OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 9 December 2010[1]

I — Introduction

1. By the present action for failure to fulfil obligations brought by the Commission on 8 July 2009, the Commission is seeking a declaration that the Republic of Hungary has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the EEA Agreement by giving less favourable treatment to the purchase of residential property in Hungary on the sale of residential property in another State than is given to the purchase of residential property in Hungary on the sale of residential property in Hungary.

II — Legal framework

2. According to Paragraph 63 of Law CXVII of 1995 on income tax ('Law CXVII'), 'the rate of tax payable on income from the sale of immovable property and property rights shall be 25 per cent. … The tax paid shall be reduced (or waived) by the amount of the tax chargeable on the part of the income from the sale of a property or a property right (allowance for purchase of housing) which is used to purchase property for residential use, by a private individual, for himself, a close family member or a former spouse, in the 12 months preceding the receipt of the income or the 60 months following that date (basis of the allowance for purchase of housing).' That allowance for the purchase of housing is to be granted only if the investment relates to residential property in Hungary.

3. Paragraph 1 of Law XCIII of 1990 on taxes ('Law XCIII') provides:

'A property tax shall be payable on inheritance, gift or transfer for consideration of property.'

4. Paragraph 2 of Law XCIII provides:

'… the provisions on tax on gifts and transfers of property for consideration shall apply

1 — Original language: English.

to properties within the national territory and the related property rights, unless otherwise provided by international convention.'

5. Finally, Paragraph 21(5) of Law XCIII provides:

'… Where a private purchaser sells his other residence within one year before or after the purchase, the basis of assessment for the calculation of the tax shall be the difference between the market value – gross – of the property purchased and that of the property sold.'

III — Pre-litigation procedure and judicial proceedings

6. By letter of 23 March 2007, the Commission drew the attention of the Hungarian Government to the fact that Hungarian tax law concerning the transfer of immovable property appeared to be in breach of the obligations of the Republic of Hungary under Articles 18 EC, 39 EC and 43 EC and the corresponding articles of the EEA Agreement.

7. It put forward the view that the provisions of Law CXVII and of Law XCIII infringed the principles of freedom of movement for persons and freedom of establishment in that they place a higher tax burden on the purchase of residential property in Hungary where there is a related sale of residential property situated in another Member State than where the related sale is of residential property on Hungarian territory. Owing to their discriminatory character, those provisions therefore represent an obstacle to the free movement of workers and capital as well as to the freedom of establishment.

8. In its letter of 8 August 2007, the Hungarian Government recognised that the provisions of Paragraph 63 of Law CXVII represent an infringement of Community (now EU) law and announced its intention to adopt new legislation to guarantee that taxable persons are treated equally. However, as far as Paragraph 21(5) of Law XCIII is concerned, the Hungarian Government upheld its view that its provisions are in accordance with the EU rules on free movement.

9. On 27 June 2008 the Commission issued a reasoned opinion in which it maintained the complaints set out in its letter before action of 23 March 2007 with regard to Paragraph 2 in conjunction with Paragraph 21(5) of Law XCIII and reiterated its view that those provisions of Hungarian tax law infringed Articles 18 EC, 39 EC and 43 EC.

10. Since, in their reply to that reasoned opinion, the Hungarian authorities essentially maintained their position that the provisions

of the Hungarian tax law at issue are in conformity with EU law, the Commmission decided to bring the present action.

IV — Analysis

A — *Main arguments of the parties*

11. The Commission takes the view that by granting, for the purpose of establishing the basis of assessment for tax on transfer of property, the possibility of deducting the market value of the property sold from the value of the property purchased in the case of a related sale of residential property situated in Hungarian territory, while denying such a deduction if the residential property sold is situated in another Member State, the provisions of the Hungarian tax law at issue are contrary to the principles of freedom of movement for persons and freedom of establishment laid down by Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the EEA Agreement and represent an obstacle to the exercise of those freedoms.

