Provisional text

JUDGMENT OF THE COURT (Second Chamber)

16 December 2021 (*)

(Reference for a preliminary ruling – Free movement of capital – Closed-ended mutual investment funds – Open-ended mutual investment funds – Investments in real estate – Mortgage registration tax and land registry fees – Tax advantage granted only to closed-ended real estate investment funds – Difference in treatment – Comparability of situations – Objective criteria of differentiation)

In Joined Cases C?478/19 and C?479/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decisions of 21 December 2018, received at the Court on 19 June 2019, in the proceedings

UBS Real Estate Kapitalanlagegesellschaft mbH

v

Agenzia delle Entrate,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb (Rapporteur) and A. Kumin, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– UBS Real Estate Kapitalanlagegesellschaft mbH, by S. Ricci and M. Serpieri, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the European Commission, by W. Roels and F. Tomat, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 43 and 56 EC (now, after amendment, Articles 49 and 63 TFEU).

2 The requests have been made in proceedings between UBS Real Estate Kapitalanlagegesellschaft mbH ('UBS Real Estate') and the Agenzia delle Entrate (Revenue Authority, Italy) concerning the restriction of the benefit of the reduction in mortgage registration tax and in land registry fees to closed-ended investment funds only, to the exclusion of open-ended investment funds.

Italian law

Legislative Decree No 347 of 31 October 1990

3 Decreto legislativo n. 347 – Approvazione del testo unico delle disposizioni concernenti le imposte ipotecaria e catastale (Legislative Decree No 347 approving the consolidated text of the provisions on mortage registration tax and land registry fees), of 31 October 1990 (Ordinary Supplement to GURI No 277 of 27 November 1990), in the version applicable to the disputes in the main proceedings, provides, first, that the formalities of registration, registration of mortgages, renewal and annotation in the land register are subject to a registration tax (*imposta ipotecaria*) ('mortgage registration tax'). The tax base is constituted by the value of the transferred or contributed real estate and the rate is set at 1.6%

4 Secondly, the land registry fee (*imposta catastale)* is also governed by Legislative Decree No 347 of 31 October 1990, and is applied to transfers, namely the change of name of the proprietor of the estate in land or of other real rights concerning a property registered in the land registry. That fee, which is applied at the rate of 0.4%, is proportional to the value of that property.

Legislative Decree No 58/1998

5 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, Consolidated text of the legislative provisions on financial intermediation, pursuant to Articles 8 and 21 of the Law No 52 of 6 February 1996), of 24 February 1998 (Ordinary Supplement to GURI No 71 of 26 March 1998), in the version applicable to the disputes in the main proceedings, ('Legislative Decree No 58/1998'), provided, in Article 1 thereof entitled 'Definitions', as follows:

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

…

(k) "open-ended fund" means a mutual investment fund whose participants have the right to request, at any time, the redemption of the shares according to the rules of operation of the fund;

(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 …

…'

6 Under Article 36 of that legislative decree, entitled 'Mutual investment funds':

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

…

3. Participation in the mutual investment fund is governed by the fund regulations. The Banca d'Italia [(Bank of Italy)], 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 mutual investment fund, or each sub-fund of the same fund, constitutes an independent asset, 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. …'

7 In accordance with Article 37 of Legislative Decree No 58/1998:

'The Minister for the Economy and Finance shall determine, by means of a regulation adopted after consultation with the Bank of Italy and the Consob, the general criteria to be met by mutual investment funds concerning:

(a) the purpose of the investment;

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

(c) the terms of participation in open-ended and closed-ended 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 creation of the fund and afterwards, for funds which invest exclusively or principally in real estate, in property rights and in shares in real estate companies.

…

2-bis. The regulation referred to in the first paragraph shall also set out the matters in respect of which the participants in closed-ended funds are to meet in assembly in order to adopt decisions binding on the portfolio management company. The meeting shall decide in all cases on the replacement of the portfolio management company, the request for admission to listing when no provision has been made therefor and on changes to management policies …'

8 According to Article 39 of Legislative Decree No 58/1998, entitled 'Fund regulations':

'1. For each mutual investment fund, fund regulations shall define its characteristics, govern its operation, designate the promoter company, the manager when it is not the promoter company, and the depositary bank, fix the distribution of tasks between the latter and regulate the existing relations between them and the participants.

