Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 19 November 2020[1]

Case C-388/19

MK
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

(Reference for a preliminary ruling – Articles 63 and 65 TFEU – Free movement of capital – Test to be performed – Principle of non-discrimination – Tax legislation – Tax on capital gains on immovable property – Residents and non-residents – Comparability of situations – Higher tax burden for non-residents – Notion of equal treatment – Possibility for non-residents to opt for the regime applicable to residents)

I. Introduction

1. The request for a preliminary ruling, which involves the interpretation of Articles 18, 63, 64 and 65 TFEU, has been made in the context of a tax dispute between the applicant, MK, and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal). It concerns a tax assessment notice issued by the tax authority in respect of the former's income for the year 2017. This reference once again raises the question of what constitutes a form of discriminatory taxation as between residents and non-residents.

2. MK is a resident of France. The essence of the claim made by him is that he has been required to pay a higher rate of capital gains tax on the disposal of a Portuguese asset by reason of his non-resident status in that country. The present case accordingly raises the question of whether, in order to establish the existence of discrimination – and, by extension, a restriction on the free movement of capital – it is necessary to make an overall assessment of all the consequences arising from the application of a special taxation regime. Put another way, the issue is whether for this purpose one must compare all the tax options available to persons residing in another Member State with those available to the residents of the Member State of taxation or, alternatively, whether that comparison should be made in relation to each of those options considered in isolation?

3. Before proceeding to a consideration of these questions, it may be convenient first to set out the relevant provisions of both national law and EU law.

1 Original language: English.

II. Legal framework

4. Article 10(1)(a) of the Código do Imposto sobre o Rendimento das Pessoas Singulares (Personal Income Tax Code, 'the CIRS') defines the concept of 'capital gain' as follows:

'1. "Capital gains" are gains which, while not considered to be business and occupational, capital or real estate income, stem from:

(a) The transfer for valuable consideration of rights *in rem* in immovable property or from the use of any private assets for the purposes of the business or professional activities pursued on an individual basis by the owner of such assets.'

5. Article 15(1) and (2) of the CIRS, entitled 'Scope of applications', provides that:

'1. In the case of persons residing in Portuguese territory, personal income tax is levied on all income, including the income obtained outside Portuguese territory.

2. In the case of non-residents, personal income tax is payable only on income obtained on Portuguese territory.'

6. For the purposes of Article 18(1)(h) of the CIRS, the following shall be considered as being obtained on Portuguese territory:

'(h) income from immovable property situated thereon, including capital gains resulting from the transfer thereof.'

7. On the date of the facts in the main proceedings, paragraphs 1 and 2 of Article 43 entitled 'capital gains' of the CIRS, resulting from Law No 42/2016 of 28 December 2016 (OE/2013), read as follows:

'1. The amount of income classified as capital gains is represented by the balance of the difference between capital gains and capital losses occurring in the same year, determined in accordance with the following articles.

2. The balance referred to in the previous paragraph, in respect of disposals made by residents as provided for in Article 10(1)(a), (c) and (d) whether positive or negative, shall be taken into account to the extent of only 50% of its amount.'

8. Article 68(1) of the CIRS sets out the progressive scale of tax brackets. In 2017 the rates of taxation were as follows:[2]

Taxable income (in euros)	Rates (percent)	
	Normal (A)	Average (B)
Up to 7 091	14.50	14.500
Above 7 091 up to and including 20 261	28.50	23.600
Above 20 261 up to and including 40 522	37	30.300
Above 40 522 up to and including 80 640	45	37.613
Above 80 640	48.00	–

9. In accordance with Article 68a, an additional solidarity tax of 2.5% applied to taxable income between EUR 80 000 and EUR 250 000; above that amount, the solidarity rate was 5%.

10. In the version applicable in the main proceedings, Article 72 of the CIRS provided:

'1. Are taxed at the autonomous rate of 28%:

(a) the capital gains referred to in Article 10(1)(a) and (d) obtained by persons not resident in Portuguese territory, provided that they do not arise from a permanent establishment situated in that territory;

…

9. Residents of another Member State of the European Union or of the European Economic Area (provided, in the latter case, that there is an exchange of information on tax matters) may elect, in respect of the income to which subparagraph 1(a) and (b) and paragraph 2 apply, for such income to be taxed at the rate which would apply under the table established by Article 68(1), had the income been obtained by persons resident in Portuguese territory.

10. In order to determine the tax rate referred to in the previous paragraph, all income shall be taken into account, including income obtained outside the said territory, on the same terms that apply to residents.

…'

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

11. On 31 May, 2018, MK filed a tax return with the Portuguese tax authority for the financial year 2017 under Model 3 IRS (personal income tax). In this declaration, MK declared, in addition to certain real estate income, the value of the capital gain realised on the resale of a building located in Portugal. On the front of the relevant tax return, in Table 8B the applicant ticked box 4 (for

2 It appears from the information provided by the referring court that the concept of 'average rate' (column B of the table below) refers to the amount of taxable income corresponding to the upper limit of each tax bracket. Any taxable income exceeding this limit will be taxed on the basis of the 'normal rate' (column A of the table below) of the next tax bracket.

'non-resident'), box 6 (for 'resident in an EU country') and box 7 (electing to be subject to the tax regime applicable to non-residents) and rejected the option in box 9 (to be taxed in accordance with the general tax rates established in Article 68 of the Income Tax Code) and the option in box 10 (to be taxed under the legislation applicable to residents).

12. On 5 July 2018, the tax authority issued a tax notice for an amount of EUR 24 654.22, calculated by applying the specific tax rate of 28% to 100% of the capital gains on the immovable property. The authority accordingly did not apply the 50% reduction of the taxable base which is applicable to resident taxable persons.

13. On 30 November 2018, MK challenged the legality of that notice before the national court, claiming that it was based on statutory provisions discriminating against nationals of other Member States of the Union who do not have tax resident status in Portugal. Accordingly, MK contended that this legislation constituted a restriction on the free movement of capital within the meaning of Article 63(1) TFEU.

14. In that regard, the national court points out that, in the judgment of 11 October 2007 in Case C-443/06 *Hollmann* (EU:C:2007:600), the Court held that the Portuguese tax legislation, as applicable to the 2003 tax year, constituted a restriction on the movement of capital, which is prohibited by Article 63 TFEU. Consequently, that court wondered whether the amendments subsequently made to that legislation effectively put an end to the restriction on capital movements which had been identified by the Court in that case.

