Request for a preliminary ruling – Case C-81/24 [Jenec] [i]

Reference for a preliminary ruling

Date lodged:

31 January 2024

Referring court:

Okrajno sodišče v Mariboru (Slovenia)

Date of the decision to refer:

25 January 2024

Applicant:

LH

Defendant:

NOVA KREDITNA BANKA MARIBOR d.d.

[…]

Request for a preliminary ruling from the Court of Justice of the European Union

The procedure

1 The applicant brought an action before the Okrajno sodišče v Ljubljani (Local Court, Ljubljana) seeking an order requiring the defendant to grant him access to a payment account with basic features and the provision of basic banking services, and to pay compensation of EUR 10 000 for the damage arising as a result of the defendant's breach of its obligation to contract.

2 The Local Court, Ljubljana, following an objection raised by the defendant in its response, declared, by order of 20 April 2021, that it lacked territorial jurisdiction and decided that it was for the Okrajno sodišče v Mariboru (Local Court, Maribor) ('the referring court') to decide on the case. In his preliminary pleading of 4 April 2022, the applicant amended point 1 of the application initiating proceedings,

[i] The name of the present case is fictitious. It does not correspond to the real name of any of the parties to the proceedings.

rewording it as follows: '*The defendant shall be required to open for the benefit of the applicant, within 10 days of the notification of the judgment, a payment account with basic features, and, more specifically, to the extent provided for in Article 181(2) of the Zakon o plačilnih storitvah, storitvah izdajanja elektronskega denarja in plačilnih sistemih* (Law on payment services, electronic money issuing services and payment systems) *(Uradni list RS*, Nos 7/18, 9/18, as corrected, and 102/20)'. In that pleading, the applicant requests the referring court to stay the main proceedings and to refer a question to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling.

Facts of the case

3 From the submissions of the parties to the proceedings, it appears that the factual situation, with reference to point 1 of the applicant's application initiating proceedings, [1] is not in dispute between the parties and that the disagreement between them concerns only the arguments as to whether or not the defendant's conduct is lawful. Slovenian procedural and civil law is based on the principle of non-challenge, according to which it is not necessary to adduce evidence of facts admitted, not challenged or challenged in an unreasoned manner and those are to be considered established. [2] [3] In that way, the referring court has established the relevant factual situation from a legal point of view, and, therefore, already refers a question to the Court of Justice for a preliminary ruling at this stage of the proceedings (despite the fact that in the present case it has not yet held the main hearing and has not yet started the taking of evidence). [4]

4 In the light of the foregoing, the referring court finds that the legally relevant factual situation is as follows. The applicant, on behalf of his wife, who had a transaction account opened with the defendant, attempted on 22 October 2017 to pay, at the Petrol service station in Ljubljana, by remittance, an amount of

[1] Whether the second point in the application initiating proceedings is well-founded depends on whether that point is well-founded.

[2] It is not necessary to prove facts that the party has acknowledged before the court in the course of the proceedings (Article 214(1) of the Zakon o pravdnem postopku (Code of Civil Procedure) (ZPP), *Uradni list RS*, No 3/07 – official consolidated text 45/08 – ZArbit, 45/08, 111/08; [Ustavno sodišče] (Constitutional Court) decisions 57/09, 12/10, 50/10, 107/10, 75/12, 40/13, 92/13, 10/14, 48/15, 6/17, 10/17, 16/19 – ZNP-1, 70/19, 1/22, and 3/22 – ZDeb.

[3] Facts which the party does not challenge or which it challenges without indicating reasons are deemed to be recognised (Article 214(2) ZPP).

[4] The national court is free when it comes to deciding when to refer a question for a preliminary ruling. In the light of the general (certainly non-binding) indications aimed at a more rational exercise of a discretionary right, the national court should refer a question for a preliminary ruling at the stage of the proceedings where the factual situation has already been established to a large extent (see Boulouis, Darmon and Huglo, *Contentieux communautaire*, p. 24). However, sometimes it is advisable to start the proceedings earlier, in order to ascertain which elements of the factual situation might be important and relevant for the outcome of the specific case (Hartley, *The Foundations of European Community Law*, p. 294).

