Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 25 February 2021 [1]

Joined Cases C-478/19 and C-479/19

UBS Real Estate Kapitalanlagegesellschaft mbH
v
Agenzia delle Entrate

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(References for a preliminary ruling - Freedom of establishment - Article 43(1)EC - Free movement of capital - Article 56(1) EC - Mortgage registration tax and Land Registry fees - Tax advantages granted only to closed-ended real estate investment funds)

I. Introduction

1. By these references for a preliminary ruling, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) is asking the Court to rule on the compatibility with EU law and, in particular, with reference to the provisions of the Treaties on the free movement of capital and freedom of establishment, of Italian legislation which limits to what I shall term 'closed-ended' real estate investment funds the availability of a reduction by half of the mortgage registration tax and the land registry fee payable upon acquisitions of commercial real estate on behalf of real estate investment funds. The case raises once again issues of restriction on the free movement of capital in the field of taxation.

2. More precisely, the preliminary references have been made in proceedings between UBS Real Estate Kapitalanlagegesellschaft mbH ('UBS Real Estate'), a company established under German law as a portfolio management company for mutual investment funds, and the Agenzia delle Entrate (the 'Italian Tax Authority'). These proceedings involve challenges brought by UBS Real Estate to the implied decisions made by the Italian Tax Authority not to refund two German investment funds managed by that company, the cost of the mortgage registration tax and land registry fees paid out by those funds when registering the acquisition of two commercial complexes on the grounds that they are not, as required by Decree-Law No. 223/2006, to benefit from a 50% reduction of the mortgage registration tax and the land registry fee payable, closed-ended investment funds, but open-ended investment funds.

[1] Original language: English.

II. Legal context

A. EU law

3. At the time of the facts at issue in the main proceedings, the Lisbon Treaty had not yet entered into force. Accordingly, while certain parties have referred to the provisions of the Treaty on the Functioning of the European Union and that these provisions are identical to those previously existing, it is nonetheless necessary to refer to the provisions of the Treaty establishing the European Community.

4. EU law currently distinguishes between two types of collective investment vehicles: undertakings for collective investment in transferable securities (UCITS) and collective investment institutions and instruments which do not qualify as UCITS, namely alternative investment funds (AIFs), which are covered by Directive 2011/61/EU on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 of 8 June 2011 ('the AIF Directive'),[2] as well as by Delegated Regulation (EU) No 694/2014 of 17 December 2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers.[3]

5. Both the AIF Directive and Delegated Regulation No 694/2104 were, however, not applicable at the time of the facts at issue in the main proceedings. Nonetheless, Delegated Regulation No 694/2014 gives an understanding of the difference between a closed and an open-ended fund.

6. That delegated regulation was enacted in order to supplement the rules in [the AIF Directive] with regulatory technical standards determining types of alternative investment fund managers ('AIFMs'), so that certain requirements of the Directive are applied in a uniform manner.[4]

7. Recital 2 of that Regulation explains that:

'It is desirable to distinguish whether an AIFM is managing AIFs of the open-ended or closed-ended type or both in order to apply correctly the rules on liquidity management and the valuation procedures of [the AIF Directive] to AIFMs.'

8. Recital 3 of Regulation No 694/2014 states that:

'The distinguishing factor in determining whether an AIFM is managing AIFs of the open-ended or closed-ended type should be the fact that an open-ended AIF repurchases or redeems its shares or units with its investors, at the request of any of its shareholders or unitholders, prior to the commencement of its liquidation phase or wind-down and does so according to the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents …'

2 OJ 2011 L 174, p. 1.

3 OJ 2014 L 183, p. 18.

4 See recital 1 of Delegated Regulation No 694/2014.

9. Article 1(1) to (3) of the said regulation, which is the only article of substance, is as follows:

'1. An AIFM may be either or both of the following:

– an AIFM of open-ended AIF(s);

– an AIFM of closed-ended AIF(s).

2. An AIFM of an open-ended AIF shall be considered as an AIFM which manages an AIF the shares or units of which are, at the request of any of its shareholders or unitholders, repurchased or redeemed prior to the commencement of its liquidation phase or wind-down, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents.

A decrease in the capital of the AIF in connection with distributions according to the rules or instruments of incorporation of the AIF, its prospectus or offering documents, including one that has been authorised by a resolution of the shareholders or unitholders passed in accordance with those rules or instruments of incorporation, prospectus or offering documents, shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

Whether an AIF's shares or units can be negotiated on the secondary market and are not repurchased or redeemed by the AIF shall not be taken into account for the purpose of determining whether or not the AIF is of the open-ended type.

3. An AIFM of a closed-ended AIF shall be an AIFM which manages an AIF other than of the type described in paragraph 2.'

B. Italian law

1. Legislative Decree No. 347/1990

10. Decreto Legislativo 31 Ottobre 1990, N. 347 relativo alle disposizioni concernenti le imposte ipotecaria e catastale (Legislative Decree No. 347 of 31 October 1990 on provisions concerning transcription and land registry fees, 'Legislative Decree No. 347/1990') provides that the formalities of transcription, registration of mortgages, renewal and annotation in the land register are subject to a transcription tax. The tax base is constituted by the value of the transferred or contributed real estate and the rate is set at 1.6%.

11. Legislative Decree No. 347/1990 also specifies that the change of the name of the owner of the property right or of a real right on a property registered in the Land Registry is subject to a registration fee ('imposta catastale'). This tax, the rate of which is 0.4%, is proportional to the value of the property.

2. Ministerial Decree No. 228/1999

12. Decreto ministeriale n. 228, – Regolamento recante norme per la determinazione dei criteri generali cui devono essere uniformati i fondi comuni di investimento (Ministerial Decree No. 228 – Regulations laying down rules for determining the general criteria with which

common investment funds must comply) of 24 May 1999[5] provided that real estate funds are funds that invest exclusively or mainly in real estate, real estate rights and interests in real estate companies.

3. Decree-Law No. 223/2006

13. Article 35, entitled 'Measures to combat fraud and tax evasion', of Decreto-Legge n. 223 – Disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonchè interventi in materia di entrate e di contrasto all'evasione fiscale (Decree-Law No. 223/2006, laying down urgent provisions for economic and social recovery, for the limitation and rationalisation of public expenditure and interventions in terms of revenue and the fight against tax evasion), of 4 July 2006[6], adopted into law, after modifications, by Law No. 248, of 4 August 2006 ('Decree-Law No 223/2006'), provides, at paragraph 10-ter:

'In respect of changes to the land register and entries relating to transfers of immovable property used for commercial purposes …, even if subject to value added tax, involving closed-ended real estate funds governed by Article 37 of the testo unico delle disposizioni in materia di intermediazione finanziaria [Unified text of the Legislative Provisions on Financial Intermediation], contained in decreto legislativo 24 febbraio 1998, n. 58 (Legislative Decree No 58 of 24 February 1998), as subsequently amended, and by Article 14-bis of legge 25 gennaio 1994, n. 86 (Law No 86 of 25 January 1994), or financial leasing companies, or banks and financial intermediaries … in respect of the purchase and lease with a purchase option of assets leased or to be leased only, the rates of mortgage registration tax and the land registry fee, as amended by paragraph 10-bis of the present Article, shall be reduced by one half. The provision set out above shall apply from 1 October 2006.'

4. Legislative Decree No. 58/1998

14. The Decreto Legislativo N. 58/1998 – Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No. 58/1998, Unified text of the Legislative Provisions on Financial Intermediation, Pursuant to Articles 8 and 21 of the Law of 6 February 1996, No. 52), of 24 February1998[7], in its version in force on the date on which the two transactions at issue in the main proceedings were carried out, mentioned, in its Article 1, entitled 'Definitions':

'1. In this legislative decree, the following definitions shall apply:

…

(k) 'open-ended fund' shall mean a mutual investment fund whose participants have the right to request, at any time, the redemption of the quotas according to the rules of operation of the fund;

5 GURI no 164, of 15 July 1999.

6 GURI no 153, of 4 July 2006.

7 Ordinary supplement to GURI no. 71, of 26 March 1998.

(l) 'closed-ended fund' means a mutual investment fund in which the right to redemption of shares is granted to participants only at predetermined deadlines …'

15. Article 36 of Legislative Decree No. 58/1998, entitled 'Common investment funds', in its version in force on the date of the fact of the main proceedings, mentioned, that:

'1. The mutual fund is managed by the portfolio management company which established it or by another portfolio management company. The latter manages both the funds it has set up itself and the funds set up by other companies.

…

3. Participation in the common fund is governed by the fund regulations. The Banca d'Italia, after consulting the [Commissione Nationale per le Società e la Borsa (Consob) (National Commission for Companies and the Stock Exchange, Italy)], sets the general criteria applicable to the drafting of the fund regulations as well as the minimum content of the latter, in addition to the provisions of Article 39.

