Case C-3/24

Request for a preliminary ruling

Date lodged:

4 January 2024

Referring court:

Augstākā tiesa (Senāts) (Latvia)

Date of the decision to refer:

4 January 2024

Applicant at first instance and appellant:

SIA MISTRAL TRANS

Defendant at first instance and respondent:

Valsts ieņēmumu dienests

[…]

Latvijas Republikas Senāts (Supreme Court of the Republic of Latvia)
DECISION

Riga, 4 January 2024

The Senate, […] [composition of the court]

by means of written proceedings, has examined the appeal in cassation lodged by SIA MISTRAL TRANS against the judgment given on 29 October 2020 by the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) in the administrative proceedings initiated by means of the action for annulment brought by SIA MISTRAL TRANS against the decision […] given on 15 August 2019 by the Valsts ieņēmumu dienests (National Tax Authority, Latvia; 'the Tax Authority').

Background

Summary of the facts

1 On 8 October 2013, the appellant, SIA MISTRAL TRANS, notified the Tax Authority, through the electronic declaration system, that, on 4 October 2013, it had begun to provide outsourced accounting services.

By a decision of 12 June 2019, the Nelegāli iegūtu līdzekļu legalizācijas novēršanas pārvalde (Office for the Prevention of Money Laundering) of the Tax Authority imposed a find of EUR 5 000 on the appellant, finding that it had infringed the requirements of the Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma finansēšanas novēršanas likums (Law on the prevention of money laundering and the financing of terrorism) ([…] in its current form, the Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma un proliferācijas finansēšanas novēršanas likums (Law on the prevention of money laundering and the financing of terrorism and proliferation; 'the Anti-Money Laundering Law')).

Following the internal review requested by the appellant, the Tax Authority, by decision of 15 August 2019, confirmed the initial decision.

The contested decision states that the appellant had registered with the Tax Authority as an entity subject to the Anti-Money Laundering Law, declaring that its type of activity was outsourced accounting services. On 10 April 2018, an inspection was carried out to assess compliance on the part of the appellant with the requirements of the Anti-Money Laundering Law, measures were recommended to rectify shortcomings and the corresponding inspection report was drawn up. On 16 May 2019, the Tax Authority carried out a further inspection and found various shortcomings in the appellant's internal control system: (1) the

appellant had not, according to its type of activity, conducted or documented the [required] assessment of the money laundering and terrorism financing risks, in order to identify, assess, understand, and manage such risks inherent in its activities and its customers; (2) the appellant does not, in practice, document customer due diligence and identification activities; (3) the internal control system does not include a procedure for updating the risk assessment and improving the internal control system; (4) the internal control system does not include a periodic review of policies and procedures; and (5) the internal control system does not include a procedure whereby documents obtained in the course of identification, due diligence and scrutiny of customer transactions are destroyed. Consequently, the Tax Authority found that the appellant had failed to comply with the requirements of Article 6(1) and (1.[2]), Article 7(1)(7), Article 8(2), Article 11.[1](1), Article 37(2) and Article 37.[2]. The decision states that, in imposing the penalty, the character, nature and duration of the infringement were taken into account, as well as the financial situation of the appellant. The fact that the appellant did not even attempt to follow the recommendations included in the inspection report of 10 April 2018 and for more than a year had not complied with the obligations and duties imposed by the Anti-Money Laundering Law was also taken into account.

The appellant brought an action against the decision of the Tax Authority before the Regional Administrative Court. In that action, the appellant stressed, in particular, that the outsourced accounting services were provided solely to persons related to it: (1) SIA Bolivar Serviss, (2) SIA Bolivar Logistic and (3) SIA Bolivar Transport. The appellant and the related commercial companies have identical members on their boards of directors, identical shareholders and identical beneficial owners: A and B, between whom there is a kindred relationship in the [*degree given*] degree. That way of carrying out the accounting was chosen solely to save resources and to avoid having to purchase a licence for the accounting software for each of the companies. A contract was concluded in relation to the foregoing and a payment to cover the costs was established. As a result of the initial decision of the Tax Authority, the accounting was reorganised such that, since 2 July 2019, the accounts of all of the related companies are drawn up independently. The appellant also informed the Tax Authority that it no longer provided outsourced accounting services, as of 30 June 2019.

