

Case C-238/20

Request for a preliminary ruling

Date lodged:

5 June 2020

Referring court:

Augstākā tiesa (Senāts) (Supreme Court, Latvia)

Date of the decision to refer:

4 June 2020

Applicant at first instance and appellant in cassation:

SIA Sātiņi-S

Other party to the appeal in cassation:

Dabas aizsardzības pārvalde (Environmental Protection Authority)

[...]

Administratīvo lietu departaments (Chamber for Administrative Law Proceedings)

Latvijas Republikas Senāts (Supreme Court of the Republic of Latvia)

DECISION

Riga, 4 June 2020

The Court [...] [composition of the referring court]

examined in written proceedings the appeal in cassation brought by SIA Sātiņi-S ('the appellant') against the judgment of the Administratīvā apgabaltiesa (Regional Administrative Court) of 30 April 2019 in the administrative law proceedings brought by that undertaking for an order requiring the Dabas aizsardzības pārvalde (Environmental Protection Authority) to issue an administrative act in its favour awarding it compensation for the serious damage caused to aquaculture on its properties by animals from migratory species and specially protected non-cynegetic species.

Subject matter and facts relevant to the dispute in the main proceedings

1. The protected natural area ‘Sātiņu dīķi’ (‘Sātiņi Ponds’) was designated a special conservation area by Ministru kabineta 1999. gada 15. jūnija noteikumi Nr. 212 ‘Noteikumi par dabas liegumiem’ (Decree No. 212 of the Council of Ministers of 15 June 1999 on protected natural areas).

In 2002, the appellant purchased the properties ‘Liegumi’ (‘Reserves’) and ‘Centri’ (‘Centres’), which are located in the ‘Sātiņu dīķi’ protected natural area. The ponds on the appellant’s property occupy 600.7 hectares (of the total surface area of 687 hectares covered by that property).

In 2005, that site was included in a Natura 2000 conservation area of European importance (‘Natura 2000 network area’).

2. On 16 August 2017, the appellant applied to the Environmental Protection Authority for an award of compensation for the losses suffered by the aquaculture on its ‘Liegumi’ and ‘Centri’ properties.

The Kurzeme Regional Administration of the Environmental Protection Authority took the view that the losses suffered as a result of the damage caused to the appellant’s aquaculture [facilities] amounted to EUR 87 428.50.

The Environmental Protection Authority refused to award the compensation sought for the serious damage caused to aquaculture by animals of migratory species and specially protected non-cynegetic species on the ground that the appellant had already received the maximum permitted amount of de minimis aid.

3. The Environmental Protection Authority states that the de minimis aid limit of EUR 30 000 laid down in Article 3(2) of Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (‘Regulation No 717/2014’) is applicable in the present case.

Regulation No 717/2014 is applicable in Latvia in accordance with the provisions contained in Ministru kabineta 2015. gada 29. septembra noteikumi Nr. 558 ‘*De minimis* atbalsta uzskaites un piešķiršanas kārtība zvejniecības un akvakultūras nozarē’ (Decree No 558 of the Council of Ministers of 29 September 2015 concerning the detailed rules on accounting for and awarding de minimis aid in the fishery and aquaculture sector; ‘Decree No 558’) and Ministru kabineta 2016. gada 7. jūnija noteikumi Nr. 353 ‘Kārtība, kādā zemes īpašniekiem vai lietotājiem nosakāmi to zaudējumu apmēri, kas saistīti ar īpaši aizsargājamo nemedījamo sugu un migrējošo sugu dzīvnieku nodarītajiem būtiskiem postijumiem, un minimālās aizsardzības pasākumu prasības postijumu novēšanai’ (Decree No 353 of the Council of Ministers of 7 June 2016 concerning the procedure for determining the amount of losses suffered by land owners or users as a result of serious damage caused by animals of migratory species and specially protected non-cynegetic species, and on the minimum requirements to be met by the protective measures necessary to avoid damage; ‘Decree No 353’).

That Authority stated that, since the appellant had already benefited from the maximum amount of de minimis aid available over any period of three fiscal years, payment of the compensation sought for 2017 would exceed the de minimis aid limit of EUR 30 0000 laid down in Article 3(2) of Regulation No 717/2014.

