



Vastuivõtmissè kuupäev : 14/12/2022

**Case C-695/22**

**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:**

10 November 2022

**Referring court:**

Městský soud v Praze (Czech Republic)

**Date of the decision to refer:**

26 October 2022

**Applicant:**

Fondee a.s.

**Defendant:**

Česká národní banka

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**Subject matter of the main proceedings**

The referring court is considering an application whereby the applicant is seeking the annulment of the defendant's decision dated 18 March 2021 ref. no 2021/029192/CNB/110 (**'the contested decision'**) confirming a fine of CZK 150,000 imposed on the applicant, as an investment broker, for a breach of the prohibition on the transmission of orders pertaining to investment instruments to foreign securities traders (**'the prohibition concerned'**).

**Subject matter and legal basis of the request**

The referring court asks whether the prohibition concerned is in line with EU law and, in this regard, it submits two preliminary questions.

## Questions referred for a preliminary ruling

‘1. Does a person who is, pursuant to Article 3(1) [of Directive 2014/65],<sup>1</sup> excluded from the scope of the Directive, and who does not, pursuant to Article 3(3) of the Directive, enjoy the freedom to provide services as defined in Article 34 thereof, enjoy the right to freedom to provide services embodied in Article 56 [TFEU], if it itself does not provide investment services on the basis of a single European passport to a client established in another Member State, but rather receives an investment service from a foreign entity using a single European passport or otherwise takes part in its provision to the end client (acts as an intermediary)?

2. If the answer to the previous question is affirmative, does EU law, namely Article 56 [TFEU], preclude legislation prohibiting an investment broker from transmitting a client’s order to a foreign securities trader?’

## Provisions of European Union law relied on

Article 3(1) and (3) (Optional exemptions) and Article 34 (Freedom to provide investment services and activities) of the Directive.

Article 56 TFEU (Freedom to provide services).

## Provisions of national law relied on

The present case falls within the scope of zákon č. 256/2004 Sb., o podnikání na kapitálovém trhu, ve znění pozdějších předpisů (Law 256/2004, on engaging in business on the capital market, as amended) (‘Law’).

Pursuant to Paragraph 29(1) of the Law, an investment broker is entitled to provide only some of the main investment services, namely to receive and transmit orders pertaining to investment instruments (which include collective investment securities) and to provide investment advice in respect of those instruments. The prohibition concerned is regulated in subparagraph 4 of that Paragraph, pursuant to which an investment broker may transmit orders (among others) solely to a securities trader, i.e., pursuant to Paragraph 5(1) of the Law, a legal entity who is entitled to provide main investment services on the basis of a permit granted by the defendant and who has its registered office in the Czech Republic pursuant to Paragraph 6(1)(b) of the Law.

The latter provision was inserted in the Law by amendment No 204/2017, effective from 3 January 2018, replacing former Paragraph 29(1)(b) of the same

<sup>1</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (‘Directive’).

Law, which made it possible to transmit orders to foreign entities as well. According to the explanatory memorandum concerned, this range of entities was restricted by the legislature on purpose, with a view to simplifying supervision by the defendant.

Hence, in the Czech Republic, the institution of an investment broker constitutes a special category, narrower than a securities trader.

Pursuant to Paragraph 162(1)(a) of the Law, a person commits an offence by unlawfully carrying on an activity pursuant to the Law.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The defendant found that, between 7 October 2019 and 27 December 2019, the applicant transmitted 407 orders to a foreign securities trader (**‘the foreign trader’**). The defendant found that the applicant enabled its clients to invest in ETF (exchange traded funds) that represent investment instruments – collective investment securities accepted for trading on foreign exchange and other regulated markets. The clients entered an order through their user accounts on the www.fondee.cz website, which the applicant then transmitted to the Dutch company DeGiro B.V., all on the basis of a trilateral agreement between that company, the applicant, and clients.
- 2 In the context of those findings, the defendant adopted the contested decision, having concluded that, by transmitting orders to a foreign trader, the applicant had breached the prohibition concerned. The applicant challenged the contested decision by an application submitted to the referring court.

