

Case C-31/21

Request for a preliminary ruling

Date lodged:

19 January 2021

Referring court:

Corte suprema di cassazione (Supreme Court of Cassation, Italy)

Date of the decision to refer:

8 January 2021

Appellant in cassation:

Eurocostruzioni Srl

Respondent in cassation:

Regione Calabria

ITALIAN REPUBLIC

THE CORTE SUPREMA DI CASSAZIONE

PRIMA SEZIONE CIVILE

(SUPREME COURT OF CASSATION – FIRST CIVIL DIVISION)

[...] [*Composition of the court*]

INTERLOCUTORY ORDER

regarding the proceedings [...] between:

Eurocostruzioni Srl, [...]

- appellant in cassation -

and

Regione Calabria, [...]

- respondent in cassation -

[Or.2]

against judgment No [...] of the CORTE D'APPELLO di CATANZARO (Court of Appeal, Catanzaro, Italy), filed on 27 October 2014;

[...] [*standard wording*]

FACTS AND GROUNDS FOR THE DECISION

1. Eurocostruzioni Srl lodged an application for a payment order [...] against the Regione Calabria (Region of Calabria, Italy) ('the Region'), stating that it had obtained funding for a total of EUR 4 918 080 under the Calabria Regional Operational Programme (ROP) 2000-2006 Axis IV for the construction of a hotel in Rossano, which it built itself, and seeking payment of the balance due of EUR 1 675 762. Following an inspection, it had been awarded final assistance of EUR 3 337 470, less the advance and the first progress payment; since then, only EUR 1 661 638 had been paid (relating to the expenses incurred for fixtures and fittings).

1.1. [...] [*procedure*].

1.2. By judgment of 4 April 2012, the Tribunale di Catanzaro (District Court, Catanzaro) [...] ordered the Region to pay Eurocostruzioni the requested sum of EUR 1 675 762, equal to the difference between the amount payable following the final inspection and the amount paid in the meantime by the Region, plus incidental expenses and court costs.

1.3. The Region appealed against that judgment at first instance, which the respondent Eurocostruzioni opposed by lodging a cross-appeal.

[Or.3]

By judgment of 27 October 2014, the Court of Appeal of Catanzaro upheld [the appeal].

According to the Court of Appeal, it was not necessary to check whether the works had actually been carried out by Eurocostruzioni in accordance with the approved project, in view of the confirmation from the competent inspection committee and the absence of complaints from the Region regarding the quantity and quality of the works carried out. However, since the contract notice referred to the decree granting assistance and decreto di concessione n. [...] (Decree No [...] granting assistance) referred to the approval of the notice (and in particular Article 11 thereof) and to Regulation (EC) No 1685/2000, payment of the assistance had to be regarded as contingent on the presentation of receipted invoices, even if the works had been carried out directly by the beneficiary

undertaking. The documents produced by Eurocostruzioni were necessary, but not sufficient, in the absence of those invoices and without any evidence of the actual monetary payment corresponding to the measurement of the works carried out at the stated prices. Lastly, Eurocostruzioni had to produce the appropriate accounting records for the works directly carried out by it as evidence of the disbursements made (purchase of materials, plant hire, payroll expenses, subcontracting, details of the labour used).

1.4. By document served on 27 October 2015, Eurocostruzioni lodged an appeal on a point of law against that judgment, which had not been notified, relying on three grounds of appeal.

1.4.1. By the first ground of appeal, raised pursuant to Article 360(3) of the codice di procedura civile (Italian Code of Civil Procedure), the appellant in cassation alleges infringement or misapplication of point 2.1 of [Rule No 1 of the Annex to] Regulation (EC) No 1685/2000 of 28 July 2000, Article 31 *quater* of Legge regionale 2 maggio 2001, n. 7 (Calabria Regional Law No 7 of 2 May 2001), the notice approved by Delibera della Giunta Regionale n. 398 del [Or.4] 14/5/2002 (Regional Executive Decision No 398 of 14 May 2002), and Decree No [...] granting assistance, as well as the principles of good faith, fair dealing and legitimate expectations.

