Case C-253/09

European Commission

v

Republic of Hungary

(Failure of a Member State to fulfil obligations – Freedom of movement for persons – Freedom of establishment – Purchase of property for use as a new principal residence – Establishing the basis of assessment for the tax levied on the purchase of real property – Deduction of the value of the residence sold from the value of the residence purchased – Exclusion of that deduction if the property sold is not situated within the national territory)

Summary of the Judgment

Freedom of movement for persons – Freedom of establishment – Citizenship of the European Union – Right to move and reside freely within the territory of the Member States – Restrictions – Tax legislation – Transfer tax on immovable property

(Arts 18 EC, 39 EC and 43 EC; EEA Agreement, Arts 28 and 31)

A Member State whose legislation provides, for the purposes of calculating the tax payable upon the purchase of property for use as a principal residence, that where a private purchaser sells his other residence within one year before or after the purchase, the basis of assessment for the calculation of the tax shall be the difference between the gross market value of the property purchased and that of the property sold, provided that the residence sold is also situated in that Member State (‘the Member State concerned’), does not fail to fulfil its obligations under Articles 18 EC, 39 EC or 43 EC or under Articles 28 and 31 of the Agreement on the European Economic Area (EEA).

Admittedly, that legislation constitutes a restriction of the freedoms of movement for persons affirmed in Articles 39 EC and 43 EC, in that it has a dissuasive effect, in terms of the property purchase tax, on persons wishing to settle in the Member State concerned by buying real property there, in comparison with persons moving within that Member State, by denying the former the benefit of the tax advantage at issue when purchasing a property. As regards Article 18 EC, the exclusion from the benefit of the reduction in the basis of assessment of persons moving within the European Union for reasons not connected with the pursuit of an economic activity may also, in some cases, be likely to discourage those persons from exercising the fundamental freedoms guaranteed by Article 18 EC.

In addition, that difference in treatment relates to objectively comparable situations since, in the light of the tax at issue, the only difference between the situation of non-residents (including nationals who have exercised their right to move freely within the European Union) and that of residents (nationals, or the nationals of another Member State, purchasing a new principal residence in the Member State concerned) relates to the place of their previous principal residence. In either situation, the persons in question will have bought a property in the Member State concerned in order to settle there and, when purchasing their previous principal residence, will have paid a tax of the same nature as that at issue, either in the Member State in which that residence was situated or in the Member State concerned.

However, that restriction may be justified by reasons relating to preserving the coherence of the tax system. When the property sold is situated in another Member State, the Member State concerned has no power to tax the transaction entered into in that other Member State by the person deciding to purchase a property in the Member State concerned for his principal residence. In those circumstances, by providing that only those who have already paid the tax at issue on the purchase of such property in the Member State concerned may benefit from the tax advantage in question when purchasing property of the same nature, the configuration of the tax advantage in question reflects a logic of symmetry. If taxpayers not having paid the tax at issue previously were able, under the tax regime at issue, to benefit from the tax advantage in question, they would take unfair advantage of taxation that was not applicable to their previous purchase outside the Member State concerned. There is therefore a direct link between the tax advantage granted and the initial levy. First, that advantage and the tax levy are applied to one and the same person and, second, they relate to the same tax.

In addition, the restriction in question is appropriate to achieve the objective pursued, in that it operates symmetrically, for only the difference in value between the property sold which is situated in the Member State concerned and the value of the property purchased may be taken into account in the tax system at issue. In addition, the restriction in question is proportionate to the objective pursued, since, first, the objective of the legislation at issue is to avoid, upon the purchase of a second principal residence in the Member State concerned, the double taxation of the capital invested in the purchase of the previous residence that has in the meantime been sold and, second, a Member State has no power to tax real property transactions carried out in other Member States. Accordingly, taking the transactions carried out in other Member States into account for the purposes of reducing the basis of assessment for the tax at issue would result in those transactions being treated as already having been subject to the tax at issue, even though that was not the case. That situation would clearly be contrary to the abovementioned objective of avoiding double taxation under the national tax system.

Since the rules prohibiting restrictions of freedom of movement and freedom of establishment laid down in Articles 28 and 31 of the EEA Agreement have the same legal scope as the substantially identical provisions of Articles 39 EC and 43 EC, those articles do not preclude the legislation in question either.