4. The appellant took legal action to secure an order requiring the Environmental Protection Authority to award it compensation for the serious damage caused to aquaculture on its properties by animals of migratory species and specially protected non-cynegetic species.

The appellant claims that the de minimis limit is imposed on State aid in order to ensure that the European Union internal market is not distorted. Compensation for loss, on the other hand, is not an advantage conferred by the State. Compensation for loss is reparation for the damage suffered by an undertaking in the performance of tasks in the public interest.

The application of point 39 of Decree No 353 gives rise to a situation in which small undertakings are covered for 100% of the losses they suffer over any period of three years, while the appellant, which manages large pond areas and is located in a Natura 2000 network area, is compensated for only 12% of the losses suffered.

5. The courts at both first and second instance dismissed those claims.

The appellant has brought an appeal in cassation in which it claims that any aid in excess of the maximum limit for de minimis aid over any period of three years must be notified to the European Commission and cannot be awarded until the Commission has declared that aid to be compatible with the internal market. The institutions could have conducted the procedure of notifying the European Commission.

6. In the light of the foregoing, this dispute is concerned with the issue of whether compensation for serious damage caused to aquaculture by animals of migratory species and specially protected non-cynegetic species in Natura 2000 network areas is subject to the de minimis limits applicable to State aid payments.

Relevant provisions of national and EU legislation

7. EU legislation:

7.1 Article 17 of the Charter of Fundamental Rights of the European Union.

7.2 Article 3(2) and recital 15 of Commission Regulation No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector.

7.3 Article 3(2)(a) and (b) and Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

8. National legislation:

8.1 Sugu un biotopu aizsardzības likums (Law on the conservation of species and biotopes)

[‘]Article 4. Powers of the Council of Ministers:

The Council of Ministers shall lay down:

[...]

(6) the procedures for determining the amount of losses suffered by land users as a result of serious damage caused by animals of migratory species and specially protected non-cynegetic species, and the minimum requirements to be met by the protective measures necessary to avoid damage;

[...][’]

[‘]Article 10. Right of land owners or users to obtain compensation:

(1) Land owners or users shall be entitled to receive compensation from the State budget funds earmarked for that purpose for serious damage caused by animals of migratory species and specially protected non-cynegetic species, provided that they have adopted the necessary protective measures and have employed their knowledge, skills and practical abilities to introduce environmentally respectful measures to prevent or reduce damage. Land owners or users shall not be entitled to receive compensation if they have maliciously contributed towards causing the damage or increasing the value thereof in order to obtain compensation.

[...]

(3) Compensation for damage caused by animals of migratory species and specially protected non-cynegetic species shall not be awarded if the land owner or user has received other State, municipal or EU payments directly or indirectly intended to offset the same limitations on economic activity or the same damage caused by animals of migratory species and specially protected non-cynegetic species for which compensation is made available in legislative provisions, or if the applicant receives aid under Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 792/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council.[’]

8.2 Lauksaimniecības un lauku attīstības likums (Law on agriculture and rural development)

Article 5:

[‘][…]

(7) The Council of Ministers shall lay down the detailed rules for managing and monitoring State aid awarded by the State and by the European Union for agriculture and the detailed rules for managing and monitoring aid awarded by the State and by the European Union for rural development and fisheries.

[…][’]

8.3 Decree No 558 of the Council of Ministers of 29 September 2015 concerning the detailed rules on accounting for and awarding de minimis aid in the fishery and aquaculture sector (applicable to the case at issue, repealed by 2018. gada 21. Novembra noteikumiem Nr. 715 ‘Noteikumi par *de minimis* atbalsta uzskaites un piešķiršanas kārtību un *de minimis* atbalsta uzskaites veidlapu paraugiem’ (Decree No 715 of 21 November 2018 concerning the detailed rules on accounting for and awarding de minimis aid and on the standard forms for accounting for de minimis aid’).

Point 1: [‘]This Decree lays down the detailed rules on accounting for and awarding de minimis aid in the fishery and aquaculture sector, in accordance with Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (“Commission Regulation No 717/2014”)[’].