2. The fund regulations shall provide, in particular, for:

(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, and of the subscription and redemption of shares, and also the terms of liquidation of the fund;

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

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

…'

Legislative Decree No 223/2006

9 Article 35, entitled 'Measures to combat tax 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, nonché interventi in materia di entrate e di contrasto all'evasione fiscale (Decree-Law No 223, laying down urgent provisions for economic and social recovery, for the limitation and rationalisation of public expenditure, and interventions in terms of tax revenue and the fight against tax evasion), of 4 July 2006 (GURI No 153 of 4 July 2006), in the version applicable to the disputes in the main proceedings ('Decree-Law No 223/2006') – adopted into law, after modification, by legge n. 248 – Conversione in legge, con modificazioni, del decreto-legge 4 luglio 2006, n. 223, recante disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale (Law No 248 adopting into law, with modifications, Decree-Law No 223 of 4 July 2006, laying down urgent provisions for economic and social recovery, for the limitation and rationalisation of public expenditure, and interventions in terms of tax revenue and the fight against tax evasion) of 4 August 2006 (Ordinary supplement to GURI No 186 of 11 August 2006) – provides, in paragraph 10-ter thereof:

'In respect of changes to the land register and entries relating to transfers of immovable property used for commercial purposes referred to in Article 10, first paragraph, point 8-ter of the decreto del presidente della Repubblica n. 633, (istituzione e disciplina dell'imposta sul valore aggiunto (Presidential Decree No 633, establishing and regulating value added tax)), of 26 October 1972 [(Ordinary Supplement to GURI No 292 of 11 November 1972)]), even if subject to value added tax, and involving closed-ended real estate funds governed by Article 37 of the Consolidated text of the legislative provisions on financial intermediation resulting from [Legislative Decree No 58/1998], as subsequently amended, and by Article 14-bis of Legge n. 86 – (Istituzione e disciplina dei fondi comuni di investimento immobiliare chiusi (Law No 86 establishing and regulating closed-ended real estate investment funds)), of 25 January 1994 [(Ordinary Supplement to GURI No 29 of 5 February 1994)]), or financial leasing companies, or banks and financial intermediaries …, regarding 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, shall be reduced by one half. The provision set out above shall apply from 1 October 2006.'

Ministerial Decree No 228/1999

10 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 mutual investment funds must comply), of 24 May 1999 (GURI No 164 of 15 July 1999), in the version applicable to the disputes in the main proceedings ('Ministerial Decree No 228/1999'), provides in Article 1(1)(d-

bis) thereof:

‘Real estate funds [are] funds that invest exclusively or principally in real estate, in property rights and in shares in real estate companies.’

11 Article 12-bis (1) of Ministerial Decree No 228/1999 provides:

‘Real estate funds shall be set up in closed form.’

The dispute in the main proceedings and the question referred for a preliminary ruling

12 UBS Real Estate is a mutual fund portfolio management company with headquarters in Germany and a branch in Italy. It manages, inter alia, two open-ended real estate investment funds established under German law, namely UBS (D) 3 Sector Real Estate Europe (formerly UBS (D) 3 Kontinente Immobilien) and UBS (D) Euroinvest Immobilien Real Estate Investment Fund (together ‘the UBS Funds’).

13 On 4 October 2006, UBS Real Estate acquired, on behalf of the UBS Funds, two building complexes used for commercial purposes which are located in San Donato Milanese (Italy). When registering the acquisition of those complexes, UBS Real Estate had to pay the Italian tax authorities mortgage registration tax and land registry fees, the total amount of which was, for each of those building complexes, EUR 802 400 and EUR 820 900 respectively.

14 At a later stage, UBS Real Estate became aware that Decree-Law No 223/2006 had entered into force prior to the acquisitions thus made, namely on 1 October 2006, and that that decree-law provided, in Article 35(10-ter) thereof, for the reduction by half of the mortgage registration tax and land registry fees in respect of real estate acquisitions by or on behalf of closed-ended real estate funds, governed by Article 37 of Legislative Decree No 58/1998.