(see paras 58, 64, 68, 74-76, 80-82, 85, 87, 91)

JUDGMENT OF THE COURT (First Chamber)

1 December 2011 (*)

(Failure of a Member State to fulfil obligations – Freedom of movement for persons – Freedom of establishment – Purchase of property for use as a new principal residence – Establishing the basis of assessment for the tax levied on the purchase of real property – Deduction of the value of the residence sold from the value of the residence purchased – Exclusion of that deduction if the property sold is not situated within the national territory)

In Case C?253/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 July 2009,

European Commission, represented by R. Lyal and K. Talabér-Ritz, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Hungary, represented by R. Somssich and M.Z. Fehér, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, M. Ileši?, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2010,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by treating differently the purchase of property in Hungary for use as a principal residence following a related sale of property of the same nature, depending on whether the property sold was situated in Hungary or in the territory of another Member State, the Republic of Hungary has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, ‘the EEA Agreement’).

National legal context

2 Paragraph 63 of Law No CXVII of 1995 on income tax (the ‘Law on income tax’), in the version in force until 31 December 2007, provides:

‘… the rate of tax payable on income from the sale of immovable property and property rights shall be 25 per cent.

… The tax paid shall be reduced (or waived) by the amount of the tax chargeable on the part of the income from the sale of a property or a property right (allowance for purchase of housing) which is used to purchase property for residential use, by a private individual, for himself, a close family member or a former spouse, in the 12 months preceding the receipt of the income or the 60 months following that date (basis of the allowance for purchase of housing).’

3 That allowance for the purchase of housing was granted only if the investment related to residential property in Hungary.

4 Paragraph 1 of Law No XCIII of 1990 on taxes (the ‘Law on taxes’), in the version applicable to the present case, reads as follows:

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

5 Paragraph 2(2) of the Law on taxes reads as follows:

‘The provisions on tax on gifts and transfers of property for consideration shall apply to properties within the national territory and the related property rights, unless otherwise provided by international convention.’

6 Paragraph 21(5) of the Law on taxes provides:

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

Pre-litigation procedure

7 By letter of formal notice of 23 March 2007, the Commission informed the Republic of Hungary that Hungarian tax law provisions concerning the transfer of immovable property appeared to be in breach of the rights guaranteed by Articles 18 EC, 39 EC, 43 EC and 56 EC and the corresponding articles of the EEA Agreement.

8 The Commission expressed the view that those tax provisions treat in a discriminatory manner the purchase of a residential property in Hungary, following the sale of a previous residence, by providing for more favourable measures where the residence sold was in Hungary and not in the territory of another Member State. Thus, those provisions tax more heavily the purchase of residential property where the related sale was not of a previous residence in Hungary. Furthermore, due to their discriminatory nature, those provisions impede the free movement of workers and of capital and the freedom of establishment. The Commission also stated that it saw no adequate reason that could justify such a difference in rules.

9 In its letter of 8 August 2007, the Republic of Hungary recognised that the provisions of Paragraph 63 of the Law on income tax constituted an infringement of the European Union ('EU') law in force, and it announced its intention to adopt new rules to ensure that, when their income tax is calculated, taxable persons will not be treated in a discriminatory manner on account of the place where their real property is situated.

10 By contrast, as regards the provision in Paragraph 21(5) of the Law on taxes, the Republic of Hungary took the view that this did not infringe EU law.

11 By letter of 12 December 2007, the Republic of Hungary informed the Commission that the Hungarian Parliament had adopted Law No CXXVI of 2007 amending certain tax laws, which entered into force on 1 January 2008. Paragraph 19 of that Law amends Paragraph 63 of the Law on income tax, repealing the provisions on the tax reduction applied when property on Hungarian territory was purchased for residential purposes.

12 Accordingly, maintaining the position set out in its letter of formal notice, the Commission issued a reasoned opinion on 27 June 2008, inviting the Republic of Hungary to take the necessary measures to comply with that opinion within two months of its receipt.

13 The Republic of Hungary replied to the reasoned opinion by letter of 27 August 2008, repeating in it the arguments put forward in its letter of 8 August 2007.

14 Since it was not satisfied with that reply, the Commission brought the present action.

The action

Arguments of the parties

15 The Commission submits that the legislation at issue, and in particular the system for calculating the tax on the purchase of real property, infringes Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the EEA Agreement, in that it places at a disadvantage EU and European Economic Area ('EEA') citizens who, in exercising their right to freedom of movement, wish to purchase a property in Hungary at the same time as selling their property situated in another Member State of the European Union or the EEA.

