Reports of Cases

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

Case C-480/19

E
joined parties:
Veronsaajien oikeudenvalvontayksikkö

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Reference for a preliminary ruling – Free movement of capital – Tax legislation – Income tax – Profits distributed to an individual residing in a Member State by a non-resident undertaking for collective investment in the form of a company with articles of association – Difference in treatment of between shares in profits distributed by undertakings for collective investment (UCITs) constituted in accordance with contract law and dividends distributed by undertakings for collective investment constituted in accordance with statute – Impossibility for resident undertakings for collective investment to be constituted in accordance with statute)

I. Introduction

1. This reference for a preliminary ruling concerns the interpretation of Articles 63 and 65 TFEU. Specifically, it raises once again the question of what constitutes discriminatory taxation for the purposes of the rules governing the free movement of capital.

2. This request was made in the context of a dispute between E and the Keskusverolautakunta (Central Tax Committee, Finland), concerning the latter's decision of 10 November 2017 in which that committee considered that any profit distributed by a Luxembourg open-ended investment company (SICAV: Société d'investissement à Capital Variable) to E should be taxed in Finland as employment income.

3. This case illustrates the need to identify precisely the measure or measures that might be discriminatory for this purpose - and thus constitute a restriction on the free movement of capital – in order that Member States are made aware of the legal measures that should be adopted to remedy it.

1 Original language: English.

II. Legal framework

A. EU law

4. EU law currently distinguishes between two types of collective investment vehicle: undertakings for collective investment in transferable securities (UCITS) and collective investment institutions that do not qualify as UCITS (alternative investment funds, or AIFs).

5. Pursuant to recital 4 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32) ('the UCITS Directive'), the objective of this directive is 'to provide for common basic rules for the authorisation, supervision, structure and activities of UCITS established in the Member States and the information that they are required to publish'. Recital 83 states that the directive should not affect national rules on taxation.

6. Article 1(3) of that directive provides:

'[UCITS] may be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies).'

B. Finnish law

1. Financial law

7. According to the information provided by the referring court and the Finnish Government, Finnish law permits the creation only of investment funds that fall under the Sijoitusrahastolaki (48/1999) (Investment Fund Law No 48/1999) implementing the UCITS Directive that are constituted in a contractual form, that is to say, 'common funds' within the meaning of that directive. The aim of such a restriction is to protect investors. Indeed, where funds do not have a statutory form and, accordingly, have no legal personality, the assets managed by those common funds are to be regarded as being held directly by the investors, so that in case of insolvency of the management companies these assets cannot be used to pay off creditors. [2]

2. Tax law

8. Finnish tax law distinguishes income from capital (which I shall term for convenience 'capital income') and employment income. The tax rate applicable on capital income is 30% for the part of such income below EUR 30 000 or 34% for the part of such income above EUR 30 000. The tax rate for any employment income is progressive, with a final bracket of more than 50%.

2 In addition to mutual funds covered by the UCITS Directive, Finnish law allows the creation of alternative investment funds, that is to say, funds that are subject not to the UCITS Directive, but to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1). According to the referring court, Finnish law allows the creation only of AIFMs with a contractual form. In its observations, however, the Finnish Government implies that AIFM funds with a statutory form can be created. In particular, in point 33 of its reply to the Court's request for clarification, the that government stated: 'For example, if a domestic hedge fund takes the form of a public limited company, the corporation tax rules applicable to normal public limited companies apply to it …'

9. Pursuant to Paragraph 32 of the Tuloverolaki (Income Tax Law), entitled 'Capital income', earnings from assets, profit from the transfer of assets and other such income which may be assumed to have been accrued from assets are all regarded as income from capital. Capital income includes in particular dividends in accordance with the provisions in Paragraphs 33a to 33d of that law.

