L'UNION SOCIALE POUR L'HABITAT

Représentation auprès de l'Union européenne
Mission Affaires européennes

Square de Meeus, 18 B-1050 Bruxelles
Tel. 322 2138441
ue@union-habitat.org – http://union-habitat.eu

Judgment of the General Court (Eighth Chamber, Extended Composition) of 15 November 2018 Stichting Woonlinie and Others v European CommissionT-202/10 RENV II and T-203/10 RENV II

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Auteur : Virginie Toussain

The Dutch woningcorporaties (housing associations) filed a petition for cancellation of the European Commission's final decision C(2009) 9963 on the compatibility of the State subsidies that are granted to them, pursuant to a notification by the Member State of the subsidy scheme used to finance the sector, and a subsequent complaint by competitors, which validated the reform proposed by The Netherlands in this respect in light of European competition law

Reminder of the proceedings to date

On 01/03/2002, the Dutch government notified the European Commission about the scheme under which State subsidies were paid to the woningcorporaties housing associations. These housing associations are tasked with acquiring, building and renting out dwellings primarily to economically deprived individuals and to groups from socially deprived backgrounds, as well as with other activities, such as building and renting out apartments offered at higher rents, building apartments for sale, building and renting out buildings that serve the general interest, and building and renting out retail premises.

The notification was withdrawn by the Dutch authorities once the Commission had confirmed that these subsidies could be construed as existing State subsidies.

On 14 July 2005 the Commission sent a letter to the Dutch authorities in which it expressed doubts about the compatibility of this State subsidy scheme with EU law.

A number of exchanges of correspondence then took place between the Commission and The Netherlands as part of a process of cooperation in order to make the contentious subsidy scheme compliant, including a letter from the Dutch government dated 6 September 2005.

On 16 April 2007, a group of local investors filed a complaint in parallel with the Commission concerning these subsidies.

On 3 December 2009, the States proposed commitments for making changes to the scheme.

On 15 December 2009, the Commission handed down a favourable decision, C(2009) 9963, approving the proposed new subsidy scheme.

On 29 April 2010, the housing associations filed a petition for cancellation of this favourable decision of the European Commission before the European General Court

On 16 December 2011, the Court dismissed the petition, ruling it inadmissible.

On 27 February 2014, the European Court of Justice quashed the lower court's ruling. The petition for cancellation was sent back before the EGC, which dismissed it once again in a ruling handed down on 12 May 2015, for lack of valid grounds.

On 15 March 2017, the ECJ once again quashed the decision of the EGC, ruling that the housing associations had an interest in taking action and that the various letters exchanged as part of the cooperation process between the European Commission and the Dutch authorities had to be taken into consideration since they constituted stages in the devising of the contentious decision, the European Community's decision having declared the new subsidy scheme proposed by The Netherlands as compatible.

The case was thereupon once again sent back before the EGC, which has just handed down its ruling.

Unless it is appealed by the petitioners, the ruling of the European General Court, which was handed down on 15 November, brings to a close a legal episode widely known as the

"Dutch case", concerning the application of European competition law on State subsidies, article 107-1 TFEU, to the general interest service of social housing in The Netherlands.

The case was opened in March 2002 by a voluntary notification by The Netherlands of the subsidy scheme used to finance the housing associations in charge of implementing the Dutch social housing policy, for an opinion on its compatibility with the EU provisions on State subsidies.

This is because State subsidies are prohibited by the Treaty, but can nevertheless, under certain conditions, be declared as compatible with the internal market by the European Commission, ruling in the capacity of European competition authority.

The notification was withdrawn by the Dutch authorities when it became clear that there was a risk that the 3e43esCommission would construe the subsidy scheme as "existing State subsidies".

Despite this, the Commission, in keeping with its powers instituted by article 17 of Regulation EC 659/1999, examined the subsidy scheme that had been notified and informed the Dutch authorities by a letter dated 14 July 2005 that the scheme constituted an existing State subsidy scheme and that it doubted that it was compatible with the internal market (this letter is referred to as the "article 17 letter" in the ruling).

This act heralded the start of a cooperation process between the Commission and The Netherlands designed to make the Dutch scheme compatible with European competition law. The parties held a number of exchanges that culminated in the adoption of the contentious decision that the housing associations subsequently challenged. The petitioners, believing that these negotiations had culminated in a modification of the national laws on State subsidies that was unfavourable to them in the pursuit of their general interest mission and that it imposed a new definition of "social housing", filed a petition for cancellation of the Commission's decision on 29 April 2010.

