

Case C-354/23 [Seberts] ⁱ

Request for a preliminary ruling

Date lodged:

8 June 2023

Referring court:

College van Beroep voor het bedrijfsleven (Netherlands)

Date of the decision to refer:

6 June 2023

Appellant:

LM BV

Respondent:

Minister van Landbouw, Natuur en Voedselkwaliteit

decision to refer

COLLEGE VAN BEROEP VOOR HET BEDRIJFSLEVEN (TRADE AND INDUSTRY APPEALS TRIBUNAL)

[...] **decision of the full chamber of 6 June 2023 in the case between [name 1] B.V. ('the agricultural holding'), at [place], appellant**

[...],

and

the Minister van Landbouw, Natuur en Voedselkwaliteit (Minister for Agriculture, Nature and Food Quality ('the Minister'), respondent [...].

ⁱ This is a fictitious name, which does not correspond to the real name of any party to the proceedings.

Proceedings

By decision of 28 August 2020 the Minister rejected the agricultural holding's grant application under Title 2.3 Energy Efficiency Glasshouse Horticulture of the Regulation on national grants from the Ministry of Economic Affairs and Climate Policy and the Ministry of Agriculture, Nature and Food Quality ('the Scheme').

By decision of 12 November 2020 ('the contested decision') the Minister declared the agricultural holding's objection unfounded.

The agricultural holding lodged an appeal against the contested decision ('the proceedings'). [...]

Reasons

Subject matter of the main proceedings and relevant facts

1. The agricultural holding is engaged in glasshouse horticulture and grows fodder crops. On 30 June 2020, it applied for a grant totalling EUR 27 800.00 for the 'Aansluiting Roca netwerk' project (a physical connection to the Rotterdam Capelle (RoCa) heating network). The agricultural holding is to be connected to the network from the RoCa power plant at Capelle aan den IJssel. To that end the agricultural holding has entered into two agreements. The first is with Eneco Warmte & Koude Leveringsbedrijf B.V. (Eneco) and relates to the connection to the heating network. It concerns the laying of a pipe to run from the main network, under the public highway, to the agricultural holding's boiler house (Eneco construction). In the boiler house, Eneco will install a sealed heat exchanger. The boiler house is located on the agricultural holding's own land. Eneco will lay the connection and operate it; the connection in the boiler house will be locked and the agricultural holding will have no access to it. The connection will become the property of Eneco through a building lease to be established for the pipe and heat exchanger on the agricultural holding's immovable property. The agricultural holding will pay Eneco a one-off fee for the connection. The second agreement is with [name 2] B.V. ('[name 2]') and relates to the connection from the boiler house to the agricultural holding's glasshouses ([name 2] connection). The agricultural holding will become the owner of the [name 2] connection.

By decision of 28 August 2022, the Minister rejected the grant application because the agricultural holding was not to acquire ownership of the Eneco connection. By the contested decision the Minister upheld that decision.

Regulatory framework

EU law

2.1

Article 107 of the Treaty on the Functioning of the European Union (TFEU), which is relevant here, reads as follows:

‘1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

...

3. The following may be considered to be compatible with the internal market:

...

c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

...’

2.2

The European Union Guidelines for State Aid in the agricultural and forestry sectors and in rural areas 2014-2020 (‘the Guidelines’), which came into force on 1 July 2014 under the reference 2014/C 204/01, read, in so far as relevant here, as follows:

‘ ...

(4) In these Guidelines, the Commission sets out the conditions and criteria under which aid for the agricultural and forestry sectors and for rural areas will be considered to be compatible with the internal market and establishes the criteria for identifying the areas that fulfil the conditions of Article 107(3) of the Treaty.

...

PART II. CATEGORIES OF AID

Chapter 1. Aid in favour of undertakings active in the primary production, processing and marketing of agricultural products

1.1.

Rural development measures

1.1.1.

Aid for investment

(133) This Section applies to investment in agricultural holdings linked to the primary agricultural production, to investment in connection with the processing of agricultural products and the marketing of agricultural products.

...

1.1.1.1. Aid for investment in tangible assets and intangible assets on agricultural holdings linked to primary agricultural production

(135) The Commission will consider aid for investment in tangible assets and intangible assets on agricultural holdings linked to primary agricultural production compatible with the internal market under Article 107(3)(c) of the Treaty if it complies with the common assessment principles of these Guidelines, the general condition for investment aid set out in point (134) of these Guidelines and with the following conditions.

(136) This Section applies to aid for investments in tangible assets and intangible assets on agricultural holdings linked to the primary agricultural production. The investment is carried out by one or more beneficiaries or concerns a tangible asset or intangible asset used by one or more beneficiaries.

(137) This Section also applies to investment in tangible assets and intangible assets linked to the production of biofuels or to the production of energy from renewable sources on holdings, which fulfils the following conditions:

...