12. It argues, in essence, that as a result of the exclusion of the tax advantage described, foreign or Hungarian citizens living in another Member State and having purchased property there may be discouraged from exercising their right to freedom of movement and from settling in Hungary.

13. The Commission considers that such persons, who may have already paid taxes of a similar amount in the State where they previously resided when they bought their property, are in a situation which is objectively comparable to that of persons who bought their previous residential property in Hungary. Consequently, such persons must be treated equally with regard to the Hungarian tax levied on the transfer of property. However, as the Hungarian legislation at issue places those who purchase residential property to replace such property situated in any other Member State – in that they have to pay the transfer tax on the total amount of the value of the property concerned – in a less favourable position than those who likewise purchase property but already had property within the territory of Hungary, it treats similar situations differently and is thus liable to constitute discrimination.

14. According to the Commission, that difference in treatment is not objectively justified.

15. In that regard, it rejects the view that the tax rules at issue could be justified by the need to maintain the cohesion of the tax

system, as there is no direct link between the tax advantage concerned and the offsetting of that advantage as required according to settled case-law in that regard. More particularly, there is no direct relationship between the acquisition of another residential property, with the resulting obligation to pay tax, and the sale of the first property and the taxes paid at that point in time, these being matters which only the Hungarian legislature considers to be connected.

16. Furthermore, in the view of the Commission, the infringement of the fundamental freedoms complained of in the present case can be justified neither by reference to the principle of territoriality invoked by the Hungarian Government, nor as a means of preventing abuses which may occur in connection with the administration of the tax advantage at issue or on the ground of the serious administrative difficulties and complications with which, it is alleged, the Hungarian authorities may be confronted in this context.

17. The Commission concedes, however, that the Republic of Hungary may impose specific requirements on the taxable person in order to obtain the necessary information, but those requirements may in any event not be disproportionate to the objective pursued.

18. The Hungarian Government contests the view taken by the Commission that the tax rule at issue, which clearly concerns direct taxation, is contrary to the provisions of the Treaty and the EEA Agreement relating to the free movement of persons and freedom of establishment.

19. In that regard, it emphasises, in particular, that persons who purchase residential property in Hungary for the first time and previously owned such property in another Member State are not in a situation comparable to that of persons who make a second purchase of residential property in Hungary in order to replace property situated in Hungary.

20. Rather, it is all those who purchase property on Hungarian territory for the first time who are to be regarded as being in the same position as each other for the purposes of the law on taxation at issue, while those who make a second purchase of property on Hungarian territory in order to replace property already owned there are, for their part, in a comparable position to one another. In fact, the members of each of those groups are treated equally under the Hungarian law on taxes, regardless of nationality or residence. The tax advantage at issue does therefore not amount to discriminatory treatment.

21. The Hungarian Government points out in this context that making a distinction between those who wish to purchase residential property in Hungary for the first time and

those who, while selling a property on which transfer tax has already been levied, purchase a new property in Hungary, is objectively justified in view of the fact that the powers of taxation of Hungary as regards the transfer of immovable property are limited to its territory. Moreover, as appears from the *Schumacker* line of case-law of the Court, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory since those two categories of taxpayer are not in a comparable situation. [2]

22. As regards the question whether the Hungarian legislation at issue constitutes an obstacle to the right to freedom of movement as granted under the Treaty articles invoked by the Commission, the Hungarian Government recalls that, according to the case-law of the Court, the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage in terms of indirect taxation or not, according to circumstances. [3]

23. In any event, according to the Hungarian Government, even if the legislation at issue is to be regarded as constituting a restriction on the freedom of movement, it is objectively justified in the light of the fiscal principle of territoriality and by the need to safeguard the cohesion of the national taxation system. As regards that latter ground of justification, the requirement that there be a 'direct link' between the tax advantage concerned and the offsetting of that advantage is not to be understood as narrowly as the Commission contends, as it is not necessary for the tax reduction granted on the second purchase of property to correspond exactly to the tax levied on the first purchase of property.

