

Overview of cases on “social housing” (10/2018)

1) State aid – existing and special project aid to housing corporations (The Netherlands)

Caused by a first decision of the European Commission the Dutch authorities amended in 2009 the provisions on social housing for their non-profit organisation “wocos” (woningcorporaties). They implemented a system of **services of general economic interest (SGEI)** according to Art 106 (2) TFEU. More precisely, the target group of socially disadvantaged households were defined as individuals with an income not exceeding EUR 33,000 (compared to previously EUR 38,000). This definition covers approximately 43 % of the Dutch population. Furthermore, the maximum rent in social housing will amount to EUR 647.53. It was also ensured that 90 % of the dwellings in each woco were allocated to individuals belonging to the target group at the moment of allocation.

These amendments were considered to be compatible with the internal market by the Commission. However, other housing associations appealed against the decision of the Commission (N 642/2009) and the rulings of the General Court (T-203/10). So the Court of Justice referred the case to the General Court twice (C-132/12P and C-415/15P), where the case is still pending.

References:

- N 642/2009: http://ec.europa.eu/competition/state_aid/cases/197757/197757_1155868_173_2.pdf
- T-203/10: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164462&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1217935> (12.5.2015, French)
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=117303&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=132920> (16.12.2011, French)
- C-132/12P: <http://curia.europa.eu/juris/liste.jsf?num=C-132/12&language=en>
- C-415/15P: <http://curia.europa.eu/juris/liste.jsf?num=C-415/15&language=en>

2) State aid - housing finance agency borrowings guarantee (Ireland)

The European Commission stated that in order to fulfil Art 106 (2) TFEU the following conditions had to be met: (i) the service in question had to be a **service of general economic interest (SGEI)** and had to be accurately defined by the Member State; (ii) the undertaking in question had to be entrusted by the Member State with the provision of such a service; (iii) the exemption should be limited to what was necessary; and (iv) the exemption might not affect the development of trade within the Union to an extent that would be contrary to the Community’s interest. In the present case an agency (HFA) advanced moneys to housing authorities (municipalities) to enable loans to be made by the authorities for the acquisition and construction of houses. The Commission concluded that social housing was fully in line with the Treaties, as it was a legitimate element of public policy and limited to what was necessary to attain this objective.

Reference:

- N 209/2001: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N209_2001

3) State aid – grants for owner occupation scheme and partnership support for regeneration (Scotland, UK)

The Scottish scheme was targeted at projects, which contributed to the provision of low cost housing for owner occupation. The aid, of which the suppliers of housing were the direct beneficiaries, was largely channelled to the future owner occupiers of social housing. The

Commission took into consideration that, without the aid, the social housing at affordable prices would not be realised; that grant applicants were incentivised to pursue reductions in cost and increases in value; and that no cumulation with other aid was possible. Therefore, the Commission stated that the scheme was compatible with Art 107 (3) (c) TFEU.

A very similar case was the British scheme which the Commission approved in the light of Art 107 (3) (c) TFEU on the same grounds until 2006 and prolonged it until 2013.

References:

- N 497/2001 (Scotland): http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N497_2001
- N 239/2002 (UK): http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N293_2006
- N 293/2006 (UK): http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N293_2006

4) State aid -housing and social programme for problematic districts (Czech Republic)

The scheme aimed at granting financial support to cover part of the investment costs for the regeneration of existing apartment houses in a selected number of the most problematic localities of towns with more than 20 000 inhabitants (except Prague) situated only in underdeveloped regions in the Czech Republic. The support could be granted to beneficiaries performing an economic activity, independently of their legal form. The measure was designed (i) to stimulate private investment in the revalorisation of defective apartment buildings, with a view to improving the health and safety living conditions of the residential accommodations in these residential properties; (ii) to improving social cohesion by preventing the creation of social ghettos by improving the quality of life and revitalising housing estates; and (iii) enhancing the environmental friendliness of the buildings by upgrading their thermal insulation which would contribute to reduce energy waste. The scheme was also co-funded by the European Regional Development Fund. The Commission acknowledged the attainment of consumer protection and economic and social cohesion. It concluded that the scheme was compatible with Art 107 (3) (c) TFEU.

Reference:

- N 342/2008: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N342_2008

5) State aid - support for construction of special housing for elderly people (Sweden)

In this case the aim of the Swedish scheme was to encourage construction of special housing for elderly people. The constructed apartments were rented from the property owners by the municipality, who in turn would allocate them to elderly people in accordance with social security legislation. The national measure was not designed as a compensation for a SGEI and therefore, the Commission examined it in the light of Art 107 (3) (c) TFEU (**sectorial aid**). The scheme was open to all property owners, the level of support was proportional (coverage of a limited proportion of 10 % of actual construction costs), the use of the dwellings was restricted to the elderly and the measure was limited in time to five years (until 2011, with final payments until 2014). As the scheme was needed to reach an objective of social equity that was otherwise not being sufficiently met by the private market and the aid was proportional, it was compatible with the common market.

References:

- N 798/2006: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N798_2006
- see also (regarding student housing and other small dwellings, only in Swedish):
- N 40/2003: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N40_2003

6) State aid and fundamental freedoms - “Libert Case” (Belgium)

The Court of Justice stated in a preliminary proceeding that national rules, which make the transfer of immovable property in the target communes subject to verification by a provincial assessment committee (examination of a “sufficient connection” between the prospective

buyer or tenant and those communes), are a restriction of the fundamental freedoms guaranteed by the FEU.