15. In those circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa - CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Should Articles [18, 63, 64 and 65 TFEU] taken together, be interpreted as precluding national legislation, such as that in dispute in the present case [which has been] amended … [in order] to enable the capital gains realised by the sale of immovable property situated in a Member State (Portugal) by a resident of another Member State of the European Union (France) not to be subject, by the election, to a tax burden greater than the one which would be applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated?'

IV. Analysis

16. In so far as the referring court's question refers to several Treaty provisions, it is first necessary to determine which of these provisions are in fact relevant.

A. Determination of the relevant treaty provisions

17. In its question, the national court refers to Articles 18, 63, 64 and 65 TFEU. By virtue of Article 63(1) TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

18. According to Article 64(1), Article 63 shall be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving in particular direct investment, including investment in real estate.

19. For its part, Article 65(1) and (3) states in particular that the provisions of Article 63 shall be without prejudice to the right of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their residence or the place where their capital is invested. This itself is subject to the effect that these legislative provisions must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payment as defined in Article 63 TFEU.

20. In that context, it must be observed that, although the TFEU does not define the terms 'movement of capital', it is settled case-law that Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty (OJ L 1988 178, p. 5), together with the nomenclature and the explanatory note annexed thereto, has an indicative value in that regard.[3] According to that explanatory note, cross-border capital movements include, in particular 'purchases of buildings and land and the construction of buildings by private persons for gain or personal use'. Consequently, any national measure relating to the purchase of a building situated in a Member State by non-resident natural persons, even when not acquired for investment purposes, is to be considered as falling within the scope of Articles 63 to 65 TFEU.[4]

21. The application of the freedoms of movement associated with the internal market is subject to two conditions which must both be satisfied. First, the situation at issue in the main proceedings must not be purely internal to the Member State in question.[5] Second, the area covered by the national measure whose compatibility with EU law has been challenged must not yet have been fully harmonised.[6] In the present case, there is no doubt, however, that these two conditions are met and that, accordingly, Articles 63 to 65 are applicable.

22. Since those provisions give effect to the principle of non-discrimination in the field of the free movement of capital, there is also no need to examine the situation envisaged by the national court in its preliminary reference in the light of Article 18 TFEU. That article, which lays down a general prohibition of all discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law for which the Treaty lays down no specific prohibition of discrimination.[7]

23. Consequently, the national tax measures which are the subject of the reference by the national court must be examined solely in the light of the principle of the free movement of capital.

B. On the scope of the review to be carried out

24. As a preliminary point, it should be noted that the question raised does not relate solely to the applicant's situation, but more generally to the compatibility with Union law of an item of national legislation, as described by the national court. Since the questions referred by the national court enjoy a presumption of relevance,[8] I consider it necessary to examine the tax regime at issue and not the particular situation of the applicant. Similarly, since the question raised does not concern the situation of persons residing in a third state – even if the principle of free movement of capital also prohibits restrictions between Member States and third States – it is not necessary, in my view, to examine this issue.

3 See, to that effect, judgment of 23 February 2006, *van Hilten-van der Heijden* (C-513/03, EU:C:2006:131, paragraph 39).

4 See, to that effect, judgment of 16 March 1999, *Trummer and Mayer* (C-222/97, EU:C:1999:143, paragraph 24).

5 See, to that effect, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47).

6 See, to that effect, judgments of 16 October 2014, *Commission* v *Germany* (C-100/13, not published, EU:C:2014:2293, paragraph 62) and of 22 March 2018 *Jacob and Lassus* (C-327/16 and C-421/16, EU:C:2018:210, paragraph 72).

7 See, to that effect, judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 55).

8 See, to that effect, judgment of 29 July 2019, *Vethanayagam and Others* (C-680/17, EU:C:2019:627, paragraph 36).

25. If the Court were nevertheless to address the situation of persons residing in a third state, then the solution reached in the Court's order of 6 September 2018 in *Patrício Teixeira* (C-184/18, not published, EU:C:2018:694), (to which some of the parties in the present case have referred) regarding the situation described by the referring court in its request might be considered as not necessarily relevant to the present case.

26. Admittedly, in that case, which concerned the Portuguese legislation in force for the 2007 tax year, the Court held, in essence, that:

– it was not necessary to notify the case, since the answer to the question referred for a preliminary ruling admitted no reasonable doubt and therefore, in accordance with Article 99 of the Rules of Procedure, it could be decided by reasoned order;

– the application of Article 64(1) TFEU could be ruled out since that provision already existed in substance in the original version of the Code, in force on 31 December 1993;[9]

– in so far as it was not apparent from the wording of Article 43(2) of the CIRS that this provision made a distinction between non-resident taxpayers on the basis of their place of residence, it had to be considered that the difference in treatment concerned objectively comparable situations.[10]

27. Consequently, the Court concluded that 'national legislation of a Member State, such as that at issue in [the] main proceedings, which makes the capital gains resulting from the sale subject … by a resident of a third State, of immovable property situated in that Member State at a tax burden higher than that which would be applied for the same type of transaction to capital gains realised by a resident of that Member State constitutes a restriction on the free movement of capital which, subject to verification by the referring court, does not fall within the exception provided for in Article 64(1) TFEU and cannot be justified on the grounds referred to in Article 65(1) TFEU.'[11]

28. It should be borne in mind, however, that since the Court has no jurisdiction under Article 267 TFEU to apply a rule of EU law to a particular case and thus to judge a provision of national law by reference to such a rule,[12] the answers to the questions referred to it are based on the premiss described by the referring court and, therefore, on the presentation made by the latter of the applicable national legislation and are not necessarily expressed in the light of the legal situation prevailing in that Member State, since the Court can only have indirect and partial knowledge of that situation.[13]

29. In its reference for a preliminary ruling in *Patrício Teixeira*, the referring court had only mentioned Article 43(2) of the CIRS as the relevant provision in force at the time, which limits the taxable base to 50% of capital gains for sales of immovable property by resident taxpayers. It was therefore solely by reference to that specific provision that the Court came to the conclusion that the legislation described by the referring court as the applicable Portuguese legislation was contrary to EU law.

