JUDGMENT OF THE COURT (First Chamber)

8 May 2013 (*)

(Fundamental freedoms – Restriction – Justification – State aid – Concept of 'public works contract' – Land and buildings located in certain communes – National legislation making the transfer of land and buildings subject to the condition that there exists a 'sufficient connection' between the prospective buyer or tenant and the target commune – Social obligation on subdividers and developers – Tax incentives and subsidy mechanisms)

In Joined Cases C-197/11 and C-203/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 6 April 2011, received at the Court on 28 April 2011, in the proceedings

Eric Libert,

Christian Van Eycken,

Max Bleeckx,

Syndicat national des propriétaires et copropriétaires ASBL,

Olivier de Clippele

v

Gouvernement flamand,

intervening parties:

Collège de la Commission communautaire française,

Gouvernement de la Communauté française,

Conseil des ministres (C-197/11),

and

All Projects & Developments NV and Others,

v

Vlaamse Regering,

intervening parties:

College van de Franse Gemeenschapscommissie,

Franse Gemeenschapsregering,

Ministerraad,

Immo Vilvo NV,

PSR Brownfield Developers NV (C-203/11),

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Ilešič, E. Levits, J.-J. Kasel and M. Safjan, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2012,

after considering the observations submitted on behalf of:

– Mr Libert, Mr Van Eycken and Mr Bleeckx, by F. Gosselin, avocat,

– the Syndicat national des propriétaires and copropriétaires ASBL, by C. Lesaffer and E. Desair, avocats,

– All Projects & Developments NV and Others, by P. de Bandt and J. Dewispelaere, advocaten,

– the Vlaamse Regering, by P. van Orshoven and A. Vandaele, advocaten,

– the Collège de la Commission communautaire française and the gouvernement de la Communauté française, by M. Uyttendaele and J. Sautois, avocats,

– Immo Vilvo NV, by P. Flamey and P. J. Vervoort, advocaten,

– the German Government, by T. Henze and A. Wiedmann, acting as Agents,

– the Netherlands Government, by C. Wissels, C. Schillemans and K. Bulterman, acting as Agents,

– the European Commission, by T. van Rijn, I. Rogalski, S. Thomas and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 October 2012,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The requests have been made in two sets of proceedings brought against the Vlaamse Regering (Flemish Government) by, on the one hand, Mr Libert, Mr Van Eycken, Mr Bleeckx, the Syndicat national des propriétaires et copropriétaires ASBL and Mr de Clippele and, on the other, All Projects & Developments NV and 35 other companies concerning provisions which make the transfer of property located in certain communes selected by the Vlaamse Regering ('the target communes') subject to a 'special condition' that the property may be 'transferred', meaning sold, leased for more than nine years or subject to a grant of a right under a long-term lease or a building lease, only to persons who have, in the opinion of a provincial assessment committee, a 'sufficient connection' with the communes in question.

3 In addition, in Case C-203/11, the Grondwettelijk Hof (Constitutional Court) asks the Court whether Articles 49 TFEU, 56 TFEU, 63 TFEU, 107 TFEU and 108 TFEU, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), and 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), as amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 188, p. 14) ('Directive 2004/18'), preclude provisions which impose, in certain situations, a 'social obligation' on persons who subdivide areas of land into plots (subdividers) and developers, which entails, in essence, the use of part of their building project for the development of social housing units or the payment of a social contribution, in return for which those operators may benefit from tax incentives and subsidy mechanisms.

Legal context

European Union Law

4 Article 1 of Directive 2004/18 provides:

'(1) For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

(2) (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the

activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…’

5 Under Article 1 of Directive 2004/38:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by [European] Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.’

6 Article 3(1) of Directive 2004/38 is worded as follows:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

7 Article 22 of Directive 2004/38, which is entitled ‘Territorial scope’, provides:

‘The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.’

8 Article 24 of Directive 2004/38, which is entitled ‘Equal treatment’, provides in paragraph 1:

‘Subject to such specific provisions as are expressly provided for in the [EC] Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.’

9 Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, p. 67) (‘the SGEI Decision’), provides in Article 1:

‘This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) [EC].’

10 Article 3 of the SGEI Decision, which is entitled ‘Compatibility and exemption from notification’, provides:

‘State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the common market and shall be exempt from the obligation of prior notification provided for in Article 88(3) of the Treaty, without prejudice to the application of stricter provisions relating to public service obligations contained in sectoral Community legislation.’

11 Recital 9 in the preamble to Directive 2006/123 is worded as follows:

‘This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards …’.

12 Article 2 of Directive 2006/123, which is entitled ‘Scope’, provides:

‘(1) This Directive shall apply to services supplied by providers established in a Member State.

(2) This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

…

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

…’

Belgian law

13 Book 4 of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy (*Belgisch Staatsblad* of 15 May 2009, p. 37408) (‘the Flemish Decree’) on ‘Measures concerning affordable housing’ contains, in Chapter 3 of Title 1, which is entitled ‘Social obligations’, Article 4.1.16 which is worded as follows:

‘(1) Where a land subdivision project or building project is subject to a rule as defined under Chapter 2, Section 2, a social obligation shall be linked by operation of law to the land subdivision authorisation or, as the case may be, the planning permission.

A social obligation … shall require a subdivider or developer to take steps to ensure delivery of a supply of social housing units consistent with the percentage applicable to the land subdivision or building project.