However, a restriction of Art 63 TFEU (free movement of capital – here because of a “social obligation” imposed on some economic operators when a building or land subdivision authorisation is granted) may be justified on the ground of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population. In addition, these national measures have to be necessary and appropriate to attain this objective.

The Flemish tax incentives and subsidy mechanisms are liable to be classified as State aid within the meaning of Art 107 (1) TFEU. It was left to the national court to determine whether the conditions relating to the existence of State aid are met. The **SGEI** Decision (here public service compensation is granted to certain undertakings entrusted with the operation of services of general economic interest) is nevertheless applicable to such measures.

The Belgium Constitutional Court classified the relevant provisions of the Flemish Decree as State aid and nullified the requirement of “sufficient connection”.

Reference:

- C-197/11 and C-203/11: <http://curia.europa.eu/juris/liste.jsf?num=C-197/11&language=DE>

7) Tax cases on housing

a) Property subsidy (Germany)

The German provision (EigZulG) made the grant of the subsidy for owner-occupied dwellings subject to the condition that those persons were liable in Germany to unlimited taxation of income and should build or purchase a dwelling for their own occupation in Germany. The Court of Justice ruled that the preclusion of persons liable in Germany to unlimited taxation of income who build or purchase a dwelling in another Member State was a restriction of the freedom of movement and freedom of establishment. The national measure could not be justified by encouraging the building of dwellings in its territory in order to ensure an adequate supply of housing because the measure went beyond what was necessary to attain the objective pursued.

Reference:

C-152/05: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-152/05&td=ALL>

b) Exemption from capital gains tax (Portugal)

The Court of Justice stated that the fiscal exemption from capital gains tax arising on the transfer for valuable consideration of real property – subject to the condition that the gains realised should be reinvested in the purchase of real property situated in Portuguese territory – was a restriction of the freedom of movement for workers and freedom of establishment. Even if it were possible to invoke a right to accommodation, the national rule was seen as disproportionate.

Reference:

C-345/05: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-345/05&td=ALL>

c) Deferral of taxation (Sweden)

The Court of Justice concluded that the Swedish tax provisions, which made entitlement to deferral of taxation on capital gains arising from the sale of a private residential property or of a right to reside in a private cooperative property conditional on the newly-acquired residence also being on Swedish territory, were a restriction of the freedom of movement for workers and freedom of establishment. The justification to ensure coherence of the tax system did not prevail in this case, as no direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy was established.

Reference:

- C-104/06: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-104/06&td=ALL>

d) Complementary pensions (Germany)

The Court of Justice stated that the German provisions for complementary pensions were a restriction of the freedom of movement for workers, in so far as those provisions (i) denied cross-border workers the right to the savings-pension bonus, unless they were fully liable to tax in that Member State; (ii) prohibited cross-border workers from using the subsidised capital for the acquisition or construction of an owner-occupied dwelling, unless the property was situated in Germany; and (iii) provided that the bonus be reimbursed on termination of full liability to tax in that Member State. With regard to point (ii) the justification of ensuring an adequate supply of housing was invoked. The Court held that even under the assumption that such an aim constituted an overriding reason in the public interest, the national measure went beyond what was necessary to achieve the desired objective, since that objective could be just as easily attained if cross-border workers continued to establish their residence in another Member State rather than in Germany. Moreover, the alleged risk of conflict with the housing policies of other Member States could not be accepted in the present case, since Germany failed to establish this risk and merely claimed that their housing policy might be disrupted.

Reference:

- C-269/07: <http://curia.europa.eu/juris/liste.jsf?num=C-269/07>

e) Prior administrative authorisation in the housing sector (the Netherlands)

The national legislation was considered to be a restriction of the free movement of capital, as the exercise of cross-frontier activities of a Dutch institution active in the housing sector (such as Servatius) was subject to prior administrative authorisation. However, this restriction could be justified by overriding reasons in the public interest. The Court of Justice held that requirements related to public housing policy in a Member State and to the financing of that policy were such overriding reasons. The national criteria regarding the prior administrative authorisation had to be objective, non-discriminatory, known in advance and capable of adequately circumscribing the exercise by the national authorities of their discretion. This assessment was left to the national court.

Reference:

- C-567/07: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-567/07>

f) Exemption from tax arising on the purchase of a first home (Greece)

The Court of Justice ruled that national provisions reserving entitlement to the exemption from the tax arising on the purchase of a first home to persons who are resident in Greece on a permanent basis were a restriction of the freedom of movement of workers and the freedom of establishment. The Hellenic Republic invoked objections, on the one hand, in facilitating the purchase of a first home and preventing any property speculation and, on the other hand, in restricting tax evasion and preventing abuse in order to justify the legislation. The Court concluded that the national requirement did not attain the objectives pursued, as no obligation on the purchaser of immovable property to use the property as a permanent residence was imposed (no prohibition of renting out the property). Furthermore, the grant of the tax advantage was non-selective and therefore it could not be presumed that the allegedly socio-political objective was met. Moreover, the national measures were disproportionate, as other less restrictive methods could have been implemented, e.g. the entry on the tax register or the land register, a requirement for declarations as to tax or accommodation or the implementation of checks by the tax authorities.

Reference:

- C-155/09: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-155/09>