Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 4 October 2012 [1]

Case C-212/11

Jyske Bank Gibraltar Ltd
v
Administración del Estado

(Reference for a preliminary ruling from the Tribunal Supremo (Spain))

(Combating of money laundering and the financing of terrorism — Directive 2005/60/EC — Obligation on credit institutions to declare suspicious financial transactions — Institutions operating under the freedom to provide services — Identification of national financial intelligence unit responsible for collecting information — Interpretation of Article 22(2) of Directive 2005/60 — Restriction on the freedom to provide services — Overriding reasons in the public interest — Appropriateness of national legislation for attaining aims in view — Proportionality)

1. Is a credit institution obliged to communicate the information required for the purpose of combating money laundering and the financing of terrorism to the financial intelligence unit in the Member State in which it provides its services or to the unit in the Member State where its registered office is located?

2. By this reference for a preliminary ruling, the Court is requested to identify the financial intelligence unit responsible for the collection, analysis and then forwarding of information on suspicious financial transactions to the national authorities responsible for the detection and prevention of financial crime ('the competent national authorities'). The matter is important since it involves ensuring efficiency and coherence not only in the combating of money laundering and the financing of terrorism, which are the subject-matter of Directive 2005/60/EC, [2] but also in the cooperation between Member States in the context of Decision 2000/642/JHA [3] with regard to the exchange of financial information. The objective is simple: it is to prevent money launderers from benefiting from and taking advantage of the freedom to provide services to facilitate their criminal activities in a manner that is harmful to the integrity of the financial system of the European Union and the Member States.

1 — Original language: French.

2 — Directive 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), as amended by Directive 2008/20/EC of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 76, p. 46; 'Directive 2005/60'). Directive 2005/60 was most recently amended by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 (OJ 2010 L 331, p. 120), but that directive is not applicable to this case.

3 — Council decision 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).

3. This question forms part of proceedings between, originally, the Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias,[4] which is the Spanish financial intelligence unit, and Jyske Bank Gibraltar Ltd,[5] a credit institution which carries on its activities in Spain under the regime of the freedom to provide services, and whose registered office is situated in Gibraltar. Jyske was ordered by the Spanish Council of Ministers to pay a fine of EUR 1 700 000 in so far as it refused to communicate the information relating to certain suspicious financial transactions required by the Servicio Ejecutivo. Before the national authorities, Jyske stated that it was only subject to such an obligation in regard to the financial intelligence unit for the territory in which it is established, namely Gibraltar, pursuant to Article 22(2) of Directive 2005/60.

4. In this case, the Tribunal Supremo (Supreme Court, Spain), before which Jyske challenged the fine imposed on it, has asked the Court whether its national legislation complies with European Union law in that it requires credit institutions carrying on their activities under the freedom to provide services in Spain to communicate the information required for the purpose of combating financial crime directly to the national financial intelligence unit.

5. In this Opinion, I shall argue that Article 22(2) of Directive 2005/60 must be interpreted as not precluding such legislation. I shall base my view on not only the wording of the provision but also on the scheme of the directive and the purposes which the European Union legislature is seeking to pursue.

6. In the event that the Court does not agree with that interpretation, I shall argue in the alternative that the Member State may, under Article 5 of that directive, lay down more stringent provisions to prevent money laundering and the financing of terrorism, provided that they are compatible with European Union law. In this connection, I shall contend that that legislation constitutes a restriction on the freedom to provide services, and I shall examine to what extent it may be justified.

7. I shall argue that Article 56 TFEU does not preclude such legislation if it meets the following conditions, which it is for the national court to verify: the national legislation must be justified for overriding reasons in the public interest, it must be such as to ensure the attainment of its aims and not go beyond that which is necessary to attain those aims, and must apply in a non-discriminatory manner. I shall make points regarding those conditions.

I – Legal context

A – *European Union law*

1. Directive 2005/60

8. Directive 2005/60 repealed Directive 91/308/EEC.[6] It is intended to prevent the financial system being used for the purpose of money laundering and the financing of terrorism by requiring the Member States, first of all, to prohibit money laundering and the financing of terrorism and, secondly, to lay down requirements applicable to credit institutions on, inter alia, customer due diligence and the disclosure of information on suspicious transactions. Those measures are minimal requirements which are common to all the Member States and Article 5 of Directive 2005/60 allows the Member States a margin of discretion with regard to the adoption or preservation of more stringent rules in their internal legal orders.

4 — The executive authority of the Commission for the Prevention of Money Laundering and Monetary Offences; 'the Servicio Ejecutivo'.

5 — 'Jyske'.

6 — Council directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77).

9. The nature and scope of the disclosure obligations are set out in Chapter III of Directive 2005/60.

10. Pursuant to Article 20 of that directive, the Member States must require credit institutions to pay particular attention to any activity which they regard as likely to be related to money laundering or the financing of terrorist activities, and in particular to complex, unusual or particularly high-value transactions.

11. Under Article 21 of the directive, the Member States must establish a national financial intelligence unit responsible for collecting, analysing and forwarding information on any suspicious financial transactions to the competent national authorities.

12. Article 22 of Directive 2005/60 – the wording of which is to be interpreted here – provides as follows:

'1. Member States shall require the institutions and persons covered by this Directive, and where applicable their directors and employees, to cooperate fully:

…

(b) by promptly furnishing the [financial intelligence] unit at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the [financial intelligence unit] of the Member State in whose territory the institution or person forwarding the information is situated. …'

13. Finally, under Article 39(2) of the directive, the Member States may order administrative penalties to be imposed on credit institutions in the event of infringement of national provisions adopted under the directive. Those penalties must be effective, proportionate and dissuasive.

2. Decision 2000/642

14. Decision 2000/642 sets out the detailed arrangements for the exchange of information between national financial intelligence units, with the aim of establishing effective and close cooperation between them.[7] That decision is applicable in Gibraltar, and the United Kingdom of Great Britain and Northern Ireland is the designator of a responsible financial intelligence unit for that territory.[8]

15. Article 1 of that decision provides:

'1. Member States shall ensure that [financial intelligence units], set up or designated to receive disclosures of financial information for the purpose of combating money laundering shall cooperate to assemble, analyse and investigate relevant information within the [financial intelligence unit] on any fact which might be an indication of money laundering in accordance with their national powers

2. For the purposes of paragraph 1, Member States shall ensure that [financial intelligence units] exchange, spontaneously or on request and either in accordance with this Decision or in accordance with existing or future memoranda of understanding, any available information that may be relevant to the processing or analysis of information or to investigation by the [financial intelligence unit] regarding financial transactions related to money laundering and the natural or legal persons involved.

