

Opinion Statement ECJ-TF 3/2021 on the CJEU decision of 18 March 2021 in Case C-388/19, *MK v Autoridade Tributária e Aduaneira*, on the taxpayers' option to avoid discriminatory taxation of capital gains

Prepared by the CFE ECJ Task Force

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This is an Opinion Statement prepared by the CFE ECJ Task Force¹ on the *MK v Autoridade Tributária e Aduaneira* case, in which the First Chamber of the Court of Justice of the EU (ECJ) delivered its decision on 18 March 2021,² which deviated from the Opinion delivered by Advocate General Hogan, on the 19 November 2021.³ In *MK*, the Court confirmed its previous case law and held that the Portuguese (optional) regime for taxation of capital gains from immovable property of non-residents was contrary to the free movement of capital under Article 63 TFEU since non-residents were taxed less favourably than residents. The fact that the domestic system provided an election for non-residents to be treated as residents was not sufficient to consider the rule as compatible with EU Law.

I. Background and Issues

1. Optional tax regimes are not a common feature of domestic tax regimes. In this case, it was introduced as a sort of patch to circumvent the hurdles created by a previous Court decision⁴ that held a Portuguese tax provision applicable solely to non-residents to be incompatible with EU Law. Instead of repealing or amending that provision, the Member State in question chose to offer non-residents the possibility of opting for the regime applicable to residents.
2. Traditionally, residents are taxed on a worldwide basis, whereas non-residents are taxed on the income sourced in that jurisdiction. Accordingly, residents are taxed on their global income, subject to progressive rates, and their personal circumstances are taken into account, according to the ability-to-pay principle. In turn, non-residents are taxed on income that has an objective nexus to the jurisdiction, being taxed without regard to their personal circumstances.

This difference is justified by the understanding that it is up to the Residence State to consider the individual's ability to pay, as only that state typically has a complete picture of the taxpayers' economic and personal circumstances (which still vary from country to country) and thus has to take them into account.

In general, this distinction is not problematic and is commonly accepted by the Court. However, the Court also notes that insofar as residents and non-residents are considered objectively comparable for a specific item of income, non-residents cannot be treated less favourably unless a (domestic) justification is pursued in a proportionate fashion.

One simple solution for such disadvantage would appear to be to offer non-residents the possibility of opting for the same (worldwide-basis) regime applied to residents. However, as this would require both an extension of the tax base and the burdensome task of providing the Source State with additional information normally only available to the state of residence, it is not clear that it is an appropriate way effectively to remove the discrimination introduced by the default different treatment.

In *MK*, the Court takes the opportunity to revisit its case law on this question and to clarify the criteria for the admissibility of optional regimes with EU Law.

¹ The CFE ECJ Task Force is formed by CFE Tax Advisors Europe and its members are Alfredo Garcia Prats (Professor at the University of Valencia), Werner Haslehner (Professor at the University of Luxembourg), Volker Heydt (Former official of the European Commission), Eric Kemmeren (Professor of International Taxation and International Tax Law at the Fiscal Institute Tilburg at Tilburg University), Georg Kofler (Chair of this Task Force and Professor at WU Wien), Michael Lang (Professor at WU Wien), João Nogueira (Deputy Academic Chairman at IBFD and Professor at the Portuguese Catholic University), Christiana HJI Panayi (Professor at Queen Mary University of London), Emmanuel Raingard de la Blétière (Associate Professor at the University of Rennes, Partner PwC France), Stella Raventós-Calvo (President of AEDAF and Vice-President of CFE), Isabelle Richelle (Co-Chair of the Tax Institute - HEC - University of Liège, Brussels Bar Elegis), Alexander Rust (Professor at WU Wien), and Rupert Shiers (Partner at Hogan Lovells), Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. The CFE ECJ Task Force was founded in 1997 and its founding members were Philip Baker, Paul Farmer, Bruno Gangemi, Luc Hinnekens, Albert Raedler, and Stella Raventós-Calvo.

² PT: ECJ, 18 Mar. 2021, Case C-388/19, *MK v. Autoridade Tributária e Aduaneira*, Case Law IBFD (accessed 31 Oct. 2021).

³ PT: Opinion of Advocate General Hogan, 19 Nov. 2020, Case C-388/19, *MK v. Autoridade Tributária e Aduaneira*, Case Law IBFD (accessed 31 Oct. 2021).