(a) The tax treatment of profit distributed by an entity having legal personality

10. Companies incorporated under Finnish law are subject to tax on their profits at a rate of 20%. The profits they distribute constitute dividends and are, accordingly, considered as capital income.[3] Depending on whether or not the distributing company is listed on a regulated market, a more or less significant part of that income is exempt from tax. The purpose of this exemption, which is always only partial, is to mitigate the effects of double taxation, first at company level, and a second time, when the dividends are distributed to the investors.[4]

11. More specifically, Paragraph 33a of the Income Tax Law, entitled 'Dividends distributed by a listed company', provides that:

'Eighty-five per cent of a dividend distributed by a listed company is capital income and 15% is non-taxable income.

…'

12. Paragraph 33b of that law, entitled 'Dividends distributed by an unlisted company', provides as follows:

'Twenty-five per cent of the dividends distributed by an unlisted company constitute taxable capital income and 75% constitute non-taxable income, up to an amount corresponding to an annual income of 8% calculated on the basis of the mathematical value of the share in the tax year, which value is fixed in the laki varojen arvostamisesta verotuksessa annettu (1142/2005) [Act on the Valuation of Assets for Taxation (1142/2005)]. To the extent that the amount of dividends received by the taxpayer exceeds EUR 150 000, 85% of the dividends constitute capital income and 15% constitute non-taxable income.

For the part exceeding the annual income referred to in subparagraph 1 above, 75% of the dividends shall constitute employment income and 25% shall constitute non-taxable income.

Without prejudice to any other provisions relating to the taxation of dividends provided for in this law, a dividend shall constitute employment income if, in accordance with a clause in the articles of association, a decision of the general meeting, a shareholders' agreement or any other agreement, its distribution is the consideration for a contribution in labor made by the beneficiary of the dividend or a person belonging to its sphere of interest. The dividend constitutes the income of the person who has made the contribution of work in question.

…'

3 Following a reform in 2014, the corporate tax rate was reduced and the tax burden on companies was shifted to shareholders.

4 The file submitted to the Court does not specify the reason why dividends paid by a listed company and those paid by a non-listed company are taxed differently.

(b) The tax treatment of profit distributed by domestic conventional investment funds

13. Although they do not have legal personality, Finnish funds subject to the UCITS Directive are nonetheless considered to have tax status for the purposes of Finnish tax law.[5] They thus come within the scope of the Finnish corporate income tax, but are exempt from it under Finnish law. Accordingly, investments made through those funds are treated in the same way for tax purposes as if they had been made directly by investors, so that they are taxed only at investor level.

14. As regards the taxation of distributed profits by those funds, such income is considered as shares in profits and not as dividends for the purposes of individual investors, given that those funds lack legal personality. Individual investors are therefore taxed in full on this income at a rate of 30% (or 34% when the capital income exceeds EUR 30 000).

(c) The tax treatment of profits paid out by foreign companies

15. Paragraph 33c(1) to (3) of the Income Tax Law, entitled 'Dividends paid by a foreign entity', states:

'Dividends received from a foreign corporation constitute taxable income in accordance with Paragraphs 33a and 33b of this law, if the corporation is a company within the meaning of Article 2 of Council Directive 2011/96/EU [of 30 November 2011] on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States,[6] as amended by Council Directive 2013/13/EU [of 13 May 2013[7]] and Council Directive 2014/86/EU [of 8 July 2014[8]].

Dividends received from foreign corporations other than those mentioned in subparagraph 1 constitute taxable income in accordance with the provisions of Paragraphs 33a and 33b, if the corporation is obliged, without options or exemption, to pay at least 10% tax on its income from which the dividends were distributed and:

(1) according to the tax legislation of a State belonging to the European Economic Area [EEA], the corporation has its registered office in that State and, according to a convention preventing double taxation, the corporation does not have its registered office in a State outside the [EEA]; or

(2) a convention preventing double taxation, which applies to the dividends distributed by the corporation, is in force between the corporation's State of residence and Finland in the tax year.

Dividends received from foreign corporations other than those mentioned in subparagraphs 1 and 2 constitute fully taxable income from employment.

