



## Luxembourg newflash

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### Combating money laundering / terrorism financing (“ML/TF”)

**Financial institutions acting on the basis of the freedom to provide services (“FPS”) may be obliged to cooperate with the financial intelligence unit of the host Member State according to the CJEU**

In a recent judgment (*Case C-212/11 “Jyske Bank Gibraltar Ltd”*), the CJEU has ruled that EU law does not preclude host Member State legislation from imposing on financial institutions operating in this Member State on an FPS basis (without being established there) the obligation to cooperate directly with the host Member State authorities on ML/TF matters relating to its operations in such State.

#### Background

The Spanish anti-money laundering/counter-terrorism financing (“**AML**”) legislative framework provides that certain professionals providing services under the FPS must cooperate with the Spanish financial intelligence unit (“**FIU**”) by spontaneously reporting suspicious activities and/or by providing information to the FIU upon request. In addition, entities thus subject to the Spanish AML framework must automatically report to the Spanish FIU certain transactions (including transfers of funds to or from designated tax heavens, including Gibraltar, of more than EUR 30,000.-).

In January 2007, the Spanish FIU requested Jyske Bank Gibraltar Ltd. (“**Jyske**”), a Gibraltar credit institution, that operated by relying on the FPS in Spain (without having a permanent establishment in the country), to provide it with certain information. It considered that there was a high risk that Jyske was being used for money laundering operations in the context of its activities in Spain. In June 2007, Jyske sent some of the information requested, but refused to provide data on the identity of its clients and documentation on suspicious transactions carried out in Spain, relying on the banking secrecy rules applicable in Gibraltar. As a consequence thereto, the Spanish authorities, considering that Jyske had infringed the aforementioned regulation, imposed on Jyske notably fines totalling EUR 1,700,000.-.

During proceedings in Spain, Jyske argued that the 3<sup>rd</sup> AML Directive<sup>1</sup> would only subject it to cooperation obligations towards the Gibraltar FIU and that, therefore, the Spanish legislation would not comply with the 3<sup>rd</sup> AML Directive. That particular context led the Spanish courts to refer a question for a preliminary ruling to the CJEU.

#### 3<sup>rd</sup> AML Directive

For the CJEU, financial institutions subject to the 3<sup>rd</sup> AML Directive are obliged under such directive to cooperate with the FIU of the country where they are established. In other words, the 3<sup>rd</sup> AML Directive primarily follows a “home country control” approach<sup>2</sup>.

<sup>1</sup>Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15).

<sup>2</sup>For branches a “host country control” approach applies.

Notwithstanding this preliminary observation, the CJEU has taken the view that the 3<sup>rd</sup> AML Directive does not, as a matter of principle, rule out host Member State legislation which requires financial institutions operating on its territory under the FPS to forward in addition information required for AML purposes to its own FIU.

### **Freedom to provide services (Art. 56 TFEU)**

The judgment not only analyses the relevant Spanish AML legislation in the light of the 3<sup>rd</sup> AML Directive but further considers the TFEU provisions on the FPS. In this respect, the CJEU states that the Spanish legislation amounts to a restriction to the FPS. Indeed, it entails for those subject to such a legislation additional difficulties and costs in respect of activities carried out under the FPS.

#### *Overriding requirement*

Nevertheless, according to established case law, a restriction to the FPS may be justified in areas which are not completely harmonised at EU level, as it is the case for AML issues<sup>3</sup>. Such restrictions could be justified only in so far as they meet an overriding requirement relating to the public interest, e.g. AML purposes in the present case.

Once again, the CJEU remains prudent as the “overriding requirement test” requires that such legislation is also non discriminatory, suitable to attain its aim and proportionate. The judgment also provides further guidance to the Spanish courts on these aspects.

#### *Suitability and proportionality*

Pursuant to the CJEU, the suitability requirement should be fulfilled where the national legislation considered enables the host Member State concerned (i) to supervise and suspend suspicious financial transactions concluded by financial institutions offering their services on their territory and, as the case may be, (ii) to pursue and punish those responsible<sup>4</sup>.

Finally, the Member State legislation will only be proportionate if it does not go beyond what is necessary in order to attain the pursued aim. In this respect, the CJEU has notably taken into account that fact that, in its opinion, the 3<sup>rd</sup> AML Directive and relevant texts setting out cooperation mechanisms between FIUs (at the time the Council Decision 2000/642/JHA<sup>5</sup>) suffer from certain deficiencies and do not yet enable the host Member State FIU to receive such information from the FIU of the home Member State.

### **Conclusions**

Drawing tentative conclusions from this judgement, one might consider that:

- Luxembourg financial institutions operating under the FPS in other EU jurisdictions will have to carefully consider the local AML requirements: where relevant (such as the case in Spain), they could validly be subject to cooperation obligations with the local FIUs and should thus ensure that they comply with such requirements;
- Foreign financial institutions that intend to provide services on an FPS basis into Luxembourg – the AML legislation of which contains at least partially a similar cooperation obligation to the Spanish one<sup>6</sup> - have to file suspicious activity reports with or provide upon request information to the Luxembourg FIU, the *Cellule de Renseignement Financier*, as is already the current practice;
- The judgment raises also questions as to how financial institutions operating under FPS in jurisdictions such as Spain will in practice identify operations which fall within the scope of

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<sup>3</sup>The CJEU emphasises that the 3<sup>rd</sup> AML Directive only sets a minimum level of harmonisation and authorises expressly Member States to apply stricter provisions.

<sup>4</sup>In this respect, the CJEU emphasises that Member States have exclusive jurisdiction with regard to the criminalisation, detection and eradication of ML/TF offences committed on their territory and that it is therefore justified that information concerning suspicious transactions carried out on the territory of a Member State be forwarded to its own FIU.

<sup>5</sup>Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information [(OJ 2000 L 271, p. 4)]

<sup>6</sup>See Article 2 (2) of the law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.

the host Member State cooperation obligations. This may raise difficulties in the absence of clear guidance on this topic;

- Member States could be encouraged to enact similar regulations to the Spanish one for financial institutions operating on an FPS basis on their territory.

Indeed, the CJEU seems to legitimate a host Member State initiative with respect to operations carried out under the FPS on its territory taking into consideration the incomplete EU AML framework and deficient EU cooperation mechanisms between FIUs applicable at the time.

However, those could be hasty conclusions as the exact leeway left to the host Member States by the CJEU remains difficult to ascertain for at least two reasons:

- The judgment only sets general guidelines to the attention of the Spanish court: it is, however, incumbent upon the latter to assess the validity of the Spanish AML legislation on such basis; and
- Last but not least, the Regulation n°1093/2010<sup>7</sup> establishing the European Banking Authority (not applicable at the time of the present case) largely bolstered AML cooperation mechanisms between FIUs, so that it is difficult to predict whether a host Member State initiative would still be justified for the CJEU under the current EU AML framework.

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<sup>7</sup>Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12).