7 — Paragraphs 3 and 4 of that decision.

8 — Article 10 of Decision 2000/642.

…’

16. Under Article 4 of that decision:

‘1. Each request made under this Decision shall be accompanied by a brief statement of the relevant facts known to the requesting [financial intelligence unit]. The [financial intelligence unit] shall specify in the request how the information sought will be used.

2. When a request is made in accordance with this Decision, the requested [financial intelligence unit] shall provide all relevant information, including available financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between Member States.

3. [A financial intelligence unit] may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Member State or, in exceptional circumstances, where divulgation of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Member State concerned or would otherwise not be in accordance with fundamental principles of national law. Any such refusal shall be appropriately explained to the [financial intelligence unit] requesting the information.’

B – *National law*

17. First of all, Directive 91/308 was transposed into Spanish law by Law 19/1993 on specific measures for preventing money laundering (Ley 19/1993 sobre determinadas medidas de prevención de blanqueo de capitales) of 28 December 1993,[9] in the version in force at the time of the facts in the main proceedings (‘Law 19/1993’).

18. Pursuant to Article 2(1) of Law 19/1993:

‘The following shall be subject to the obligations laid down in this law:

(a) Credit institutions

…

Foreign persons or institutions conducting activities in Spain of the same type as those conducted by the aforementioned persons or institutions, whether through branches *or by providing services* [10] without a permanent establishment.

The persons in question shall also be subject to the requirements laid down in this law for operations carried out through agents or other legal or natural persons acting as their intermediary.’

19. Pursuant to Article 3(4) of Law 19/1993, such persons and bodies must cooperate with the Servicio Ejecutivo and, to that end, must communicate to it of their own motion any fact or operation which could constitute evidence or proof that it is connected with money laundering as a result of the activities referred to in Article 1 of that law (subparagraph (a)) and provide the information which the Servicio Ejecutivo requests in the execution of its powers (subparagraph (b)).

20. Failure to fulfil those obligations constitutes a very serious offence under Article 5(3)(b) and(d) of Law 19/1993.

9 — BOE No 311 of 29 December 1993, p. 37327.

10 — My emphasis.

21. Finally, the first subparagraph of Article 16(3) of that law provides that the Servicio Ejecutivo and, where appropriate, the Secretariat of the Commission for the Prevention of Money Laundering and Monetary Offences are to collaborate with the authorities of other Member States which perform analogous tasks by seeking in particular to obtain the cooperation of the authorities of the States whose sovereignty extends to territories contiguous with those of the Kingdom of Spain.

22. Law 19/1993 was repealed by Law 10/2010 on the prevention of money laundering and the financing of terrorism (Ley de prevención del blanqueo de capitales y de la financiación del terrorismo) of 28 April 2010.[11] The purpose of that law was to transpose Directive 2005/60. Pursuant to Article 48(3) of that law, the Servicio Ejecutivo undertakes to collaborate with its equivalent bodies abroad. The exchange of information is to take place in accordance with the principles of the Egmont group, and in particular Decision 2000/642.

23. Secondly, it must be pointed out that point (c) of the second subparagraph of Article 5(2) of Royal Decree 925/1995 of 9 June 1995, implementing Law 19/1993,[12] requires that the Servicio Ejecutivo be informed of account transfers to or from tax havens.

24. Article 7(2)(b) of Royal Decree 925/1995, as amended by Royal Decree 54/2005, provides as follows:

'Persons or institutions subject to the obligations hereunder shall, in any event, notify the Servicio Ejecutivo on a monthly basis of:

…

(b) transactions with or by natural or legal persons who are resident in territories or countries which are designated for such purposes by order of the Ministro de Economía y Hacienda, or who are acting on behalf of such resident persons, and transactions involving transfers of funds to or from such territories or countries, regardless of the residence of the parties, provided that the value of such operations is in excess of EUR 30 000 or its equivalent in foreign currency.'

25. Territories regarded as tax havens and uncooperative territories were previously laid down by Royal Decree 1080/1991 of 5 July 1991, and order ECO/2652/2002 of 24 October 2002 on the implementation of disclosure obligations in relation to operations with certain States to the Servicio Ejecutivo of the Commission for the Prevention of Money Laundering and Monetary Offences.[13] Gibraltar appears on this list.

26. According to the Tribunal Supremo, Article 5 of the Crime (Money Laundering and Proceeds) Act 2007, which transposes Directive 2005/60 into the legislation of Gibraltar, requires adherence to banking confidentiality.

II – The main proceedings and the question referred for a preliminary ruling

27. Jyske is a branch of Jyske Bank established in Denmark.[14] It is constituted as a credit institution based in Gibraltar and carries on its activities in Spain under the freedom to provide services. Jyske comes under the supervision of the Gibraltar Financial Services Commission.

11 — BOE No 103 of 29 April 2010, p. 37458.

12 — BOE No 160 of 6 July1995, p. 20521. That royal decree was amended by Royal Decree 54/2005 of 21 January 2005 (BOE No 19 of 22 January 2005, p. 2573).

13 — BOE No 260 of 30 October 2002, p. 38033.

14 — The Jyske Bank group comprises, inter alia, the parent company established in Denmark and five branches established in Germany, France, the Netherlands, Gibraltar and Switzerland (see information available on the group's website at http//www.jyskebank.dk).

28. On 30 January 2007, the Servicio Ejecutivo informed Jyske that if it did not designate an agent authorised to deal with it, the Servicio Ejecutivo would have to investigate the structure of Jyske's organisation and procedures with regard to activities carried on by it in Spain under the freedom to provide services. At this time, the Servicio Ejecutivo asked Jyske to provide, by 1 March 2007, documents and information on the identity of its customers.