2 By judgment of 29 October 2020, the Regional Administrative Court, ruling on appeal, dismissed the action for annulment of the contested decision. That judgment is based on the following grounds:

2.1 The appellant, in its capacity as a provider of outsourced accounting services, is subject to the Anti-Money Laundering Law. The fact that the appellant solely provides accounting services for three related customers is irrelevant. In accordance with point (a) of Article 2(1)(3) of 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 ('Directive 2015/849'), that directive applies also to external accountants, and the recipient of the outsourced accounting services is not a decisive factor. Nor does the Anti-Money Laundering Law include any provision which is more beneficial for related persons. Moreover, the appellant already knew the opinion of the Tax Authority on the matter, following the first inspection of 10 April 2018. If the appellant had been unsure about any issues, that situation could have been resolved before the following inspection.

2.2 The Tax Authority correctly found that the appellant had failed to comply with the requirements of Article 6(1) and (1.[2]), Article 7(1)(7), Article 8(2), Article 11.[1](1), Article 37(2) and Article 37.[2].

2.3 When deciding on the penalty, the Tax Authority took into account the circumstances provided for in Article 77(3) of the Anti-Money Laundering Law, in particular, the gravity and duration of the breach, the degree of responsibility and the financial situation of the person, as well as cooperation with the supervisory authority.

Article 78(1)(3) of the Anti-Money Laundering Law allows for the imposition of fines of up to EUR 1 000 000. The fine of EUR 5 000 imposed on the appellant is appropriate to the nature of the infringement and proportionate to the financial situation of the appellant, in comparison with the threat caused to the interests of the national economy. The appellant infringed essential requirements of the Anti-Money Laundering Law and failed to comply with fundamental legal obligations set down therein, thereby hindering attainment of the objectives of that law.

3 The appellant has lodged a cassation appeal against that decision of the [Regional Administrative Court], arguing that the penalty imposed is disproportionate.

Grounds

Applicable legislation

European Union law

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 2: 1. This Directive shall apply to the following obliged entities:

[…]

(3) the following natural or legal persons acting in the exercise of their professional activities: (a) auditors, external accountants and tax advisors […].

Article 58: 1. Member States shall ensure that obliged entities can be held liable for breaches of national provisions transposing this Directive in accordance with this Article and Articles 59 to 61. Any resulting sanction or measure shall be effective, proportionate and dissuasive.

Latvian law

5 Law on the prevention of money laundering and the financing of terrorism and proliferation. This law transposes Directive 2015/849.

Article 3 'Entities subject to the Law: (1) Persons who carry on the following economic or professional activities shall be regarded as obliged entities for the purposes of this law:

[…]

(3) external accountants, sworn auditors, firms of sworn auditors and tax advisors, as well as any other person who undertakes to provide assistance with tax matters (such as advice or material assistance) or acts as an intermediary in the provision of such assistance, irrespective of the frequency with which it is provided and of the existence of remuneration […].'

Article 6 'Obligation to conduct a risk assessment and to establish an internal control system': (1) The obliged entity, according to its type of activity, shall conduct and document an assessment of the risks of money laundering and the financing of terrorism and proliferation in order to identify, assess, understand, and manage such risks inherent in respect of its own activities and customers, and, on the basis of that assessment, shall establish an internal control system for the prevention of money laundering and the financing of terrorism and proliferation, including by developing and documenting the relevant policies and procedures, which shall be approved by the board of directors of the obliged entity, if any is appointed, or, where appropriate, by another senior management body of the obliged entity.

[…]

(1.^{2}) When performing the assessment of the risk of money laundering and the financing of terrorism and proliferation and establishing the internal control system, the obliged entity shall take into account at least the following circumstances affecting the risks:

(1) customer risk inherent in the legal form, the ownership structure, the economic or personal activities or the beneficial owner of the customer;

(2) country and geographical risk, that is, the risk that the customer or the beneficial owner of the customer is linked to a country or territory whose economic, social, legal or political circumstances may be indicative of a high money laundering or terrorism and proliferation financing risk inherent in the country;

(3) risk relating to the services and products used by the customer, that is, the risk that the customer may use the service or product in question for the purposes of money laundering or the financing of terrorism and proliferation;

(4) risk relating to the delivery channel of the service or product, associated with the form in (or channel through) which the customer obtains and uses the service or product.

Article 7 'Internal control system': (1) When establishing the internal control system, the obliged entity must provide for at least the following:

[…]

(7) the procedure for the retention and destruction of information and documents obtained in performing due diligence on the customer and conducting scrutiny of the customer's transactions.

