



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 December 2012 *

(Structural funds — Regulation (EC) No 1083/2006 — Geographical eligibility — Implementation of an investment co-financed by the European Union from a place located outside of the eligible regions and by an operator established in such a place)

In Case C-579/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Administrativo e Fiscal do Porto (Portugal), made by decision of 19 October 2011, received at the Court on 22 November 2011, in the proceedings

Grande Área Metropolitana do Porto (GAMP)

v

Comissão Directiva do Programa Operacional Potencial Humano,

Ministério do Ambiente e do Ordenamento do Território,

Ministério do Trabalho e da Solidariedade Social,

intervening parties:

Instituto Nacional de Administração,

Sindicato dos Quadros Técnicos do Estado,

Instituto Superior de Ciências do Trabalho e da Empresa,

Instituto do Desporto de Portugal,

THE COURT (Third Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court acting as Judge of the Third Chamber, E. Jarašiūnas, A. Ó Caoimh and C. Toader, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 November 2012,

* Language of the case: Portuguese.

after considering the observations submitted on behalf of:

- the Grande Área Metropolitana do Porto (GAMP), by J. Pacheco de Amorim and B.M. Soares, advogados,
- the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território, by M. Fonseca, advogada,
- the Portuguese Government, by L. Inez Fernandes, P. Pinheiro and G. Santos Machado, acting as Agents,
- the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,
- the European Commission, by A. Caeiros and A. Steiblytė, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 174 to 176 TFEU and of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).
- 2 The reference has been made in proceedings between the Grande Área Metropolitana do Porto ('GAMP'), an association of municipalities, and several national authorities, represented by the Comissão Directiva do Programa Operacional Potencial Humano (Executive Committee of the Operational Programme for Human Potential), the Ministério do Ambiente e do Ordenamento do Território (Ministry for the Environment and Town and Country Planning), now the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território (Ministry for Agriculture, the Sea, the Environment and Town and Country Planning), and the Ministério do Trabalho e da Solidariedade Social (Ministry for Employment and Social Solidarity), concerning the use of European Union funds.

Legal context

Regulation No 1083/2006

- 3 Recital 1 in the preamble to Regulation No 1083/2006 is worded as follows:

'Article 158 [EC] provides that, in order to strengthen its economic and social cohesion, the Community is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas. Article 159 [EC] requires this action to be supported by the Structural Funds, the European Investment Bank (EIB) and the other existing Financial Instruments.'
- 4 Article 1 of that regulation provides that the regulation lays down 'the general rules governing the European Regional Development Fund (ERDF), the European Social Fund (ESF) (hereinafter referred to as the Structural Funds) and the Cohesion Fund ...' and defines, inter alia, 'the objectives to which

the Structural Funds and the Cohesion Fund ... are to contribute, the criteria for Member States and regions to be eligible under those Funds, the financial resources available and the criteria for their allocation’.

5 Article 3(2) of Regulation No 1083/2006 provides:

‘[T]he ERDF, the ESF [and] the Cohesion Fund ... contribute ... towards achieving the following three objectives:

- (a) the Convergence objective, which shall be aimed at speeding up the convergence of the least-developed Member States and regions by improving conditions for growth and employment through the increasing and improvement of the quality of investment in physical and human capital, the development of innovation and of the knowledge society, adaptability to economic and social changes, the protection and improvement of the environment, and administrative efficiency. This objective shall constitute the priority of the Funds;
- (b) the Regional competitiveness and employment objective, which shall, outside the least-developed regions, be aimed at strengthening regions’ competitiveness and attractiveness as well as employment ...;
- (c) the European territorial cooperation objective, which shall be aimed at strengthening cross-border cooperation through joint local and regional initiatives ...’.

6 Title I of Regulation No 1083/2006 contains Chapter III, entitled ‘Geographical eligibility’, which contains Articles 5 to 8 of that regulation, entitled respectively ‘Convergence’, ‘Regional competitiveness and employment’, ‘European Territorial Cooperation’ and ‘Transitional support’.

