



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

20 September 2018*

(Reference for a preliminary ruling — Fundamental freedoms — Articles 21, 45, 49 and 63 TFEU — Directive 2004/38/EC — Articles 22 and 24 — Right of pre-emption of a government body on land located in its operating area with a view to developing social housing — Housing allocated on a priority basis to private individuals who ‘have strong social, economic or socio-cultural ties’ with the area in which that body operates — Situation which is confined in all respects within a single Member State — Inadmissibility of the request for a preliminary ruling)

In Case C-343/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the *Nederlandstalige rechtbank van eerste aanleg Brussel* (Dutch-language Court of First Instance, Brussels, Belgium), made by decision of 19 May 2017, received at the Court on 8 June 2017, in the proceedings

Fremoluc NV

v

Agentschap voor Grond- en Woonbeleid voor Vlaams-Brabant (Vlabinvest APB),

Vlaams Financieringsfonds voor Grond- en Woonbeleid voor Vlaams-Brabant (Vlaams Financieringsfonds),

Vlaamse Maatschappij voor Sociaal Wonen NV (VMSW),

Christof De Knop and Others,

intervener:

Vlaams Gewest,

THE COURT (Fourth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 May 2018,

* Language of the case: Dutch.

after considering the observations submitted on behalf of:

- Fremoluc NV, by P. Peeters, R. van Cleemput, P. de Bandt and J. Dewispelaere, advocaten,
- the Agentschap voor Grond- en Woonbeleid voor Vlaams-Brabant (Vlabinvest APB) and the Vlaamse Maatschappij voor Sociaal Wonen NV (VMSW), by P. Hofströssler and V. Sagaert, advocaten,
- the Vlaams Gewest, by E. Cloots, S. Sottiaux and J. Roets, advocaten,
- the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,
- the European Commission, by H. Tserepa-Lacombe, M. Kellerbauer, L. Malferrari and F. Wilman, acting as Agents,

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

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 21, 45, 49 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 request has been made in proceedings between Fremoluc NV on the one hand, and Agentschap voor Grond- en Woonbeleid voor Vlaams-Brabant (Agency for Land and Housing Policy for Flemish Brabant, Belgium, 'Vlabinvest APB'), Vlaams Financieringsfonds voor Grond- en Woonbeleid voor Vlaams-Brabant (Flemish Financing Fund for Land and Housing Policy for Flemish Brabant, Belgium), Vlaamse Maatschappij voor Sociaal Wonen NV (Flemish Social Housing Association, Belgium, 'the VMSW'), Vlaams Gewest (Flemish Region, Belgium) and Christof De Knop and Others ('the De Knop associates'), on the other hand, relating to the validity of a contract for the sale of immovable property by the De Knop associates to Vlabinvest APB following the exercise, by the latter, of a right of pre-emption over that property.

Legal context

EU law

- 3 Article 22 of Directive 2004/38, 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.'

4 Article 24(1) of that directive, entitled ‘Equal treatment’, states:

‘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.’

Belgian law

5 According to the decreet betreffende opdracht van de bevoegdheid inzake het voeren van een specifiek grond- en woonbeleid voor Vlaams-Brabant aan de Provincie Vlaams Brabant (Decree concerning the transfer of the competence to implement a specific land and housing policy for Flemish Brabant to the Province of Flemish Brabant) of 31 January 2014 (*Belgisch Staatsblad* of 28 February 2014, p. 17461), Vlabinvest APB has the power to pursue a specific land and housing policy for the province of Vlaams Brabant (province of Flemish Brabant, Belgium), including the development of social housing projects in the municipalities of that province and has, for its implementation, a right of pre-emption relating to building land situated in areas earmarked for house renovation and house-building in 26 municipalities in its operating area, designated by the Vlaams regering (Flemish Government, Belgium).

6 The Besluit houdende het provinciaal reglement betreffende de werking en het beheer van [Vlabinvest APB] (Decree laying down the provincial regulations on the operation and management of [Vlabinvest APB]) of 25 February 2014 (‘the provincial regulations of 25 February 2014’) establishes Vlabinvest APB’s operating area in 39 municipalities in the province of Flemish Brabant, and defines social housing as ‘a project which is or has been entirely or partly financed by ... Vlabinvest APB in order to provide homes or plots on favourable terms’ and lays down the income requirements as regards eligibility to accommodation for rent and for sale.