⁴ PT: ECJ, 11 Oct. 2007, Case C-443/06, *Erika Waltraud Ilse Hollmann v. Fazenda Pública*, Case Law IBFD (accessed 31 Oct. 2021).

3. The facts of the MK case are simple. MK is a French national and resident who acquired real estate in Portugal. A couple of years later, and still as a French resident, he sold that real estate with a considerable capital gain.
4. The Portuguese law applicable to the facts is also relatively straightforward. Residents were taxed only on 50% of the gain, with progressive rates ranging from 14,5% to 48% (with an eventual additional 2,5% or 5% as “solidarity rate”). Non-residents were taxed on the full amount of the gain, but at a fixed rate of 28%. The latter, solely applicable to non residents, was the rule assessed in *MK*.
5. The Court had already held this regime to be inadmissible in *Hollman*⁵ and *Teixeira*.⁶ However, instead of repealing the regime (which was kept as applying to non-residents by default), the Portuguese government merely added an option for non-residents to be treated as residents⁷. The latter would require them to disclose their worldwide income in order to allow to determine which would be the bracket rate applicable to domestically sourced real estate gain.
6. In the corresponding annual tax return, MK declared the real estate gain as a non-resident but decided not to opt for submitting the capital gain to the progressive rates applicable to residents.
7. Accordingly, the Portuguese tax authorities assessed him by applying the (fixed) tax rate of 28% to the full capital gain. MK appealed against the assessment in the national (arbitration) tribunal, arguing that the assessment was based on rules that had already been considered incompatible with EU law in *Hollmann*.⁸ Tax authorities argued that the regime was not entirely the same given the inclusion of an option – not used by the taxpayer – of being treated as a resident taxpayer. MK counter-argued, claiming that introducing an optional regime would not remove the compatibility issues underlying the rules that were ultimately applied in his assessment.
8. The domestic Court had doubts on whether the inclusion of the optional regime was enough to overcome the previously flagged compatibility issues. Thus, decided to sustain the proceedings and to refer the following question to the CJEU, for a preliminary ruling:

“Should Articles [18, 63, and 65 TFEU] taken together, be interpreted as precluding national legislation, such as that in dispute in the present case [Article 43(2), of the CIRS], which was amended [by the insertion of paragraphs 9 and 10 into Article 72 of that code] to enable the capital gains realised from the transfer 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 virtue of a choice made by the taxable person, to a tax burden greater than the one which would apply for the same type of transaction to capital gains realised by a resident of the State in which that immovable property is situated?”

II. The Judgment of the Court of Justice

9. In *MK*, the Court examined whether a Member State was allowed to keep a (previously held) incompatible tax regime insofar as it introduced, as an option, a tax regime that would – as a generally applicable regime – be compliant with EU law.
10. The Court started by determining the relevant TFEU provision for its assessment since the domestic Court had submitted its question under Articles 18, 63 and 65 TFEU “taken together”.⁹ The Court concluded that

⁵ *Hollman*, supra n. 4.

⁶ PT: ECJ, 6 Sept. 2018, Order in Case C-184/18, *Fazenda Pública v Carlos Manuel Patrício Teixeira*, Case Law IBFD (accessed 31 Oct. 2021).

⁷ Actually, the text of the applicable provision merely provides for the application of the system of rates that would be applicable to residents, leaving open whether the deductions normally made available to residents would also be made available and in which circumstances or proportion.

⁸ *Hollmann*, supra n. 5.

⁹ *MK*, supra n. 2, para. 18.

the case should be assessed under 63 TFEU regarding the free movement of capital.¹⁰ It dismissed the application of Article 18 TFEU (general prohibition against discriminatory treatments) since a more specific non-discrimination provision was applicable. It also rejected the application of Article 64 TFEU, given the absence of any fact capable of triggering its application.¹¹

