Case C-671/23

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:

13 November 2023

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

8 November 2023

Applicant at first instance:

M

Defendant at first instance:

Bank of Lithuania

Subject matter of the main proceedings

The dispute in the main proceedings concerns the annulment of the decision of the Financial Market Authority of the Bank of Lithuania and the order to take actions.

Subject matter and legal basis of the request

Interpretation of Article 59 of Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; third paragraph of Article 267 TFEU.

Questions referred

1. Is Article 59 of Directive 2015/849 to be interpreted as precluding national legislation under which, if the competent national authority finds a number of infringements of different sets of requirements under Article 59(1)(a) to (d) of Directive 2015/849 during a single inspection, each of those infringements is considered to constitute a separate systematic infringement, and each of those

infringements is subject to a separate fine taking into account the maximum fine laid down in the national law implementing Directive 2015/849?

2. Is Article 59 of Directive 2015/849 to be interpreted as precluding national legislation under which, if the competent national authority finds a number of infringements of the same set of requirements under Article 59(1)(a) to (d) of Directive 2015/849 during a single inspection, each of those infringements is considered to constitute a separate systematic infringement and each of those infringements is subject to a separate fine taking into account the maximum fine laid down in the national law implementing Directive 2015/849?

3. If at least one of the above questions is answered in the affirmative, what criteria must be taken into account when determining whether an infringement under Article 59 of Directive 2015/849 is systematic?

Provisions of EU law and case-law of the Court of Justice relied on

Recital 59 and Articles 5 and 59 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 (OJ 2015 L 141, p. 73) ('Directive 2015/849').

Judgment of 24 October 2013, *Commission* v *Italy* (C-151/12, EU:C:2013:690, paragraph 26 and the case-law cited).

Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 60).

Judgment of 30 April 2019, *Italy v Council (Mediterranean swordfish quota)* (C-611/17, EU:C:2019:332, paragraph 111).

Judgment of 26 March 2020, *ERG and Others*, C-496/18 and C-497/18, (EU:C:2020:240, paragraph 93 and the case-law cited).

Judgment of 12 May 2022, *U.I. (Indirect customs representative)* (C-714/20, EU:C:2022:374, paragraphs 59 to 61).

National legal framework

Article 2(7), Article 9(1), (13), (14), (16) and (17), Article 10(1), Article11(1)(4) and 11(3), Article 14(1)(4), Article 14(3)(2) and (3)(3), Article14(5), Article 16(2), Article 22(1) and (2), Article 29(1)(2), (1)(3), (1)(4), (1)(8), (1)(9), (1)(10), Article 29(2), 29(3)(4) and 29(7), Article 34, and Article 39(1)(2) of the Law of the Republic of Lithuania on the Prevention of Money Laundering and Terrorist

Financing (in the version amended by Law No XIII-1440 of 30 June 2018; 'the AML/CFT Law').

The Law of the Republic of Lithuania on the Bank of Lithuania (in the version amended by Law No. XIII-1854 of 20 December 2018; 'the Law on the Bank of Lithuania'), Article 43^3(7) to (10).

Point 18.1 of the Procedure for the Calculation of Fines approved by Resolution No 03-126 of the Board of the Bank of Lithuania of 10 July 2018 ('the Procedure').

Points 4, 30, 31.3.4 and 33 of the Instructions to Financial Market Participants for the Prevention of Money Laundering and/or Terrorist Financing, as approved by Resolution No 03-17 of the Board of the Bank of Lithuania of 12 February 2015 (original version; 'the Instructions').

Succinct presentation of the facts and the main proceedings

1 The decision of the Director of the Financial Market Authority of the Bank of Lithuania of 13 November 2020 'The Application of a Sanction to M' ('the contested decision') states that applicant M ('the applicant'), an electronic money institution, committed eight infringements of the AML/CFT Law and the Instructions. The period under review is 1 April 2019 to 31 March 2020.

2 It was found that during the period under review, the applicant did not establish a process for assessing money laundering and terrorist financing ('ML/TF') risks in all its activities and did not carry out a ML/TF risk assessment of all its activities, and that the procedures for customer risk assessment established and put in place by the applicant did not allow for the proper classification of customers into risk groups, and, as a consequence, the applicant breached the requirements of Article 29(1)(2), (3)(4) and 29(7) of the AML/CFT Law and of points 4 and 30 of the Instructions (infringement 1).

