

Case C-608/19**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:**

12 August 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

20 June 2019

Appellant:

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)

Respondent:

Zennaro Giuseppe Legnami Sas di Zennaro Mauro & C

Subject matter of the main proceedings

Appeal lodged by the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (National Institute for Insurance against Accidents at Work) ('the INAIL') against the judgment of the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court, Veneto, Italy), which had granted the application, brought by Zennaro, for annulment of the decision refusing to grant financial assistance which was the subject of a public notice for incentives to undertakings (*de minimis* aid).

Subject matter and legal basis of the reference

Having regard to Article 267 TFEU, the referring court seeks clarification as to the precise interpretation of the rules laid down in Regulation 1407/2013 regarding applications for the grant of *de minimis* aid and exceeding of the ceiling of EUR 200 000 for that aid, including in relation to the possibility for the

applicant undertaking to take any corrective action necessary to fall below the ceiling.

Question referred

Must the rules on the grant of aid laid down in Articles 3 and 6 of Regulation No 1407/2013 be interpreted as meaning that it is possible for an applicant undertaking, which finds itself exceeding the maximum permissible ceiling on account of the cumulation with previous financial assistance, to opt - up to the actual payment of the financial assistance applied for - to reduce the funding (by amending or varying the project) or to forgo (in full or in part) previous financial assistance, possibly already received, in order to fall below the maximum limit payable; and must those provisions be interpreted as meaning that the various options proposed (variation or forgoing) apply even if they are not expressly provided for in the national legislation and/or in the public notice relating to the grant of aid?

Provisions of EU law relied on

Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid; in particular recitals 3, 10, 21 and 22, Article 3(2), (4) and (7), and Article 6(5)

Provisions of national law relied on

Bando 2013 ‘AVVISO PUBBLICO 2013 INCENTIVI ALLE IMPRESE PER LA REALIZZAZIONE DI INTERVENTI IN MATERIA DI SALUTE E SICUREZZA SUL LAVORO in attuazione dell’art. 11, co[mma] 1 lett.a) e co[mma] 5 D.lgs 81/2008 e s.m.i.’ (2013 invitation to tender ‘2013 PUBLIC NOTICE INCENTIVES FOR UNDERTAKINGS FOR IMPLEMENTING PLANS CONCERNING HEALTH AND SAFETY AT WORK, pursuant to Article 11(1)(a) and (5) of Legislative Decree 81/2008, as subsequently amended and supplemented’)

Succinct presentation of the facts and the main proceedings

- 1 Zennaro, the respondent in the proceedings at second instance, correctly submitted an application for funding within the 2013 framework public notice and, on 30 October 2014, the INAIL informed it of the acceptance of its project and the possibility of obtaining advance funding, which the undertaking then actually applied for.
- 2 However, in the course of the subsequent procedure relating to the public notice it emerged that, just two months earlier, Zennaro had been granted by the Region of

Veneto additional European funds, also regarded as State aid, in an amount which, combined with other public funding received earlier by that undertaking, exceeded, over the three-year reference period, the *de minimis* threshold of EUR 200 000.

- 3 In the light of this situation, in order to avoid exceeding the abovementioned ceiling the respondent submitted to the INAIL on 12 August 2015, before the project was implemented, a variation of the project, reducing the total cost thereof so as to fall below the maximum permissible threshold.
- 4 By decision of 18 November 2015, the INAIL announced that it could not grant the respondent the funding and considered that it could not grant partial funding unless the respondent forwent completely the previous funding.
- 5 The respondent claimed that the court of first instance (the Regional Administrative Court, Veneto, Italy) should annul that decision and informed the INAIL that it had forgone the regional financial assistance which had been received earlier.
- 6 On 6 June 2016, the INAIL confirmed that it would not provide the funding, because the limit laid down in Regulation (EC) No 1407/2013 had been exceeded, and that partial payment of the financial assistance would be contrary to Article 3(7) of that regulation.
- 7 The respondent also claimed that the decision of 6 June 2016 should be annulled.
- 8 The court of first instance upheld the action in the light of the express approach of the Directorate-General for Competition of the European Commission in response to the question raised by the respondent concerning the possible interpretations of Article 3(7) of Regulation No 1407/13.
- 9 In its response, the Directorate-General acknowledged the possibility that the financial assistance could be reduced proportionally by the paying public entity for the purpose of complying with the threshold at issue and that it was for the national authorities to determine the preferred option, since both solutions - that of the proportional reduction and that of the complete refusal of the financial assistance - were, in abstract terms, consistent with EU law.
- 10 The court of first instance further held that the INAIL should have expressly indicated in the public notice its strict interpretation of Article 3(7) of Regulation No 1407/13.
- 11 The INAIL appealed against the judgment at first instance before the Consiglio di Stato (Council of State, Italy), the referring court.