29. That request was made following a report of the Servicio Ejecutivo of 24 January 2007, which stated that Jyske was carrying on in Spain, under the freedom to provide services, a substantial operation comprising, inter alia, the grant of mortgages for the purchase of property in Spain. The report stated that 'in order to develop such an operation in Spain, the institution has dual support or backing, namely from the branch in Spain of the parent company and from two firms of lawyers in Marbella (Spain). According to information in the public domain, the proprietor of one of the two firms was investigated for money laundering offences and his name appears, as does the name of the other firm of lawyers mentioned above, in connection with a number of operations divulged to the Servicio Ejecutivo by other persons subject to a duty of disclosure regarding evidence of money laundering'. In the light of those facts, the Servicio Ejecutivo considered that there was a very high risk that Jyske was being used for money laundering operations in the context of its activities in Spain under the freedom to provide services. The mechanism used for this purpose consisted in creating in Gibraltar 'corporate structures ultimately intended to prevent detection of the identity of the actual and final owner of property acquired in Spain, essentially on the Costa del Sol, and of … the origin of the monies used for the purposes of such acquisition'.

30. On 23 February 2007, Jyske sent a communication to the Servicio Ejecutivo informing it that it had applied to its supervisory authority, the Gibraltar Financial Services Commission, for an opinion to establish whether it was entitled to provide such information without infringing Gibraltar legislation on banking confidentiality and the protection of personal data. On 14 March 2007, the Financial Services Commission indicated to the Servicio Ejecutivo that the appropriate mechanism for gathering the information was collaboration with the supervisory authorities; the Servicio Ejecutivo replied, by letter of 2 April 2007, that Jyske was subject to obligations in relation to its activities in Spain.

31. On 12 June 2007, Jyske sent the Servicio Ejecutivo some of the information requested. However, it refused to provide the data on the identity of its customers, relying on the banking secrecy rules applicable in Gibraltar. Nor did the information include copies of reports drawn up by Jyske since 1 January 2004 on the specific analysis of complex or unusual operations, or those with no apparent economic or visible legal purpose specifically referred to in Article 20 of Directive 2005/60, or documentation on suspicious transactions carried out by Jyske since 1 January 2004 in the context of its activities under the freedom to provide services in Spain.

32. Consequently, on 25 October 2007, the Secretariat of the Spanish Commission for the Prevention of Money Laundering and Monetary Offences opened an investigation into Jyske, accusing it, in particular, of having infringed the provisions of Law 19/1993.

33. Following that investigation, on 17 April 2009, the Spanish Council of Ministers determined that Jyske had committed a very serious offence by failing to fulfil its disclosure obligations under Law 19/1993. Consequently, it made an order for two public reprimands and two financial penalties for a total amount of EUR 1 700 000.

34. On 30 April 2009, Jyske brought an appeal against that decision which was dismissed by the Council of Ministers on 23 October 2009. Jyske then brought an administrative appeal before the Tribunal Supremo. Jyske claims that, under Directive 2005/60, it is only subject to an obligation of disclosure vis-à-vis the Gibraltar authorities, and that, in so far as the Spanish legislation extends that obligation to credit institutions operating in Spain under the freedom to provide services, it does not comply with the provisions of that directive.

35. In that context, the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 22(2) of Directive 2005/60 … permit a Member State to make it a mandatory requirement that the information which must be provided by credit institutions operating in its territory without a permanent establishment be forwarded directly to its own authorities responsible for the prevention of money laundering, or, on the other hand, must the request for information be directed to the financial intelligence unit of the Member State in whose territory the addressee institution is situated?'

III – My analysis

A – *Admissibility of the question referred*

36. The Spanish Government challenges the admissibility of the question referred on the ground that it is hypothetical. Indeed, it points out that the Member States were obliged to transpose the requirements of Directive 2005/60 by 15 December 2007 at the latest. It notes that the requests for information sent by the Servicio Ejecutivo to Jyske are dated 30 January and 12 June 2007.

37. I do not consider that the question can be ruled inadmissible.

38. I would point out that, under Article 46, Directive 2005/60 entered into force in December 2005, and the Member States were, under the first subparagraph of Article 45(1) thereof, required to transpose it into their internal legal order by 15 December 2007 at the latest – which, let us not forget, constitutes a final deadline. Although the facts in the main proceedings actually go back to 30 January 2007, the actual subject-matter of the dispute concerns the legality of the decision adopted by the Spanish Council of Ministers on 17 April 2009, which found Jyske liable for a failure to fulfil its obligations in relation to the combating of money laundering and the financing of terrorism and made orders against it. The dispute in question therefore arose well after the date by which the Spanish Government was required to transpose Directive 2005/60 into its own internal legal order. The question which the national court is now asking is therefore admissible.

39. I would further point out that, pursuant to settled case-law, the national court is the only court with jurisdiction to assess both the need for a reference for a preliminary ruling and the relevance of the questions which it puts to the Court.[15]

B – *Merits*

40. Under Article 22(1) of Directive 2005/60, the Member States must require credit institutions to provide their financial intelligence unit promptly with the information which it considers necessary for the purpose of combating money laundering and the financing of terrorism.

41. Article 22(2) of that directive – the wording of which is to be interpreted here – states that that information must be forwarded 'to the [financial intelligence unit] of the Member State in whose territory the institution or person forwarding the information is situated'.

15 — See, in particular, the order of 15 April 2011 in Case C-613/10 *Debiasi*, paragraph 20 and the case-law cited

42. By its question, the national court is essentially asking whether a Member State may, under Article 22(2) of that directive, oblige a credit institution to forward the information required for the purpose of combating money laundering and the financing of terrorism directly to the financial intelligence unit of that State where the institution is carrying on its activities in that country under the freedom to provide services.

43. In other words, is such an institution required to forward the information to the financial intelligence unit of the Member State where it is providing its services or to the financial intelligence unit in the Member State where it has its registered office?

44. The question arises because Jyske established its registered office in Gibraltar and has no branch in Spain. Indeed, it is clear from the information provided by the Spanish Government and from the annual report of the activities of the Gibraltar Financial Services Commission [16] that Jyske is a credit institution whose activities are authorised in its Member State of origin. That authorisation is in my view based on Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking-up and pursuit of the business of credit institutions, [17] which was subsequently replaced by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006. [18] Those directives institute the 'single European passport' based on the principle of the mutual recognition of authorisations issued by the Member State of origin. The 'passport' thus allows the credit institution to carry on activities for which it is authorised in all the Member States, either by establishing a branch or under the freedom to provide services. In the context of the main proceedings, it is by means of the provision of services that Jyske therefore chose to carry on its financial activities in Spain. [19]

45. In those circumstances, and for the reasons which I now go on to adumbrate, I believe that a Member State may require credit institutions which carry on financial operations in its territory, not by establishing a branch, but under the freedom to provide services, to declare suspicious financial transactions to the national financial intelligence unit. In my view, that interpretation of Article 22(2) of Directive 2005/60 is the correct one, having regard to the scheme of Directive 2005/60 and the objectives which the European Union legislature is seeking to pursue, and is entirely compatible with the wording of that provision.