24. The Hungarian Government emphasises, finally, that the obligation to take account of tax which may be levied on the transfer of property in another Member State would lead to excessive complexity of its fiscal system and would meet serious administrative difficulties, as it is not possible in practice to verify whether or to what extent a comparable transfer tax may have been levied on the purchase of immovable property somewhere outside Hungary and to effectively prevent abuse of the tax advantage at issue. It is, on the other hand, contrary to the Commission's submission, not an objective of the tax legislation at issue to avoid a reduction of fiscal revenues.

2 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 34.

3 — Relying, inter alia, on Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45.

B — *Appraisal*

25. On a preliminary point, in my view, contrary to what the Commission contended in its application, there is no reason to call into question the characterisation, by the Hungarian Government, of the property tax on the transfer of real property at issue in the present case as a form of direct tax, in so far as it is apparently directly collected from the person who also bears its economic burden. [4]

26. As regards the judgment in *European Community* v *Belgium* which the Commission cited in this context, suffice it to note that that case, firstly, concerned a different tax, namely registration duties and that, secondly, the Court, for the purpose of answering the questions referred to it, essentially adopted the classification as an indirect tax given to the tax at issue in that case by the national court. [5]

27. That being said, it should be recalled that, according to the settled case-law of the Court, although direct taxation falls within their competence, Member States must nonetheless exercise that competence consistently with Community law. [6]

28. It is therefore necessary to consider whether, as the Commission maintains, the provisions in Hungarian legislation relating to the taxation of transfers of real property for consideration, and in particular Paragraph 2 in conjunction with Paragraph 21(5) of Law XCIII, constitute a restriction on the freedom of movement for persons and freedom of establishment enshrined in Articles 18 EC, 39 EC and 43 EC, and in Articles 28 and 31 of the EEA Agreement.

29. As regards, first of all, the complaint that the Republic of Hungary has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC, it must be noted that Article 18 EC, which sets out in general terms the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC with regard to freedom of movement for workers and in Article 43 EC with regard to freedom of establishment. It is therefore appropriate to consider, first, whether the tax regime at issue is contrary to Articles 39 EC and 43 EC before turning,

4 — As to that commonly accepted distinction between direct and indirect tax see the Opinion of Advocate General Stix-Hackl in Case C-475/03 *Banca Popolare di Cremona* [2006] ECR I-9373, points 54 and 55.

5 — Case C-199/05 [2006] ECR I-10485, in particular paragraph 17.

6 — See, for example, Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraph 16; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29; Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 10; and Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 12.

second, to an examination of that regime in the light of Article 18 EC. [7]

30. In this context it should be recalled, at the outset, that any national of a Member State, irrespective of his place of residence and his nationality, who exercises or has exercised the right to freedom of movement for workers or freedom of establishment and who has been employed in a Member State other than that of residence falls within the ambit of Article 39 EC or of Article 43 EC, as the case may be. [8]

31. It should be noted, next, that the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Union citizens of occupational activities of all kinds throughout the Union, and preclude measures which might place Union citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. [9]

32. Thus, the rules on freedom of movement for workers and those concerning freedom of establishment are, in particular, directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State. [10]

33. In the present case, the tax legislation at issue, more particularly Paragraph 21(5) of Law XCIII, is criticised by the Commission on the ground that, in order to determine whether a purchaser of residential property in Hungary may deduct the commercial value, for the purpose of calculating the basis of assessment for tax arising on transfers of property for consideration, of another residential property sold within one year before or after the purchase of property concerned, it draws a distinction on the basis of whether or not that property previously owned and sold is situated in Hungary. According to the Commission, as a result of the difference in tax treatment between taxable persons, be they foreign or Hungarian citizens, who sell property situated in Hungary and taxable persons who sell property situated outside Hungarian territory, the tax regime at issue is discriminatory and may discourage such taxable persons from exercising their right to freedom of movement and of establishment.

