

**Case C-368/23 [Fautromb] <sup>1</sup>****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:**

12 June 2023

**Referring court:**Formation restreinte du Haut conseil du Commissariat aux comptes  
(France)**Date of the decision to refer:**

25 May 2023

**Applicant:**

H3C

**Defendant:**

MO

**1. The facts and procedure in the main proceedings**

- 1 MO, who is 82 years old, has been entered in the register of statutory auditors since 1976 and in the register of the ordre des experts-comptables (Order of Accountants) since 1967.
- 2 MO owns, directly or indirectly through the limited liability company Fiducial International, 99.9% of the capital of the non-trading company Fiducial, of which he is the manager. That company is the parent company of the multidisciplinary Fiducial group, established in 1970 by MO, whose staff of over 20 000 work in nearly 80 countries.
- 3 Within that group, Société fiduciaire nationale de révision comptable (Fidaudit) and its subsidiaries carry out statutory audit activities. MO did not personally have any authority to certify or sign off accounts. Société fiduciaire nationale

<sup>1</sup> The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

d'expertise comptable (Fidexpertise) and its subsidiaries carry out accounting activities. MO holds, directly or indirectly, virtually all the capital of those two companies, of which he is also the chairman of the board of directors and chief executive officer.

- 4 The Fiducial Group offers a range of other services to undertakings through its subsidiaries:
  - Fiducial Security Services, in the field of security;
  - Fiducial Office Solutions, in the field of sales of office supplies and furniture;
  - Fiducial Informatique, in the field of IT services delivery;
  - Fiducial Real Estate, in the area of property agency and the management of real estate investment companies;
  - Banque Fiducial, in the banking sector, and
  - Fiducial Médias, which operates a national radio station and regional media.
- 5 The Haut conseil du Commissariat aux comptes (High Council of Statutory Auditors), the regulatory authority for the profession of statutory auditor in France, is hearing disciplinary proceedings against MO for failure to comply with audit legislation.
- 6 It is alleged that MO has, in essence, been in breach of Article L. 822-10 of the Commercial Code since 3 January 2016, by engaging, directly or indirectly, in commercial activities which cannot be described as ancillary to the profession of accountant and are, therefore, incompatible with the functions of a statutory auditor.

## 2. Legal framework

### A. *EU law*

*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, as amended by European Parliament and Council Directives 2008/30/EC of 11 March 2008, 2013/34/EU of 26 June 2013, 2014/56/EU of 16 April 2014 and (EU) 2022/2464 of 14 December 2022.*

- 7 Article 2 of the directive defines a statutory audit as an audit of annual financial statements or consolidated financial statements in so far as required by EU law or by national law as regards small undertakings, or voluntarily carried out at the request of small undertakings where national legislation defines such audits as statutory audits. It next defines a statutory auditor and an audit firm, respectively,

as a natural or legal person who is approved by the competent authorities of a Member State to carry out statutory audits.

- 8 Recital 5 of the directive states that that directive aims at high-level, though not full, harmonisation of statutory audit requirements and that a Member State requiring statutory audit may impose more stringent requirements, unless otherwise provided for by that directive.
- 9 Recital 9 further states that statutory auditors should adhere to the highest ethical standards and that they should therefore be subject to professional ethics, covering at least their public-interest function, their integrity and objectivity and their professional competence and due care.
- 10 In addition, Directive 2014/56/EU of 16 April 2014 amending Directive 2006/43, states, in the first recital thereof, that it was necessary to further harmonise the rules set out in Directive 2006/43 in order to enhance, inter alia, the independence and objectivity of statutory auditors and audit firms in the performance of their tasks. Recitals 6 and 7 of that directive further state that it is particularly relevant to reinforce independence as an essential element when carrying out statutory audits, and that conflicts of interest should be avoided.
- 11 In application of those principles, Articles 21 and 22 of Directive 2006/43/EC of 17 May 2006, as amended by Directive 2014/56, provide inter alia:
  - Member States are to ensure that all statutory auditors and audit firms are subject to principles of professional ethics, covering at least their public-interest function, their integrity and objectivity and their professional competence and due care;
  - Member States are to ensure that, first, when carrying out a statutory audit, a statutory auditor or an audit firm is independent of the audited entity and is not involved in the decision-taking of the audited entity and that, secondly, a statutory auditor or an audit firm takes all reasonable steps to ensure that, when carrying out a statutory audit, his, her or its independence is not affected by any existing or potential conflict of interest or business or other direct or indirect relationship involving the statutory auditor or the audit firm and its network or any person directly or indirectly linked to the statutory auditor or the audit firm by control;
  - the statutory auditor or the audit firm is not to carry out a statutory audit if there is any threat of self-review, self-interest, advocacy, familiarity or intimidation created by financial, personal, business, employment or other relationships between, on the one hand, the statutory auditor, the audit firm and its network, and any natural person in a position to influence the outcome of the statutory audit, and, on the other hand, the audited entity, as a result of which an objective, reasonable and informed third party, taking into account the safeguards applied, would conclude that the statutory auditor's or the audit firm's independence is compromised.

*Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities*

- 12 Recital 5 of the regulation states that it is important to lay down detailed rules with a view to ensuring that the statutory audits of public-interest entities are carried out by statutory auditors and audit firms subject to stringent requirements and that a common regulatory approach should enhance the integrity, independence, objectivity, responsibility, transparency and reliability of auditors of public-interest entities, contributing to the quality of statutory audits in the European Union, thus to the smooth functioning of the internal market, while achieving a high level of consumer and investor protection. That recital states that these strict requirements should be applicable to statutory auditors and audit firms only in so far as they carry out statutory audits of public-interest entities.
- 13 Article 1 of the regulation provides that the regulation lays down, inter alia, rules on the organisation and selection of statutory auditors and audit firms by public-interest entities to promote their independence and the avoidance of conflicts of interest. Article 2 adds that that regulation is to apply without prejudice to Directive 2006/43/EC. Article 5 next defines the non-audit services which a statutory auditor or an audit firm carrying out the statutory audit of a public-interest entity, or any member of his, her or its network, cannot directly or indirectly provide to that entity, to its parent undertaking or to its controlled undertakings, between the beginning of the period audited and the issuing of the audit report, first, and in the financial year immediately preceding that period, secondly.

*Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*

- 14 Recitals 97 and 101 of the directive state:

*‘(97) It is necessary to provide in this Directive for certain rules on high quality of services, ensuring in particular information and transparency requirements. These rules should apply both in cases of cross border provision of services between Member States and in cases of services provided in a Member State by a provider established there, without imposing unnecessary burdens on SMEs. They should not in any way prevent Member States from applying, in conformity with this Directive and other Community law, additional or different quality requirements.*

...

*(101) It is necessary and in the interest of recipients, in particular consumers, to ensure that it is possible for providers to offer multidisciplinary services and that restrictions in this regard be limited to what is necessary to ensure the impartiality, independence and integrity of the regulated professions. This*

*does not affect restrictions or prohibitions on carrying out particular activities which aim at ensuring independence in cases in which a Member State entrusts a provider with a particular task, notably in the area of urban development, nor should it affect the application of competition rules.'*

15 Article 25 provides:

*'1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.*

*However, the following providers may be made subject to such requirements:*

*(a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, which vary according to the specific nature of each profession, and is necessary in order to ensure their independence and impartiality;*

*(b) providers of certification, accreditation, technical monitoring, test or trial services, in so far as is justified in order to ensure their independence and impartiality.*

*2. Where multidisciplinary activities between providers referred to in points (a) and (b) of paragraph 1 are authorised, Member States shall ensure the following:*

*(a) that conflicts of interest and incompatibilities between certain activities are prevented;*

*(b) that the independence and impartiality required for certain activities is secured;*

*(c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy.'*

## **B. National law**

### *The Commercial Code*

16 Under Article L. 822-1 of the Commercial Code, the functions of statutory auditor are performed by natural persons or by audit firms.