15 Taking the view that open-ended investment funds were also entitled to that reduction, UBS Real Estate requested the tax authorities to refund half of the sums paid by way of those taxes and fees in respect of the two building complexes which it had acquired on behalf of the UBS Funds.

16 In the absence of a reply from the tax authorities, UBS Real Estate brought actions against those two implied rejection decisions before the Commissione tributaria provinciale di Milano (Provincial Tax Court, Milan, Italy). By judgments of 21 December 2009 (Nos 282/05/09 and 283/05/09), that court dismissed the actions, finding that, by Decree-Law No 223/2006, the Italian legislature had intended to restrict the benefit of the reduction in the mortgage registration tax and in land registry fees solely to the category of closed-ended investment funds.

17 UBS Real Estate appealed against both of those judgments before the Commissione tributaria regionale per la Lombardia (Regional Tax Court, Lombardy, Italy). By judgments of 3 April 2012, that court dismissed those appeals, reasoning, in essence, that because of the considerable differences between closed-ended investment funds, recognised and operating in Italy, and open-ended investment funds, recognised and operating in Germany, it was not appropriate to find that there had been an infringement of, inter alia, EU law on the basis of a difference in treatment, given that different situations could be subject to different tax regimes.

18 Since UBS Real Estate was of the view that the appellate court had erred in holding that Article 35(10-ter) of Decree-Law No 223/2006 was consistent with Articles 12, 43 and 56 EC (now, after amendment, Articles 18, 49 and 63 TFEU), it brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), the referring court. In support of its appeals, it submits, in particular, that since it had been held on appeal that the two types of

investment fund mentioned in the preceding paragraph corresponded to different situations which could be treated differently, whereas such differences were irrelevant in the light of the rationale of Article 35(10-ter) of Decree-Law No 223/2006, the provisions of the Treaties relating to the free movement of capital and freedom of establishment had been infringed.

19 The referring court states, first of all, that the Italian tax regime for closed-ended real estate investment funds had been the subject of numerous interventions by the national legislature over recent years. Those interventions were inspired by two different purposes, namely those of promoting the development of a particular portfolio management instrument and of limiting its use for the purposes of circumventing tax legislation.

20 The referring court then proceeds to clarify the specific characteristics of the two types of investment fund concerned. In that regard, it explains, first, as regards closed-ended investment funds, that the Italian legislation on mutual investment funds provides for the portfolio management company which created the funds to redeem only the shares subscribed to during specific periods. Those funds are, therefore, characterised by a predetermined number of shares, which does not vary over time. Since the capital amount of the funds is fixed in nature and allocated to them at the time the funds are created, those collective investment instruments can be subscribed to only during a certain pre-determined period, and the redemption of the capital thus invested can be requested only on the termination of the funds or after a certain number of years following their creation. Outside those periods, shares in a closed-ended investment fund can only be bought and sold on the stock exchange. Since the duration of such a fund fluctuates between 10 and 30 years, its assets would be divided up at the end of its term between the various participants or, if sold, any proceeds would be distributed to them.

21 Secondly, it is clear from the applicable Italian legislation that open-ended investment funds are characterised by the variable nature of their capital, which may increase or decrease on a daily basis, depending on new subscriptions or requests to redeem shares. They may, therefore, be subscribed to at any time, and it is possible to redeem the injected capital, in whole or in part, at any time. In that regard, the referring court states that although the investor in a closed-ended fund who intends to dispose of his or her investment has no choice but to sell his or her shares to a third party, the holder of the shares in an open-ended fund may, on the other hand, request that fund to redeem the amount corresponding to his or her shares.