16 The Commission considers that the tax at issue is an indirect tax.

17 Next, the Commission submits that that tax is payable on any purchase of real property in Hungary for use as a principal residence, but may be reduced, or even completely offset, if the purchase takes place with some degree of simultaneity with the sale of the purchaser's previous residence, provided that that residence is situated in Hungary. Although, pursuant to Paragraph 21(5) of the Law on taxes, the basis of assessment for the calculation of the tax is to be the difference between the gross market value of the property purchased and that of the property sold, only the value of property within Hungarian territory that is sold may be deducted. In those circumstances, as a result of the discrimination brought about by the regime for that tax, those purchasing real property for the first time in Hungary for use as their principal residence are in a less favourable position, and are less encouraged to purchase a property in Hungary, and to settle there, than those purchasing such residential property to replace a property already owned by them in Hungary.

18 However, in the Commission's view, those owning a principal residence in another Member State prior to purchasing their new principal residence in Hungary might have been in the same situation as those already owning a principal residence in Hungary, namely they also had to pay,

in that other Member State, a tax of an equivalent level to the tax at issue upon the purchase of their intended principal residence. The fact that when the basis for the assessment of the tax is calculated the Hungarian legislation does not allow the market value of the property sold to be deducted from that of the property bought where the property sold is not situated in Hungary results in objectively comparative situations being treated differently, and is therefore discriminatory.

19 As regards the infringement of the freedom of establishment, the Commission considers – contrary to the view taken by the Republic of Hungary – that with regard to exercising that freedom, it is of little relevance that the legislative provision at issue applies to residential property and not to commercial property. Indeed, it cannot be excluded that a self-employed person may establish his place of economic activity at his principal residence.

20 As regards persons not pursuing an economic activity, the Commission submits that the same conclusion must be drawn for the same reasons on the basis of Article 18 EC.

21 The Commission also takes the view that, for the same reasons as set out in relation to the infringement of Articles 39 EC and 43 EC, the Republic of Hungary also fails to comply with its obligations under Articles 28 and 31 of the EEA Agreement, concerning the freedom of movement for workers and the freedom of establishment respectively.

22 In addition, the Commission submits that such discrimination is not justified by reasons in the public interest.

23 With regard to the grounds relating to the coherence of the tax system, the Commission submits that the Republic of Hungary cannot rely on the judgments in Case C-204/90 *Bachmann* [1992] ECR I-249 or in Case C?471/04 *Keller Holding* [2006] ECR I-2107. Although, the Commission submits, the need to preserve the coherence of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the EC Treaty, the argument based on that ground could only succeed if there were a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy. However, there is no direct fiscal link between the sales of real property covered by the legislation at issue.

24 In addition, the Commission takes the view that the principle of territoriality relied on by the Republic of Hungary – that is, the existence of a power of taxation exercisable without limitation over property within Hungary and the absence of such a power in respect of property outside Hungary – cannot justify the provision in Paragraph 21(5) of the Law on taxes either.

25 Similarly, the Commission, relying on Case C-319/02 *Manninen* [2004] ECR I?7477, paragraph 49, submits that a possible reduction in tax revenue cannot be relied on by the Hungarian authorities as an overriding reason in the public interest to justify the measure in question.

26 Lastly, relying again on *Manninen*, the Commission also rejects the justification based on the difficulties faced by the Hungarian authorities in taking into account the existence of properties sold in other Member States – and the tax paid when those properties are purchased – when determining the amount of tax payable for the purchase of a property in Hungary. The difficulty in determining to what extent, with regard to the substance and method of the calculation, the tax paid abroad corresponds to the tax at issue could not, under any circumstances, be an argument to justify the discrimination at issue. The Commission concedes, however, that the Republic of Hungary may, following Case C-256/06 *Jäger* [2008] ECR I-123, impose specific requirements on the taxable person in order to obtain the necessary information, but those requirements may in any event not be disproportionate to the objective pursued.

27 The Republic of Hungary, asserting that the tax at issue must – contrary to the view taken by the Commission – be categorised as direct taxation, counters that the tax regime at issue does not infringe Articles 18 EC, 39 EC and 43 EC, nor the corresponding provisions of the EEA Agreement. In the alternative, that Member State contends that the regime in question is, in any event, justified by reasons in the public interest.