17 Statutory auditors are subject to various rules governing professional ethics, resulting, first, from Articles L. 822-9 to L. 822-16 and R. 822-20 to R. 822-31 of the Commercial Code and, secondly, from the Code of professional ethics for statutory auditors, which is annexed to the regulatory part of the Commercial Code.

18 Article L. 822-10 of the Commercial Code provides:

*‘The functions of a statutory auditor are incompatible with:*

- 1. Any activity or act capable of undermining his or her independence;*
- 2. Any paid employment; however, a statutory auditor may deliver teaching associated with the practice of his or her profession or take up paid employment with a statutory auditor or an accountant.*
- 3. Any commercial activity, whether carried out directly or through an intermediary’.*

19 Article L. 822-10 of the Commercial Code was supplemented by the Law of 22 May 2019, which now provides for two exceptions to the prohibition on engaging in commercial activities, paragraph 3 thereof now being worded as follows:

*‘3. Any commercial activity, whether carried out directly or through an intermediary, with the exception, on the one hand, of commercial activities ancillary to the profession of accountant, carried out in compliance with the rules governing professional ethics and conduct and the independence of statutory auditors, and in accordance with the conditions laid down in the third paragraph of Article 22 of Regulation No 45-2138 of 19 September 1945 on the establishment of the ordre des experts-comptables and governing the professional title and profession of accountant and, on the other hand, of ancillary commercial activities engaged in by a multidisciplinary partnership in accordance with the conditions laid down in Article 31-5 of Law No 90-1258 of 31 December 1990 on the exercise, in the form of a company or firm, of liberal professions governed by particular legislation or regulations or whose professional title is protected, and on holding companies for liberal professions.’*

20 Article 22 of Regulation No 45-2138 of 19 September 1945 provides that the practice of accountancy is incompatible with any employment or act capable of undermining the independence of the person carrying it out, and then lists various incompatibilities, which include carrying out any commercial activity or act of agency other than those involved in the practice of the profession, unless it is carried out on an ancillary basis and is not likely to jeopardise the practice of the profession or the independence of partners who are accountants, or the latter’s compliance with the rules inherent in their status and in their professional ethics.

21 Article 31-5 of Law No 90-1258 of 31 December 1990 provides that a multidisciplinary partnership formed for the collective exercise of certain liberal professions may, on an ancillary basis, carry out any commercial activity provided that its pursuit by one or more of the professions specified in the objects of the partnership is not prohibited by law or decree.

### **3. Reasons for the reference for a preliminary ruling**

- 22 No legislation or regulation defines the commercial activities referred to in Article L. 822-10(3) of the Commercial Code. In the course of the proceedings, MO disputed neither that he had indirectly engaged in the activities in question nor that they were commercial activities which cannot be described as ancillary to the profession of accountant.
- 23 However, MO submits that the provisions of Article L. 822-10(3) of the Commercial Code are contrary to EU law, and in particular Article 25 of Directive 2006/123 on services in the internal market, with the result that those provisions cannot form the basis of a disciplinary penalty. In his view, the prohibition imposed by Article L. 822-10(3) of the Commercial Code is disproportionate, since the independence of statutory auditors and the prevention of conflicts of interest are adequately ensured by other French and EU laws, regulations and rules of professional ethics, with which he complies when carrying out the business activities in question.
- 24 MO relies on the judgment of 27 February 2020, *Commission v Belgium* (C-384/18, EU:C:2020:124), in which the Court of Justice of the European Union held that by prohibiting the exercise of accounting activities in conjunction with the activities of an insurance broker or agent, or of an estate agent, or with any banking or financial services activity, and by permitting the chambers of the Professional Institute of Approved Accountants and Tax Consultants to prohibit the exercise of accounting activities in conjunction with any artisanal, commercial or agricultural activity, the Kingdom of Belgium had failed to fulfil its obligations under, inter alia, Article 25 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
- 25 In that judgment, the Court of Justice rejected the Kingdom of Belgium's argument that, first, the prohibition at issue is proportionate in so far as it relates only to strictly defined activities in respect of which it is presumed that a conflict of interest may occur and, secondly, alternative measures are not as effective for attaining the objectives pursued, in view of the structure of the Belgian market (paragraph 52).
- 26 The Rapporteur General of the Haut conseil [du Commissariat aux comptes] considers that that solution cannot be applied to MO's situation, since the activities, tasks and ethical obligations of Belgian accountants and French statutory auditors differ substantially.
- 27 On account of the specific nature of the tasks entrusted to statutory auditors, and in particular their task of certifying accounts, the Rapporteur General argues that the activities of statutory auditors are subject to a set of rules governing professional ethics arising, in particular, under national law, from Articles L. 822-9 to L. 822-16 and R. 822-20 to R. 822-31 of the Commercial Code and from the Code of professional ethics for statutory auditors.

