Vastuvõtmise kuupäev : 29/11/2022

Case C-661/22

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:

20 October 2022

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

19 October 2022

Appellant (applicant at first instance):

Bruc Bond UAB

Other party to the appeal proceedings (defendant at first instance):

Lietuvos bankas

Subject matter of the main proceedings

A dispute between Bruc Bond UAB (the ‘appellant’) and Lietuvos bankas (Bank of Lithuania) concerning the latter’s resolution to revoke the payment institution licence issued to Bruc Bond UAB (the ‘resolution’).

Subject matter and legal basis of the reference

Interpretation of: points 3 and 5 of Article 4 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC; point 2 of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC; third paragraph of Article 267 of Treaty on the Functioning of the European Union.

Question referred

In circumstances such as those in the main proceedings, where a payment institution accepts funds without a specific payment order to transfer them on the same or following business day and the funds remain in the payment institution's account intended for carrying out payment transactions for longer than the time limits for the execution of the payment service laid down by the legislation, are the actions of the payment institution to be regarded as:

(a) a part of a payment service or a payment transaction, as defined in points 3 and 5 of Article 4 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, performed by the payment institution; or

(b) the issuance of electronic money as defined in point 2 of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC[?]

Provisions of EU law cited

1. Recitals 25 and 71, points 3, 4, 5 and 12 of Article 4, Article 18(3), Article 73(1) and Article 83 of Directive (EU) 2015/2366.

2. Recitals 5 and 7, points 1, 2 and 3 of Article 2, Article 6(1), Article 10, Article 11(1) and (2) of Directive 2009/110/EC.

3. Point 5 of Article 4 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

4. Judgement of 16 January 2021 in Case C-389/17 *Paysera LT*, EU:C:2019:25, paragraphs 24, 25, 29 and 32-35.

Provisions of national law and the case-law cited

1. Article 2(11) and (40), Article 5, Article 6(3), Article 38(1), Article 42(2), Article 46(1) and (3) of the Lietuvos Respublikos mokėjimų įstatymas (Republic of Lithuania Law on Payments) (in the version applicable to the dispute, in force as from 20 October 2019).

2. Article 4(3) and (5) of the Lietuvos Respublikos mokėjimo įstaigų įstatymas (Republic of Lithuania Law on Payment Institutions) (in the version applicable to the dispute, in force from 1 August 2018).

3. Article 2(1), Article 5, Article 6(1) of the Lietuvos Respublikos elektroninių pinigų ir elektroninių pinigų įstaigų įstatymas (Republic of Lithuania Law on Electronic Money and Electronic Money Institutions) (in the version applicable to the dispute, in force from 1 August 2018).

Brief summary of the facts and the main proceedings

1 By the resolution, the Bank of Lithuania revoked the payment institution licence of Bruc Bond UAB which had entitled it to provide payment services referred to in Article 5(3) and (6) of the Law on Payments of the Republic of Lithuania (execution of payment transactions, including transfers of funds in a payment account with the payment service provider of the payment service user or with another payment service provider: execution of direct debits, including one-off direct debits, execution of payment transactions through a payment card or a similar device and/or execution of credit transfers, including standing orders and money transfers), as it retained the customers' funds for longer than the time required for the execution of the payment transactions or for technical reasons, and was, therefore, issuing electronic money without being an issuer of electronic money, and, therefore, infringed the requirements of the Republic of Lithuania Law on Electronic Money and Electronic Money Institutions.

2 The Bank of Lithuania established that as from 20 February 2017, the accounts of six of the appellant's customers were credited with funds received by customers (incoming payments) without a specific purpose of payment, and that transfers of funds (outgoing payments) had, for several days (or, in some cases, for months) not taken place, with the exception of debiting the appellant's fees, although the appellant's business plan indicated that it does not control the funds for longer than necessary to carry out the transactions, and that the funds are held in the account for no longer than 48 hours, and are returned to the payer if there is no payment order within 48 hours. In the case in the main proceedings, it was established that in some cases Bruc Bond UAB was unable to execute payment orders due to customers' failure to specify the purpose of payment. There is no dispute between the parties that the appellant controlled the funds longer than necessary. Furthermore, it has been established that the appellant has returned all the funds transferred to it without a payment order.

3 The appellant appealed against the resolution of the Bank of Lithuania to the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius), which dismissed the appeal on 8 June 2021. It subsequently applied to the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) (the referring court) to have the judgment mentioned above set aside and to have a new judgment made, upholding its appeal.

Main arguments of the parties to the main proceedings

4 The appellant states that the court of first instance was wrong to find that it issued electronic money, as it unlawfully set out conditions for the issue of electronic money which are not laid down in the Law on Electronic Money and Electronic Money Institutions, which is contrary to the interpretation given by the Court of Justice in its judgment of 16 January 2021 in Case *Paysera LT* that payment transactions can be regarded as relating to the issuance of electronic money only where the payment service is provided by an electronic services institution and is provided for the purpose of issuing or redeeming the par value of the electronic service. The appellant takes the view that, where a payment service is not provided by an electronic money institution and the issuance or redemption of the par value of the electronic services is not the purpose of the service provided, that service does not constitute an activity related to the issuance of electronic money.

5 The Bank of Lithuania bases its conclusion that the appellant issued electronic money on its position as the Supervision Board in respect of funds held in payment accounts, which states that a payment institution may accept funds into a payment account opened by it only in conjunction with a payment order which must be executed within the time limits laid down in the Law on Payments and must take sufficient measures to ensure that funds received from third parties into the payment account of the customer of the payment institution are not held for longer than is necessary for the payments to be made, otherwise, the funds held in the payment account of the payment institution are to be regarded as deposits or other repayable funds or electronic money.