22 Lastly, the referring court observes that the possible triggering of a market crisis, which could occur following a drop in real estate prices, might induce many participants in open-ended investment funds to request the early redemption of their shares, which could result in the ‘liquidity cushions’ of such funds being absorbed. Those funds would, therefore, be forced to sell part of their real estate below its normal value, in order to be able to meet those redemption requests. From that point of view, the objective of the Italian legislature in restricting the reduction in mortgage registration tax and in land registry fees solely to closed-ended investment funds may have been to promote and encourage the creation of investment funds which do not stem from ‘highly speculative and uncertain intentions’. Such an approach is not, however, free from criticism, in that it would de facto create an obstacle to investment from other Member States, since open-ended investment funds, originating in those States, would be dissuaded from acquiring real estate used for commercial purposes in Italy.

23 In those circumstances the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question, which is worded identically in Cases C?478/19 and C?479/19, to the Court of Justice for a preliminary ruling:

‘Does EU – law in particular the provisions [of the Treaties] 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)?’

24 By decision of the President of the Court of 22 July 2019, Cases C?478/19 and C?479/19 were joined for the purposes of the written and oral procedures and of the judgment.

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether Articles 43 and 56 EC (now, after amendment, Articles 49 and 63 TFEU) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which restricts the reduction in mortgage registration tax and in land registry fees solely to closed-ended real estate funds, to the exclusion of open-ended real estate funds.

The freedom of movement applicable

26 First of all, as regards the applicability of the provisions of the FEU Treaty and the Italian Government’s argument that, in essence, the answer to the question referred for a preliminary ruling in each of the joined cases should be based on the relevant provisions of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 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 (OJ 2011 L 174, p. 1), it suffices to note that that directive was not applicable at the material time.

27 That said, since that question submitted for a preliminary ruling refers to the provisions of the FEU Treaty relating both to freedom of establishment and to the free movement of capital, it is necessary to determine which freedom is applicable in the main proceedings (see judgment of 6 March 2018, *SEGRO and Horváth*, C?52/16 and C?113/16, EU:C:2018:157, paragraph 52 and the case-law cited).

28 In that regard, it is clear from settled case-law that, in order to determine whether national legislation falls within the scope of one or other of the fundamental freedoms guaranteed by the FEU Treaty, the purpose of the legislation concerned must be taken into consideration (see, to that effect, judgments of 21 June 2018, *Fidelity Funds and Others*, C?480/16, EU:C:2018:480, paragraph 33 and the case-law cited, and of 3 March 2020, *Tesco-Global Áruházak*, C?323/18, EU:C:2020:140, paragraph 51 and the case-law cited).

29 It should also be borne in mind that, according to settled case-law, national measures which govern transactions by which non-residents make investments in immovable property on the territory of a Member State may fall within the scope of both Article 43 EC (now, after amendment, Article 49 TFEU), relating to freedom of establishment, and Article 56 EC (now, after amendment, Article 63 TFEU), relating to the free movement of capital (see, to that effect, judgment of 1 June 1999, *Konle*, C?302/97, EU:C:1999:271, paragraph 22).

30 The right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment, generates capital movements when it is exercised (see, to that effect, judgments of 25 January 2007, *Festersen*, C?370/05, EU:C:2007:59, paragraph 22 and the case-law cited, and of 11 October 2007, *ELISA*, C?451/05, EU:C:2007:594, paragraph 58 and the case-law cited).

31 As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988

L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents; that nomenclature still has the same indicative value for the purposes of defining the concept of capital movements (judgment of 6 March 2018, *SEGRO and Horváth*, C?52/16 and C?113/16, EU:C:2018:157, paragraph 56 and the case-law cited).

32 In the present case, the national legislation at issue in the main proceedings concerns the reduction in mortgage registration tax and land registry fees relating to transfers of real estate used for commercial purposes to which, inter alia, closed-ended real estate funds are parties.

33 Although that legislation is, prima facie, capable of being covered by both Article 43 EC and Article 56 EC (now, after amendment, Articles 49 and 63 TFEU), the fact remains that, in the context of the main proceedings, any restrictions on freedom of establishment resulting from that legislation are an inevitable consequence of the restriction of the free movement of capital and do not, therefore, justify an independent examination of that legislation in the light of Article 43 EC (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C?52/16 and C?113/16, EU:C:2018:157, paragraph 55 and the case-law cited).