…'

14 Article 4.1.17 in Chapter 3 of the Flemish Decree provides:

'The subdivider or developer shall have the option of discharging a social obligation in one of the following ways:

1. in kind, in accordance with Articles 4.1.20 to 4.1.24;

2. by the sale to a social housing organisation of the land required for the prescribed supply of social housing, in accordance with Article 4.1.25;

3. by the leasing to a social rental agency of housing developed in the context of a land subdivision or building project, in accordance with Article 4.1.26;

4. by a combination of points 1, 2 and/or 3.'

15 Under Article 4.1.19 of the Flemish Decree:

'The subdivider or developer may discharge in whole or in part a social obligation through payment of a social contribution to the commune in which the land subdivision project or building project is developed. The social contribution shall be calculated by multiplying the number of social housing units or social lots which are in principle to be developed by EUR 50 000 and by indexing that amount on the basis of the ABEX index, the reference index being that of December 2008. …'.

16 Articles 4.1.20 to 4.1.24 of the Flemish Decree provide, for the benefit of private undertakings discharging the 'social obligation' in kind, tax incentives and subsidy mechanisms such as the application of a reduced rate of value added tax (VAT) and a reduced rate of stamp duty (Article 4.1.20(3), second subparagraph), a purchase guarantee in respect of the housing developed which no social housing organisation is prepared to purchase (Article 4.1.21) and infrastructure subsidies (Article 4.1.23).

17 Under Article 4.1.22 of the Flemish Decree:

'Social housing units for purchase and social lots developed on the basis of the social obligation shall be offered in the name and on behalf of the subdivider or developer by a social housing organisation operating in the commune. The offer shall be made in accordance with the conditions established by the Flemish Government on the transfer of immovable property by the Vlaamse Maatschappij voor Sociaal Wonen and the social housing organisations. The subdivider or developer and the social housing organisation shall to that end conclude an administration agreement.

The social housing organisation shall, with regard to the social housing units for purchase and the social lots in question, exercise all the rights defined in or arising under the Flemish Housing Code, as if they had themselves developed the social housing units for purchase and the social lots.'

18 Book 3 of the Flemish Decree also provides for subsidies to be granted irrespective of whether any 'social obligation' is discharged. In particular, these are subsidies for 'activation projects' (Article 3.1.2 of that decree), a reduction in the tax on natural persons which is obtained on conclusion of renovation agreements (Articles 3.1.3 et seq. of that decree) and a flat-rate reduction of the taxable amount for stamp duty (Article 3.1.10 of that decree).

19 Book 5 of the Flemish Decree, which is entitled 'Living in your own region', provides in Article 5.2.1:

'(1) A specific requirement shall apply to the transfer of land and buildings constructed thereon in regions which satisfy the two conditions referred to below:

1. the land and buildings constructed thereon are within a "residential extension area" laid down by the Royal Decree of 28 December 1972 on the presentation and implementation of draft plans and sector plans, as at the date of entry into force of this decree;

2. the land and buildings constructed thereon are, when the private transfer instrument is signed, located in the target communes which appear on the most recent list published in the *Belgisch Staatsblad*, as prescribed in Article 5.1.1, it being understood that the private transfer instrument shall be regarded for the application of this provision as having being signed six months before attribution of a fixed date, if more than six months have elapsed between the date of signature and the date of attribution of a fixed date.

The special transfer condition means that the land and buildings constructed thereon may be transferred only to persons who have, in the opinion of a provincial assessment committee, a sufficient connection with the commune. "Transfer" shall mean sale, leasing for more than nine years, or grant of a right under a long-term lease or a building lease.

…

The special transfer condition shall expire, definitively and without any right of renewal, twenty years after the date of attribution of a fixed date to the initial transfer subject to the condition.

…

(2) For the purposes of [Article 5.2.1, second subparagraph], a person shall have a sufficient connection with the commune if he satisfies one or more of the following conditions:

1. he has been continuously resident in the commune or in a neighbouring commune for at least six years, provided that that commune is also included on the list prescribed in Article 5.1.1;

2. on the date of transfer, he carries out activities in the commune, provided that those activities occupy on average at least half a working week;

3. he has established a professional, family, social or economic connection to the commune as a result of a significant circumstance of long duration.

…'

20 For the purposes of the application of those provisions, the 'target communes', in accordance with Article 5.1.1 of the Flemish Decree, are the communes in which the average price of land is highest per square metre and in which internal or external migration is highest. Under the Order of the Flemish Government of 19 June 2009 establishing a list of communes for the purposes of Article 5.1.1(1) of the Decree of 27 March 2009 on land and real estate policy (*Belgisch Staatsblad* of 22 September 2009, p. 63341) that there are 69 target communes.

21 Lastly, under Article 5.2.3 of the Flemish Decree, the provincial assessment committee and third parties who are adversely affected may apply for annulment of a transfer which has taken place in disregard of the special condition.

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

Case C-197/11

22 In Case C-197/11, Mr Libert, Mr Van Eycken and Mr Bleeckx, who are resident in Belgium, the Syndicat national des propriétaires et copropriétaires ASBL and Mr de Clippele, notary, applied to the Cour constitutionnelle (Constitutional Court) for annulment of the provisions of Book 5 of the Flemish Decree on the ground that they restrict the right to purchase or sell property in the target communes.