1. Interpretation of Article 22(2) of Directive 2005/60

46. In Article 22(2) of Directive 2005/60, the European Union legislature identifies the financial intelligence unit as being responsible for the assembly, analysis and transmission of data on suspicious financial transactions to the competent national authorities. In this connection, the wording of that provision states expressly that the competent unit is that of the Member State in whose territory the 'institution or person forwarding the information is situated'.

47. In order for that wording to be interpreted, it is first necessary to consider the scheme and purpose of Directive 2005/60.

16 — See annual report for 2002 of the Gibraltar Financial Services Commission, available at http://www.fsc.gi.

17 — OJ 2000 L 126, p. 1.

18 — OJ 2006 L 177, p. 1. See also Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), as most recently amended by Directive 2010/78 ('Directive 2004/39'). Directive 2004/39 is to allow investment undertakings, banks and stock exchanges to offer their services beyond borders on the basis of the permit issued by the competent authority in the Member State of origin.

19 — Pursuant to Article 299(4) EC, the provisions of the EC Treaty are applicable to Gibraltar – which is a European territory whose foreign affairs are governed by the United Kingdom – subject to the exclusions provided for in the Act concerning the Conditions of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the Adjustments to the Treaties (OJ 1972 L 73, p. 14). Therefore the Treaty provisions on the freedom to provide services and the secondary legislation adopted to ensure the establishment of that freedom apply to Gibraltar. An economic operator such as Jyske, established in Gibraltar, is therefore entitled to rely on those rules.

a) Scheme and purpose of Directive 2005/60

48. In order to understand the context in which the provision which the Court is here called upon to interpret operates, and the objectives which the European Union legislature is seeking to pursue, it is necessary to examine Directive 2005/60 in the context in which it was adopted.

49. The combating of financial crime in the European Union has three components.

50. The first is the criminalisation of money laundering and the financing of terrorism under the law of the Member States.

51. This component was introduced at the Tampere European Council where all Member States were asked to reach agreement on a definition for the offences of money laundering and the financing of terrorism, on the criminalisation thereof, and on sanctions in their internal legal orders.

52. Those offences are now defined in many provisions of international and European law, including the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The European Union legislature also gives a definition of those crimes in Article 1 of Directive 2005/60, requiring the Member States to ensure that money laundering and the financing of terrorism are prohibited in their territory.

53. With regard to the criminalisation and punishment of such offences, reference must be made to Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.[20] Framework Decision 2001/500 lays down a minimum standard which is none the less common to all the Member States with regard to the punishment of such offences, in requiring in Article 2 that the Member States adopt all necessary measures to ensure that they are punishable by deprivation of liberty of at least four years.

54. There is therefore currently a common definition of the offences of money laundering and the financing of terrorism in the European Union and minimum requirements with regard to their criminalisation and punishment in the national legal orders. None the less, it must be borne in mind that competence to investigate and pursue those financial crimes remains within the exclusive jurisdiction of the Member State in whose territory the criminal financial transactions are carried out.

55. The second component is the prevention of money laundering and the financing of terrorism.

56. This is based on the directive in question, Directive 2005/60, which lays down provisions common to all the Member States with regard to the monitoring of financial transactions concluded by credit institutions and the detection of financial offences. The objective is to avert threats liable to affect the integrity and proper functioning of the financial system owing to the introduction into the system of funds of criminal origin and the use of money for terrorism.

57. As its title indicates, Directive 2005/60 therefore institutes a system of preventive control implemented at national level. This is founded on a risk-based approach. The Member States are required to identify, evaluate and understand the threats of money laundering and financing of terrorism so as to be able to mitigate them and, if appropriate, to freeze, seize and confiscate the proceeds of crime. To that end, the Member States must require the institutions and persons to which and whom the directive applies to fulfil two obligations.

20 — OJ 2001 L 182, p. 1.

58. The first, set out in Chapter II of Directive 2005/60, is a customer due diligence obligation. The directive requires credit institutions to apply more or less stringent due diligence measures, according to their assessment of the risks and depending, inter alia, on the type of customer and business relationship. Those measures constitute identifying the customer, the subject-matter and nature of the business relationship, conserving documents and evidence, and prohibiting anonymous accounts or fictitious passbooks.

59. The second is a reporting obligation regarding suspicious financial transactions, the nature and scope of which are set out in Chapter III of Directive 2005/60. Therefore, and in accordance with Article 20 of that directive, Member States must require credit institutions to pay special attention to financial transactions which appear to them to be likely to be related to criminal activity, and in particular those which may appear complex, unusual, without apparent economic or visible legal purpose, or for a particularly high amount. Under Article 22 of the directive, credit institutions are therefore required immediately to inform the financial intelligence unit specially established for this purpose by the Member State. I should point out that the main proceedings came about as a result of a failure to fulfil that obligation.

60. In order to ensure observance of those obligations, the European Union legislature has conferred on the competent national authorities enhanced powers of supervision and monitoring set out in Articles 36 and 37 of Directive 2005/60. The authorities may therefore compel the production by credit institutions of any information relevant to monitoring compliance with their obligations, and in particular perform checks and onsite inspections. Those powers are furthermore complemented by the requirement on the part of the Member States to lay down sanctions in the event of failure to fulfil those obligations which, pursuant to Article 39(1) of the directive, must be not only effective and proportionate, but also dissuasive.

61. All those measures, whether obligations on the credit institutions or powers of supervision and penalties conferred on the competent national authorities, constitute preventive and dissuasive measures which, if implemented efficiently by all Member States, must enable the effective combating of money laundering and financing of terrorism, and safeguard the soundness and integrity of the financial system.