…

6. Each common investment fund, or each sub-fund of the same fund, constitutes an independent portfolio, separate for all legal purposes from the assets of the portfolio management company and that of each participant, as well as from any other assets managed by the same company …'

16. According to Article 37 of Legislative Decree No. 58/1998, in its version in force on the date of the fact of the main proceedings, entitled 'Structure of mutual funds':

'1. The Minister of the Economy and Finance determines, by means of a regulation adopted after consultation with the Bank of Italy and the CONSOB, the general criteria to be met by mutual funds concerning:

a) the purpose of the placement;

b) the categories of investors for whom the offering of shares is intended;

c) the terms of participation in open and closed funds, in particular the frequency of issue and redemption of shares, the minimum subscription threshold if applicable and the procedures to be followed;

d) the minimum and maximum duration, if applicable;

d-bis) the terms and conditions applicable to acquisitions or contributions of property, both at the time of constitution of the fund and afterwards, for funds which invest exclusively or mainly in real property, in real property rights and in real estate shares in real estate companies.

…

2-bis. The regulations referred to in paragraph 1 also set out the matters on which the participants in closed funds meet in assembly to adopt decisions binding on the portfolio management company. The meeting still decides on the replacement of the portfolio management company, on the request for admission to listing when it is not provided for and on changes to management policies …'

17. According to Article 39 of Legislative Decree No. 58/1998, in its version in force on the date of the fact of the main proceedings, entitled 'Fund Regulations':

'1. For each mutual fund, a regulation defines its characteristics, governs its operation, designates the promoter company, the manager when it is not the promoter company, and the custodian bank, fixes the distribution tasks between the latter and regulates the existing relations between them and the participants.

2. The regulation provides in particular:

a) the name and duration of the fund;

b) the terms of participation in the fund, the terms and conditions of the issuance and termination of certificates as well as the subscription and redemption of shares, as well as the terms of liquidation of the fund;

c) the bodies competent for the choice of investments and the criteria for allocating these investments;

d) the type of property, financial instruments and other securities in which it is possible to invest the assets of the fund;

…'

III. The facts of the main proceedings and the request for a preliminary ruling

18. UBS Real Estate is a mutual fund portfolio management company with headquarters in Germany and a branch in Italy. It manages the portfolios of two real estate investment funds, namely 'UBS (D) 3 Sector Real Estate Europe' in liquidation (formerly, 'UBS (D) 3 Kontinente Immobilien') and 'UBS (D) Euroinvest Immobilien Real Estate Investment Fund' ('the UBS Funds'), which were both constituted under German law. [8]

19. On 4 October 2006, UBS Real Estate acquired, on behalf of the UBS Funds, two real estate complexes for professional use which are located in San Donato Milanese, Italy. When registering the acquisition of the two properties, UBS Real Estate paid the Italian Tax Authority on behalf of both funds the registration tax (3%) and the registry fee (1%) in an overall sum of EUR 802 400.00 in respect of one property, and EUR 820 900.00 in respect of the other.

[8] According to UBS, those funds were not marketed in Italy.

20. At a later stage, UBS Real Estate became aware that Decree-Law No. 223/2006 had entered into force on 1 October 2006. This Decree-Law provides for the reduction by half of the mortgage registration tax and land registry fees over real estate acquisitions on behalf of closed-ended real estate investment funds within the meaning of Article 37 of Legislative Decree No. 58/1998.

21. UBS Real Estate lodged two applications to the Italian Tax Authority for the reimbursement of what it alleged were two tax overpayments in respect of the registration of each property, as it claimed that open-ended funds, such as the two funds at stake, should also be entitled to benefit from the provisions of Decree-Law No. 223/2006.

22. The Italian Tax Authority did not, in fact, issue any explicit decisions in respect of the two applications lodged by UBS Real Estate. This failure, however, gave rise under Italian law to the adoption of two implicit rejections ('silenzio-rifiuto') of the applications.

23. UBS Real Estate then commenced two sets of proceedings in respect of these two implicit decisions before the Commissione Tributaria Provinciale di Milano (Provincial Tax Court, Milan, Italy). These proceedings were dismissed on the grounds that the Italian legislature had expressly restricted the benefit of the tax reduction provided for by Decree-Law No. 223/2006 to the category of closed-ended investment funds only.

24. UBS Real Estate appealed against both judgments of the Provincial Tax Commission before the Commissione Tributaria Regionale per la Lombardia (Regional Tax Court, Lombardy, Italy).

25. Those appeals were both dismissed by two judgments of the Commissione Tributaria Regionale per la Lombardia (Regional Tax Court Lombardy) on 3 April 2012 on the ground that, given the many differences between the two types of real estate fund (the closed-ended fund governed by Italian law, and the open-ended fund governed by German Law), there was neither an infringement of EU law on the basis of different treatment (as different tax rules can be applied to different circumstances) nor infringement of Article 25 of the Convention between Italy and Germany for the avoidance of double taxation (since there would be no discernible discrimination based on nationality).

26. UBS Real Estate then brought two appeals on certain points of law before the Corte suprema di cassazione (Supreme Court of Cassation) against these findings. In those appeals, UBS Real Estate challenged, inter alia, the compatibility of Article 35(10-ter) of Decree-Law No 223/2006 with the provisions of the current Articles 18, 49, and 63 TFEU. The Revenue Authority opposed those appeals and lodged a cross-appeal.

27. To support its appeals, UBS Real Estate claims, inter alia, that the Regional Tax Commission infringed Article 49 TFEU by ruling that the difference in tax treatment between closed-ended investment funds and open-ended investment funds is justified by differences in the situations, whereas those differences were irrelevant in light of the criterion used and of the rationale underlying Article 35(10-ter) of Decree-Law No. 223/2006.

28. The Corte suprema di cassazione (Supreme Court of Cassation) considers that the two cases raise, in substance, the question of whether the differences existing between closed-ended investment funds governed by Italian law and open-ended investment funds governed by the law of another Member State are capable of justifying a different tax treatment.

29. In that regard, that court points out that the Italian tax regime for real estate mutual funds has been subject to numerous changes, in recent years, in order to encourage the development of closed-ended funds, while also ensuring that they are not used for the purpose of circumventing the legislation.

30. With regard more specifically to Article 35(10-ter) of Decree-Law No. 223/2006, the Corte suprema di cassazione (Supreme Court of Cassation) indicated that limiting the tax benefit under this provision, to closed funds merely aims, in essence, at promoting and encouraging the development of collective real estate investment funds that are not underpinned by highly speculative and uncertain intentions, and at limiting systemic risks on the real estate market in the event of a crisis. Indeed, in the event of a crisis in the real estate market, persons having invested in investment funds of that type would generally request the early redemption of their shares, which would result in the absorption of the liquidity cushions of such funds. The latter would then be forced to sell part of the real estate acquired below its normal value to meet these redemption requests, which would accentuate the crisis. For this reason, it would be preferable to encourage investors to acquire units of closed funds rather than open funds.

31. It is in this context that the Corte suprema di cassazione (Court of Cassation) decided to stay the proceedings and to refer in each case, one question to the Court for a preliminary ruling, which are worded in identical terms in both cases:

'Does EU law - in particular the provisions of the Treaty concerning freedom of establishment and free movement of capital, as interpreted by the Court - preclude the application of a provision of national law, such as Article 35(10-ter) of Decree-Law No 223/2006 (in so far as it grants relief on mortgage registration tax and the Land Registry fee only in respect of closed-ended real estate investment funds)?'

32. During the proceedings, the Court addressed questions for written answers to the Italian Government and UBS Real Estate. While UBS Real Estate responded to these questions, the Italian Government did not, so that certain aspects of its legislation remain to be confirmed.

IV. Analysis

33. From the outset, it should be recalled that, first, in accordance with Article 267 TFEU, within the framework of the preliminary ruling procedure, the Court only has jurisdiction to rule on the interpretation of the Treaties or on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, but not on the exact interpretation to be given to national legislation or upon the compatibility of provisions of national law with the legal rules of the European Union or on the accuracy of all of the factual information contained in the case file. [9]

34. It follows that, on the one hand, the Court lacks jurisdiction to rule on the interpretation of an international agreement concluded by Member States, such as the convention existing between Italy and Germany for the avoidance of double taxation. On the other hand, when the Court gives a preliminary ruling (and contrary to the situation in infringement proceedings), the answer it provides is always given in consideration of the circumstances referred by the national court. It

[9] See, to that effect, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 15) and of 11 June 2020, *Subdelegación del Gobierno en Guadalajara* (C-448/19, EU:C:2020:467, paragraph 17).

is exclusively for the latter to verify that the factual pieces of information transmitted were correct and, therefore, that the premiss of the question asked corresponds to the situation at issue in the main proceedings, in particular as regards the objectives pursued by the legislation in question. [10]

35. Admittedly, the Court can take into consideration the existing bilateral conventions between two Member States as part of the legal context, to circumscribe the situation envisaged by the referring court in its question and thus give an interpretation of EU law that is of use to the national court, as long as it does not rule on the concrete interpretation to be made thereof. [11]

36. In the present case, however, it does not appear that the existing tax treaty between Italy and Germany constitutes the justification for the contested decisions, nor does the national court refer to it in its two questions. In those circumstances, I see no reason to take it into account to answer the questions asked.