6 The Bank of Lithuania also relies on the European Commission's letter of 26 October 2015, which states that payment institutions are only permitted to hold payment accounts and to receive funds from consumers to provide those payment services; unlike deposits, funds should not be under the control of the payment institution for longer than is necessary for operational and technical reasons in order to provide the relevant payment service; the fact that electronic money funds are held in the form of a cash value means that the funds are controlled by the issuer for the entire duration of the contract (however, the cash value can be redeemed at any time at the request of the holder of electronic money), whereas that is not so in respect of an ordinary payment account, where the funds can only be transferred to another account or withdrawn, at any time, from the account (without additional charges).

Brief summary of the reasons for the request for a preliminary ruling

7 The referring court submits that Directive 2015/2366 clearly states that a payment transaction carried out by a payment institution includes the act, initiated by the payer or on his [or her] behalf or by the payee, of placing, transferring or withdrawing funds, i.e. the holding of funds is not included in the payment transaction. Article 46 of the Law on Payments and Article 83 of [Directive

2015/2366] deal with the time limits for the execution of payment services, and Article 38 of the Law on Payments and Article 73 of [Directive 2015/2366] provide that in the case of an unauthorised payment transaction, the payment service provider must refund the payer the amount of the unauthorised payment transaction immediately (no later than by the end of the following business day after noting or being notified of the transaction).

8 The referring court points out that the provision of technical capabilities for the customers of payment institutions to provide funds and to hold them in the accounts of the payment institution for longer than is necessary to execute payment transactions or for technical reasons falls within the scope of the issuance of electronic money, as, in accordance with point 2 of Article 2 of Directive 2009/110, electronic money is defined as electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions, i.e. electronic money relates to the holding thereof [*].

9 In its judgment of 16 January 2021 in Case *Paysera LT*, the Court of Justice ruled that Article 5(2) of Directive 2009/110 must be interpreted as meaning that services provided by electronic money institutions in payment transactions constitute activities linked to the issuance of electronic money, within the meaning of that provision, if those services trigger the issuance or redemption of electronic money in a single payment transaction. It also noted that the concept of the 'issuance of electronic money' is not defined by Directive 2009/110, and a payment service provided for the purpose of enabling the redemption of the par value of the electronic money constitutes an activity linked to the issuance of electronic money. The Court of Justice pointed out that, as is clear from point 3 of Article 4, read in conjunction with the Annex to that directive, the execution of a payment transaction, including the transfer of funds to a payment account, constitutes a payment service. In so far as the funds are redeemed solely for the purpose of their transfer and in a single payment transaction a service may be regarded as being linked to the issuance of electronic money within the meaning of Article 5(2) of Directive 2009/110. A transaction whereby, at the request of the seller, the buyer of the goods or services pays for them by making a transfer of funds for that purpose to the electronic money institution, which, upon receipt of the funds, issues electronic money for the benefit of the seller (electronic money holder), is directly linked to the issuance of electronic money, if the transfer of funds automatically triggers, in a single payment transaction, the issuance of electronic money. The transfer of funds is thus linked to the issuance of electronic money.

10 However, in its judgment in Case *Paysera LT*, the Court of Justice did not assess the difference between the activities of payment institutions and those of electronic money institutions, but rather whether payment services provided by an

[*] Translator's note: It is believed that 'thereof' refers to monetary value, rather than e.g. electronic money.

electronic services institution should be regarded as services relating to the issuance of electronic money.

11 The referring court considers that it is apparent from the provisions of Directives 2009/110 and 2015/2366 that the nature of the services provided by the electronic money issuer and the nature of the payment transaction carried out by the payment institution are similar. The funds for payment transactions can be electronic money and the issuer of electronic money undertakes, at the customer's request, to deliver the funds to the payee who accepts the electronic money (point 2 of Article 2 of Directive 2009/110). In the case of a payment transaction carried out by a payment institution, the payment service provider must also deliver the funds to the payee (point 5 of Article 4 of Directive 2015/2366).

12 The national court maintains that, on the basis of the judgment in *Paysera LT*, the issuance of electronic money is not a spontaneous activity, but is carried out for the purpose of enabling the redemption of the par value of the electronic money. The case in the main proceedings involves the situation where the appellant did not intend to issue electronic money, but if the customers failed to specify the purpose of the payment transfers, the funds were held for a certain period of time (longer than necessary to execute the payment transactions) and only refunded to the customers after a certain period of time. It is apparent from the facts of the case that the refunding of the amounts of the unauthorised payment transactions took a significant amount of time and was carried out over a period of time longer than permitted for the execution of the payment transactions, that is to say, it was not carried out immediately in accordance with Article 73 of Directive 2015/2366.

13 In the light of the foregoing, the question from the national court is whether, in circumstances such as those in the main proceedings, the actions of a payment institution are to be regarded as part of a payment service or of a payment transaction executed by the payment institution or whether those actions are to be regarded as the issuance of electronic money. The answer to the question referred is of fundamental importance to the case in the main proceedings, as it would enable (1) a clear decision to be taken on the assessment of the services provided by payment institutions and of the situation in which a payment institution fails to execute a payment order within the time limits laid down in the legislation in accordance with points 3 and 5 of Article 4 of Directive 2015/2366 and point 2 of Article 2 of Directive 2009/110; 2) the establishment of uniform case-law of the national courts, and 3) the interpretation and application of the rules of national law to the disputed legal relationship in order to determine the appellant's obligations related to the provision of payment services, thus ensuring the effectiveness of European Union law.