11. The Court proceeded in examining the breach of that freedom.
12. The analysis was made solely considering one of the optional regimes (and not both of them, as proposed by AG Hogan), namely, the default regime applied to non-residents, which was compared with the regime applied to residents.¹² In its exam, the Court took jointly into account the differences in the taxable basis and the applicable rates. It noted that the reduction in the taxable basis combined with the application of the progressive scale of rates would allow residents “to benefit systematically from a tax burden which, for that reason, is lower regardless of the tax rate applicable to the whole of his income”.¹³
13. Therefore, and recalling *Hollmann*,¹⁴ the Court concluded that in “the sale of the same immovable property situated in Portugal, if capital gains are realised, non-residents are subject to a tax burden greater than that applied to residents and are consequently in a less favourable position than the latter”.¹⁵
14. The Court distinguished the present case from *Hirvonen*,¹⁶ where it dealt with a tax system in which residents were also taxed at progressive rates (and benefited from a tax-free allowance), whereas non-residents were taxed at a fixed rate. That system was considered as “compatible with EU Law” since “the single rate [applicable to non-residents was] not higher than that which would actually be applied to the person concerned [if it were a resident], in accordance with the progressive scale, in respect of net income increased by an amount corresponding to the tax-free allowance”.¹⁷ The situation was different in MK since the assessed tax regime meant that “non-residents [were] systematically subject to a tax burden greater than that applied to residents”.¹⁸
15. Accordingly, the Court concluded that the tax regime at stake constituted a restriction to the free movement of capital under Article 63 TFEU.
16. The Court moved to the analysis of the justifications. It started by recalling that, under Art. 65 TFEU, a restriction could only be considered admissible if it “either relate[s] to situations which are not objectively comparable” or if they are “justified by an overriding reason relating to the public interest”.¹⁹ This was not the case in MK.
17. First, residents and non-residents were objectively comparable²⁰ as: i) real estate capital gains was designed as a specific category of income; ii) such category was assessed for both residents and non-residents; iii) the nexus was the same, i.e. the location of the taxable income in Portugal.²¹ The Court also noted that the ratio legis for the reduction in half of the taxable basis of residents (namely avoiding “excessive taxation” of “income which is considered abnormal and fortuitous”)²² would equally fit in the case of non-residents.

¹⁰ Recalling *Hollmann*, the Court held that the alienation of real estate had to be considered a movement of capital, falling under the purview of Art. 64 TFEU.

¹¹ One should note that the question submitted by the referring Court (transcribed in para. 18) merely made reference to Art. 18, 63 and 65. However, when rephrasing the question (in para 19) the Court (inadvertently) included Art. 64 TFEU in the scope of the question, reason why it made reference to it (dismissing its application) in para. 24 of the decision.

¹² And that could be applied to non-residents that opted for it.

¹³ MK, supra n. 2, para. 29.

¹⁴ PT: ECJ, 11 Oct. 2007, Case C-443/06, Erika Waltraud Ilse Hollmann v. Fazenda Pública, Case Law IBFD (accessed 31 Oct. 2021).

¹⁵ MK, supra n. 2, at para. 27.

¹⁶ SE: ECJ, 19 Nov. 2015, Case C-632/13, Skatteverket v. Hilkka Hirvonen, Case Law IBFD (accessed 31 Oct. 2021).

¹⁷ MK, supra n. 2, at para. 31.

¹⁸ MK, supra n. 2, at para. 28 and 31.

¹⁹ MK, supra n. 2, at para. 35.

²⁰ MK, supra n. 2, para. 36.

²¹ MK, supra n. 2, para. 37.

²² MK, supra n. 2, para. 39.

18. Second, because there were no “overriding reasons in the public interest”.²³ The Court has specifically dismissed any claim based on the coherence of the tax system since - and by recalling its prior conclusion in *Hollmann* - it would not be possible to establish “a direct link between the tax advantage and the offsetting of that advantage by a particular tax levy”.²⁴
19. The Court has not forgotten the existence of an optional regime. However, instead of considering it as part of the assessed regime (or as a composite regime, as proposed by AG Hogan),²⁵ it considered it autonomously. And concluded that the inclusion of a second (optional) regime was not “capable of excluding the discriminatory effects of the first of the two taxation regimes”.²⁶ With reference to *Gielen*,²⁷ it held that “a national scheme which restricts a fundamental freedom (...) remains incompatible with EU law, even if its application is optional”.²⁸
20. Accordingly, the Court concluded that the Portuguese tax rule on taxation of non-resident capital gains was incompatible with EU law.

III. Comments

A. Introduction

21. MK is the latest of a series of cases where the Court deals with optionality, i.e. with the question of whether a certain tax rule can be considered as compatible with EU law, despite its restrictive features, taking into account that the taxpayer: i) has to opt for it; ii) is free to choose an EU-compliant option.
22. The previous case law has not been able to solve all doubts regarding the admissibility of optionality. There is nothing better to illustrate this assertion than the difference of outcomes between the Opinion of the Advocate General Hogan and the judgment of the Court.
23. MK raises several interesting issues besides its final outcome. In these comments, we will be dealing with some of them and namely: i) the different Court decisions on optionality; ii) the difference between composite and alternative regimes; iii) the difference between default and optional regimes; iv) the elements that are considered for assessing the different treatment; v) the legitimacy of extending worldwide income systems of taxation to non-residents; vi) the wide tax policy implications and, finally; vii) some remaining open questions.