Article 8 'Updating the risk assessment and improving the internal control system': (2) The obliged entity shall, periodically, but at least once every 18 months, conduct a documented assessment of the efficacy of the internal control system, in particular by reviewing and updating the assessment of the risk of money laundering and the financing of terrorism and proliferation related to the customer, its country of residence (or establishment), the economic or personal activity of the customer, the services and products used and their delivery channels, as well as the transactions carried out, and, if necessary, shall implement measures for improving the efficacy of the internal control system, including measures for reviewing and clarifying policies and procedures for the prevention of money laundering and the financing of terrorism and proliferation.

Article 11.[1] 'Customer due diligence measures and risk factors': (1) Customer due diligence measures are a set of activities based on the risk assessment, in the context of which every obliged entity shall:

(1) identify the customer and verify the identification data obtained;

(2) determine the beneficial owner and, on the basis of the risk assessment, make sure that the relevant natural person is the beneficial owner of the customer. In the case of a legal arrangement or legal person, the obliged entity shall also check the structure of the members of that person and the way in which the beneficial owner exercises control over that legal arrangement or legal person;

(3) obtain information regarding the purpose and envisaged nature of the commercial relationship and occasional transactions;

(4) once the commercial relationship has commenced, carry out monitoring, including checks to confirm that the transactions carried out in the course of that relationship are being performed in accordance with the information which the obliged entity holds on the customer, its economic activity, its risk profile and the origin of the funds;

(5) ensure that the documents, personal data and information obtained in the course of customer due diligence are retained, periodically assessed and updated in accordance with the inherent risks, at least every five years.

Article 37 'Retention, updating and destruction of documents resulting from customer due diligence': (2) Every obliged entity, for a period of five years after the end of the commercial relationship or after carrying out an occasional transaction, shall retain:

(1) all information obtained in the course of customer due diligence, including information regarding the customer's domestic and international transactions, occasional domestic and international transactions and the accounting records for them, copies of the documents providing evidence of the customer's identification data, results of customer due diligence, as well as available information obtained using electronic means of identification, certification services, within the meaning of Article 1(10) of the Elektronisko dokumentu likums (Law on electronic documents), in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, or other technological solutions to the extent and with the scope established by the Council of Ministers;

(2) information regarding all payments made by the customer;

(3) correspondence with the customer, including electronic correspondence.

Article 37.[2] 'Provision of documents and information resulting from customer due diligence to the Finanšu izlūkošanas dienests (Financial Intelligence Service) and to supervisory authorities': Every obliged entity shall document the customer due diligence measures taken, as well as the information regarding all payments made by the customer and received by the customer, and, at the request of the supervisory authorities or the Financial Intelligence Service and within the time limited specified, shall submit those documents to the supervisory authority of the obliged entity or send copies of those documents to the Financial Intelligence Service.

Article 77 'Authority to impose penalties and apply supervisory measures':

[…]

(3) The supervisory authority, when establishing penalties and the type and scope of supervisory measures in accordance with paragraph 1 of this article, shall take account of all of the relevant circumstances, inter alia:

(1) the gravity, duration and systematic nature of the breach;

(2) the degree of responsibility of the natural or legal person;

(3) the financial situation of the natural or legal person (annual income of the natural person held responsible or total annual turnover of the legal person held responsible and other factors affecting the person's financial situation);

(4) the benefit obtained by the natural or legal person as a consequence of the breach, in so far as it can be calculated;

(5) the losses caused to third parties as a consequence of the breach, in so far as they can be determined;

(6) the level of cooperation of the natural or legal person held responsible with the supervisory authority;

(7) any previous breaches by the natural or legal person with regard to the prevention of money laundering and the financing of terrorism and proliferation and with regard to international and domestic sanctions.

Article 78 'Failure to comply with the requirements laid down with regard to the prevention of money laundering and the financing of terrorism and proliferation': (1) Infringement of the legislative provisions on the prevention of money laundering and the financing of terrorism and proliferation – in particular, those relating to customer due diligence, to the supervision of commercial relationships and of transactions, to the reporting of unusual and suspicious transactions, to the provision of information to the supervisory authority or the Financial Intelligence Service, to refraining from carrying out a transaction, to the freezing of funds, to the internal control system, to the retention and destruction of information and to infringement of Regulation [2015/847] – may result in the following penalties being imposed on obliged entities:

[…]

(3) imposition of a fine of up to EUR 1 000 000 on the person (natural or legal) responsible for the infringement […].

Reasons for uncertainties regarding the interpretation of European Union law

6 One of the questions which must be clarified in this case is whether point (a) of Article 2(1)(3) of Directive 2015/849, which establishes that that directive applies to external accountants, also applies in cases in which the accounting services are provided solely to companies related to the external accountant.