34 Furthermore, as the Advocate General observed, in essence, in point 44 of his Opinion, it is apparent from the documents before the Court that the acquisition of the two building complexes concerned was carried out by UBS Real Estate, on behalf of the UBS Funds, only as a passive investment, with the sole aim of making a financial investment and not in order to establish an economic activity there.

35 In the light of all the foregoing considerations, the national measure at issue in the main proceedings must be examined exclusively in the light of the primary-law provisions on the free movement of capital, namely Article 56 EC (now, after amendment, Article 63 TFEU).

Whether there is a restriction on free movement of capital

36 It should be noted that, according to settled case-law, the measures prohibited by Article 56(1) EC (now, after amendment, Article 63(1) TFEU), as restrictions on the movement of capital, include those that 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, in particular, judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C?252/14, EU:C:2016:402, paragraph 27 and the case-law cited, and of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 49 and the case-law cited).

37 In the present case, since the question referred in the disputes in the main proceedings is whether the differences between closed-ended and open-ended investment funds are capable of allowing those two types of fund to be treated differently in terms of taxation, it is necessary to examine whether the criterion of whether a real estate fund is ‘open-ended’ or ‘closed-ended’ is capable of constituting a restriction prohibited, as a rule, by Article 56(1) EC (now, after amendment, Article 63(1) TFEU).

38 In that regard, it should be noted that the criterion relating to the form of the real estate fund does not in itself constitute a difference in treatment between resident and non-resident real estate funds.

39 However, national legislation which applies without distinction to resident and non-resident operators may constitute a restriction on the free movement of capital. Indeed, it follows from the Court's case-law that even a differentiation based on objective criteria may de facto disadvantage cross-border situations (judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 55 and the case-law cited).

40 That is the case where national legislation which applies without distinction to resident and non-resident operators reserves a tax advantage in situations in which an operator complies with conditions or obligations which are, by their nature or in fact, specific to the national market, in such a way that only operators present on the national market are capable of complying with those conditions or obligations, and non-resident operators which are comparable do not generally comply with those conditions or obligations (judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 56 and the case-law cited).

41 In that regard, it is apparent from the documents before the Court that, in accordance with Article 12-bis of Ministerial Decree No 228/1999, real estate funds may be created in Italy only as closed-ended investment funds.

42 As the Advocate General observed in points 75 and 76 of his Opinion, since only real estate funds governed by the law of Member States other than the Italian Republic can be set up in the form of open-ended investment funds and are, consequently, liable to be denied the benefit of the tax advantage conferred by Article 35(10-ter) of Decree-Law No 223/2006, the application of the distinguishing criterion based on the 'open-ended' or 'closed-ended' nature of investment funds leads to real estate funds governed by the law of Member States other than the Italian Republic being disadvantaged, thereby creating a difference in treatment to their detriment.

43 Consequently, it must be held that, as the referring court reasons, that difference in treatment is liable to discourage open-ended investment funds governed by the law of Member States other than the Italian Republic from acquiring real estate used for commercial purposes in Italy and therefore constitutes a restriction on the free movement of capital prohibited, as a rule, by Article 56 EC (now, after amendment, Article 63 TFEU).

44 That being so, pursuant to Article 58(1)(a) EC (now, after amendment, Article 65(1)(a) TFEU), the provisions of Article 56 EC (now, after amendment, Article 63 TFEU) are to 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.

45 In so far as that provision constitutes a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Consequently, it cannot be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or of the State in which they invest their capital is automatically compatible with the Treaties. Indeed, the derogation in Article 58(1)(a) EC (now, after amendment, Article 65(1)(a) TFEU) is itself limited by Article 58(3) EC (now, after amendment, Article 65(3) TFEU), which provides that the national provisions referred to in paragraph 1 of Article 58 EC (now, after amendment, Article 65 TFEU) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article [56 EC (now, after amendment, Article 63 TFEU)]' (see, to that effect, judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C?480/19, EU:C:2021:334, paragraph 29 and the case-law cited).

