

Case C-347/20

Request for a preliminary ruling

Date lodged:

28 July 2020

Referring court:

Administratīvā rajona tiesa (District Administrative Court, Latvia)

Date of the decision to refer:

15 July 2020

Applicant:

SIA Zinātnes parks

Defendant:

Finanšu ministrija (Ministry of Finance)

[...]

ADMINISTRATĪVĀ RAJONA TIESA (DISTRICT ADMINISTRATIVE COURT)

[...]

DECISION

[...] 15 July 2020

The District Administrative Court [...]

[...] [composition of the court]

has heard, in a public hearing, the administrative-law proceedings originating in the action lodged by SIA Zinātnes parks seeking the annulment of the decision [...] made on 4 November 2019 by the Ministry of Finance.

Subject matter and relevant facts of the main proceedings

1. On 15 January 2019 the Centrālā finanšu un līgumu aģentūra (Central Finance and Procurement Agency, ‘the Agency’) announced phase two of the open call to select projects to receive aid under the ‘Growth and Employment’ programme co-financed by the European Regional Development Fund, specific objective 3.1.1 (‘To promote the creation and development of SMEs, in particular in the manufacturing and RIS3 priority sectors’), measure 3.1.1.5 (‘Support for investment in establishment or reconstruction of production premises and infrastructure’).¹ In view of the changes that were made,² the deadline for submitting projects was set as 30 April 2019.
2. The limited liability company Zinātnes parks, the applicant herein, submitted a project to the Agency on 30 April 2019.

Together with its application, the applicant submitted a resolution passed by its shareholders on 29 April 2019 to amend its Articles of Association and increase its share capital by means of a contribution from a specified shareholder of a fraction of the share capital, plus share premium, to be paid within a specified period of time.

During the project evaluation period, the applicant informed the Agency that the increase in share capital had been registered in the Companies Register on 24 July 2019,³ while, in the course of the objection procedure, by way of supplementary material it provided an interim operating report approved by a sworn auditor.

3. By a decision of the Finance Ministry dated 4 November 2019 which brought the administrative procedure to an end, the applicant’s project was refused on the grounds that, on the date of its application, it had to be considered an ‘undertaking in difficulty’ within the meaning of Article 2(18)(a) of Commission Regulation No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

The decision states that, in spite of the resolution passed by the company’s shareholders, under Article 202(3) of the Komerclikums (Commercial Code), an increase in share capital will not be deemed to have occurred until the new shares have been registered in the Companies Register, and that the shares were registered after the project had been submitted. The purpose of the open call is to ensure that candidates are able to compete on equal terms and, therefore, once projects have been submitted, no further clarification may be provided. Moreover, under paragraph 7.17 of the call documents,⁴ proof of an improved financial

¹ See the announcement at <https://www.vestnesis.lv/op/2019/10.PD3> (consulted on 9 July 2020).

² See the announcement at <https://www.vestnesis.lv/op/2019/69.PD3> (consulted on 9 July 2020).

³ See the announcement at <https://www.vestnesis.lv/op/2019/152.KRI108> (consulted on 15 July 2020).

⁴ The call documents are available at <https://www.cfla.gov.lv/lv/es-fondi-2014-2020/izsludinatas-atlases/3-1-1-5-k-2> (consulted on 9 July 2020).

situation may not be provided in any form, but must be in the form of an interim operating report approved by a sworn auditor and submitted directly with the project, so that the Agency has an accurate picture of the applicant's financial situation.

4. The applicant brought an action against that decision before the [referring] court, arguing that, on the date on which it submitted its project, it should not be considered an undertaking in difficulty, in view of the resolution passed by its shareholders which it submitted to the authority with its project. According to the applicant, the information it failed to supply does not, in itself, have any impact on its financial situation and may therefore also be submitted during the project evaluation period.
5. In the administrative-law proceedings, there is no dispute between the parties that, based on the financial information in the applicant's most recent financial report (for 2018), the applicant would be classed as an undertaking in difficulty within the meaning of Article 2(18)(a) of Regulation No 651/2014. It is also evident that the applicant remedied that deficiency by increasing its share capital and registering the corresponding alteration in the Companies Register on 24 July 2019.

In the proceedings, the disagreement centres on whether — and, if so, how — the actions taken by the applicant to improve its financial situation affected the evaluation of the project under the public call.

Legal framework

EU law

6. Regulation No 651/2014

6.1. According to recital 14:

‘(14) Aid granted to undertakings in difficulty should be excluded from the scope of this Regulation, since such aid should be assessed under the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 as prolonged by Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 or their successor Guidelines, in order to avoid their circumvention, with the exception of aid schemes to make good the damage caused by certain natural disasters. In order to provide legal certainty, it is appropriate to establish clear criteria that do not require an assessment of all the particularities of the situation of an undertaking to determine whether an undertaking is considered to be in difficulty for the purposes of this Regulation.’