Point 2: [‘]In order to obtain de minimis aid in accordance with the provisions of Articles 3, 4 and 5 of Commission Regulation No 717/2014, an aid applicant must make an application for de minimis aid (“the application”) to the aid awarding body (Annex 1). The application shall indicate the de minimis aid received by the applicant in the current year and in the two preceding fiscal years, as well as any planned de minimis aid, irrespective of the mode of award or the awarding body. In cases where de minimis aid is cumulated, the applicant for aid shall also provide information on the other aid received for the project in question in connection with the same eligible costs. In providing information on de minimis aid and other planned State aid, the applicant for aid shall indicate any aid for which it has applied but in respect of which the aid awarding body has not yet made a decision. If the applicant for de minimis aid has not previously received aid of this type, it shall provide the relevant information in its application.[’]

8.4 Decree No 353 of the Council of Ministers of 7 June 2016 on the procedure for determining the amount of losses suffered by land owners or users as a result of serious damage caused by animals of migratory species and specially protected non-cynegetic species, and on the minimum requirements to be met by the

protective measures necessary to avoid damage (in the version applicable to the case at issue):

Point 1: [‘]This Decree lays down:

- 1.1 the procedure for determining the amount of losses suffered by land owners or users as a result of serious damage caused by animals of migratory species and specially protected non-cynegetic species (“losses”);

[...][‘]

Point 39: [‘]When adopting a decision on the award of compensation, the Administration shall meet the following requirements:

- 39.1 award the compensation with due regard for the limitations in terms of sector and activity referred to in Article 1(1) of Commission Regulation (EU) No 1408/2013 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 the agriculture sector (“Commission Regulation No 1408/2013”) or in Article 1(1) of Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector (“Commission Regulation No 717/2014”).
- 39.2 verify that the amount of compensation does not increase the total amount of de minimis aid received during the fiscal year in question and during the two preceding fiscal years to a level in excess of the de minimis aid threshold laid down in Article 3(2) of Commission Regulation No 1408/2013 (economic operators involved in the primary production of agricultural products) or in Article 3(2) of Commission Regulation No 717/2014 (economic operators active in the fishery and aquaculture sector in accordance with Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000]. In considering the amount of compensation, the Administration shall assess the de minimis aid received in relation to a single undertaking. A single undertaking is one which meets the criteria laid down in Article 2(2) of Regulation No 1408/2013 and in Article 2(2) of Commission Regulation No 717/2014.[’]

Point 40: [‘]Within a period of two months from the determination of the amount of the losses, the [competent] official shall adopt either a decision awarding compensation, which shall fix the amount thereof, or a decision refusing compensation.[’]

Reasons why the referring court has doubts as to the interpretation of EU law

9. In the opinion of the Senāts, it is necessary to determine, in the first place, the applicable legislative framework, which is to say to answer the question whether compensation for losses caused by protected birds and animals to economic operators in the fishery and aquaculture sector is to be regarded as State aid.

9.1 In answer to the questions raised by the Senāts, the institution competent [in this field] — the Vides aizsardzības un reģionālās attīstības ministrija (Ministry of the Environment and Regional Development) — states, with reference to the judgment of the Court of Justice of the European Union of 19 March 2013, *Bouygues and Bouygues Télécom v Commission and Others*, C-399/10 P and C-401/10 P (EU:C:2013:175), that compensation for losses caused by protected animals in the fishery and aquaculture sector is to be regarded as State aid.

What is more, notifications of State aid awarded in comparable situations, such as, for example, in case SA.50367 (2018/N), concerning the payment of compensation for damage caused by protected animals, have been published on the European Commission's website.

9.2 Nonetheless, the Senāts has doubts about whether the legislation on State aid can be extended to compensatory payments.

Compensatory payments are made available for the performance of certain obligations in the public interest, that is to say, in the present case, for refraining from protecting fishery resources from the damage caused by birds and animals. The State imposes public-interest obligations of this kind by laying down restrictions on the management of certain sites.