37. Secondly, in so far as the national court refers in its questions to several freedoms of movement, it is first necessary to determine which of these freedoms is relevant.

A. Determination of the relevant provisions of the Treaty

38. Since the national court mentions in its question both the freedom of establishment, referred in Article 43 EC and the free movement of capital, laid down in Article 56 EC, it is necessary to determine whether the national measure at issue in the main proceedings falls within the scope of the freedom of establishment or the free movement of capital or if it falls within both.

39. According to the Court's case-law, in determining whether the national measure falls under one or more freedoms, the purpose of that legislation must be taken into account. [12]

40. In that regard, it should be noted that freedom of establishment can be defined as the freedom to set up or transfer a company in a Member State other than the State of origin, under the same conditions as those applicable to residents. [13] Accordingly, that freedom presupposes that the operator involved intends actually to pursue its economic activity by means of a stable arrangement and for an indefinite period. [14] Thus, for example, in a dispute relating to a building, the freedom of establishment may be invoked by the persons who acquire that building if they intend to carry on an economic activity in it. [15]

[10] This is all the more so since, unlike infringement proceedings, there is no burden of proof on the parties, as a reference for a preliminary ruling is a judge-to-judge procedure. Indeed, the procedure provided for by Article 267 TFEU is not an adversarial procedure, but an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. See judgment of 15 September 2011, *Unió de Pagesos de Catalunya* (C-197/10, EU:C:2011:590, paragraph 16).

[11] See, to that effect, judgments of 19 January 2006, *Bouanich* (C-265/04, EU:C:2006:51, paragraph 51) and judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 27).

[12] Judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 34).

[13] See, for example, to that effect, judgments of 28 January 1986, *Commission* v *France* (270/83, EU:C:1986:37, paragraph 14); of 7 July 1988, *Stanton and L'Étoile 1905* (143/87, EU:C:1988:378, paragraph 11) and of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 33). In my view, it is sufficient that non-residents have the option of opting into the tax regime applicable to residents. It is then up to non-residents to decide whether they prefer this regime or another that, depending on their situation, may be more or less advantageous.

[14] See, for example, judgments of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraphs 148 to 150) and of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 44).

[15] See, to that effect, judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 38).

41. Although the EC Treaty did not define the concept of 'movement of capital' – no more than the TFEU does now – it is nonetheless settled case-law that Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty,[16] together with the nomenclature and the explanatory note annexed thereto, has an indicative value in that regard.[17] According to the explanatory note to Directive 88/361, cross-border capital movements include, in particular, 'purchases of buildings and land and the construction of buildings by private persons for gain or personal use'. Indeed, the right to acquire, exploit and dispose of immovable property on the territory of another Member State necessarily generates, when exercised, movements of capital.

42. It follows that any national measure which governs the real estate investment made by non-residents in the territory of a Member State might almost inevitably affect both the freedom of establishment and the free movement of capital.[18]

43. According, however, to a settled case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute.[19] Accordingly, in order to determine which freedom will serve as a basis to answer the question referred, it is necessary to take account of the configuration of the dispute at issue in the main proceedings. Indeed, the fact that a national measure is liable to interfere with two freedoms does not necessarily mean that those two freedoms may be invoked by the requesting party in the dispute in the main proceedings. Therefore, in the event that a national measure is likely to fall within the scope of two freedoms, that measure should be examined by reference only to one of those two freedoms if it appears, in the circumstances of the case, that the claimant can rely on only one.[20]

44. In the present case, it would appear from the case file that the two funds which acquired the two commercial complexes in question did so as a form of passive investment rather than to establish a business in or otherwise use the real estate in question. It follows that the funds in the main proceedings have not made use of their right to freedom of establishment, but only of their right to the free movement of capital.[21] Consequently, as the Commission stated, the alleged difference in treatment must be examined solely from the perspective of the free movement of capital.

[16] OJ 1988 L 178, p. 5. That directive, which is still in force, brought about the full liberalisation of capital movements and constituted the first stage of monetary union. See judgment of 23 February 1995, *Bordessa and Others* (C-358/93 and C-416/93, EU:C:1995:54, paragraph 17).

[17] Judgment of 23 February 2006, *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131,paragraph 39).

[18] See, to that effect, judgment of 1 June 1999, *Konle* (C-302/97, EU:C:1999:271, paragraph 22).

[19] See, for example, judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28).

[20] See, to that effect, judgments of 26 June 2008, *Burda* (C-284/06, EU:C:2008:365, paragraphs 68 and 69); of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraphs 34 and 35) and of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 19). The determination of the applicable freedom(s) might be of practical importance since freedom of establishment is covered by Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

[21] Admittedly, in its judgment of 30 May 1989, *Commission* v *Greece* (305/87, EU:C:1989:218), the Court examined a regulation on the conclusion of legal acts by nationals of other Member States relating to immovable property situated in the Greek border regions from the point of view of freedom of establishment. However, it should be noted that this case concerned an action for failure to fulfil obligations and not a reference for a preliminary ruling. In a reference for a preliminary ruling, the determination of the freedom at issue must take account of the situation of the parties (which is why, among other things, the question of whether the dispute is internal or not is decisive for the admissibility of the question). However, in an action for failure to fulfil obligations, the Court rules on the compatibility of legislation with EU law in general. In *Commission* v *Greece* (305/87, EU:C:1989:218), having regard to the objectives and content of the legislation at issue, the legislation was capable of applying both to simple investors and to persons wishing to establish themselves by means of the real estate at issue.

45. In order, however, for any of the freedom of movements associated with the internal market to apply, two conditions need to be satisfied: first, the situation at issue in the main proceedings must not be purely internal to the Member State in question;[22] secondly, the domain covered by the national measure whose compatibility with EU law has been challenged must not yet have been fully harmonised.[23]

46. In the present case, the first condition is clearly satisfied as the applicant is acting on behalf of two funds governed by the law of another Member State. So far as the second condition is concerned – that is to say, the determination of whether the domain covered by the measure at issue in the main proceedings is fully harmonised at EU level – regard must be had not to the activity carried out by the funds, but rather to the nature and the effect of that measure.

47. Here one may observe that since Article 35 of Decree-Law No. 223/2006 applies in case of real estate transfers and disposals for professional use, and as it is intended to provide a tax advantage, this measure belongs to real estate tax law. It is clear that EU law has not harmonised the tax rules applicable to real estate transactions, including where, such as in the present case, these are carried out by a 'closed' real estate fund.

48. In these circumstances, I propose to examine the national legislation at issue in the light only of the free movement of capital, enshrined in Article 56 EC (now Article 63 TFEU).

B. On the existence of a restriction

1. On the test to be applied

49. At the outset, it should be recalled that direct taxation is still primarily a matter left to Member States, which are free to establish the system of taxation they deem the most appropriate. It is up to them to determine the scope of their tax jurisdiction as well as the basic principles of their tax system. In the current state of harmonisation of national tax legislation, Member States are accordingly free to establish the system of taxation they consider the most appropriate.[24]

50. In that context, these freedoms of movement cannot be understood as meaning that a Member State is required to align its tax rules with those of other Member States in order to ensure the removal of disparities in all circumstances.[25] Accordingly, the disadvantages which could arise from the parallel exercise of sovereign tax competences by Member States should not, in themselves, be deemed to constitute restrictions of the free movement of capital.[26] If that were

22 See, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47)

23 See, for example, to this effect, judgment of 16 October 2014, *Commission* v *Germany* (C-100/13, not published, EU:C:2014:2293, paragraph 62).

24 See judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 49). EU law does not require the Member States to consult each other to avoid double taxation of the same gain or, vice versa, that a single gain is not taxed at all. See judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47 or judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61,, paragraphs 169 to 172).