…'

16. According to the Finnish Government, the purpose of Paragraph 33c of the Income Tax Law is to apply the same treatment to foreign companies as is applied to companies incorporated under Finnish law. Since the reduction of the tax base provided for in Paragraphs 33a and 33b is intended to mitigate the effects of double taxation of profits at corporate level and investor level, only dividends paid by

5 I note that considering domestic investment funds as fiscal entities while exempting them from income tax, has the effect of changing the nature of the distributed income in order to simplify the tax treatment of the transactions in question. Indeed, if such funds had been considered as transparent tax entities, in order to apply the corresponding regime to them it would have been necessary to distinguish between the income distributed by such funds which comes from shares of listed companies and that which comes from shares of non-listed companies. As those funds are not transparent, the income distributed by them is taxed according to whether or not they are themselves listed

6 OJ 2011 L 345, p. 8.

7 OJ 2013 L 141, p. 30.

8 OJ 2014 L 219, p. 40.

companies which have paid income tax in their State of residence would come within the scope of these provisions. On the other hand, where a foreign company has not paid any income tax, it would be in a different situation, so that there would be no reason for it to benefit from this mechanism for the mitigation of double taxation of profits. As we shall now see, this rationale is key to understanding the potential issue of discriminatory taxation in the present case.

C. Luxembourg law

17. For the purposes of this case, it appears only necessary to note that under Luxembourg law the term SICAV designates investment funds in the form of a company with variable capital and shares.[9] Companies meeting the conditions to be so qualified are exempt from corporate income tax normally levied on the profits of any company.[10] A SICAV governed by Luxembourg law is not necessarily a UCITS within the meaning of the UCITS Directive, but can be subject to Directive 2011/61.[11]

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

18. E is a natural person residing in Finland who had invested in a sub-fund of a UCITS investment fund governed by Luxembourg law, from which the accrued income was distributed to the investors annually.

19. On 20 June 2017, E requested a preliminary decision from the Central Tax Committee to know whether, in substance, for the purposes of taxation in Finland, the income distributed by a Luxembourg SICAV should be taxed as capital income or as employment income.

20. In its preliminary decision of 10 November 2017, the Central Tax Committee found that income distributed by a SICAV governed by Luxembourg law is to be regarded as the payment of dividends in Finland and that, with regard to the taxation of E in Finland, that income is to be taxed, pursuant to Paragraph 33c(3) of the Income Tax Law, as employment income.

21. It appears from Court's file that, in essence, the Central Tax Committee considered that the fact that the SICAV at issue in the main proceedings is a UCITS fund was not relevant in determining the applicable tax scheme. Rather, it considered that, in the light of the applicable tax provisions, the relevant criterion is the legal nature under Finnish law of the income distributed, which in turn depended on the legal form of the fund. Since, according to the law applicable to its incorporation, SICAVs governed by Luxembourg law have legal personality and, therefore, the income they distribute constitutes dividends and not shares in profits, that income is to be considered as if it were distributed by any other undertaking constituted in accordance with statutes, whether or not they are investment funds. Accordingly, the committee was of the opinion that the profits distributed by such funds should not be treated differently to domestic funds because they will be taxed in the same way as if they were incorporated under Finnish law.

22. On the basis of this conclusion, it would appear, although the reference for a preliminary ruling is perhaps not very clear in this respect, that the Central Tax Committee considered that a SICAV governed by Luxembourg law does not fulfil the condition set out in the first subparagraph of Paragraph 33c of the Income Tax Law, in so far as that kind of company is not subject to corporate

9 This term does not designate a particular form of company. For example, a SICAV might be a 'société anonyme' or a 'commandite par action'.

10 Companies having the status of SICAV are nonetheless required, in principle, to pay an annual subscription tax. This tax is not, however, based on the profits but on the net asset value of the fund.

