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## EU Law and Local Residency Requirements for Planning Permission

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### Introduction

This L&RS Note provides a brief overview of issues decided by the Court of Justice of the European Union in the case in *Libert and Others v. Flemish Government and Others*,<sup>1</sup> referred to as ‘the Flemish Decree case’. It also examines how discriminatory measures under Irish planning law may be affected by aspects of EU law that were considered in the Flemish Decree case.

### The Flemish Decree case

The judgment of the Court of Justice of the European Union in *Libert and Others v. Flemish Government and Others* relates to provisions of the Treaty on the Functioning of the European Union (TFEU) and to Directives that have general application in all Member States. The decision is therefore potentially relevant to all Member States, including Ireland.

The cases arose from measures introduced by the Flemish government dealing with acquisition and development of lands in certain areas of Flanders. A local resident and

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<sup>1</sup> Joined cases C-197/11 and C-203/11, judgment (8 May 2013) available [here](#)

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several property development companies objected to provisions in the Flemish law and brought cases before Belgium's Constitutional Court. The Constitutional Court asked the Court of Justice to give preliminary rulings on questions concerning the application and effect of EU laws on two aspects of the Flemish law:

- a provision that required persons seeking to buy or enter into long-term leases of property in certain communities in Flanders to have a "sufficient connection" with that community, and
- a requirement that developers ensure that a particular percentage of housing developments in certain areas be devoted to the provision of social housing.

### The 'Sufficient Connection' Requirement

The Flemish law required a person who proposed to buy or enter into a long-term lease of a home in certain communities in Flanders to have a "sufficient connection" to the community concerned. This could be demonstrated by having been resident in the community for six years, by conducting economic activity in the community for at least half of every working week or by having a long-term link with the community based on a "professional, family, social or economic connection". The Flemish Government maintained that this was a social support that was intended to help ensure housing for economically disadvantaged persons.<sup>2</sup>

The Court of Justice considered the requirement in light of the 'four freedoms' provided for in the EU Treaties – that is, the free movement of labour, capital and goods and the freedom to provide services throughout the Member States. It also examined the provision's effect in the light of [Directive 2004/38/EC](#), which deals with the movement and residence of EU citizens within the EU. It concluded that the requirement restricted each of these fundamental freedoms. The Court noted its own case law demonstrating that Member States could restrict those freedoms on grounds of the public interest, but only if the restrictions were appropriate and went no further than necessary. In this case, the objective of providing housing to economically disadvantaged persons could have been achieved by means – such as income supports or subsidies – that did not impinge on the EU's fundamental freedoms. In fact, the 'sufficient connection' requirement applied equally to well-off and economically disadvantaged persons, and so did not provide the public interest justification on which the Flemish Government relied. The requirement was therefore incompatible with EU law.

### The Social Housing Requirement

Another provision of the Flemish law related to developments of housing in certain areas. It imposed a 'social obligation' whereby developers were obliged to ensure that a defined

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<sup>2</sup> The Belgian Constitutional Court had noted that the law was enacted at least partly in response to concerns about 'gentrification', where the arrival of affluent newcomers into an area forces housing and related prices up, to the detriment of current and prospective residents who are less well off.

percentage of housing units were devoted to social housing units. This obligation could be satisfied directly by the developer providing the social housing itself (and be compensated by tax incentives and subsidy payments), or indirectly by selling land or leasing units to a social housing agency.

The Court of Justice considered three issues arising from this provision:

- whether the compensation by way of tax incentives and subsidies amounted to state aid for the purposes of EU law,
- whether the social housing obligation was compatible with Directive 2006/123/EC, dealing with the freedom to provide services across Member States, and
- whether the social housing obligation amounted to a public works contract for the purposes of EU law.

### State Aid

Article 107(1) of the TFEU prohibits State Aids – that is, aids granted by Member States to undertakings that have the effect of distorting competition in a way that affects trade between Member States. The Court of Justice found that the reliefs and incentives – which included reduced VAT and stamp duty as well as subsidies for infrastructure work – were capable of constituting state aids. However, the Court of Justice did not have jurisdiction or sufficient information to make a full determination of the issue and it left it for the Belgian Constitutional Court to determine whether the facts of the case amounted to a breach of state aid rules or whether the reliefs and incentives fell within the scope of allowable exceptions to the prohibition in Art.107(1).<sup>3</sup>

### Directive 2006/123/EC

This Directive concerns the right to provide services across Member States. In the Belgian Constitutional Court, property developers had argued that the social housing obligation of the Flemish law was unduly restrictive and could inhibit or prevent an undertaking providing housing development or rental services. The Court of Justice was asked to rule on this issue but determined that the Directive had no application to the development or use of land, town planning or building standards.