6.2. Article 2 of the regulation, entitled ‘Definitions’, establishes the following:

‘For the purposes of this Regulation the following definitions shall apply:

[...]

(18) “undertaking in difficulty” means an undertaking in respect of which at least one of the following circumstances occurs:

(a) In the case of a limited liability company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital. For the purposes of this provision, “limited liability company” refers in particular to the types of company mentioned in Annex I of Directive 2013/34/EU and “share capital” includes, where relevant, any share premium;

[...]

7. Regulation (EU) No 1303/2013

Article 125 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 regulates the functions of the managing authority, and paragraph 3 includes the following:

‘As regards the selection of operations, the managing authority shall:

- (a) draw up and, once approved, apply appropriate selection procedures and criteria that:
 - (i) ensure the contribution of operations to the achievement of the specific objectives and results of the relevant priority;
 - (ii) are non-discriminatory and transparent;
 - (iii) take into account the general principles set out in Articles 7 and 8;

[...]

8. Directive 2017/1132

8.1. Article 68 of Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, entitled ‘Decision by the general meeting on the increase of capital’, provides as follows:

‘1. Any increase in capital shall be decided upon by the general meeting. Both that decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 16.

[...]

8.2. According to Article 14 of the directive, entitled ‘Documents and particulars to be disclosed by companies’:

‘Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:

[...]

(e) at least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;

[...]

8.3. Article 16 of the directive, entitled ‘Disclosure in the register’, provides as follows:

‘ ...

6. The documents and particulars may be relied on by the company as against third parties only after they have been disclosed in accordance with paragraph 5, unless the company proves that the third parties had knowledge thereof.

[...]

7. [...]

Third parties may, moreover, always rely on any documents and particulars in respect of which the disclosure formalities have not yet been completed, save where non-disclosure causes them not to have effect.’

Latvian law

9. The implementation of EU funds in Latvia is governed by the Eiropas Savienības struktūrfondu un Kohēzijas fonda 2014.-2020. gada plānošanas perioda vadības

likums (Law on the Management of the European Union Structural Funds and Cohesion Fund for the 2014-2020 Programming Period).⁵

9.1. Article 21 of this law, entitled ‘Selection of projects’, provides as follows:

‘1. Calls for projects shall be:

(1) open, where candidates compete on equal terms for their projects to be accepted and to be awarded funding from a European Union fund; ...

[...]

2. The liaison authority shall select the projects in accordance with the selection methods and the call documents. The call documents shall be drawn up by the liaison authority and approved by it in conjunction with the responsible authority and the managing authority.

[...]

5. Candidates shall prepare and submit their projects in accordance with the call documents.

[...]

9.2. Article 25 of the law, entitled ‘Unconditional approval, conditional approval or refusal of projects under open calls to select projects’ provides as follows in paragraph 3:

‘3. A project shall be refused where at least one of the following situations arises:

[...]

(2) The project does not satisfy the evaluation criteria, and the correction of the defects referred to in paragraph 4 of this article would affect the substance of the project.

[...]

4. A project shall be granted conditional approval where the candidate must take certain actions specified by the liaison authority in order for the project to satisfy the evaluation criteria in full and for the project to be implemented properly. The decision shall set out the relevant conditions, and compliance with the conditions shall be verified having regard to the call documents. If any condition in the said decision is not satisfied, or if it is not satisfied within the

⁵ Current and previous versions of all Latvian legislation can be found at the website <https://likumi.lv/>.

timescale laid down in the decision, the project shall be deemed to have been refused.’

9.3. Article 30 of the law, entitled ‘Clarification of projects’, provides as follows:

‘During the period between the submission of a project and the decision to grant unconditional or conditional approval of the project or to refuse it, no further clarification of the project may be submitted.’

10. The aid measure in question is governed by the Ministru kabineta 2018. gada 25. septembra noteikumi Nr. 612 ‘Darbības programmas “Izaugsme un nodarbinātība” 3.1.1. specifiskā atbalsta mērķa “Sasmērēt MVK izveidi un attīstību, īpaši apstrādes rūpniecībā un RIS3 prioritārajās nozarēs” 3.1.1.5. pasākuma “Atbalsts ieguldījumiem ražošanas telpu un infrastruktūras izveidei vai rekonstrukcijai” otrās projektu iesniegumu atlases kārtas īstenošanas noteikumi’ (Decree No 612 of the Council of Ministers of 25 September 2018 on the rules for implementing phase two of project selection for the ‘Growth and Employment’ operational programme, specific objective 3.1.1 (‘To promote the creation and development of SMEs, in particular in the manufacturing and RIS3 priority sectors’), measure 3.1.1.5 (‘Support for investment in establishment or reconstruction of production premises and infrastructure’)).