25 See, for example, judgment of 27 February 2020, *AURES Holdings* (C-405/18, EU:C:2020:127, paragraph 32).

26 Judgment of 16 July 2009, *Damseaux* (C-128/08, EU:C:2009:471, paragraph 27).

indeed the case, then the ability of Member States to levy taxes would be unduly prejudiced. In these circumstances, it must be accepted that quasi-restrictions brought about by the coexistence of two systems of taxation fall outside the scope of the Treaty. [27]

51. Member States must, however, exercise their fiscal competence consistently with the freedom of movement, which means that in 2006 they should have refrained from adopting measures prohibited by Article 56(1) EC (now Article 63(1) TFEU). [28]

52. In taxation matters, the Court generally follows a more restrictive approach than in other matters when it comes to assessing the respect for the freedoms of movement. Indeed, where in those others matters, the Court finds that there is a restriction as soon as the national tax legislation at issue merely had the effect of deterring cross-border operations, it must be observed that the mere fact of subjecting an activity or transaction to a particular tax necessarily makes it less attractive. Therefore, in order not to impair unduly the ability of Member States to levy taxes, the Court considers, in principle, that, in order to qualify as a restriction for this purpose, a taxation measure must establish a discrimination, whether direct or indirect, to the detriment of a cross-border investor. [29] Accordingly, the Court requires, in principle, in order for a measure to be declared incompatible with EU law, that comparability test has been carried out. [30]

53. In general, a measure is to be considered as discriminatory when its object or effect is to treat comparable situations differently or, conversely, to treat different situations identically. [31]

54. Given that the objective of the freedoms of movement is the completion of the internal market, the Court initially used a specific definition in that field. Indeed, where the Treaty prohibits the use of a specific criterion, direct discrimination occurs when a person is expressly treated less favourably on the basis of that criterion. There is instead an indirect discrimination when the criterion used appears to be superficially neutral while in practice placing persons fulfilling the prohibited criterion at a disadvantage as compared with others. [32] On the basis of this approach, in the context of the exercise of freedoms of movement, including the free movement of capital, the Court used to consider that a direct discrimination occurred when a measure

[27] See, to that effect, judgment of 14 November 2006, *Kerckhaert and Morres* (C-513/04, EU:C:2006:713, paragraph 20) and Opinion of Advocate General Geelhoed in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:139, point 39).

[28] See, for example, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 40).

[29] See, to that effect, judgments of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 53), and of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47). Admittedly, according to certain judgments, 'the measures prohibited by Article [56](1) EC, as restrictions on the movement of capital, *include* those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States'. See, for example, judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 15). Emphasis added. However, this does not mean that the fact that a measure produces such a deterrent effect is sufficient for it to be qualified as a restriction. See paragraphs 23 and 39 of this judgement.

[30] Advocate General Kokott proposed abandoning the non-discrimination test and instead urged the application to tax matters of the same test as those applied in other areas. The Court, however, did not follow her Opinion in that respect. See Opinion of Advocate General Kokott in *Nordea Bank* (C-48/13, EU:C:2014:153, point 22), judgment of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraphs 23 and 24).

[31] See, for example, judgment of 13 March 2014, *Bouanich* (C-375/12, EU:C:2014:138, paragraph 45), and of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraphs 24 and 25).

[32] See Opinion of Advocate General Wahl in *Austria* v *Germany* (C-591/17, EU:C:2019:99, point 42). See also, to that effect, Article 2(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

established a distinction according to nationality and an indirect discrimination arose when a measure, although based on another criterion, such as that of residence, led in fact to the same result. [33]

55. It is important to note, however, that for about a decade now the Court has very often (but not always) [34] resorted to the general definition of the concept of discrimination - set out in point 53 of the present opinion - which raises a number of potential questions.

56. First, it is difficult not to point out that this more general approach might lead to the paradoxical result that, if a piece of legislation pursues a clearly discriminatory objective, no discrimination will be found, since in view of this objective, the situations in question should be considered as different.

57. Second, that approach does not seem entirely consistent with the one also followed in some of the same judgments, which consists of examining the comparability of situations at the justification stage, whereas according to the general definition of the concept of discrimination, the comparability of the situation at stake is part of the definition of the concept of discrimination itself. [35]

58. Third, in so far as the comparability must be assessed in the light of the objectives pursued by the legislation in question, it is logical to first consider whether the objective being pursued is permissible before proceeding with the comparison. In this situation, the question might arise as to what remains to be examined at the justification stage.

59. For my part, I believe that, whatever the approach taken, in the case of direct discrimination, that is to say of discrimination by object, there is generally no need to assess whether the situations at issue are strictly comparable, since this comparability can be presumed.

60. Regarding the stage at which the comparison should be carried out, it may be observed that the case-law on this topic does not always make a very clear distinction in respect of the different stages of the test (that is to say, whether the measure amounts to a restriction, and, if so, whether it is objectively justifiable), but rather examines in general whether the measure is contrary to the Treaties. [36] In any case, even if some may regard this methodologically as unsatisfactory, I note

[33] See, for example, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraphs 26 to 29); of 20 January 2011, *Commission* v *Greece* (C-155/09, EU:C:2011:22, paragraph 46); of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 28) and of 18 June 2020, *Commission* v *Hungary* (*Transparency of association*) (C-78/18, EU:C:2020:476, paragraph 62). This approach appears to be consistent with the case-law according to which the freedoms of movement constitute declinations of the principle of non-discrimination according to nationality provided for in Article 12 EC (now Article 18 TFEU), so that when these freedoms apply, there is no need to apply this provision autonomously. See, for example, judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 31).

[34] For a recent example of an application of the first approach, see judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 62).

[35] Admittedly, Article 58(1)(a) EC (now Article 65(1)(a) TFEU) provides that 'Article 56 shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'. However, as I explained in my Opinion in *E (Income paid by UCITS)* (C-480/19, EU:C:2020:942), the expression 'without prejudice to the right of Member States' does not imply the existence of an exception, but rather that Member States may define different rules for non-residents in certain circumstances where necessary. Accordingly, I consider that Article 56(1)(a) EC, in particular read in conjunction with the third paragraph of that article, merely recalls, with regard to the criterion of residence, in which case the use of such a criterion, although equivalent to nationality, is compatible with EU law, that is to say, that these Member States may treat persons differently on the basis of this criterion, provided that this does not constitute a means of arbitrary discrimination or a disguised restriction, which presupposes that there is a justification for the criterion used (arbitrary discrimination) and that, in the light of this justification, this different treatment does not appear inconsistent (disguised discrimination). For an example of a judgment that proceeded to the comparison of situations at the stage of qualifying a measure as a restriction, see judgment of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 42).

[36] See, for example, judgment of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 26).

that, in the context of the preliminary reference procedure, the stage at which the examination of comparability is carried out has no practical effect, provided, of course, that such an examination is carried out. [37]

61. Finally, as for the objectives to be considered in examining the comparability and the justification respectively, any doubts that may exist in this regard, might, I suggest, be readily resolved. What matters for the comparison is *the objective* pursued by *the fiscal advantage or disadvantage whose application is disputed*, whereas, at the stage of the examination of the possible justifications, the objectives to be taken into account are those *specifically pursued, within this measure, by the criterion that led to the application or, depending on the situation, to the refusal of the application of this measure* to the cross-border situation or operation in question. [38]

62. In this regard, what I think needs to be kept in mind about the examination of comparability of situations - whether it is considered as a condition for defining the concept of restriction or as a justification - is that the criterion of comparison to be used to determine whether the difference in treatment resulting from such legislation is one which reflects an objective difference in the given situations depends on the objectives pursued by the legislation in question. [39]

63. In this context it is also important to remember that the mere fact that an entity governed by foreign law and having a corporate form unknown in the host State is denied a particular tax advantage provided for other categories of entities is not *in itself* sufficient to establish that the legislation in question creates an unjustified restriction on the free movement of capital. Such a rule might indeed be perfectly consistent with another choice made by this Member State, namely, to tax the distributed profits according to the legal status of the entity making the distribution and not according to the nature of the activity carried out. [40] For example, as I explained in my Opinion in *E (Income paid by UCITS)* (C-480/19, EU:C:2020:942), it makes perfect sense for a Member State to apply the tax rules on the taxation of dividends to income distributed by funds with legal personality, even where the Member State concerned does not allow its own funds to be constituted in that form.

64. It would, however, be wrong to rule out any risk of indirect discrimination even where the relevant criterion is likely to be met by certain foreign entities. Indeed, where a criterion used has the effect of excluding foreign entities only in part - for example, those that have chosen a certain corporate form - the fact, conversely, that it is only foreign entities which are not likely to satisfy the condition or conditions required in order to benefit from a tax advantage may nonetheless serve to cast doubt on the real intentions of the national legislature. [41]

[37] However, this question may be of some importance in the context of an action for failure to fulfil obligations in so far as the burden of proof of the restriction rests on the Commission, while that of justification rests on the Member State.

[38] See, to that effect, judgment of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960, paragraphs 65 and 66) and judgment of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 42). These objectives may, sometime, be identical.

[39] See, for example, judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 28) and of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402), paragraph 49).

