Reports of Cases

OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 4 October 2012 [1]

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

Eric Libert,
Christian Van Eycken,
Max Bleeckx,
Syndicat national des propriétaires et copropriétaires (ASBL),
Olivier de Clippele
v
Gouvernement flamand (C-197/11)
and
All Projects & Developments NV,
Bouw- en Coördinatiekantoor Andries NV,
Belgische Gronden Reserve NV,
Bouwonderneming Ooms NV,
Bouwwerken Taelman NV,
Brummo NV,
Cordeel Zetel Temse NV,
DMI Vastgoed NV,
Dumobil NV,
Durabrik Bouwbedrijven NV,
Eijssen NV,
Elbeko NV,
Entro NV,
Extensa NV,
Flanders Immo JB NV,
Green Corner NV,
Huysman Bouw NV,
Imano BVBA,
Immpact Ontwikkeling NV,
Invest Group Dewaele NV,
Invimmo NV,
Kwadraat NV,
Liburni NV,
Lotinvest NV,
Matexi NV,
Novus NV,
Plan & Bouw NV,
7Senses Real Estate NV,
Sibomat NV,
Tradiplan NV,
Uma Invest NV,
Versluys Bouwgroep BVBA,
Villabouw Francis Bostoen NV,
Willemen General Contractor NV,
Wilma Project Development NV,
Woningbureau Paul Huyzentruyt NV
v
Vlaamse Regering (C-203/11)

(References for a preliminary ruling from the Cour constitutionnelle (Belgium))

1 — Original language: French.

(National rules making the transfer of land and of buildings conditional upon the existence of a sufficient connection between the prospective buyer or tenant and the target commune — Social obligation imposed on subdividers and developers — Tax incentives and subsidy mechanisms — Restriction of fundamental freedoms — Justification — Principle of proportionality — State aid — Concept of 'public works contract')

I – Introduction

1. In the present cases, the Court has been called upon to rule on the interpretation of several articles of primary law and several provisions of secondary law of the European Union. The articles of primary law in question are Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU, 63 TFEU, 107 TFEU and 108 TFEU. The provisions of secondary law concerning which the questions have been referred are 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,[2] 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,[3] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market,[4] and Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.[5]

2. The Court's answer should assist the Cour constitutionnelle/Grondwettelijk Hof (Constitutional Court, Belgium), which referred the questions for a preliminary ruling, in deciding on the actions for annulment of several provisions of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy ('the land and real estate decree').

3. The applicants in the main proceedings in Case C-197/11 draw attention to the provisions of the land and real estate decree which link the transfer of land and of buildings constructed thereon in certain Flemish communes to the condition that there exists a sufficient connection between the prospective buyer or tenant and the relevant commune, which would limit the possibility of freely disposing of the immovable property.

4. The applicants in the main proceedings in Case C-203/11 consider that the ground for annulment of the land and real estate decree lies not only in the condition as to the existence of a sufficient connection between the prospective buyer or tenant and the relevant commune, but also in the social obligation to which persons dividing areas of land into plots (subdividers) and developers are subject and in the tax incentives and subsidy mechanisms which partially compensate for that social obligation.

2 — OJ 2004 L 134, p. 114.
3 — OJ 2004 L 158, p. 77.
4 — OJ 2006 L 376, p. 36.
5 — OJ 2005 L 312, p. 67.

II – Legal context

A – *European Union law*

1. Directive 2004/18

5. Article 1 of Directive 2004/18, entitled 'Definitions', 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.…'

2. Directive 2004/38

6. Article 22 of Directive 2004/38, entitled 'Territorial scope', is worded as follows:

'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.'

7. Article 24 of that directive, entitled 'Equal treatment', provides in paragraph 1:

'Subject to such specific provisions as are expressly provided for in the 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.'

3. Decision 2005/842

8. Article 1 of Decision 2005/842, entitled 'Subject-matter', provides:

'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) of the Treaty.'

9. Article 2 of that decision, entitled ‘Scope’, provides in paragraph 1:

‘This Decision applies to State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 86(2) of the Treaty which falls within one of the following categories:

…

(b) public service compensation granted to hospitals and social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned;

…’

10. Under Article 3 of Decision 2005/842, entitled ‘Compatibility and exemption from notification’:

‘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.’

B – *Belgian law*

11. Book 4 of the land and real estate decree, on ‘Measures concerning affordable housing’, contains, in Chapter 3, entitled ‘Social obligations’, Article 4.1.16, according to which:

‘(1) Where a land subdivision project or building project is subject to a rule as defined under Chapter 2, Section 2, a social obligation is linked by operation of law to a 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.’