7 Pursuant to Article 5 thereof:

‘1. The regions eligible for funding from the Structural Funds under the Convergence objective shall be regions corresponding to level 2 of the common classification of territorial units for statistics (hereinafter NUTS level 2) within the meaning of Regulation (EC) No 1059/2003 [of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ 2003 L 154, p. 1] whose gross domestic product (GDP) per capita, measured in purchasing power parities and calculated on the basis of Community figures for the period 2000 to 2002, is less than 75% of the average GDP of the EU-25 for the same reference period.

...

3. Immediately following the entry into force of this Regulation, the Commission shall adopt the list of regions fulfilling the criteria under paragraph 1 ... This list shall be valid from 1 January 2007 to 31 December 2013.

...’

8 Article 22 of Regulation No 1083/2006, entitled ‘Non transferability of resources’, provides:

‘The total appropriations allocated by Member State under each of the objectives of the Funds and their components shall not be transferable between them.

...’

9 Article 32 of that regulation states:

‘1. The activities of the Funds in the Member States shall take the form of operational programmes within the national strategic reference framework. Each operational programme shall cover a period between 1 January 2007 and 31 December 2013. An operational programme shall cover only one of the three objectives referred to in Article 3, save as otherwise agreed between the Commission and the Member State.

...

5. The Commission shall adopt each operational programme as soon as possible but no later than four months following its formal submission by the Member State ...’

10 Under Article 34 of the same regulation, entitled ‘Specific character of the Funds’:

‘1. Operational programmes shall receive financing from only one Fund ...

2. Without prejudice to the derogations laid down in the specific regulations of the Funds, the ERDF and the ESF may finance, in a complementary manner and subject to a limit of 10% of Community funding for each priority axis of an operational programme, actions falling within the scope of assistance from the other Fund, provided that they are necessary for the satisfactory implementation of the operation and are directly linked to it.

...’

11 Article 35 of Regulation No 1083/2006, entitled ‘Geographical scope’, provides:

‘1. Operational programmes submitted under the Convergence objective shall be drawn up at the appropriate geographical level and at least at NUTS level 2.

Operational programmes submitted under the Convergence objective with a contribution from the Cohesion Fund shall be drawn up at national level.

...’

12 Article 56(4) of Regulation No 1083/2006, entitled ‘Eligibility of expenditure’, reads:

‘The rules on the eligibility of expenditure shall be laid down at national level subject to the exceptions provided for in the specific Regulations for each Fund. They shall cover the entirety of the expenditure declared under the operational programme.’

Decision 2006/595

13 Pursuant to Article 1 of, and Annex I to, Commission Decision 2006/595/EC of 4 August 2006 drawing up the list of regions eligible for funding from the Structural Funds under the Convergence objective for the period 2007-2013 (OJ 2006 L 243, p. 44), the NUTS 2 regions eligible under Article 5(1) of Regulation No 1083/2006 are, so far as concerns the Portuguese Republic, the North, Centre and Alentejo regions and the Autonomous Region of the Azores.

14 Pursuant to Article 2 of, and Annex II to, Decision 2006/595, so far as concerns the Portuguese Republic, the Algarve region is a NUTS 2 region which is also eligible for funding from the Structural Funds under the Convergence objective, but only on a transitional basis, as set out in Article 8 of Regulation No 1083/2006.

- 15 The Lisbon region is not referred to in Decision 2006/595 and is thus not eligible for funding from the Structural Funds under the Convergence objective. It is, however, eligible for funding under the Regional Competitiveness and Employment objective.

The National Strategic Reference Framework

- 16 On 28 June 2007 the Portuguese Government approved a National Strategic Reference Framework ('NSRF') within the meaning of Article 32(1) of Regulation No 1083/2006.
- 17 Point 6 of Annex V to the NSRF provides:

'Expenditure relating to operations co-financed by the Structural Funds and by the Cohesion Fund shall be eligible under the Operational Programmes if it is affected in the NUTS 2 regions covered by each of those Operational Programmes.

