



A PROCEDURE FOR PRIOR AUTHORISATION OF CROSS-FRONTIER PROPERTY INVESTMENTS CONSTITUTES A RESTRICTION ON THE FREE MOVEMENT OF CAPITAL

For such a procedure to be justified, it must be based on objective, non-discriminatory criteria which are known in advance, so that it adequately circumscribes the exercise of the national authorities' discretion

Netherlands law provides that the authorities must promote adequate housing. To that end, associations and foundations whose purpose is to operate in the public housing sector and which do not intend to distribute any profits other than in the interests of public housing may be approved. Approved institutions give priority to the housing of persons who, because of their income or other circumstances, have difficulty finding suitable accommodation.

Woningstichting Sint Servatius is an approved institution. With a view to building housing in Liège (Belgium), 30 km from the Netherlands border, Servatius formed two Belgian-law companies and applied to the competent Netherlands Minister for authorisation.

In order to finance the project, Servatius lent money to one of its Belgian subsidiaries, having itself contracted a loan, in its capacity as an approved institution in the Netherlands, on particularly favourable terms.

By decision of 5 December 2002, the Minister refused to authorise Servatius' project on the ground of the project's location in Belgium. According to the Minister, Servatius had failed to show that the project would be of benefit to the Dutch housing market and, more specifically, to persons seeking accommodation in the Maastricht region (Netherlands).

The Raad van State (Council of State), which had to decide the case, referred a number of questions to the Court of Justice for a preliminary ruling.

The Court notes that the Netherlands approved institutions must submit their cross-border property investment projects to a prior administrative authorisation procedure and must demonstrate that the investments concerned are in the interests of housing in the Netherlands. In the Court's view, such an obligation constitutes a restriction on the free movement of capital.

In that connection, the Netherlands Government argues that the prior authorisation scheme in question is justified by requirements associated with the housing policy it pursues and with the financing of that policy. Thus, such a scheme seeks to ensure that approved institutions invest, in accordance with their statutes, in projects in the interests of public housing in the Netherlands. There is also a concern to prevent the financial facilities available to those institutions by virtue of the objects laid down in their statutes being diverted to other economic activities, thereby jeopardising the effectiveness and the financing of that housing policy.

The Court accepts that restrictions may be warranted on the ground of such requirements. However, a scheme of prior administrative authorisation cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as the free

movement of capital. Therefore, if such a scheme is to be justified, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.

In view of the material in the files lodged with the Court, it is conceivable that the national provisions do not fully satisfy those requirements, a matter which falls to be determined by the national court.

In that regard, the Court notes that the national provisions concerned make prior authorisation by the competent Minister dependent on a single condition, namely that the project concerned be in the interests of public housing in the Netherlands. As to the question whether that condition is satisfied, it is apparent that that a check is carried out on a case-by-case basis but that the check is not set within a legislative framework and that there are no other specific and objective criteria from which the institutions concerned can ascertain in advance the circumstances in which their application for authorisation will be granted and on the basis of which the courts, if an action is brought before them in respect of a refusal of authorisation, may exercise their powers of review to the full.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of Community law or the validity of a Community act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which the same issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355