12. Article 4.1.17 of the land and real estate decree provides that:

‘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.’

13. Under Article 4.1.19 of the land and real estate 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.

…'

14. The land and real estate decree lays down, for the benefit of private undertakings discharging the 'social obligation' in kind, the following tax incentives and subsidy mechanisms: the application of a reduced rate of value added tax and of a reduced rate of stamp duty (Article 4.1.20(3), second subparagraph; infrastructure subsidies (Article 4.1.23), and a purchase guarantee for the housing built (Article 4.1.21).

15. Moreover, Book 3 of the land and real estate decree, entitled, 'Activation of land and buildings', provides for subsidies 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 obtained on conclusion of renovation agreements (Article 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).

16. Article 5.1.1 of the land and real estate decree, which forms part of Book 5 of the decree, entitled 'Living in your own region', provides:

'The Flemish Government shall draw up every three years and for the first time during the calendar month in which this Decree enters into force a list of the communes which satisfy the two conditions set out below on the basis of the most recent statistics:

1. the commune is among the 40 per cent of Flemish communes in which the average price of land is highest per square metre;

2. the commune is among:

   (a) either the 25 per cent of Flemish communes having the highest level of internal migration; or

   (b) the 10 per cent of Flemish communes having the highest level of external migration.

The list, referred to in the first paragraph, shall be published in the *Moniteur Belge/Belgisch Staatsblad*.

…'

17. Article 5.2.1 of the land and real estate decree, which also forms part of Book 5, provides:

'(1) A specific requirement applies 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 *Moniteur belge/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 the 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 erected 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(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.

…'

18. Under Article 5.1.1 of the land and real estate decree, an order of the Flemish Government of 19 June 2009 drew up the list of 69 communes to which the special condition governing the transfer of ownership for the purposes of Article 5.2.1 of the land and real estate decree applies ('the target communes').

III – Questions referred

19. The single question in Case C-197/11 is worded as follows:

'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 [land and real estate decree] … entitled "Living in your own region", 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?'

20. The questions in Case C-203/11 are worded as follows:

‘(1) Should Articles 107 [TFEU] and 108 [TFEU], whether or not read in conjunction with … Decision 2005/842 …, be interpreted as requiring that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3)[, second subparagraph], 4.1.21 and 4.1.23 of the [land and real estate 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 [land and real estate decree], entitled "Living in your own region"), 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?'

IV – Assessment

A – *The single question in Case C-197/11 and the twelfth question in Case C-203/11*

21. The single question in Case C-197/11 is identical to the twelfth question in Case C-203/11 and is concerned with whether the provisions of the Treaty on the Functioning of the European Union which prohibit restrictions on fundamental freedoms and Articles 22 and 24 of Directive 2004/38 preclude legislation of a Member State which makes the transfer of immovable property, in the target communes, that is to say, in the communes in which the average price of land is highest per square metre and in which internal or external migration is highest, subject to the condition that there exists a sufficient connection between the prospective buyer or tenant and the relevant commune.

22. With regard to this question, the Flemish Government draws attention to the fact that the disputes before the referring court are concerned with a purely internal situation, since all the applicants in the main proceedings are either established or resident in Belgium.

23. In that regard, it should be recognised that the disputes in the main proceedings contain no cross-border elements. Nevertheless, it must not be forgotten that the questions referred were raised in the specific proceedings before the referring court. That is to say, proceedings for the annulment of a legislative measure of national law which applies both to Belgian nationals and to those of other Member States. It is clear that the decision of the referring court in such a procedure will have *erga omnes* effects, including on nationals of other Member States.

24. The applicants in the main proceedings rely on European Union (EU) law and the Court is not in a position to assess whether the referring court, in proceedings for annulment, is able to review the legislative measure of national law at issue not only in relation to national law but also in relation to EU law. In the present cases, I am of the view that the Court should have trust in the referring court inasmuch as the question referred is necessary for the referring court to be able to deliver judgment [6] and, therefore, give the requested interpretation of the Treaty provisions on the fundamental freedoms of the internal market. [7]

25. The referring court regards the condition as to the existence of a sufficient connection with the target commune as a restriction on fundamental freedoms.

26. I concur with that view. Within the meaning of the case-law, access to housing and to other immovable property is a condition for the exercise of the fundamental freedoms. [8] The condition as to a sufficient connection with the target commune means, in reality, a prohibition imposed on certain persons, that is to say, those who do not satisfy that condition, on buying or leasing for more than nine years land and the buildings constructed thereon. There is no doubt that that condition is such as to deter citizens of the Union from exercising their fundamental freedoms enshrined in the Treaty.

