

Case C-950/19**Request for a preliminary ruling****Date lodged:**

17 December 2019

Referring court:

Helsingin hallinto-oikeus (Finland)

Date of the decision to refer:

13 December 2019

Appellant:

A

Other party to the proceedings

Patentti- ja rekisterihallituksen tilintarkastuslautakunta

**THE HELSINGIN
HALLINTO –
OIKEUS**
(ADMINISTRATIVE
COURT, HELSINKI)

**INTERLOCUTORY
ORDER**

13 December 2019

... [not translated]

... [not translated]

Subject matter

Request to the Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU)

Appellant

KHT A (statutory auditor A approved by the Chamber of Commerce)

Parties to the case

A
Patentti- ja rekisterihallituksen tilintarkastuslautakunta
(audit committee of the patent and registration office)

Contested decision

By order of 13 November 2018 ... [not translated], the Patentti- ja rekisterihallituksen tilintarkastuslautakunta ('the audit committee') ordered KHT A to pay to the State a fine in the amount of EUR 50 000.

The audit committee established that, on 12 July 2018, a two-year grace period within the meaning of Paragraph 11 of Chapter 4 of the Tilintarkastuslaki (Code of procedure before courts of statutory auditors; 'the Code') had begun and that on the same day A assumed the position of head of the finance department at X Oyj and thus a key management position. According to the audit committee, A infringed the obligation in Paragraph 11 of Chapter 4 of the Code.

The subject matter of the dispute and the relevant facts

1. A brought a claim before the administrative court against the decision of the audit committee. A sought reduction of the amount of the fine by at least half.
2. The Helsingin hallinto-oikeus (Administrative Court, Helsinki) is the competent administrative court in the pending case.
3. According to the documents in this case, Y Oy worked as a statutory auditor at X Oyj. KHT A worked as key audit partner appointed by Y Oy from 2014 until 12 July 2018. On 12 July 2018, A concluded an employment contract with X Oyj. According to a stock exchange announcement published by X Oyj on 17 July 2018, X Oyj appointed A as head of the finance department and member of the management group at X Oyj and A commenced employment in that position in February 2019. A's position with Y Oy ended on 31 August 2018. According to a statement issued by the Auditors' Oversight Body of Y Oy on 31 August 2018, X Oyj confirmed in writing that A would not work in a key management position at X Oyj or in a position in charge of the company's finance or accounting before the publication of the audit report for the year 2018. According to the commercial register, [Or. 2] Z Oy was entered as X Oyj's statutory auditor on 14 December 2018.

Summary of the main arguments of the parties

4. A submitted, inter alia, that he had cooperated in a transparent manner with the authority, which had not imposed any fines on him previously. His action entailed no disadvantages for third parties.
5. In A's view, the decision is based on an erroneous interpretation with regard to the gravity and duration of the provision's infringement. According to A, it is evident that the taking up of a position could only concern a situation in which the person

has in fact commenced employment in that position. While it is true that a ‘moral link’ might already arise for the person before entering the service, that person, before commencing employment, has neither an actual position nor influence on the company’s affairs. In addition, circumstances may still change before employment commences. With regard to independence, the assessment must focus on the person’s ability to influence a future employer’s accounting or annual statement of accounts (in the present case by commencing employment as head of the finance department). A submits that he only took up the position when he actually commenced employment in that position, namely in February 2019. If the change in circumstances were to be considered, namely that Z Oy was X Oyj’s statutory auditor for the 2018 financial year, then the actual grace period began with the conclusion of X Oyj’s audit for the year 2017 on 5 February 2018. If the grace period were to be determined purely on the basis of genuine independence, the grace period would amount to one year (the 2018 financial year). If the matter were to be regarded in purely formal terms and without taking into consideration the actual situation, the grace period would have started on 12 July 2018 and ended in February 2019 after the signing of X Oyj’s annual statement of accounts for the year 2018, that is to say it would amount to approximately seven months.