The appellant, in the course of the proceedings conducted in relation to this case, both before the administrative authorities and, subsequently, before the courts, has consistently disputed the notion that it is subject to the obligations established in the Anti-Money Laundering Law. Taking the foregoing into account, as well as the fact that, before examining the proportionality of the fine imposed, it is essential to determine whether there has indeed been an infringement, this court must assess whether the appellant is required to comply with the obligations applicable to external accountants.

7 According to recital 3 of Directive 2015/849, that directive is the fourth to address the threat of money laundering. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (‘Directive 2001/97), extended the scope of Directive 91/308/EEC, both in terms of the crimes covered and in terms of the range of professions and activities covered. Recital 15 of Directive 2001/97 states that the obligations of that directive concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professions which have been shown to be vulnerable to money laundering. That means that, when considering which persons Directive 2001/97 and, subsequently, Directive 2015/849 are to apply to, a decisive factor is whether the activity or profession of the person in question is exposed to a greater risk of money laundering.

As far as the external accounting sector is concerned, the *Nacionālais noziedzīgi iegūtu līdzekļu legalizācijas un terorisma un proliferācijas finansēšanas risku novērtēšanas ziņojums par 2017. – 2019. gadu* (National money laundering and terrorist and proliferation financing risk assessment report for the years 2017 to 2019) identified the risk that representatives of the sector may not only become involved in money laundering involuntarily, but also knowingly carry out activities which help their customers to launder money, advising [them] on tax evasion and asset structuring, preparing documentation for fictitious transactions and providing record-keeping services and creating complex legal entities and offshore companies. Moreover, law enforcement authorities state that external accountants also tend to offer those activities as a professional money laundering service. There is a risk that, in the interests of the customer, external accountants may deliberately not provide information regarding suspicious transactions […].

Therefore, external accountants must usually be regarded as persons whose activities are exposed to a fairly high risk of money laundering.

8 At the time when the Tax Authority found the infringements in the appellant’s operations, the likums ‘Par grāmatvedību’ (Law on accounting) was in force. According to Article 3(3)(2) of that law, an external accountant is a person who, on the basis of a written contract with an undertaking (except by means of an employment contract), undertakes to provide or provides accounting services to a customer. In addition, in accordance with Article 3.[1](1) of that law, an external

accountant is required to have civil liability insurance to cover any losses caused as a consequence of its professional activities or omissions. Thus, in its capacity as an independent economic operator, the external accountant offers its services to another undertaking and is also responsible for the losses caused by its professional activities or omissions.

The above is also consistent with the meaning of the concept of 'external accountant' appearing in point (a) of Article 2(1)(3) of Directive 2015/849. In Latvian, 'ārštata' ['external', in English] refers to someone who works for an undertaking but is not an employee of that undertaking. Looking at the English version of that directive, it may be observed that the term used there is 'external accountant'. Consequently, also according to the term used in English, Directive 2015/849 is not applicable to any kind of accountant, but rather solely to one whose professional activity is organised outside the undertaking to which the accounting services are provided.

9 As stated previously, the appellant has stressed throughout the proceedings that it solely provided accounting services to persons related to it. The appellant has stated that its main activity has never been related to the provision of accounting services, as its main activity is freight transport. The specific model of carrying out accounting for related persons was designed with the aim of saving resources. Neither the administrative authorities nor the courts have disputed that assertion, observing, rather, that that fact is irrelevant to the decision in the present case. This court doubts whether that position is valid.

10 According to the case-law of the Court of Justice of the European Union, in competition law, the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. The Court has also stated that the term 'undertaking' must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (judgment of the Court of Justice of 20 January 2011, *General Química and Others v Commission*, C-90/09 P, EU:C:2011:21, paragraphs 34 and 35 and the case-law cited). That same approach is typical in matters related to the law on State aid. For example, recital 4 of Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, states that the Court of Justice of the European Union has ruled that all entities which are controlled (on a legal or on a de facto basis) by the same entity should be considered as a single undertaking. It may be deduced from the foregoing that both in competition law and in the law relating to State aid, related undertakings may be regarded as a single undertaking. On the other hand, if related undertakings are to be regarded as a single undertaking, then this court has doubts as to whether the provision of accounting services within those undertakings (even where it is formally organised as an outsourced service) is exposed to a greater risk of money laundering than accounting organised in-house, employing the accountants as staff members of the undertaking, on the basis of an employment contract.

