Case C-562/20

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:

28 October 2020

Referring court:

Administratīvā rajona tiesa (District Administrative Court, Latvia)

Date of the decision to refer:

12 October 2020

Applicant:

SIA Rodl & Partner

Defendant:

Valsts ieņēmumu dienests (State Tax Administration, Latvia)

Subject matter of the main proceedings

Claim that the court should i) annul the decision of the State Tax Administration ('the defendant') imposing on the applicant a sanction for the incorrect risk assessment which the latter carried out, in accordance with the Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma un proliferācijas finansēšanas novēršanas likums (Law on the Prevention of Money Laundering, Terrorist Financing and Nuclear proliferation), with respect to its customers, and ii) order the defendant to withdraw the information published on its website in relation to the application of that sanction.

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

In accordance with Article 267 TFEU, the referring court asks the Court of Justice to interpret Article 18 of 2015/849, as well as Annex III, point 3(b), to, and Article 13(1)(c) and (d), Article 14(5) and Article 60(1) and (2) of, that directive, with a view to clarifying in which cases enhanced customer due diligence measures must be taken, how information on the customer's activities is to be

obtained and how information on the sanctions applied to obliged entities is to be published.

Questions referred for a preliminary ruling

1. Must Article 18(1) and (3) of Directive 2015/849, in conjunction with Annex III, point 3(b), thereto, be interpreted as meaning that those provisions i) automatically require a provider of external bookkeeping services to take enhanced customer due diligence measures on the ground that the customer is a non-governmental organisation and the person authorised and employed by the customer is a national of a high-corruption-risk third country, in the present case, the Russian Federation, who holds a Latvian residence permit, and ii) automatically require that customer to be categorised as representing a higher degree of risk?

2. If the preceding question is answered in the affirmative, can the abovementioned interpretation of Article 18(1) and (3) of Directive 2015/849 be regarded as proportionate and, therefore consistent with the first subparagraph of Article 5(4) of the Treaty on European Union?

3. Must Article 18 of Directive 2015/849, in conjunction with Annex III, point 3(b), thereto, be interpreted as meaning that it lays down an automatic obligation to take enhanced customer due diligence measures in every case where one of the customer's business partners, but not the customer itself, is in some way linked to a high-corruption-risk third country, in the present case, the Russian Federation?

4. Must Article 13(1)(c) and (d) of Directive 2015/849 be interpreted as meaning that, when taking customer due diligence measures, the obliged entity must obtain from the customer a copy of the contract concluded between that customer and a third party, and, therefore, that an examination of that contract *in situ* is considered to be insufficient?

5. Must Article 14(5) of Directive 2015/849 be interpreted as meaning that the obliged entity is required to apply due diligence measures to existing commercial customers even where there is no indication of any significant changes in the customer's circumstances and the time limit laid down by the competent authority of the Member State for the adoption of new monitoring measures has not expired, and that that obligation is applicable only in relation to customers that have been categorised as representing a high risk?

6. Must Article 60(1) and (2) of Directive 2015/849 be interpreted as meaning that, when publishing information on a decision imposing an administrative sanction or measure for breach of the national provisions transposing that directive against which there is no appeal, the competent authority has an obligation to ensure that the information published conforms exactly to the information contained in that decision?

EU legal framework

Treaty on European Union, first subparagraph of Article 5(4).

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 13(1)(c) and (d), Article 14(1) and (5), Article 18, Article 60(1) and (2) and Annex III.

Provisions of national law relied on

Law on the Prevention of Money Laundering, Terrorist Financing and Nuclear Proliferation: Article 6(1)(1^1) and (1^2), Article 7(1), points 5, 7 and 11, Article 8(2), Article 11(1), points 1 and 2, Article 11^1(1) and (3), point 2(a), (b) and (c), Article 20(1) and (2), Article 22(2), point 5, and Article 46(1^2) and (1^3).

Case-law of the Court of Justice

Judgment of the Court of Justice of 25 April 2013, *Asociaţia Accept*, C-81/12, EU:C:213:275, paragraph 71

Judgment of the Court of Justice of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraphs 77, 87 and 107

Brief summary of the facts and the main proceedings

1 The applicant is a commercial company, registered in the Republic of Latvia, whose business is to provide services in the fields of accounting, bookkeeping, auditing and tax consultancy. In accordance with Article 3(1), point 3, of the Law on the Prevention of Money Laundering, Terrorist Financing and Nuclear Proliferation ('the Law on Prevention'), the applicant is subject to that Law.

2 Between 3 April and 6 June 2019, the defendant's staff carried out an anti-money-laundering inspection of the applicant, on the basis of which an initial inspection report was drawn up on 3 April 2019 (a further report followed on 6 June 2019).