23 In its order for reference, the Constitutional Court states in that connection that the contested provisions limit the opportunities for people who are not considered to have a 'sufficient connection' with the target communes, within the meaning of Article 5.2.1(2) of the Flemish Decree, to acquire land or buildings thereon, to take out a lease of more than nine years or to acquire rights to a long lease or building lease, in those communes. Moreover, the contested provisions may have the effect of deterring citizens of the Union who own or rent a property in those communes from leaving them to reside in another Member State or pursue a professional activity there since after a certain period of residence outside those communes, they would no longer have a 'sufficient connection' to them.

24 In that regard, the Constitutional Court considers that, according to the *travaux préparatoires* of the Flemish Decree, its purpose is to respond to the housing needs of the local population in certain Flemish communes where the high land prices lead to 'gentrification', whereby less affluent population groups are excluded from the property market due to the arrival of 'financially stronger' population groups from other communes. The Constitutional Court is therefore uncertain, first, whether such an objective can be regarded as being in the 'public interest' in the light of the Court's case-law and thus as justifying the restrictive measures adopted by the Flemish Government and, second, whether those measures are necessary and proportionate to attain such an objective.

25 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 … to be interpreted as precluding the scheme established by Book 5 of the [Flemish] Decree which, in certain communes referred to as “target communes”, makes the transfer of land and buildings thereon conditional upon the purchaser or the lessee demonstrating a sufficient connection with those communes for the purposes of Article [5.2.1(2)] of the Decree?’

Case C-203/11

26 The dispute in the main proceedings concerns an application for annulment of several provisions of the Flemish Decree brought before the Constitutional Court by All Projects & Developments NV and 35 other companies governed by Belgian law and professionally active in the property sector in the Flemish Region.

27 Those companies claim that the social obligation imposed on them pursuant to Book 4 of the Flemish Decree is contrary to European Union (‘EU’) law, in particular the freedom of establishment, the freedom to provide services and the free movement of capital, and Directives 2006/123 and 2004/18, and that the tax incentives and subsidy mechanisms, provided for in Book 4, from which they benefit in return for discharging the social obligation, may constitute unlawful State aid which could be subject to a recovery order as they were not notified to the European Commission.

28 Moreover, those companies claim that the ‘special condition’ relating to the transfer of property, provided for in Book 5 of the Flemish Decree, constitutes an obstacle to the exercise of rights under EU law and fundamental freedoms under the FEU Treaty given that, as a result of the application of that condition, there has been a reduction in the number of potential buyers for the lots and housing units developed by those companies in the target communes.

29 In that context, having doubts as to the interpretation of the relevant provisions of EU law, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Should Articles 107 [TFEU] and 108 [TFEU], whether or not read in conjunction with [the SGEI Decision], be interpreted as requiring that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3)(2), 4.1.21 and 4.1.23 of the [Flemish Decree] should be notified to the European Commission before the adoption or entry into force of those provisions?

2. Should a scheme which by operation of law imposes on private actors whose land subdivision or building projects are of a certain minimum size, a “social obligation” amounting to a percentage of a minimum of 10% and a maximum of 20% of that land subdivision or that building project, which can be performed in kind or by the payment of a sum of [EUR] 50 000 for each social lot or dwelling not realised, be appraised against the freedom of establishment, against the freedom to provide services or against the free movement of capital, or should it be classified as a complex scheme which should be appraised against each of those freedoms?

3. Having regard to Article 2(2)(a) and (j) thereof, is Directive 2006/123… applicable to a compulsory contribution by private actors to the delivery of social houses and apartments, which is imposed by operation of law as a "social obligation" linked to every building or land subdivision authorisation sought in respect of a project of a minimum size as determined by law, where the social housing units delivered are bought at predetermined capped prices by social housing companies to be rented out to a broad category of individuals, or, by substitution, are sold by the social housing company to individuals belonging to the same category?

4. If the third question referred is answered in the affirmative, should the concept of "requirement to be evaluated" in Article 15 of Directive 2006/123… be interpreted as meaning that it covers an obligation on private actors to contribute, in addition to, or as part of their usual activity, to the construction of social housing, and to transfer the units developed at capped prices to semi-public authorities, or through substitution of the latter, even though those private actors then have no right of initiative in the social housing market?

5 If the third question referred is answered in the affirmative, should the national court apply a penalty, and if so, what penalty, to:

   (a) the finding that a new requirement, subjected to evaluation in accordance with Article 15 of Directive 2006/123…, was not specifically evaluated in accordance with Article 15(6) of that directive;

   (b) the finding that no notification of that new requirement was given in accordance with Article 15(7) of that directive?

6. If the third question referred is answered in the affirmative, should the concept of "prohibited requirement" in Article 14 of Directive 2006/123… be interpreted as precluding a national scheme, in the cases described in that article, not only if it makes access to a service activity or the exercise of it subject to compliance with a requirement, but also if that scheme merely provides that non-compliance with that requirement will cause the financial compensation for the performance of a service prescribed by law to lapse, and that the financial guarantee supplied in regard to the performance of the service will not be reimbursed?

7. If the third question referred is answered in the affirmative, should the concept of "competing operators" in Article 14(6) of Directive 2006/123… be interpreted as meaning that it is also applicable to a public institution whose mandates can partially interfere with those of the service providers, if it takes the decisions referred to in Article 14(6) of that directive and it is also obliged, as the final step in a cascade system, to buy the social housing units developed by a service provider in the performance of the 'social obligation' imposed on him?