The public-interest obligations laid down by the State in relation to the special conservation area at issue in the present case are imposed pursuant to EU legislation, that is to say, in the case at issue, in essence, Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ('Directive 2009/147').

The Senāts takes the view that compensation for damage caused by birds and animals constitutes compensation for loss within the meaning of Article 17 of the Charter of Fundamental Rights of the European Union and not a top-up payment, which could be regarded as State aid.

The judgment of the Court of Justice of the European Union in joined cases *Bouygues and Bouygues Télécom v Commission and Others*, cited above, provides a definition of the concept of 'State aid' but that judgment is concerned, in essence, with the payment of a shareholder loan proposal in the context of a company share capital increase. The Senāts considers that the scope of the concept of State aid as defined by the Court of Justice of the European Union in the aforementioned case does not unequivocally include the compensation for loss at issue in the present case.

9.3 From an analysis of Article 1 of Regulation No 717/2014 in the light of recital 15 thereof, the Senāts infers that that regulation is not applicable *prima facie* to compensation for losses caused by birds, migratory animals or non-cynegetic animals.

It follows, in the view of the Senāts, that the national legislation implementing Regulation No 717/2014, that is to say Decree No 558 of the Council of Ministers, does not cover such losses either.

9.4 Nonetheless, in the light of the jurisdiction of the Court of Justice of the European Union in matters involving the interpretation and application of the Treaties, the Senāts considers it necessary to put this question to the Court of Justice of the European Union.

It has not been possible to find an answer to that legal question in the existing case-law of the Court of Justice of the European Union.

10. Irrespective of whether compensation may be regarded as State aid, it is also necessary to address the question of what amount of compensation it is appropriate to award.

10.1 The right to property provided for in Article 17 of the Charter of Fundamental Rights of the European Union includes the right to use the assets in one's ownership and to obtain fair compensation for the imposition of certain limitations.

10.2 The institution competent in this field — the Vides aizsardzības un reģionālās attīstības ministrija (Ministry of the Environment and Regional Development) — states that the amount of compensation is not equal to the amount of the losses actually suffered, since the principal factor having a bearing, in practice, on the calculation of the amount of compensation is, for example, the surface area of the fish ponds. At present, the formula for calculating compensation does not take into account how many fish are eaten, or, in other words, to what extent damage is actually caused to aquaculture.

10.3 The Senāts considers that compensation for limiting the right to property must be actual and effective, which is to say that there must be a guarantee of adequate compensation for the losses actually suffered. Directive 2009/147 does not address the matter of compensation, but states that, in order to prevent serious damage to fisheries, the Member States may establish exceptions to the requirements it lays down.

The Senāts states that, while it is true that the Member States enjoy a margin of discretion in striking a balance between providing appropriate protection for birds and guaranteeing economic interests, there is a need within the territory of the European Union for a conceptually similar solution in principle in the context of appropriate compensation for an obligation imposed by an EU legal act.

10.4 The existing case-law of the Court of Justice of the European Union on the interpretation and application of Article 17 of the Charter of Fundamental Rights of the European Union does not provide a clear answer to that question.

11 In the light of the foregoing considerations, the Senāts considers that, in the interests of clarifying how the rules relating to State aid and compensation for observing the limitations imposed by the provisions of EU law, this case must be referred to the Court of Justice of the European Union.

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union, [...] the Senāts:

decides

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

1. Does the right to fair compensation for limits on the right to property that is guaranteed by Article 17 of the Charter of Fundamental Rights of the European Union allow the compensation awarded by a State for the losses caused to aquaculture in a Natura 2000 network area by protected birds, in accordance with Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, to be significantly less than the losses actually suffered?
2. Does the compensation awarded by a State for the losses caused to aquaculture in a Natura 2000 network area by protected birds, in accordance with Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, constitute State aid within the meaning of Articles 107 and 108 of the Treaty on the Functioning of the European Union?
3. If the answer to the second question is in the affirmative, is the de minimis aid limit of EUR 30 000 laid down in Article 3(2) of Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector applicable to compensation such as that at issue in the dispute in the main proceedings?

To stay the proceedings pending a ruling from the Court of Justice of the European Union.

[...] [statement that the decision is non-appealable, and signatures]