3 The initial inspection report states that the applicant's internal monitoring system had a number of shortcomings and that the applicant had not carried out and documented an assessment of the risk of money laundering and terrorist financing associated with its economic activities, in accordance with Article 6(1) of the Law on Prevention. In particular, there was some dispute in that regard over the risk assessment of some of the applicant's customers: one particular foundation ('the

Foundation') and one particular commercial company ('the Commercial Company').

4 The abovementioned Foundation is established in the Republic of Latvia and its purpose is to popularise and promote the information technology sector in education.

5 The Foundation first became a customer of the applicant on 25 October 2016. The document identifying the customer was signed on 7 March 2017 by a natural person authorised by the Foundation (a national of the Russian Federation) who is at the same time the head (and an employee) of the Foundation. The whole of Latvian society is designated as being the beneficial owner of the Foundation (a fact which is contrary to the legislation in force).

6 The applicant assessed the customer's risk as low. The defendant has stated that, according to information from the Noziedzīgi iegūtu līdzekļu legalizācijas novēršanas dienests (Money Laundering Prevention Service), the main threats of terrorist financing lay in the possible use of NGOs and the business community to finance terrorism, and that international practice and the experience of law enforcement agencies in several countries showed that NGOs were particularly vulnerable and liable to being misused to finance terrorism. Consequently, according to the defendant, the applicant, being subject to the Law on Prevention, has an obligation to carry out a detailed examination of the customer if there is an increased risk assessment, given that the applicant's customer has links with the Russian Federation (high-corruption-risk third country).

7 The Commercial Company is also established in the Republic of Latvia and its business is in the area of public relations and communication.

8 The Commercial Company first became a customer of the applicant on 28 December 2017. The Commercial Company's sole business partner and sole beneficial owner is a Latvian national.

9 The applicant assessed the risk associated with the Commercial Company as low. On analysing extracts from the Commercial Company's current account, the defendant found that that company received monthly transfers of EUR 25 000 from Nord Stream A2 AG, an undertaking established in Switzerland which is a subsidiary of the Russian undertaking Gazprom (Gazprom holds 51% of the former undertaking's share capital). Furthermore, the invoices issued show that these were issued in accordance with the contract signed on 1 January 2018 between the Commercial Company and Nord Stream 2 AG. The defendant asked the applicant to produce a copy of that contract, but the applicant did not provide it, stating that it had examined the original of the contract *in situ* at the customer's premises. In the light of the foregoing, the defendant concluded that, in carrying out its monitoring of the business relationship, the applicant had not paid particular attention to the transactions concluded by its customer (the Commercial

Company) with Nord Stream 2 AG, which is an undertaking that belongs to an entity established in a high-corruption-risk third country.

10 By the time the follow-up to the inspection report was drafted (on 6 June 2019), the shortcomings in the monitoring system had been remedied and, for that reason, no breaches were found to have been committed.

11 By decision of 11 July 2019 of the Director of the Anti-Money Laundering Administration, a pecuniary fine of EUR 3 000 was imposed on the applicant for the breach of the requirements laid down in the Law on Prevention which had been found during the inspection.

12 On the basis of that decision, the defendant, on 11 August 2019, published on its website information on the breaches of the requirements laid down in the Law on the Prevention which the applicant was alleged to have committed.

13 The abovementioned decision of 11 July 2019 was contested by the applicant but was confirmed by decision of 13 November 2019 of the applicant's Director-General ('the contested decision').

14 On 13 December 2019, the applicant asked the referring court to annul the contested decision and to impose on the defendant an obligation to withdraw the information published on its website in relation to the sanctions imposed on the applicant as being subject to the Law on Prevention.

Essential arguments of the parties to the main proceedings

15 The essential arguments of the parties to the main proceedings are included in the grounds set out by the referring court.

Brief summary of the grounds for the request for a preliminary ruling

Obligation to take enhanced customer due diligence measures even in the case where the customer's form, structure and activity are not indicative of a risk

16 Article 18(1) of Directive 2015/849 provides that the Member States may determine other 'cases of higher risk' in which 'enhanced customer due diligence measures' must be taken.

17 The referring court has doubts as to whether any non-governmental organisation should be regarded as a case of higher risk and, for that reason, be subject to enhanced due diligence criteria. Neither Directive 2015/849 nor the Law on Prevention provide that, because of their legal form, non-governmental organisations must be regarded in themselves as higher-risk cases. According to the applicant, if the defendant, as a national monitoring authority, considers that, in every case where the obliged entity's customer is a non-governmental organisation or one of the customer's employees comes from a high-corruption-

risk third country, the customer must be the subject of a detailed examination, the question arises as to whether that requirement is excessive or whether it is proportionate and, if so, whether this should be expressly laid down in law.