EUR 93. When the cashier entered the applicant's personal data into the system, the defendant blocked the payment. In the letter which the defendant sent to the applicant's wife, in her capacity as its customer, it explained that, due to political events and increased risks linked to general security and the increased possibility of abuse of banking products for terrorist financing or other criminal offences, it had adopted certain more restrictive measures to comply with the obligations imposed by the legislation on the prevention of terrorist financing and money laundering. Compliance with OFAC (Office of Foreign Assets Control) limitations is also included in the context of those measures, as is apparent from the internal acts of the defendant. It concerns, above all, the defendant's Regulation on the prevention of money laundering and terrorist financing (anti-money laundering regulation). That regulation provides that, before establishing a business relationship, all customers must be checked as regards their possible inclusion in the lists of restrictive measures (EU, OFAC, UN, internal list), bearing in mind that inclusion in such lists means a prohibition on entering into a relationship with such a customer. Substantially similar requirements with regard to taking into account the inclusion of potential customers in the OFAC list are also imposed by other internal acts of the defendant, and, in particular, by the Instructions for the establishment of business relationships with natural persons, the Customer acceptance policy guidelines, the defendant's Methodology on restrictive measures and the defendant's Code of conduct. After the commencement of the present civil proceedings and after receipt of the response, on 23 March 2022, the applicant presented himself in person at the defendant's business premises, as he wished to open a payment account with basic features. An employee of the bank met with the applicant, and then examined the valid personal identity document produced by the latter. The bank employee explained to him that '*the system, faced with the name of the applicant, does not permit the opening of a transaction account*' and that it is, therefore, not possible to open such an account with the defendant. The applicant, 10 days after the submission of an application to open a payment account with basic features with the defendant, had not received any written reply from the defendant, despite the fact that he had requested that such a reply be sent. On 23 February 2015, the Special State Prosecutor of the Republic of Slovenia had concluded and archived the case brought against the applicant concerning the same offences as those for which an international warning had been issued. The applicant has never been convicted anywhere in the world of the offence for which he has been included in the OFAC list, and no restrictive measures of any kind have ever been taken against him by the United Nations, the European Union or the Republic of Slovenia.

The opposing legal arguments of the parties to the case

5 There is a dispute between the parties as to whether the provisions of Article 16(4) of Directive 2014/92/EU may be interpreted as conferring on Member States the power to permit banks, under national law, to refuse a consumer's application to open a payment account with basic features on the ground that the person concerned is included in the OFAC list, despite the fact that he or she has never

been convicted anywhere of the offence for which he or she is on that list, and that the United Nations, the European Union and the Member States of the European Union have never adopted restrictive measures of any kind against him or her Therefore, the dispute concerns, above all, whether such a case may come within the infringement of the provisions of Directive (EU) 2015/849 on the prevention of money laundering and terrorist financing. According to the applicant, such an interpretation would be contrary to Article 48 of the Charter of Fundamental Rights of the European Union.

National law

6 The Zakon o plačilnih storitvah, storitvah izdajanja elektronskega denarja in plačilnih sistemih (Law on payment services, electronic money issuing services and payment systems) (the 'ZPlaSSIED' [5]) [6] regulates, inter alia, the rights and obligations of payment service users and providers in relation to the provision of payment services, and lays down rules and conditions for access to payment accounts with basic features (Article 1(3) and (9)).

Article 180(1) of the ZPlaSSIED prohibits unjustified differentiation between consumers as regards the opening of and access to payment accounts with basic features:

(1) 'A *consumer legally resident in the European Union who applies to open a payment account with basic features within the European Union, or to have access to such an account, shall not be discriminated against by the bank, in particular for reasons related to nationality, residence, gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national community, membership of a national minority from another country, financial situation, lineage, disability, old age or sexual orientation. The conditions applicable to the opening of a payment account with basic features and access to it shall in no way be unjustifiably discriminatory*'.

Article 181 of the ZPlaSSIED sets out the conditions governing the consumer's right to have a payment account with basic features (which at the same time corresponds to an obligation of the bank to contract), and the exceptions relating thereto:

(1) '*All banks operating consumer payment accounts are obliged to offer consumers a payment account with basic features*'.

5 *Uradni list RS*, Nos 7/18, 9/18, as corrected, and 102/20.

6 This is the national legislative act transposing into Slovenian law Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ 2014 L 257, p. 214; 'Directive 2014/92/EU').

(3) 'A ***consumer legally resident in the European Union***, *including a consumer with no fixed address and an asylum seeker, and a consumer who has not been granted authorisation to reside but whose expulsion is impossible for legal or factual reasons,* ***shall have the right to open and use a payment account with basic features with a bank***. *That right shall apply irrespective of the consumer's habitual residence*'.

(4) '*The bank shall organise the procedure for opening a payment account with basic features in such a way that the exercise of that right is not excessively difficult or burdensome for the consumer. The bank shall open the payment account with basic features without undue delay, or at the latest 10 business days after receiving the consumer's complete application for the opening of such a payment account*'.