### Public Works Contracts

A number of developers had argued before the Belgian Constitutional Court that the social housing requirement was equivalent to a provision of a public works contract for the purposes of various EU legal provisions. They maintained that the obligation to reserve part of the land for social housing (or equivalent measures as outlined above) breached those

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<sup>3</sup> Exceptions are provided for in Art. 107(2) and (3) for matters including aid granted to individual persons on social grounds, relief from natural disasters and certain classes of assistance on cultural or economic grounds.

provisions as an unwarranted interference with trade between Member States, the right to establish business in Member States and an unfair advantage to local property owners and developers.

The Court of Justice decided that it did not have sufficient information to determine whether the rules on social housing and the circumstances of this particular case amounted to a public contract or a public works contract. It clarified the criteria that would have to be met if they were to be so classified and left it up to the Belgian Constitutional Court to determine the relevant facts.

## Relevance to Ireland

A number of Irish planning authorities restrict the granting of planning permission for housing based on personal characteristics of the applicant such as their connection to a particular locale as a 'permanent native resident' who has lived in the area for a number of years, having employment locally, or – in Gaeltacht areas – proficiency in the Irish language. These restrictions are by their nature discriminatory but are generally justified as a means of preserving the culture or rural character of the area. The measures are commonly applied to permissions for one-off housing and are enforced by means of 'enurement clauses', which seek to restrict the ability of the original owners to dispose of the house for a period of years. These restrictions bear some similarity to the measures that were the subject of the Flemish Decree case, though in that case the provisions were formulated as social housing measures, notwithstanding their obvious aim of preserving local characteristics.

## Law Society Report

The courts in Ireland do not appear to have considered the use of local residency conditions and equivalent measures, but the issue has received some attention from legal scholars. In 2005 the Law Society's Law Reform Committee published a report on the use of restrictive measures by Irish planning authorities entitled 'Discriminatory Planning Conditions: The Case for Reform'.<sup>4</sup> This examines these measures in light of EU law as well as human rights conventions, the Constitution, statutes and case law. Concerning EU law it notes (as the Court of Justice subsequently did in the Flemish Decree case) that measures restricting any of the EU's four freedoms must affect trade or movement of workers between Member States before they can be actionable in EU law. Where a discriminatory measure has such an effect, it will make no difference if the measure is applied indiscriminately to nationals of

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<sup>4</sup> Report available [here](#)

all Member States: the fact that it inhibits the freedom is sufficient to constitute, on the face of it, a breach EU law.

However, it may be possible to justify a discriminatory measure if it was introduced for a reasonable purpose and goes no further than is necessary. The authors consider it likely that the Court of Justice would accept some types of discriminatory planning measures to preserve an area's rural character and to foster employment outside the tourist sector. They argue that 'bloodline' conditions (i.e. favouring the children or other relatives of local residents), preference for returning emigrants and local residency conditions would be unlikely to pass muster because they would discriminate against outsiders who might contribute to rural development. However, they propose that local residency and employment conditions (including those favouring agricultural workers who need to live close to their place of work) would be reasonable and proportionate. (They note that EU law regards a person moving between Member States to seek employment as 'a worker', so such a condition should not discriminate against job-seekers.)

The article also considers the effects of [Directive 2000/43/EC](#) concerning equal treatment of persons of different racial or ethnic origins. (As the article points out, that Directive does not apply to difference of treatment based on nationality.) The article suggests that the Directive is obscure in its phrasing but concludes that, similarly to the arguments based on the four freedoms, it prohibits measures based on criteria such as family relation to a local inhabitant but might permit those based on local residency and employment.

## Conclusion

The judgment of the Court of Justice in the Flemish Decree case underscores the relevance of the EU's four freedoms to measures that give residents of a locale preference in acquiring housing in that area. This confirms the view expressed in the report published by the Law Society's Law Reform Committee in 2005.

Unlike the approach adopted in Ireland, the Flemish Government's measures were framed as a support for social housing. The Court of Justice found that this gave insufficient justification for the discriminatory measures. In contrast, the authors of the Law Society report say that discriminatory measures that are intended to maintain the rural character of an area and to foster non-tourist industry may be legitimate under EU law provided they are proportionate. They suggest that local residence provisions tied to a local employment obligation may be proportionate for the suggested purposes. Similarly, measures to foster a local language may be legitimate provided they are applied in a non-discriminatory manner.

The authors state that discriminatory measures framed around family connections to an area are likely to be found to breach EU law, as the purposes they are intended to achieve (such as preserving rural characteristics etc.) can usually be attained without such discrimination.