7 Article 2 of those regulations provides:

‘§1. The management committee of Vlabinvest APB offers for rent, long term rental (long leasehold) or sale the homes and plots included in a social housing project financed by ... Vlabinvest APB, after evaluation of tenants, lessees with long-term leases or potential buyers by the evaluation committee

§2. As regards the provision of homes or land in a social housing project referred to in §1 ..., absolute priority must be given, at any stage of the project, to prospective tenants, leaseholders or buyers who have strong social, economic or socio-cultural ties with the operating area in question.’

8 According to Article 2/2 of the Besluit van de Vlaamse regering betreffende de voorwaarden voor de overdracht van onroerende goederen door de Vlaamse Maatschappij voor Sociaal Wonen en de sociale huisvestingsmaatschappijen ter uitvoering van de Vlaamse Wooncode (Decree of the Flemish Government on the conditions for the transfer of immovable property by the Flemish Social Housing Association and social housing associations pursuant to the Flemish Housing Code) of 29 September

2006 (*Belgisch Staatsblad* of 13 November 2006, p. 60628), as amended by the Besluit van de Vlaamse regering (Flemish Government Decree) of 4 April 2014 (*Belgisch Staatsblad* of 11 July 2014, p. 53261, ‘the Decree of 29 September 2006’):

‘... The priority for the transfer of housing and plots which are part of a housing project that is partly funded using resources ... from Vlabinvest APB shall apply only after application of the priority referred to in Article 2§2, of the [provincial regulation of 25 February 2014] ..., to private individuals with housing needs who have strong social, economic or socio-cultural ties with the operating area of Vlabinvest APB.

That priority rule is aimed at meeting the housing needs of the least affluent local population in a region with specific problems in the housing market. ...’

- 9 The same priority rule has also been inserted in the second to sixth paragraphs of Article 17 of the Besluit van de Vlaamse tot reglementering van het social huurstelsel ter uitvoering van titel VII van de Vlaamse Wooncode (Decree of the Flemish Government for the regulation of the social rented housing scheme and implementing Title VII of the Flemish Housing Code) of 12 October 2007 (*Belgisch Staatsblad* of 7 December 2007, p. 60428, ‘the Decree of 12 October 2007’).

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

- 10 On 9 February 2015, Fremoluc, established in Belgium, concluded, as purchaser, with the De Knop associates, as vendors, resident in that Member State, a contract for the sale of several plots of land located in the province of Flemish Brabant (Belgium), subject to the condition that no statutory pre-emption rights be exercised. Vlabinvest APB, responsible for the land and housing policy for that province, exercised such a right and acquired those plots on 14 July 2015, before selling them to VMSW on 31 July 2015, which transferred back to it a right to build on those plots at the same time.
- 11 Fremoluc brought proceedings before the referring court, the Nederlandstalige rechtbank van eerste aanleg Brussel (Dutch-language Court of First Instance, Brussels, Belgium), seeking annulment of the contracts concluded by Vlabinvest APB on 14 and 31 July 2015 and a declaration that the contract of 9 February 2015 was fully effective. It submits, in particular, that the contract of 14 July 2015 has an unlawful basis, rendering it incurably void, namely Vlabinvest APB’s implementation of the land policy for which it is responsible, which imposes a priority rule contrary to Articles 21, 45, 49 and 63 TFEU and Articles 22 and 24 of Directive 2004/38.
- 12 Vlabinvest APB, the VMSW and the Flemish Region maintain, by contrast, that those provisions are not applicable in the present case, since the dispute is confined in all respects within a single Member State, namely in Belgium. They add that that priority rule can apply only at the stage at which the plots and homes which will be developed are awarded in the context of a social housing project by Vlabinvest APB. The possible restriction relied on is therefore irrelevant at the stage of the dispute in the main proceedings, which concerns the acquisition of building land to carry out such a project.
- 13 However, the referring court takes the view that, although the dispute in the main proceedings is confined in all respects within Belgium, the case is not wholly unrelated to a situation in which EU law may be applicable. In particular, the scheme which includes the priority rule contested by Fremoluc has both many notable similarities to and differences from that at issue in the case which gave rise to the judgment of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288). Referring to paragraphs 33 to 35 of that judgment, that court states that that rule appears to affect the nationals and undertakings of other Member States and that if the contracts of 14 and 31 July 2015 were annulled, the application of that rule at the time of the subsequent offer for sale or rental of the

plots and homes created, would be avoided. The national court does not, however, rule out the possibility that the Court might decide that, in the present case, EU law is not applicable to the dispute in the main proceedings.