The EGC's ruling of 15 November 2018, although it dismissed the challenge raised by the Dutch housing associations, provided various clarifications concerning the assessment of the prerogatives and obligations of the Member States in terms of services of general economic interest (I), and specifically in the field of social housing (II).

I) Assessment of the compatibility of State subsidies with services of general economic interest (SGEI)

A) The proceedings for cancellation of the decision and the notion of State subsidy

Although some might be surprised by the duration of the proceedings surrounding this petition for cancellation, which was first filed in April 2010, one should bear in mind that the very issue of its admissibility gave rise to 4 court rulings of the EGC and the ECJ hinging on the petitioners' interest in bringing the case (ruling C-132/12), and what acts could be challenged (ruling C- 414/15).

Thus, on appeal, the ECJ ruled that the housing associations had an interest in taking action inasmuch as the cancellation of the contentious decision of the European Commission would result in the maintenance of prior conditions that were more favourable to them. The petitioners therefore had a legitimate interest in seeking the cancellation of this decision.

In the second appeal, the ECJ also allowed the petitioners' request to take into consideration the documents exchanged between the government of The Netherlands and the Commission as part of the cooperation process stipulated by article 108-1 TFEU as part of the assessment of existing subsidies, including the "article 17 letter". The petitioners argued that this letter contained various elements that vindicated their petition in that they showed that it was the Commission that had initiated the proposals put forward by the national authorities to modify the housing authorities' missions and the definition of social housing. The ECJ held that this letter and all of the exchanges between the parties constituted an initial stage of the contentious decision and accordingly, this letter had to be examined on the basis of article 108-1 TFEU, even though it did not constitute a decision of incompatibility of the subsidies as per article 108-2 TFEU, as it generated the same legal effects as a formal decision towards a Member State.

The EGC therefore had to perform its judicial review while confining itself to assessing compliance with due process, checking the accuracy of the facts and ascertaining the absence of errors of law, blatant errors in the assessment of the facts or abuses of power.

In the present case, the petitioners' first argument was dismissed inasmuch as it was being invoked for the first time and was not founded on elements that had arisen in the course of the proceedings, being therefore barred under article 84 of the procedural rules.

The EGC, ruling in accordance with the precedents in terms of SGEI, initially examined the deemed nature of the contentious subsidies to determine if they were State subsidies, something that is in principle prohibited by article 107-1 TFEU.

It therefore had to check whether the cumulative elements of a State subsidy were present: a specific economic advantage granted to an enterprise that might affect trade between the Member States.

To that end, the sector at stake, SGEI, had to be taken into consideration, since State payments considered as compensation or consideration for services provided by the beneficiary enterprises in return for their performance of public service obligations, are not subject to the prohibition laid down by article 107-1 TFEU, the criterion of an economic advantage being absent.

The EGC thus checked whether the case at hand fitted in with the consistent case law by referring to the Altmark Trans ruling of 2003, which laid down the 4 cumulative criteria of consideration for the provision of public services, the first of which is the need to clearly define the public service obligations involved.

The EGC meanwhile asserted that enterprises that were in charge of performing SGEI and that received subsidies that were construed as State subsidies as per article 107-1 TFEU, could benefit from the provisions of article 106-2 TFEU, whereby these subsidies can be deemed compatible with the common market, subject to complying with the condition of a clear definition of the obligations inherent to the SGEI (BUPA ruling, 2008). A decision of exemption from notification of subsidies granted specifically to housing associations (no. 2005/842) also highlights these elements.

The examination of the contentious subsidy scheme must therefore take place in light of these various criteria, and in particular the definition of the SGEI mandate granted to an enterprise that provides a SGEI.

B) The compatibility of State subsidies with the internal market and the concept of a blatant error of judgement

Services of General Economic Interest therefore benefit from special treatment in terms of competition law and State subsidies.

Indeed, the EGC pointed out that the case law consistently holds that the Member States have extensive leeway when it comes to defining what they consider as a SGEI, and as a result, the definition of these services by a Member State can only be challenged by the Commission in case of a blatant error of judgement.

The prerogative of the Member States in this respect is not unlimited and cannot be exercised arbitrarily for the sole purposes of enabling a particular sector to sidestep the application of the European competition rules. Indeed, the Member States are not

dispensed from having to demonstrate, backed by suitable legal justification, that the scope and ambit of the SGEI is necessary and proportionate in relation to a genuine need for a public service.