46 The Court has also held that a distinction must, therefore, be made between the differences

in treatment authorised under article 58(1)(a) EC (now, after amendment, Article 65(1)(a) TFEU) and the discrimination prohibited by Article 58(3) EC (now, after amendment, Article 65(3) TFEU). Before national tax legislation can be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment resulting from that legislation must concern situations which are not objectively comparable or must be justified by an overriding reason in the public interest (see, to that effect, judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C?480/19, EU:C:2021:334, paragraph 30 and the case-law cited).

Whether the situations are objectively comparable

47 It is apparent from the Court's case-law that the comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue (see, in particular, judgment of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 26 and the case-law cited), as well as the purpose and content of the latter (see, in particular, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C?252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

48 Moreover, only the relevant distinguishing criteria laid down by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects an objectively different situation (see, to that effect, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C?252/14, EU:C:2016:402, paragraph 49 and the case-law cited).

49 In that regard, as the Advocate General stated in point 78 of his Opinion, it should be noted, in the first place, that, for the purposes of examining whether there is an objective difference between the situation of open-ended real estate funds and that of closed-ended real-estate funds, the main difficulty stems from the fact that the referring court does not clearly set out the reason for which the tax advantage at issue in the main proceedings was provided for in Italian law.

50 Indeed, as regards the purpose of the tax advantage conferred by the national legislation, the referring court used only general terms to indicate that in recent years the tax regime of closed-ended, real estate mutual investment funds has been the subject of numerous legislative interventions inspired by two opposing aims, namely, on the one hand, to encourage the development of a particular portfolio management tool and, on the other, to limit its use for the purposes of circumventing the legislation. The referring court observed that the possible triggering of a market crisis, which could occur following a drop in real estate prices, might induce many participants in open-ended investment funds to request the early redemption of their shares, which could result in the 'liquidity cushions' of such funds being absorbed. Those funds would, therefore, be forced to sell part of their real estate below its normal value, in order to be able to meet those redemption requests. In those circumstances, the referring court states that the objective of the Italian legislature underlying the tax advantage conferred in Article 35(10-ter) of Decree-Law No 223/2006 on closed-ended real estate funds could be to promote and encourage the creation of investment funds which do not stem from highly speculative and uncertain intentions.

51 In the second place, it should be noted that the positions expressed by the various parties which submitted written observations differ considerably as regards the objective of the tax advantage conferred by Article 35(10-ter) of Decree-Law No 223/2006, consisting in a 50% reduction in the rate of mortgage registration tax and of land registry fees in respect of real estate acquisitions by or on behalf of closed-ended funds governed by Article 37 of Legislative Decree No 58/1998.

52 First of all, UBS Real Estate disputes the assumption on which the referring court relies and

submits that the rationale of a provision such as that at issue in the main proceedings, which halves the amount to be paid by way of property registration taxes, is the need to prevent operators who frequently carry out real estate purchase and sale transactions on a professional basis from being from being penalised by that activity by paying the same taxes twice, that is, both at the time of purchasing property and at the time of its sale, as confirmed in particular by a study of the Consiglio nazionale del Notariato (National Council of Notaries, Italy) and by a circular of the Associazione fra le società italiane per azioni (Assonime) (Association of Italian limited companies).

53 Next, the Italian Government contends that the functional and structural differences between closed-ended real estate funds and open-ended real estate funds, whether in relation to the subscription procedures and the arrangements for the redemption of shares or the characteristics of both types of fund, show that open-ended real estate funds are not in an objectively comparable situation to that of closed-ended real estate funds. Moreover, that conclusion is, it is argued, supported by the history of the national provision, from which it is apparent that the Italian legislature had intended to reserve the tax advantage in question solely to investments which are in fact of immovable property, to the exclusion of investments in movable property, even if the latter are valued by means of the temporary acquisition of immovable property, and that legislation is intended, in essence, to favour the creation in Italy of closed-ended funds making investments in immovable property.