3 The applicant's remote identification of its customers was significantly flawed, the applicant performed an incorrect identification in respect of some of its natural person customers and therefore infringed the requirements of Articles 9(1), 10(1), 11(1)(4) and 11(3) of the AML/CFT Law (infringement 2).

4 It was found that the applicant failed to ensure the proper application of enhanced customer identification for higher risk customers and therefore infringed the requirements of Articles 14(1)(4) and (5) of the AML/CFT Law. The applicant did not obtain the approval of a senior manager before entering into a business relationship with a politically exposed person; the applicant did not take appropriate steps to identify the source of the assets and funds involved in the business relationship or transaction, and therefore breached the requirements of Article 14(3)(2) and (3) of the AML/CFT Law (infringement 3).

5 The applicant's procedures for identifying customers and verifying their identity did not ensure that the purpose and nature of the customer's business relationship was clear and comprehensible in all cases, and the applicant did not always adequately fulfil its obligation to understand the nature of the customer's business as a legal person, thus infringing the requirements of Article 9(13) and (14) of the AML/CFT Law (infringement 4).

6 It was found that the applicant failed properly to update customer and beneficiary identification information during the period under review, in breach of Articles 9(17), 29(1)(8) of the AML/CFT Law and 33 of the Instructions (infringement 5).

7 It was observed that the applicant failed to ensure that the transactions entered into in the course of the business relationship were in line with the customer's business profile and risk profile. As no comprehensive analysis of the customer's transactions and payment operations had been undertaken, the applicant did not have sufficient knowledge of the customer's behaviour to be able properly to identify suspicious transactions and operations, and the applicant therefore breached the requirement of Article 9(16) of the AML/CFT Law. The measures put in place by the applicant to monitor customer relationships and transactions were insufficient adequately to manage ML/TF risks and, as a result, infringed Article 29(1)(3) and Article 16(2) of the AML/CFT Law (infringement 6).

8 The applicant's internal controls and procedures did not in all cases ensure the proper implementation of the requirements of international financial sanctions and restrictive measures, therefore the applicant breached the requirements of Article 29(1)(4) of the AML/CFT Law and point 31.3.4 of the Instructions (infringement 7).

9 It was found that during the period under review the applicant had not appointed a board member responsible for the implementation of the ML/TF prevention measures laid down in the AML/CFT Law, thereby infringing the requirement of Article 22(1) of the AML/CFT Law. The applicant's internal control with regard to ML/TF risk management was not sufficiently effective, the applicant did not have sufficient human resources and did not properly control the processes related to ML/TF prevention, and due to shortcomings which had been identified in the organisation of training, the staff implementing the ML/TF prevention measures were not adequately informed of the importance of the requirements for the prevention of ML/TF or of their roles and responsibilities, which led to a breach of Article 22(2) and Article 29(1)(9) and (1)(10) of the AML/CFT Law (infringement 8).

10 The defendant, the Bank of Lithuania ('the defendant'), imposed eight fines for the breaches observed (EUR 55 000 for each of infringements 1 to 3, 6 and 7 each, EUR 35 000 for each of infringements 4 and 5, and EUR 25 000 for infringement 8).

11 The defendant calculated the amount of the fines on the basis of (i) the provisions of Article 43 [3](10) of the Law on the Bank of Lithuania, and (ii) the Procedure. It considered that infringements 1 to 7 were serious and systematic. The defendant calculated each fine in accordance with the maximum fine set by the Law on the Bank of Lithuania (EUR 5 100 000, as 10% of the institution's annual gross turnover was less than EUR 5 100 000). For each of infringements 1, 2, 3, 6 and 7, which were considered to be serious, the defendant set the basic amounts of the fines at 30% of the maximum fine amount, and for each of infringements 4, 5 and 8, which were found to be less serious infringements, the defendant set the basic amounts of the fine at 20% of the maximum fine amount. The defendant reduced those basic fine amounts considering that they were disproportionately high in relation to the gross income of the applicant and that lower fines would also be effective in preventing infringements.