Moreover, in the present case, decision 2005/842 covers the provision of the SGEI of social housing and the scope of the mission to be entrusted in light of the specific aspects that must be taken into consideration. Indeed, “housing associations that procure housing to socially deprived persons or to vulnerable social groups who cannot afford and therefore cannot find housing under market conditions, must benefit from the exemption from notification mentioned in the decision, even if the amount of the compensation that they receive exceeds the thresholds stipulated by the latter, provided that the services that they provide can be construed as services of general economic interest by the Member States”.

Finally, in light of the narrow scope of the power of review of the Commission and of the EGC (limited to the detection of blatant errors in the definition of a SGEI), and the extensive leeway available to the Member States, the burden of proof rests upon the latter, “based on the precedents that hold that the burden of proof to demonstrate that a SGEI is delimited sufficiently clearly rests upon the national authorities”.

II) The notion of social housing and European competition law

The petitioners assert that during the cooperation process instigated between the European Commission and The Netherlands, the Commission wrongly analysed the national laws applicable to social housing, which led it to conclude that there was a blatant error in assessment of the notion of SGEI as applied to social housing. The petitioners contend that this conclusion then led the Commission to impose changes to the applicable rules and to adopt a new, restrictive definition of social housing that constitute an interference with the prerogative of the Member States.

A) Social housing as a service of general economic interest

In support of their petition, the housing associations highlight the comments and questions raised by the Commission, primarily in the “article 17 letter”, in which it held that the subsidy scheme was incompatible with the internal market because it did not comply with the criteria applicable to compensation for public services, due to the presence of a blatant error in the definition of social housing.

The question is therefore whether the mission attributed to the housing associations, to wit: “these housing associations are tasked with acquiring, building and renting out

dwellings primarily to economically deprived individuals and to groups from socially deprived backgrounds, as well as with other activities, such as building and renting out apartments offered at higher rents, building apartments for sale, building and renting out buildings that serve the general interest, and building and renting out retail premises" constitutes a blatant error that makes the contentious subsidy scheme incompatible with European law.

The Commission held that the fact that the housing associations' activities were not restricted to socially deprived persons, whereas social housing is a public service that is social in nature and the definition of the contentious activities must have a direct link to households from socially deprived backgrounds, and the fact that the housing associations were permitted to rent apartments to higher-income persons in case of excess capacity, justified its doubts about the compatibility of the scheme that had been notified to it and the notion of blatant error that was raised, and warranted engaging the cooperation procedure that culminated in the definition of the new applicable framework.

The EGC backed the European Commission on these different points, dismissing the various arguments put forward by the petitioners, on the grounds that it was based on Dutch law that the Commission had held that the definition of the social housing SGEI did not meet the requisite level of clarity, inasmuch as the delimitation of the target group to whom the social housing was destined was not sufficiently precise.

The EGC pointed out that in light of the elements that were assessed, "the Commission had not stated that the definition of a SGEI was not sufficiently precise owing to the lack of an income ceiling; moreover, the legal provisions concerning the oversight of housing associations were not relevant to determining whether their mission was sufficiently defined in the legislation".

Thus, the Commission had not imposed the new applicable framework, and moreover, the national authorities had the option to challenge the Commission's assessment by demonstrating that the definition of social housing as a SGEI was sufficiently precise and did not contain any blatant error.

It was therefore up to the Dutch authorities to demonstrate that the definition of the mission granted to the housing associations was sufficiently precise in order to meet the aim of social housing as a SGEI, which is, according to decision 2005/842, to procure housing to economically disadvantaged persons or to vulnerable social groups, who cannot afford and therefore cannot find housing under market conditions.

The EGC moreover emphasised that the national authorities, in the course of their correspondence with the Commission, acknowledged the inaccuracy of the SGEI mission.

The EGC therefore dismissed the petitioners' interpretation inasmuch as "the Commission did not hold that the definition of the SGEI featured a blatant error, because it did not provide that the housing associations had to rent housing units "exclusively" to economically disadvantaged persons, but held that it was imprecise, because it provides for rental as a "priority to persons who have problems finding suitable housing", without any definition of this target group of economically disadvantaged persons".

B) The compatibility of the social housing missions with the internal market

It is therefore necessary to delimit the social housing mission clearly in order for it to fit in with the provisions governing State subsidies and SGEI, but the EGC stated in its ruling on the petition filed by the housing associations that the Member State has full latitude to determine this delimitation provided that it is sufficiently precise and linked to the target group at stake.