54 Lastly, the Commission observes that Italian law imposes a single substantive regulatory framework applicable to all mutual investment funds, but confers favourable tax treatment on the acquisition of commercial real estate by closed-ended real estate funds, in the form of a reduction in mortgage registration tax and in land registry fees. Since the main objective of closed-ended funds and open-ended funds is to give the subscriber the opportunity of making a financial investment, there is perfect comparability between closed-ended and open-ended real estate funds. In addition, if account is taken of the fund’s objective of purchasing immovable property in order subsequently to resell it, closed-ended real estate funds and open-ended real estate funds are also comparable.

55 In that context, it is for the referring court, which has sole jurisdiction to interpret national law, taking account of all the elements of the tax legislation at issue in the main proceedings and the national tax system concerned as a whole, to determine the main objective pursued by the provision in question (see, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 79).

56 In that regard, if the referring court concludes that the objective of Article 35(10-ter) of Decree-Law No 223/2006 is to prevent a fund from being penalised by being taxed twice, that is on the purchase of immovable property and its subsequent resale, it must be found that, in the light of that objective, and as the Advocate General observed in point 81 of his Opinion, open-ended and closed-ended funds are in objectively comparable situations.

57 The referring court could, on the other hand, conclude that the objectives pursued by the national legislation at issue in the main proceedings are intended to promote and encourage the creation of closed-ended funds, which do not stem from highly speculative and uncertain intentions, and to limit the systemic risks on the real estate market, and that such considerations therefore constitute the basis on which open-ended funds are excluded from the tax advantage conferred by Article 35(10-ter) of Decree-Law No 223/2006. However, it must be noted that considerations of that kind do not relate specifically to the reasons which distinguish open-ended funds from closed-ended funds in the light of the tax advantage in question.

58 It must be added that the purpose and content of that legislation provide for a 50% reduction in the rate of mortgage registration tax and in land registry fees for the acquisition of real estate by

or on behalf of closed-ended funds governed by Article 37 of Legislative Decree No 58/1998, and that, with regard to such a tax advantage, a closed-ended fund and an open-ended fund, in so far as they each pursue the activity of acquiring and subsequently reselling real estate liable to be taxed twice, appear to be in a comparable situation.

59 In those circumstances, it is necessary to examine whether the difference in treatment introduced by Article 37 of Legislative Decree No 58/1998 may be justified by overriding reasons in the public interest.

Whether there is an overriding reason in the public interest

60 It should be recalled that, according to the Court's settled case-law, a restriction on the free movement of capital is permissible if it is justified by overriding reasons in the public interest, if it is suitable for securing the attainment of the objective which it pursues and if it does not go beyond what is necessary in order to attain that objective (see, to that effect, judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, C?480/19, EU:C:2021:334, paragraph 56 and the case-law cited).

61 In the present case, it must be noted that although the referring court has not put forward such reasons in the requests for a preliminary ruling, it has explained, as has been pointed out in paragraph 50 above, the aims which inspired the interventions by the legislature in the area of the tax treatment of closed-ended real estate funds, namely, encouraging the development of a particular portfolio management instrument, limiting its use for the purposes of circumventing legislation, and seeking to promote and encourage the creation of closed-ended funds, which do not stem from highly speculative and uncertain intentions, those different legislative interventions having been guided by considerations linked to the need to limit systemic risks on the real estate market. In addition, various grounds of justification have been put forward before the Court by the Commission and the Italian Government, namely, those of combating tax evasion and avoidance and of preserving the coherence of the tax system at issue in the main proceedings.

62 As regards, first of all, the combating of tax evasion and avoidance, it must be borne in mind that the Court has held that a national measure restricting the free movement of capital may be justified by the need to prevent tax evasion and avoidance where it specifically targets wholly artificial arrangements which do not reflect economic reality and the purpose of which is to avoid the tax normally payable on the profits generated by activities carried out in the territory of the Member State concerned (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C?135/17, EU:C:2019:136, paragraph 73 and the case-law cited). Consequently, a general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaties (judgment of 11 October 2007, *ELISA*, C?451/05, EU:C:2007:594, paragraph 91 and the case-law cited).

63 Suffice it to note, in that regard, that, in so far as the national legislation excludes all open-ended real estate funds from the benefit of the tax advantage, it clearly does not meet the requirements set out in the preceding paragraph and cannot, therefore, be justified by the need to prevent tax evasion and avoidance.