(5) '*The period laid down in the preceding paragraph shall also apply where the consumer's application to open a payment account with basic features is rejected*'.

(6) '***The bank shall refuse the consumer's application for the opening of a payment account with basic features whenever opening such an account would result in an infringement of the provisions of the law governing the prevention of money laundering and terrorist financing***. *In such a case, the bank shall take measures in accordance with the law governing the area of countering money laundering and terrorist financing*'.

(8) '*In the cases provided for in paragraphs 6 and 7 of this Article, the bank shall, after taking the decision to reject the application to open a payment account with basic features, inform the consumer without delay, in writing and free of charge, of the rejection of the application and of the specific reasons for refusing the application, except where this is prohibited under other provisions*'.

(9) '*In the event of a refusal of the application to open a payment account with basic features, the bank shall inform the consumer of the remedies available against the rejection of his or her application, of the right to inform the Bank of Slovenia of such rejection, and of the right to initiate the out-of-court dispute resolution mechanism provided for in Article 286 of this Law. In this notice the bank shall also mention the appropriate contact details*'.

7 The Zakon o preprečevanju pranja denarja in financiranja terorizma (Law on the prevention of money laundering and terrorist financing) (the 'ZPPDFT-2' [7]) [8]

[7] *Uradni list RS*, No 48/22.

[8] That is the national legislative act transposing into Slovenian law 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 (OJ 2015 L 141, p. 73), as last amended by Commission Delegated Regulation

defines measures, competent bodies and procedures for the detection and prevention of money laundering and terrorist financing, and governs the monitoring of the implementation of the provisions of that law (Article 1(1)).

Article 2(1) of ZPPDFT-2 defines the concept of 'money laundering', for the purposes of that law, as follows:

'*Money laundering means any conduct relating to sums of money or asset value obtained by means of a criminal offence, including:*

- *exchange transactions or any type of transfer of money or of any other asset value deriving from a criminal offence;*

- *acts aimed at concealing or disguising the true nature, origin, location, movements, availability, ownership or any rights relating to sums of money or other asset value deriving from a criminal offence*'.

Point 1 of Article 4(1) of the ZPPDFT-2 provides that banks are required to take measures to detect and prevent money laundering:

'*Banks and their branches in Member States, branches of banks of third States and banks of Member States that establish a branch in the Republic of Slovenia shall take measures for the detection and prevention of money laundering and terrorist financing, as laid down in this law, before or upon the collection, delivery, exchange, safekeeping, disposition or any other conduct in relation to sums of money or other asset value, and upon entering into business relationships.*'

Article 17 of the ZPPDFT-2 sets out the tasks related to the detection and prevention of money laundering:

'*(1) In order to detect and prevent money laundering and terrorist financing, obliged entities shall ensure, in carrying out their activities, the fulfilment of the tasks laid down in this law and by the rules adopted on the basis of the latter.*

(2) The tasks laid down in the preceding paragraph shall include the following activities:

1. *drawing up an assessment of the risk of money laundering and terrorist financing;*

2. *implementing policies, controls and procedures to effectively minimise and control the risks of money laundering and terrorist financing;*

(EU) 2019/758 of 31 January 2019 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council with regard to regulatory technical standards for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries (OJ 2019 L 125, p. 4) ('Directive (EU) 2015/849').

3. *implementing "know your customer" measures ("customer monitoring") in accordance with the methods and conditions laid down in this law;*

4. *communicating the required and requested data and submitting documentation to the Office [of the Republic of Slovenia for the prevention of money laundering] on the basis of this law;*

5. *appointing a representative ("representative") and replacement representatives and creating the conditions necessary for their work;*

6. *initiatives to ensure regular vocational training of employees and establishing regular internal controls on the performance of the tasks referred to in this law;*

7. *drawing up a list of indicators for recognising customers and transactions for which there are grounds for suspecting money laundering or terrorist financing;*

8. *ensuring protection and storage of data and keeping of registers required by this law;*

9. *implementing group policies and procedures as well as measures aimed at detecting and preventing money laundering and terrorist financing in their branches and majority-owned subsidiaries in Member States and third countries;*

10. *performing other tasks and obligations under this law and the rules adopted on the basis thereof*".

Article 18 of the ZPPDFT-2 defines the risk of money laundering and terrorist financing and risk assessments:

'*(1) The risk of money laundering and terrorist financing consists in the possibility that the customer exploits the financial system for the purpose of money laundering or terrorist financing, or directly or indirectly uses a business relationship, transaction, product, service or distribution channel, taking into account the geographical risk factor (State or geographic area), for the purposes of money laundering or terrorist financing.*

(2) The obliged entity shall assess the risk of a particular group or type of customer, business relationship, transaction, product, service or distribution channel and shall take into account geographical risk factors in relation to possible misuses for money laundering or terrorist financing purposes.