27. I am of the view that the fact that the condition as to the existence of a sufficient connection with the target commune applies solely in a number of communes, which is presently 69, and that its application is limited to certain parts of those communes, is irrelevant to the issue of whether or not that condition represents a restriction on fundamental freedoms. The limited scope of the condition as to the existence of a sufficient connection with the target commune may be taken into consideration in the context of assessing the justification of that restriction on fundamental freedoms.

6 — In that regard, it should be noted that, at the hearing, the representative of the Government of the French Community pointed out that the referring court had, on several occasions, held that an applicant who proved his interest in an action was not obliged, in addition, to establish that he had a specific interest in any plea which might be raised therein.

7 — See, in that regard, Case C-470/11 *Garkalns* [2012] ECR, paragraph 17 and the case-law cited.

8 — See, to that effect, Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraph 15, and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 67.

28. 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 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. [9]

29. Accordingly, it is appropriate to examine, on the one hand, whether the land and real estate decree introducing the condition as to the existence of a sufficient connection with the target commune pursues an objective in the public interest and, on the other hand, whether the condition as to the existence of a sufficient connection with the target commune is appropriate for attaining the objective identified and whether that measure goes beyond what is necessary to attain the objective pursued.

30. As regards the objective pursued by the land and real estate decree, the referring court, on the basis of the *travaux préparatoires* relating to the land and real estate decree, refers to the objective of meeting the accommodation requirements of the endogenous population. It raises itself a question as to whether that objective can be regarded as an overriding reason in the public interest with a view to justifying a restriction on fundamental freedoms.

31. With a view to understanding better the objective of the land and real estate decree, the referring court cites its *travaux préparatoires*, which explain that 'the high land prices in some Flemish communes leads to gentrification. That finding means that less affluent population groups are excluded from the market due to the arrival of financially stronger population groups from other communes. The less affluent population groups are not only socially weak individuals but often also young families or single persons who have many expenses, but are not yet in a position to build up sufficient capital'.

32. The Flemish Government states that the national rules at issue are intended primarily to encourage housing for the endogenous population in residential extension areas, which the legislature passing the decree deemed necessary in order to guarantee the right to adequate housing and, by extension, social cohesion, by promoting regional planning and by not allowing the social and economic fabric to unravel.

33. If the land and real estate decree actually had the aim of encouraging residency by the less affluent endogenous population in the target communes, I am of the opinion that such an objective could be regarded as a social objective linked to regional planning policy. The Court has already ruled that such an objective constitutes an overriding reason in the public interest. [10]

34. However, it must be borne in mind that there are also other opinions on the objective pursued by the land and real estate decree. To that effect, the Government of the French Community argues that the actual objective of the decree is not to limit the effects of gentrification but rather to preserve the Flemish nature of the population of the target communes. It is clear that such an objective cannot be regarded as an overriding reason in the public interest. In that regard, I would like to point out that it is for the referring court to determine the precise objective of the land and real estate decree.

35. I will now examine whether the condition as to the existence of a sufficient connection with the target commune is appropriate for attaining the objective of meeting the accommodation requirements of the less affluent endogenous population and whether that measure goes beyond what is necessary to attain that objective.

9 — See *Commission* v *Hungary*, cited in footnote 8, paragraph 69.

10 — See, to that effect, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 34; Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraphs 38 and 39; Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 30; and Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 74.

36. Article 5.2.1(2) of the land and real estate decree sets out three conditions at least one of which must be met if the requirement for a sufficient connection with the target commune is to be met. 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 for at least six years before the transfer. In accordance with the second condition, the prospective buyer or tenant should, at the date of the transfer, carry out activities in the commune concerned. 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. It is the provincial evaluation committee which evaluates whether the prospective buyer or tenant of the immovable property meets one or more of the conditions set out.

37. It is noteworthy that none of those conditions reflects socio-economic aspects related to the objective of protecting the less affluent endogenous population on the property market. The conditions in question favour not only the less affluent endogenous population but also a section of the endogenous population which would have sufficient means and, therefore, would have no need of protection on the property market.

38. As I have already stated, the requirement as to a sufficient connection with the target commune means, in reality, prohibiting some people, that is to say, those who do not fulfil that condition, from buying or renting for more than nine years land and the buildings constructed thereon. I concur with the view put forward by the representative of the applicants in the main proceedings in Case C-197/11 in its written observations, that is to say, that other measures could meet the objective pursued by the land and real estate decree without necessarily resulting in a prohibition on purchasing or leasing by other persons. There could be, for example, subsidies for purchase, price regulation in target communes or measures adopted by the authorities to assist the protected endogenous population.

