Court of Justice of the European Union
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Press and Information

Judgment in Case C-212/11
Jyske Bank Gibraltar Ltd v Administración del Estado

EU law does not preclude Spanish legislation which requires credit institutions, operating in Spain without being established there, to forward directly to the Spanish authorities information necessary for combatting money laundering and terrorist financing

Where there is no effective mechanism ensuring full and complete cooperation between the Member States which would allow those crimes to be combatted effectively, that legislation is proportionate

The directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[1] imposes certain disclosure obligations, in particular, on credit institutions. For that purpose, it requires each Member State to establish a central financial intelligence unit (FIU) responsible for receiving, analysing and disseminating to the competent authorities information concerning potential money laundering or terrorist financing[2]. The directive provides for that information to be forwarded to the FIU of the Member State in whose territory the institution is situated.

Spanish legislation requires credit institutions operating in Spain, regardless of the place of their establishment, to inform the Spanish FIU of account transfers of more than €30,000 to or from tax havens and uncooperative territories, such as Gibraltar.

Jyske, a branch of the Danish bank NS Jyske Bank, is a credit institution established in Gibraltar which operates in Spain under the rules on the freedom to provide services, that is to say, without being established there.

In January 2007, the Spanish FIU requested Jyske to provide it with certain information. It 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. The mechanism used for this purpose consisted in creating in Gibraltar corporate structures intended to prevent detection of the identity of the actual owner of property acquired in Spain, essentially on the Costa del Sol, and of the origin of the monies used. In June 2007, Jyske sent some of the information requested, but it refused to provide the data on the identity of its clients and documentation on suspicious transactions carried out in Spain, relying on the banking secrecy rules applicable in Gibraltar. Therefore, the Consejo de Ministros (Council of Ministers, Spain), considering that Jyske had failed to fulfil its disclosure obligations under Spanish legislation, imposed on it two public reprimands and two financial penalties totalling €1 700 000.

Jyske considers that the directive imposes on it an obligation of disclosure only vis-à-vis the Gibraltar FIU and that, therefore, the Spanish legislation does not comply with the directive. The bank, therefore, brought an action before the Tribunal Supremo (Supreme Court, Spain), which decided to refer a question to the Court of Justice on that subject.

[1] 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 United Kingdom was authorised to also notify an FIU in Gibraltar.

In today's judgment, the Court declares that **the directive does not expressly preclude the possibility of requiring credit institutions carrying out activities in Spain under the freedom to provide services to forward the required information in respect of the fight against money laundering and terrorist financing directly to the Spanish FIU. Therefore, the directive does not, in principle, preclude the Spanish legislation,** in so far as it seeks to strengthen, in compliance with EU law, the effectiveness of the fight against those crimes. Therefore, it cannot compromise the principles established by the directive 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.

The Court assesses next whether the Spanish legislation complies with the freedom to provide services. The Court considers that it constitutes a restriction on that freedom, in so far as it gives rise to difficulties and additional costs. Furthermore, that legislation is liable to be additional to the controls already conducted in the Member State where the institution at issue is situated, thus dissuading it from carrying out such activities.

However, that restriction on the freedom to provide services can be justified by overriding reasons in the public interest, such as the fight against money laundering and terrorist financing. Therefore, the national court must determine whether the legislation at issue is appropriate for attaining that aim, in particular, whether it allows Spain 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. In that regard, the Court points out that such legislation enables Spain to supervise all financial transactions carried out by credit institutions in its territory, whatever the manner in which those institutions have chosen to provide their services, which appears to be suitable so as to attain, effectively and coherently, the aim pursued.

The national court must then determine whether that legislation is applied in a non-discriminatory manner and whether it is proportionate, that is to say, suitable for securing the attainment of the aim pursued without going beyond what is necessary in order to attain it. Therefore, the legislation would be disproportionate where the cooperation mechanism established between the FIUs of the different Member States already allowed the Spanish FIU to obtain the required information through the FIU of the Member State where the credit institution is situated. In that regard, **the Court notes that that mechanism for cooperation between FIUs suffers from certain deficiencies.** In particular, there are important exceptions to the requirement for the requested FIU to forward the information requested to the applicant FIU. In effect, an FIU may refuse to divulge information which could hinder a judicial inquiry carried out in the Member State, either where such divulgence would have consequences which are clearly disproportionate in the light of the legitimate interests of a person or the Member State concerned, or where such would result in an infringement of the fundamental principles of national law[3]. Moreover, when combatting money laundering, the authorities must act as quickly as possible, but no provision is made for a time-limit for information to be forwarded, nor for sanctions in case of unjustified refusal on the part of the requested FIU to forward the requested information. Furthermore, recourse to that mechanism of cooperation raises specific difficulties with regard to activities carried out under the freedom to provide services. Therefore, **where there is no effective mechanism, at the time of the facts, ensuring full and complete cooperation between the FIUs and allowing money laundering and terrorist financing to be combatted just as effectively, that legislation is proportionate.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[3] 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).

The full text of the judgment is published on the CURIA website on the day of delivery.

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