28 The Republic of Hungary contends, first, that the freedom of movement for persons and freedom of establishment have not been infringed, mainly on the ground that there is no difference in treatment between objectively comparable situations. Challenging the Commission's position on this point, the Republic of Hungary considers that persons wishing to purchase a property in Hungary for the first time are in an objectively comparable situation, it being of little relevance whether or not they have purchased a property of the same nature in another Member State. Persons who, while already owning property in Hungary as their principal residence, purchase another property of that nature in that Member State to replace the previous property are also in an objectively comparable situation.

29 By contrast, the Republic of Hungary contends that those selling their principal residence situated in Hungary in order to purchase another property of that nature in that Member State are not in a comparable situation to those selling their principal residence situated in another Member State in order to purchase property of the same nature in Hungary. First, the residence for tax purposes of such persons may be different because those in the first category are resident in Hungary, whereas those in the second are resident abroad. Second, for that latter category, the property previously owned falls outside the scope of Hungarian tax law, both territorially and materially, while that is not true of the property sold by the first category of residents.

30 In that connection, the Republic of Hungary relies on the Court's case-law, and in particular Case C-279/93 *Schumacker* [1995] ECR I?225, paragraph 34, and Case C-376/03 *D.* [2005] ECR I-5821, which state that, as regards the taxation of income and of assets, the situations of residents and of non-residents are not, as a rule, comparable and that the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to residents is not, as a rule, discriminatory. In addition, the Republic of Hungary cites in support of its argument the judgment in Case C-512/03 *Blanckaert* [2005] ECR I-7685, stating that the contested provisions in *Blanckaert* and in the present case are similar.

31 The Republic of Hungary also states that the Treaty, as interpreted by the Court, offers no guarantee to an EU citizen that transferring his activities to another Member State will be neutral as regards taxation (see, inter alia, Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 55; Case C?365/02 *Lindfors* [2004] ECR I?7183, paragraph 34; and Case C?403/03 *Schempp* [2005] ECR I-6421, paragraph 45). The Republic of Hungary therefore contends that the tax regime in question is in conformity with the fiscal principle of territoriality, which is recognised by EU law (see, in particular, Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471), in accordance

with which the different national tax systems coexist without any hierarchy.

32 Since distortions arising from the differences between the national tax laws do not fall within the scope of the Treaty provisions on freedom of movement, it is conceivable that a person who has availed himself of those provisions is treated less favourably for taxation purposes in one Member State simply because he is subject to another Member State's tax authority. However, such a situation cannot be regarded as amounting in itself to discrimination against that person or as a restriction, contrary to EU law, of the right to freedom of movement.

33 In that connection, the Republic of Hungary states that the Member States' powers of taxation include not only determining the tax burden, but also granting tax advantages. Thus, the legislation at issue is consistent with the principle of territoriality and does not infringe EU law.

34 The Republic of Hungary contends that any limitation of fundamental freedoms in that situation is the necessary consequence of the territorial allocation of the powers of taxation between the Member States. Maintaining a balanced allocation of the power to tax between the Member States constitutes one of the reasons in the public interest which justify such limitations.

35 Alternatively, referring to a settled line of case-law (see *Bachmann*; Case C?300/90 *Commission* v *Belgium* [1992] ECR I-305; *Manninen*; *Keller Holding*; and Case C-379/05 *Amurta* [2007] ECR I-9569), the Republic of Hungary considers that the tax regime at issue is justified by reasons in the public interest relating to the coherence of the tax system. It contends that the Court has accepted a justification of that kind in the circumstances in question provided, first, that a direct link is established between the grant of the tax advantage concerned and the corresponding tax levy, and, second, that the advantage and the levy apply to the same person and to the same taxation. In the present case, the Republic of Hungary asserts that such a link exists since only those persons who have already purchased real property situated in Hungary may benefit from the tax advantage at issue when purchasing another property there. It cannot therefore be denied that that tax advantage and the corresponding tax levy relate to the same person and are part of the same tax.

36 Furthermore, the Republic of Hungary rejects the Commission's argument that the legislation at issue is intended solely to avoid a reduction of budgetary income. The objective pursued by that legislation consists in ensuring that any purchase of property in Hungary is subject at least once to the tax at issue for the full market value of the property purchased, while preventing the assets liable to the tax on the first purchase from being taxed again. This is a coherent body of rules, inseparable from the implementation of the principle of territoriality.

