

Case C-392/23**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:**

27 June 2023

Referring court:

Curtea de Apel Bacău (Romania)

Date of the decision to refer:

20 April 2023

Appellant:

Rustrans SRL

Respondent:

Ministerul Agriculturii și Dezvoltării Rurale – Direcția Generală Pescuit – Autoritatea de Management pentru POPAM

Subject matter of the main proceedings

Contentious administrative appeal brought by the appellant, Rustrans S.R.L., against the respondent, the Ministerul Agriculturii și Dezvoltării Rurale – Direcția Generală Pescuit – Autoritatea de Management pentru Programul Operational pentru Pescuit și Afaceri Maritime (POPAM) (Ministry of Agriculture and Rural Development – Directorate-General for Fisheries – Managing Authority of the Operational Programme for Maritime Affairs and Fisheries (POPAM); ‘the DGP AM POPAM’), seeking the annulment of an administrative act.

Subject matter and legal basis of the request

Pursuant to the provisions of Article 267 TFEU, the interpretation is sought of Article 48(1)(c) of Regulation (EU) No 508/2014, Articles 4, 69 and 125 of Regulation (EU) No 1303/2013, and Article 33 of Regulation (EU, Euratom) 2018/1046.

Questions referred for a preliminary ruling

(1) For the purpose of modernising an aquaculture unit by means of the investment referred to in Article 48(1)(c) of Regulation No 508/2014, does the contribution in kind of land adjoining ponds, aquaculture plants or tanks made of concrete, as well as buildings present on that land, constitute eligible expenditure within the meaning of Article 69 of Regulation No 1303/2013 where modernisation of the aquaculture unit is carried out through the purchase of equipment, technological machinery and materials for the fish farm?

(2) Must Article 48(1)(c) of Regulation No 508/2014, read in conjunction with Articles 4 and 125 of Regulation No 1303/2013 and Article 33 of Regulation 2018/1046 on the principle of sound financial management, be interpreted as meaning that there is no direct link between the modernisation of an aquaculture unit by means of expenditure on the purchase of equipment, technological machinery and materials for the fish farm located on the land and the contribution in kind of the land adjoining concrete ponds, land adjoining ponds for aquaculture plants, land adjoining concrete tanks and buildings located on that land?

(3) Does the 10% limit referred to in Article 69(3)(b) of Regulation No 1303/2013 apply only to contributions consisting of land and buildings for which a cash payment is made for the purposes of a lease agreement [referred to in Article 69(1)(d)] or does it also apply to the contribution in kind [consisting of] land and immovable property belonging (not rented) to the beneficiaries?

(4) Does Article 69 of Regulation No 1303/2013 set a limit of 10% only for the contribution in kind consisting of land or does it set a limit of 10% for the contribution in kind consisting of land and buildings?

Provisions of European Union law relied on

Article 48(1)(c) of 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 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council.

Articles 4, 69 and 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.

Article 33 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

Provisions of national law relied on

Ordonanța de urgență a Guvernului nr. 66 din 29 iunie 2011 privind prevenirea, constatarea și sancționarea neregulilor apărute în obținerea și utilizarea fondurilor europene și/sau a fondurilor publice naționale aferente acestora (Government Emergency Order No 66 of 29 June 2011 on the prevention, detection and sanctioning of irregularities in obtaining and using EU funds and/or related national public funds; ‘the OUG No 66/2011’): Article 2(1)(a), which defines the irregularities; Article 3, on the principles to observe when selecting and approving funding applications; and Article 45, which lays down the right and duty of the DGP AM POPAM to perform audits on the expenditure approved for funded projects.

Hotărârea Guvernului nr. 347 din 11 mai 2016 privind stabilirea cadrului general de implementare a operațiunilor cofinanțate din Fondul European pentru Pescuit și Afaceri Maritime prin Programul operațional pentru pescuit și afaceri maritime 2014-2020 (Government Decision No 347 of 11 May 2016 laying down the general framework for the implementation of operations co-financed by the European Maritime and Fisheries Fund through the Operational Programme for Maritime Affairs and Fisheries 2014–2020) (version in force on the date the funding was granted) (‘HG No 347/2016’).

Article 4 lays down the conditions for expenditure to be eligible for funding, including the condition that expenditure be borne and actually incurred by the beneficiary [paragraph (1)(a)], and the condition that it be accompanied by invoices and supporting documents attesting to the payment and actual incurring of expenditure [paragraph (1)(b)].