### **The essential arguments of the parties in the main proceedings**

- 3 Arguments of the applicant. According to the applicant, the prohibition concerned breaches Article 56 TFEU. A foreign trader is restricted in the free provision of services by being discriminated against,<sup>2</sup> as, unlike a domestic trader, it cannot provide services to an investment broker.
- 4 Irrespective of that discrimination, it argues, access to the market in the Czech Republic is unduly restricted, which runs contrary to the single market principle.<sup>3</sup>

<sup>2</sup> In this context, the applicant refers to judgments of the Court of Justice dated 18 December 2007, *Laval*, C-341/05, particularly paragraphs 114 and 115, and of 3 March 2020, *Google Ireland Limited*, C-482/18, paragraphs 25 and 26, and the case-law cited therein, and of 28 April 2009, *Commission v Italian Republic*, C-518/06, paragraph 64.

<sup>3</sup> As of 31 December 2020, only 39 domestic securities traders were active in the Czech Republic, who held a monopoly in terms of access to 160 investment brokers.

- 5 Article 3(3) of the Directive represents a special provision restricting merely Articles 34 and 35 of the Directive. It does not, in any way restrict the right to the freedom to provide services pursuant to Article 56 TFEU.
- 6 Article 34 of the Directive introduced a single European passport, which has been established because the right to freedom to provide services pursuant to Article 56 TFEU in itself was unable to ensure adequate integration of the European financial market. Hence, the single European passport constitutes an extension of the right to the freedom to provide services. That means that investment brokers cannot take advantage of the European passport for investment enterprises but may utilise the general regime of the freedom to provide services under Article 56.
- 7 An institution similar to that of investment brokers exists in other Member States, as well, for example, in France, Ireland, Austria, and Slovakia, without those entities being precluded from transmitting orders to foreign traders.
- 8 Arguments of the defendant. The applicant is not claiming rights for itself, but rather for a foreign trader. Given that an investment broker is excluded from the freedom to provide investment services (including the receipt and transmission of orders) by the Directive, it may have the right of freedom to provide services pursuant to Article 56 TFEU only as long as it does not concern investment services.
- 9 Foreign traders may provide investment services in the Czech Republic subject to the same conditions as in the Member State of their origin. In this regard, this is not about regulatory requirements for foreign traders, but rather for domestic investment brokers.
- 10 Any establishment of stricter conditions for entities excluded from the scope of the Directive and, therefore, any level of inequality in their freedom to provide services in the single market, is at the discretion of the Member State, which, for example, does not need to permit the transmission of orders to all of the entities listed in Article 3(1)(c) of the Directive, but rather only to some of them (the Directive lays down only the framework, i.e., the minimum requirements).
- 11 An investment broker is not a distribution channel serving a foreign trader, but rather an independent provider of investment services. A foreign trader must exert the same effort in the provision of services in the Czech Republic and expend the same costs as a domestic trader intending to provide its services abroad.
- 12 An investment broker does not provide an investment service to a foreign trader, but rather to its client, and it intends to make use of the services of a foreign trader. The prohibition concerned therefore does not prevent it from freely providing services.
- 13 If the non-existence of an investment broker in itself does not constitute an obstacle to the freedom to provide investment services, then the restrictions put

onto an investment broker by national law cannot constitute an obstacle to freedom to provide services.

- 14 The new regulation introducing the prohibition concerned does not establish a less attractive environment for foreign traders, and, on the contrary, their number has grown since the introduction of the prohibition concerned.

### **Analysis of the questions**

- 15 The fundamental question is whether the prohibition concerned breaches EU law.
- 16 The single European passport guaranteeing freedom to provide investment services, introduced by the Directive, applies only to investment companies that are, according to Czech law, in particular securities traders. Furthermore, the Directive enables, on the basis of and to the extent stipulated in Article 3(1) to (3), the exclusion from that freedom to provide services of certain persons operating on the capital market who or which are regulated purely by national law (as is the investment broker in the present case).
- 17 The dispute, however, pertains to the question of whether investment brokers are also excluded from the right to the freely provide services pursuant to Article 56 TFEU as far as investment services are concerned.
- 18 The freedom to provide services is primarily used by a foreign trader who provides investment services, in this case by executing the orders of a domestic client (investor). The applicant acts as an intermediary between the two parties and is the ‘passive recipient’ of the services of the foreign trader.<sup>4</sup> Were it not for the restriction in Article 3(3) of the Directive, there would be no doubt that an investment broker would be restricted in violation of the right to the free provision of services embodied in Article 56 TFEU, in brokering an investment service between a foreign trader and a domestic client.
- 19 According to the referring court, the key to the assessment of the case lies in the scope of the nature of the exception provided for in Article 3(3) of the Directive, which lends itself to two possible interpretations: (i) the first, advocated by the applicant (see paragraph 6 above), according to which that provision restricts investment brokers solely to the use of the single European passport, rather than the general freedom to provide services, while (ii) the second interpretation, advocated by the defendant (see paragraph 8 et seq., above), according to which if an investment broker, who is entirely subject to the discretion of the Member States, is expressly excluded from the right to freely provide investment services,