Thus the EGC emphasised that delimitation criteria other than mere income ceilings could have been adopted by the Dutch government, "but one cannot rule out the possibility that the Commission would have also approved a definition of the SGEI proposed by the Dutch authorities based on a criterion other than an income ceiling, if this definition was sufficiently clear and related to economically disadvantaged persons".

The EGC also stated that the Commission's decision no. N209/01 on State subsidies for social housing in Ireland, did not constitute the European definition of social housing, but only an example, "the Commission not having required that the Dutch authorities base their scheme on the same criteria, nor held that they could only define the SGEI by reference to an income ceiling".

Other criteria than limited resources may therefore be used by the Member States in their definitions of what constitutes social housing.

As to the argument about the lack of distinction between a SGEI and its financing, the EGC stated that a SGEI could be defined, by assumption, relative to the general interest that it aimed to foster rather than relative to the means of ensuring its provision.

Thus the EGC confirmed that the Commission had been within its rights to invoke in its assessment of a subsidy scheme the risks of excessive compensation, or cross-subsidies, inasmuch as a clear definition of the SGEI is necessary to ensure compliance with the

condition of proportionality of the subsidies, i.e. to ensure that the compensation that is granted does not exceed what is necessary to accomplish the public service.

Also, where the housing associations engaged in commercial activities in parallel with their SGEI, something that they were entitled to do, it was important to avoid the risk that subsidies aimed at funding the SGEI be used instead to finance ancillary activities that would then no longer be performed under market conditions. In such a case, these commercial activities would have to be operated using separate books.

Finally, the EGC emphasised that the Commission's assessment of the risk of excessive compensation inherent to a subsidy scheme need not necessarily be founded on past experience but could be based on conjecture.

Although the EGC dismissed the Dutch petitioners' challenge in the present case, the ruling did not inasmuch approve a restrictive definition of "social housing", but rather came out against the inaccuracy of the Member State's definition of the general interest mission that was entrusted to the housing associations.

In light of the extensive leeway that the Member States have in terms of defining a SGEI, the EGC ruled that this prerogative must be exercised in keeping with European competition rules and the rules of the internal market, and that in order to be compatible, and therefore to qualify for exemption from the rules against subsidies, the State subsidies had to be granted in accordance with various criteria.

The EGC ruled that the exemption from notification of the State subsidies mentioned by decision EC 2005/842 as applicable to housing associations, for instance, required an accurate and clear definition of the general interest mission granted and a link to the beneficiaries of this service, namely economically disadvantaged persons.

Nevertheless the EGC confirmed the freedom of Member States to define social housing in keeping with the principles of necessity, proportionality and respect of the internal market. Indeed, although they do not have "unlimited" powers in this respect, as we have shown, the criteria of the scope of the mission remain open, with the particular one chosen in the present case, namely an income ceiling, not being the only one that could be used by the national authorities.

To conclude, the social housing mission, provided that it is defined precisely by the appropriate authorities, is compatible with the internal market.

Virginie Toussain
Responsable juridique
Mission Affaires Européennes

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Les Hlm, habiter mieux, bien vivre ensemble

Représentation auprès de l'Union européenne
Square de Meeus 18 • B-1050 Bruxelles
Tél. : +322 213 84 42 / +32 495 211 377

• virginie.toussain@union-habitat.org
• http://www.union-habitat.eu
• twitter @USH_Bruxelles

For more information >

8 arguments raised in the present case

- error of law committed by the Commission in construing all the Dutch measures as a subsidy scheme: the sales of plots of land at lower prices by municipalities should not be construed as being part of the subsidy scheme but as individual subsidies;

- incomplete and incorrect interpretation of the facts: the petitioners challenged the European Commission's interpretation of the definition of the social housing SGEI and its conclusion that it incorporated a blatant error;

- incorrect interpretation of the notion of persons with "relatively high income": the petitioners challenged the Commission's interpretation of this ancillary activity as an element of the public service mission of the housing associations, a notion that contributed to the conclusion that there was a blatant error in the present case.

- the Commission committed an error of law and overstepped its powers by demanding that The Netherlands come up with a new definition of "social housing"

- the Commission committed an error of law when it failed to draw a distinction between a SGEI and its financing in its analysis

- the Commission wrongly interpreted the decision of 28 November 2005 exempting from notification State subsidies paid as consideration for public services

- the Commission committed an error in its assessment of the financing element, and in particular the issue of compensation, in this 2005 decision

- the argument concerning the activity of "social buildings", i.e. public interest facilities: specific prerogative of the petitioners, separate from that of from that of social housing (not dealt with in the comments, mission that transcends social housing, for which the EGC reiterated the previous arguments regarding SGEI)