34. In that regard, it must be observed that the submissions of the Commission, upon which it is incumbent to establish the existence of the alleged breach of Community/EU law in an action for failure to fulfil

7 — See, to that effect, *Commission* v *Portugal*, cited in footnote 6, paragraphs 13 and 14, and *Commission* v *Germany*, cited in footnote 6, paragraphs 18 and 19.

8 — See *Commission* v *Germany*, cited in footnote 6, paragraph 20; Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 31; Case C-470/04 *N* [2006] ECR I-7409, paragraph 28; and Case C-212/05 *Hartmann* [2007] ECR I-6303, paragraph 17.

9 — See *Commission* v *Sweden*, cited in footnote 6, paragraph 17; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94; Case C-232/01 *van Lent* [2003] ECR I-11525, paragraph 15; and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 52.

10 — See, for example, Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 33, and *Commission* v *Sweden*, cited in footnote 6, paragraph 19.

obligations,[11] were ambiguous as to whether it considers the differentiation under Hungarian tax legislation complained of to amount to discrimination on the grounds of residence. Thus, on the one hand, the Commission contended that the contested legislation in particular discourages persons who have their residence in another Member State from settling in Hungary, for example, by taking up employment there. On the other hand, it expressly rejected the reference made by the Hungarian Government to the *Schumacker* case-law,[12] declaring in this context that the distinction drawn by the tax regime at issue is not based on residence, as the present case concerns taxpayers who are either resident, or about to become resident, in Hungary.

35. In any event, according to the Commission's line of argument, discrimination appears to be considered to arise generally out of the less favourable tax treatment of transfers of domicile from another Member State to Hungary in comparison with transfers of domicile within Hungarian territory. The Commission essentially takes the view that pursuant to the principle of (fiscal) equality, the former cross-border situation should receive the same tax treatment as the latter domestic situation, that is to say, it should give rise to entitlement to the tax advantage at issue in the present case.

36. As both parties to the present proceedings have indeed acknowledged in this context, whether the position of the Commission, and thereby the present action for infringement, is well founded, turns on the question whether the aforementioned situations – that of a taxpayer selling real property situated in Hungary, on the one hand, and that of a taxpayer selling real property outside Hungarian territory, on the other – are objectively comparable as regards the tax advantage (the possibility of deducting the market value of the property sold from the basis of assessment of the tax on the transfer of property) at issue.

37. That is in fact a consequence of the fact that, according to settled case-law, discrimination can arise only through the application of different rules to comparable situations or the application of the same rules to different situations.[13]

38. Accordingly, discrimination against one category of taxable persons by comparison with another category of taxable persons can only be claimed if the situation of those

11 — See, inter alia, Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34, and Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 17.

12 — *Schumacker*, cited in footnote 2, paragraph 34.

13 — See to that effect, for example, Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 18, and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, paragraph 27.

groups is comparable as regards the taxation rules concerned.[14]

39. As regards the present case, Hungary is therefore required to make available the tax advantage at issue to taxable persons selling residential property outside Hungarian territory only if their situation is to be regarded as being objectively comparable, in the context of the tax on the transfer of property at issue, to the situation of a taxable person selling property situated within Hungarian territory.[15]

40. It must be observed in this context that, both in its written submissions and at the hearing, the Commission essentially limited itself, as regards the appropriate approach to be chosen in answering the question of objective comparability in the present case, to stating that, in its view, there is no objective difference between a taxable person purchasing a first residential property in Hungary and one purchasing a first residential property somewhere else in the Union.

41. Apart from the fact that that argument is, as such, hardly conclusive, I think that the analysis of the Commission in the present case is based on a premiss which does not sufficiently take account of the fact that at the current stage of development of EU law and of the harmonisation of national law in the field of direct taxes, we cannot perceive of the Community/Union as forming a single 'taxation area' or tax sovereignty which would make the location of taxable persons or property, or their movement within that area, irrelevant as regards their liability to direct taxes.