30. The present case file suggests, however, that Article 43(2) of the CIRS might not be the only relevant legislative provision that needs to be taken into account in order to determine whether the capital gains resulting from the sale by a resident of a third State of a property situated in that Member State were, and still are, subject to a tax burden greater than that which would be applicable to capital gains realised by a resident of that Member State in respect of the same type of transaction. Indeed, it seems that Article 43(2) of the CIRS is part of a set of provisions, which, taken together,

9 Paragraph 32.

10 Paragraph 37.

11 My translation.

12 See, for example, judgment of 26 May 2005, *António Jorge* (C-536/03, EU:C:2005:323, paragraph 15).

13 See, to that effect, judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank* (C-625/17, EU:C:2018:939, paragraph 41).

form a composite regime of capital taxation applicable to resident taxpayers. By virtue of these other provisions, any gain made by such a person is progressively taxed by reference to certain income brackets. In effect, therefore, the Portuguese tax legislation provides for the aggregation of the income received and capital gains realised in any one tax year. By contrast, Article 72(1) of the CIRS provides that a gain realised by a person residing in a third State is subject to a flat tax rate.

31. Those provisions thus suggest that the issue of whether Portuguese legislation establishes some form of discriminatory taxation for the purposes of Articles 63, 64 and 65 TFEU does not depend so much, as such, on the 50% reduction of the taxable base provided for in Article 43(2) of the CIRS for residents as on the actual difference in any effective tax rate that might be brought about as a result. It comes down, accordingly, to the question of whether capital gains on immovable property realised by non-residents were taxed at a single rate which was higher than the effective marginal rate applied to such capital gains realised by residents.

32. Accordingly, if the referring court in *Patrício Teixeira* had set out the regime applicable to non-residents as a whole, I think it likely that the Court would not have come to the conclusion that the fact that Article 43(2) of the CIRS did not make any distinction between residents and non-residents on 31 December 1993 could not have been considered as sufficient to conclude that there was no objective difference in the situation of the two categories of taxpayers at issue in this case on that date. It would, I suggest, have then been necessary for the Court to examine instead whether this difference was in fact the result of the combined effect of this provision together with other provisions which form the tax regime applicable to non-residents.

33. In those circumstances, while the conclusion reached by the Court in *Patrício Teixeira* is naturally correct in the light of the premiss set out by the national court in that reference (that is to say, that the situation of residents and non-residents differs *only* in that the former benefit from a reduction of 50% of their taxable base), it must nonetheless yet be ascertained whether that premiss actually corresponds in fact to the legal situation which prevailed in Portugal for the 2007 tax year (and subsequent years). One must also inquire whether it is not appropriate to take account of other provisions, such as those cited in the present case.[14] Accordingly, these elements need to be further examined in order to determine whether, in particular, the possible application of Article 64(1) TFEU might be excluded.

34. In that regard, according to the Court's case-law, it is however exclusively for the national court to determine the content of the legislation which existed on a date laid down by an EU measure, the Court having jurisdiction only to provide guidance on interpreting the EU concept which constitutes the basis of a derogation from Community rules for national legislation which exists on a particular date.[15]

14 In this respect, I would point out that, for Article 64 TFEU to apply, the measure had to have formed part of the legal order of the Member State concerned continuously, since 31 December 1993, not in its detail, but only in essence. See judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 38).

15 See, to that effect, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 191).

C. On the existence of a restriction on the free movement of capital

1. Applicable principles

35. At the outset, it may be recalled that direct taxation remains essentially within the competence of the Member States. It is up to them to determine the scope of their tax jurisdiction as well as the basic principles of their tax system. In the current state of harmonisation of national tax legislation, they are accordingly free to establish the system of taxation that they consider appropriate including, in particular, to provide for a system of progressive taxation or for a flat tax.[16] In this context, Member States may impose such reporting and administrative obligations as they deem necessary to ensure effective tax collection.[17]

36. Fundamental freedoms relating to the internal market cannot, therefore, be understood as meaning that a Member State is required to align its tax rules with those of other Member States in order to ensure that any disparities arising from the application of these national tax rules are thereby eliminated.[18] Accordingly, two Member States may even tax the same transaction on the basis of a different connecting factor.[19] All of this means that freedoms of movement – important though they are – are not intended to solve any problems of interoperability between the different national taxation systems.[20] They only aim at ensuring that Member States exercise their competences in a non-discriminatory manner. In particular, it is not for the Court to say what the tax system of the Member States should be like.

37. Member States must nevertheless exercise their fiscal competence in a manner which is consistent with the principle of freedom of movement. This means that Member States must refrain from adopting discriminatory measures to the detriment of persons who have exercised their right to freedom of movement.[21]

38. In areas other than taxation, any national measure that prohibits, hinders or renders less attractive the exercise by EU nationals of a freedom of movement guaranteed by the Treaty constitutes a restriction on that right of free movement, even if that measure is indistinctly applicable *prima facie*.[22]

16 See judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 49). EU law does not require the Member States to consult each other to avoid any double taxation of the same gain or, vice versa, that a single gain is not taxed at all. See judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47).

17 See judgment of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 37). Regarding the administrative burden, Member States must, of course, treat residents and non-residents identically, but only to the extent that they are subject to the same regime, since otherwise the difference in administrative burden is merely an extension of the difference in regime and, therefore, is not to be considered in isolation. See judgment of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 25).

18 Judgment of 27 February 2020, *AURES Holdings* (C-405/18, EU:C:2020:127, paragraph 32).

19 Double taxation issues are in principle dealt with through bilateral or multilateral conventions.

20 Admittedly, in judgment of 9 February 2017, *X* (C-283/15, EU:C:2017:102, paragraph 47), the Court held that 'the freedom of the Member States, in the absence of unifying or harmonising measures adopted under EU law, to allocate among themselves their powers to impose taxes, in particular to avoid the accumulation of tax advantages, must be reconciled with the necessity that taxpayers of the Member States concerned are assured that, ultimately, all their personal and family circumstances will be duly taken into account, irrespective of how the Member States concerned have allocated that obligation amongst themselves.' However, in the same paragraph, the Court underlined that this applied to inequalities in treatment that do not result from disparities between the provisions of national tax law. The following paragraph also specifies that a taxable person must be able to rely on his or her personal and family circumstances in 'each Member State of activity where that type of tax advantage is granted'. Accordingly, if Member States are not obliged to lay down rules intended to avoid an overlapping of tax advantages or disadvantages, when they do, they must apply them to both residents and non-residents.