Pursuant to Article 5:

‘(1) By way of derogation from the provisions of Article 4(1)(a) and (b), the contribution in kind is considered eligible for funding if it meets the conditions laid down in Article 69(1) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council.

(2) Under the Operational Programme for Maritime Affairs and Fisheries 2014–2020, equipment, plant and machinery, land, buildings and immovable property are recognised as contributions in kind.

(3) *The contribution in kind consisting of the assets referred to in paragraph (2) must also fulfil the following cumulative conditions:*

(a) *the subject of the contribution in kind must have been purchased or constructed by the beneficiary through sources of financing other than non-repayable public subsidies;*

(b) *the assets must be free of any encumbrances/prohibitions affecting the implementation of the operation and must not be the subject of disputes relating to the right asserted by the potential applicant, pending before the courts, when the funding application is submitted;*

(c) *the contribution in kind must be necessary and closely related to the implementation of the operation;*

(d) *the value of the goods must be certified by an authorised expert who is independent of the beneficiary of the operation, in accordance with the legal provisions in force. In the case of land, the amount of the contribution in kind may not exceed the limit laid down in Article 69(3)(b) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council.'*

Pursuant to Article 7:

'(1) The cost of the purchase of land with or without buildings shall be eligible for funding up to a maximum of 10%, or 15% in the case of derelict sites and sites formerly in industrial use which comprise buildings, of the total eligible expenditure required by the operation, in accordance with the provisions of Article 69(3)(b) of Regulation (EU) No 1303/2013.

(2) The land referred to in paragraph (1) must be used for the purposes defined within the framework of the funded operation, in accordance with the provisions laid down in the funding agreement. Otherwise, the beneficiary is required to return the corresponding non-repayable funds, in accordance with the legal provisions in force.

(3) Where a building is purchased for demolition and subsequent use of the land for the purpose of achieving the objectives of the operation, only the cost of purchasing the land shall be eligible, if it complies with the provisions of paragraphs (1) and (2).'

Ordinul nr. 816/2016 din 24 mai 2016 al ministrului agriculturii și dezvoltării rurale privind aprobarea Listei detaliate a cheltuielilor eligibile pentru operațiunile finanțate, inclusiv cheltuielile de personal ale Autorității de Management, în cadrul Programului operațional pentru pescuit și afaceri maritime 2014-2020 (Order No 816 of 24 May 2016 of the Minister for Agriculture and Rural Development approving the detailed list of eligible expenditure for funded operations, including expenditure for the staff of the Management Authority, within the framework of the Operational Programme for Maritime Affairs and

Fisheries 2014–2020 (version in force on the date the funding was granted), Annex, letter J, measure II.2. *Productive investments in aquaculture*.

Succinct presentation of the facts and procedures in the main proceedings

- 1 Through an appeal brought before the Curtea de Apel Bacău – Secția a II-a civilă și de contencios administrativ și fiscal (Court of Appeal of Bacău – Second Civil Chamber for administrative and tax matters) of 7 November 2022, the appellant, SC Rustrans SRL requested, in proceedings against the DGP AM POPAM, the annulment of the report establishing irregularities and settlement of credit entry No 292304/19.10.2022, as well as the exemption from the payment of a debt of 3 378 392.20 Romanian lei (RON).
- 2 The appellant submitted a funding application to the DGP AM POPAM for the purposes of implementing the project entitled ‘Extinderea și diversificarea activității companiei RUSTRANS SRL pe segmentul de acvacultură’ (Extension and diversification of the activity of RUSTRANS SRL in the aquaculture sector), SMIS reference 121910 under Union Priority No 2: Fostering environmentally sustainable, resource efficient, innovative, competitive and knowledge-based aquaculture, measure II.2: Productive investments in aquaculture – Article 48(1)(a) to (d) and (f) to (h) [of Regulation (EU) No 508/2014] (POPAM). In this project, it was specified that a plot of land and related buildings would be contributed in kind.
- 3 According to the feasibility study, SC Rustrans SRL set the following objectives for the investment project:
 - strengthening the competitiveness of the undertaking by investing in the modernisation of the aquaculture unit;
 - increasing production capacity following the purchase of technological equipment and efficient specialist aquaculture facilities;
 - optimising production costs and improving the efficiency of the business through the purchase of efficient technologies and equipment.
- 4 Subsequently, funding contract No 155/18.09.2018 was entered into, the total amount of which was RON 19 151 676.06: total amount eligible for funding – RON 17 477 871.93; amount of eligible co-financing from the beneficiary – RON 12 466 155.03; amount eligible for non-repayable funding – RON 5 011 716.90. The amount of eligible co-financing from the beneficiary is composed of the contribution in kind consisting of built-on land, buildings and special constructions assessed in accordance with the legislative procedure as follows: built-on land: RON 2 343 160, buildings and special constructions: RON 10 972 682.