That general criterion of territorial eligibility of expenditure shall, as a rule, operate according to the location of the investment. In the case of tangible investments (in which the location of the investment is clearly identifiable) it shall be of immediate application. In the case of intangible investments, the criterion of territorial eligibility shall be assessed according to the location of the beneficiary body – defined by the location of its headquarters or by the location of the sub-office (or establishment) responsible for carrying out the operation.

Expenditure relating to the following shall constitute an exception to the general rule of territorial eligibility:

- (a) Operations with relevant spill-over effect in the areas and according to the procedures defined in sections 7 and 8;
- (b) ...'

- 18 Point 7 of Annex V to the NSRF states:

'Expenditure relating to operations carried out in the NUTS 2 Lisbon region ... but whose effects spill over to the other regions of the mainland and are considered very relevant for the development of the 'Convergence' regions of mainland Portugal shall constitute an exception to the general rule of territorial eligibility.

[List of the categories of investments falling within those exceptions]

Those categories of interventions constitute exceptional cases, which are duly justified according to the nature of the operations and the multiplying effect that they give rise to in regions other than those in which the investment is made. Those categories, taken together, represent a small percentage of funds provided for programmes under the Structural Funds. The guidelines set out below, established together with the European Commission and the Portuguese authorities, may, where necessary, be made subject to additional specifications in the context of each thematic operational programme.'

- 19 Point 8 of Annex V to the NSRF establishes 'specific methods' to determine the eligibility of expenditure in the light of the spill-over effects outside of the Lisbon region.

The Operational Programme for Human Potential

20 One of the Operational Programmes provided for by the NSRF is the Human Potential Programme ('OPHP'). One of the main axes (axis 3) of the OPHP concerns further training and contains a category of investment entitled 'Strategic training for management and innovation in public administration' ('training in public administration').

21 The training in public administration is referred to, in point 7 of Annex V to the NSRF, among the categories of investments which fall within the exceptions to the rule of territorial eligibility. In that regard, point 8 of that annex states:

'Noting that ... the objectives pursued favour, in particular, the reduction of administrative costs and the improvement of national competitiveness by improving administrative efficiency, it is particularly important to point out that, notwithstanding the significant concentration of human resources in public administration in the Lisbon region, the effects of efforts to consolidate have necessarily had repercussions on the whole of national territory as a result of the nature of the bodies and services which they provide (aimed at citizens and/or economic operators as a whole).

That concentration of services in the capital region explains why a significant part of the investments to be made are concentrated in that region ...'

22 Point 8 provides as a 'specific method' for that training:

(a) Evaluation of the spill-over effects in the convergence regions of mainland Portugal in accordance with the concentration of the resident population in those regions.

(b) Quantification of the spill-over effects:

concentration of the resident population in the NUTS 2 North, Centre and Alentejo regions in relation to the resident population of mainland Portugal: 68.5% ...

(c) Quantification of the costs incurred in the NUTS 2 Lisbon region, which are eligible for OPHP:

for each investment of an amount of EUR 1 000 in strategic training for management and innovation in public administration made in the NUTS 2 Lisbon region, the amount invested of EUR 685 shall be eligible under axis 3 of the OPHP.

The amount which is non-eligible under axis 3 of the OPHP shall be financed by the respective Lisbon axis (whose resident population corresponds to 27.5% of the population of mainland Portugal) and Algarve axis (whose resident population corresponds to 4% of the population of mainland Portugal) and/or by means of national resources.'

23 On 16 October 2007, the Commission approved, on the basis of Article 32(5) of Regulation No 1083/2006, the OPHP as a 'multi-objective' programme, that is to say, first, under the Convergence objective in the North, Centre and Alentejo regions and, on a transitional basis, in the Algarve region and, second, under the 'Regional Competitiveness and Employment' objective in the Lisbon region.