[40] Admittedly, in paragraph 50 of the judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377), the Court held that 'the circumstance that in [a Member State] there is no type of company with a legal form identical to [the law at stake] cannot in itself justify a difference in treatment, since, as the company law of the Member States has not been fully harmonised at [EU] level, that would deprive the freedom of establishment of all effectiveness'.. Nevertheless, the Court did not infer the existence of a restriction from the mere fact that this legal form did not exist in the national legislation but simply that such a circumstance does not constitute *in itself* a *justification*. .What matters to establish a restriction, is that, in view of the objectives pursued by the measure in question and the tax principles applied, this form of company should have been treated identically to another form of company existing in domestic law.

[41] See, to that effect, judgment of 9 October 2014, *van Caster* (C-326/12, EU:C:2014:2269, paragraphs 36 and 37), and of 8 June 2017, *Van der Weegen and Others* (C-580/15, EU:C:2017:429, paragraph 29).

65. In that kind of situation it is therefore particularly important to examine the comparability of the situations of those foreign entities in order to assess whether the choice of that criterion is consistent with the logic of the national law and therefore, whether the fact that only foreign entities are unlikely to meet that criterion is the simple consequence of the Member State's choice not to have provided for this particular legal form or, on the contrary, if it constitutes an indirect means of favouring national undertakings.

66. Finally, it should be recalled that a difference of treatment may be compatible with EU law if it is justified, in the case of direct discrimination, by one of the grounds expressly provided for in the Treaties [42] or, in the case of indirect discrimination, also by overriding reasons in the public interest and, in both cases, provided that the measure of national law is suitable for securing the attainment of the objective in question and does not go beyond what is necessary to attain that objective. [43]

67. It is in the light of the foregoing that I propose to answer the question referred by the referring court.

2. Application

68. From the outset, it should be noted that Article 35(10-ter) of Decree-Law No. 223/2006 submits the availability of the reduction of the rate of the transcription fees and of the registration fees to *two specific conditions*, namely, that the applicant must first be a closed real estate fund and, second, that it must be governed by Article 37 of Legislative Decree No. 58/1998.

69. Although the question asked by the referring court in the present case only relates to the first condition, I propose to take the liberty of making a few observations as to the second condition. Indeed, always bearing in mind, as I observed, that it is for the referring court ultimately to interpret the national legislation, I note that, as these two conditions are distinct, each could be put forward to justify the refusal to apply the 50% reduction of fee rates to the two real estate funds in question.

(a) On the second condition laid down in Article 35(10-ter) of Decree-law No. 223/2006

70. The claimant argues that the *second condition* establishes a direct discrimination, inasmuch as Article 37 of Legislative Decree No. 58/1998 applies *only to funds governed by Italian law*.

71. While it is not clear from the information supplied by the referring court what the scope of Article 37 of Legislative Decree No. 58/1998 was at the time of the events, [44] it is important to underline that should it transpire that this provision applied either only to funds incorporated under Italian law (for those constituted in accordance with statute) or, those whose contract is subject to Italian law (for those with a contractual form), or those whose management company

[42] See, with respect to tax measures, the Opinion of Advocate General Tizzano in *SEVIC Systems* (C-411/03, EU:C:2005:437, point 55) or, more generally, judgments of 7 May 1997, *Pistre and Others* (C-321/94 to C 324/94, EU:C:1997:229, paragraph 52).

[43] See, for example, judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 70).

[44] As explained, at the time of the events, the AIF Directive had not been adopted. Moreover, real estate funds did not fall within the scope of Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), which established the principle of home country control, as they are not supposed to invest in transferable securities and/or in other liquid financial assets as referred to in Article 1 of Directive 85/611.

is based in Italy, then the second condition *would* constitute a direct discrimination. Indeed, in those circumstances, the reference made by Article 35(10-ter) of Decree-Law No. 223/2006 to Article 37 of Legislative Decree No. 58/1998 would be exactly like laying down a criterion of fund 'nationality' in order to apply Article 35(10-ter) of that Decree-Law. [45]

72. As I have explained, a direct discrimination can only be justified on one of the grounds expressly provided for in the Treaties which are essentially provided for, in the context of the free movement of capital, in Article 58(1)(b) EC (now Article 65(1)(b) TFEU), namely the maintenance of public policy and public security, [46] which includes the fight against tax evasion or fraud and the need to prevent indefensible tax benefits.

73. Accordingly, should it transpire that Article 37 of Legislative Decree No. 58/1998 applies *only* to funds subject to Italian law, or managed by management companies governed by Italian law, it seems difficult to see how one of those grounds could be considered to have been established, as the risk of tax avoidance seems, with regard to the nature of the two fees at issue, to be as great irrespective of the 'nationality' of the funds in question. Even if that criterion pursued the ground of public policy consisting in favouring 'close ended' real-estate funds (which is discussed in greater detail below) in order to avoid systemic risk, it seems that that risk would remain the same, irrespective of the 'nationality' of the funds.

(b) On the first condition laid down in Article 35(10-ter) of Decree-law No. 223/2006

(1) Regarding the existence of a restriction

74. As regards the *first condition*, it should be noted that, in so far as it is not directly linked to the law applicable to the funds, no direct discrimination can be found.

75. With regard to the question of the possible existence of an indirect discrimination, it is necessary to examine whether the criterion used – namely, whether or not a particular real estate fund is 'closed' – constitutes a criterion which, although superficially neutral, in practice places funds governed by foreign law at a fiscal disadvantage. To do so, it is necessary that this criterion has the effect of treating funds governed by foreign law less favourably, even though they are, from the point of view of the objectives pursued by the tax measure in question, in an identical situation than the funds governed by national law. In this regard, as explained above, indirect discrimination may be presumed where the only entities which are unlikely to meet the criterion used are entities governed by foreign law. [47]

76. In the present case, even though both open and closed-ended funds are subject to the fees at issue when a property is acquired, the first condition stipulates that it is only the latter which may benefit from the fees rebate of 50%. By virtue of Article 12-bis of Ministerial Decree No. 228/1999, real estate funds can only be created in Italy in closed-ended form. It follows that only funds which are governed by another law are likely to fail to meet this condition. In this particular circumstance, it must be therefore presumed that the application of this criterion, while superficially neutral, amounts to a difference in treatment, to the detriment of certain cross-border situations.

[45] This would not be an indirect discrimination, since the criterion applied, albeit by reference, would relate directly to whether or not the transaction has a cross-border nature.

[46] See Article 58(1)(b) EC.

[47] See, to that effect, judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 50).

77. Such a difference in treatment is, however, only likely to constitute indirect discrimination – and, therefore, a restriction for the purpose of Article 56 EC (now Article 63 TFEU) – if open and closed-ended funds may be regarded as being in truly comparable situations, having regard to the objectives pursued by the legislature when it granted the tax advantage for which the benefit is claimed, namely, here, the granting of a 50% reduction in the applicable fee rates.

78. One difficulty which is immediately apparent is that the referring court was not very clear about the reason *why* Italian law granted such a tax advantage. Indeed, in its reference for a preliminary ruling, that court only mentioned that: 'In recent years, the tax regulations of closed-ended real estate investment funds have been the subject of numerous legislative interventions inspired by two opposing aims: on the one hand, to encourage the development of a peculiar asset management tool; on the other, to limit its use for elusive purposes'. It is, however, difficult to know whether that statement concerns Articles 35(10-ter) of Decree-Law No. 223/2006 or whether it is merely a clarification of the context of the present case aimed at explaining the reason in general behind the various interventions of the national legislature with regard to the tax regime for investment funds.

79. Even if one assumes that this explanation specifically concerns Article 35(10-ter) of Decree-Law No. 223/2006, this would serve only to explain why open-ended funds are excluded from the benefit of that provision, but not why such a fiscal advantage has been granted.

80. In this context, the only serious explanation put forward to explain the objective pursued by the 50% reduction of the fees rates was one advanced by UBS Real Estate. According to the latter, the real objective of the law was to avoid prejudicing funds which frequently carry out purchase-resale operations [48] in so far as, from an economic point of view, these transactions would be taxed twice. [49]

81. If that were the case - a matter which is for the national court to verify - it would have to be held that, from the perspective of such an objective, all real estate funds, whether open or closed, must be regarded as being in the same situation, so that they should, in principle, have been treated identically.

82. It follows that if this were indeed the reason for the fact that Italy has provided for the possibility of obtaining a reduction in the taxes in question, limiting the benefit to closed funds only would constitute an indirect discrimination. This would also be true if no clear objective for this fiscal benefit could be discerned by the referring court.

83. Since, however, the limitation of this benefit to closed funds only could be aimed at achieving certain public interest objectives, it is to this issue which I will now turn.

[48] To establish that Article 35(10-ter) of Decree-law No. 223/2006 pursues such an objective, the claimant refers to Study No. 2/2009/T of 15 May, 2009 of the Consiglio nazionale del Notariato (National Council of Notaries, Italy) entitled 'Il regime tributario dei fondi immobiliari' (The tax system for real estate funds), as well as to a document of the Assonime (association of Italian joint stock companies). While neither of those documents are official legal sources, they both mention that the application of the tax relating to the acquisition of real estate for professional use takes into account the fact that the acquisition of real estate by such entities is necessarily followed by the resale of the said real estate: real estate funds are set up for a specific period during which the purchased real estate is resold.