The essential arguments of the parties to the main proceedings

- 12 The INAIL considered that the partial grant of the financial assistance is not in line, in particular, with the provisions of Article 3(7) of Regulation No 1407/2013 since, in its view, *de minimis* aid is deemed to have been granted at the moment the right to receive it is conferred on the undertaking, irrespective of whether or not it is actually paid.
- 13 As regards compliance with the maximum limit, it is checked at the moment the financial assistance is granted, that is to say at the stage when the application is accepted. Any corrective measures by the applicant must therefore be taken at that stage and not at the subsequent stage where the authority reports or checks the declarations made by the undertakings.
- 14 In support of its position, the INAIL refers to the clauses of the 2013 invitation to tender and concludes that the mere fact that the undertaking was found eligible to receive aid is a circumstance that must be taken into account for the purpose of calculating the *de minimis* amount: that circumstance cannot be affected by varying the project, but only by forgoing completely the previous aid which has already been granted and can be cumulated with that applied for.
- 15 Consequently, the respondent should have taken care to ascertain, prior to it being granted, that the grant of the aid applied for would not result in the ceiling of EUR 200 000 being exceeded: subsequently it could neither vary the project, to reduce the fundable amount thereof, nor partially forgo the previous funding. The only possible solution would have been to forgo completely the previous aid.
- 16 Furthermore, according to the INAIL, the provisions of Regulation 1407/2013 must be interpreted strictly and, in order to be applied, it is not necessary for them to be referred to in the relevant public notice.
- 17 The respondent argues, by contrast, that it is clear from the public notice that variations may be proposed to affect the original decision to grant, otherwise the notice itself would have expressly provided for verification of compliance with the *de minimis* thresholds at an earlier time, that is to say at the stage at which the eligibility for financial assistance was examined.
- 18 The respondent also refers to Article 6(5) of Regulation No 1407/2013 to conclude that the declarations concerning the total amount of *de minimis* aid received and the consequent checks cannot relate solely to the situation of the undertaking at the time of the first decision to grant, but must relate to the overall situation of the aid received.
- 19 Finally, in the view of the respondent, the interpretation of the rules on *de minimis* aid provided by the INAIL is excessively strict and would be punitive for undertakings, thus contradicting the purpose of the system in question which is to simplify the administrative burdens for undertakings in the case of a limited amount of aid.

Succinct presentation of the reasons for the reference

- 20 Examining the clauses of the public notice at issue, the referring court considers that both solutions proposed by the parties are possible.
- 21 In its view, the above provisions of Regulation 1407/2013 are not decisive either: under Article 3(4), the provision whereby the aid is to be deemed ‘granted’ at the moment the legal right to receive it is conferred on the undertaking, irrespective of the date of payment, does not preclude a more comprehensive procedure, under the applicable national law, which also includes prior assessment of whether or not the ceiling has been exceeded (under Article 6(3)), only at the conclusion of which it can be said conclusively that the right to the financial assistance has been ‘conferred’.
- 22 Similar considerations apply with regard to the declarations of the aid received and the moment at which the possible forgoing of previous aid can/must take place (compulsorily before the actual payment of the earlier financial assistance or even subsequently).
- 23 As the court of final instance, the referring court considers that it is obliged to bring the matter before the Court of Justice since it has found nothing in the case-law of the Court of Justice which would enable it to rule on the correct application of the provisions of EU law on this matter, in particular given the importance in economic terms of the incentives for undertakings.