37 Lastly, the Republic of Hungary contends that extending the tax advantage to real property situated abroad, in the context of the legislation at issue, would give rise to practical difficulties of such a magnitude as to prevent the system from working and would no longer allow, in particular, abuse to be prevented.

38 In addition, the Republic of Hungary states, in its rejoinder, that it is clear from its application that the Commission challenges the Hungarian legislation to the extent that this allegedly restricts persons who wish to transfer their principal residence to Hungary, in exercise of their rights of freedom of movement and freedom of establishment, from exercising such rights. Had the Commission wished to examine the legislation at issue by considering the purchase of property only as an investment, without taking into account changes in tax residence or domicile, it is to be assumed that it would have done so in terms of the free movement of capital as referred to in Article 56 EC.

39 However, since the Commission did not refer to that fundamental freedom, but only to the

freedom of movement for persons, the application should be regarded as referring only to situations in which, in exercising his right to freedom of movement, a person transfers his residence to Hungary. The Republic of Hungary deduces from this that the change in the place of residence and tax residence justifies distinguishing between those purchasing a property for the first time in Hungary and those purchasing another property in Hungary to replace a previous property already situated there.

40 Consequently, the Republic of Hungary, citing Case C-67/08 *Block* [2009] ECR I?883 in support of its reasoning, contends that there is no obligation on a Member State to take into consideration the market value of a property situated in another Member State of the European Union or the EEA.

Findings of the Court

41 First of all, it should be recalled that there is a disagreement between the Commission and the Republic of Hungary as to whether the tax at issue should be categorised as direct or indirect taxation.

42 In that connection, it should be noted that, regardless of whether, in the present case, the tax in question constitutes direct or indirect taxation, the tax has not been harmonised within the European Union and therefore falls within the competence of the Member States, which, according to settled case-law, must exercise that competence consistently with EU law (see, in particular, with regard to direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21; Case C-155/09 *Commission* v *Greece* [2011] ECR I?0000, paragraph 39; and Case C-10/10 *Commission* v *Austria* [2011] ECR I-0000, paragraph 23).

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

Complaints alleging infringement of the provisions of the Treaty

44 As regards the complaint alleging infringement of Articles 18 EC, 39 EC and 43 EC, it should be recalled that Article 18 EC, which sets out in general terms the right of every EU citizen to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC with regard to freedom of movement for workers and in Article 43 EC with regard to freedom of establishment (see Case C-345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 13; Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 15; Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraph 18, and *Commission* v *Greece*, paragraph 41).

45 Consequently, the tax regime at issue must be examined first in the light of Articles 39 EC and 43 EC before being examined in the light of Article 18 EC for persons moving from one Member State to another Member State in order to settle there for reasons not connected with the pursuit of an economic activity.

– The existence of restrictions of Articles 39 EC and 43 EC

46 The Treaty provisions on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and they preclude measures which might place those nationals at a disadvantage when they wish to

pursue an economic activity in the territory of another Member State (see Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraph 34 and case-law cited; *Commission* v *Portugal*, paragraph 15; *Commission* v *Sweden*, paragraph 17; *Commission* v *Germany*, paragraph 21; and *Commission* v *Greece*, paragraph 43).

47 The freedom of establishment conferred on nationals of one Member State in the territory of another Member State includes in particular access to and exercise of activities of self-employed persons under the same conditions as are laid down by the law of the Member State of establishment for its own nationals (see, inter alia, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13; Case C-47/08 *Commission* v *Belgium* [2011] ECR I-0000, paragraph 79; and, to the same effect, Case C-161/07 *Commission* v *Austria* [2008] ECR I-10671, paragraph 27). In other words, Article 43 EC prohibits a Member State from laying down in its laws conditions for the pursuit of activities by persons exercising their right of establishment there which differ from those laid down for its own nationals (Case C?161/07 *Commission* v *Austria*, paragraph 28, and Case C-47/08 *Commission* v *Belgium*, paragraph 79).

48 In the present case, the Commission submits that, as a result of the difference in tax treatment which it establishes between taxable persons – be they foreign or Hungarian citizens – who sell property situated in Hungary and taxable persons who sell property situated outside Hungarian territory, the legislation at issue is discriminatory and may discourage the latter from exercising their right to freedom of movement and of establishment.