39. It follows from the foregoing that the condition as to the existence of a sufficient connection between the prospective buyer or tenant of the immovable property and the target commune, which provides (i) that the prospective buyer or tenant must reside in the target commune for at least six years before the transfer, or (ii) that the prospective buyer or tenant must carry out activities in the commune, or (iii) that the prospective buyer or tenant must have a professional, family, social or economic connection as a result of a significant circumstance of long duration, does not constitute a measure which is appropriate for attaining the objective of meeting the property needs of the less affluent endogenous population. Even assuming that the condition as to the existence of a sufficient connection on the part of the prospective buyer or tenant of the immovable property might be appropriate for attaining the objective pursued by the land and real estate decree, that measure goes beyond what is necessary to attain the objective pursued.

40. As regards Articles 22 and 24 of Directive 2004/38, which aim to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States conferred directly on Union citizens by the Treaty and which aim in particular to strengthen that right,[11] I have doubts as to the need to examine the national legislation at issue in the light of those provisions, given that they contain no new specific reasons justifying a restriction on the right to move and reside freely within the territory of the Member States. As regards Article 24 of Directive 2004/38, it is a specific expression of the general prohibition on discrimination provided for in Article 18 TFEU.

41. With regard to Article 22 of Directive 2004/38, that article defines the territorial scope of the right to move and reside freely within the territory of the Member States. In that regard, certain doubts may be raised concerning the second sentence of that article, in accordance with which ‘Member States may impose territorial restrictions on the right of residence and the right of permanent residence only

11 — See Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 50 and the case-law cited.

where the same restrictions apply to their own nationals'. However, it cannot be inferred from that that territorial limitations are in general allowed provided that they apply also to nationals of the host Member State and that, accordingly, that provision introduces a new ground justifying a restriction on the right conferred on citizens of the Union by the Treaty. Indeed, as the Commission rightly claimed, the second sentence of Article 22 of Directive 2004/38 contains a supplementary condition which a restriction on the right of residence and the right of permanent residence must satisfy in order that it may be justified on grounds of public policy, public security or public health within the meaning of Article 27 of Directive 2004/38.

42. In view of the foregoing observations, I propose that the Court should answer that Articles 21 TFEU, 45 TFEU, 56 TFEU and 63 TFEU must be interpreted as meaning that they preclude national rules which make, in some communes, the transfer of land and buildings constructed thereon subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes where the existence of that connection is evaluated by reference to the following alternative conditions:

— the requirement that a person to whom the immovable property is to be transferred has been resident in the relevant commune for at least six years before the transfer;

— the requirement that the prospective buyer or tenant carries out, at the date of the transfer, activities in the commune; and

— the existence of a professional, family, social or economic connection as a result of a significant circumstance of long duration.

B – *The first question in Case C-203/11*

43. This question relates to the tax incentives and subsidy mechanisms provided for by the land and real estate decree. The measures at issue 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, referred to in Article 3.1.3 of the land and property decree, and the reduction of the tax base for stamp duty, referred to in Article 3.1.10 of the land and property decree.[12] 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, referred to in the second subparagraph of Article 4.1.20(3) of the land and real estate decree, the infrastructure subsidies referred to in Article 4.1.23 of the land and real estate decree and the purchase guarantee by a social housing organisation of the social housing units developed, referred to in Article 4.1.21 of the land and real estate decree.

44. The referring court seeks to ascertain whether the measures at issue should be classified as State aid within the meaning of Article 107 TFEU and when, if so, they should be notified to the Commission or whether, in some circumstances, those measures are exempt from the requirement to notify State aid under Decision 2005/842.

12 — The claimants in the main proceedings have also challenged before the referring court the subsidies intended for activation projects referred to in Article 3.1.2 of the land and real estate decree. The referring court has already established that that measure constitutes *de minimis* aid within the meaning of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ 2006 L 379, p. 5), which is excluded from the concept of State aid.

1. Classification of the measures

45. As regards the classification of the measures at issue as State aid, the referring court rightly refers to the case-law of the Court which determines that State aid exists where the following conditions are fulfilled. First, there must be intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient. Fourthly, it must distort or threaten to distort competition. [13]

46. It follows from the reasoning of the order for reference that the referring court has doubts concerning the second condition relating to the effect on intra-Community trade and concerning the third condition relating to the advantageous nature of the measures at issue.