42. In reality, however, from a perspective of direct taxation, the Community/Union presents itself as a mosaic of coexisting national tax systems and fiscal sovereignties, where, in principle, each Member State determines the organisation and conception of their tax system and exercises its taxing powers, according to the fiscal principle of territoriality, in relation to activities carried out in their territory.[16]

43. Even though fiscal sovereignty is subject to the requirements of Community/EU law, in particular the fundamental freedoms, and even though the allocation of national powers of taxation is coordinated to some extent by taxation conventions, the fact remains therefore that territorial aspects, such as the place

14 — See also to that effect, *Schempp*, cited in footnote 3, paragraph 29, and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 33.

15 — Cf. a contrario *Schumacker*, cited in footnote 2, paragraph 34.

16 — See, in this context, Case C-67/08 *Block* [2009] ECR I-883, paragraphs 28 to 30, and Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 23; as regards the fiscal principle of territoriality, see Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 75, and Case C-250/95 *Futura Participations* [1997] ECR I-2471, paragraph 22.

of residence or the place where property is situated, may be of objective relevance in the exercise of powers of taxation by the Member States.

44. Admittedly, however, the problem is to identify whether in a specific case tax legislation may be based on such a criterion or, in other words, whether the situations of two taxpayers are, despite a difference relating to residence of the taxpayer or place of the property, objectively comparable. That question must, in any event, be determined and assessed by reference to the purpose and content of the specific national tax regime which makes the distinction at issue. [17]

45. In that regard, it should be borne in mind in the present case that the tax at issue constitutes a tax levied on the transfer of property for consideration. Relating to real property, it is not uncommon and in fact, as the Hungarian Government has submitted, it is consistent with the fiscal principle of territoriality for such taxation to be made dependent on the place where the real property is situated as a connecting factor. That criterion is therefore, as such, objectively consistent with the type of tax at issue.

46. It should be noted next that, by adopting the disputed Paragraph 21(5) of Law XCIII, Hungary has chosen to exercise its taxing powers over the transfer of property in such a way that, subject to the conditions as defined in the aforementioned provision, a second purchase of residential property is only taxed on the basis of the difference between the market value of the property purchased and that of the property sold. It has not been disputed that that choice is legitimate and lies within Hungary's tax sovereignty, as it would be legitimate for it either not to impose any tax at all on the transfer of residential property or, conversely, to take as a basis of assessment the market value of the property purchased without deduction on every purchase of such property.

47. Even if, as the Commission has demonstrated, the deduction granted according to that mechanism may not necessarily correspond to the tax levied on the first purchase of residential property, the fact remains that the taxable person concerned has, under the taxation legislation at issue, already been liable to Hungarian transfer tax with regard to that property.

17 — See, to that effect, *Amurta*, cited in footnote 14, paragraph 33; Case C-391/97 *Frans Gschwind* [1999] ECR I-5451, paragraph 26; see also Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 26. It follows that case-law of the Court on this aspect in the area of direct taxation, such as *Schumacker* (cited in footnote 2) invoked by the Hungarian Government, or *Manninen* (Case C-319/02 [2004] ECR I-7477) relied on by the Commission, must be read in the light of the circumstances of each case and, in particular, in the light of the specific tax at issue and cannot without more be transposed to the tax legislation at issue in the present case.

48. In that light, to require Hungary to take account of the market value of residential property purchased and sold in another Member State and, accordingly, of a transfer of real property which has not yielded transfer tax on behalf of Hungary, would result in serious interference with the level and extent of taxation legitimately [18] chosen by Hungary as regards transfers of residential property.