- 5 Since the project implementation period was extended by 6 months beyond the initial 24-month period, a reduction of 0.5% of the eligible non-repayable amount was applied.
- 6 The project is currently under way and is being audited; four applications for reimbursement have been made, as a result of which a total amount of RON 4 826 294.03 has been paid out, of which RON 3 619 720.51 is from the EMFAF [European Maritime, Fisheries and Aquaculture Fund] (75%) and RON 1 206 573.51 is a contribution from the national budget (25%).
- 7 In the report establishing irregularities and the settlement of credit entry No 292304/19.10.2022, it was found that there were irregularities within the meaning of Article 2(1)(a) of OUG No 66/2011 (offences, irregularities and non-compliance with national and/or European legal provisions resulting from an act or omission by the beneficiary which affected or was likely to affect the EU budget) as regards the direct link between the contribution in kind and the operation funded for that purpose; the principle of sound financial management, referred to in Article 125(2) of Regulation (EU) No 1303/2013, was considered to be clearly applicable.

In addition, irregularities were found with regard to ineligible expenditure relating to the contribution in kind – land and/or buildings provided by the beneficiary – in that the 10% limit laid down in Article 69(1) of Regulation (EU) No 1303/2013 was exceeded. A tax credit was established in the amount of RON 3 378 392.20, of which RON 2 533 794.15 was a contribution from EU funds, and RON 844 598.05 was a national public contribution from the state budget.

- 8 The report was drawn up following audits carried out on the basis of a recommendation from the European Commission's DG MARE, which in 2021 identified an irregularity with regard to the expenditure relating to the contribution in kind – land and buildings – made by the beneficiaries in connection with the funded projects, in so far as the ceiling of 10% of the total expenditure of the project/operation was exceeded, infringing the provisions of Article 69(1) and (3)(b) of Regulation (EU) No 1303/2013, and in terms of the lack of connection between the contribution in kind and the funded operation, in the light of the principle of sound financial management enshrined in Article 4 and Article 125(1) of Regulation (EU) No 1303/2013 and Article 33 of Regulation (EU, Euratom) 2018/1046, and in the light of the principle of efficiency, enshrined in the provisions of Article 48(1)(c) of Regulation (EU) No 508/2014. These audits by the European Commission resulted in a final audit report.

The essential arguments of the parties in the main proceedings

- 9 The appellant argued that the respondent's decision was unlawful, claiming that the fault of the DGP AM POPAM, which was required to audit in detail all the projects in the light of the applicable national and EU rules, was obvious. In its opinion, it is incorrect to find an irregularity, in the sense of an infringement of

Article 69(3)(b) of Regulation (EU) No 1303/2013, as a result of exceeding the percentage of 10% allegedly applicable to the entire contribution in kind made by the beneficiary, since that provision was misinterpreted.