10.1. Paragraph 7 of the decree establishes that:

‘Phase two of project selection for the measure shall be implemented by means of a public call.’

10.2. Paragraph 15 of the decree stipulates that:

‘Funding shall not be made available where:

[...]

15.3. The candidate is classified as an undertaking in difficulty within the meaning of Article 2(18) of Commission Regulation No 651/2014;

[...]

11. The practical aspects of the project selection process are governed by the call document, drafted by the Agency, and by the annexes to that document.⁶

In Annex 5 to the call documents, entitled ‘Methodology for applying the project evaluation criteria’, paragraph 6 of section II describes how it will be determined whether or not the candidate is an undertaking (economic operator) in difficulty:

⁶ The call documents and the annexes can be found at <https://www.cfla.gov.lv/lv/es-fondi-2014-2020/izsludinatas-atlases/3-1-1-5-k-2> (consulted on 9 July 2020).

‘An “unconditional positive” evaluation will be awarded where the candidate is not an economic operator in difficulty. The classification [of a candidate] as an undertaking in difficulty at the time of the decision on the award of the aid must be made on an objective basis, using verifiable and reliable information about the candidate and related undertakings:

- (a) The information in the most recent publicly available final annual report will be checked.
- (b) Where an interim operating report approved by a sworn auditor is submitted, the information in that report will be used as the basis for determining whether the undertaking is in difficulty.
- (c) Where the candidate refers to publicly available, verifiable, information concerning an increase in share capital undertaken after the most recent final annual report, that information will be taken into account where it is accompanied by an interim operating report approved by a sworn auditor.

[...]

A “conditional positive” evaluation will be awarded where the information submitted is incomplete or not sufficiently precise. The candidate will be invited to submit further clarification of the information provided. Clarification is permitted only in respect of technical, arithmetical and drafting issues. [...]

A “negative” evaluation will be given where the candidate displays any of the characteristics of an undertaking in difficulty, or fails to satisfy the conditions established in a conditional positive evaluation, or, while satisfying the conditions in question, does not respond to the requirements or fails to satisfy them by the deadline laid down in the conditional positive evaluation.’

12. In Latvia, the activities of commercial companies are governed by the Commercial Code.

12.1. Article 12 of the Commercial Code, entitled ‘Disclosure in the register’, provides as follows:

‘1. Entries in the Companies Register may be relied on as against third parties once they have been disclosed. [...]

2. Where information which is required to be registered in the Companies Register is not registered, or is registered but not disclosed, the information in question may not be relied on as against third parties by the person for whose benefit the information should have been registered, unless the third parties in question had knowledge thereof.

[...]

12.2. Article 196 of the Commercial Code, entitled ‘Resolutions on alterations to share capital’, provides as follows:

‘1. Share capital may be increased or reduced only by means of a resolution passed by the shareholders setting out the procedure for the said increase or reduction.

[...]

3. In the event of an alteration to share capital, a corresponding amendment must also be made at the same time to the Articles of Association.’

12.[3]. Article 202 of the Commercial Code, entitled ‘Applications to the Companies Registry concerning increases in share capital’, provides as follows in paragraph 3:

‘The increase in share capital shall be deemed to have occurred on the date on which the new share capital figure is registered in the Companies Register.’

Reasons why the referring court has doubts over the application and interpretation of the provisions of EU law

13. According to the case-law of the Court of Justice of the European Union, the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, for example, judgment of 10 December 2010, C-497/10, EU:C:2010:829, paragraph 45).

The concept of ‘undertaking in difficulty’ was incorporated into the national legislation on State aid (which also covers funding from EU funds) by virtue of Article 2(18) of Regulation No 651/2014. Since the provisions in Regulation No 651/2014 and other rules of EU law governing State aid do not include any express reference to the law of the Member States, the referring court considers that the concept of ‘undertaking in difficulty’ requires an independent interpretation to ensure a uniform assessment of undertakings and application of State aid conditions across all Member States.

Since the interpretation and application of EU law are a matter for the Court of Justice of the European Union, the referring court considers it necessary to refer the legal questions at issue in the present proceedings to the Court.

14. In view of the ground for refusal relied on by the authority, in these proceedings it is of critical importance, first of all, to clarify the correct interpretation of the concept of ‘subscribed share capital’ used in Article 2(18)(a) of Regulation No 651/2014.