The dispute in the main proceedings and the questions referred for a preliminary ruling

24 By decisions of 15 and 26 September 2008 and of 15 October, 4 November and 26 December 2008, the Comissão Directiva do Programa Operacional Potencial Humano approved the applications of the Instituto Nacional de Administração (National Institute for Administration), the Sindicato dos

Quadros Técnicos do Estado (State Union of Technical Executives), the Instituto Superior de Ciências do Trabalho e da Empresa (Higher Institute of Employment and Entrepreneurial Science), the Ministério da Saúde (Ministry for Health) and the Instituto do Desporto de Portugal (Institute of Sport of Portugal) for funding for investments under the OPHP in relation to training in public administration.

- 25 Since those candidates are all established in the Lisbon region, in so far as the funding applied for fell under the Convergence objective laid down in Article 5 of Regulation No 1083/2006, those decisions were adopted pursuant to the exception provided for in point 6(a) of Annex V to the NSRF.
- 26 Considering that exception to be incompatible with European Union law and that the decisions adopted by the Comissão Directiva do Programa Operacional Potencial Humano thus unlawfully reduced the funds available for the interested bodies established in the Portuguese NUTS 2 regions which are eligible under the Convergence objective, GAMP brought an action seeking the annulment of those decisions before the Tribunal Administrativo e Fiscal do Porto.
- 27 By order of 20 December 2010 that court declared that the action had become devoid of purpose in so far as it had been brought against the decision approving the application of the Ministério da Saúde.
- 28 As regards the other aspects of the dispute, the Tribunal Administrativo e Fiscal do Porto decided, by decision of 19 October 2011, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Must [European Union] law and, in particular, the provisions of Articles 5 to 8, 22, 32, 34, 35 and 56 of ... Regulation ... No 1083/2006 ... and Articles 174, 175 and 176 [TFEU], be interpreted as meaning that it does not allow exceptions to the principle of territorial eligibility of expenditure, that is, that expenditure relating to operations co-financed by the Structural Funds and by the Cohesion Fund is eligible under the Operational Programmes only if it is effected in the NUTS 2 regions covered by each of those Operational Programmes?
 2. Specifically, must the abovementioned instruments be interpreted as meaning that they do not allow national authorities to establish rules that, by constituting exceptions to the principle of territoriality of expenditure, allow investments to be considered eligible under Operational Programmes specifically aimed at the Convergence objective if the location of those investments, or of the beneficiary body, is not situated in the NUTS 2 regions covered by such Operational Programmes?
 3. Or, on the contrary, must [European Union] law and, in particular, the provisions in Articles 5 to 8, 22, 32, 34, 35 and 56 of ... Regulation ... No 1083/2006 ... and Articles 174, 175 and 176 [TFEU], be interpreted as meaning that they do not preclude the existence of exceptions to the principle of territorial eligibility of expenditure, allowing national authorities to establish rules that allow the expenditure relating to operations co-financed by the Structural Funds and by the Cohesion Fund to be considered as eligible under the Operational Programmes, even though it is not effected in the NUTS 2 regions covered by each of those Operational Programmes, particularly when those exceptions relate to expenditure/operations with a relevant spill-over effect, that is, justified according to the nature of the operations and the multiplying effect that they give rise to in regions other than those in which the investment is made?
 4. More specifically, do those instruments preclude national authorities from establishing rules that allow investments to be considered eligible in the context of Operational Programmes aimed at the Convergence Objective where those investments, or the beneficiary body, are not located in the NUTS 2 regions covered by that Convergence objective, particularly where they relate to

expenditure/operations with a relevant spill-over effect, that is, justified according to the nature of the operations and the multiplying effect that they give rise to in regions other than those in which the investment is made?’