(143) The investment must pursue at least one of the following objectives:

(a) improvement of the overall performance and sustainability of the agricultural holding, in particular through a reduction of production costs or the improvement and re-deployment of production;

(b) the improvement of the natural environment, hygiene or animal welfare standards, provided that the investment concerned aims at going beyond the Union standard in force;

...

Eligible costs

(144) The aid covers the following eligible costs:

(a) the construction, acquisition, including leasing, or improvement of immovable property ...;

...’.

Netherlands law

2.3

The Regulation reads, in so far as relevant here, as follows:

‘ ...

Title 2.3. Energy-efficiency glasshouse horticulture

...

Article 2.3.2. Award of grants

1. The Minister shall, on request, award a grant to a glasshouse undertaking or a glasshouse undertaking within an association of glasshouse undertakings for the equipment, plant or machinery listed below:

...

b. a physical connection to a heating network ...’.

Article 2.3.3. Eligibility for grants

1. The Minister shall award a grant for an investment referred to in Article 2.3.2 if the investment is at least aimed at one of the objectives listed in point 143(a) and (b) of [the Guidelines].

...

Article 2.3.6. Eligible costs

1. The costs listed in point 144(a) ... of [the Guidelines] are eligible for a grant.

Article 2.3.8. State aid

‘The grant referred to in Article 2.3.2 contains state aid and is justified by state aid measures SA.50448 (2018/N) and SA.59823 (2020/N), and Section 1.1.1.1. of [the Guidelines]’.

2.4

By decisions SA.50448 (2018/N) of 21 September 2018 and SA.59823 (2020/N) of 11 May 2021, the European Commission ('the Commission') decided that the state aid scheme contained in Title 2.3 Energy-efficiency glasshouse horticulture of the Regulation, including any modification thereof, was compatible with the internal market pursuant to Article 107(3)(c) TFEU. The Commission concluded inter alia that the conditions of Section 1.1.1.1. 'Aid for investment in tangible assets and intangible assets on agricultural holdings linked to primary agricultural production' of Part II 'Categories of aid' of the Guidelines were met.

The agricultural holding's position

3. The agricultural holding disagrees with the rejection of the grant application. According to the agricultural holding, the one-off fee it pays to Eneco for the Eneco connection falls within the costs mentioned in point 144(a) of the Guidelines. That fee is equal to the costs for laying the connection, which consist of costs for installing the physical pipes and connecting them to the main grid, and costs for a heat exchanger for a heating supply. According to the agricultural holding, neither the Regulations nor the Guidelines imply that it is important for the award of a grant that ownership be acquired of the connection (the pipe from the main network and the heat exchanger). The essence of the Guidelines is that both tangible and intangible assets may be involved, and that the grant must finance the cost of construction (or) procurement, including leasing. Procurement is therefore just one of the possible forms of incurring costs. The other forms (construction and leasing) are therefore also permitted. A connection fee that is capitalised would be an intangible asset. According to the agricultural holding, use of that connection fee by the contractor to finance the construction of the heating network would be in keeping with the Guidelines. In Eneco's opinion, for the safe and reliable operation of the heating network, entrusting ownership and maintenance of (part of) the heating network to an individual undertaking connected thereto is not an option. The costs incurred by Eneco and passed on to the agricultural holding in the form of the connection fee reflect the actual costs to be incurred for the materials and the laying of the connection. The agricultural holding also appeals to the principle of equality. It argues that other agricultural holdings have been awarded similar grants, pointing to holdings with a physical connection to an OCAP carbon dioxide network, for which they pay a connection fee to OCAP, while the carbon dioxide network and connections thereto remain the property of OCAP. Furthermore, the grant application also includes the [name 2] connection, of which the agricultural holding will become the owner. The Minister erred in failing to decide on that part of the grant application.

The Minister's position

4. The Minister takes the position that he was right to reject the grant application. According to him, it follows from the legal framework (reproduced above) that eligible costs are costs that have been classified as investments. After all, what is involved is investment aid. Investing always means procuring, and that presupposes acquiring ownership. In that case, it is not the agricultural holding

that invests in the Eneco connection, but Eneco. The agricultural holding pays only a fee. Since it does not become owner of the Eneco connection, there is no investment within the meaning of point 133 and point 144(a) of the Guidelines.

The comparison with the grants awarded for physical connections to OCAP's carbon dioxide network is not valid, because in those cases grants were awarded only for the part owned by the grant applicant. There has therefore been no infringement of the principle of equality. Furthermore, the actual costs for the Eneco connection are not known, as Eneco does not specify the connection fee charged.

The costs for the [name 2] connection are in principle eligible for a grant. However, the agreement with [name 2] will be terminated if no grant is awarded for the physical connection to the heating network.