- 28 In his view, several of those provisions are intended, inter alia, to ensure the independence and impartiality of statutory auditors and to prevent conflicts of interest, namely:
- Article L. 822-10(1) and (2) of the Commercial Code, which establishes a general incompatibility between the functions of a statutory auditor and any activity or act capable of undermining his or her independence, as well as any paid employment, unless it is carried out with a statutory auditor or an accountant or for teaching purposes;
  - Articles L. 822-11 to L. 822-13 of that code, which lay down various prohibitions and provide for the implementation of safeguard measures relating to the relationship between statutory auditors and the entities audited by them, in particular by reference to the provisions of Regulation (EU) No 537/2014 of 16 April 2014;
  - Articles 4 and 5 of the Code of professional ethics, which require statutory auditors to be independent of the entity for which they undertake tasks or provide a service and to avoid placing themselves in a situation which might be perceived as compromising the impartial performance of those tasks or that service; Articles 12, 18 to 22 and 31 to 35 thereof then contain various provisions intended to ensure the application of those principles.
- 29 MO maintains, however, that those provisions, far from illustrating the need to impose on statutory auditors standards of professional ethics more stringent than those imposed on Belgian accountants, make it possible specifically to guarantee the independence and impartiality of statutory auditors, so that the prohibition on commercial activities laid down by Article L. 822-10(3) of the Commercial Code is not necessary to achieve that objective.
- 30 Moreover, MO notes that, while the objective of Regulation (EU) No 537/2014 of 16 April 2014, as defined by Article 1 thereof, is to promote the independence of statutory auditors and audit firms and the avoidance of conflicts of interest in the audit of public-interest entities, that regulation, like Directive 2006/43/EC of 17 May 2006, lays down not a general prohibition on engaging in commercial activities but only a prohibition on providing, directly or indirectly, non-audit services to audited entities or their related undertakings. MO concludes from this that the level of independence and impartiality expected of statutory auditors by the European legislature can be achieved by means other than a prohibition on engaging in commercial activities such as that imposed by Article L. 822-10(3) of the Commercial Code.
- 31 The Formation restreinte du Haut conseil du Commissariat aux comptes (High Council of Statutory Auditors, Restricted Composition) considers, first of all, that, by making all commercial activities incompatible with the functions of statutory auditor, with the exception of commercial activities ancillary to the profession of accountant and commercial activities engaged in on an ancillary basis by a

partnership formed for the collective exercise of certain liberal professions, Article L. 822-10(3) of the Commercial Code actually makes statutory auditors subject to requirements such as those referred to in the first subparagraph of Article 25(1) of Directive 2006/123 on services in the internal market.