11 See the web site of the Association of the Luxembourg Fund Industry (ALFI) https://www.alfi.lu/en-GB/Pages/Setting-up-in-Luxembourg/Alternative-investment-funds-legal-vehicles/RAIF-(Luxembourg-Reserved-Alternative-Investment-F.

income tax in Luxembourg and nor does it meet the condition set out in the second subparagraph of Paragraph 33c of that law. Accordingly, pursuant to the third subparagraph of Paragraph 33c, the Central Tax Committee concluded that dividends paid by a Luxembourg fund should be taxed as employment income.

23. E appealed against the decision of the Central Tax Committee to the referring court, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).

24. In his appeal, E claimed that the administrative practice consisting in treating the profits distributed by a SICAV as employment income, taxable according to a progressive system of taxation on the basis of Paragraph 33c(3) of the Income Tax Law, would lead to higher taxation than that applicable to profits distributed by a Finnish investment fund, since that latter profit is treated as capital income. E maintained that this was contrary to the free movement of capital enshrined in Article 63 TFEU.

25. In this context, the referring court considers that in order to rule on the legality of the decision of the Central Tax Committee, it is necessary to determine whether or not it is contrary to Articles 63 and 65 TFEU to tax the income paid by a SICAV under Luxembourg law as employment income rather than as capital income on account of the legal form of that collective investment undertaking. In particular, that court considers that the present case requires clarification as to whether the fact that a SICAV governed by Luxembourg law constitutes a collective investment undertaking, within the meaning of the UCITS Directive, is relevant for the determination of whether the profit distributed by such an entity should be treated, for tax purposes, as profits distributed by a Finnish investment fund, constituted in accordance with contract law, which is the only type of collective investment undertaking that can be created in Finland.

26. It is in this context that the referring court has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are Articles 63 and 65 TFEU to be interpreted as meaning that they preclude a national interpretation according to which income received by a natural person residing in Finland from an undertaking for collective investment in transferable securities based in another Member State of the Union and constituted in accordance with statute within the meaning of the [UCITS] Directive … is not, for the purposes of income tax, treated in the same way as income received from a Finnish investment fund constituted in accordance with contract law within the meaning of the same directive … because the legal form of the UCITS located in the other Member State does not correspond to the legal structure of the national investment fund?’

IV. Analysis

27. First of all, in the light of the provisions cited by the national court, it seems to me that the contested decision simply results from the application of those provisions to the income at issue. Accordingly, it is the compatibility of the legislation described by the referring court with EU law that must be examined in the present case. [12]

12 In particular, the contested decision does not appear to be directly related to the Convention between Luxembourg and the Finland for the avoidance of double taxation with respect to taxes on income and on Fortune and its Protocol, signed in Luxembourg on 1 March, 1982 (Mémorial A 1982, p. 1966).

28. In this context, it is worth noting that direct taxation is still primarily a matter for the Member States. Therefore, given the current state of harmonisation of EU tax law, Member States are free to establish the system of taxation they deem the most appropriate, and consequently the application of progressive taxation falls within the discretion of each Member State.[13] In particular, fundamental freedoms cannot be understood as meaning that a Member State is required to align its tax rules with those of another Member State in order to ensure, in every situation, the removal of disparities between different national tax schemes, given that the decisions made by a company to establish commercial structures abroad may or may not, depending on the circumstances, be to that company's advantage.[14]

29. However, although Member States are free to determine the scope as well as the basic principles of their tax systems, they must nonetheless exercise their fiscal competence consistently with the freedom of movement, which means that they must refrain from adopting measures prohibited by Article 63(1) TFEU.[15] In other words, fundamental freedoms are not intended to solve problems of interoperability between the different national taxation systems. Rather they are intended to ensure that the Member States exercise their competences in a non-discriminatory manner.[16]

30. Pursuant to the Court's case-law, 'the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, *include* those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States'.[17] Since the mere fact of subjecting an activity or transaction to a particular tax necessarily makes it less attractive, it is therefore likely to dissuade nationals of other Member States from investing in that State. Yet in order not to impair unduly the ability of Member States to levy taxes, the fact that a measure has such a dissuasive effect is not in itself sufficient for it to qualify as a restriction in this sense: such a measure must also establish a discrimination, whether direct or indirect, to the detriment of the cross-border investor.[18]