[49] From a legal perspective, that does not seem to be the case, since the taxpayer at the time of purchase and of a resale will not be the same. Although it is not clear how this phenomenon would specifically affect investment funds, - since this 'double' taxation seems to result simply from the carrying out of two distinct legal transactions - the possibility that this is indeed the objective pursued by the Italian legislature cannot be excluded.

(2) Concerning the existence of a justification

84. As I have already sought to explain, an indirect discrimination might be compatible with the Treaties if it appears to be justified by an overriding reason in the public interest.

85. In this respect, the referring court referred, in essence, to two objectives which would be pursued by the first condition laid down in Article 35(10-ter) of Decree-law No. 223/2006. The first would be to promote and encourage the development of collective real estate investment funds that are not underpinned by highly speculative and uncertain intentions and, second, to limit the systemic risk on the real estate (and wider banking) markets in the event of a crisis.[50] In addition to these two objectives, the Commission mentioned, for its part, the fight against tax evasion. Finally, the Italian Government mentioned another justification, namely that of preserving the coherence of the Italian system, since Italian law recognises closed-ended investment funds as the only type of fund that can make real estate acquisitions.[51]

86. First, with regard to the objective put forward by the Commission, although Article 35 of Decree-Law No. 223/2006 is entitled 'Measures to combat tax evasion and avoidance', I fully share this party's view that, if that were indeed the objective pursued, the first criterion would be completely inappropriate to reach such an objective. Indeed, this would be tantamount to postulating that acquisitions made by open-ended funds are fraudulent. Moreover, according to settled case-law, in order for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that concession by a particular tax levy, which is not the case here.[52]

87. Secondly, with regard to the justification mentioned by the Italian Government, I note that such a justification is inconsistent with the case-law which states that indirect discrimination may result from the fact that non-residents are unlikely to meet the condition(s) required in order to benefit from a tax regime or that they could only meet them with difficulty.[53]

88. As for the first objective put forward by the referring court in connection with the fight against highly speculative acquisitions and uncertain intentions, and regardless of whether such an objective constitutes an overriding reason in the public interest under EU law, it does not appear to be likely to justify the first condition of application of Article 35(10-ter) of Decree-Law

[50] In this respect, it should be noted that Article 35(10)ter of Decree-law No. 223/2006 applies irrespective of whether the fund in question is distributed in Italy: it applies to the acquisition by a fund of a property. Consequently, the need to protect investors cannot be invoked by Italy.

[51] In any event, in accordance with Article 267 TFEU, it is not for the Court, in the context of a reference for a preliminary ruling, to decide whether the interpretation of the national provisions made by the referring court is correct and, *a fortiori*, to establish what the objectives pursued by a measure are. See, to that effect, judgment of 21 October 2010, *Padawan* (C-467/08, EU:C:2010:620), paragraph 22), of 15 September 2011, *Gueye* (C-483/09 and C-1/10, EU:C:2011:583, paragraph 42); and of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraphs 25 and 26). As already explained, since there is no burden of proof on the Member State concerned, it is necessary to bear in mind that, when the Court of Justice gives a judgment on a reference for a preliminary ruling, it always does so solely on the basis of the justifications put forward by the referring court and, sometimes, but with a certain margin of discretion, by the parties. Consequently, if it turns out that the justifications put forward are not the right ones, the answer provided by the Court, although justified in view of the circumstances described by the referring court, may prove inoperative for the dispute. The same applies where it is found that certain provisions of national legislation, although relevant, were not mentioned by the national court or where it appears that the provisions cited were not in fact applicable to the dispute in the main proceedings, in particular *ratione temporis*. Although regrettable, and a source of misunderstanding for EU citizens, that is the consequence of the preliminary reference procedure, where, contrary to a national supreme court, the Court does not have the competences to interpret national law and must therefore rely on the statements made by the referring courts.

[52] See, for example, judgment of 1 December 2011, *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 71).

[53] However, as I explained earlier, the circumstance that an entity takes a form that is not recognised in the host State does not oblige this Member State to apply the most favourable existing tax regime to that entity, but rather simply the one resulting from a consistent application of the criteria provided for by national legislation.

No. 223/2006. Indeed, the closed or open-ended nature of a fund relates, as UBS Real Estate points out, to the possibility for investors to request that their investment (represented by the number of units they hold) be redeemed by the funds. Of course, that nature can have repercussions on how a fund will be managed, since, in particular, the fact that investors may ask for their units to be redeemed at any time will oblige the fund to conserve liquidity to meet a reasonable number of requests. However, this issue does not appear to be related to the level of speculation of the investment made by that fund or to the more or less certain nature of its intention in this regard.

89. If, by that ground, the national court intends to refer to an objective which would be to encourage long-term real estate acquisitions over short-term speculative ones - especially as the latter may contribute to an artificial increase in prices and, therefore, to the problem of access to properties - then this consideration, however worthy, cannot in itself and in these particular circumstances justify such a difference in treatment between open and closed-ended funds. It is admittedly in the nature of a closed fund that investors cannot exercise their redemption rights whenever they want. However, this feature of closed-ended funds does not oblige them to hold the properties they acquire for a longer time than if they were open-ended. Since the first condition laid down in Article 35(10-ter) does not appear to be consistent with such an objective, the latter could not provide the requisite objective justification.

90. The second justification advanced by the referring court is that, in essence, the national legislation seeks to prevent what might be termed a 'snowball' effect on the commercial real estate market. In this context, the referring court explains that in the case of open-ended funds, if there were to be a market crisis following a drop in real estate prices, this could induce many investors to ask for the early repayment of part of the invested sums. This phenomenon could absorb the liquidity reserves of the funds, which in turn could then be forced to sell part of the real estate below its book value in order to satisfy the requests for repayment of the shares. [54] To avoid such a risk, it would therefore be legitimate to encourage only the development of closed-ended funds - and irrespective of whether the law which governs them - by confining certain fiscal benefits to them, such as the one provided for in Article 35(10-ter) of Decree-law No. 223/2006.

91. In that respect, an objective which aims at limiting a risk of a systemic nature clearly constitutes an overriding reason in the public interest for the purposes of EU law. [55] Indeed, systemic risks are obviously a matter of concern, as illustrated by the fact that the European Union adopted a regulation aimed at limiting such risks in relation to financial markets. [56]

92. In order, however, for an indirect discrimination of this kind to be compatible with EU law, not only does it need to pursue an overriding reason in the public interest, but it must also be proportionate to the achievement of that objective. That implies that the measure adopted (in

[54] The difference between the liquidity of an open-ended and a closed-ended investment funds is now recognised by Article 1 of Delegated Regulation 694/2014.

[55] Requiring that the problem exists, rather than reasoning in terms of risk, in order to authorise a Member State to invoke the need to combat it would lead to a legislative to-and-fro and would, in my opinion, reflect a form of judicial short-sightedness: a measure is adopted in response to a problem, but will have to be abolished once its effectiveness is established, which would lead to the problem reappearing and thus lead the State to reinstate that measure, and so on. If the problem invoked by a Member State is currently contained, perhaps it is precisely because the measures taken to remedy it are effective.

[56] See Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ 2010 L 331, p. 1). It is true that in the present case, the systemic risk at issue concerns the real estate market. However, the existence of such a risk of repercussions of crisis in real estate markets on the stability of the financial system and of the economy as a whole seems to be commonly accepted. See, for example, the first recital of the recommendation of European systemic risk board of 31 October 2016 on closing real estate data gaps (ESRB/2016/14) (OJ 2017 C 31, p. 1).

the present case to exclude open-ended funds from the benefit of the 50% fees rate reduction) is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to do so. [57]

93. In the case of the prevention of a complex risk, I also believe that Member States must be allowed a *measure of discretion*. [58] Therefore, the Court's control of the proportionality of any measure taken to reach such objective should be limited to verifying the absence of a manifest error in this regard. [59]

94. Although this problem is probably less important for the real estate market than others, such as corporate or household over-indebtedness, it is nevertheless well known in finance and justifies, in my opinion, that Member States take an interest in it, since any crisis is generally the result of a combination of factors. This is all the more so as, in the present case, the measure in question concerns more specifically commercial properties, [60] a market in which investment funds are major players. [61]

95. I propose to start by looking at the second criterion, namely, the need for the measure in question not to go beyond what is necessary in order to achieve the overriding reason in the public interest under consideration.

96. In the present case, if we look at the effects produced by that measure, that condition can be considered as met, since, rather than purely and simply prohibiting any open-ended funds from acquiring real estate situated on its territory, Italy has merely excluded open-ended funds from a tax advantage.