- 10 The appellant submits that the 10% limit does not apply globally to its entire contribution, but only to the contribution consisting of land, which is also supported by the national legislation in force at the time the funding was granted, namely Article 5 of HG No 347/2016. The last sentence of Article 5(3)(d) of HG No 347/2016 refers strictly to the percentage limit laid down in Article 69 of Regulation (EU) No 1303/2013, but that limit is laid down only in respect of land and not in respect of buildings or other immovable property.
- 11 The appellant also stated that Article 69(1) of Regulation (EU) No 1303/2013 provides that costs relating to 'the purchase of land not built on and land built on in the amount exceeding 10% of the total eligible expenditure for the operation concerned' are not eligible for funding. In the present case, however, the land was not purchased but was already owned. The appellant also submitted that the provisions of Article 69(1) of Regulation (EU) No 1303/2013 also lay down a limit of 10% in the case of the leasing of land, but that the latter provision does not apply either.
- 12 According to the appellant, the irregularity relating to the lack of a direct link between the contribution in kind consisting of the land and the buildings, contributed to the project by the beneficiary, and the whole of the funded operation is also unfounded. The contribution in kind consists of the land on which some fish tanks are located. Those assets are the central and indispensable element of the aquaculture business. There is therefore a direct link between them and the operation proposed for funding, namely the purchase of equipment, machinery and facilities. The purchases made under the funding programme concerned only the equipment and machinery necessary for the expansion and diversification of SC Rustrans SRL's business in the aquaculture sector. There is a clear link between the contribution in kind (land on which the tanks, ponds and all adjacent constructions which form the fish farm are located) and the equipment and machinery purchased in the context of the project.
- 13 The respondent contended that the appeal should be dismissed. As regards the existence of fault on the part of the authority, it pointed out that the DGP AM POPAM had the power to find and sanction irregularities even after the project had been audited and assessed, although it should have found them at the stage prior to signing the contract.
- 14 As regards the 10% limit laid down by Regulation (EU) No 1303/2013, the respondent stated that, in the case of land and immovable property, the percentage of contributions in kind is limited to 10% of the total eligible expenditure relating to the funded operation, in accordance with Article 69(3) of Regulation (EU) No 1303/2013.

- 15 As regards the lack of a direct link between the contribution in kind and the funded operation, the respondent argued that the buildings contributed in kind to fund the project were not directly linked to the funded operation (purchase of equipment, machinery and materials). The activities carried out within the project, as described in the funding application, do not directly involve the buildings with which the appellant co-financed the project, but involve equipping the fish farm to carry out the specific activity, such that the contribution and the direct link between the immovable property (land and buildings) and the operation proposed for funding, namely the purchase of equipment, machinery and equipment, is not clear.
- 16 Therefore, in accordance with the principle of efficiency, only the costs necessary for the modernisation of existing aquaculture plant and those related to that modernisation are eligible under that provision; consequently, the costs relating to existing land and/or immovable property on that land cannot not be considered eligible for the funded activity (purchase of equipment), as they are not necessary to achieve the objective.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 17 As regards the question of the lack of a direct link between the contribution in kind and the funded operation, the referring court notes that, in assessing compliance with the principle of sound financial management and the principle of efficiency, the opinions of the Commission and the Romanian State differed, in that each party justified the costs necessary for the modernisation of existing aquaculture units differently: according to the Romanian State, the land and the buildings (farm) should also have been included since, without them, the project would not have been possible, whereas, according to the Commission, the land and the buildings were a prerequisite for the modernisation operation.
- 18 When granting the funds, the Romanian State therefore considered, like the appellant, that, in order to achieve the objective, namely to increase production volume, an aquaculture farm needed both means of production (assets and equipment) and land and buildings (for example, tanks). Without the existing fish farm and its land, the project would not have been possible. The value of the existing farm to be modernised is part of the ‘technological flow’ and, therefore, of the funded operation.
- 19 Subsequently, following the binding conclusions of the European Commission auditors, the respondent is of the opinion that immovable property consisting of land and buildings is not directly related to the modernisation process described in the funding application, since the purchase of equipment, machinery and facilities funded by the project does not concern immovable property, buildings and land contributed in kind. Although the object of the contribution in kind (fish farm and/or the related land) is a precondition for the very existence of a modernisation project, its value is not part of the costs associated with the modernisation process.

- 20 In accordance with the principle of sound financial management and the principle of efficiency, only the costs necessary for and associated with the modernisation of the existing aquaculture units are eligible for funding under that provision. Costs relating to land and buildings are not considered eligible for the funded activity (purchase of equipment) as they are not necessary to achieve the corresponding objective.
- 21 As regards the question of exceeding the 10% limit laid down in Article 69(1) of Regulation (EU) No 1303/2013 on the contribution in kind – land and/or buildings – contributed by the beneficiary, the interpretation of the provisions of that article is at issue, namely whether the 10% limit applies only to land or also to buildings and whether it applies only to certain operations (purchases, leases), whereas the differences of opinion result from the provisions of national law and concern the implementing rules for the provisions of EU law.
- 22 At issue in the present case is the applicability of the 10% limit only to the contribution in kind consisting of land, as expressly stated in the wording of Article 5(3) of HG No 347/2016, or to the contribution in kind consisting of land and buildings, in so far as the second subparagraph of Article 69(1) of Regulation No 1303/2013 applies, since there is no need to distinguish between contributions in kind made with or without negligible cash payments in respect of the lease.

WORKING DOCUMENT