016 of the Înaltă Curte de Casație și Justiție (High Court of Cassation and Justice, Romania 'the Court of Cassation'), concerning the delivery of a preliminary decision to clarify certain legal issues relating to the criminal offence of money laundering;

La Lege nr. 129/2019 din 11 iulie 2019 pentru prevenirea și combaterea spălării banilor și finanțării terorismului (Law No 129 of 11 July 2019 on the prevention and suppression of money laundering and the financing of terrorism, amending certain other legislative acts), published in the *Monitorul Oficial al României*, Part I, No 589 of 19 July 2019 (not yet published at the time when the reference was made to the Court of Justice).

Outline of the facts and the main proceedings

1 At first instance, the Regional Court sentenced the defendant LG to a term of imprisonment of one year and nine months, with a conditional suspension of execution of the sentence, in accordance with Article 81 *et seq*. of the previous Criminal Code (which was more favourable to the defendant), for having committed the criminal offence of money laundering provided for in Article 29(1)(a) of Law No 656/2002, pursuant to Article 41(2) of the previous Criminal Code, by the commission of 80 physical acts. The Regional Court also ordered that criminal proceedings against the defendant LG for tax evasion be closed, LG having made good the relevant loss. In so far as concerns the defendant MH, the court acquitted her, finding that the condition of imputability was not satisfied, inasmuch as it had not been proved that she had been aware of the fact that the defendant LG had laundered money derived from tax evasion.

2 The court found that the defendant LG, acting as company director, had committed the offence of tax evasion and that the money obtained therefrom had been laundered, also by him. Between 2009 and 2013, LG had failed to record in the accounts of the company SC Vinalcool Brașov SA the tax documents that provided evidence of the receipt from the companies Medofta SRL and Reproflex SRL of income from the letting of commercial premises. In order to maintain the appearance, *vis-à-vis* the representatives of Medofta SRL and Reproflex SRL, of lawful commercial transactions, LG had requested those companies to pay the sums due to Vinalcool Brașov SA into an account belonging to the company Arta Romana SRL, which was owned by the defendant MH, the accused's partner, using a debt transfer agreement concluded between the defendant, Vinalcool Brașov SA and Arta Romana SRL. The total sum transferred amounted to RON 512 301.15, which then came into LG's possession through the intermediary of the defendant MH, the money being taken out in cash from the bank or from cash machines by both defendants. More specifically, the defendant LG laundered

the money derived from the commission by him of the offence of tax evasion, as predicate offence.

3 The Public Prosecutor, the defendant LG and the Tax Authority appealed against that judgment before the referring court. LG has subsequently withdrawn his appeal.

4 The Public Prosecutor takes issue with the judgment, arguing in particular that there were no grounds for acquitting the defendant MH.

5 The Tax Authority takes issue with the judgment because its civil-law claims were partly dismissed in the judgment.

The referring court, the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania, 'the Court of Appeal'), considering it necessary to interpret certain provisions of Directive 2015/849 and having found no case-law on the subject, brought to the attention of the parties, *ex officio*, the possibility of a referral to the Court of Justice for a preliminary ruling.

Essential arguments of the parties to the main proceedings

6 The Public Prosecutor opposed the reference to the Court of Justice. In its opinion, the requirements of Article 267 TFEU are not fulfilled. In addition, the directive has not been transposed into Romanian law, even though the period prescribed for transposition expired in 2017, and the offences were committed before the directive was adopted. The Public Prosecutor takes the view that the directive meets the requirements for the application of the doctrine of *acte clair*, as established by the Court of Justice, and that there is continuity in so far as concerns the legislative acts adopted at EU level, since the substantive content thereof has remained the same.

7 The defendants have agreed to the reference to the Court of Justice.

Summary of the reasons for the reference

8 The directive currently in force and the repealed directive define money laundering in similar fashion for each of the alternative ways in which the offence may be committed, and the national legislation has transposed in almost identical terms the provisions relating to the definition of the offence; any variations regarding the typical character, the unlawfulness and imputability of the offence are irrelevant. However, the referring court notes that there are conflicting interpretations of the domestic legislation, inasmuch as diverging solutions are to be found in judicial practice. Indeed, the various ways in which the present dispute could potentially be resolved are diametrically opposed, depending on whether or not the court takes the view that the essential feature of the typical character of the offence is present.

9 In the referring court's view, the same person cannot be guilty both of the money-laundering offence, in one or other of its forms, and also of the predicate offence.

10 The Court of Appeal refers, in particular, to two decisions of the Court of Cassation: Judgment No 147/2011, in which the court ruled that 'the parties committing the two offences cannot be one and the same person', and Judgment No 836/2013, in which the court ruled only on the form of money laundering provided for in Article 23(1)(c) of Law No 656/2002, holding that 'the party committing the principal offence cannot also be guilty of the offence of money laundering', otherwise there would be a 'violation of the principle of *ne bis in idem*'. In other decisions the Court of Cassation and other national courts have ruled in the same way, that is to say, holding that it is not possible for the person committing the offence of money laundering also to be guilty of the predicate offence.

11 By contrast, the Court of Cassation ruled on these same legislative provisions in Judgment No 16/2016, in which it acceded to a request for clarification of certain legal issues, ruling, in particular, that the party committing the offence of money laundering may also be guilty of the offence from which the property was derived. In the grounds for its decision, the Court of Cassation stated that 'the provisions of Article 29(1) of Law No 656/2002, which define the offence of money laundering, refer to knowledge of the source of the property … which condition is satisfied in the situation where one and the same person committed the offence of money laundering and the offence from which the property was derived'.

12 The Constitutional Court also ruled on these same provisions in Judgment No 418/2018, in which it ruled that the provisions of Article 29(1)(c) of Law No 656/2002, as interpreted by the Court of Cassation in Judgment No 16/2016, are unconstitutional in so far as concerns the party guilty of the offence. It held that 'the perpetrator … of the principal offence … cannot be the party guilty of the offence of money laundering'. The words 'knowing that such property is derived from the commission of a criminal offence', appearing in that provision, mean that parties involved in the commission of the offence from which the property is derived cannot be guilty [of money laundering]'.

13 According to the information given at the end of Law No 656/2002, in the republished version, as subsequently amended, that law transposed the provisions of Directive 2005/60 into national law.

14 The wording of both the directive (in any of its successive forms) and of the national law contains a condition, 'knowing that such property is derived from criminal activity or from an act of participation in such activity'. The referring court analyses those words semantically, grammatically and teleologically and reaches the conclusion that the same person cannot be guilty of the two offences.

15 The referring court, the Court of Appeal, also refers to the English-language version of the directive and then draws a parallel between the system of common

law and the system of Roman-Germanic law, referring to the Criminal Codes of Italy, Spain and the Netherlands, and also to works of legal theory.

16 The referring court considers that, in this case, the doctrine of *acte clair* does not apply, since different solutions to this question are to be found in legal theory and in judicial practice.

17 Even though Romania failed to transpose Directive 2015/849 within the prescribed period, and only transposed it with Law No 129 of 11 July 2019, after it had been decided, on 25 June 2019, to make a reference to the Court of Justice for a preliminary ruling, the referring court considers that the question should nevertheless be submitted to the Court of Justice with reference to that legislative act, especially as there are no differences in the provisions of Article 1 which define money laundering.