49. In my view, therefore, the Hungarian Government has correctly submitted that the situation of a taxable person who has purchased and sold residential property on Hungarian territory is, with regard to the content and purpose of the tax legislation at issue, objectively different from that of a taxable person who has purchased and sold residential property in another Member State, on the ground that in the former situation the purchase of property has been subject to transfer tax in Hungary, whereas the transfer of property at issue in the second situation is, in accordance with the fiscal principle of territoriality, not subject to Hungarian taxation.

50. In other words, from the perspective of the taxing powers of Hungary, which are, pursuant to the fiscal principle of territoriality, limited, as regards transfer tax, to activities within its territory, taxable persons in a purely domestic situation and taxable persons in a cross-border situation are treated equally in that anyone who purchases residential property situated in Hungary for the first time is taxed on the full market value of the property concerned, whereas anyone who subsequently makes a second purchase of residential property situated in Hungary is entitled, subject to the further conditions laid down by Paragraph 21(5) of Law XCIII, to be taxed on the basis of the difference between the market value of the property purchased and the (first) property sold.

51. It follows from the foregoing that, contrary to the Commission's submissions, Paragraph 2 in conjunction with Paragraph 21(5) of Law XCIII is not discriminatory in allowing the market value of residential property sold to be taken into account for the purpose of establishing the basis of assessment for tax on transfer of property only on condition that that property is situated in Hungary.

52. In so far as the Commission maintains that that tax regime may, by denying the tax advantage it contains to taxable persons transferring their residential property to Hungary, nevertheless constitute a restriction on the free movement of persons, it should be noted that the Court has held that the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to

18 — See point 46 above.

the citizen's advantage in terms of taxation or not, according to circumstances.[19]

53. In that regard, the possible 'deterrent effect' of the particular tax regime at issue on persons wishing to avail themselves of their right to free movement is in principle not different from that which can arise simply by reason of the existence of any direct tax in a given Member State or on account of a comparatively high tax rate which a Member State is, in any event, free to choose in the exercise of its fiscal sovereignty. The point is that such a restrictive effect is, in circumstances like those of the present case, the result of disparities between the taxation systems of the Member States rather than of unfavourable tax treatment of cross-border situations inherent in the tax legislation of the Member State concerned in itself, so that such an effect must be accepted as a consequence of the coexistence of different national tax systems.[20]

54. It follows, firstly, without it being necessary to assess whether the tax legislation at issue is also justified by the need to maintain the cohesion of the tax system or the prevention of tax abuses, that the provisions of Paragraph 2 in conjunction with Paragraph 21(5) of Law XCIII are not contrary to Articles 39 EC and 43 EC.

55. Secondly, with regard to persons who are not economically active, the same conclusion applies, for the same reasons, to the complaint relating to Article 18 EC.

56. Thirdly, in so far as the Commission also claims that the Republic of Hungary has failed to fulfil its obligations under Articles 28 and 31 of the EEA Agreement, which are essentially identical to those established by Articles 39 EC and 43 EC and in respect of which the Commission has not put forward separate reasoning, that complaint must be rejected on the same grounds as those set out above.

57. In the light of the foregoing, I come to the conclusion that the present action for failure to fulfil obligations should be dismissed.

19 — See, to that effect, *Block*, cited in footnote 16, paragraphs 34 and 35; *Schempp*, cited in footnote 3, paragraph 45; and Case C-365/02 *Lindfors* [2004] ECR I-7183, paragraph 34.

20 — See, to that effect, also *Block*, cited in footnote 16, paragraph 28; Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 20; and *Columbus Container Services*, cited in footnote 10, paragraph 43. Thus in the present case, for example, if the Member State in which a person has purchased a first residential property taxes every purchase, including a second purchase, of residential property in full and at a higher tax rate than is applicable in Hungary, that person may, according to the logic of the Commission's argument, even be encouraged, despite the Hungarian tax regime at issue, to settle in Hungary and to buy a second residential property there, rather than moving within the Member State concerned.

V — Conclusion

58. I therefore propose that the Court:

(1) dismiss the action as unfounded;

(2) order the European Commission to pay the costs.