18 In the present case, it is common ground that the Russian Federation is not a high-risk country, which is to say that it is not included in the list of high-risk countries published by the Financial Action Task Force (FATF) or in the European Commission's list of third countries not doing enough to combat money laundering and terrorist financing, although the view might be taken, in accordance with Annex III, point 3(b), to Directive 2015/849 and Article 11^{1}(3), point 2(b), of the Law on Prevention, that it is a country in which there is a high risk of corruption. Nonetheless, the provisions of the Law on Prevention and of Directive 2015/849 do not directly require the customer to be subjected to enhanced due diligence measures in the case where a national of the Russian Federation is merely an employee of the customer, which is to say not the beneficial or actual owner of that customer for the purposes of Directive 2015/849.

19 Recital 4 of Directive 2015/849 states that Union action should continue to take particular account of the FATF Recommendations and instruments. Paragraph 71 of the 'FATF Guidance for a Risk-Based Approach for the Accounting Profession' ('the FATF Guidance') sets out a number of criteria whereby a customer may be a higher risk on account of its geographical location. Nonetheless, none of those criteria has to do with the nationality of one of the customer's employees. The applicant takes the view that any conclusion drawn, with respect to the potentially higher risk represented by the Foundation, on the basis of the nationality of a person who is employed and has been authorised by that customer is incompatible with the FAT Guidance.

20 The case-law of the Court of Justice states that Member States must ensure that the enhanced customer due diligence measures capable of being applied are based on assessment of the existence and level of a risk of money laundering or terrorist financing with respect to a customer, business relationship, account, product or transaction, as the case may be. Without such assessment, it is not possible for either the Member State concerned or, as the case may be, an institution or person covered by [Directive 2015/849] to decide in an individual case what measures to apply. Finally, where there is no risk of money laundering or terrorist financing, it is not possible to take preventive action on those grounds (judgment in *Safe Interenvíos*, paragraph 107). The Court has also stated in that regard that such measures must have a concrete link with the risk of money laundering and terrorist financing and be proportionate to that risk (judgment in *Safe Interenvíos*, paragraph 87). Consequently, if such a risk cannot be identified, it would be inappropriate and disproportionate always to require enhanced due diligence.

21 The principle of proportionality laid down in Article 5 of the Treaty on European Union applies both to EU law and to domestic law in situations in which Member States exercise their discretion and competence in areas of EU law which have

been harmonised by the European Union (including the area governed by Directive 2015/849). As the Court has held, the criterion of proportionality is essential in connection with additional measures introduced by Member States in order to prevent money laundering and terrorist financing. The formal requirement always to classify any non-governmental organisation as a high-risk customer may not be proportionate to the objective, because the benefit to society does not outweigh the harm caused to the rights and legitimate interests of the person concerned.

22 In accordance with the case-law of the Court of Justice, where national law is applied and a situation falls within the scope of a directive, national law must be interpreted as far as possible in the light of the wording and the purpose of the directive (judgment in *Asociaţia Accept*, paragraph 71). In the present case, there are doubts about the interpretation of Article 18(1) and (3) of Directive 2015/849, in conjunction with Annex III, point 3(b) thereto, and, in particular, about whether that provision envisages an automatic obligation to take enhanced customer due diligence measures if there is any indication of a risk associated with the customer's legal form (if it is a non-governmental organisation) or a risk associated with the customer's economic activities (if the person authorised and employed by the customer is a national of a high-corruption-risk third country, in the present case, the Russian Federation, who holds a Latvian residence permit), and about whether that provision prescribes that such a customer is always to be categorised as representing a higher degree of risk. What is more, if that conclusion were reached with respect to the interpretation of the relevant provisions of Directive 2015/849, it would fall to be assessed whether such a requirement must be considered to be proportionate.

Adoption of enhanced customer due diligence measures if one of the customer's business partners has links with a high-corruption-risk third country, in the present case, the Russian Federation

23 The fact that the customer itself or its beneficial owner is established in the Russian Federation — which is not a high-risk country but might be assessed as being a country or territory in which there is a high risk of corruption — might be a factor that increases the risk associated with the customer, which might in turn be a reason for subjecting the customer to a detailed examination.

24 In the view of the defendant, the fact that Nord Stream 2 AG, which is (51%) owned by the Russian undertaking, Gazprom, is a business partner of the Commercial Company is a factor which increases the risk associated with the customer. What is more, the fact that the Commercial Company receives EUR 25 000 a month from Nord Stream 2 AG might indicate that those entities are engaged in a transaction, atypical in its scale and complexity, which does not appear to have any apparent economic or legal purpose.

25 Consequently, the defendant considers, the applicant infringed Article 20(1), points 1 and 2, and Article 22(2), point 5, of the Law on Prevention, which correspond to Article 13(1)(c)and (d) and Article 18(1) of Directive 2015/849.