The appellant in cassation observes that for the operations receiving the assistance, EU legislation requires – not exclusively, but only ‘as a general rule’ – proof of payment from final beneficiaries by means of ‘received invoices’ or ‘accounting documents of equivalent probative value’.

1.4.2. By the second ground of appeal, raised pursuant to Article 360(3) and (5) of the Italian Code of Civil Procedure, the appellant in cassation alleges (i) infringement or misapplication of point 2.1 of [Rule No 1 of the Annex to] Regulation (EC) No 1685/2000 of 28 July 2000, Article 31 *quater* of Calabria Regional Law No 7 of 2 May 2001, the notice approved by Regional Executive Decision No 398 of 14 May 2002, and Decree No [...] granting assistance, as well as the principles of good faith, fair dealing and legitimate expectations, and (ii) failure to state reasons and/or inadequate reasoning regarding a disputed fact which is decisive for the case.

The appellant in cassation points out that the administrative authority, at the initial stage of granting assistance, divides the project expenses into eligible and ineligible expenses; for the former, in particular, regarding works (as opposed to movable property, fittings, land and buildings purchased), reference is made not to the market value, but to the 1994 price list of the Provveditorato Opere Pubbliche (Office of Public Works) for the Region of Calabria, plus 15% (Article 9 of the notice). The appellant in cassation further emphasises that the inspection committee had established that the quality and quantity of the works carried out corresponded to those previously identified and quantified in the decree granting assistance.

The appellant in cassation goes on to argue that, for the works carried out, neither national nor EU legislation specifically required the presentation of invoices; they required only the presentation of the bill of quantities and the measurement booklet, endorsed and stamped by the director of works, as **[Or.5]** suitable supporting documents to assist the inspection committee in its audit and review.

1.4.3. By the third ground of appeal, raised pursuant to Article 360(3) and (5) of the Italian Code of Civil Procedure, the appellant in cassation alleges (i) infringement or misapplication of point 2.1 of [Rule No 1 of the Annex to] Regulation (EC) No 1685/2000 of 28 July 2000, Article 31 *quater* of Calabria Regional Law No 7 of 2 May 2001, the notice approved by Regional Executive Decision No 398 of 14 May 2002, and Decree No [...] granting assistance, as well as the principles of good faith, fair dealing and legitimate expectations, and (ii) failure to state reasons and/or inadequate reasoning regarding a disputed fact which is decisive for the case.

The appellant in cassation submits that the judgment under appeal, although not referring to the memoranda from the Region dated 26 October 2007 and 26 November 2007 (more than a year after the completion and inspection of the works), accepted their content without considering the blatant contradiction between those unilateral guidelines and the content of the contract notices and decrees framing the legal relationship between the parties.

1.4.4. By document served on 30 November 2015, the Region opposed the appeal on a point of law, seeking [...] the dismissal of that appeal.

[...]

2. The first two grounds are closely linked and require the interpretation of EU law, and in particular Commission Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds (applicable *ratione temporis*; subsequently repealed by Article 54 of Commission Regulation (EC) No 1828/2006 of 8 December 2006), with particular reference to Article 1 thereof and point 2 of [Rule 1 of] the Annex thereto.

[Or.6]

The [Supreme Court of Cassation] [...] therefore considers it necessary to refer questions of interpretation to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.

3. It is helpful at this point to give a summary of the relevant legislative background.

3.1. The case concerns assistance granted for the construction and furnishing of a hotel and its leisure facilities in the municipality of Rossano.

The appellant in cassation had been granted a capital contribution for the hotel's construction, had carried out the work and had purchased the furnishings. It had provided the administrative authority of the Region of Calabria with the documents required by the notice and the decree granting assistance (that is, receipted invoices for movable property and the bill of quantities and measurement booklet for the works carried out). It passed the inspection by the competent technical committee, but never received payment of the assistance for the works and equipment, since the Region had insisted on other accounting records having equivalent effect to the invoices.