<sup>4</sup> In this regard, the present case differs from the situation addressed in the judgment of the Court of Justice of 8 May 2019, *Mastromartino*, C-53/18, and, on the other hand, it largely resembles the situation of a betting game broker addressed in judgment of the Court of Justice of 6 November 2003, *Gambelli*, C-243/01 (see paragraph 58).

that exemption applies to all provision of investment services and also to participation therein.

- 20 Neither method of interpretation has led the referring court to an unambiguous conclusion. A linguistic interpretation provides no answer. It cannot be automatically inferred from Article 3(1)(c)(iv) of the Directive, referred to as a secondary source by the defendant, according to which a broker can offer services, inter alia, to collective investment undertakings authorised under the law of the Czech Republic (but not any other state), that the provision refers only to undertakings permitted by the domestic Member State of the investment broker. The EU legislature would undoubtedly specify that it should be the home Member State of the investment broker, and other language versions (English, French), indicate, rather, that any Member State is meant. The referring court doubts that it would be possible to restrict the range of the undertakings to which orders could be transmitted (investment companies, loan institutions, etc.) solely on the basis of their nationality or state of establishment.
- 21 The referring court did not reach an unambiguous conclusion either on the basis of an inquiry into the meaning and purpose of the exemption from Article 34 of the Directive. It understands that the present case does not pertain to a situation when the field concerned would not be regulated at all by secondary law, but rather a situation when certain entities are expressly excluded by that law from the freedom to provide services. Undoubtedly, the purpose of the exclusion is to prevent entities established pursuant to national legislation from providing investment services across Member States subject to the same terms as investment companies that are subject to the Directive. In that case, however, a problematic situation arises, when such entities de facto take part in the cross-border provision of services, such as by the applicant through its interaction between a foreign trader and a domestic client. In support of this line of argument, the referring court notes the judgment of the Court of Justice of 14 June 2017, in *Khorassani v Pflanz*, C-678/15, paragraph 30, according to which there is a close link between the investment service consisting of the reception and transmission of orders and the execution of orders, the former being provided upstream from the latter and in general leading to the provision of the latter, so these services cannot be entirely divided.
- 22 The referring court therefore maintains that it cannot be inferred from Article 3(3) of the Directive that entities established solely pursuant to national law would be excluded from any participation in the cross-border provision of investment services. In this regard, the applicant confirmed that it itself does not use a single European passport, only providing its services to the domestic client and brokering the provision of a service of a foreign trader.
- 23 The referring court concurs with the applicant that the exclusion pursuant to Article 3(3) of the Directive applies only to the freedom to provide services within the meaning of the Directive, rather than to freedom to provide services pursuant to Article 56 TFEU, which is not disputed either by the text of the Directive or by

the defendant. Nothing should therefore prevent the applicant from invoking Article 56 TFEU.

- 24 The regulation in Paragraph 29(4) of the Law consisting of a prohibition on the transmission of orders to a foreign trader would therefore constitute an impermissible restriction of the freedom to provide services. Furthermore, such an interpretation contributes to a more effective implementation of the freedom to provide investment services by foreign traders who use the single European passport in line with the requirements of the Directive and through national entities, i.e., through another distribution channel that could otherwise be used only by domestic traders.
- 25 For the sake of completeness, the referring court adds that a mere interest in better or easier control by the regulator, i.e., the defendant, certainly cannot constitute grounds for stricter national regulation based on protection of public order or security, as required by Article 52 in conjunction with Article 62 TFEU. After all, the defendant has failed to explain sufficiently how fundamentally the restriction enacted contributes to easier supervision over investment brokers and how its non-existence would disrupt public order. In this regard, the Court of Justice has already ruled that effective control or supervision does not constitute legitimate grounds for a stricter national regulation of the provision of services (judgment of 4 December 1986, *Commission v Germany*, C-205/84, and others).