6. A submitted that his transfer was notified in a transparent manner so that third parties also would understand that the situation had been carefully considered and safeguards had been put in place. A argues also that, as a result of the change of statutory auditor, no situation arose in which A worked as head of X Oyj’s finance department while Y Oy worked as statutory auditor of that company. According to a stock exchange announcement of 29 November 2018, X Oyj had changed its statutory auditor for the 2018 financial year, with the result that there had been no actual transfer to an audit client, since A started as head of X Oyj’s finance department only in February 2019. A argues that a prerequisite for the application of Paragraph 5 of Chapter 10 of the Code must be that the audit relationship in question still continues after the transfer of the statutory auditor to the client entity. According to A, the independence of X Oyj’s statutory audit was not compromised by his transfer to that entity as head of the finance department.
7. In its observations to the administrative court, the **audit committee** submitted that, in its order, it took into consideration the circumstances referred to in Paragraph 7 of Chapter 10 of the Code.
8. In the contested decision, the audit committee took the view that the start of the grace period should be calculated from the date the key audit partner ceased to work as such in connection with the statutory audit engagement in question. In its view, A’s grace period thus started on 12 July 2018. [Or. 3]
9. The audit committee stated that the terms ‘takes up’ a position used in Paragraph 11 of Chapter 4 of the Code could refer either to the signing of a contract concerning that position or to the actual commencement of employment in that position. The legislative documents provide no interpretative guidance and there is no case-law on the application of the provision. The fact that

circumstances may change in the period between the conclusion of the contract and actual commencement of employment supports the interpretation according to which *'takes up'* indicates that employment has actually commenced. According to the audit committee, it was not justified to sanction an act which has not yet occurred. Numerous other circumstances support the opposite interpretation, according to which *'takes up'* indicates the date of conclusion of a binding contract concerning the position. The provision relates to independence. When assessing independence, external circumstances – the outward appearance of independence – are important. The conclusion of a contract is a visible external circumstance. The conclusion of a contract also has a direct impact on the behaviour and the attitude of the person concerned, his/her employer and stakeholders. A statutory auditor who has entered into a contract is bound to the new employer under that contract. This means, above all, loyalty towards the employer and acting in the interest of the new employer already prior to commencement of the actual work. The independence of a statutory auditor who transfers to an audit client in a management position, thereby ends already on the date the contract is concluded. With regard to the purpose of the provision, the date on which employment actually commences is not decisive. In the present case, the fact that the new employer, X Oyj, made A's appointment visible by means of a communication on the capital market and among stakeholders, supports the latter interpretation of the provision. In the opinion of the audit committee, A took up the position upon signing the corresponding employment contract on 12 July 2018.

National legislation and drafting history

10. According to Paragraph 11(1) of Chapter 4 of the Code, a statutory auditor or a key audit partner who carries out a statutory audit for an audit firm is prohibited from taking up the following positions before at least one year has elapsed since that audit:
 - (1) a key management position in the audited entity;
 - (2) membership of the audit committee of the audited entity or of the body performing equivalent functions to an audit committee;
 - (3) membership of the administrative body without management affiliation or membership of the supervisory body of the audited entity.
11. Pursuant to Paragraph 11(2) the period referred to in Paragraph 11(1) is two years where the subject of the audit is a public-interest entity.
12. Under Paragraph 5(1) of Chapter 10 of the Code, the audit committee may impose a fine where a statutory auditor infringes the periods referred to in Paragraph 11 of Chapter 4 concerning the transfer of a statutory auditor to an audited entity. Under Paragraph 5(2), the fine for infringement of the period referred to in Paragraph 11

of Chapter 4 is capped at a maximum amount of EUR 50 000. Under Paragraph 5(3) the fine imposed is payable to the State.

13. According to Paragraph 7(1) of Chapter 10 of the Code, when deciding on the fine, all relevant factors should be taken into account. These are: **[Or. 4]**
 - (1) the gravity and the duration of the infringement;
 - (2) the statutory auditor's level of responsibility;
 - (3) the statutory auditor's willingness to cooperate with the competent authority;
 - (4) previous fines imposed on the statutory auditor; and
 - (5) the extent of the damage or disadvantages caused by the act or omission.
14. According to Paragraph 7(2), when deciding on the fine, in addition to the factors listed in Paragraph 7(1) the following should be taken into account:
 - (1) the statutory auditor's financial situation;
 - (2) the extent of the advantages obtained by the statutory auditor.
15. It is observed in the Government proposal to Parliament for the adoption of the law amending the Code and other legislation related to it (Government Proposal HE 70/2016 vp) that, by means of those amendments, the amendments made to the directive on statutory audits and the regulation relating to it are implemented. It is proposed to add to the Code provisions which, inter alia, concern the transfer of a statutory auditor to an audited entity. In respect of Paragraph 11 of Chapter 4, the reasons given in the Government proposal imply that Paragraph 11, which is based on Article 22a of the amending directive, is new and deals with the transfer of a statutory auditor to an audited entity. What is meant by transfer to an entity is that the statutory auditor takes up a key management position in the audited entity, becomes a member of the audit committee of the audited entity or of an equivalent body, or becomes a non-executive member of the administrative body or a member of the supervisory body of the audited entity. Paragraph 11(1) defines the basic offence which concerns all statutory auditors or key audit partners who carry out a statutory audit within the meaning of Chapter 3 of that code. Such persons may not transfer to the entity they audited or become members of its bodies before the period of at least one year has elapsed since the end of the audit engagement. That period is referred to as the so-called 'cooling off' or grace period. 'Key management position' refers to members of the management group who support the managing director, or to persons whose management position was determined by the managing director or the board of directors. The head of the finance department or a person occupying an equivalent position is regarded as being in a management position within the entity even without a specific definition.