49 The Commission therefore submits that the discrimination arises out of the less favourable tax treatment of transfers of residence from another Member State to the Republic of Hungary in comparison with transfers of residence within Hungarian territory, and essentially takes the view that pursuant to the principle of fiscal equality, the first situation, which involves a cross-border element, must receive the same treatment as the second situation, and that it should give rise to entitlement to the tax advantage at issue.

50 In that connection, it should be recalled that it is settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, *Schumacker*, paragraph 30; Case C?383/05 *Talotta* [2007] ECR I?2555, paragraph 18; and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, paragraph 27).

51 Accordingly, a difference in treatment between two categories of taxable person may be categorised as discrimination within the meaning of the Treaty provided that the situations of those categories of taxable person are comparable in the light of the taxation rules concerned.

52 It follows that, in the present case, the Republic of Hungary is required to make available the tax advantage at issue to taxable persons selling property outside Hungarian territory only if their situation is to be regarded as being objectively comparable, in the context of the tax at issue, to the situation of taxable persons selling property situated within Hungary.

53 In that connection, the Republic of Hungary disagrees with the Commission's conclusion and claims that the situations are not comparable. It asserts that it is possible not to confer the tax advantage at issue on property for which a government tax had to be – or ought to have been – paid beforehand in another Member State if that Member State had established such a tax. Since, given the nature of that government tax, the scope of the legislation at issue extends only to property situated in Hungary, those persons not having purchased a property beforehand in Hungary and those already owning such a property there are not in a comparable situation, so that the fact of applying different rules to those two categories of person does not constitute discrimination within the meaning of the Treaty.

54 However, that argument cannot be accepted.

55 Admittedly, the Court has held, in relation to direct taxes, that the situations of residents and of non-residents in a Member State are generally not comparable, because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (*Schumacker*, paragraphs 31 and 32; Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 22; and Case C?169/03 *Wallentin* [2004] ECR I-6443, paragraph 15).

56 Furthermore, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situations of residents and of non-residents from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (*Schumacker*, paragraph 34; *Gschwind*, paragraph 23; Case C-234/01 *Gerritse* [2003] ECR I?5933, paragraph 44; and *Wallentin*, paragraph 16).

57 However, it must be stated that those principles were developed by the Court in the context of case-law on income tax, an area in which objective differences between taxable persons, such as source of income, personal ability to pay tax or personal and financial circumstances, may affect the taxation of a taxpayer and are, as a rule, taken into account by the legislature. That is not true of the tax at issue, which is determined in relation to the sale price of real property. Moreover, the Republic of Hungary has not argued – and nor is there any evidence to that effect in the Court file – that the personal circumstances of a taxpayer are taken into account when the tax in question is paid.

58 In those circumstances, in the light of the tax at issue, the only difference between the situation of non-residents in Hungary (including Hungarian nationals who have exercised their right to move freely within the European Union) and that of residents in Hungary (Hungarian nationals, or the nationals of another Member State, purchasing a new principal residence in that Member State) relates to the location of their previous principal residence. In both situations, the persons in question will have bought a property in Hungary in order to settle there and, when purchasing their previous principal residence, will have paid a tax of the same nature as that at issue, either in the Member State in which that residence was situated or in Hungary.

59 In such circumstances, acceptance of the proposition that a Member State may freely apply a different treatment solely by reason of the fact that an EU citizen's first principal residence is situated in another Member State would deprive the rules relating to the freedom of movement for persons of all meaning (see, to that effect, Case 270/83 *Commission* v *France,* paragraph 18, Joined Cases C?397/98 and C?410/98 *Metallgesellschaft and Others* [2001] ECR I?1727,

paragraph 42; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 26).

60 In the light of the foregoing considerations – and as the Commission correctly observes – all those moving their principal residence within the European Union or the European Economic Area, whether that be just within Hungary itself or be from the Member State where the previous residence was situated to Hungary, are in a comparable situation.

61 That being the case, it should be recalled that in order to establish whether discrimination exists, the comparability of a Community situation with a purely domestic situation must be examined also by taking into account the objective pursued by the national provisions at issue (see, in particular, *Papillon*, paragraph 27).