- 32 The question therefore arises as to whether Article 25(1)(a) of Directive 2006/123 allows the introduction of those requirements, which makes it necessary to ascertain whether they are justified in order to guarantee compliance with the rules governing the professional ethics and conduct of statutory auditors and, in particular, in order to ensure their independence and impartiality.
- 33 In that regard, in the first place, there is no doubt that the prohibition on commercial activities imposed by Article L. 822-10(3) of the Commercial Code is likely to prevent situations of conflict of interests and, consequently, to limit the risks of undermining the independence and impartiality of statutory auditors.
- 34 In the second place, that prohibition could fall within the discretion afforded to Member States, in accordance with recital 5 of Directive 2006/43, to impose more stringent requirements than those provided for by that directive.
- 35 In order to give a ruling in the disciplinary proceedings brought against MO, the Formation restreinte considers it necessary to interpret Article 25 of Directive 2006/43. In that connection, it refers for a preliminary ruling the first question set out below.
- 36 Moreover, the exceptions to that prohibition introduced by the Law of 22 May 2019 (see paragraph 19 of this summary) limit the scope of the freedom of statutory auditors to diversify their activities, while ensuring that those activities are in any event subject to the ethical requirements imposed on accountants or other regulated professions.
- 37 In that connection, the Formation restreinte du Haut conseil du Commissariat aux comptes refers for a preliminary ruling the second question set out below.

#### **4. Status as a 'court or tribunal'**

- 38 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, the Court of Justice takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39; and of 26 January 2023, *NV Construct*, C-403/21, EU:C:2023:47, paragraph 39). In addition, it is on the basis of the information provided in the request for a preliminary ruling that the Court of Justice verifies whether the referring body is capable of being classified as a court or tribunal within the meaning of Article 267 TFEU (most recently,

order of 7 February 2023, *Konstrukta – Defence*, C-521/22, EU:C:2023:94, paragraph 24).

- 39 The Formation restreinte du Haut conseil du Commissariat aux comptes was established by Article L. 821-2, II, of the Commercial Code, which confers jurisdiction on it to impose the penalties for misconduct to which statutory auditors are subject under Article L. 824-1 of that Code.
- 40 The Formation restreinte is composed of a judge, who is its President and is a member of the College of the Haut conseil du Commissariat aux comptes, and four other members elected by the College from among its members.
- 41 The mandate of the members of the College of the Haut conseil du Commissariat aux comptes is irrevocable and they are subject to rules of professional ethics laying down various incompatibilities and requiring them to exercise their functions with dignity, probity and integrity, to put to an end immediately any conflict of interest and not to receive or seek instructions from any authority in the exercise of their powers.
- 42 In the procedure before the Formation restreinte, the person concerned is heard following an investigation carried out by the Rapporteur General. He or she may be assisted by a legal adviser at all stages of the procedure, the complaints are notified to him or her and he or she may consult the file and submit observations. He or she is subsequently heard in open court by the Formation restreinte, which deliberates before giving a reasoned decision which is subject to appeal before the Conseil d'État (Council of State).
- 43 It follows from those elements that the Formation restreinte, which may not assume jurisdiction of its own motion and has sole jurisdiction to rule on disciplinary proceedings brought against statutory auditors, gives rulings in accordance with the rules of law, in *inter partes* proceedings and in a manner which guarantees its independence, with the result that the Formation restreinte is a court or tribunal for the purposes of Article 267 TFEU, cited above.

## **5. Questions referred**

- 44 The Formation restreinte du Haut conseil du Commissariat aux comptes stays the proceedings until the Court of Justice of the European Union has ruled on the following questions:

*'1. Must Article 25 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market be interpreted, having regard in particular to the provisions 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 and of Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit*

*of public-interest entities, as precluding national legislation which prohibits statutory auditors and audit firms from carrying out any commercial activity, whether directly or through an intermediary?*

*2. If the first question is answered in the affirmative, does the same apply where that legislation excludes from the scope of that prohibition, by way of exception, on the one hand, commercial activities ancillary to the profession of accountant, carried out in compliance with the rules governing professional ethics and conduct and the independence of statutory auditors and in accordance with the conditions laid down in the third paragraph of Article 22 of Regulation No 45-2138 of 19 September 1945 and, on the other hand, ancillary commercial activities engaged in by a multidisciplinary partnership in accordance with the conditions laid down in Article 31-5 of Law No 90-1258 of 3 December 1990?'*

Paris, 25 May 2023,

Clerk of the Court

President

WORKING DOCUMENT