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Court of Justice rules that the Breyne Act breaches EU Law



On 16 November 2023, the European Commission issued a reasoned opinion requiring the Belgian Government to amend the so-called Breyne Act, which offers important legal safeguards for buyers of houses or apartments to be built or under construction. As Belgium has failed to comply with the request, the matter was brought before the Court of Justice.

On 26 February 2026, the Court of Justice ruled against Belgium. In line with the European Commission's position, the Court confirmed that the guarantee to be provided under the Breyne Act by non-accredited sellers and contractors creates an unjustified obstacle for sellers and contractors established in other EU Member States, since Belgian accredited sellers and contractors are subject to a significantly lower guarantee requirement. This unequal treatment violates the freedom to provide services.

What is the Breyne Act?

Buying a house or apartment that is not yet (fully) constructed involves numerous risks. The law of 9 July 1971, more commonly known as the Breyne Act, aims to protect prospective owners of residential buildings, either to be built or under construction, from the risks associated with such an endeavour. The Breyne Act imposes legal safeguards on all construction contracts, sales on plan and turnkey contracts relating to such unfinished residential properties.

One of the safeguards that the Breyne Act offers is the obligation for the seller or contractor (depending on the type of contract) to provide a financial guarantee. This financial guarantee protects the (future) owner should the seller or contractor fail to comply with its contractual obligations, for example by not delivering the agreed building. Such a scenario would have serious adverse effects for the owner since the sale would already have legally taken place and advance payments may already have been made. It is precisely this guarantee mechanism that lay at the heart of the proceedings before the Court of Justice.

What type of guarantee is required under the Breyne Act?

Under Article 12 of the Breyne Act (read in conjunction with Articles 3 and 4 of the Royal Decree of 21 October 1971), a distinction is made between two different scenarios:

a) **If it concerns a seller or contractor that is accredited in Belgium**, the seller/contractor should deposit an amount of 5% of the price of the residential building with the Belgian Deposit and Consignment Office ("*Deposito- en Consignatiekas"/"Caisse des dépôts et consignations*"). This should ensure that the future owner cannot lose (part of) its advance payment, which is also limited to 5% under the Breyne Act.

b) **Where the seller or contractor is not accredited in Belgium**, it must guarantee either the completion of the residential building or, in the event of termination of the contract prior to completion, the repayment of the amounts already paid. To that end, it must provide a joint and several guarantee issued by a credit institution or insurance company, allowing the future owner to recover the sums required to the complete the building in case of non-performance. This comes down to a guarantee for 100% of the contract price.

What were the issues raised by the European Commission?

According to the European Commission, the distinction between sellers/contractors who are accredited in Belgium and those who are not breaches European law, and in particular, the European Directive of 12 December 2006 on services in the internal market, also known as the Services Directive. Under the Services Directive, service providers established in the European Union must not face unjustified obstacles when they wish to establish themselves or provide services across borders.

In practice, the European Commission considered that obtaining Belgian accreditation is a greater hurdle for non-Belgian sellers/contractors, who may need to complete a lengthy administrative procedure before they can compete on equal terms with Belgian contractors that already hold accreditation. It therefore took the view that imposing more stringent guarantees on non-accredited sellers/contractors under the Breyne Act created an unjustified obstacle and should be removed.

In order to enforce the freedom to provide services under the Services Directive, the European Commission issued a reasoned opinion and gave the Belgian Government a deadline of two months, as of 16 November 2023, to amend the Breyne Act. The Belgian Government failed to comply and the European Commission brought proceedings before the Court of Justice on 3 December 2024.

What did the Court of Justice decide?

On 26 February 2026, the Court of Justice upheld the European Commission's position and found that, by imposing a guarantee amounting to 100% of the total price of the building on contractors and sellers who are not "accredited contractors", whilst the latter need only provide a guarantee of 5%, Belgium had failed to fulfil its obligations under Articles 16 and 23 of the Services Directive.

Violation of Article 16 – Free provision of services

The Court held that the distinction in the current guarantee obligations between accredited and non-accredited contractors constitutes a prohibited restriction on the free provision of services. Belgium failed to justify this restriction, and the Court found no valid ground under Article 16 of the Services Directive. It confirmed that consumer protection, although an overriding reason in the public interest, is not among the permissible justifications for restrictions on the free provision of services.

The Court further observed that Belgian accreditation is reserved to contractors, which automatically excludes real estate developers. Developers who are not contractors because they do not carry out the construction works themselves must therefore either provide a 100% completion guarantee or set up a structure with an accredited Belgian contractor to benefit from the 5% guarantee. Developers established in other Member States would, in practice, need to set up a secondary establishment in Belgium to do so. The Court agreed with the European Commission that the need to establish a secondary establishment in Belgium in order to create such a structure and obtain the reduced guarantee is incompatible with the Services Directive.

The Court observed that the extensive evidential requirements linked to the mutual recognition mechanism under Belgian accreditation law – relating to technical, financial and economic capacity, as well as social and fiscal obligations – may deter contractors or real estate developers from other Member States from relying on accreditation obtained in their home state.

Violation of Article 23 – Professional insurance and guarantees

Under Article 23 of the Services Directive, Member States may require service providers whose services present a direct and particular risk to the financial security of the recipient to take out professional liability insurance or provide a guarantee or similar arrangement. However, any such obligation must be appropriate in relation to the nature and extent of the risk.

While the Court acknowledged that contractor insolvency may cause financial harm to consumers, it held that the 100% guarantee was disproportionate and incoherent with the objective of consumer protection, as buyers facing the same insolvency risk are not equally protected.

The Court noted the paradox that, under Article 12 of the Breyne Act, buyers are in fact better protected when contracting with a non-accredited contractor than with an accredited one.

The Court further noted that the Breyne Act already provides additional protections for consumers, including progressive transfer of ownership and staged payments, which mitigate insolvency risks.

The Court therefore concluded that requiring a non-accredited contractor to provide a guarantee amounting in practice to 100% of the contract price goes beyond what is necessary to ensure consumer financial protection.

What are the consequences of the judgment?

The judgment confirms that, by requiring non accredited contractors and sellers to provide a guarantee covering 100% of the contract price, while accredited contractors are subject to a 5% guarantee, Belgium has failed to fulfil its obligations under Articles 16 and 23 of the Services Directive. Belgium is therefore required to amend the Breyne Act to bring it into line with European law, the choice of compliance measures being left to the Belgian authorities.

If you have any questions on legal developments at European or Belgian level, do not hesitate to contact your usual Real Estate team contact.

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