Moreover, from the circumstances described by the appellant, it may be deduced that the choice of the method of accounting was determined not by objective criteria derived from the legislation or criteria based on economic reality (for example, an external account who is a self-employed professional cannot be expected to enter into employment contracts with his or her customers, thereby becoming an employee of the undertaking in question), but rather by efficiency considerations, within a group of related undertakings, relating to the most suitable and profitable organisational model for the accounting.

11 Similarly, considerations relating to the effectiveness of Directive 2015/849 also give rise to doubts regarding the applicability of that directive in the present situation. As has already been stated, the appellant and the companies to which it provides accounting services are all under the control of the same individuals (who are, at the same time, their beneficial owners). That leads to some scepticism as regards the possibility of the provider of accounting services complying, independently and fully, with the obligations which, in accordance with Directive 2015/849, Latvian law imposes on it and, consequently, as regards the possibility of in any event achieving the objectives of that directive, namely, the prevention of money laundering. By way of illustration, it may be noted that the Tax Authority also imposed a penalty for failure to comply with a particular obligation whose usefulness in this particular situation is doubtful (failure to determine the procedure whereby documents obtained in the course of identification, due diligence and scrutiny of customer transactions are destroyed, which would relate to documents relating to the identification of the same economic entity with the same beneficial owners).

Those considerations raise doubts as to whether, in this situation, it is proportionate to require a company to comply with all of the obligations imposed by Directive 2015/849 and by the law, when what would be achieved may only be formal compliance with the requirements.

12 In such circumstances, it is necessary to clarify whether point (a) of Article 2(1)(3) of Directive 2015/849 is also applicable to those cases in which the accounting services are provided solely to persons related to the entity providing them.

13 If the answer to the above question is in the affirmative, it would next be necessary to clarify whether the fact that the accounting service is provided solely to persons related to the provider has to be taken into account when imposing a penalty for infringements relating to the prevention of money laundering and the financing of terrorism and proliferation. According to Article 58(1) of Directive 2015/849, the Member States must ensure that obliged entities can be held liable for breaches of national provisions transposing that directive. At the same time, that provision states that any resulting sanction or measure must be effective, proportionate and dissuasive. The proportionality of sanctions for infringements of legal rules that fall within the scope of Directive 2015/849 is also mentioned in recital 59 of that directive.

If the fact, mentioned previously by this court, that the appellant provides accounting services solely to related undertakings is not grounds for excluding the appellant from the application of Directive 2015/849, the question would, nevertheless, arise of whether that fact should be taken into account when determining the penalty. That is to say, whether such a fact does not lead to the infringement by the appellant being viewed as deserving the imposition of a lesser penalty in comparison with that which would be appropriate for providers of outsourced accounting services who provide services to independent undertakings.

For example, Article 7(1)(7) of the Anti-Money Laundering Law states that the internal control system must provide for a procedure for the retention and destruction of information and documents obtained in performing due diligence on the customer and conducting scrutiny of the customer's transactions. That requirement is consistent with Article 40(1), second subparagraph, of Directive 2015/849, which provides, inter alia, that Member States must ensure that obliged entities delete personal data. Such a requirement is clearly intended to protect personal data. However, as has been mentioned previously, in the case of related persons, a situation may arise in which the scope of the personal data in the possession of the external accountant, when that accountant performs due diligence on the customer and conducts scrutiny of the customer's transactions, is identical to the personal data of the external accountant itself. That is, in complying with its obligations as an external accountant, the person in question does not obtain additional data.

14 In summary, this court has doubts regarding the interpretation of European Union law. It is therefore necessary to refer certain questions to the Court of Justice of the European Union for a preliminary ruling.

[…] [procedural considerations]

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union, […] the Augstākā tiesa (Senāts) (Supreme Court (Senate), Latvia)

decides

to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must the term 'external accountant' in point (a) of Article 2(1)(3) of 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, be interpreted as meaning that it is also

applicable to cases in which the accounting services are provided solely to persons related to the external accountant?

2. If the answer to the first question is in the affirmative, must Article 58(1) of 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, be interpreted as meaning that, in the context of the proportionality of the sanction imposed, the following facts are relevant: (1) the accounting service is provided solely to persons related to the person providing the service; (2) the choice to carry out the accounting by taking on an external accountant depends on efficiency considerations, within a group of related undertakings, and is not determined by criteria derived from legislation or criteria based on economic reality?

To stay the proceedings pending a ruling from the Court of Justice of the European Union.

[…][signatures]