26 Article 5 of Directive 2015/849 provides that, within the limits laid down by EU law, Member States may adopt or retain in force stricter provisions in the field covered by that directive to prevent money laundering and terrorist financing. The Court of Justice has stated in its case-law that the 'stricter provisions' referred to in Article 5 of Directive 2015/849 may concern situations for which the directive prescribes certain types of customer due diligence and also other situations which Member States consider to represent a risk. Consequently, the Republic of Latvia may also adopt stricter measures to prevent money laundering and terrorist financing if it considers there to be a risk. The referring court nonetheless has doubts about whether, in this particular case, the defendant, when applying the provisions of the Law on Prevention, went beyond what is required by law in taking the view, in particular, that the fact that one of the Commercial Company's business partners is a subsidiary of an undertaking established in the Russian Federation is in itself a factor which increases the risk associated with the customer, even if that presumption is not provided for either in the Law on Prevention or in Directive 2015/849.

27 Article 13(1) of Directive 2015/849 sets out the customer due diligence measures, which include, in points (c) and (d), assessing and, as appropriate, obtaining information on the purpose and intended nature of the business relationship, as well as conducting ongoing monitoring of the business relationship. Nonetheless, that provision of the Directive does not specify the methods and means of assessing and obtaining such information.

28 It should be noted that the provisions of the Law on Prevention, in common with Article 13(1) of Directive 2015/849, do not require copies of transactional documents to be obtained, in particular where the transaction does not exhibit any unusual features or there is no indication of any increased risk associated with the customer. Consequently, the referring court has doubts about whether the defendant exceeded its statutory powers in requiring the production of a copy of the contract concluded between the Commercial Company and Nord Stream 2 AG.

29 In the light of the foregoing, it must be clarified whether the provisions of Directive 2015/849 state that, in the event that one of the customer's business partners has links with a high-corruption-risk third country, in the present case, the Russian Federation, enhanced customer due diligence measures must be taken, and whether those provisions require the production of a copy of the contract concluded between the customer and the third country and, therefore, whether an examination of that contract *in situ* is considered to be insufficient.

Updating of information on the customer

30 Article 14(5) of Directive 2015/849 states that the obligation to update information on the customer is to apply 'on a risk-sensitive basis'. In other words, if the customer is low-risk and the customer's circumstances have not changed significantly, Article 14(5) of Directive 2015/849 does not require customer due diligence measures to be taken. Given that, in the view of the defendant, the applicant infringed Article 8(2) of the Law on Prevention, which provides that a person subject to that Law must periodically update information on the customer and, in any event, at least once every 18 months, and given that, at the time when the events of the present case occurred, that is to say when the defendant undertook its inspection of the applicant, 18 months had not yet passed since the Commercial Company first became a customer of the applicant, it must be clarified whether the provisions of Directive 2015/849 state – and, if so, whether this is justified and proportionate – that the obliged entity must apply due diligence measures to existing customers even in a situation in which there is no indication of any significant changes in the customer's circumstances, and whether that duty applies only to customers which have been found to represent a high risk.

Publication of information on the website of the State Tax Administration

31 Article 60(1) of Directive 2015/849 lays down the obligation to publish information relating to any decision imposing an administrative sanction or measure for breach of the national provisions transposing Directive 2015/849 against which there is no appeal. Paragraph 2 of that article allows the Member State also to publish sanctions against which there is an appeal, on condition that it also publishes information on the appeal and its outcome.

32 The [referring] court concludes that, when transposing Directive 2015/849, the Republic of Latvia introduced the strictest option [available under the Directive] — that provided for in Article 60(2) — and that, in accordance with Article 46(1^2) of the Law on Prevention, decisions of the supervisory authority against which there is an appeal (and which are not yet final) must also be published on that authority's website.

33 Article 60(1) of Directive 2015/849 provides that the publication must include at least information on the type and nature of the breach and the identity of the persons responsible. The applicant states that, in its publication, the defendant, initially (on 11 August 2019), gave an incorrect description of the nature of the breach (that the applicant's internal monitoring system was not developed), despite the fact that the applicant had devised an internal monitoring system, even though this had been found to have certain defects. In the applicant's opinion, that publication gave the general public an erroneous impression as to the nature of the breach committed by the applicant and this has had an adverse impact on the applicant's reputation.

34 The referring court observes that, even at the time of making the present order, the publication also states in relation to the applicant that its internal monitoring

system is not fully developed; that a risk assessment has not been carried out or documented; that the scope of the customer examination is not consistent with the existing risks; that it has not been clarified who is the beneficial owner; that the transactions in question have not been adequately monitored, despite the fact that the follow-up to the inspection report (of 6 June 2019) did not establish the existence of any breaches, which is to say that the breaches had been remedied during the inspection.

35 The Court of Justice of the European Union is therefore asked whether Article 60(1) and (2) of Directive 2015/849 must be interpreted as meaning that, when publishing information on a particular decision, the competent authority has an obligation to ensure that the information published conforms exactly to the information set out in the decision.