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

22 See, for example, judgment of 14 November 2018, *Memoria and Dall'Antonia* (C-342/17, EU:C:2018:906, paragraph 48).

39. In tax matters, however, the concept of 'restriction' is applied in a somewhat more limited fashion. Indeed, the mere fact of imposing a tax on an activity or transaction necessarily makes engaging in that transaction less attractive. In order, therefore, not to prejudice the ability of Member States to levy taxes,[23] the Court's case-law to date suggests that the national measure at issue must *also* give rise to either a direct or indirect discrimination in order for that measure to be regarded as a 'restriction' in this sense. In turn, the test to be applied in order to establish the existence of a restriction in tax matters is therefore identical to the one to be applied in matters other than taxation.[24]

40. The necessity for a non-discrimination test – and, therefore, for examining the comparability of the two situations in order to classify a measure as a 'restriction' in this sense – must be considered as having been definitely established since the judgment of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087). In that case, Advocate General Kokott proposed abandoning the non-discrimination test and instead urged the application to tax matters of the same test as those applied in other areas.[25] The Court, however, did not follow her Opinion in that respect.[26] In addition, where, as in the present case, the free movement of capital is at issue, the need for such a comparison flows from the wording of Article 65 TFEU.

41. Taking the decision in *Nordea Bank* as my starting point, one must, I think, inquire whether there is a discrimination amounting to a restriction on the free movement of capital in the case of Article 63 TFEU.

42. Before going any further, I should pause to observe that there are essentially two problems particular to the question of discriminatory taxation and, therefore, of restrictions on free movement in the field of taxation. The first concerns the way in which the concept of 'discrimination' should be understood in that context.

43. A first approach suggests that any measure having, in the case of direct discrimination, as its object, or, in the case of indirect discrimination, as its effect, to treat comparable situations differently or, conversely, to treat different situations identically, constitutes discrimination.[27]

44. According to the second approach, where the law prohibits the use of a specific criterion, a direct discrimination occurs when a person is treated less favourably by reference to the express terms of such a criterion. By contrast, an indirect discrimination exists when a provision or criterion which appears neutral is nonetheless applied in a manner which places some persons at a disadvantage compared with others by reference to some prohibited criterion.[28]

23 See, for example, judgments of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 53) and of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47).

24 See, for example, judgment of 12 April 1994, *Halliburton Services* (C-1/93, EU:C:1994:127 paragraph 15) and of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 29).

25 Opinion of Advocate General Kokott in *Nordea Bank* (C-48/13, EU:C:2014:153, point 22).

26 Judgment of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraphs 23 and 24). See also Opinion of Advocate General Kokott in *Staatssecretaris van Financiën* (C-87/13, EU:C:2014:2164). For more recent examples of judgments from the Grand Chamber endorsing this approach, see judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47 , paragraph 41); of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 54) or of 3 March 2020, *Google Ireland* (C-482/18, EU:C:2020:141, paragraph 44).

27 See, for example, judgment of 13 March 2014, *Bouanich* (C-375/12, EU:C:2014:138, paragraph 45).

28 See, for example, judgments of 26 April 2018, *ANGED* (C-236/16, EU:C:2018:291, paragraph 17) and of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraph 18).

45. Historically, the second approach, which can be seen, however, as an application of the first one, has prevailed in the case-law on the freedoms of movement. Thus, according to the Court, a direct discrimination occurs when a measure establishes a distinction according to the nationality [29] and an indirect discrimination arises when a measure, although based on another criterion, such as that of residence, leads in fact to the same result. [30] It may be observed, however, that for about a decade now the Court has resorted more often to the first definition of the concept of 'discrimination', setting aside any reference to nationality. [31]

46. In my opinion, since the freedoms of movement are aimed at the completion of the single market, without depriving the Member States of their fiscal autonomy, the second approach based on the existence of a prohibited criterion should nonetheless continue to be employed in order to determine whether a measure constitutes a restriction in the form of a discriminatory tax measure. [32]

47. In addition, the first approach is in fact equivalent to examining the coherence of a law, since, according to the Court's case-law, comparability is to be assessed in the light of the objective pursued by the tax in question. [33] Therefore, that approach seems to be relevant where, as in VAT, [34] the neutrality of that measure, here understood as its consistency with its objectives, is questioned. [35] With regard to freedoms of movement, the consistency of the legislation with its objectives does not need to be examined to establish the existence of a discrimination, [36] but rather whether the national legislator has thereby sought to protect its nationals.

29 See, for example, judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 19). Certain judgments have suggested that a tax measure based on the place of residence constitutes direct discrimination. See, for example, judgment of 26 April 2018, *ANGED* (C-236/16, EU:C:2018:291, paragraph 17). However, the majority of the judgments consider this to be indirect discrimination. See, for example, judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 29). That approach must, in my view, be approved, in so far as the Court systematically examines, where there are differences of treatment based on residence, whether those differences may be justified on overriding grounds, whereas direct discrimination can be justified only on grounds expressly provided for by the Treaty. See opinion of Advocate General Tizzano in *SEVIC Systems* (C-411/03, EU:C:2005:437, point 55). Besides, the concepts of 'tax residence' and those of 'registered office' or 'company headquarters', which can be used to establish the nationality of a company when a State applies the statutory seat theory, are different. A company may be regarded as a resident for tax purposes in a State without having the nationality of that State within the meaning of company law. See judgment of 13 July 1993, *Commerzbank* (C-330/91, EU:C:1993:303, paragraph 15).

30 See, for example, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 26); of 20 January 2011, *Commission* v *Greece* (C-155/09, EU:C:2011:22, paragraph 46); of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 28) and of 18 June 2020, *Commission* v *Hungary (Transparency of association)* (C-78/18, EU:C:2020:476, paragraph 62).