B. The decisions of the Court on optionality

24. Both the Advocate General and the Court acknowledged the existence of prior case law on the thema decidendum. However, their interpretation of those cases is not fully aligned. In this section, we will review the relevant excerpts and examine how the Court interprets them.
25. In *Test Claimants in the FII Group Litigation*, the Court considered that “the fact that a national scheme which restricts the freedoms of movement is optional does not mean that it is not incompatible with Community law”²⁹ and that “a system which restricts the freedoms of movement still remains incompatible with Community law, even though its application may be optional.”³⁰

²³ MK., supra n. 2, para. 36-

²⁴ MK, supra n. 2, para. 41.

²⁵ AG Opinion, supra n. 3, para. 30.

²⁶ MK, supra n. 2, para. 43.

²⁷ NL: ECJ, 18 Mar. 2010, Case C-440/08, F. Gielen v. Staatssecretaris van Financiën, Case Law IBFD (accessed 31 Oct. 2021).

²⁸ MK, supra n. 2, para. 45.

²⁹ UK: ECJ, 12 Dec. 2006, Case C-446/04, *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue*, Case Law IBFD, para. 162 (accessed 31 Oct. 2021).

³⁰ Test claimants, supra n. 29, para. 195.

26. In *Gielen*, it considered that the discriminatory nature of a regime “is not called into question by the argument that the option to be treated as a resident taxable person is capable of remedying the discrimination at issue”,³¹ even if the taxpayer was provided “with a choice between a discriminatory tax regime and one which is ostensibly not discriminatory”.³² In fact, “such a choice is not (...) capable of remedying the discriminatory effects of the first of those two tax regimes”³³ as the consequence “would be to validate a tax regime which, in itself, remains contrary to Article 49 TFEU by reason of its discriminatory nature”.³⁴ Therefore, it held the legislation to be “discriminatory towards nonresident taxable persons, even though those taxable persons may opt for the regime applicable to resident taxable persons in order to benefit from that tax advantage”.³⁵
27. *Becker* revisited the issue and, by reference to the two above mentioned cases, concluded that “the fact that a national scheme which restricts the freedoms of movement is optional does not mean that it is not incompatible with Community law”.³⁶ In fact, “[t]he existence of an option which would possibly render a situation compatible with European Union law does not, in itself, correct the illegal nature of a system, such as the system provided for by the contested rules, which comprises a mechanism of taxation not compatible with that law. It should be added that this is even more so in the situation where, as in the present case, the mechanism incompatible with European Union law is one which is automatically applied where the taxpayer fails to make a choice.”³⁷
28. Seemingly in contrast, in *Hirvonen*, the Court accepted an optional rule that deviated from the standard regime offered to residents. Although it acknowledged that the specific optional rule for non-residents was *prima facie* discriminatory (i.e. excluded them from the tax-free allowance offered by the standard regime), the option was still admissible since it did not lead to less-favourable treatment overall. As the Court explained, the taxpayer “would have paid higher taxes if she had opted to be treated like a resident taxpayer and thus to be subject to the ordinary taxation regime. That is why she opted for the taxation at source regime, governed by the special income tax law. Since she benefited from more advantageous taxation than that which would have been applied to her had she opted for the ordinary taxation regime, [she] cannot in addition claim a tax advantage which would have been granted to her under the ordinary taxation system.”³⁸

A careful reading of the above-cited case law shows that the Court’s case-law on optionality appears to be quite consistent. In all cases: i) the Court assesses each of the rules autonomously; ii) only accepts the optional *prima facie* restrictive regime (i.e. that deviates from the tax treatment granted to residents) if it does not lead to worse treatment of the non-resident taxpayer.

C. Composite regime vs alternative regimes

29. In the Advocate General’s view, the tax rules at stake were “part of a set of provisions, which, taken together, form a composite regime of capital taxation applicable to resident taxpayers”.³⁹ Accordingly, assessing the compatibility with EU law required an overall assessment of both rules. Insofar as one of them provided an EU-compatible solution, the regime – as a whole – should not be struck down. On the contrary, it would be beneficial to non-resident taxpayers as they would be provided with the option to choose from

³¹ *Gielen*, supra n. 27, para. 49.