62. None the less, it must be noted that the European Union legislature is only undertaking a minimum harmonisation at this stage. In accordance with Article 5 of Directive 2005/60, it is allowing the Member States the freedom to adopt or maintain much more stringent provisions to detect and prevent the threat of financial crime.

63. Finally, the third component is cooperation and exchange of information within the European Union.

64. At the time of the facts in the main proceedings, this component was based on Decision 2000/642 and Article 38 of Directive 2005/60.

65. Decision 2000/642 is intended to reinforce and deepen exchanges of information between national financial intelligence units established under Directive 91/308, so that the competent national authorities cooperate closely and directly. That decision sets out rules common to the Member States in regard to their financial intelligence units' powers, the content of requests for information and the scope of information exchange.

66. None the less, the Member States retain a significant margin of discretion in the implementation of the cooperation mechanism. On the one hand, Article 1 of the decision expressly provides that the financial intelligence units are to cooperate in accordance with their national jurisdictions. However, the Member States have retained a significant degree of freedom with regard to determining the status of their national unit, which may be administrative or judicial or be constituted as a police

authority, so that each one is subject to very different rules on their functioning, procedure and competences, depending on the Member State. On the other hand, Articles 4 and 5 of Decision 2000/642 enable the Member States to apply a certain number of restrictions as to the scope of information exchange and use. So, financial intelligence units may refuse to divulge information which is connected with a criminal investigation being conducted in the Member State, or where divulgation of the information is not 'in accordance with fundamental principles of national law', or may adversely affect the 'interests… of the Member State' or of a natural or legal person. It is not difficult to see that such restrictions are liable to impede or paralyse the cooperation mechanism, having regard to the interpretation of those provisions and above all the diversity of the national regulations adopted in the field of market surveillance or protection of professional secrecy and personal data. In this instance, this case illustrates the latter point very well.

67. In addition, it must be pointed out that Decision 2000/642 does not establish any monitoring mechanism in relation to Member States' actions or any power to compel in the event of a national financial intelligence unit failing to act. While the rules established by the European Union legislature in the context of that decision are therefore intended to harmonise the basic features of cooperation between financial intelligence units, they remain minimal in nature and allow the Member States a significant degree of discretion as regards the extent of their cooperation.

68. That mechanism was not strengthened by Directive 2005/60, even though the directive was adopted more than five years later. Although the European Union legislature mentions, in recital 40 in the preamble to that directive, the arrangements for cooperation established by Decision 2000/642, it is only to encourage 'to the greatest possible extent' 'cooperation between financial intelligence units' laid down in that decision.

69. It is true that in Article 38 of Directive 2005/60, the European Union legislature sought to go beyond mere intergovernmental cooperation by integrating the European Commission into the system. Yet its ambition remains modest in nature and the Commission's role relatively unobtrusive. In fact, that provision provides that '[t]he Commission shall lend such assistance as may be needed to facilitate coordination, including the exchange of information between [financial intelligence units] within the Community'. It is the only article in the section entitled 'Cooperation' and nowhere does it state the manner in which the support is to be implemented in practice. Recital 40 in the preamble to the directive none the less states that the support is to be given in particular by means of financial support. The European Union legislature does not therefore confer on the Commission either any decision-making power or any power to compel the Member States or their financial intelligence units, indispensable though they sometimes are to efficient cooperation.

70. It must therefore be concluded that, at the time of the facts of the main proceedings, the cooperation established by the European Union legislature with regard to the exchange of information in the field of financial crime was only in its infancy and largely based on the goodwill of the Member States.

71. However that system showed some limitations which the European Union legislature sought to remedy by establishing, in the context of Regulation (EU) No 1093/2010,[21] a European supervisory authority, the European banking authority. It must be noted that Regulation No 1093/2010 does not apply to these proceedings, owing to its date of entry into force. It is interesting none the less to consider its aims in order better to understand the limitations of the form of cooperation instituted by Directive 2005/60 and the competences which at the time of the facts in the main proceedings were to be devolved onto the national financial intelligence units.

21 — Regulation 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).

72. Under Article 1, Regulation No 1093/2010 is intended to institute a European supervisory system the aim of which is, inter alia, to ensure the integrity of the financial markets and the efficiency of the cooperation arrangements for the national supervisory authorities, thus covering the scope of application of Directive 2005/60. In recitals 8 and 9 in the preamble to that regulation, the European Union legislature stated as follows:

'(8) The Union has reached the limits of what can be done with the present status of the Committees of European Supervisors. The Union cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border financial institutions; where there is insufficient cooperation and information exchange between national supervisors; where joint action by national authorities requires complicated arrangements to take account of the patchwork of regulatory and supervisory requirements; *where national solutions are most often the only feasible option in responding to problems at the level of the Union*, [22] and where different interpretations of the same legal text exist. The European System of Financial Supervision (hereinafter "the ESFS") should be designed to overcome those deficiencies and provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network.

(9) The ESFS should be an integrated network of national and Union supervisory authorities, *leaving day-to-day supervision to the national level* [23] …'

73. In the context of the ESFS, the European Union legislature has therefore established a European banking authority which not only has a leading and coordinating role with regard to the exchange of information but also enjoys the power to monitor and compel as regards the actions of national supervisory authorities and the activities of credit institutions. The European banking authority must therefore guarantee observance by national financial intelligence units of their supervisory and cooperation obligations under Directive 2005/60 and Decision 2000/642, [24] and ensure that disputes likely to arise between them with regard to questions of procedure or lack of cooperation are resolved. [25]

74. Finally, it must be pointed out that Directive 2006/48, which lays down horizontal rules on the activities of credit institutions in the European Union, also provides for information exchanges between the Member State of origin and the host Member State. Those exchanges are none the less limited to prudential supervision of financial institutions. [26]

75. In the light of those developments, I believe that the Kingdom of Spain was entitled to submit credit institutions operating under the freedom to provide services in its territory to a disclosure obligation.

76. First of all, I have observed that the approach followed in regard to the criminalisation of money laundering operations and financing of terrorism is still largely intergovernmental. Although there is a common definition of those offences in the European Union and of the minimal requirements with regard to their criminalisation and punishment in the national legal orders, the competence to investigate and pursue such financial crimes none the less continues to fall within the exclusive

22 — My emphasis.

23 — Idem.