47. Regarding the effect of the measures at issue on intra-Community trade, I should like to point out that it is for the referring court to assess, taking into consideration a number of matters of law or of fact relevant to the case in question, whether the specific measures are liable to affect intra-Community trade. I consider that the existing case-law provides a sufficient basis to enable the referring court to do so. [14]

48. For the purposes of that case-law, the referring court must examine whether the measures at issue strengthen the position of the recipient undertakings compared with other undertakings competing in intra-Community trade. [15] However, the recipient undertakings need not themselves 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. [16] Even aid of a relatively small amount may also be liable to affect trade between Member States, in particular where there is strong competition in the sector in question. [17] Finally, it must not be forgotten that it is not necessary to establish that the measures at issue have a real effect on intra-Community trade or that competition is actually being distorted, but only to examine whether those measures are liable to affect such trade and distort competition. [18]

49. With regard to the advantageous nature of the measures at issue, I understand that part of the question referred as seeking, in essence, to obtain clarification of the case-law [19] within the meaning of which, 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 competing undertakings, such a measure is not State aid within the meaning of EU law. [20] However, for particular measures to escape classification as State aid, four conditions, known as the '*Altmark* conditions', must be satisfied.

13 — See Case C-417/10 *3M Italia* [2012] ECR, paragraph 37, and Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 31 and the case-law cited.

14 — The analysis contained in the order for reference demonstrates that the referring court is well aware of that case-law.

15 — See, to that effect, Case C-494/06 P *Commission* v *Italy and Wam* [2009] ECR I-3639, paragraph 52, and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 141 and the case-law cited.

16 — See, to that effect, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 80 and the case-law cited.

17 — See, to that effect, Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27.

18 — See, to that effect, *Cassa di Risparmio di Firenze and Others*, cited in footnote 15, paragraph 140 and the case-law cited.

19 — Nevertheless, I am obliged to point out in that regard that the referring court does not request an interpretation of the provisions of EU law, but rather the application to a specific case of the interpretation already given. This is evidenced by the detailed analysis of the relevant case-law contained in the order for reference. However, the Court has no jurisdiction either to give a ruling on the facts in an individual case or to apply to national measures or situations the rules of EU law which it has interpreted, since those questions are matters for the exclusive jurisdiction of the national court (*Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 22).

20 — See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 87, and *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 35 and the case-law cited.

50. Before analysing those conditions, it should be noted that the case-law cited can be applied only in relation to the measures compensating for the social obligation to which the subdividers and developers are subject. The Flemish Government has itself stated in its written observations that the social obligation imposed on subdividers and developers also constitutes a fair price which they must pay for the right to act under the authorisation and for the significant economic benefits resulting therefrom.

51. According to the first *Altmark* condition, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.[21] It follows that it is necessary to consider whether the social obligation to which subdividers and developers are subject may be regarded as a public service obligation.

52. As the Flemish Government explained in its written observations, the social obligation is imposed on developers and subdividers in the context of a policy seeking to provide more equal access to social housing for groups of modest means and for socially disadvantaged groups, by means of a territorial allocation based on actual needs and not depending exclusively on the voluntary initiative and goodwill of operators. From that point of view, nothing prevents the social obligation defined by the land and real estate decree from being regarded as a public service obligation. The fact that that social obligation does not directly benefit individuals, the applicants for social housing, but the social housing companies (which are the embodiment of the public authorities) is irrelevant in that regard. As the German Government pointed out in its written observations, for it to be possible to make something available, the material basis must be created. The social housing companies are therefore involved only as administrative and technical intermediaries.

53. According to the second *Altmark* condition, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.[22] That condition seems to be problematic in particular in relation to the infrastructure subsidies and the social housing purchase guarantee. Even if the national rules cited by the referring court make it possible to identify the beneficiaries of those measures, they do not, however, make it possible to identify the parameters on the basis of which such compensation is calculated. Nevertheless, the Flemish Government in its written observations describes the method for calculating such compensation. It is therefore for the referring court to determine whether the parameters used to calculate the compensation referred to by the Flemish Government satisfy the second *Altmark* condition.

54. According to the third *Altmark* condition, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations.[23] It seems in this case that the measures compensating for the social obligation are not calculated by reference to the actual cost of discharging that obligation. For that reason, I consider that it is possible that the final cost of the combination of different measures compensating for the social obligation exceeds the amount of the costs related to discharging that obligation.

55. According to the fourth *Altmark* condition, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport 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

21 — See *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 37.

22 — See *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 38.