8. (a) If the third question referred is answered in the affirmative, should the concept "authorisation scheme" in Article 4(6) of Directive 2006/123… be interpreted to mean that it is applicable to certificates issued by a public institution after the initial building or land subdivision authorisation has already been given, and which are necessary in order to qualify for certain of the compensations for the performance of a "social obligation" which was linked by law to the original authorisation and which are also necessary in order to claim the

reimbursement of the financial guarantee imposed on the service provider in favour of the public institution?

(b) If the third question referred is answered in the affirmative, should the concept of "authorisation scheme" in Article 4(6) of Directive 2006/123… be interpreted to mean that it is applicable to an agreement which a private actor concludes with a public institution pursuant to a legal rule in the context of the substitution of the public institution in respect of the sale of a social housing unit developed by the private actor in the performance, in kind, of a "social obligation" which is linked by law to a building or land subdivision authorisation, taking account of the fact that the conclusion of that agreement is a condition for the executability of the authorisation?

9. Should Articles 49 [TFEU] and 56 [TFEU] be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the delivery of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

10. Should Article 63 [TFEU] be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

11. Should the concept of "public works contracts" in Article 1(2)(b) of Directive 2004/18… be interpreted to mean that it is applicable to a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

12. Should Articles 21 [TFEU], 45 [TFEU], 49 [TFEU], 56 [TFEU] and 63 [TFEU] and Articles 22 and 24 of Directive 2004/38… be interpreted as precluding the scheme introduced by Book 5 of the [Flemish Decree], namely the scheme whereby in certain so-called "target communes" the transfer of land and any buildings constructed thereon is made subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes within the meaning of Article 5.2.1(2) of that decree?'

30 By order of the President of the Court of 7 June 2011, Cases C-197/11 and C-203/11 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The question in Case C-197/11 and the twelfth question in Case C-203/11

31 By those questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 preclude legislation, such as Book 5 of the Flemish Decree, which makes the transfer of immovable property in the target communes subject to verification, by a provincial assessment committee, that there exists a 'sufficient connection' between the prospective buyer or tenant and those communes.

Preliminary observations

32 It must be noted at the outset that the Flemish Government claims that it is not necessary to answer those questions because, in its view, they concern only a purely internal situation quite unconnected to EU law. The actions in the main proceedings, which concern either Belgian nationals resident in Belgium or undertakings established under Belgian law, are confined within one single Member State so that the provisions of EU law relied upon are not applicable.

33 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State (see Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33, and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 45).

34 It is common ground that the applicants in the main proceedings are Belgian nationals and that all aspects of the main proceedings are confined within one Member State. However, it is by no means inconceivable that individuals or undertakings established in Member States other than the Kingdom of Belgium have been or are interested in purchasing or leasing immovable property located in the target communes and are thus affected by the provisions of the Flemish Decree in question (see, to that effect, Case C-470/11 *Garkalns* [2012] ECR I-0000, paragraph 21 and the case-law cited).

35 Moreover, as the Advocate General has noted in point 23 of his Opinion, the referring court has made a request for a preliminary ruling to the Court specifically in proceedings for the annulment of those provisions, which apply not only to Belgian nationals but also to nationals of other Member States. Consequently, the decision of the referring court that will be adopted pursuant to the present judgment will also have effects on the nationals of other Member States.

36 In those circumstances, it is necessary for the Court to rule on those two questions.

The existence of a restriction of the fundamental freedoms guaranteed by the FEU Treaty

37 In that regard, it is necessary to establish whether, and to what extent, Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 preclude legislation such as that at issue in the main proceedings.

38 It should be borne in mind, first, that Article 21 TFEU and, in their respective areas, Articles 45 TFEU and 49 TFEU, and Articles 22 and 24 of Directive 2004/38, prohibit national measures which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement within the European

Union. Such measures, even if they apply without regard to the nationality of the individuals concerned, constitute restrictions on the fundamental freedoms guaranteed by those articles (see, to that effect, Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraphs 21 and 22; Case C-253/09 *Commission* v *Hungary* [2011] ECR I-0000, paragraphs 46, 47 and 86; and Case C-46/12 *L.N.* [2013] ECR I-0000, paragraph 28).

39 In the present case, as the Constitutional Court has stated in its orders for reference, the provisions of Book 5 of the Flemish Decree prevent persons without a 'sufficient connection' with a target commune, within the meaning of Article 5.2.1(2) of that decree, from purchasing land or buildings thereon, or from taking out a lease of more than nine years or from acquiring rights to a long lease or building lease.

40 In addition, those provisions deter Union citizens who own or rent a property in the target communes from leaving them to reside in another Member State or pursue a professional activity there. If they have not stayed in the commune for a certain period of time, those citizens will not necessarily have a 'sufficient connection' any more with the commune in question, as is required by Article 5.2.1(2) of the Flemish Decree for the purpose of exercising the rights referred to in the previous paragraph.

41 It follows that the provisions of Book 5 of the Flemish Decree undoubtedly constitute restrictions on the fundamental freedoms guaranteed by Articles 21 TFEU, 45 TFEU and 49 TFEU and Articles 22 and 24 of Directive 2004/38.

42 Next, as regards the freedom to provide services under Article 56 TFEU, the provisions of the Flemish Decree at issue may also hinder the business activities of undertakings active in the property sector, as regards both undertakings established in Belgium which offer their services to, inter alia, non-residents and undertakings established in other Member States.

