



Newsflash

Constitutional Court: absence of real estate buyers' right to withdraw is legal when sale is outside the seller's premises

One of the protection measures in consumer law is to grant consumers the right to withdraw when signing an agreement outside the (professional) sellers' premises. The law reserves this protection specifically for consumers of services and movable property when the sale takes place outside the company's premises. In the case that led to the Court's ruling, a question was raised on whether the distinction made with regard to immovable property buyers, to whom the right to withdraw is not granted by law, is constitutional.

In a [ruling](#) on 17 September 2015, the Constitutional Court validated the exclusion of an immovable property sale, by a property developer-seller and taking place outside its premises, from the scope of the provisions on "sale outside the company's premises" in the (old) Belgian Law on Market Practices and Consumer Protection¹.

The Court ruled on the (non-)discriminatory nature of the different protection levels accorded to consumers of movable goods and services and immovable property buyers.

The facts

A property developer and a buyer conclude a private deed of purchase at the buyer's home in relation to the purchase of an unfinished but already watertight building structure, subject to the condition precedent that the buyer obtains a mortgage loan to finance the purchase within four months.

The property developer does not hear from the buyer for four months and decides to claim the sale's cancellation to the buyer's detriment. The buyer files a counterclaim, claiming the deed's nullity due to the omission of the right to withdraw, laid down by article 60 of the Law on Market Practices and Consumer Protection (now art. VI.67 CEL).

¹ Now book VI 'Market Practices and consumer protection' in the Code of Economic Law (CEL)

The Court of first instance rules that the deed constitutes a property development agreement which has the nature of a “sales” agreement relating to immovable property, which falls outside the scope of the Law on Market Practices, making the protection provided by article 60 inapplicable.

In view of these facts, the Court of first instance asked the Constitutional Court if articles 58 §1, 1° and 60 constitute a violation of the principle of non-discrimination and equal treatment, since a consumer can benefit from protection with property development agreement which has the nature of a “services” agreement but not with an immovable property sale.

Evolution of the law

The Law of 6 April 2010 on Market Practices, with the exception of articles 110 to 118, was repealed by article 8 in the law of 21 December 2013² but was largely reproduced in Book VI ‘Market Practices and Consumer Protection’. As such, this modification has no impact on the preliminary questions.

Ruling Constitutional Court

The Constitutional Court ruled that, in this case, there was no discrimination and based its ruling on the following arguments:

- Purpose of the articles in question: a right to withdraw in order to protect the consumer who imprudently takes up a sudden offer outside the premises of a company.
- This kind of protection is not needed “when the company’s visit to the consumer’s home was explicitly requested in advance with the intention to negotiate the purchase”, as set out in article 59,1° of the Law on Market Practices; this was likely the case here;
- Reference to Directive 25/777/EEG transposed into Belgian law, later annulled and replaced by Directive 2011/82/EU, from which the exclusion of immovable property from protection ensues;
- The existence of alternative protection for consumers with regard to the purchase of immovable property based on standard legislation regarding sales and sector specific legislation applicable to this kind of transaction³;
- The compared categories’ difference in nature: the nature and the amount of the immovable property purchase mean that the risk of imprudently signing an agreement is more limited.

The Court concludes that the difference in protection is justified by the specific nature of immovable property, which renders the foreseen right to withdraw superfluous.

² Law of 21 December 2013, M.B./B.S. 30 December 2013.

³ More specifically, the so-called “Breyne” Law.

Legal consequences

Although the Law on Market Practices contains a definition for the terms 'movable goods' and 'services', there is yet to be a common definition for property development "services" agreement and property development "sales" agreement. Consequently, the qualification of the agreement by the judge will determine whether or not the right to withdraw must be included in the agreement.

Vigilance does therefore remain appropriate for property developers wishing to sign a private deeds outside company premises, in places such as realty fairs.

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