24 — See recitals 27 and 28 in the preamble to, as well as Article 17 of, Regulation No 1093/2010

25 — See recital 32 in the preamble to, and Article 19 of, that regulation.

26 — See in particular Title V, Chapter I, Sections I and II of that directive.

jurisdiction of the Member State where the criminal financial operations are transacted. Therefore it seems to me legitimate and logical that the Member State concerned should be able to obtain any information it deems useful for the purpose of bringing proceedings from any credit institution offering its services in that State's territory.

77. I have, furthermore, indicated that Directive 2005/60 establishes the system for monitoring and detecting suspicious financial transactions at national level only.

78. I would point out that that system is based primarily on due diligence and disclosure obligations, the implementation of which is within the sole responsibility of the Member States in whose territory the credit institutions are situated, which must espouse a risk-based approach. The effectiveness of those measures is assured by the conferral on the competent national authorities of enhanced supervisory and investigatory powers, in particular to carry out onsite inspections at credit institutions, and of powers to impose penalties. [27]

79. Next, that system is based on the establishment of financial intelligence units which are central national units whose legal status is defined by the Member States. Until the adoption of Regulation No 1093/2010, their actions were not the subject of supervision or even monitoring at European Union level since they were not yet part of an integrated European network.

80. However, in order to ensure the effectiveness of such a monitoring and detection system on which Directive 2005/60 is based, it seems to me indispensable that financial intelligence units be able to obtain the information for the purpose of combating money laundering and the financing of terrorism from all credit institutions operational in their country, whether they act through a branch or under the free movement of services.

81. First of all, the financial intelligence unit of the host Member State is, unlike the financial intelligence unit in the Member State of origin, closest to the national market, and is better acquainted than any other body with the risks associated with money laundering and the financing of terrorism in its own country. It is aware of all the facts likely to be linked to criminal financial activity in that country, not only in relation to the credit institutions and persons referred to in Directive 2005/60, but also in relation to all the national authorities responsible for the detection and eradication of financial crime, whether the administrative, judicial or enforcement authorities or the supervisory bodies for stock markets or financial derivatives markets. [28] Thus the financial intelligence unit of the host Member State, by receiving information indicating atypical financial transactions directly, analysing it and being in a position, where appropriate, to order further investigations, collects all the evidence of suspicious financial transactions and enables the prompt freezing, seizure and confiscation of assets likely to constitute the proceeds of crime.

82. Next, the effectiveness of the risk-based approach demands that risks be assessed not only by the financial intelligence unit best placed to assess the risks associated with the national market, but also by the unit which will enable the Member State where the suspicious financial transaction occurs to respond rapidly by ordering the suspension of that transaction in accordance with Article 24 of Directive 2005/60. Nor should it be overlooked that administrative action operates on a slower timescale than the financial sector.

27 — See Articles 37 and 39 of Directive 2005/60.

28 — See Article 25 of that directive.

83. Finally, it seems to me that only that interpretation assures the useful effect of the enhanced supervisory and investigatory powers conferred on the competent national authorities under Article 37 of Directive 2005/60 and the effectiveness of the penalties which those authorities may impose on credit institutions which fail to fulfil their due diligence and disclosure obligations under Article 39 of that directive.

84. Secondly, there is a danger of jeopardising the useful effect of Directive 2005/60 if one introduces different rules of procedure depending on the distribution channel chosen by the credit institution to provide its financial services, whether it provides them through the traditional means of a branch – which, may I point out, is nothing other than an operational office without legal personality – or chooses rather to offer its services under the freedom to provide services.

85. Indeed, one must avoid a situation where the credit institution opts for the freedom to provide services regime in order to circumvent the more stringent supervision exercised by the host Member State and so opens a registered office or branch in a Member State where supervision is perhaps less stringent. In such a situation, the desire to cause the authority of the Member State of origin to prevail not only risks seriously compromising the fight against financial crime but also amounts to tolerating the development of trafficking and financing the aim of which is to destabilise the Member States themselves, as this case appears to illustrate.

86. Furthermore, making a distinction according to the distribution channel used for financial services results in a difference in treatment which is in my view artificial and unjustified. In fact, credit institutions which offer their financial services through a branch or under the freedom to provide services are operating not only in the same geographical market but also in the same product market, since the range of services offered currently is likely to be equally broad in both cases owing to the new technologies. It none the less remains true that in the case of similar services, those operating through a branch would then be required to declare any suspicious financial transactions to the financial intelligence unit in the Member State in which they have the branch, whereas those operating under the freedom to provide services would be exempted from that obligation. Such a situation would clearly impair the effectiveness of the supervision established by Directive 2005/60, and money launderers could take advantage of that situation in order to advance their criminal activities.

87. Therefore, it seems clear to me that any credit institution which carries on its activities in the territory of a Member State under the freedom to provide services must be subject to as effective a supervisory system as that to which a credit institution operating through a branch in the same national territory is subject to ensure that they all comply with the applicable requirements in the same conditions.

88. Thirdly, I consider that the provisions laid down in the context of Decision 2000/642 and Directive 2005/60 are not sufficient to guarantee enhanced cooperation to support the fight against financial crime effectively in a situation such as that at issue in the main proceedings. In fact, if the credit institution in question does not provide the required information spontaneously, and the financial intelligence unit of the Member State of origin does not request it, in the absence of any indications and not knowing the risks associated with the market in which the credit institution is providing its services, there is no means of compelling that authority to require the credit institution to disclose the information and communicate it to the financial intelligence unit of the host Member State.

89. As we have seen, at the time of the facts in the main proceedings, cooperation and information exchange were based more on Member States' goodwill than on an integrated network of national and European surveillance authorities whose actions are supervised and omissions penalised, as is now the case under the new European system of financial supervision.

90. Fourthly, I do not think that the provisions laid down in the context of the directives relating to access to and the carrying-on of credit institutions' activities, namely Directives 2000/12 and 2006/48, and Directive 2004/39 on markets in financial instruments, in the versions in force at the time of the facts in the main proceedings, militate in favour of the financial intelligence unit in the Member State of origin being competent in circumstances such as those in the main proceedings. In fact, the principles of trust and mutual recognition on which those directives are based extend only to the authorisation of the credit institution and its prudential supervision. I offer as evidence the fact that under Article 31 of Directive 2006/48, the host Member State may, regardless of any authorisation issued by the Member State of origin, adopt any appropriate measures vis-à-vis the credit institution to prevent or avert acts committed by the credit institution in its territory in violation of legal provisions adopted by it for reasons relating to the public interest, of which combating financial crime is obviously one.