43 By application of those provisions, immovable property located in a target commune cannot be sold or leased to just any Union citizen, but only to those demonstrating a 'sufficient connection' with the commune in question, which clearly restricts the freedom to provide services of the property undertakings in question.

44 Lastly, with regard to the free movement of capital, it should be borne in mind that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are likely to discourage residents of one Member State from making investments in immovable property in other Member States (see Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 21).

45 That is the case, in particular, of national measures which make investments in immovable property conditional upon a prior authorisation procedure and thus restrict, by their very purpose, the free movement of capital (see *Woningstichting Sint Servatius*, paragraph 22 and the case-law cited).

46 In the cases in the main proceedings, it is common ground that Book 5 of the Flemish Decree provides for such a prior authorisation procedure to verify the existence of a 'sufficient connection' between the prospective buyer or tenant of immovable property and the target commune in question.

47 It must thus be held that the obligation to submit to such a procedure is likely to discourage non-residents from making investments in immovable property in one of the target communes in the Flemish Region and that, therefore, such an obligation constitutes a restriction of the free movement of capital under Article 63 TFEU.

48 In those circumstances, the Court finds that the provisions of Book 5 of the Flemish Decree clearly constitute a restriction of the fundamental freedoms guaranteed by Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38.

Justification of the measures established by the Flemish Decree

49 It should be borne in mind that, according to well-established case-law, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the FEU Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, are appropriate for attaining that objective and do not go beyond what is necessary to attain the objective pursued (see, inter alia, *Woningstichting Sint Servatius*, paragraph 25, and *Commission* v *Hungary*, paragraph 69).

50 In that regard, the Vlaamse Regering claims that the condition for the existence of a 'sufficient connection' between the prospective buyer or tenant and the commune in question is justified inter alia by the purpose of responding to the housing needs of the less affluent local population, in particular socially weak individuals and young families as well as single persons not yet in position to build up sufficient capital to purchase or rent immovable property in the target communes. That section of the local population is effectively excluded from the property market owing to the arrival of financially stronger population groups from other communes who can afford the high land and building costs in the target communes.

51 The objective of the regime set out in Book 5 of the Flemish Decree, as a regional planning measure, is thus to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population.

52 In that regard, it must be noted that such requirements relating to social housing policy in a Member State can constitute overriding reasons in the public interest and therefore justify restrictions such as those established by the Flemish Decree (see *Woningstichting Sint Servatius*, paragraphs 29 and 30, and Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 74).

53 However, it is also important to establish whether the existence of a 'sufficient connection' with the target commune in question constitutes a necessary and appropriate measure to attain the objective put forward by the Vlaamse Regering, as referred to in paragraphs 50 and 51 above.

54 In that regard, it is relevant that Article 5.2.1(2) of the Flemish Decree sets out three conditions, any one of which is to be met and compliance with which must be verified as a matter of course by the provincial assessment committee in order to establish whether the requirement for a 'sufficient connection' between the prospective buyer or tenant and the target commune is satisfied. The first condition is the requirement that a person to whom the immovable property is to be transferred has been resident in the target commune or a

neighbouring commune for at least six consecutive years prior to the transfer. In accordance with the second condition, the prospective buyer or tenant must, at the date of the transfer, carry out activities in the commune in question which occupy on average at least half a working week. The third condition requires the prospective buyer or tenant to have a professional, family, social or economic connection with the commune in question as a result of a significant circumstance of long duration.

55 However, as the Advocate General has noted in point 37 of his Opinion, none of those conditions directly reflects the socio-economic aspects relating to the objective put forward by the Vlaamse Regering of protecting exclusively the less affluent local population on the property market. Such conditions may be met not only by the less affluent local population but also by other persons with sufficient resources who, consequently, have no specific need for social protection on the property market. Those conditions thus go beyond what is necessary to attain the objective pursued.

56 In addition, it should be noted that less restrictive measures other than those set out in the Flemish Decree could meet the objective pursued without necessarily resulting in a *de facto* prohibition on purchasing or leasing by any prospective buyer or tenant who does not fulfil the aforementioned conditions. Provision could, for example, be made for subsidies for purchase or other subsidy mechanisms specifically designed to assist less affluent persons, in particular those who are able to prove that they have a low income, to purchase or rent immovable property in the target communes.

57 Lastly, it should be recalled, so far as concerns the third condition referred to in paragraph 54 above, requiring that the prospective buyer or tenant has a professional, family, social or economic connection with the commune in question as a result of a significant circumstance of long duration, that a prior administrative authorisation procedure cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom. Thus, if such a procedure is to be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion (see, inter alia, *Woningstichting Sint Servatius*, paragraph 35 and the case-law cited).

58 However, in the light of the vague nature of that condition and in the absence of any specification of the situations in which it would be deemed to have been met in individual cases, the provisions of Article 5.2.1 of the Flemish Decree do not comply with such requirements.

59 Consequently, a prior administrative authorisation procedure, such as that at issue in the cases in the main proceedings, cannot be considered to be based on conditions capable of adequately circumscribing the exercise of the provincial assessment committee's discretion and such a procedure cannot therefore justify a derogation from a fundamental freedom guaranteed by EU law.

60 In the light of all the foregoing considerations, the answer to the question in Case C-197/11 and the twelfth question in Case C-203/11 is that Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 preclude legislation, such as Book 5 of the Flemish Decree, which makes the transfer of immovable

property in the target communes subject to verification, by a provincial assessment committee, that there exists a 'sufficient connection' between the prospective buyer or tenant and those communes.