16. As regards the transfer of a statutory auditor to the entity to be audited, the Economic Committee’s report TaVM 16/2016 vp establishes that the provisions on time limits prescribed by the directive are of considerable length in the specific context of Finland. Taking into account the domestic labour market for statutory auditors, the rule on grace periods can create significant barriers to the professional development and optimal use of the current professional skills of statutory auditors, especially outside the capital region. The Economic Committee observed that the provision creates an unsatisfactory legal situation in the specific context of Finland. However, it is a minimum prescribed by mandatory EU rules and therefore not possible to derogate from at national level. In order to minimise the impact of this unsatisfactory situation, the Economic Committee considers it necessary and appropriate to exercise national discretion when sanctioning infringements of the grace period.

Relevant EU law [Or. 5]

17. According to Article 22a(1) (inserted by Directive 2014/56/EU) of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, Member States are to ensure that a statutory auditor or a key audit partner who carries out a statutory audit on behalf of an audit firm does not, before a period of at least one year, or in the case of statutory audit of public-interest entities a period of at least two years, has elapsed since he or she ceased to act as a statutory auditor or key audit partner in connection with the audit engagement:
- (a) take up a key management position in the audited entity;
 - (b) where applicable, become a member of the audit committee of the audited entity or, where such committee does not exist, of the body performing equivalent functions to an audit committee;
 - (c) become a non-executive member of the administrative body or a member of the supervisory body of the audited entity.

Case-law of the Court of Justice

18. The administrative court is not aware of any decision of the Court of Justice applicable to this case.

The need for a preliminary ruling

19. The main issue in the case before the administrative court is whether the audit committee was entitled to impose a fine of EUR 50 000 on A for infringement of the grace period within the meaning of Paragraph 11 of Chapter 4 of the Code. It

is essential for the resolution of the case to know how the duration of the grace period is calculated.

20. Pursuant to Paragraph 7(1) of Chapter 10 of the Code, when deciding on the fine, account must be taken, inter alia, of the gravity and duration of the infringement, with the result that the administrative court must determine when A took up a key management position at X Oyj in the manner specified by that code. Since the provision in Paragraph 11 of Chapter 4 of the Code implemented Article 22a(1) (inserted by Directive 2014/56/EU) of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2016 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, in order to ensure the correct interpretation of EU law in this case, the request for preliminary ruling from the Court of Justice is justified.
21. In respect of the request for a preliminary ruling from the Court of Justice, A and the audit committee were given the opportunity to be heard.

Interim order of the Helsingin hallinto-oikeus concerning the request for a preliminary ruling from the Court of Justice

22. The Helsingin hallinto-oikeus has decided to stay the proceedings and to request a preliminary ruling from the European Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) concerning the interpretation of Article 22a(1) (inserted by Directive 2014/56/EU) of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2016 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and [Or. 6] 83/349/EEC and repealing Council Directive 84/253/EEC. The request for a preliminary ruling is necessary for the resolution of the dispute before the Helsingin hallinto-oikeus.

Questions referred

1. Is Article 22a(1) (inserted by Directive 2014/56/EU) of Directive 2006/43/EC to be interpreted as meaning that a key audit partner takes up a position of the kind referred to in this provision upon conclusion of the employment contract?

2. If the answer to the first question is in the negative: Is Article 22a(1) to be interpreted as meaning that a key audit partner takes up a position of the kind referred to in this provision upon commencing employment in the position concerned?

... [not translated] [Or. 7] [not translated]