91. Therefore, in the light of the context of the provision in question and the objectives pursued by the European Union legislature, I am of the view that Article 22(2) of Directive 2005/60 must be interpreted as referring to credit institutions which carry on financial activities not only by establishing a registered office or branch, but also under the freedom to provide services.

92. That is the manner in which the wording of that provision is to be interpreted.

b) Wording of Article 22(2) of Directive 2005/60

93. I should point out that it is plainly apparent from the wording of Article 22(2) of Directive 2005/60 that the competent financial intelligence unit is the one in the Member State 'in whose territory the institution … is situated', or that of the Member State where the 'person forwarding the information is situated'.

94. The first case clearly refers to the situation where the credit institution has a registered office or branch in the Member State. To that extent, and in the light of the foregoing developments, I consider that the expression used by the European Union legislature also covers the situation where the credit institution is *present in the national market* in that it offers its financial services other than by the establishment of an operational office, that is to say by carrying on it activities under the freedom to provide services.

95. With regard to the second case, I consider that the provision is most ambiguous and broad in its wording. It undoubtedly refers to the persons listed in Article 2(1)(3) of Directive 2005/60, who include providers of services bound by the same disclosure obligations as those binding financial institutions. But there is no indication to exclude the possibility that that state of affairs might also cover a situation where a person provides services for the transfer of funds or securities in the national territory operating through agents.

96. I therefore note that the wording used by the European Union legislature does not preclude Article 22(2) of Directive 2005/60 from being interpreted as meaning that the information required for the purpose of combating money laundering and the financing of terrorism must be forwarded to the financial intelligence unit of the Member State in whose territory the credit institution is providing its services. On the contrary, I consider that that interpretation is the correct one having regard to the objectives which the European Union legislature is seeking to pursue in the context of that legislation and the scheme thereof.

97. It is in the light of all the foregoing elements, therefore, that I consider that Article 22(2) of Directive 2005/60 must be interpreted as not precluding legislation of a Member State which requires credit institutions to forward the information required for the purpose of combating money laundering and the financing of terrorism directly to the financial intelligence unit of that State, where the institutions carry on their activities in that State under the freedom to provide services.

98. That interpretation in my view enables the powers of the Member States in connection with the detection, supervision and elimination of financial crime in their territory to be complied with. I must none the less point out that it obviously does not preclude exchanges of information between the host Member State and the Member State of origin; quite the contrary, since the latter may have access to extremely useful information since it is hosting the relevant institution's registered office.

99. In the event that the Court does not share my interpretation of that provision, I would point out that under Article 5 of Directive 2005/60, a Member State may, in the field governed by that directive, adopt more stringent national provisions for the prevention of money laundering and the financing of terrorism. National legislation such as that at issue in the main proceedings, which strengthens the disclosure obligation in Article 20 et seq. of Directive 2005/60, undoubtedly falls within Article 5.

100. The Court must none the less ensure that such legislation is compatible with European Union law, and in particular the principle of the freedom to provide services enshrined in Article 56 TFEU. Indeed, as I have stated, Jyske is established in Gibraltar and carries on financial activities in Spain under the freedom to provide services. Therefore, the compatibility of the legislation in question must be examined in the light of that provision.

101. In so far as that question relates to propositions advanced in the alternative, I shall limit myself to making the following few observations.

2. Compatibility of national law with the freedom to provide services

102. I would point out first of all that it is settled case-law that Article 56 TFEU requires not only the elimination of any discrimination against a service provider established in another Member State on the basis of his nationality, but also the removal of any restriction, even where it is applied without distinction to national providers and those of other Member States, where it is such as to prohibit, hinder or render less attractive the activities of the provider established in another Member State where he lawfully provides similar services. [29]

a) Existence of a restriction

103. It is undeniable, nor indeed is it challenged, that the legislation in question constitutes a restriction on the freedom to provide services.

104. Indeed, that legislation requires providers of services established in a Member State other than the Kingdom of Spain promptly to inform the national financial intelligence unit, spontaneously or at the latter's request, of any current or past financial transactions likely to be linked to money laundering or to the financing of terrorism. Clearly such legislation is such as to impede and render less attractive the activities of the credit institution concerned, in particular where the services call for a certain speed of action. Indeed, the disclosure obligation may occasion delays in the completion of

29 — See, in particular, Case C-244/04 *Commission* v *Germany* [2006] ECR I-885, paragraph 30 and the case-law cited.

the transactions concerned, or failure to conclude them at all, and give rise to additional costs. Furthermore, that obligation is likely adversely to affect data protection and confidentiality of business and other information held by the credit institution. Those facts show, if it needed to be shown, that the national legislation in question is indeed likely to impede the freedom to provide financial services.

105. A restriction is none the less compatible with Article 56 TFEU if it fulfils the following conditions, which it is for the national court to verify. The legislation must be justified by overriding reasons in the public interest, appropriate for the purpose of ensuring that the aims in view are attained, proportionate, and applied in a non-discriminatory manner. [30] I should like to offer below some elucidation in regard to the fulfilment of those conditions in the context of the main proceedings.

b) Justification of the restriction

106. In this case, the legislation in question must permit the national authorities to verify whether credit institutions offering their services in their country are carrying out financial transactions for purposes other than those in respect of which they have been authorised in the Member State of origin, connected with money laundering or the financing of terrorism. The disclosure obligation laid down in the national legislation must enable a requirement under European Union law, namely the combating of financial crime and the maintenance of the integrity of the financial system, to be implemented by forestalling suspicious financial transactions.

107. I would point out that the purpose of combating money laundering and the financing of terrorism constitutes, under the case-law of the Court, an overriding reason in the public interest capable of justifying a restriction on the freedom to provide the services in question. [31]

c) The appropriateness of the legislation in question for attaining the aims in view

108. I note that it is the settled case-law of the Court that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. [32] That analysis must be carried out taking account of the context in which the regulations were adopted and, with regard to the legislation in question here, I consider that it fulfils those conditions.