The second, ninth and tenth questions in Case C-203/11

61 By these questions, the referring court asks, in essence, whether Articles 49 TFEU, 56 TFEU and 63 TFEU preclude legislation such as Book 4 of the Flemish Decree, according to which a 'social obligation' is imposed on some economic operators when a building or land subdivision authorisation is granted.

62 In order to reply to these questions, it should be observed as a preliminary point that, while that legislation may be within the ambit of the three fundamental freedoms alluded to by the referring court, the fact remains, as the Advocate General has noted in point 68 of his Opinion, that the restriction of the freedom of establishment and the freedom to provide services is, in the case in the main proceedings, an inevitable consequence of the restriction of the free movement of capital and, therefore, does not justify an independent examination of that legislation in the light of Articles 49 TFEU and 56 TFEU (see, to that effect, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 51 and the case-law cited).

63 It follows that the scheme established by Book 4 of the Flemish Decree must be examined exclusively in the light of the free movement of capital.

64 In accordance with settled case-law, the measures prohibited by Article 63(1) TFEU include those which are likely to discourage residents of one Member State from making investments in immovable property in other Member States. That is the case, in particular, of national measures which make investments in immovable property conditional upon a prior authorisation procedure and thus restrict, by their very purpose, the free movement of capital (see *Woningstichting Sint Servatius*, paragraphs 21 and 22).

65 In the case in the main proceedings, it is common ground that, under Book 4 of the Flemish Decree, some subdividers or developers are required, for the grant of a building or land subdivision authorisation, to follow a procedure under which they must discharge a social obligation entailing the use of part of their building project for the development of social housing units or the payment of a financial contribution to the commune in which that project is developed.

66 In those circumstances, it must be concluded that, as stated by the referring court in its order for reference, since the investors in question cannot freely use the land for the purposes for which they wished to acquire it, the scheme established by Book 4 of the Flemish Decree constitutes a restriction of the free movement of capital.

67 However, it must be noted that, in accordance with the case-law referred to in paragraph 52 above, the obligation imposed on those economic operators to discharge the social obligation provided for by that decree, in so far as its purpose is to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population, may be justified by requirements relating to social housing policy in a Member State as an overriding reason in the public interest.

68 It is however for the referring court to assess, in the light of the circumstances of the case before it, whether such an obligation satisfies the principle of proportionality, that is to say, whether it is necessary and appropriate to attain the objective pursued.

69 In the light of all the foregoing considerations, the answer to the second, ninth and tenth questions in Case C-203/11 is that Article 63 TFEU must be interpreted as not precluding legislation such as Book 4 of the Flemish Decree, according to which a 'social obligation' is imposed on some economic operators when a building or land subdivision authorisation is granted, in so far as the referring court finds that that legislation is necessary and appropriate to attain the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population.

The first question in Case C-203/11

70 By this question, the referring court asks, in essence, whether, in the light of Articles 107 TFEU and 108 TFEU, read in conjunction with the SGEI Decision, the tax incentives and subsidy mechanisms provided for in the Flemish Decree must be classified as State aid subject to the obligation to notify the Commission.

71 Some of the measures in question are designed specifically to compensate for the social obligation to which subdividers and developers are subject and consist in: (i) a reduced rate of VAT on the sale of housing and reduced stamp duty for the purchase of building land (Article 4.1.20(3), second subparagraph, of the Flemish Decree); (ii) a purchase guarantee in respect of the housing developed (Article 4.1.21 of that decree); and (iii) infrastructure subsidies (Article 4.1.23 of that decree).

72 Other measures aim to 'reactivate' the use of land and buildings and consist in a tax reduction applicable to natural persons who conclude a renovation agreement (Article 3.1.3 et seq. of the Flemish Decree) and reduction of the tax base for stamp duty (Article 3.1.10 of that decree). As the Constitutional Court has pointed out in its order for reference, while it is true that the beneficiary of those measures is a natural person, the fact remains that undertakings active in the property renovation sector nevertheless derive an advantage indirectly.

73 In order to answer the first question in Case C-203/11, it is necessary to provide the referring court with guidance on interpretation in order to enable it to determine whether the measures described in paragraphs 71 and 72 above may be classified as State aid in accordance with Article 107(1) TFEU (Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraphs 23 and 24).

74 It is settled case-law that classification as State aid requires all the conditions set out in Article 107(1) TFEU to be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (*Fallimento Traghetti del Mediterrane*, paragraph 31 and the case-law cited, and Case C-417/10 *3M Italia* [2012] ECR I-0000, paragraph 37).

75 In the case in the main proceedings, while the referring court considers that the measures established by the Flemish Decree fulfil the first and fourth conditions referred to in paragraph 74 above, it has doubts as to the second condition relating to the impact of the

measures on trade between Member States and concerning the third condition relating to the selective nature of those measures.

76 So far as concerns the second condition, it should be borne in mind that for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 54, and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 140).

77 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see, inter alia, *Unicredito Italiano*, paragraph 56 and the case-law cited, and *Cassa di Risparmio di Firenze and Others*, paragraph 141).

78 In that regard, it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (*Unicredito Italiano*, paragraph 58, and *Cassa di Risparmio di Firenze and Others*, paragraph 143).