In the field of company law, the Latvian legal order applies the concept of ‘share capital’, which constitutes a contribution paid in money or other securities capable of monetary valuation in order to establish and carry on a commercial activity within a company with share capital. Under Article 202(3) of the Commercial Code, the increase in share capital will be deemed to have occurred on the date on which the new share capital figure is registered in the Companies Register. This implies that until the relevant shareholder resolution has been disclosed the alteration to share capital will not be effective and therefore may not be relied on as against third parties.

At the same time, the referring court cannot, *prima facie*, find evidence that Directive 2017/1132 expressly establishes such a mandatory prerequisite in order for shareholders’ resolutions approving increases to subscribed share capital to take effect, nor that it expressly leaves regulation of this issue up to Member States. The referring court therefore has doubts over whether, in making the contested decision, the authority correctly interpreted the concept of ‘subscribed share capital’ used in Article 2(18)(a) of Regulation No 651/2014 when construing the concept of share capital used in Latvian domestic law, under which ‘subscribed share capital’ refers solely to the amount of share capital that has been disclosed (published) in the manner provided for in domestic legislation.

In the applicant’s view, the shareholder resolution under which a specified shareholder undertook to invest in the increase in share capital, and the fact that the authority was notified of this situation, are sufficient grounds for considering that the subscribed share capital has increased and that the company is no longer to be classified as an undertaking in difficulty within the meaning of Article 2(18)(a) of Regulation No 651/2014.

The correct understanding of this concept is vitally important in these proceedings, because it determines the frame of reference for assessing the applicant’s financial situation. The referring court has not managed to find an answer to any similar question in the case-law established to date by the Court of Justice of the European Union.

15. In addition, a further question arises in these proceedings, that is, when assessing the financial situation of a candidate for aid, whether the selection procedure requirements concerning the documents to be submitted are relevant, and whether the defects identified can be remedied during the selection procedure.

In this regard, it should be recalled that the Agency organised a public call to select projects, meaning that candidates are able to compete on equal terms to gain approval for their projects and to be granted EU funding. The authority therefore considers that the selection criteria must be applied strictly to all candidates and that, in principle, candidates may not submit further clarification of their projects once these have been submitted, including providing additional documents as evidence of their financial situation, since this would constitute clarification of their projects and would breach the principle of equal treatment, thereby putting

other candidates at a disadvantage. However, according to the applicant, if, in the opinion of the authority, the information submitted by the applicant on its financial circumstances is insufficient, this does not per se alter its financial situation and, therefore, the defects identified can be remedied during the selection period.

According to Article 125(3)(a)(ii) of Regulation No 1303/2013, the selection rules must be non-discriminatory and transparent. The preliminary assessment of the referring court is that those principles give rise to the fundamental principle, established in Article 30 of the Law on the Management of the European Union Structural Funds and Cohesion Fund for the 2014-2020 Programming Period and laid down in the call documents, which stipulates that no further clarification of projects may be made once they have been submitted. The authority must comply with the criteria which it has itself established, and is therefore required to exclude projects from selection where candidates have failed to supply a document or information which they were required to produce in accordance with the documents governing the selection procedure. While the Court of Justice of the European Union has established similar case-law with regard to public procurement, where tender selection processes must also comply with similar principles (see, to that effect, judgments of 7 April 2016, C-324/14, EU:C:2016:214, paragraph 62, and of 6 November 2014, C-42/13, EU:C:2014:2345, paragraph 42), the referring court has not managed to find an answer to any similar question in the case-law on State aid established to date by the Court of Justice of the European Union.

16. Having regard to the above, and in order to clarify how the EU legislation on State aid should be applied, the referring court considers it necessary to refer the matter to the Court of Justice of the European Union.

[...] [proceedings to be stayed]

Operative part

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, [...] [reference to domestic rules of procedure] the District Administrative Court

has decided

To refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

- (1) Must the concept of ‘subscribed share capital’ in Article 2(18)(a) of Commission Regulation No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, in conjunction with other EU legal provisions relating to company law, be interpreted as meaning that, for the purposes of determining subscribed share capital, only particulars that have been published in the manner laid down by the national laws of each

Member State may be taken into account, bearing in mind that the particulars in question are thus deemed to become effective only from that moment?

- (2) When assessing the concept of ‘undertaking in difficulty’ in Article 2(18) of Commission Regulation No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, is it necessary to attach significance to the requirements, laid down as part of the procedure for selecting projects for European funds, concerning which documents are to be submitted as evidence of the financial situation of the undertaking in question?
- (3) If the reply to the second question referred is in the affirmative, is a provision of domestic law on the selection of projects, which establishes that no further clarification of projects may be made once they have been submitted, compatible with the principles of non-discrimination and transparency established in Article 125(3)(a)(ii) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006?

To stay proceedings until the Court of Justice of the European Union issues a decision.

[...] [signatures and stamp]