(3) On the basis of the risks ascertained in accordance with the preceding paragraph, the obliged entity shall carry out an assessment of the inherent risks in its business activity (risk assessment of the obliged entity).

(4) On the basis of the risks ascertained in accordance with paragraphs 2 and 3 of this article, the obliged entity shall carry out a risk assessment by which it estimates the level of risk of the individual customer in relation to money laundering and terrorist financing (customer risk assessment).

(5) Obliged entities that have branches and majority-owned subsidiaries in Member States and third countries shall also draw up a group risk assessment, taking into account the risks to which their branches and majority-owned subsidiaries, as well as the group as a whole, are exposed (group risk assessment).

(6) The risk assessment and the procedure for determining the risk assessment referred to in paragraphs 2, 3, 4 and 5 of this article shall reflect the particular characteristics of the obliged entity and its business activity.

(7) The obliged entity shall prepare the risk assessment referred to in paragraphs 2, 3, 4 and 5 of this article in accordance with the guidelines issued by the competent supervisory body referred to in Article 152(1) of this law in accordance with its powers, and taking into account the report containing the findings of the national risk assessment and the supranational risk assessment.

(8) The findings resulting from the risk assessment referred to in paragraphs 2, 3, 4 and 5 of this article shall be documented by the obliged entity and updated by it at least every two years. The documented findings shall be made available to the competent supervisory bodies referred to in Article 152(1) of this law upon their request.

(9) The obliged entity shall, with regard to significant changes in its commercial processes, such as the introduction of a new product, a new commercial practice, including new distribution channels, the introduction of a new technology for new and existing products or organisational changes, carry out an appropriate assessment of how those changes affect the exposure of that obliged entity to the risk of money laundering or terrorist financing.

(10) The obliged entity shall carry out the risk assessment referred to in the preceding paragraph before the introduction of a change under that paragraph and, in accordance with the findings made, shall take appropriate measures to reduce the risk of money laundering or terrorist financing'.

Article 21 of the ZZPPDFT-2 lays down customer monitoring measures:

'*(1) In so far as this law does not provide otherwise, the monitoring of the customer shall include the following measures:*

1. verifying the customer's identity and verifying his or her identity on the basis of reliable, independent and objective sources;

2. verifying the actual owner of the customer [legal person];

3. collecting data on the purposes and intended nature of the commercial relationship or transaction as well as other data within the meaning of this law;

4. regularly and diligently monitoring the commercial activities which the customer carries out with the obliged entity.

(5) in determining the scope that the implementation of the measures referred to in the preceding paragraph must have, the obliged entity shall take into account at least:

- *the purpose of entering into the business relationship and its nature,*

- *the amount of resources, the value of the assets or the scope of the transaction,*

- *the duration of the business relationship and the appropriateness of the commercial activity in relation to the purpose of entering into the business relationship*'.

Article 22 of the ZZPPDFT-2 provides that the obliged entity must carry out the monitoring of the customer at the time of entering into the business relationship with the customer.

Article 29 of the ZZPPDFT-2 sets out the detailed rules for establishing and verifying the customer's identity:

'*(1) The obliged entity, as regards the customer who is a natural person* […], *shall establish and verify his or her identity and collect the data referred to in point 2 of Article 150(1) of this law by examining the personal identity document of the customer in his or her presence. If it is not possible to obtain all the data required from this document, the missing data shall be taken from another valid official document presented by the customer or shall be provided directly by the customer.*

(3) If, in establishing and verifying the customer's identity within the meaning of this article, the obliged entity has doubts as to the veracity of the data obtained or the reliability of the documents and other business records from which the data was obtained, it shall also request a written declaration from the customer.'

Article 64 of the ZZPPDFT-2 establishes additional measures for enhanced customer monitoring:

'*(1) Enhanced monitoring of the customer shall include, in addition to the measures provided for in Article 21(1) of this law, additional measures, which under this law apply:*

1. in the event of entering into a current account relationship with a bank or another similar credit institution established in a third State;

2. in the event of entering into a business relationship or carrying out a transaction within the meaning of points 2 and 3 of Article 22(1) and Article 23 of this law with a customer who is a politically exposed person within the meaning of Article 66 of this law;

3. where the eligible persons of a life insurance or a life insurance related to units of investment funds, and the beneficial owners of an eligible person are politically exposed persons within the meaning of Article 68 of this law;

4. where the customer or transaction is related to a high-risk third country.