23 — See *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 39.

discharging the obligations.[24] In this case, it is clear that the beneficiaries of the measures compensating for the social obligation have not been selected pursuant to a public procurement procedure. However, it does not appear from the documents before the Court that an analysis required under the fourth condition has been carried out or that the measures at issue were determined on the basis of the expenses which would be incurred by a typical and properly administered undertaking in discharging the social obligation.

2. Moment at which State aid is notified to the Commission

56. Article 108(3) TFEU requires that the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107 TFEU, it must without delay initiate the procedure provided for in Article 108(2) TFEU. The Member State concerned must not put its proposed measures into effect until that procedure has resulted in a final decision.

57. According to the Court's case-law, the obligation to notify new State aid is one of the fundamental features of the system of control put in place by the Treaty in the field of State aid. Under that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, in accordance with Article 108(3) TFEU, not to implement such a measure until the Commission has taken a final decision on the measure.[25] The purpose served by the provision introduced by Article 108(3) TFEU is not a mere obligation to notify but an obligation of prior notification which, as such, necessarily implies the suspensory effect required by the final sentence of Article 108(3).[26]

58. In that regard, the referring court seeks to ascertain whether it is Article 4.1.23 of the land and real estate decree, providing for the infrastructure subsidies, or rather the implementing order of the Flemish Government, defining the conditions under which such subsidies may be granted, which should have been notified to the Commission, inasmuch as the infrastructure subsidies might be classified as State aid.

59. I consider that the answer is quite clear. The measure in question was already provided for by the land and real estate decree, even if the details were specified by the implementing order. For that reason, with a view to fulfilling one of the obligations under Article 108(3) TFEU, the draft land and real estate decree should have been notified to the Commission.

3. Exemption from the obligation to notify new State aid to the Commission

60. The referring court seeks to ascertain whether the measures compensating for the social obligation to which subdividers and developers are subject, assuming that such measures must be classified as State aid, may be exempt from the obligation to notify the Commission for the purposes of Decision 2005/842.

61. Article 3 of Decision 2005/842 declares State aid in the form of public service compensation that meets the conditions laid down by Articles 4 to 6 of that decision compatible with the common market and exempt from the obligation to notify. I am of the same opinion as the referring court, which considers that those conditions seem to be based on the first three *Altmark* conditions.

24 — See *Altmark Trans and Regierungspräsidium Magdeburg*, cited in footnote 20, paragraph 93.

25 — See, to that effect, Case C-81/10 P *France Télécom* v *Commission* [2011] ECR I-12899, paragraph 58.

26 — See, to that effect, Case C-332/98 *France* v *Commission* [2000] ECR I-4833, paragraph 32.

62. As has already been argued, it is my view that the third *Altmark* condition, in particular, is not satisfied in this case. That condition, to the effect that the compensation cannot exceed what is necessary to cover the costs incurred in the discharge of the public service obligations, is also contained in Article 5 of Decision 2005/842. It follows that, as the measures compensating for the social obligation must be classified as State aid, since they do not satisfy the third *Altmark* condition, they are even less able to benefit from the exemption from the obligation to notify the Commission within the meaning of Decision 2005/842.

63. In view of the foregoing observations, I propose that the Court should answer that Articles 107 TFEU and 108 TFEU, read in conjunction with Decision 2005/842, must be interpreted as meaning that they require that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3), second subparagraph, 4.1.21 and 4.1.23 of the land and real estate decree be notified to the Commission prior to the adoption of those provisions provided that it is established that those measures are liable to affect trade between Member States and that they do not satisfy the *Altmark* conditions.

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

64. This series of questions relates to a social obligation which, in accordance with Article 4.1.16 of the land and real estate decree, requires subdividers and developers to take steps to ensure that a supply of social housing units is delivered.

65. It seems that the referring court has no doubt as to the classification of a social obligation as a non-discriminatory restriction on fundamental freedoms. Its doubts concern the issue of determining, first, in the light of which fundamental freedom that social obligation must be reviewed and, secondly, whether a social obligation as a restriction on fundamental freedoms may be justified by an overriding reason in the public interest.

66. As a preliminary point, it should be noted that, as with regard to the single question in Case C-197/11 and with regard to the second question in Case C-203/11, the Flemish Government draws attention to the fact that the disputes before the referring court are concerned with a purely internal situation. In that regard, I refer to my previous considerations.[27]

67. As for the freedom in the light of which the scheme governing a social obligation should be reviewed, it is true that it is possible to identify the influence of a social obligation both on the freedom of establishment and on the freedom to provide services, as well as on the free movement of capital.

68. However, I share the Commission's view that, in the case of a social obligation, the free movement of capital prevails, since the restriction on the freedom of establishment and on the freedom to provide services is merely an inevitable consequence of the restriction on the free movement of capital.