[57] See, for example, judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 122). Certain judgments or instruments have referred to a third criterion, namely that it must not be possible to replace the requirement with a less restrictive measure that could achieve the *same* result. However, the latter constitutes the other facet of the criterion, which is, for the measure at issue, to not go beyond what is necessary for the attainment of that objective. In fact, if it were possible to adopt a less restrictive measure that could achieve the *same* result as a given measure, that latter measure would inevitably go beyond what is necessary in order to do so.

[58] See, by analogy, concerning the reduction of health risks, judgment of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141, paragraph 65).

[59] See, by analogy, judgment of 18 June 2015, *Estonia* v *Parliament and Council* (C-508/13, EU:C:2015:403, paragraph 29).

[60] It is generally accepted that commercial real estate has specific characteristics that make it, at least in part, a separate market from residential real estate. Nevertheless, it seems to be recognised that there is a significant risk of negative spillover effects from commercial property on the wider financial sector and the real economy. See, to that effect, European Systemic Risk Board (ESRB), *Report on vulnerabilities in the EU commercial real estate sector*, November 2018, p. 51. In addition, according to that report, the commercial real estate sector represented in 2018 in Italy around 6% of the gross domestic product. See p. 11. Admittedly, even if, according to this report, Italy was not among the Member States which were the most exposed to a negative spillover risk in 2018, this does not mean that such a risk does not exist (and even less that it did not exist in 2006). Consequently, the fight against this risk must be considered as being likely to constitute an overriding reason in the public interest for the purposes of EU law.

[61] According to some authors, real estate investment funds were in 2020 the most commonly used vehicle to invest in commercial real estate in Italy. See, Croce, L., de Capitani, G. and Trutalli, F., *Commercial real estate in Italy: Overview*, Thomson Reuters Practical law, online Q&A guide to corporate real estate law in Italy. A PwC study, which refers to data from the Bank of Italy, indicates that real estate funds in Italy managed in 2019 assets in either retail, office or industrial properties under management for a value amounting EUR 56 000 000 000. However, this study does not specify the overall size of the market. See PwC, *Real Estate Market Overview: Italy 2019*, available on the website of that global network of firms. In Ireland, the share of commercial real estate held by investment funds (excluding real estate investment trusts and insurance corporations and pension funds) represented in 2016, depending on the estimate of the overall market used, between 25 and 50% of the commercial real estate portfolio (Office, Retail and Industrial). Estimation made from the figures mentioned in Coates, D., Daly, P., Keenan, E., Kennedy, G., and McCarthy, B., *Who Invests in the Irish Commercial Real Estate Market ? An overview of Non-Bank Institutional Ownership of Irish CRE*, Banc Ceannais na hÉireann/Central Bank of Ireland, Financial stability Notes, No 6, 2019, No 6, p. 5 and 7. In France, 14% of the commercial properties in Paris and its suburbs are held by investment funds (listed or not but excluding institutional investors or banks). See Association française des sociétés de placement immobilier (ASPIM) and Ernst & Young, *L'investissement immobilier, une dynamique au service des territoires*: *1re étude socio-économique des fonds d'investissement immobilier non cotés*, October 2019, p. 7.

97. With respect to the first criterion, which is for the measure to constitute an appropriate means for securing the attainment of the overriding reason in the public interest under consideration, things are, however, not so simple.

98. In this respect, it should be recalled, firstly, that this criterion simply requires that the measure in question is *capable of reducing* the alleged risk. [62] Admittedly, this implies that the measure at issue is, at a minimum, effective. However, that does not mean that this measure alone must be able to eliminate that risk, which would very often be impossible in practice. If that were not the case, it would mean that Member States would be precluded from using a combination of deterrent measures, rather than a strict prohibition, in order to achieve a particular objective.

99. Secondly, to be considered as appropriate for securing the attainment of an overriding reason in the public interest, a measure also needs genuinely to reflect a concern to attain that objective in a consistent and systematic manner. [63]

100. In the present case, I consider that there is a link between the perceived risk invoked and the open or closed nature of the funds. Indeed, as explained by the referring court, where an open-ended fund offers daily redemptions, but a significant proportion of the assets in which the fund invests cannot be liquidated within a day without material loss of value, there is an asset-liability mismatch. That issue in turn generates a risk that these funds may be forced to sell buildings in the midst of a real estate crisis, thereby fuelling any crisis on the commercial property market. [64] This is why there are now a number of rules aimed at guaranteeing a certain amount of liquidity in open-ended funds in order to ensure that they can meet redemption obligations and other liabilities. [65]

101. The position with regard to closed-ended funds is different. In a closed-ended fund the redemption of units can only be requested on the scheduled date or, depending on the formula chosen, after a certain number of years of subscription, contrary to what is the case, in principle, for open-ended funds. The advantage of closed-ended funds as compared with open funds is that the former do not risk of being confronted with the sudden need to make improvised disinvestments in order to obtain liquidity. Besides, from a capital markets perspective it is

[62] See, to that effect, judgment of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141, paragraph 65).

[63] See, to that effect ,judgment of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 52).

[64] See, for example, European Systemic Risk Board, Report on Vulnerabilities in the EU Commercial Real Estate Sector, November 2018, p. 5. '[I]nvestment vehicles, such as open-ended REIFs, face redemption risks that can lead to [Commercial real estate market] price corrections if funds are forced to sell their assets rapidly'. Ibid. p. 79. It should be kept in mind in this respect that it is generally due to a drop in prices on the real estate market that investors in this type of fund ask to be reimbursed in order to limit their loss.

[65] In October 2016, the US SEC adopted new rules designed to promote effective liquidity risk management for open-end funds (https://www.sec.gov/rules/final/2016/33-10233.pdf); in July 2016, the HK SFC published a circular providing additional guidance to asset managers particularly in relation to liquidity risk management (https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/doc?refNo= 16EC29); the UK FCA published additional guidance (https://www.fca.org.uk/publications/documents/liquidity-management-investment-firms-good-practice); the French AMF has published a consultation report on stress testing at investment funds level (August 2016, https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/autorite-des-marches-financiers-amf-launches-consultation-use-stress-tests-help-manage-risk-asset, final report published in February 2017) as well as detailed guidance on the use of newly introduced redemption gates (December 2016, https://www.amf-france.org/en/news-publications/news/setting-redemption-gates-mechanisms-amf-publishes-new-instruction-and-adjusts-its-existing-policy); the Indian SEBI published a circular (May 2016) in the area of liquidity management (https://www.sebi.gov.in/sebi_data/attachdocs/1464693701007.pdf). See also, The Board of the International Organization of Securities Commissions, *Open-ended Fund Liquidity and Risk Management – Good Practices and Issues for Consideration – Final report*, February 2018 (https://memofin-media.s3.eu-west-3.amazonaws.com/uploads/library/pdf/Memo%20OICV%20gestion%20risque%20liquidit%c3%a9.pdf) or more recently, in the context of the Covid crisis, ESMA, Report on Recommendation of the European Systemic Risk Board (ESRB) on liquidity risk in investment funds, 12 November 2020, especially page 54 on Real estate funds.

generally considered that real estate funds should be established as limited liquidity funds or as closed-ended funds due to the long-term nature of an investment in real estate and the lead time required in bringing sales of real estate assets to completion. [66]

102. Admittedly, one may fairly ask whether the dissuasive effect of a measure consisting in simply denying a tax advantage to this type of fund is sufficient to achieve the overriding reason in the public interest of reducing the systemic risk on the real estate market by dissuading open-ended funds from operating on that market. [67] However, as I have already explained, in order to be considered appropriate under the principle of proportionality as laid down in EU law, it is sufficient that the measure at issue is likely to contribute to the achievement of the overriding reason in the public interest at stake. [68]

103. In the present case, it should be noted that the relevant objective which would be pursued by the first criterion set out in Article 35(10-ter) of Decree-Law No. 223/2006 is to reduce the systemic risks to the commercial real estate market caused by the development of the activity of real estate open-ended funds. Given that the first criterion has been found as establishing indirect discrimination, which implies that it has a deterrent effect on the funds concerned, such a criterion necessarily contributes to the achievement of that objective.

104. This is all the more so as, to the extent that Member States must be given a certain margin of appreciation in the prevention of complex risks involving a large number of factors, it does not seem at all irrational for a Member State to take into account such risk. As recent experience has shown, several crises in certain markets have occurred due to the concomitant occurrence of events that, taken in isolation, seemed unlikely to occur. The events of 2007-2011 have shown that the risk of systemic shocks in this situation is a very real one.

105. Similarly, one may question in this context whether such a measure is coherent with the measures taken to the same effect with respect to open-ended funds under Italian law, given that the latter are prohibited from investing in the real estate market. However, it should be borne in mind that EU law does not apply to reverse discrimination. [69] Consequently, the fact that a more drastic measure has been adopted with regard to funds under national law cannot call into question the consistency with which the objective must be considered to be pursued.