- 14 In those circumstances, the *Nederlandstalige rechtbank van eerste aanleg Brussel* (Dutch-language Court of First Instance, Brussels) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Should Articles 21, 45, 49 and 63 [TFEU] and Articles 22 and 24 of [Directive 2004/38] be interpreted as precluding a scheme under which a government body develops land with a view to offering plots and homes for sale and rental on favourable terms, with priority being given to persons who have strong social, economic and socio-cultural ties with the area in which that body operates, and which sets income requirements which the vast majority of those persons can fulfil, such as the scheme which results from reading the following in conjunction with each other:

- the [provincial regulation of 25 February 2014];
- Article 2/2 of [the Decree of 29 September 2006] and of the second to sixth paragraphs of Article 17 of [the Decree of 12 October 2007]?’

- 15 On 9 March 2018, *Vlabinvest APB* and the *VMSW* appealed against the order for reference. By judgment of 24 April 2018, the *hof van beroep te Brussel* (Court of Appeal, Brussels, Belgium), which acquired jurisdiction by reason of the ‘*effet dévolutif*’ of an appeal under national law, decided to maintain the request for a preliminary ruling.

Admissibility of the request for a preliminary ruling

- 16 By its question, the referring court asks, in essence, whether Articles 21, 45, 49 and 63 TFEU and Articles 22 and 24 of Directive 2004/38 must be interpreted as precluding national legislation granting a right of pre-emption to a government body, responsible for land and housing policy, for the acquisition of building land on which social housing will be developed and providing that it will be allocated according to a priority rule based on the existence of strong ties that potential beneficiaries have with the part of the territory corresponding to the operating area of that body.
- 17 *Vlabinvest APB*, the *VMSW* and the Flemish Region submit that the request for a preliminary ruling is inadmissible on the ground that the case in the main proceedings is wholly unrelated to EU law, which *Fremoluc*, the Czech Government and the European Commission dispute.
- 18 It should be noted at the outset that the request for a preliminary ruling concerns the interpretation of provisions of the FEU Treaty relating to freedom of movement for persons, freedom of establishment and the free movement of capital, and to measures adopted to implement those provisions, in a situation where, as the referring court itself observes, the dispute in the main proceedings is confined in all respects within a single Member State. According to the Court’s settled case-law, those provisions of the FEU Treaty, and the measures adopted to implement them, do not apply to a situation which is confined in all respects within a single Member State (see, to that effect, judgments of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 33 and the case-law cited, and of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited).
- 19 As the Court has observed, while the bringing of an action for failure to fulfil obligations requires the Court to ascertain whether the national measure challenged is, in general, capable of deterring operators from other Member States from making use of the fundamental freedoms in question, its function in proceedings for a preliminary ruling is to help the referring court to resolve the specific

dispute pending before that court, which presupposes that those freedoms may be relied on in that dispute and, therefore, that it has been established that those freedoms are applicable to that dispute (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 49, and order of 31 May 2018, *Bán*, C-24/18, not published, EU:C:2018:376, paragraph 22).

- 20 In paragraphs 50 to 53 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874), the Court referred to the four situations in which it could, nonetheless, be necessary for the resolution of the disputes in the main proceedings to interpret the provisions of the Treaties relating to fundamental freedoms, even though the disputes in the main proceedings were confined in all respects within a single Member State, leading the Court to find that those requests for a preliminary ruling are admissible.
- 21 The Court has also stated that, in those four situations, it cannot, where the referring court does no more than state that the legislation in question applies without distinction to nationals of the Member State concerned and those of other Member States, consider that the request for a preliminary ruling concerning the provisions of the FEU Treaty on the fundamental freedoms is necessary to enable that court to give judgment in the case pending before it. The specific factors that allow a connecting link to be established between the subject matter or circumstances of a dispute, confined in all respects within the single Member State concerned, and those provisions must be apparent from the order for reference (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54; orders of 27 April 2017, *Emmea and Commercial Hub*, C-595/16, not published, EU:C:2017:320, paragraph 18, and of 31 May 2018, *Bán*, C-24/18, not published, EU:C:2018:376, paragraph 17).
- 22 The Court added that, in a situation such as that in the main proceedings, which is confined in all respects within a single Member State, it is for the referring court to indicate to the Court, in accordance with the requirements of Article 94 of the Court's Rules of Procedure, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute (judgments of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 55; of 8 December 2016, *Eurosaneamientos and Others*, C-532/15 and C-538/15, EU:C:2016:932, paragraph 47; and order of 31 May 2018, *Bán*, C-24/18, not published, EU:C:2018:376, paragraph 18).
- 23 It should be noted that those requirements also appear in the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439, p. 1).
- 24 In the present case, it should be observed, first of all, that the present request for a preliminary ruling contains no indication that the situation in the main proceedings may be covered by any of the circumstances contemplated by the case-law resulting from the judgments of 5 December 2000, *Guimont* (C-448/98, EU:C:2000:663), and of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360), referred to in paragraphs 52 and 53 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874). In particular, the referring court does not state that it was obliged, under Belgian law, to find that Fremoluc was entitled to the same rights as those which a national of another Member State would derive from EU law in the same situation or that the provisions of that law have been made applicable by Belgian legislation.
- 25 Next, it must be noted that the dispute in the main proceedings seeks the annulment of a contract for the sale of land located in Belgium, concluded between owners resident in Belgium and a public body of that Member State and of ensuing contracts between public bodies of that State and that it constitutes a specific civil law case, which may lead only to a decision applicable as between the

