

Netherlands
Raad van State
19 December 2007
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Subject: Housing Corporations - Cross-frontier activities - Public resources - Services of General economic Interest - State Aid - Free movement of Capital - Article 56 EC - Article 58 EC - Article 86(2) EC - Article 87 EC - Article 88 EC

Parties: The minister of Public Housing against the Housing Corporation Sint Servatius

Summary: The administrative law division of the Council of State (the Division) referred an extensive list of questions to the European Court of Justice about the prohibition, for a Dutch housing corporation (Sint Servatius), to deploy building activities outside the Netherlands. The Division has expressed several doubts about the application of European rules regarding to the free movement of capital and its exceptions, and about State Aid rules with regard to Services of General economic Interest.

The arguments in favour of continuation of the experimental building project in Belgium brought forward by the Corporation, which is meant to solve the shortage of suitable houses for starters on the housing market of Maastricht are:

- The cities of Maastricht and Liege form one "euregional" housing market. There has been great interest from Belgium citizens too for the housing market of Maastricht, which could be explained by the shortage of suitable houses for starters in Liege.
- According to the a policy document of the Dutch province of Limburg of 10 May 2005, the Maastricht region has to be seen in an international context; the Belgium border area should be considered as a functional part of the residential region of Maastricht.
- Dutch housing corporations are free to use their public resources as they see fit, under the sole condition that this is in the interest of the Netherlands public housing market.
- The requirement of prior approval is not necessary because the Minister has sufficient instruments of control afterwards, notably: the annual report, the public housing report and the auditor's report.
- The refusal to sanction the experiment implies an absolute prohibition to deploy activities outside the Dutch border, whereas this prohibition has no base in any legal rule. The minister infringes by doing so the free movement of capital.
- The project is financed in conformity with market conditions and will be profitable. The Minister's argument that the experiment has elements of unjustified State Aid is untrue.

On 19 December 2007 the following questions were referred to the ECJ for preliminary ruling. (Case C-567/07)

1. Does the requirement that the Minister give prior authorisation for any cross-frontier activities of an undertaking which is authorised by law to promote the Netherlands' public housing interests, which may rely on public resources for this purpose, which may operate, by law, solely in those interests, and which in principle

has its area of activity within the Netherlands ('authorised institution') constitute a restriction on the free movement of capital, as referred to in Article 56 of the EC Treaty?

2.a. Can a Member State's public housing interests be regarded as a public policy interest as referred to in Article 58 of the EC Treaty?

2.b. Can a Member State's public housing interests be regarded as an overriding reason in the public interest recognised in the case-law of the Court of Justice?

2.c. More specifically, can interest in the effectiveness of the ability to finance a Member State's public housing system be regarded as a public policy interest as referred to in Article 58 of the EC Treaty or as an overriding reason in the public interest recognised in the case-law of the Court of Justice?

3.a. Assuming that the requirement of prior authorisation for an authorised institution as referred to in Question 1 constitutes a restriction for which there is justification as referred to in Questions 2.a, 2.b and 2.c, is that requirement necessary and proportionate?

3.b. When applying that justification, does a Member State have a wide margin of discretion in determining the scale of the public interest concerned and the manner in which that interest is promoted? Is one of the determinants in this context the fact that the Community has few, if any, powers in the public housing sector?

4.a. Besides, or in conjunction with, the overriding reasons in the public interest referred to in Article 58 of the EC Treaty and recognised in the case-law of the Court of Justice, can a Member State rely on Article 86(2) of the EC Treaty to justify a restriction on the free movement of capital, if special rights have been granted to the undertakings concerned and those undertakings are entrusted with the operation of services of general economic interest?

4.b. Do the public interests referred to in Article 58 of the EC Treaty and the overriding reasons in the public interest recognised in the case-law of the Court of Justice have the same content as the general economic interest referred to in Article 86(2) of the EC Treaty?

4.c. Does reliance by the Member State concerned on Article 86(2) of the EC Treaty, its contention being that the undertakings to which special rights have been granted perform tasks of general economic interest, have additional weight over and above reliance on public interests as referred to in Article 58 of the EC Treaty and the overriding reasons in the public interest recognised in the case-law of the Court of Justice?

5.a. Can undertakings, such as the authorised institutions referred to in Question 1, which, on the one hand, are required to employ all their capital for the benefit of public housing, but which, on the other hand, also undertake commercial activities in respect of public housing, be regarded, for all or some of their tasks, as undertakings entrusted with the operation of services of general economic interest, as referred to in Article 86(2) of the EC Treaty?

5.b. For the answer to Question 5.a to be in the affirmative, is it necessary for the undertakings concerned to keep separate accounts from which it is absolutely clear what costs and receipts are associated with their social activities, on the one hand, and with their commercial activities on the other, and for that obligation to be laid down in national legislation? Should it then be ensured that a Member State's financial resources benefit only the social activities and their continuity?

6.a. If an authorised institution as referred to in Question 1 can be regarded, in respect of all or some of its activities, as an undertaking entrusted with the operation of services of general economic interest as referred to in Article 86(2) of the EC Treaty, can the entrustment of the operation of such services justify the imposition on the authorised institution of a restriction on the free movement of capital as referred to in Article 56 of the EC Treaty?

6.b. When applying that justification, does a Member State have a wide margin of discretion in determining the scale of the general economic interest concerned and the manner in which that interest is promoted? Is one of the determinants in this context the fact that the Community has few, if any, powers in the public housing sector?

7.a. Can the fact that a Member State provides certain undertakings as referred to in Article 86(2) of the EC Treaty with financial resources make it necessary for the territorial scale of their activities to be limited in order to prevent those financial resources from constituting prohibited State aid and the undertakings employing those resources in another Member State from competing with undertakings in that Member State under conditions which do not comply with market rules?

7.b. Can a Member State, in this instance the Netherlands, require authorised institutions as referred to in Question 1 wishing to undertake housing construction activities of a social and commercial nature in another Member State to obtain prior authorisation if there is as yet no legal obligation in the first mentioned Member State to make a distinction between the two types of activity? Is the requirement of prior authorisation in this case a necessary and proportionate means of ensuring compliance with Articles 87 and 88 of the EC Treaty?