



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Joined Cases C-197/11 and C-203/11
Libert and Others and All Projects & Developments and Others v Flemish
Government

Advocate General Mazak considers that the Flemish Decree on land and buildings policy is contrary to European Union law

Making the transfer of land and constructions subject to the condition that there exists a sufficient tie between the prospective buyer or tenant and the relevant municipality constitutes an unjustified restriction on the fundamental freedoms

In Belgium, a decree of the Flemish Region of 27 March 2009 on land and buildings policy links the transfer of property in certain Flemish municipalities to the condition that there exists a sufficient tie between the prospective buyer or tenant and the relevant municipality. The same decree also imposes a social obligation on subdividers and developers, while providing for tax incentives and subsidy mechanisms.

The Constitutional Court (Belgium), before which several applications for annulment of that decree have been brought, asks the Court of Justice whether the decree is compatible with European Union law, namely the fundamental freedoms and the rules on State aid and public contracts.

In today's opinion, Advocate General Ján Mazak looks, first, at the condition that there exists a sufficient tie between the prospective buyer or tenant and the target municipality, that is to say one of the municipalities in which the average price of land is the highest per square meter. He takes the view that that condition constitutes a restriction on the fundamental freedoms. In reality, that condition amounts to a prohibition imposed on certain persons on buying and leasing for more than nine years land and the buildings erected thereon.

However, he points out that it is for the Constitutional Court to determine the precise aim of the decree on land and buildings. If that decree actually aims to encourage residency by the less affluent endogenous population in the target municipalities, as the Flemish Government maintains, such an objective could be regarded as a social objective linked to regional planning policy which would constitute an overriding reason in the public interest. Nonetheless, the Advocate General refers to the position defended, in that regard, by the French Community, which argues that the real objective of the decree is to preserve the Flemish nature of the population of the target municipalities. In the Advocate General's view, it is clear that such an objective could not be regarded as an overriding reason in the public interest.

In any event, even assuming that the condition that there exists a sufficient tie on the part of the prospective buyer or tenant of the immovable property might be appropriate for attaining the objective pursued, the Advocate General considers that measure goes beyond what is necessary to attain the objective.

The decree on land and buildings sets out three alternative criteria for fulfilling the condition as to the existence of a sufficient tie with the target municipality. The first criterion is the requirement that a person to whom the immovable property is to be transferred must have been resident in the target municipality for at least six years before the transfer. In accordance with the second criterion, the prospective buyer or tenant should, at the date of the transfer, carry out activities in the municipality concerned. The third criterion provides for a professional, family, social or economic tie as a result of a major and long-standing circumstance. It is for the provincial

evaluation committee to assess whether the prospective buyer or tenant of the immovable property satisfies one or more of those criteria.

According to the Advocate General, other measures could meet the objective pursued without necessarily resulting in a prohibition on purchasing or leasing. There could be, for example, subsidies for purchase, price regulation in target municipalities or measures adopted by the authorities to assist the protected endogenous population.

Next, as regards the tax incentives and subsidy mechanisms provided for by the land and buildings decree, the Advocate General considers that those measures can be divided into two groups having separate aims. The measures forming part of the first group aim to reactivate the use of certain lands and buildings. They are the tax reduction granted to a lender who concludes a renewal agreement, and the reduction of the tax base for stamp duty. The measures forming part of the second group compensate for the social obligation to which subdividers and developers are subject. That group includes the reduced rate of value added tax on the sale of housing and the reduced stamp duty for the purchase of building land, the infrastructure subsidies of the land and buildings decree and the guarantee of purchase by a social housing organisation of the social housing unit developed.

In response to the question referred by the Constitutional Court, which seeks to determine whether the measures at issue should be classified as State aid and if they should be notified to the Commission, the Advocate General takes the view that it is for the referring court to determine whether those measures are liable to affect trade between Member States and whether they satisfy the conditions set out in the case-law of the Court of Justice.

Another series of questions of the Constitutional Court relates to a social obligation which, within the meaning of the land and buildings decree, requires subdividers and developers to ensure a supply of social housing units. In that context, the Advocate General considers that it is necessary to determine the objective of the rules at issue and to determine whether that objective can be regarded as an overriding reason in the public interest.

According to the Flemish Government, the rules address a real problem, more precisely a critical shortage of affordable housing. For the Advocate General, it thus seems that a social obligation is related to the public housing policy in a Member State and to the financing of that policy, which the Court has already recognised as an overriding reason in the public interest. However, it is for the referring court to determine the precise aim of the rules at issue and whether that social obligation satisfies the principle of proportionality, in other words whether it is suitable for securing an increase in the supply of social housing and whether or not the established objective could be pursued by less restrictive measures with regard to the free movement of capital.

Finally, the Constitutional Court asks whether the concept of 'public works contract' contained in Directive 2004/18¹ applies in this case, namely to rules which make the granting of a building or land subdivision authorisation subject to a social obligation entailing the development of social housing units which should subsequently be sold at capped prices to, or, with substitution, by, a public institution. The Advocate General considers that the directive applies to such rules, provided that, firstly, they provide for the existence of a contract concluded between a contracting authority and that, secondly, an economic operator has a real opportunity to negotiate with the contracting authority the content of that contract and the price to be applied to the works carried out.

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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