31 See Lenaerts K. and Bernardeau L., 'L'encadrement communautaire de la fiscalité directe', *Cahiers de droit européen*, vol. 1, Bruylant, 2007, p. 19-109, p. 36 et seq. It is true that the nationality criterion may seem restrictive, but in practice, it only has the effect of assimilating discrimination based on residence to indirect discrimination. By contrast, the first approach, to the extent that it turns its back on a specific criterion, might be seen as creating the risk that the Court's control will become driven by societal considerations and that, in so doing, the Court will approach the possibility of reviewing not simply the existence of discrimination, but more generally the way in which the exercise of jurisdiction by Member States is articulated, and this despite the fact that an overlapping of jurisdictions should not be considered as an impediment, but as the consequence of the parallel exercise by two States of their competences.

32 In addition, according to the second approach, discrimination can also arise through the application of the same rule to different situations. See judgment of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 41).

33 See, for example, judgments of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 64) and of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960, paragraph 65). The Court sometimes also refers to the object and content of the national provisions at issue. See judgment of 18 December 2014, *Q* (C-133/13, EU:C:2014:2460, paragraph 22).

34 See, for example, judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 51).

35 Applied in the presence of a prohibited criterion, the first approach might even lead to a paradoxical result. Indeed, as under that approach, comparability is to be assessed in the light of the objective pursued by the measure in question, if that measure precisely pursues as an objective to treat differently two categories of persons on the basis of a prohibited criterion, no discrimination can be found, since, in the light of that objective, those two categories must be regarded as not comparable.

36 A lack of consistency national legislation does not necessarily imply the existence of a restriction to one of the freedoms of movement. Indeed, a measure may be inconsistent with its objectives without necessarily placing non-nationals or non-residents at a disadvantage. That said, while the consistency of the legislation with its objectives should not be decisive at the stage where the existence of a restriction is assessed, it is, however, relevant when examining the justification of that measure. Indeed, for a restriction to be compatible with Union law, it must not only be justified, but it must also be proportionate to that justification, which requires legislation to pursue such an objective in a consistent and systematic manner. See, for example, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of association)* (C-78/18, EU:C:2020:476, paragraph 76).

48. This brings me to the second issue, namely, the point of reference to be used to assess the existence of a restriction. Should one look at the relevant tax provision in isolation? Or (as I rather think should be the case) should one look at the tax regime as a whole?

49. While admittedly some uncertainty attends the case-law in that certain judgments may give the impression that the term 'measure' should be understood as referring to each element likely to influence the calculation of the due tax, a closer look at the case-law tends to show that it refers to the tax regime at issue, considered a whole.[37] Moreover, this appears to be consistent with the approach adopted in the case of state aid. Indeed, in that domain,[38] with regard to the assessment of the criterion of the selectivity of a tax measure, the Court, after having initially examined the comparability in the light of the objectives pursued by the alleged state aid,[39] finally decided, following a leading judgment delivered by the Grand Chamber, that the examination of comparability must be carried out on the nature and general scheme of the tax system concerned.[40] Since then, in order to classify a tax measure as 'selective', it is necessary, first, to identify the common or 'normal' tax system applicable in the concerned Member State and, second, to demonstrate that the tax being examined is a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation.[41]

50. In my view, the same or similar should apply to any freedom of movement, in particular, regarding the application of the comparability test. Indeed, as Advocate General Wahl has pointed out, carrying out the comparability test in the light of the reference framework ensures that 'a tax measure is assessed against a framework that includes all relevant provisions, and not against provisions that have been carved out artificially from a broader legislative framework, which constitutes a concern which also had to prevail in relation to free movement'.[42] Moreover, in both matters, it is only once the reference framework has been established that it is possible to identify the potentially discriminatory rules which lead to placing cross-border situations at a disadvantage where they should have been treated identically in the light of the objectives pursued by that reference framework.

51. Viewing the provisions of a national law in isolation – without, however, making an overall comparison of the effects of each provision – creates a risk that EU nationals may seek to avail of the advantages conferred on them with those granted to residents without at the same time having due regard to the particular burdens to which those same resident taxpayers may be subject.[43] While EU law may require equal treatment, this does not mean that non-residents can pick and choose features

37 See, for example, judgment of 30 June 2016, *Feilen* (C-123/15, EU:C:2016:496, paragraph 27). Other judgments state that the comparability of the situations at issue must be examined in the light of 'the national provisions at issue'. See judgment of 27 February 2020, *AURES Holdings* (C-405/18, EU:C:2020:127, paragraph 37).

38 The test to be applied when determining whether an aid is selective or in order to establish the existence of a restriction is relatively close to a non-discrimination test. The condition for selectivity consists in ascertaining 'whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article [107] (1) of the T[FEU] in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'. Judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41). In my view, there is nevertheless a difference between the two, namely that, as regards State aid, comparability must be assessed from an economic and not a legal point of view. Thus, based on the objective pursued by the measure at issue, or the reference framework, operators who should be considered to be in a comparable situation are all operators active on the market on which the measure at issue might produce its effects.

39 See judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 80 to 87).

40 Judgments of 8 September 2011, *Paint Graphos* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 76) and of 19 December 2018, *A-Brauerei* (C-374/17, EU:C:2018:1024, paragraph 37).

41 Joined Cases in judgment of 7 November 2019, *UNESA and Others* (C-105/18 to C-113/18, EU:C:2019:935 paragraph 61).

42 Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, point 109) and judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 103).

43 However, the approach must be different where the situation at issue in the main proceedings is the consequence of the characterisation of a transaction and where, in order to do so, the tax authorities have examined several provisions in order to successively rule out the application of other tax regimes, as in the case of *Veronsaajien oikeudenvalvontayksikkö* (C-480/19) (a case in which my Opinion will also be delivered today). Indeed, since, in that situation, each of those provisions determines the scope of application of those respective regimes and not the amount of tax to be paid, each of those provisions should be regarded as constituting autonomous measures and, therefore, be examined in isolation.

of the tax regime of another Member State so as to acquire what amounts to a privileged status vis-à-vis the residents of that State. Thus, for example, in the present case, it appears that the claimant is seeking to combine the 50% allowance with the application of an average tax rate, which claim (if it were accepted) would be more favourable than the one applied to the residents.

2. Application

52. To start with, it should be recalled that the Portuguese tax legislation, as described by the national court in *Hollmann* – which related to the taxation of capital gains on immovable property in Portugal in respect of the 2007 tax year – was declared by the Court to be contrary to EU law.