31. In general, a measure is to be considered as discriminatory when its object or effect is to treat comparable situations differently or, conversely, to treat different situations identically.[19] In the context of the freedoms of movement, given that their objective is the completion of the internal market, the Court generally uses a more specific definition. Indeed, where the law prohibits the use of a specific criterion, direct discrimination occurs when a person is expressly treated less favourably on the basis of that criterion, and indirect discrimination occurs when the criterion is used, in what appears to be a neutral manner, while in practice it places persons fulfilling the prohibited criterion at a disadvantage as compared with others.[20]

13 See, for example, judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 49).

14 See, for example, judgments of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraph 43); of 10 June 2015, *X* (C-686/13, EU:C:2015:375, paragraph 33); and of 27 February 2020, *AURES Holdings* (C-405/18, EU:C:2020:127, paragraph 32). Given the disparities in the national legislation of the Member States, the result of the exercise of these freedoms may therefore be more or less advantageous, or even disadvantageous, as EU law does not guarantee Union citizens that the exercise of the freedoms of movement will be neutral with regard to taxation. See, for example, judgments of 15 July 2004, *Lindfors* (C-365/02, EU:C:2004:449, paragraph 34); of 12 July 2005, *Schempp* (C-403/03, EU:C:2005:446, paragraph 45); and of judgment of 20 May 2008, *Orange European Smallcap Fund* (C-194/06, EU:C:2008:289, paragraphs 37 and 62).

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

16 Accordingly, the fact that there is no legal status in the national legislation of a Member State equivalent to the legal status of an entity registered in another Member State does not oblige the former Member State to treat that entity in the same way as the entity benefiting, under that legislation, from the most important advantages, even though it does not display the characteristics that justified the granting of those advantages, but only to apply the existing rules in a non-discriminatory manner to the said entity registered in the other Member State.

17 See, for example, judgment of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 15). Emphasis added.

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

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

20 For further explanation of the test to be carried out, see my Opinion in *Autoridade Tributária e Aduaneira* (C-388/19).

32. Based on this more specific approach, the Court classifies, from the perspective of the fundamental freedoms, a measure as establishing 'direct discrimination' when it treats situations differently because of the nationality of the parties involved,[21] and as 'indirect discrimination' when, although based on another criterion such as residence, it in fact leads to the same result.[22]

33. Admittedly, the Court has held on particular occasions that the existence of a disadvantage might be inferred from the fact that non-residents either were not likely to satisfy the condition or conditions required in order to benefit from a tax scheme or could only do so with difficulty.[23] However, since according to settled case-law, 'the disadvantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions prohibited by [EU law]',[24] such a circumstance is not sufficient in itself to establish the existence of a restriction.[25] For a measure to constitute discrimination and, therefore, a restriction, as is apparent from the judgment in *Köln-Aktienfonds Deka*, it is necessary that, in the light of the aim pursued by that measure,[26] nationals and non-nationals - or residents and non-residents - are to be considered as being in a comparable situation.[27] However, when the objective pursued by a fiscal measure is not directly related to one of the elements that characterise a UCITS fund in comparison to another fund, such a distinction is irrelevant. Indeed, the fact that, in order to qualify as a restriction, a measure must be discriminatory, does not imply that 'any' distinction is relevant. With regard to fundamental freedoms, what is important is not the general economic neutrality or coherence of the legislation at issue, which is a matter of national law, but rather whether that legislation specifically places cross-border operations at a disadvantage.