62 In that connection, the file shows that, in the present case, the objective of the national legislation is to impose on all property purchases a tax whose basis of assessment is the total market value of the property being purchased, while preventing the assets taxed upon the purchase of the property now being sold from being taxed again on the subsequent purchase.

63 As regards the comparability of the situations, that objective of taxing only once the capital invested for the purchase of real property may, as a rule, be achieved both where the property sold is situated in Hungary and where it is situated in another Member State.

64 In the light of the objective of the Law on taxes, both of those situations are therefore objectively comparable.

65 Consequently, the tax regime at issue creates a difference in treatment on the basis of the location of the real property sold.

66 As regards the dissuasive effect of the legislation at issue alleged by the Commission, it should be remembered that – as has been noted – by refusing to grant the tax advantage at issue to those purchasing a property in Hungary for use as their principal residence when they have sold or are about to sell their previous principal residence situated in another Member State, that legislation results in a heavier tax burden for those persons than for those benefiting from that advantage.

67 In those circumstances, it cannot be ruled out that the legislation at issue may, in certain cases, dissuade those relying on their right to freedom of movement (and to freedom of establishment) under Articles 39 EC and 43 EC from purchasing a property in Hungary.

68 In the light of the foregoing considerations, it must be held that Paragraph 2(2), in conjunction with Paragraph 21(5), of the Law on taxes constitutes a restriction on the freedoms of movement for persons enshrined in Articles 39 EC and 43 EC, in that they have a dissuasive effect – in terms of the property purchase tax – on persons wishing to settle in Hungary by buying real property there, in comparison with persons moving within that Member State, by denying the former the benefit of the tax advantage at issue when purchasing a property.

– Whether the restrictions are justified

69 According to well-established case-law, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, are appropriate for attaining that objective and do not go beyond what is necessary to attain the objective pursued (see, in particular, *Commission* v *Greece*, paragraph 51).

70 It is appropriate therefore to examine whether the difference in treatment between those two

categories of taxpayer may be justified by an overriding reason in the public interest, in particular the need to preserve the coherence of the tax system.

71 The Court has already accepted that the need to preserve the coherence of a tax system may justify legislation restricting fundamental freedoms (see, inter alia, *Bachmann*, paragraph 21; *Manninen*, paragraph 42; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 43; and Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 77).

72 However, 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 advantage by a particular tax levy (see, in particular, *Manninen*, paragraph 42; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I?2107, paragraph 68; and *Amurta*, paragraph 46).

73 In that connection, it must be noted that the tax regime laid down by the Law on taxes is based on the concept that the purchaser of a property situated in Hungary for use as his principal residence who sells his previous residence also situated in that Member State, within the time-limit laid down by that Law, must pay the tax not on the entire value of the property bought, but only on the difference in market value between the property bought and the property sold. Tax is therefore levied only on the hitherto untaxed part of the assets invested for the purchase of the property.

74 By contrast, when the property sold is situated in a Member State other than Hungary, the Republic of Hungary has no power to tax the transaction entered into in that other Member State by the person deciding to purchase a property in Hungary for his principal residence. In those circumstances, by providing that only those who have already paid the tax at issue on the purchase of such property in Hungary may benefit from the tax advantage in question when purchasing property of the same nature, the configuration of the tax advantage in question reflects a logic of symmetry within the meaning of the case-law (see, to that effect, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 42).

75 If taxpayers not having paid the tax at issue previously were able, under the tax regime at issue, to benefit from the tax advantage concerned, they would take unfair advantage of taxation that was not applicable to their previous purchase outside Hungary.

76 It follows that, under the tax regime in question, there is a direct link between the tax advantage granted and the initial levy. First, that advantage and the tax levy are applied to one and the same person and, second, they both relate to the same tax.

77 In that context, it should be noted that the two requirements that the levy be identical and applied to one and the same person have been found to be sufficient to establish the existence of such a link (see, inter alia, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 58; Case C?168/01 *Bosal* [2003] ECR I-9409, paragraphs 29 and 30; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 42). In addition, it must be noted that the Commission has not expressly disputed that the tax advantage in question is granted to the same taxpayer in relation to the same tax.

78 In the light of the foregoing, it must be found that the restriction stemming from Paragraphs 2(2) and 21(5) of the Law on taxes is justifiable by the need to preserve the coherence of the tax system.

79 However, in order for that restriction to be justified on that basis, it must also be appropriate and proportionate to the objective pursued, as noted in paragraph 69 above.