109. In fact the legislation enables the Member State to supervise all financial transactions carried out by credit institutions in its territory, and whatever the manner in which those institutions have chosen to provide their services, whether by establishing a registered office or branch, or under the freedom to provide services. In this way, all are subject to similar obligations, which seems to me to be entirely logical, since they are carrying on their activities in the same market and offering similar financial services which may, to a greater or lesser degree, be used for the purpose of money laundering or the financing of terrorism. The legislation further enables the Member State, in the light of the enhanced supervisory and investigatory powers conferred on it by Directive 2005/60, to suspend completion of those transactions. Finally, in so far as the Member State has exclusive jurisdiction with regard to the criminalisation, detection and eradication of financial crime in its territory, that legislation enables it to require, any time where there is reasonable doubt as to the legality of a financial transaction, the forwarding of any information which it deems necessary to accomplish its duty and, where appropriate, to pursue and punish those responsible.

30 — See Case C-470/11 *Garkalns* [2012] ECR, paragraph 35 et seq. and the case-law cited.

31 — Case C-212/08 *Zeturf* [2011] ECR I-5633, paragraphs 45 and 46.

32 — Ibid., paragraph 57 and the case-law cited.

110. In my view, therefore, these facts show that the legislation in question does indeed enable financial crime to be combated effectively and coherently.

d) Proportionality of the legislation in question

111. I must at this point assess whether the objectives pursued by the Spanish legislation in question can clearly be attained by a measure less restrictive of the freedom to provide services. I am not convinced that at the time of the facts in the main proceedings this could be the case.

112. First of all, the legislation forms part of the framework of preventive monitoring requiring the rapid transmission of information prior to the completion of suspicious financial transactions which, where appropriate, calls for an extremely rapid response on the part of the competent national authorities once such suspicions are confirmed. Such an objective can accordingly be attained only if the cooperation between the national financial intelligence units truly enables the host Member State to fulfil its task by intervening before the suspicious financial transaction is concluded. At the time of the facts in the main proceedings, the exchange of information between those units was, as the European Union legislature has recognised, insufficient, paralysed in particular by a lack of trust and by a lack of coherence in the application of the European Union legislation.[33]

113. Secondly, it must be pointed out that the legislation in question refers only to information relating to suspicious financial transactions which the financial intelligence unit deems useful for the purpose of fulfilling its mission, and not to data on all financial transactions concluded by credit institutions. The requirement is therefore extremely specific. Furthermore, I am not convinced that conferring exclusive power to collect such information on the financial intelligence unit of the Member State of origin is as efficient, in so far as that unit is not in my view the best placed to determine what information is most relevant with regard to financial transactions concluded in the territory of the host Member State.

114. Since there are no effective means to guarantee full and compete cooperation between financial intelligence units, and having regard to the negative consequences of that fact in terms of the effectiveness of the fight against financial crime and the integrity of the European and national financial system, I am therefore of the opinion that a Member State was entitled to take the view that its obligations under Directive 2005/60 were better assured by national legislation such as that at issue in the main proceedings.

e) Non-discriminatory application

115. According to the facts at my disposal, the legislation in question does not appear to be discriminatory. Indeed, in so far as it subjects all credit institutions as well as all foreign persons or bodies which carry on activities in Spain through branches or under the freedom to provide services, that legislation appears to affect all credit institutions without distinction, whether they are established on national territory or in another Member State. However, it is for the national court to ascertain that the legislation is also applied in a non-discriminatory way.

116. In the light of all those considerations, and in the event that the Court does not share my interpretation of Article 22(2) of Directive 2005/60, I take the view that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions to provide the information required for the purpose of combating money laundering and the financing of terrorism directly to the financial intelligence unit of that Member State where those institutions are

33 — See, in particular, recital 1 in the preamble to Regulation No 1093/2010.

carrying on their activity in national territory under the freedom to provide services, if such legislation is justified by overriding reasons in the public interest, is such as to secure the attainment of the aim in view and does not go beyond that which is necessary in order to attain it, and is applied in a non-discriminatory manner.

117. It is for the national court to ascertain that those conditions are fulfilled taking account of the following considerations:

— In the light of the risks to the integrity of the financial market caused by financial crime, a Member State may legitimately require credit institutions offering their services in the national territory to disclose information on suspicious financial transactions with a view to preventing money laundering and the financing of terrorism.

— Such legislation is appropriate to attain that aim if it enables the Member State effectively to supervise and suspend suspicious financial transactions concluded by credit institutions offering their services in the national territory and, if appropriate, to pursue and punish those responsible.

— The obligation on credit institutions carrying on their activities under the freedom to provide services may constitute a proportionate measure in pursuit of that aim in the absence, at the time of the facts in the main proceedings, of any effective mechanism guaranteeing full and complete cooperation between financial intelligence units.

— Such legislation is not, in itself, discriminatory.

IV – Conclusion

118. In the light of the foregoing considerations, I propose that the Court should answer the Tribunal Supremo's question as follows:

(1) Article 22(2) of 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, as amended by Directive 2008/20/EC of the European Parliament and of the Council of 11 March 2008, must be interpreted as not precluding legislation of a Member State which requires credit institutions to forward the information required for the purpose of combating money laundering and the financing of terrorism directly to the financial intelligence unit of that State, where the institutions carry on their activities in that State under the freedom to provide services.

(2) (a) In any event, Article 56 TFEU must be interpreted as not precluding such legislation where it is justified by overriding reasons in the public interest, is such as to secure the attainment of the aim in view and does not go beyond that which is necessary in order to attain it, and is applied in a non-discriminatory manner.

(b) It is for the national court to ascertain that those conditions are fulfilled taking account of the following considerations:

— In the light of the risks to the integrity of the financial market caused by financial crime, a Member State may legitimately require credit institutions offering their services in the national territory to disclose information on suspicious financial transactions with a view to preventing money laundering and the financing of terrorism.

— Such legislation is appropriate to attain that aim if it enables the Member State effectively to supervise and suspend suspicious financial transactions concluded by credit institutions offering their services in the national territory and, if appropriate, to pursue and punish those responsible.

— The obligation on credit institutions carrying on their activities under the freedom to provide services may constitute a proportionate measure in pursuit of that aim in the absence, at the time of the facts in the main proceedings, of any effective mechanism guaranteeing full and compete cooperation between financial intelligence units.

— Such legislation is not, in itself, discriminatory.