

Anti-money laundering: reporting requirements for credit institutions providing banking services on a cross-border basis (CJEU, 25 April 2013, n° C-212/11)

Can an EU member state impose anti-money laundering reporting obligations on credit institutions which provide banking services on its territory on a cross-border basis?

The Court of Justice of the European Union (*CJEU*) has given a positive answer to this question in its decision dated 25 April 2013 (the *Decision*).

In the case at hand, a credit institution, located in Gibraltar and passported to provide banking services on a cross-border basis in Spain, was requested by Spanish authorities to provide them with specific information for the purpose of combatting money laundering.

1. RATIONALE OF THE DECISION

Credit institutions providing banking services on the basis of the European passport through the establishment of branches are required to report suspicious transactions to each respective financial intelligence unit (*FIU*) in whose territory they have instituted a permanent establishment. This requirement arises from the combination of articles 3 and 22, para. 2 of the Directive no. 2005/60/CE dated 26 October 2005, concerning the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the *Directive*).

On the other hand, the Directive does not oblige credit institutions providing banking services on a cross-border basis to report suspicious transaction to the FIU of the host member state. Such entities are only subject to reporting requirements to the relevant FIU located in their home member state.

The question that arose was thus to determine whether or not a host member state may impose additional obligations, such as reporting requirements, on credit institutions providing banking services on a cross-border basis.

The CJEU's positive answer to this question is based on two main arguments arising from both the Directive and the Treaty on the Functioning of the European Union (*TFEU*).

Firstly, the CJEU notes that article 22, para. 2 of the Directive, which provides for the competence of the "FIU of the member state in whose territory the institution or person forwarding the information is situated" does not expressly prevent a member state from requiring entities providing services on a cross border basis to report suspicious transactions. The Court also notes that the Directive, while envisaging a form of co-operation between FIUs, does not provide comprehensive regulation for it.

Secondly, the Court also refers to article 56 of TFEU which prohibits restrictions to the free provision of services on a cross-border basis. The Court recalls that national legislation which requires reporting to the host state's FIU does indeed erect restrictions within the meaning of article 56. However, the Court also underlines that such restrictions are valid when justified by "an overriding requirement relating to the public interest and that interest is not already safeguarded by the rules to which the service provider is subject in the member state in which he is established and in so far as it is appropriate for securing the attainment of the aim which it pursues and does not go beyond what is necessary in order to attain it".

According to the Court, these conditions are met by host state legislation that provides for a reporting obligation towards the local FIU, in particular because Decision n° 2000/642 dated 17 October 2000 regarding the conditions of cooperation between FIU of member states regarding communication of information, is incomplete.

2. CONSEQUENCES OF THE DECISION

Credit institutions providing services on a cross-border basis can be required to report suspicious transactions to the FIU located in the territory where they provide cross border banking services. These obligations requirements come in addition to the reporting requirements towards their home state FIU.

The Decision relates to Spanish legislation, which expressly establishes the obligation to report to the local FIU for entities providing banking services on a cross-border basis. Here lies a difference with French legislation, in particular with regulation CRBF n° 92-13 which, while providing for French mandatory provisions applicable to European credit institution providing cross border services in France, does not expressly mention such requirement.

3. IMPACT OF THE PROPOSAL FOR DIRECTIVE DATED 6 FEBRUARY 2013 ON THE DECISION

The proposal for directive regarding the prevention of the use of the financial system for the purpose of money laundering and terrorist financing extends and strengthens the cooperation between FIUs. If it is voted in its current state (i.e. without further amendment), it will presumably deprive the obligation enshrined in the Decision dated 25 April 2013 of its main justification.

For a detailed analysis of the Decision, please see Th. Bonneau, « Un établissement de crédit en libre prestation de services doit-il faire une déclaration de soupçon à Tracfin ? » To be published in *Mélanges Paul Lè Cannu*, éd. Lextenso, Dalloz, IRJS, Transactive, 2013.

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