69. The national rules provide that the social obligation may be discharged either in kind, that is to say, by delivering a social housing unit, or by the sale of land to a social housing organisation, or by renting the housing units delivered to a social rental agency or, lastly, through the payment of a social contribution. It should be recognised, as stated by the referring court, that such rules are likely to deter nationals of a Member State from investing in another Member State in the immovable property sector given the fact that they cannot freely use the land for the purposes for which they wished to acquire it.

27 — See points 23 and 24 of this Opinion.

According to settled case-law, capital movements include investments in immovable property on the territory of a Member State by non-residents. In other words, the right to acquire, use or dispose of immovable property on the territory of another Member State generates capital movements when it is exercised. [28]

70. Even if a social obligation constitutes a restriction on the free movement of capital, it may be justified by an overriding reason in the public interest, provided that it is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary for that purpose. [29]

71. Therefore, 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.

72. According to the Flemish Government, the rules imposing a social obligation on subdividers and developers address a real problem, more precisely a critical shortage of affordable housing. Accordingly, it seems that the social obligation is related to 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. [30] However, it is for the referring court to establish the precise objective of the rules at issue.

73. It is also for the referring court to determine whether a 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.

74. For the purposes of that assessment, the statistics from the Flemish authorities cited at the hearing by the representative of the applicants in the main proceedings in Case C-203/11 could be helpful. It follows from those statistics that the land and real estate decree introducing the social obligation for subdividers and developers actually has a rather negative impact on the social housing sector.

75. In view of the foregoing observations, I propose that the Court should answer that Article 63 TFEU must 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, provided that it is established that that scheme does not satisfy the principle of proportionality.

D – *The third, fourth, fifth, sixth, seventh and eighth questions in Case C-203/11*

76. By this series of questions, the referring court seeks an interpretation of certain provisions of Directive 2006/123.

77. However, according to recital 9 in the preamble to Directive 2006/123, that directive applies neither to rules concerning the development or use of land nor to rules concerning town and country planning. Moreover Article 2(2)(j) of Directive 2006/123 expressly states that the directive is not to apply to social services relating to social housing.

28 — See *Woningstichting Sint Servatius*, cited in footnote 10, paragraph 20 and the case-law cited.

29 — Ibid., paragraph 25 and the case-law cited.

30 — See *Woningstichting Sint Servatius*, cited in footnote 10, paragraph 30.

78. I consider that the land and real estate decree amounts to rules concerning the development or use of land and rules concerning town and country planning.

79. For that reason, there is, to my mind, no need to answer the questions relating to Directive 2006/123.

E – *The eleventh question in Case C-203/11*

80. By this question, the referring court asks the Court to interpret the concept of 'public works contract' contained in Article 1(2)(b) of Directive 2004/18. More specifically, it seeks to ascertain whether a public works contract exists in the case of 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 are subsequently to be sold at capped prices to a public institution, or with substitution by it.

81. The land and real estate decree regards a social obligation as a condition for the granting of a building or land subdivision authorisation. Even though Article 4.1.17 of that decree sets out several options for discharging that obligation, the eleventh question is concerned solely with performance of the social obligation in kind, that is to say, performance in the form of the development of social housing units.

82. It should be recalled that the definition of a public works contract is a matter of EU law.[31] For the purposes of Article 1(2)(a) and (b) of Directive 2004/18, four characteristics are required for it to be possible to speak of a public works contract. First, it must be established that there is a contract concluded in writing. Secondly, it must be a contract for pecuniary interest. Thirdly, the parties to a contract must be one or more economic operators, on the one hand, and one or more contracting authorities, on the other hand. Fourthly, the object of a contract must be either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I to the directive or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

83. I consider that, in the present case, the first of the above characteristics, namely the existence of a contract concluded in writing, is problematic, since the social obligation is imposed on subdividers and developers by the land and real estate decree. As the referring court noted, the national rules provide for an administration agreement concluded between the developer or subdivider and the social housing company. However, it states at the same time that that administration agreement is concerned solely with placing the social housing units already developed on the market and not with their development.

84. Even though it is for the referring court to ascertain whether, in this case, there was a contract concluded in writing, I am able to cite some elements arising from the case-law of the Court which may be of assistance.

85. First of all, I should like to draw attention to the judgment in *Ordine degli Architetti and Others*.[32] In it, the Court ruled that the fact that the public authorities are not free to choose the contractor cannot in itself justify non-application of Directive 2004/18, since that would ultimately preclude from Community competition the execution of works to which the directive would otherwise apply.[33]

31 — See, to that effect, Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 40.