80 In that respect, it should be noted that, in the light of the Court's case-law, the restriction in question is appropriate to achieve such an objective, in that it operates in a symmetrical manner, since only the difference in value between the property sold which is situated in Hungary and the value of the property purchased may be taken into account in the tax system at issue (see, to that effect, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 44).

81 In addition, the restriction in question is proportionate to the objective pursued. It should be remembered, first, that the objective of the legislation at issue is to avoid – upon the purchase of a second principal residence in Hungary – the double taxation of the capital invested in the purchase of the previous residence that has been sold. Second, as noted in paragraph 74 above, the Republic of Hungary has no power to tax real property transactions carried out in other Member States.

82 Accordingly, taking the transactions carried out in other Member States into account for the purposes of reducing the basis of assessment for the tax at issue would result in those transactions being treated as already having been subject to the tax at issue, even though that was not the case. That situation would clearly be contrary to the abovementioned objective of avoiding double taxation under the Hungarian tax system.

83 While the property transactions carried out in other Member States might also have been subject to similar or even identical taxes to that at issue, it must be noted, however, that in the current stage of the development of EU law, the Member States enjoy a certain autonomy in the area of taxation provided they comply with EU law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation (see, by analogy, Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 51, and Case C-67/08 *Block* [2009] ECR I-883, paragraph 31).

84 That assessment cannot be called into question by the fact that, because of the method of calculating the basis of assessment for the tax on property, a taxpayer may be exempted from payment of that tax when subsequently purchasing a property situated in Hungary. Indeed, where the value of the second property purchased is lower than that of the property being sold, the capital invested in that second purchase is not then subject to tax, and the taxpayer is not entitled to any rebate of any part of the tax paid on the first purchase. As a result of such a mechanism, the regime in question may indeed be regarded as constituting an advantage and not as a disguised exemption for the sole benefit of Hungarian residents.

85 It follows that the restriction of the freedom of movement for persons and of freedom of establishment may be justified in order to preserve the coherence of the tax system.

– Whether Article 18 EC is restricted

86 As regards persons not resident in Hungary and not pursuing an economic activity there, it should be recalled that national legislation which places certain nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction of the freedoms conferred by Article 18(1) EC on every citizen of the Union (see Case C?406/04 *De Cuyper* [2006] ECR I?6947, paragraph 39; Case C?192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 31; and Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I?9161, paragraph 25).

87 In the present case, it cannot reasonably be denied that the exclusion from the benefit of the reduction in the basis of assessment of persons moving within the European Union for reasons not connected with the pursuit of an economic activity may, in some cases, be likely to discourage

those persons from exercising the fundamental freedoms guaranteed by Article 18 EC.

88 However, the Court has held that such a restriction can be justified in the light of EU law if it is based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to the legitimate objective pursued by the provisions of national law (see *De Cuyper,* paragraph 40; *Tas-Hagen and Tas*, paragraph 33; and *Morgan and Bucher*, paragraph 33).

89 In that connection, it should be noted that the same conclusion as that reached in paragraphs 69 to 85 above for justifying the restriction in relation to Articles 39 EC and 43 EC applies, for the same reasons, to the complaint alleging infringement of Article 18 EC (see Case C-522/04 *Commission* v *Belgium* [2007] ECR I-5701, paragraph 72; *Commission* v *Germany*, paragraph 30; and *Commission* v *Greece*, paragraph 60).

The complaints alleging infringement of the provisions of the EEA Agreement

90 The Commission also asserts that the Republic of Hungary has failed to fulfil its obligations under Articles 28 and 31 of the EEA Agreement concerning freedom of movement for workers and freedom of establishment respectively.

91 It is to be noted, in that regard, that the rules prohibiting restrictions on freedom of movement and freedom of establishment laid down in Articles 28 and 31 of the EEA Agreement have the same legal scope as the substantially identical provisions of Articles 39 EC and 43 EC (see, in particular, Case C-522/04 *Commission* v *Belgium*, paragraph 76).

92 In those circumstances, the complaints alleging infringement of the freedom of movement for persons and freedom of establishment must be declared unfounded.

93 Since none of the complaints has been upheld, the action brought by the Commission must be dismissed.

Costs

94 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Republic of Hungary has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the European Commission to pay the costs.**

[Signatures]

* Language of the case: Hungarian.