53. Although some paragraphs of the Court's judgment seem to suggest that the restriction in question was the result of the application to residents alone of a 50% tax base reduction in the value of the capital gains to be taken into account, this perhaps is not the full picture. An examination of paragraphs 37, 38, 51 and 54 of that judgment demonstrates that, in order to establish that that was a restriction on free movement in the sense I have described, the Court did not confine itself to the finding that the taxable base was not the same for residents as for non-residents. Rather, the essence of the objection related to the greater capital gain tax burden imposed on non-residents as a result of the transaction in question. As the Court observed: 'capital gains resulting from the transfer of immovable property situated in a Member State where that transfer is made by a resident of another Member State, were subject to a *tax burden* greater than the one which would have been applicable for the same type of transaction to capital gains realised by a resident of the State in which that immovable property was situated'.[44]

54. At the risk of stating the obvious, the real form of discrimination is the final amount of tax that non-residents will have to pay for the realised real estate capital gain if that is greater than the amount which would have been charged to residents in respect of the same transaction. Consequently, what was relevant was not so much the non-application of the 50% reduction in the taxable base, but rather the overall effective tax rate which was in fact applied, resulting from the combined effect of the percentage of taxable base taken into account and the applicable tax rate.

55. Even in the absence of the 50% reduction on the taxable base, the legislation described by the referring court in *Hollmann* would have in any case been regarded as establishing a difference in treatment, since it subjected capital gains realised by a non-resident with a low income to a flat tax rate of 28%, whereas the same capital gains made by a resident with the same low income might be taxed according to a bracket scale whose lowest tax rate was lower than 28%.

56. In fact, due to the use by Portugal of a progressive rate imposed on all income (including realised capital gains), (which is the regime which generally applies to residents) on the one hand and a fixed rate of capital gains on the other (which is the regime which is generally applicable to non-residents with no other income taxable in Portugal in respect of once-off capital gains), it is almost inevitable that, in certain comparable situations, some non-resident taxpayers will be treated less favorably than resident taxpayers.[45] Indeed, according to the Court's case-law, any unjustified restriction, even of

44 Paragraph 61. Emphasis added. Admittedly, in paragraph 40 of that judgment, the Court mentioned that: 'the laying down of a basis of assessment of 50% applicable only to capital gains realised by taxable persons residing in Portugal and not to those realised by non-resident taxable persons constitutes a restriction on the movement of capital prohibited by Article 56 EC.' The Court did not, however, stop at this finding, but then held that the restriction consisted in the fact that non-resident taxable persons were consequently subject to higher taxation. See, for example, paragraph 51. One may, perhaps, infer from this that paragraph 40 was only a provisional conclusion. Indeed, what is likely to penalise a non-resident taxpayer is the final amount of tax payable. See, to that effect, judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 68).

45 See, judgment of 12 June 2003, *Gerritse* (C-234/01, EU:C:2003:340, paragraph 47).

minor importance, on the free movement of capital is to be regarded as discriminatory. It is thus generally sufficient for a tax law to introduce direct or indirect discrimination in respect of even one taxable person in a cross-border situation, for that legislation might be considered incompatible with EU law.[46]

57. In those circumstances, contrary to what the claimant suggests, the *Hollmann* judgment cannot be interpreted[47] as meaning that, in order to put an end to the restriction identified by the Court, the Portuguese Government should necessarily have allowed non-residents – even when taxed at the rate of 28% – also to benefit from a 50% reduction of their taxable base.[48] As I have already observed, EU law only requires Member States to allow residents of other Member States to benefit from the same, and not a better, treatment as that applicable to nationals.[49] Consequently, the Portuguese Government was only required to ensure that the overall effective tax rate was equivalent for the same type of transaction carried out by taxable persons in comparable situations.

58. According to the Court's file, the Portuguese tax legislation was amended in two ways after the decision in *Hollmann*.

59. First, the Portuguese Government decided to offer EU nationals the choice between opting to be taxed either as a resident, or as a non-resident. In its observations, the Portuguese Government indicated that it preferred to leave such a choice to EU citizens rather than impose a particular tax regime on them. This was done in order to spare those interested the requirement of informing the Portuguese tax authorities of the amount of their overall income and to relieve them of the additional compliance costs which would thereby have been entailed.

60. Second, the applicable rates of taxation under the scheme for residents in Portugal and under the scheme for persons resident in the European Union, respectively, were changed. In particular, an additional solidarity tax was introduced, which applies only to persons resident in Portugal.

61. It follows therefore that, for the 2017 tax year, only 50% of the capital gain realised by persons resident in Portugal was taken into account in determining the taxable amount. To that amount a scale per bracket was applied. The highest bracket, applicable to the proportion of income in excess of EUR 80 640, was taxed at 48%, to which was added, for certain taxpayers, an additional tax - the solidarity tax - the rate of which was 5% on the bracket of income in excess of EUR 250 000. As a result, the marginal tax rate for capital gains on real estate was 26.5%. Under the non-resident regime, however, realised capital gains did not benefit from the 50% allowance. These capital gains were instead taxed at a single rate of 28%.

62. Since the marginal rate applicable was higher for EU non-tax resident citizens than for residents, it might seem that the national legislation in question introduced a difference in treatment at the expense of EU non-resident taxpayers by permitting an effective overall higher tax burden on the realisation of a capital gain. In other circumstances, the conclusion that this amounted to a form of discriminatory tax treatment of non-residents would have seemed unavoidable, akin to what was held in *Hollmann*.

46 See, to that effect, judgment of 1 April 2008, *Government of the French Community and Walloon Government* (C-212/06, EU:C:2008:178, paragraph 52). Accordingly, considering that there can be any discrimination because the different methods of calculation applied lead to an 'overall' equivalent result does not seem to me to be consistent either with this line of case-law or with the very essence of the individual right that the Union citizens derive from the freedoms of movement.

47 In that regard, the Portuguese Government submits, inter alia, that if the applicant had wished to opt for the resident scheme and thus to benefit from that allowance, he could have rectified his declaration, in the context of an application for an ex-gratia payment, under Article 140 of the CIRS, read in conjunction with the instructions contained in Circular Letter No 20162 of 29 October 2012 issued by the ATA.