Consideration of the questions referred

- 29 By its questions, which should be examined together, the referring court asks, in essence, whether the provisions of European Union primary law concerning economic, social and territorial cohesion and Regulation No 1083/2006 preclude an investment co-financed by the European Union from being implemented from a place located outside of the eligible regions and by an operator established in such a place.
- 30 In that regard, it is apparent from the second paragraph of Article 174 TFEU, read in conjunction with the first paragraph of Article 175 TFEU, that the Structural Funds and the other financial instruments of the European Union which contribute to economic, social and territorial cohesion aim, in particular, to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions. Moreover, that objective is reiterated in recital 1 in the preamble to Regulation No 1083/2006 and must be taken into account by the Member States when implementing investments co-financed by those funds and instruments (see, on that latter point, Case C-166/07 *Parliament v Council* [2009] ECR I-7135, paragraph 45).
- 31 Similarly, Article 3(2)(a) of Regulation No 1083/2006 states that the priority of the Structural Funds and the Cohesion Funds is to speed up the convergence of the least-developed Member States and regions.
- 32 In line with that aim, the European Union legislature has laid down criteria to define the regions and zones which are eligible. So far as concerns the Convergence objective, Article 5 of Regulation No 1083/2006 states that the regions eligible for funding from the Structural Funds are the NUTS 2 regions, that is to say those ‘whose gross domestic product (GDP) per capita, measured in purchasing power parities and calculated on the basis of Community figures for the period 2000 to 2002, is less than 75% of the average GDP of the EU-25 for the same reference period’.
- 33 It is also clear from that aim and from the criteria used to pursue it that the use of Structural Funds to achieve the Convergence objective must benefit the NUTS 2 regions specifically. That condition is, moreover, highlighted by the expression ‘Geographical eligibility’, adopted in the title of the chapter containing Articles 5 to 8 of Regulation No 1083/2006, and in the first subparagraph of Article 35(1) of that regulation, pursuant to which, each Operational Programme falling within that objective must be drawn up ‘at the appropriate geographical level and at least at NUTS level 2’.
- 34 By contrast, it cannot be inferred from Regulation No 1083/2006 or from the provisions of primary law concerning economic, social and territorial cohesion that the operator entrusted with implementing the investment must necessarily be established in the region for which that investment is intended. In addition, it does not result from those texts that the use of funds must, in all cases, physically take place in that region.
- 35 As submitted by the Portuguese Government and the European Commission, the interests of the region set to benefit from the co-financing by the European Union are best served where the operator entrusted with implementation provides the best qualitative and quantitative guarantees that the project will be carried out. The fact that that operator is established outside of that region should not be an obstacle to assigning the project to it. In that regard, it needs to be borne in mind that, although the Structural Funds and the other financial instruments of the European Union – set out in paragraphs 30 and 31 above – aim to speed up the convergence of the least-developed regions, they do not, however, aim to reserve the provision of services rendered in the context of programmes

co-financed by the European Union only to operators established in those regions. In line with that aim, it is those regions which must benefit from the co-financing by the European Union and not the operators which are established there.

- 36 Similarly, as stated by the Portuguese and Netherlands Governments, the interests of the eligible region are sometimes served just as well when the investment is implemented from a place located outside of that region.
- 37 Given the foregoing considerations, the fact that the entities at issue in the main proceedings entrusted with implementing the investment are established in a place outside of the NUTS 2 regions referred to and that they provide, from that place, training for civil servants working in public administration – who carry out their duties for the inhabitants of those regions – does not infringe the rules of geographical eligibility laid down in Regulation No 1083/2006.
- 38 However, in so far as co-financed under the Convergence objective, the investment thus implemented must, evidently, target specifically and identifiably those NUTS 2 regions. In the case in the main proceedings, it is for the referring court to examine whether that condition is satisfied. In particular, it is required to assess whether the rule set out in point 8 of Annex V to the NSRF – that 68.5% of the expenditure effected in Lisbon is eligible since the effects brought about by that proportion of the expenditure occur in the North, Centre and Alentejo regions – is duly justified.
- 39 In the light of the above, the answer to the questions referred is that the provisions of European Union primary law concerning economic, social and territorial cohesion and Regulation No 1083/2006 must be interpreted as not precluding an investment co-financed by the European Union from being implemented from a place located outside of the eligible regions and by an operator established in such a place, provided that the investment targets specifically and identifiably the eligible regions.

Costs

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The provisions of European Union primary law concerning economic, social and territorial cohesion and Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 must be interpreted as not precluding an investment co-financed by the European Union from being implemented from a place located outside of the eligible regions and by an operator established in such a place, provided that the investment targets specifically and identifiably the eligible regions.

[Signatures]