79 In Case C-203/11, it cannot be ruled out that the measures established by the Flemish Decree strengthen the position of beneficiary undertakings compared with other undertakings competing in intra-Community trade. In addition, the advantage, in terms of competitiveness, conferred by the subsidies granted to the operators concerned may make it more difficult for undertakings established in other Member States to penetrate the Belgian market and indeed may make it easier for the Belgian undertakings in question to penetrate other markets.

80 It should also be borne in mind that the Court has previously held that a national measure by which the public authorities grant certain undertakings a tax exemption which, although it does not involve a transfer of State resources, places those to whom it applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (see Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 30 and the case-law cited).

81 It should however be noted that, in accordance with recital 8 in the preamble to, and Article 2 of, Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles [87 EC and 88 EC] to *de minimis* aid (OJ 2007 L 139, p. 5), aid not exceeding a ceiling of EUR 200 000 over any period of three years is deemed not to affect trade between Member States and not to distort or threaten to distort competition. Such measures are excluded from the concept of State aid and are thus exempt from the notification requirement of Article 108(3) TFEU.

82 In the case in the main proceedings, it is for the referring court to determine, in the light of the foregoing guidance on interpretation and by reference to all the relevant circumstances of the case, whether trade between Member States is liable to be affected by the measures established by the Flemish Decree and whether Regulation No 1998/2006 applies to the present case.

83 So far as concerns the third condition referred to in paragraph 74 above, relating to the beneficial nature of the measures in question, it must be observed that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid (see, inter alia, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 59).

84 By contrast, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 87).

85 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 88).

86 As the Advocate General has noted in point 50 of his Opinion, before analysing those conditions, it should be noted that the case-law cited in paragraph 85 above may be applied only in relation to the measures established by Book 4 of the Flemish Decree, referred to in paragraph 71 above, which alone are intended to compensate for the social obligation to which the subdividers and developers are subject.

87 As regards the conditions that must be satisfied for the measures in question to escape classification as State aid, it should be borne in mind that, first, the undertaking receiving such compensation must actually have public service obligations to discharge, and the obligations must be clearly defined (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 89).

88 In that regard, on account in particular of the wide discretion enjoyed by the Member States, it is not inconceivable that the social obligation may be regarded as a ‘public service’. In that context, the fact, alluded to by the referring court, that the social obligation does not directly benefit individuals – the applicants for social housing – but rather the social housing companies, is irrelevant with regard to the classification of the service in question.

89 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 90).

90 In that regard, as the Advocate General has noted in point 53 of his Opinion, it appears that while the provisions of the Flemish Decree make it possible to identify the beneficiaries of the measures established by that decree, they do not however make it possible to identify, in a sufficiently objective and transparent manner, the parameters on the basis of which such compensation is calculated.

91 Third, the compensation paid cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 92).

92 Fourth, the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the requisite means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 93).

93 The examination of the two latter conditions requires an appraisal of the facts in the main proceedings.

94 However, even if the Court had before it the information necessary to enable it to make such an appraisal, which is not the case here, it must be recalled that the Court has no jurisdiction to give a ruling on the facts in an individual case or to apply the rules of EU law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (see *Servizi Ausiliari Dottori Commercialisti*, paragraph 69 and the case-law cited).

95 The Constitutional Court must therefore assess, in the light of the guidance on interpretation set out above, whether the measures at issue in the case in the main proceedings should be classified as State aid within the meaning of Article 107(1) TFEU.

96 If the referring court were to conclude that the measures compensating for the social obligation to which subdividers and developers are subject should be classified as State aid, it also asks the Court whether those measures may be exempt, pursuant to the SGEI Decision, from the obligation to notify the Commission under Article 108(3) TFEU.

97 In that regard, it should be borne in mind that, in accordance with Article 2(1)(b) of the SGEI Decision, that decision applies to inter alia State aid in the form of public service compensation granted to social housing undertakings carrying out activities qualified as services of economic interest by the Member State concerned.

98 As stated in recital 7 to the SGEI Decision, Member States have a wide margin of discretion with regard to the definition of services that could be classified as being services of general economic interest.

99 Article 3 of the SGEI Decision states that State aid in the form of public service compensation granted to undertakings responsible for the operation of such services of general economic interest is compatible with the common market and exempt from the

obligation of prior notification provided that it meets the conditions laid down in Articles 4 to 6 of that decision.

100 As the Advocate General has noted in point 61 of his Opinion, those conditions are based on the conditions set out in *Altmark Trans and Regierungspräsidium Magdeburg*, in particular the first three conditions, on compliance with which the Court does not have jurisdiction to rule in the present judgment, as stated in paragraph 94 above.

101 Consequently, in order to establish whether the exception to the requirement for notification of the Commission, as provided for in the SGEI Decision, is applicable in circumstances such as those in the main proceedings, the referring court must verify whether those conditions are met with regard to the measures established by Book 4 of the Flemish Decree, referred to in paragraph 71 above.

102 The answer to the first question in Case C-203/11 is therefore that the tax incentives and subsidy mechanisms provided for in the Flemish Decree are liable to be classified as State aid within the meaning of Article 107(1) TFEU. It is for the referring court to determine whether the conditions relating to the existence of State aid are met and, if so, to ascertain whether, as regards the measures established in Book 4 of the Flemish Decree whereby compensation is provided for the social obligation to which subdividers and developers are subject, the SGEI Decision is nevertheless applicable to such measures.

The third to eighth questions in Case C-203/11

103 By these questions, the referring court asks, in essence, whether Directive 2006/123 is applicable in circumstances such as those in the main proceedings and, if so, it asks the Court to interpret several provisions of that directive.