³² *Gielen*, supra n. 27, para. 50.

³³ *Gielen*, supra n. 27, para. 51.

³⁴ *Gielen*, supra n. 27, para. 52.

³⁵ *Gielen*, supra n. 27, para. 55.

³⁶ DE: ECJ, 28 Feb. 2013, Case C-168/11, *Dr Manfred Beker and Christa Beker v. Finanzamt Heilbronn*, Case Law IBFD, para. 62 (accessed 31 Oct.

2021).

³⁷ *Beker*, supra n. 36, para. 62.

³⁸ SE: ECJ, 19 Nov. 2015, Case C-632/13, *Skatteverket v. Hilkka Hirvonen*, Case Law IBFD (accessed 31 Oct. 2021), para. 45.

³⁹ AG Opinion, supra n. 3, para. 30.

the regime that would be most beneficial to them and “in a free market economy, it must be assumed that individuals act rationally”.⁴⁰ This would have been a reasonable approach.

30. The Court took a different view and decided that each of the alternatives had to be examined separately. Furthermore, it considered that an option should be struck down as incompatible with EU law even though another fully EU-compliant was offered.
31. This conclusion should be considered by both the Commission and the Member States when designing tax rules in the future, since it prevents them from adopting any solutions, even if on an alternative basis (and even if considered more favourable to the taxpayer) that are not fully EU-compliant. Taxpayers can never be left with an option that is not entirely EU-compliant even if considered as more beneficial.

D. Nominal and effective rates, tax burden and compliance costs

32. In previous cases on optionality, the Court focused on a specific element of the tax regime and decided on the basis of that. For instance, in *Hirvonen*, the focus was placed on the nominal rate and on the tax-free allowance. In *MK*, and despite a reference to specific elements of the regime (namely at the reduction in the taxable basis for residents and on the nominal system of rates), the Court did not consider any of those factors individually; instead, it determined the difference in treatment on the basis of the overall “tax burden”.⁴¹
33. When determining the tax burden, the Court only took into account the financial stream. The assessment set completely aside any consideration of compliance costs (i.e. computing and declaring the worldwide tax income in accordance with Portuguese tax rules). One should note that compliance costs are an essential part of the (tax) equation and may even justify an economically reasonable taxpayer to prefer a prima facie less favourable regime insofar as it reduces its compliance costs.

In this respect, the position of the Court differs from the views expressed by the Portuguese government and by AG Hogan. The Court, however, has not even considered the discussion of whether the taxpayer’s exercise of the option would lead to higher compliance costs, which might deter taxpayers to so choose. Indeed, those costs are a real problem in non-harmonised areas such as direct taxation, where taxpayers are exposed to many different legal systems.

AG Hogan Opinion could be summarised as “choice is always good”: insofar as there is an EU-compliant option, Member States should be allowed to adopt any other regimes. One should also take into account that the alternative (and non-discriminatory) option could be preferable to the taxpayer, in light of those compliance costs. This, of course, assumes that “in a market economy [...] individuals act rationally”⁴².

E. Neutralization of the differences through extending a worldwide system of taxation to non-residents

34. AG Hogan considered it legitimate for a Member State to overcome discrimination by simply extending regimes conceived and applied to residents to non-residents. In his words, “Portugal could have simply decided, in the 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. This would indeed 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

⁴⁰ AG Opinion, supra n. 3, para. 73.

⁴¹ *MK*, supra n. 2, para. 19, 28 – 31. The AG referred to the notion of “effective tax rate” which, in this context, is the same – See AG Opinion, supra n. 3, para. 74.

⁴² AG Opinion, supra n. 3, para. 73.

Member States of their powers of taxation. Indeed, any other solution would amount in substance to a challenge to the fiscal autonomy of each Member State.”⁴³

35. The proposal put forward by AG Hogan may not have taken in due account the way how tax systems are currently designed and administered, namely in what concerns data gathering and automatic exchange of information. However, in light of future technologic developments and EU initiative, it might be easier for Source States to gather information and support taxpayers to fulfil their reporting obligations.