3.2. The funding was granted by the Region under the Regional Operational Programme [...], local tourism networks and systems [...] [*reference to the aid programme*].

The relevant regulatory framework was that of the Structural Funds 2000-2006 laid down in Council Regulation (EC) No 1260/1999 of 21 June 1999.

Regulation (EC) No 1685/2000 of 28 July 2000 lays down the implementing provisions on **[Or.7]** the eligibility of expenditure relating to operations co-financed by the Structural Funds.

By Decision C(2000) 2050 of 1 August 2000 and Decision C(2000) 2345 of 8 August 2000, the European Commission approved the Community Support Framework and Operational Programme for Calabria.

3.3. Article 4(4)(c) of Legge 15 marzo 1997, n. 59 (Law No 59 of 15 March 1997) devolved the administrative functions and tasks relating to regional, structural and EU cohesion policies to the regions; this was subsequently implemented by Decreto Legislativo 31 marzo 1998, n. 123 (Legislative Decree No 123 of 31 March 1998).

3.4. The Region, having taken note of the Regional Operational Programme and completed its programming, by Regional Law No 7 of 2 May 2001 (Article 31 *quater*) proposed to support and develop small and medium-sized enterprises through aid granted in accordance with Regulation (EC) No 70/2001. It stipulated that the Regional Executive should enact measures to establish the implementing procedures for the granting of aid in compliance with all the conditions laid down by Regulation (EC) No 68/2001.

3.5. By Regional Executive Decision No 398 of 14 May 2002, the Region approved the contract notice, which, in Article 8 thereof, listed the following as eligible expenses: (1) land; (2) buildings and equipment; (3) fixtures and fittings; (4) planning and surveys.

[...] [*detailed list of eligible expenditure*]

Article 9 of the contract notice required the quantification of works for buildings and equipment with reference to the 1994 price list of the Office of Public Works for the Region of Calabria, plus 15% [Or.8], and, for any items not mentioned, the current market prices estimated by the architect.

Article 11 of the same notice provided that [...] payment of assistance was governed by the measure granting assistance and laying down the requirements with which the beneficiary had to comply.

3.6. Decree No [...] granting assistance listed the documents to be produced by the beneficiary, making no specific provision for works other than the production of accounting records for those works (measurement booklet and accounting ledger, duly signed on each page by the director of works and the beneficiary undertaking).

Article 4 specified that assistance for the works, within the limits allowed by the decree, would be calculated on the basis of the measurement booklet and the accounting ledger, with the unit prices referred to in Article 9(b) of the notice, subject to audit by the inspection committee.

4. The judgment of the Corte di appello di Reggio Calabria (Court of Appeal, Reggio Calabria), on appeal before the Supreme Court of Cassation, while acknowledging that, in the present case, the works financed had actually been carried out in accordance with the approved project and corresponded to that project in terms of quantity and quality, [...] ruled that assistance could not be paid to Eurocostruzioni for the construction works directly carried out by that undertaking, notably because of the requirements laid down in Regulation (EC) No 1685/2000, expressly referred to in the contract notice and the decree granting assistance, which, for the payment of assistance, required the expenditure documents to be in the form of receipted invoices, and where this could not be done, to be in the form of accounting documents of equivalent probative value.

[...] [Or.9] [...]

Therefore, the provision of that EU regulation should be taken into account for the purpose of deciding the case, both because it is directly applicable to the matter at hand and because of the reference *per relationem* in the contract notice and the decree granting assistance.

The Court of Appeal regarded the content of the provisions [of EU law] as a decisive factor, and in particular Commission Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds (subsequently repealed by Article 54 of Commission Regulation (EC) No 1828/2006 of 8 December 2006), intended to regulate the payments in question and referred to in the decree granting assistance.

5. The appellant in cassation submits that, for expenditure eligible for assistance relating to buildings and equipment which it constructed itself, and which is therefore different from the purchase of land, buildings, furnishings and equipment, proof of expenditure could be provided by means other than that documented by receipted invoices and equivalent documents.