104 In order to reply to these questions, it should be noted that, as stated in recital 9 to Directive 2006/123, that directive does not apply to, inter alia, 'requirements, such as … rules concerning the development or use of land, town and country planning, building standards…'.

105 In addition, under Article 2(2)(j) of Directive 2006/123, that directive does not apply to services relating to social housing or to persons permanently or temporarily in need which are provided by the State or by providers mandated by the State.

106 As stated in paragraphs 50 and 51 above, the objectives of the Flemish Decree relate to land planning and social housing.

107 In those circumstances, the Court finds that Directive 2006/123 is not applicable to legislation such as the Flemish Decree and that, consequently, there is no need to answer the third to eighth questions referred in Case C-203/11.

The eleventh question in Case C-203/11

108 By this question, the referring court asks, in essence, whether the development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which

developed those units, is covered by the concept of 'public works contract' contained in Article 1(2)(b) of Directive 2004/18.

109 In order to answer that question, it should be borne in mind that, in accordance with Article 1(2)(b) of Directive 2004/18, read in conjunction with Article 1(2)(a) thereof, public works contracts result where four criteria are fulfilled, that is to say, they are contracts for pecuniary interest, concluded in writing, between an economic operator and a contracting authority, which must have as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I to that directive or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

110 As the Court does not have sufficient information to allow it to verify whether those criteria are met in the case in the main proceedings, it will thus confine itself in this judgment to providing the referring court with some elements which may be of use to it in carrying out that assessment.

111 So far as concerns, in particular, the existence of a contract concluded in writing, it follows from the order for reference that the Constitutional Court is uncertain as to whether that criterion has been met in the present case, inasmuch as the social obligation entailing the development of social housing units is imposed in the absence of an agreement concluded between the housing authorities and the economic operator concerned. According to the order for reference, the social obligation is imposed directly on subdividers and developers by the Flemish Decree and is applicable to them merely because they own the land in relation to which they have applied for the grant of a building or land subdivision authorisation.

112 In that regard, it should be borne in mind that, in order to establish that some kind of contractual relationship existed between an entity which could be regarded as a contracting authority and a subdivider or developer, the case-law of the Court requires, as the Advocate General has noted in point 86 of his Opinion, a development agreement to be concluded between the housing authorities and the economic operator in question for the purpose of determining the work to be undertaken by the economic operator and the terms and conditions relating thereto.

113 Where such an agreement has been concluded, the fact that the development of social housing units is a requirement imposed directly by national legislation and that the party contracting with the authorities is necessarily the owner of the building land in question does not preclude the existence of a contractual relationship between the authorities and the developer in question (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraphs 69 and 71).

114 However, although it is true that Article 4.1.22, first subparagraph, of the Flemish Decree expressly requires an administration agreement to be concluded between the subdivider or developer and the social housing organisation, it is apparent from the order for reference that that agreement does not, in principle, regulate the relationship between the contracting authority and the economic operator concerned. In addition, such an agreement does not appear to concern the development of social housing units, but only the next stage which entails placing them on the market.

115 It is therefore for the referring court to determine, in the light of all the applicable legislation and the relevant circumstances of the case in the main proceedings, whether the development of social housing units at issue in the main proceedings is within the framework of a contractual relationship between a contracting authority and an economic operator and whether the criteria referred to in paragraph 109 above have been met.

116 In that context, it is also important to note that, on the one hand, the application of Directive 2004/18 to public works contracts is nevertheless subject to the condition that the estimated value of the contract reaches the threshold set out in Article 7(c) of that directive and that, on the other, there are, as is apparent from the settled case-law of the Court, two types of contracts entered into by a public entity that do not fall within the scope of EU public procurement law.

117 The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or entities which control it (see Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR I-0000, paragraph 32 and the case-law cited).

118 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out. In those circumstances, the EU rules on public procurement are not applicable in so far as, in addition, such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (see *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 34 and 35).

119 In the light of all the foregoing considerations, the answer to the eleventh question in Case C-203/11 is that the development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units, is covered by the concept of ‘public works contract’ contained in Article 1(2)(b) of Directive 2004/18 where the criteria set out in that provision have been met, a matter which falls to be determined by the referring court.

Costs

120 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 (First Chamber) hereby rules:

1. **Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC preclude legislation, such as Book 5 of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy, which makes the transfer of immovable property in the target communes designated by the Vlaamse Regering subject to verification, by a provincial assessment committee, that there exists a 'sufficient connection' between the prospective buyer or tenant and those communes.**

2. **Article 63 TFEU must be interpreted as not precluding legislation such as Book 4 of the Decree of the Flemish Region, according to which a 'social obligation' is imposed on some economic operators when a building or land subdivision authorisation is granted, in so far as the referring court finds that that legislation is necessary and appropriate to attain the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population.**

3. **The tax incentives and subsidy mechanisms provided for in the Flemish Decree are liable to be classified as State aid within the meaning of Article 107(1) TFEU. It is for the referring court to determine whether the conditions relating to the existence of State aid are met and, if so, to ascertain whether, as regards the measures established in Book 4 of the Flemish Decree whereby compensation is provided for the social obligation to which subdividers and developers are subject, Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is nevertheless applicable to such measures.**

4. **The development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units, is covered by the concept of 'public works contract' contained in Article 1(2)(b) of 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, as amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009, where the criteria set out in that provision have been met, a matter which falls to be determined by the referring court.**