F. Impact on tax policy

36. The decision on MK reduces Member States’ scope of action in the design of tax rules for non-residents.
On the one hand, Member States cannot treat non-residents less favourably when they are in an objectively comparable situation. However, and on the other hand, the extension of the tax regime designed for residents to non-residents may also not be adequate, as mentioned above.
37. In our view, the decision on MK cannot be interpreted as requiring (or giving permission to) Member States to extend domestic tax regimes to non-residents in all circumstances (and to allow them to gather information on the individual’s global income and expenses).⁴⁴
38. In the current state of affairs, it continues to make sense to treat non-residents differently. Member States have simply to ensure that they are not treated less favourably than comparable residents. Of course, one could claim that this solution would be unfair and infringe the domestically protected equality principle but this is a matter for equal treatment under domestic Constitutional law.
39. MK urges Member States to revise their domestic laws, screening if all of the options provided to non-residents lead them to a tax burden that is the same or more favourable than what would apply were they residents.⁴⁵

F. Open questions

40. Despite their clarifications, MK leaves still leaves some open questions whose solution may require further consultation.
41. Firstly, in MK, the non-EU compliant option was the default one. Non-resident taxpayers had to elect to avoid being taxed under said regime. This could raise the question of whether it matters to offer the non-compliant option as the default or the elective tax regime. In fact, if the taxpayer had explicitly to opt for the non-EU compliant regime, one could question if it should be even allowed to raise the issue of compatibility at all since it would be a *venire contra factum proprium*. It remains to be seen if the Court would take the same decision if the default regime was compliant with EU law and the optional the non-compliant one.⁴⁶
42. Secondly, it remains to be seen whether the Court will ever include in its assessment compliance costs and the impact those might have on taxpayers. And if it will ever consider as incompatible with EU law a regime that, at face value, substantively and procedurally is precisely the same for both residents and non-residents, but that factually exposes non-resident taxpayers to a significantly higher level of compliance

⁴³ AG Opinion, supra n. 3, para. 65.

⁴⁴ Thus, we do not agree with the position of Advocate General, expressed in para 65 of its Opinion, that the Member State could have simply extended the regime designed for residents to non-residents requiring the latter “to fill in two tax returns” as, even if “admittedly regrettable” it would be the “inevitable consequence in the absence of harmonisation, of the exercise in parallel by two Member States of their powers of taxation. Indeed, any other solution would amount in substance to a challenge to the fiscal autonomy of each Member State” – para. 65 of the AG Opinion, cited supra in n. 3.

⁴⁵ Some countries still provide non-residents with the option of being treated as residents in case all or most of their income derives from domestic sources. Following MK, a taxpayer that has not opted for being treated as a resident, may claim that he was offered a route that was incompatible

⁴⁶ Likely it would not matter since, has the Court acknowledged, the application of the default regime also required an action by the taxpayer. See MK, supra n. 2, at 11.

and of compliance costs in light of having to deal with multiple legal systems. The Court avoids this balancing by straightforwardly prohibiting non-EU compliant regimes, even if they are offered as an option to fully EU-compliant regimes and create less compliance burdens to taxpayers. Indeed, the Court only interferes with the procedural aspects (e.g., filing requirements, proofs, etc) if those are different for resident and non-resident taxpayers.⁴⁷

IV. The Statement

43. The CFE welcomes the judgment as it clearly refers to a case of unjustified discrimination. However, there are some questions that are left open (and that Court was not required to provide an answer). The Court's judgment in *MK* reinforces the established case law that EU law prohibits the adoption of non-EU compliant regimes, even if they are offered as an option to fully EU-compliant regimes. Member States are still free to adopt optional regimes but have to ensure that each one of the routes that the taxpayer may elect does not lead to unfavourable tax treatment.
44. The CFE stresses, however, that the creation of EU-compliant options should not necessarily imply that Member States simply extend the rules conceived for residents to non-residents, as such extension may be quite both burdensome and disproportional.
45. The CFE notes that *MK* may lead Member States to adopt simplified rules that end up treating non-residents more favourably. Which should not be regarded as a matter of unfairness, taking into account that they will normally be again subject to taxation at the Residence Member State, which is (traditionally) the one placed in the best position to assess a taxpayer's ability to pay and their corresponding final tax burden.

⁴⁷ See, e.g., ECJ, 21 January 2010, C-311/08, *SGI*, EU:C:2010:26, para. 71, where the Court refers to the taxpayer's ability to provide evidence of any commercial justification in transfer pricing cases without being subject to "undue administrative constraints".