12 The applicant brought an action against the contested decision before the first instance court. By decision of 21 September 2021, the first instance court upheld in part the applicant's action and reduced the fine to EUR 200 000, but dismissed the applicant's argument that a single systematic infringement of the AML/CFT Law ought to have been established in the case.

13 The applicant then appealed against the judgment of the first instance court requesting (i) that the part of the judgment of the first instance court rejecting the applicant's action be set aside and (ii) that the applicant's arguments in the action at first instance be upheld in full. In that appeal, the defendant requested that the court (i) set aside the judgment of the first instance court and (ii) reject the applicant's appeal.

The essential arguments of the parties in the main proceedings

14 The applicant takes the position that, under Article 34 of the AML/CFT Law, infringements are classified as either serious or systematic. According to the applicant, in the event of multiple serious infringements, a single systematic infringement of the law must be established and only one fine, the maximum amount of which is laid down in the law, may be imposed in respect of a systematic infringement (Article 39(1)(2) of the AML/CFT Law). The applicant also submits that, under a linguistic interpretation of Article 34 of the AML/CFT Law, occurrences of non-compliance with a set of requirements (for example, the requirements for the identification of the customer and of the beneficiary set out in Articles 9 to 15 of the AML/CFT Law) are deemed to constitute a single serious infringement. The applicant also submits that the contested decision, by imposing a number of fines, infringes the *ne bis in idem* principle. As the infringement was not classified as a single systematic infringement, a number of fines were imposed in respect of infringements of similar requirements of the same Article.

15 The defendant argues, referring to Article 39(1)(2) of the AML/CFT Law, that a fine may be imposed on a financial institution in respect of at least one serious

infringement of the AML/CFT Law, however, there is no similar provision in the case of a systematic infringement, and, therefore, an infringement can only be considered to be systematic when additional infringements of the AML/CFT Law have also been committed, as provided for in Article 34(2). The defendant notes that the provisions of Directive 2015/849 were intended to strengthen the requirements for the prevention of ML/TF in order to minimise the risks of ML/TF in the European Union and the adverse effects they have on the economy and the financial system. According to the defendant, to treat a number of serious ML/TF infringements as a single serious infringement or as a single systematic infringement would, in principle, be inconsistent with those objectives of Directive 2015/849. According to the defendant, it would then be in the interest of financial institutions which have committed a number of ML/TF infringements to have them treated as systematic and to be subject to a single sanction in respect of those infringements. The defendant also submits that to treat a number of different infringements as a single infringement would make it impossible to individualise the sanction and that failure to individualise the fine imposed in respect of each infringement (without taking into account the duration, gravity and other circumstances of each infringement, and without indicating a specific fine) would mean that a proper defence could not be put forward.

Succinct presentation of the reasoning in the request for a preliminary ruling

16 The referring court points out that, pursuant to the provisions of Articles 59(1), 59(2)(e) and 59(3)(a) of Directive 2015/849, maximum administrative pecuniary sanctions of at least EUR 5 000 000 or 10% of the total annual turnover may be imposed on a financial institution in the case of serious, repeated, systematic breaches, or a combination thereof, of the requirements laid down in Article 59(1)(a) to (d).

17 Article 39(1)(2) of the AML/CFT Law states that the Bank of Lithuania has the right to impose a fine of EUR 2 000 to EUR 5 100 000 (if 10% of the gross annual turnover is less than EUR 5 100 000) on a financial institution for breaches of the AML/CFT Law, where the financial institution systematically breaches that law, or commits a single and serious breach of that law, or breaches the law repeatedly within a period of one year from the date of the imposition of a sanction for a breach of the law. It should be noted that the wording of that provision ‘where a financial institution […] systematically infringes this Law or commits a single serious infringement of this Law’ differs from the wording of Article 59(1) of Directive 2015/849, which refers to ‘breaches on the part of obliged entities that are serious, repeated, systematic, or a combination thereof’, as Article 39(1)(2) of the AML/CFT Law refers to ‘a single serious infringement of this Law’. The question therefore arises whether, in the present case, Article 39(1)(2) of the AML/CFT Law properly implements Article 59 of Directive 2015/849, and whether the defendant’s interpretation of Article 39(1)(2) of the AML/CFT Law is consistent with Article 59 of Directive 2015/849.