32 — Case C-399/98 [2001] ECR I-5409.

33 — Ibid., paragraph 75.

86. In the present case, the situation is similar, since the social obligation entailing the development of social housing units is linked by operation of law to a subdivision authorisation or a planning authorisation. However, it must not be forgotten that in the case giving rise to *Ordine degli Architetti and Others*, the Court emphasised the fact that a development agreement must always be concluded between the municipal authorities and the economic operator. In the present case, I understand the national rules as not providing for the conclusion of a contract with a view to discharging a social obligation. It is for the referring court to examine whether that is actually the case.

87. I consider that it is relevant to refer to another finding set out in *Ordine degli Architetti and Others*. The Court stated therein that 'the basic aim of the Directive … is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism.[34]' In that regard, I entertain some doubts as to the issue of how the social obligation could favour subdividers and developers. The application in the main proceedings in Case C-203/11 shows that even the economic operators to which the social obligation applies consider that that obligation is detrimental to their situation. Similarly, the referring court itself has stated in the order for reference that a social obligation performed in kind always entails a loss for subdividers and developers.

88. The second judgment, to which I would also like to draw attention, is *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*.[35] The Court ruled in that judgment that, with a view to holding that there is no contract within the meaning of the rules relating to public procurement, the referring court should consider whether the economic operator is able to negotiate with the contracting authority the actual content of the services it has to provide and the tariffs to be applied to those services and whether, as regards non-reserved services, that operator can free itself from obligations arising under the cooperation agreement, by giving notice as provided for in that agreement.[36]

89. As in *Ordine degli Architetti and Others* and, in my view, unlike the present case, in *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* some type of contract was concluded between the public authorities and the private operator. More precisely, it was a cooperation agreement. The question arises whether such an agreement is actually a contract within the meaning of the rules on public procurement, since an economic operator has no opportunity to refuse to conclude such an agreement.

90. It follows from *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* that if the referring court were to conclude, in this case, that some kind of contractual relationship existed between an entity which could be regarded as a contracting authority and a subdivider or developer in relation to the social obligation, the referring court should examine whether or not the contractual freedom of a subdivider or developer has been restricted in that it was not able to negotiate the actual content of the services it has to provide and the tariffs to be applied to those services.

91. Based on the way in which the national rules at issue may be construed, I consider that it is primarily the ability to negotiate the price to be applied for the works carried out that is limited. In this case, the price of the works carried out is the sales price of a social housing unit to a social housing company. That price is capped by the national rules and does not therefore represent the market price.

34 — *Ordine degli Architetti and Others*, cited in footnote 32, paragraph 75.

35 — Case C-220/06 [2007] ECR I-12175.

36 — Ibid., paragraph 55.

92. Having regard to the foregoing, I am of the opinion that the answer to the eleventh question should be that the concept of 'public contract' in Article 1(2)(b) of Directive 2004/18 must be interpreted as meaning 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 which are subsequently to be sold at capped prices to a public institution, or with substitution by it, provided that, first, those rules provide for the existence of a contract concluded between a contracting authority and an economic operator 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.

V – Conclusion

93. In the light of the foregoing considerations, I propose that the Court should give the following answers to the questions referred by the Cour constitutionnelle:

(1) Articles 21 TFEU, 45 TFEU, 56 TFEU and 63 TFEU must be interpreted as meaning that they preclude national rules which make, in some communes, the transfer of land and buildings constructed thereon subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes where the existence of that connection is evaluated by reference to the following alternative conditions:

— the requirement that a person to whom the immovable property is to be transferred has been resident in the relevant commune for at least six years before the transfer;

— the requirement that the prospective buyer or tenant carries out, at the date of the transfer, activities in the commune; and

— the existence of a professional, family, social or economic connection as a result of a significant circumstance of long duration.

(2) Articles 107 TFEU and 108 TFEU, read in conjunction with Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, must be interpreted as meaning that they require that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3), second subparagraph, 4.1.21 and 4.1.23 of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy be notified to the European Commission prior to the adoption of those provisions provided that it is established that those measures are liable to affect trade between Member States and that they do not satisfy the conditions set out in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

(3) Article 63 TFEU must 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, provided that it is established that that scheme does not satisfy the principle of proportionality.

(4) The concept of 'public contract' 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 must be interpreted as meaning 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 which are subsequently to be sold at capped prices to a public institution, or with substitution by it, provided that, first, those rules provide for the existence of a contract concluded between a contracting authority and an economic operator 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.