106. This fiscal measure at issue appears in any event to be part of a legislative package designed to achieve the stated objective, that is to say, to give preference to investments in the Italian commercial property market made by closed rather than open-ended funds in order to reduce the systemic risk that would be created by the holding of too many buildings by such funds. [70] Consequently, any assessment of whether the measure in question is sufficient would require an overall examination of all such measures, which have not, however, been specified by the national court.

[66] See, for example, Dillon Eustace, *A Guide to Irish Regulated Real Estate Funds*, 2009, page 4.

[67] See, by analogy, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 43).

[68] If, under the first condition of the proportionality test, excessive importance were to be given to the effectiveness of the measure in question, this condition would come into conflict with the second condition, which is that the measure in question should not go beyond what is necessary.

[69] See judgment of 16 June 1994, *Steen* (C-132/93, EU:C:1994:254, paragraphs 9 to 11).

[70] See paragraph 76 of the present Opinion. As I explained in my Opinion in *Autoridade Tributária e Aduaneira (Impôt sur les plus-values immobilières)* (C-388/19, EU:C:2020:940), the Court should not look at the tax measures in isolation but must rather endeavour to get the full picture of the tax legislation applicable to the situation at issue, even if it makes this assessment more difficult.

107. Admittedly, here, other measures, particularly of a behavioural nature, such as a prohibition on the acquisition of real estate in Italy for speculative purposes, would probably have been more effective for this purpose. Such measures would, however, have had an even greater impact on the free movement of capital and the freedom of enterprise. A fortiori, the same problem would have arisen if structural measures, such as those currently provided for in the AIF Directive, had been adopted towards all funds wishing to acquire commercial real estate in Italy. Indeed, it should be remembered that the right to freedom of enterprise includes the right of every enterprise to freely dispose, within the limits of the liability it incurs for its own actions, of the economic, technical and financial resources at its disposal.

108. UBS Real Estate argues, however, that the first condition would not be appropriate for securing the attainment of the objective of limiting the systemic risk identified by the referring court, since there would be no difference between these closed-ended investment funds and open-ended investment funds. Both have the same characteristics and are subject to the same management and investment rules.

109. But is this really the case? Here one may note that the similarities put forward by UBS Real Estate regarding the management and investment rules relate to rules that apply because of the qualification of the entities in question as investment funds. With regard to the problem raised by the referring court, UBS Real Estate acknowledges that there is a difference between an open-ended fund and a closed-ended fund due to the first being subjected, by definition,to an asset-liability mismatch.

110. UBS Real Estate responds by saying that open-ended real estate funds, provided they have more liquidity than closed-ended funds, would be a less risky investment. For my part, however, I cannot accept this argument. The risks to which UBS Real Estate refers here are those to which the individual investors are subject. Yet these are not the risks mentioned by the referring court, which are of a general systemic nature to the extent that the issue of asset-liability mismatch can amplify any price decline in the commercial real estate market,[71] and in turn, under certain circumstances, as recent experience has shown, can ultimately threaten banking and financial markets.

111. Lastly, UBS Real Estate contends that open-ended funds under German law would, in reality, be comparable to closed-ended funds under Italian law. On the one hand, German law would require the maintenance of a liquidity cushion that cannot be less than a certain amount. This liquidity cushion would reduce the liquidity risk associated with the investment. In the case of the two funds in question, their operating rules would thus provide that they must maintain at least 5% of the value of those funds in liquidity. On the other hand, that law would allow the open-ended funds to provide for clauses allowing the possible sale of the fund's real estate to be delayed in order to proceed with the reimbursement of the participants, which would eliminate

[71] The same applies to the arguments of UBS Real Estate relating to the recommended investment horizon for the funds' investors.

the risk envisaged by the referring court. This was precisely what was provided for in the operating rules of the funds in question.[72] By contrast, Italian law would allow Italian closed-ended funds to provide for an early redemption of units.

112. In this respect, I agree that the clauses referred to by UBS Real Estate might well reduce the risk identified by the referring court in so far as they allow UBS Real Estate to postpone the repayment of investments made for up to three years. Moreover, while the prospectuses and the rules relating to the fund provide that, in principle, investors may ask to be reimbursed and that it is only in exceptional circumstances that this reimbursement may be frozen, it should be noted that these clauses provide for the possibility of freezing claims for a relatively long period and that the exceptional circumstances likely to justify their implementation include the event of a crisis in the real estate market. All of this is, however, a matter for the national court to verify.

113. However, it should be noted that a period of suspension of the request for the redemption of the investment made of three years remains shorter than the period at the end of which, in a closed fund, investors might request to be redeemed, which is generally between 5 and 20 years, with an average duration of 10-12 years. Since, however, a real estate crisis might well last for more than three years,[73] it follows that although clauses such as those specified in UBS Real Estate's prospectus and rules might serve to reduce the risk referred to by the referring court, they do not completely eliminate it. In my opinion, it is not for the Court to assess whether, having regard to the content of the clauses at issue, the risk that remains is sufficient to justify that the Member States take measures to respond to it. It is rather for the national courts to make that final assessment.

114. If these clauses were likely fully to remedy the risk, then the question that arises is whether a criterion should be considered inappropriate (or as going beyond what is necessary) on the grounds that it does not involve a detailed examination of the rules of the operation of the funds,[74] but depends solely on the qualification given to them by the law governing their operation.[75]

[72] Article 12 of the General Fund's rules of these two funds, in the version transmitted to the Court, provides that: 'the [managing] Company reserves the right to temporary refuse redemption for liquidity reasons to protect the investors. If the bank deposits and the proceeds from the sale of the money market instrument, investment units and securities held are not sufficient to allow payment of the redemption price and to guarantee orderly ongoing management servicing of the business or if they are not immediately available, the Company has the right to refuse redemption for a period of six months. If, after the expiry of the period specified above, there are still insufficient funds to cover redemption, properties belonging to the investment fund must be sold. The Company can refuse redemption until the sale of these properties has been completed on reasonable terms, but for no more than two years after the redemption request has been submitted. An announcement to investors [published in the electronic Bundesanzeiger (Federal Gazette) and in a financial or daily newspaper with a sufficiently large circulation or in the electronic information media described in the sales prospectus] allows the period specified above to be extended by a further year.'

[73] For example, the so-called subprime crisis had an effect on the US housing market from at least 2007 to 2012. A similar crisis affected both Spanish and Irish property markets from 2008 until 2014.

[74] In this respect, I must recall that the question raised concerns the compatibility of the first condition set out in Article 35(10-ter) of Decree Law No 223/2006 to benefit from a reduction in tax rates and not the practice followed by the Italian tax authorities. Consequently, the argument put forward by UBS Real Estate must be understood as criticising the recourse to a condition drawn from the open or closed nature of the fund, in so far as it would have been more appropriate to resort to a criterion based on a refined analysis of the rules governing the operation of the funds.

[75] In this respect, it should be pointed out once again that, at the time of the facts at issue in the main proceedings, real estate funds did not fall within the scope of Directive 85/611 and therefore did not benefit from the principle of mutual recognition or that of control by the State of origin alone.

115. In matters of free movement, the Court has admittedly been rather cautious of this type of approach, requiring the use of criteria that are as precise as possible. [76]

116. For my part, however, I consider that in the event that the referring court were to hold that the reason for the preferential fiscal treatment of closed-end real estate funds was to guard against potential systemic risks in the commercial property market and, by extension, against potential systemic risks emerging in financial markets, then the use of such a criterion would not appear to be *manifestly inappropriate*. [77] Bearing in mind the discretion enjoyed by the Member States in this matter, any endeavour to favour closed real estate funds would have to be regarded in such circumstances as proportionate, even if it were also possible to differentiate even further by also favouring certain particular open-ended funds whose clauses and prospectuses sought to exclude partially the risk resulting from asset-liability mismatch.

V. Conclusion

117. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

Article 56 EC is to be interpreted as permitting the use of a criterion based on the open or closed nature of a fund as a condition for obtaining a reduction in the rate of mortgage registration tax and land registry fee that have to be paid out in case of a property acquisition if the justification for the said criterion is that it helps to guard against systemic risk in the relevant real estate market and provided also that there is no direct discrimination based on factors such as whether the funds are administered in Italy or are otherwise governed by Italian law.

[76] However, in an area admittedly falling within the exclusive competence of the Union, the Court recognised that the use of general criterion (a duration of marriage of one year, as proof of the reality and stability of relations between the persons concerned) did not violate the principle of proportionality, even though a more enhanced assessment of each situation, based, for example, on an examination of the evidence provided by the interested parties, would have been possible. See judgment of 19 December 2019, *HK* v *Commission* (C-460/18 P, EU:C:2019:1119, paragraph 89).

[77] The position with regard to direct discrimination, – if such were to be established – is, as I have already observed, different.