34. Finally, I would like to recall that a restriction on a freedom of movement may be justified by overriding reasons relating to the public interest and, consequently, may not be regarded as contrary to EU law, if it is applied without discrimination on grounds of nationality, appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary to attain it.[28]

35. In this regard, I would observe that, while in an increasing number of judgments the Court has assessed the comparability of the situation at the justification stage, I believe that, if, contrary to my suggestion, the Court were not to retain the concept of discrimination applicable in the presence of a prohibited criterion, but were rather instead to regard the broader definition of discrimination as referring to any measure having as its object or effect the treatment of comparable situations differently or, conversely, different situations identically, such a comparison should be carried out, expressly or impliedly, before a measure can properly be regarded as discriminatory and, accordingly, qualified as a restriction.[29] Indeed, in this case, it follows from that broader definition of discrimination that the comparison constitutes an element that qualifies the latter.

21 See, for example, judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraph 19).

22 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 45); of 19 November 2015, *Hirvonen* (C-632/13, EU:C:2015:765, paragraph 29); and of 18 June 2020, *Commission* v *Hungary (Transparency of association)* (C-78/18, EU:C:2020:476, paragraph 62).

23 To my knowledge, this particular approach has been used only on rare occasions in tax matters. See judgments of 3 February 2000, *Dounias* (C-228/98, EU:C:2000:65, paragraph 61), of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 62), and, regarding the burden of proof, judgment of 28 January 2010, *Direct Parcel Distribution Belgium* (C-264/08, EU:C:2010:43, paragraph 35).

24 See, for example, judgment of 16 July 2009, *Damseaux* (C-128/08, EU:C:2009:471, paragraph 27).

25 See, to that effect, judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraphs 54 and 110).

26 According to the Court's case-law, the comparability of the situation at issue must be assessed in the light of the aim pursued by the measure at issue. See, for example, judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 64). The Court also sometimes takes into account the 'the object and content' (see judgment of 18 December 2014, *Q* (C-133/13, EU:C:2014:2460, paragraph 22), or the 'purpose and content' of that measure (See judgment of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960, paragraph 65).

27 See, for example, judgment of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraphs 74 and 75).

28 See, to that effect, judgment of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960, paragraph 83).

29 See, for example, judgment of 13 March 2014, *Bouanich* (C-375/12, EU:C:2014:138, paragraph 45 to 56) or judgment of 12 June 2003, *Gerritse* (C-234/01, EU:C:2003:340, paragraph 47). See also, on this topic, Lenaerts, K., and Bernardeau, L., 'L'encadrement communautaire de la fiscalité directe', *Cahiers de droit européen*, vol. 1, Bruylant, 2007, pp. 19-109, p. 55.

36. The reason why a large number of judgments have nonetheless assessed the comparability of the situations at the justification stage rather than at the stage where the existence of a restriction is assessed [30] seems to be related to the approach adopted in certain judgments, that is to say, one which presents Article 65(1)(a) TFEU as establishing *a derogation* from the fundamental principle of the free movement of capital, and which therefore, must be interpreted strictly. [31]

37. Apart from the fact that certain judgments in which the assessment of the comparability of the situation at the justification stage was carried out were dealing with fundamental freedoms other than the free movement of capital, [32] I note that the wording of Article 65(1)(a) TFEU does not justify making this comparison only at a later stage. Indeed, that article merely states 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 place of residence or with regard to the place where their capital is invested'. In this context the expression 'without prejudice to the right of Member States' et seq., simply means that Member States are indeed permitted to have regard to the residence status of taxpayers when framing their capital taxation legislation. It does not imply the existence of an exception, but rather that Member States may make different rules for non-residents in some circumstances where it might be relevant to do so.

38. In addition, if Article 65(1)(a) TFEU were to be regarded as forming, strictly speaking, a 'derogation', it would mean that the test to be applied in tax matters for identifying the existence of a restriction would differ according to the freedom of movement at issue, since, for example, in relation to the freedom of establishment, it is established that the situations must be compared before a measure is classified as a restriction in this sense. [33]

39. In my view, there is no real reason why, in the context of the free movement of capital, the lack of comparability of two tax situations should be considered at a different stage. Irrespective of whether the case concerned the free movement of capital or another fundamental freedom, the definition of what constitutes a restriction should remain identical.