48 The solution adopted by the Court in order of 6 September 2018, *Patrício Teixeira* (C-184/18, not published, EU:C:2018:694) may appear to support such a claim. Indeed, in that order, the Court relied solely on the fact that the regulations at issue provided for a 50% rebate, without examining the applicable legislation as a whole, concluding that there was a restriction. However, as explained, that solution must put the information communicated to the Court by the referring court into context, which referred only to the 50% reduction in the value of the capital gain to be taken into account for the benefit of residents alone.

49 See, to that effect, judgment of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 20).

63. It should be noted, however, that the Portuguese legislation now allows for the possibility of any person residing in another Member State to opt for the regime applicable to residents. The availability of this option rules out, in my view, any discriminatory tax treatment provided, of course, that the non-resident taxpayers concerned have been informed in a timely and effective fashion that they may exercise this option. Indeed, the rules on freedoms of movement only require that EU nationals residing in another Member State are offered the possibility of benefiting from the same tax rules as its residents. [50]

64. Accordingly, provided that an EU national residing in another Member State has the real and effective possibility of opting for the same regime as the one applicable to residents, which presupposes that they have been duly informed of this option in a timely and effective way, no discrimination should be found to have occurred. [51] Where this is the case, the question of whether or not this option has been exercised by the taxpayer concerned is, in my view, irrelevant, since the Member States are entitled to allow their taxable persons to choose between several regimes. [52]

65. It might be emphasised that, as stated above, in the current state of harmonisation of national tax legislation or lack thereof, Member States are free to establish the system of taxation which they consider most appropriate, such as, for example, a system of progressive taxation by instalments calculated on the basis of the total income of the person concerned. Therefore, Portugal could have simply decided, in application of the Court's judgment in *Hollmann*, to require non-residents to declare, as residents are required to do, all their income in order to determine at which rate the capital gains resulting from the transfer of immovable property should be taxed. It is true this would have meant that the persons concerned would have had to fill in two tax returns, but this would have been the admittedly regrettable, yet nevertheless inevitable consequence in the absence of harmonisation, of the exercise in parallel by two Member States of their powers of taxation. [53] Indeed, any other solution would amount in substance to a challenge to the fiscal autonomy of each Member State.

66. The reason why the Portuguese Government did not choose this option seems obvious, namely, that it wished to alleviate the tax formalities which would otherwise have been imposed on non-tax residents. [54]

67. In my opinion, Portugal is therefore perfectly entitled to proceed in this manner *provided* – and it is a vital proviso – it allows non-residents to elect to be taxed for capital gains tax purposes in precisely the same way as residents. This requires that the gains realised in Portugal are not taxed according to the marginal bracket, but are split into the different brackets that would have been applied if all taxable income had been taxed in Portugal in proportion to the gain realised in that Member State as a percentage of overall income. Indeed, it cannot be assumed that gains realised in Portugal necessarily

50 In the Commission's view, which was expressed during the hearing, the applicant would have had a choice between an illegal regime and a legal regime. However, it should be pointed out that the alleged unlawfulness of the option of being taxed at a fixed rate is based on its discriminatory nature. It is therefore not by nature, but by comparison with the regime applied to the resident, that this regime would be illegal. Accordingly, since, in my opinion, from the moment that non-residents can choose to be taxed in exactly the same way as residents, no discrimination can be accepted, it must logically be considered that the said claimant has a choice between two valid options.

51 When questioned at the hearing on this point, the Commission acknowledged the difficulties in deciding how Portugal should have applied the *Hollmann* decision. The Commission observed, however, that if Portugal were to apply the same taxation regime based on consideration of all income to residents and non-residents in order to establish the rate of taxation, no discrimination could properly be found.

52 Member States are not obliged to impose the application of a regime; they can leave it up to individuals to choose which one they wish to have applied to them. See, by analogy, judgment of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 73).

53 See, for example, judgment of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 38). Indeed, any solution to the contrary would amount to challenging the possibility for States to exercise their powers in parallel. In this respect, I would like to make it clear that, in so far as I consider that no discrimination has been established, no proportionality test under Union law has to be carried out. Indeed, a proportionality test is only required at the justification stage. See, for example, judgment of 18 June 2020, *Commission* v *Hungary (Transparency of association)* (C-78/18, EU:C:2020:476, paragraph 76).

54 Admittedly, in such a situation, residents are disadvantaged since they do not enjoy the possibility of benefiting from this easing of formalities. However, as has been pointed out, EU law does not prohibit reverse discrimination. See, to that effect, judgment of 16 June 1994, *Steen* (C-132/93, EU:C:1994:254, paragraph 11).

correspond to those that would have fallen within the last bracket in this scenario. This means that, for a taxable person with EUR 25 000 of income from other Member States and EUR 5 000 in Portugal, these EUR 5 000 should not be taxed for the 2017 tax year at 37%, but at the average rate that would have been applicable if all income had been taxed in Portugal, namely, and according to the information contained in the file, 27.95%.

68. In expressing this view, I have not overlooked the fact that the Court held in paragraph 162 of *Test Claimants in the FII Group Litigation* and paragraph 53 of *Gielen* that 'the fact that a national scheme which restricts the freedom of establishment is optional does not mean that it is not incompatible with European Union law'.[55] It should be stressed, however, that the Court, sitting in Grand Chamber, took a different approach in *Bevola and Jens W. Trock*[56] and examined whether the possibility of non-residents opting for another regime made a difference so far as the non-discrimination issue was concerned.

69. It is difficult to conclude otherwise than that with its judgment in *Bevola and Jens W. Trock*, the Court has thus effectively departed from this earlier case-law in so far as it consisted in examining for this purpose each detail of a Member State's tax legislation in isolation. It may also be noted that the approach adopted by the Court in *Test Claimants in the FII Group Litigation* and in *Gielen* could be explained by the alternatives existing in those two cases.

70. In *Test Claimants in the FII Group Litigation* the taxpayers concerned had indeed the choice between two regimes which were *both* incompatible with the EU law.[57]

71. As for *Gielen*, the choice was between a regime that was favourable in all circumstances and one that was always unfavourable to the taxpayer.[58] Since there was no advantage in opting for the second alternative, the fact that a Member State was offering a choice between the two could not have any other objective than to mislead certain taxable persons. Conversely, as the Court held in *Hirvonen*, where EU citizens may opt for a regime that is overall more favourable than the ordinary taxation regime and requires less effort from non-resident taxpayers than that required of resident taxpayers, the approach adopted in *Gielen* was held not to apply.[59]

72. In the light of these cross-currents of judicial opinion, if the Court were not to follow the approach taken by the Grand Chamber in *Bevola and Jens W. Trock*, I consider that the question which should be asked in the present case is whether a tax regime could be found to be discriminatory in respect of cross-border situations where EU citizens have a choice between two options, each with advantages and disadvantages, but one of which corresponds exactly to the regime applicable to residents.