parties. Under those circumstances, the present case is not covered by the situation referred to in the judgment of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288), cited by the referring court.

- 26 In the case which gave rise to that judgment, a reference was made to the Court by the Cour constitutionnelle de Belgique (Constitutional Court, Belgium) in proceedings for the annulment of provisions applicable not only to Belgian nationals but also to nationals of other Member States, suggesting that the decision adopted by that court, following the judgment of the Court, would also have effect in respect of the latter nationals. It follows that the request for a preliminary ruling does not fall within the situation referred to in paragraph 51 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874) either.
- 27 Finally, it remains to be determined whether the request for a preliminary ruling could be covered by the situation described in the case-law arising from the judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300), referred to in paragraph 50 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874). In that respect, it should be noted that the admissibility of such a request is subject to the requirements set out in paragraphs 54 and 55 of that judgment.
- 28 It follows from those requirements that, in order for it to be found that there is such a connecting link, it is not sufficient for the referring court to state that it is not inconceivable that nationals established in other Member States were or are interested in making use of Union provisions on fundamental freedoms to carry out activities in the territory of the Member State which enacted the national legislation in question and, consequently, that that legislation, applicable without distinction to nationals and to nationals of other Member States, is capable of producing effects which are not confined to that Member State.
- 29 The request for a preliminary ruling must clearly set out specific factors, that is, not hypothetical considerations but specific evidence, such as complaints or applications brought by operators situated in other Member States or involving nationals of those Member States, on the basis of which the required connecting link may be positively established. More particularly, the referring court may not merely submit to the Court evidence suggesting that such a link cannot be ruled out or which, considered in the abstract, could constitute evidence to that effect, and must, on the contrary, provide objective and consistent evidence enabling the Court to ascertain whether such a link exists (see, by analogy, judgments of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraphs 20 and 22, and of 19 April 2018, *Oftalma Hospital*, C-65/17, EU:C:2018:263, paragraphs 39 and 40).
- 30 The present request for a preliminary ruling merely states that the priority rule in question in the main proceedings appears to affect the nationals and undertakings of other Member States without clearly setting out specific evidence to that effect. In particular, the request has not provided any evidence which would help to confirm that nationals of other Member States, such as competitors of Fremoluc, are interested in making use of the fundamental freedoms in question in the dispute in the main proceedings.
- 31 It follows that none of the four situations referred to in paragraph 20 of the present judgment, in which it might prove necessary, in order to resolve the dispute in the main proceedings, for the provisions of the Treaties relating to the fundamental freedoms to be interpreted, is applicable in the present case. As regards Articles 22 and 24 of Directive 2004/38, it should be noted that it governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national (judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 20 and the case-law cited). It is not in any way apparent from the request for a preliminary that the dispute in the main proceedings involves nationals of Member States other than the Kingdom of Belgium.

- 32 In those circumstances, that request does not demonstrate that there is a connecting link between the subject matter or the circumstances of the dispute in the main proceedings, which is confined in all respects within a single Member State, and Articles 21, 45, 49 and 63 TFEU and Articles 22 and 24 of Directive 2004/38, of which an interpretation is sought.
- 33 In the light of all the foregoing considerations, it must be held that this request for a preliminary ruling is inadmissible.

Costs

- 34 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 (Fourth Chamber) hereby rules:

The request for a preliminary ruling from the Nederlandstalige rechtbank van eerste aanleg Brussel (Dutch-language Court of First Instance, Brussels, Belgium), made by decision of 19 May 2017, is inadmissible.

[Signatures]