18 The referring court notes that Article 59(1) of Directive 2015/849 refers to cases where the sets of requirements laid down in points (a) to (d) are infringed in a serious manner, and Article 34(1)(1) to (3) of the AML/CFT Law defines a serious infringement as an infringement of the provisions of the AML/CFT Law implementing, *inter alia*, the requirements laid down in Article 59(1)(a) to (d) of Directive 2015/849, without specifying any other qualitative or quantitative elements of such infringement; Article 34(1)(4) of the AML/CFT Law defines a serious infringement as a case where a financial institution has not established the internal control procedures referred to in Article 29 of that law.

19 The referring court notes that, in its view, the wording of Article 34(2)(2) of the AML/CFT Law 'where infringements covering a number of sets of requirements are found at the same time […]' implies that, in order to establish a systematic infringement in accordance with that provision, it is necessary to establish that more than one of the sets of requirements laid down in that provision has been infringed. However, Article 59(1) of Directive 2015/849 does not appear to require that, in order for an infringement to be considered to be systematic, it must necessarily be found to be in breach of a number of sets of requirements, as in Article 34(2)(2) of the AML/CFT Law. The national court notes that, in the present case, (i) infringements of a number of different sets of requirements and (ii) repeated infringements of one set of requirements under Article 34(2)(2) of the AML/CFT Law were identified and treated by the defendant as separate systematic infringements, which were subjected to separate fines.

20 The referring court states that the provisions of the AML/CFT Law, the infringements of which were established by the contested decision, implement various provisions of Directive 2015/849. For example, in establishing infringement 3, infringements of, *inter alia*, Article 14(3)(2) and (3) of the AML/CFT Law implementing the relevant provisions of Article 20 of Directive 2015/849 were identified. With regard to infringement 4, infringements of Article 9(13) and (14) of the AML/CFT Law implementing Article 13(1)(b) and (c) of Directive 2015/849 were established. In establishing infringement 6, an infringement was found *inter alia*, in relation to Article 16(2) of the AML/CFT Law implementing Articles 33, 34 and 35 of Directive 2015/849.

21 The national court observes that the text of Directive 2015/849 does not contain a detailed definition of a systematic or serious infringement and that Article 5 of Directive 2015/849 states that 'Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing, within the limits of Union law'. Furthermore, Article 59(4) of Directive 2015/849 provides that 'Member States may empower competent authorities to impose additional types of administrative sanctions in addition to those referred to in points (a) to (d) of paragraph 2 or to impose administrative pecuniary sanctions exceeding the amounts referred to in point (e) of paragraph 2 and in paragraph 3'. Member States are thus granted a certain discretion to adopt more stringent provisions within the limits set by EU law. However, it is doubtful whether those provisions of Directive 2015/849 can be interpreted as conferring

on Member States a discretion to adopt provisions of national law under which the national competent authority may impose a number of fines in respect of infringements detected during the same inspection, with each of the fines being calculated in accordance with the maximum limit laid down in national law (in the present case, EUR 5 100 000), where the requirements laid down in Article 59(1)(a) to (d) of Directive 2015/849 are found to have been infringed.

22 Since Article 59(1) of Directive 2015/849 refers to cases of 'breaches on the part of obliged entities that are serious, repeated, systematic, or a combination thereof, of the requirements laid down in' points (a) to (d) thereof, and Article 59(3)(a) states that Member States shall ensure that where the obliged entity concerned is a credit institution or financial institution the maximum administrative pecuniary sanctions of at least EUR 5 000 000 or 10% of the total annual turnover can also be applied, the referring court takes the view that, where the infringement referred to in Article 59(1) of Directive 2015/849 is established, it should be subject to a single administrative pecuniary sanction, the maximum amount of which is laid down in Article 59(3)(a) of Directive 2015/849. If separate fines could be imposed for each of the concurrent infringements referred to in Article 59(1) of Directive 2015/849, the total maximum amount of the concurrent fines could be many times higher than the maximum fine set out in Article 59(3)(a) of Directive 2015/849, and it is questionable whether such a situation would be in line with the principles of legal certainty and proportionality.