(2) The obliged entity shall carry out enhanced monitoring of the customer in the cases referred to in the preceding paragraph and to the extent that:

1. within the meaning of Article 19(2) of this law, it considers that the customer, business relationship, transaction, product, service, country or geographical scope involves an increased risk of money laundering or terrorist financing, or

2. an increased risk of money laundering or terrorist financing is entailed, within the meaning of point 2 of Article 14(2) of this law, and of the rule laid down in Article 14(4) of this law.

(3) When determining the customers, business relationships, transactions, products, services, distribution channels, countries or geographical areas for which it considers that there is an increased risk of money laundering or terrorist financing, the obliged entity shall take into account the increased-risk factors established by the Minister.

(4) When determining the enhanced customer monitoring measures, the obliged entities shall take into account the guidelines of the supervisory bodies referred to in Article 152(1) of this law relating to risk factors and measures that may be taken in such cases'.

Grounds of the reference for a preliminary ruling

8 Article 16(1) of Directive 2014/92/EU establishes the obligation of the Member States to ensure that all credit institutions or a sufficient number of credit institutions offer consumers payment accounts with basic features and to guarantee in their territory access to such accounts for all consumers; Article 16(2), for its part, establishes that Member States are required to ensure that consumers legally resident in the European Union have the right to open and use a payment account with basic features with credit institutions located within their territory. This ensures the right of consumers to a payment account with basic features. That right is admittedly limited by a legitimate aim, which is to prevent the misuse of such an account for the purposes of money laundering or terrorist financing, which is why Member States must, pursuant to Article 16(4) of

Directive 2014/92/EU, ensure that banks refuse applications for a payment account with basic features whenever opening such an account constitutes an infringement of the rules on the prevention of money laundering and terrorist financing laid down in Directive (EU) 2015/849.

9 The referring court is uncertain as to whether the opening of a transaction account in the name of a customer who is included in the OFAC list of restrictive measures would constitute an infringement of the rules on the prevention of money laundering and terrorist financing laid down in Directive (EU) 2015/849, especially where that person has never been definitively convicted anywhere of the offence for which he is included in that list and where no restrictive measures of any kind have been taken against that person at national level, at EU level or at the level of an international organisation of which the State concerned or the European Union is a member. Indeed, the aim of Directive (EU) 2015/849 is to prevent the use of the European Union's financial system for the purposes of money laundering and terrorist financing (Article 1), so Member States must ensure that money laundering and terrorist financing are prohibited (Article 2). Directive (EU) 2015/849 provides that banks are obliged, when establishing a business relationship, to implement verification measures (verifying the identity of customers, verifying the origin of funds and of data on the purpose and nature of commercial transactions), but it is by no means established that inclusion in the OFAC list of restrictive measures is to be taken into account in that context. Even if the fact that a person is included in such a list would constitute a special circumstance that would justify enhanced vigilance on account of the increased risk, it is not clear whether such a person should be denied the opening of a transaction account. In the event that the opening of a payment account with basic features for the benefit of such a person would constitute an infringement of Directive (EU) 2015/849, that would therefore constitute an exception to the right of access to such a payment account under Article 16(4) of Directive 2014/92/EU. In that context, the question arises as to whether such a rule constitutes an infringement of the right to the presumption of innocence enshrined in Article 48 of the Charter of Fundamental Rights of the European Union, also in the light of the fact that recital 65 of Directive (EU) 2015/849 states that that directive respects the right to the presumption of innocence.

Questions for a preliminary ruling

10 In the light of the foregoing considerations, the Local Court, Maribor, refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

(1) Does Article 16(4) of Directive 2014/92/EU permit Member States to require banks to refuse a consumer's application for a payment account with basic features, on the ground that that consumer is included in the OFAC list – a list of the United States Department of the Treasury, Office of Foreign Assets Control – in that opening such an account

would constitute an infringement of the rules on the prevention of money laundering and terrorist financing laid down in Directive (EU) 2015/849?

(2) If the first question is answered in the affirmative: is there an exception where that consumer has never been convicted anywhere in the world of the offence for which he or she is included in the abovementioned list, and/or where no restrictive measures of any kind have been taken against that consumer by the Member State concerned, the European Union or any other international organisation of which the Member State concerned or the European Union is a member?

(3) Does an answer in the affirmative to the first question mean non-compliance with Article 48 of the Charter of Fundamental Rights of the European Union which establishes the right to the presumption of innocence?

(4) Does an answer in the negative to the second question mean non-compliance with Article 48 of the Charter of Fundamental Rights of the European Union which establishes the right to the presumption of innocence?