Reasons for the question referred for a preliminary ruling

5. The Minister awards grants under Article 2.3.2(b) of the Regulations for a physical connection to a heating network. The costs referred to in point 144(a) and (b) of the Guidelines are eligible for a grant under Article 2.3.6. of the Regulations if they constitute an investment within the meaning of the Guidelines. Therefore, in that case the Guidelines and in particular the interpretation of the concept 'investment' are decisive for whether aid must be granted for the financing of the physical connection to the heating network.

6. Point 144(a) of the Guidelines provides that the aid must serve to finance costs connected with the construction, acquisition (including leasing), or improvement of immovable property. Since that point forms part of section 1.1.1. and paragraph 1.1.1.1. of the Guidelines, and also in view of points 135, 136 and 137 thereof, the aid in question is investment aid and, more specifically, aid for investment in tangible and intangible assets on agricultural holdings. The concept of investment in tangible and intangible fixed assets is not defined in the Guidelines. In common parlance, it refers to the use of resources (money) to procure or improve tangible and intangible assets. It does not automatically follow that acquiring ownership of the immovable property is a requirement for that. By contrast, it could be inferred from the nature of the eligible costs for the financing of which the aid in point 144(a) of the Guidelines serves, namely the costs of constructing, procuring and improving immovable property, that also in the case of the construction or improvement of immovable property the beneficiary of the grant is required to be or become the owner of the immovable property to which the costs relate. However, the fact that procurement may also involve leasing could again indicate that ownership is not a requirement in that case for being awarded investment aid. Other language versions, such as the French, German or English versions, do not provide the Tribunal with any clarity on how to interpret the Guidelines applicable here either.

7. In that regard, the agricultural holding points out that the Eneco connection for which it pays Eneco a project fee increases the value of the agricultural holding and that there is therefore an improvement in the latter's immovable property. At the Tribunal hearing, a comparison was made with the leasing of solar panels for a house; the solar panels do not become the property of the homeowner, but they do increase the value of the house and to that extent it could be said that the house undergoes an improvement.

8. It follows from settled case-law of the Court of Justice that, when interpreting a provision of EU law, account must be taken not only of its wording, but also of its context and the objectives pursued by the rules that it forms part of (see, for example, judgments of 22 January 2020, *Ursa Major Services B.V.*, C-814/18, EU:C:2020:27, paragraph 49, and 27 January 2021, *De Ruiter*, C-361/19, EU:C:2021:71, paragraph 39).

9. It is not evident from the objectives mentioned in points 143(a) and (b) of the Guidelines, which aim to improve the overall performance and sustainability of the agricultural holding and improve the natural environment, that the beneficiary of the grant has to acquire ownership of the immovable property to which the costs relate. Indeed, that limits the possibilities to only those situations in which the investments concern costs related to property that is owned or is to be owned by agricultural holdings. In that case, the physical connection to the heating network leads to an improvement in the overall performance and sustainability of the agricultural holding and the improvement of the natural environment, regardless of whether the agricultural holding owns the physical connection to the heating network. In that regard, it may also be of relevance that, as the agricultural holding argues, Eneco does not consider it an option, for the safe and reliable operation of the heating network, to entrust ownership and thus maintenance of the heating network to any individual company connected thereto.

10. It could therefore be inferred from the abovementioned objectives of the Guidelines that the granting of investment aid that serves to finance the costs of the construction, procurement or improvement of immovable property does not require the beneficiary itself to be or to become the owner of the immovable property to which the costs relate. However, it should be noted that the Guidelines constitute an exception to the general principle that state aid is incompatible with the internal market, as laid down in Article 107(1) TFEU. The Court of Justice tends to interpret exceptions to that principle narrowly (see, for example, the judgment of 23 February 2006, *Atzeni and others*, C-346/03 and C-529/03, EU:C:2006:130, paragraph 79).

11. The foregoing entails that the precise meaning of the Guidelines and, more specifically, of points 135, 136 and 137 and point 144(a) thereof is not beyond reasonable doubt. Since an interpretation of EU law on that point is necessary for resolving the dispute, the Tribunal is obliged, pursuant to Article 267 TFEU, to request a preliminary ruling from the Court of Justice. The Tribunal therefore submits the following question to the Court of Justice:

‘Are the European Union Guidelines for State Aid in the agricultural and forestry sectors and in rural areas 2014-2020 (2014/C 204/01) and, in particular, paragraphs 135, 136 and 137 and point 144(a) thereof, to be interpreted as meaning that there is investment aid that serves to finance the costs of the construction, procurement or improvement of immovable property only if the grant beneficiary itself also is or is to become the owner of the immovable property to which the costs relate?’

12. [The proceedings are stayed] [...]

Decision

[Decision to refer the preliminary question expressed above and to stay the proceedings] [...] [Closing formula and signatures] [...].

WORKING DOCUMENT