64 Next, the Italian Government submits that the difference in treatment introduced by Article 35(10-ter) of Decree-Law No 223/2006 is justified by the need to preserve the balance and coherence of the national system, given that Italian law recognises only closed-ended investment funds as the sole category of fund which may carry out real estate acquisitions.

65 In that regard, it must be borne in, admittedly, that the Court has held that the need to preserve the coherence of a tax system may justify legislation restricting fundamental freedoms

(see, to that effect, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 50 and the case-law cited, and of 13 March 2014, *Bouanich*, C?375/12, EU:C:2014:138, paragraph 69 and the case-law cited).

66 However, for an argument based on such a justification to succeed, according to settled case-law, a direct link has to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 51 and the case-law cited, and of 13 March 2014, *Bouanich*, C?375/12, EU:C:2014:138, paragraph 69 and the case-law cited).

67 As it is, in the present case, the Italian Republic has not shown that the tax advantage granted to closed-ended Italian funds was offset by a particular tax levy, which would justify excluding real estate funds governed by the law of Member States other than the Italian Republic from the benefit of that advantage.

68 As regards, lastly, (i) the need to promote the development of a particular portfolio management instrument, (ii) the creation of closed-ended funds, which do not stem from highly speculative and uncertain intentions, and (iii) the need to limit systemic risks on the real estate market, it should be noted, in the first place, in so far as concerns the need to promote the development of a particular instrument, that that objective appears to be attained by the national legislation authorising only the creation of closed-ended funds.

69 However, unfavourable tax treatment of funds of another type, created in accordance with the law of another Member State, leads essentially to national funds being systematically favoured.

70 In addition, in accordance with consistent case-law, an objective of a purely economic nature cannot justify a restriction on a fundamental freedom guaranteed by the Treaties (judgment of 25 February 2021, *Novo Banco*, C?712/19, EU:C:2021:137, paragraph 40 and the case-law cited)

71 In the second place, as the Advocate General observed in points 88 and 89 of his Opinion, it must be stated that the open-ended or closed-ended nature of a fund does not appear to be linked to the level of speculation of the investments made by that fund or to the more or less certain nature of the intentions harboured in that regard, and that the feature of being closed-ended does not oblige such a fund to hold the property it has acquired for a longer time than if it were open-ended.

72 Consequently, even if the need to prevent property speculation could be considered an overriding reason in the public interest capable of justifying a restriction on the free movement of capital, it cannot be relied on in the cases in the main proceedings, since the application of a tax advantage solely to closed-ended funds, to the exclusion of open-ended funds, does not appear suitable for attaining the objective pursued.

73 In the third place, as the Advocate General observed in points 90 and 91 of his Opinion, the objective of limiting systemic risks on the real estate market can constitute an overriding reason in the public interest. However, in order for a restriction on the free movement of capital to be justified by the need to limit systemic risks on the real estate market, the national legislation conferring a tax advantage solely on closed-ended real estate funds must be suitable for securing the attainment of the objective relied upon and must not go beyond what is necessary to attain it, which it is for the referring court to ascertain.

74 In the light of all the foregoing considerations, the answer to the question referred is that Article 56 EC (now, after amendment, Article 63 TFEU) must be interpreted as precluding legislation of a Member State which restricts the benefit of the reduction in mortgage registration tax and in land registry fees solely to closed-ended real estate funds, to the exclusion of open-ended real estate funds, provided that those two categories of fund are in objectively comparable situations, unless such a difference in treatment is justified by the objective of limiting systemic risks on the real estate market.

Costs

75 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 56 EC (now, after amendment, Article 63 TFEU) must be interpreted as precluding legislation of a Member State which restricts the benefit of the reduction in mortgage registration tax and in land registry fees solely to closed-ended real estate funds, to the exclusion of open-ended real estate funds, provided that those two categories of fund are in objectively comparable situations, unless such a difference in treatment is justified by the objective of limiting systemic risks on the real estate market.

[Signatures]

* Language of the case: Italian.