In support of that assertion, the appellant in cassation argues that the provisions of the regulation in question are not exhaustive (see point 2.1 of Rule No 1 of the Annex referred to in Article 1, 'Proof of expenditure'), quoting it thus: 'In linea generale, i pagamenti effettuati dai beneficiari finali, a titolo di pagamenti intermedi e pagamenti del saldo, devono essere comprovati da fatture quietanzate. Ove ciò non risulti possibile, tali pagamenti devono essere comprovati da documenti contabili aventi forza probatoria equivalente.' ('As a general rule, payments by final beneficiaries, declared as interim payments and payments of the final balance, shall be supported by receipted invoices. Where this cannot be done, payments shall be supported by accounting documents of equivalent probative value.')

The official Italian wording is almost identical: 'Di norma, i pagamenti effettuati dai beneficiari finali devono essere [Or.10] comprovati da fatture quietanzate. Ove ciò non sia possibile, tali pagamenti devono essere comprovati da documenti contabili aventi forza probatoria equivalente.' ('As a rule, payments by final beneficiaries shall be [Or.10] supported by receipted invoices. Where this cannot be done, payments shall be supported by accounting documents of equal probative value.')

Similarly, the French and English versions read as follows:

'En règle générale, les paiements effectués par les bénéficiaires finals sont accompagnés des factures acquittées. Si cela s'avère impossible, ces paiements sont accompagnés de pièces comptables de valeur probante équivalente',

and

'As a rule, payments by final beneficiaries shall be supported by receipted invoices. Where this cannot be done, payments shall be supported by accounting documents of equivalent probative value.'

According to the appellant in cassation, the phrases 'as a general rule' and 'as a rule' express only a general principle, which is not necessarily exhaustive and is liable to differ in individual cases.

This interpretation cannot be taken for granted, since the phrase, like that used in other EU languages, means 'without further elucidation and without going into the details of individual cases'. It is certainly not clear that it permits any derogation from what has been established for cases generally.

Moreover, EU law does not seem to include – at least not explicitly – among the measures financed the direct construction of a building by the final beneficiary using its own materials, tools and labour, whereas the purchase of second-hand equipment (Rule No 4), the purchase of land (Rule No 5), the purchase of real estate (Rule No 6), and subcontracting (point 3 of Rule No 1) are provided for; moreover, under Rule No 1 of the Annex (points 1.5 to 1.8), various specific examples of non-billable costs are mentioned (depreciation, contributions in kind, overheads).

[Or.11]

6. In those circumstances, the [Supreme] Court of Cassation finds it necessary to refer questions of interpretation for a preliminary ruling under Article 267 TFEU, requesting the Court of Justice of the European Union to answer the following questions:

1. Does Commission Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds, and in particular the provisions of point 2.1 of Rule No 1 of the Annex thereto ('proof of expenditure'), require that proof of payment by final beneficiaries must necessarily be furnished by means of receipted invoices, even if the funding was granted to the beneficiary to construct a building using its own materials, tools and labour, or may there be a derogation, other than the one specifically provided for where this is not possible, which requires the presentation of 'accounting documents of equivalent probative value'?

2. What is the correct interpretation of the phrase 'accounting documents of equivalent probative value'?

3. Specifically, do the abovementioned provisions of [Regulation (EC) No 1685/2000] preclude national and regional law and consequent implementing measures which, in the event that funding has been granted to the beneficiary in order to construct a building using its own materials, tools and labour, provide for a system of auditing the publicly funded expenditure consisting of:

(a) prior quantification of the works on the basis of a regional price list for public works and, for items not provided for therein, the current market prices estimated by the architect;

(b) a subsequent report, with presentation of the accounts for the works, consisting of the measurement booklet and the accounting **[Or.12]** ledger, duly signed on each page by the director of works and the beneficiary undertaking, and the audit and confirmation of the works carried out, on the basis of the unit prices referred to in point (a), by an inspection committee appointed by the competent regional administrative authority?

[...] [*standard wording*]

Decided in Rome [...] on 12 November 2020

[...]

WORKING DOCUMENT