73. In my opinion, the answer to this question could only be in the negative. Indeed, in a free market economy, it must be assumed that individuals act rationally.[60] Accordingly, Member States cannot be held accountable for the fact that a taxable person did not opt for the regime that would have minimised his or her tax burden.[61] Besides, the fact that non-residents had to choose, according to their situation, which regime was best for them, rather than having a specific regime imposed on

55 Judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 162) and of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148), paragraph 53).

56 Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 25).

57 In the *Test Claimants in the FII Group Litigation*'s case, the other option referred to in that judgment was the one described in its paragraph 15 and for which the Court had previously found that it was also disadvantageous. See judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraphs 61 to 65).

58 See judgment of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148, paragraph 40). Indeed, the only difference between the two regimes, as described by the Court, was that only one allowed hours worked in another Member State to be taken into account.

59 Judgment of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 43).

60 See, to this effect, judgment of 4 October 2017, *Mercedes-Benz Financial Services UK* (C-164/16, EU:C:2017:734, paragraph 38).

61 See, by analogy, judgment of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraphs 64 and 65).

them, cannot *in itself* constitute a form of restriction on the free movement of capital. In order for the existence of a restriction to be established, there must be discrimination. Accordingly, as I have previously mentioned, what is important is that non-residents have the option, if they wish, of electing to be taxed for capital gains tax purposes on exactly the same basis as that which applies to residents.

74. While, as provided for in Article 65(1)(a) TFEU, complete and perfect equality cannot be expected in matters of taxation, it is the substance of the claim of discrimination which falls for consideration in such cases. In this context, one cannot look at a particular provision of national legislation in isolation without also taking into account all the possibilities available to the persons concerned. As I have explained, the mere fact that non-residents benefit from a reduction of the taxable base is not *in itself* sufficient to assess the existence of a difference in treatment: account must also be taken of all the rules competing to form the effective tax rate.[62]

75. In the present case, it is true that the *effective* applicable tax rate (that is to say, taking into account differences in taxable bases) is always higher for non-resident EU citizens than for residents. It may be observed, however, that so far as the effective marginal rate is concerned, this difference was 1.5% in 2017 (due to the creation of the additional solidarity levy), whereas it was 4% in 2007, which is the fiscal year referred to in the *Hollmann* case.[63]

76. More importantly, perhaps, it has become clear in a way in which perhaps it was not in *Hollmann* - that non-residents, although they have to make a declaration, are not required to declare all their income to the Portuguese tax authorities. Unlike residents, therefore, non-residents are not obliged to complete all the annexes of the declaration and to provide them with supporting documents. Since, according to the Court's case-law, the additional administrative burdens borne by non-residents under a tax regime may constitute a restriction, conversely, the fact that non-residents do not have to bear such burdens must also be taken into account in order to determine whether or not those taxable persons are disadvantaged by a tax measure.[64]

77. If one examines, for example, the situation of a person having earned more than EUR 250 000 during the 2017 tax year and who, in addition to his or her income, also realises a capital gain on the sale of a garage of EUR 5 000, this difference only amounts approximatively to EUR 153.[65] Given that, if this person chooses to be treated as a resident, he or she will have to declare, as for all residents, all of his or her income, including that coming from sources not located in the territory of the State in question and, where appropriate, justify the latter, one would imagine that in such circumstances such a non-resident will prefer to opt for the non-resident regime.

78. It follows that the non-resident regime, which applies on a contingent basis,[66] might, in certain circumstances, be more advantageous for residents of another Member State than for residents of the Member State of taxation. That assumption may admittedly appear very marginal, but it is nonetheless real. Therefore, it cannot be ruled out that the decision to opt for the non-resident regime may be the result of a rational choice.

62 Judgment of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraph 56).

63 See judgment of 11 October 2007, *Hollmann* (C-443/06, EU:C:2007:600, paragraphs 7, 9 and 38).

64 See, in this sense, judgments of 31 January 1984, *Commission* v *Ireland* (74/82, EU:C:1984:34, paragraph 51); of 18 October 2012, *X* (C-498/10, EU:C:2012:635, paragraph 32) and of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 62). However, this is not the case if these charges are justified in the light of the particular situation of non-residents and proportionate to what is necessary to the collection of tax. See, in this sense, judgment of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 37).

65 As explained earlier, the average rate (in that example 44.9% to which is added the 5% of the solidarity tax), not the marginal rate, must be taken into account. The difference is therefore EUR 152.32 and not EUR 75.

66 Regarding the relevance of this circumstance, see judgment of 3 March 2020, *Tesco-Global Áruházak* (C-323/18, EU:C:2020:140, paragraph 72).

79. I take the view that, in any case, the findings of the Court reached by the Court in the *Test Claimants in the FII Group Litigation* and *Gielen* cases, even if the Court would consider that these decisions still represent good law, cannot be transposed without qualification to legislation such as that at issue before the referring court in the present case. The real point, however, is that the non-residents must be given a choice in the matter: they must be informed of their right to – and subsequently be allowed to – avail of the same treatment as residents for capital taxation purposes.

V. Conclusion

80. In view of the above, I therefore propose that the Court should answer the question referred by the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa - CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) to it as follows:

Article 63 TFEU must be interpreted as not precluding national legislation which makes the taxation of capital gains derived from the sale of immovable property situated in a Member State by a resident of another Member State, subject to a different tax regime than the one applicable to residents, provided that that same legislation offers non-residents the possibility of opting for the tax regime applicable to residents. In those circumstances, the authorities of the Member State in question must ensure that the possibility of making such a choice has been brought to the attention of the non-residents in a clear, timely and intelligible manner and that the consequences attached to the fact that the whole of the income of the person concerned is not taxed in that State are neutralised. Compliance with the latter requirements is, however, a matter for the national court to verify.