40. In the present case, in order to establish whether Paragraph 32 of the Income Tax Law establishes a restriction, the parties debated mainly the relevance of the fact that a SICAV carries out the same activities as a mutual fund.

30 In some judgments, the Court has considered that once a measure has been qualified as a restriction, the lack of comparability might serve as a justification for its discriminatory effect. See, for example, judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 42). In other judgments, however, the Court has examined the comparability of the situations as a condition to qualify a measure as a restriction. See, for example, judgment of 13 March 2014, *Bouanich* (C-375/12, EU:C:2014:138, paragraphs 45 to 56), or of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraphs 31 to 38). Finally, in certain cases, the Court has twice carried out that examination: the first time, to qualify a measure as a restriction, the second time at the justification stage. See judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraphs 57 and 65) or, in relation to the freedom of establishment, of 17 May 2017, *X* (C-68/15, EU:C:2017:379, paragraphs 42 and 50). In these situations, the first examination of comparability focused, in substance, on whether the persons concerned were subject to the same kind of tax treatment (which in fact amounts to examining not the comparability of situations, but the scope of the measure in question) and the second on the comparability of the situations having regard to the aim pursued by the national tax legislation at issue.

31 See judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 45).

32 See judgment of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 23).

33 See judgments of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424 paragraph 32), and of 9 February 2017, *X* (C-283/15, EU:C:2017:102, paragraph 29). See, with regard to the freedom to provide services, judgment of 30 January 2020, *Anton van Zantbeek* (C-725/18, EU:C:2020:54, paragraph 26).

41. However, as I have already explained, the comparability of the situations cannot be assessed in an abstract manner. Instead, that comparison must be carried out in the light of the aim pursued by the measure in question, provided that this aim is not itself discriminatory.[34] Accordingly, factors such as the objects of incorporation, the corporate form,[35] the kind of business conduct or the rules applicable to companies at issue, are not, in themselves, decisive: it is the aim pursued by the tax measure at issue which will determine the relevant criteria.

42. It follows that no particular conclusions can be drawn for the present case from the fact that in paragraph 50 of the judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377), referred to by some of the parties, the Court held that 'the circumstance that in Finnish law there is no type of company with a legal form identical to that of a SICAV governed by Luxembourg law cannot *in itself* justify a difference in treatment, since, as the company law of the Member States has not been fully harmonised at [EU] level, that would deprive the freedom of establishment of all effectiveness'.[36]

43. As is clear from the use of the term 'in itself,' the Court did not rule out the possibility that this circumstance might be relevant in other contexts.[37] In *Aberdeen Property Fininvest Alpha*,[38] that particular circumstance was inconsequential because, as the Court noted, the aim pursued by the measure in question was to relieve resident parent companies of a series of charges to tax on the profits distributed by a resident subsidiary. From that perspective, as long as the parent companies are actually incorporated, the precise corporate form of those taxable entities does not appear to be relevant to assessing whether they are in a comparable situation.

44. The same applies to the situation in which a company is subject to the UCITS Directive. Admittedly, that directive provides that a UCITS may be constituted in accordance with contract law or statute, but that fact might only be relevant for the assessment of the existence of a restriction if the tax measure in question pursues an objective, and the attainment of that objective depends on the fact that the fund is a UCITS.[39] For example, if Finland had intended to tax the income distributed by UCITS funds in a specific manner, then it would have been obliged to treat SICAVs governed by Luxembourg law covered by the concept of UCITS, and mutual funds governed by Finnish law which were also covered by that concept, in an identical manner.

45. It is thus important to note that in many Member States tax law is, generally speaking, considered to be distinct from other branches of law and, as such, the legal characterisation given to certain situations for the purposes of commercial law or civil law do not necessarily carry over for tax purposes. One of the best examples of this is undoubtedly the fact that in tax matters the concept of residence may be different from that used, for example, in the context of family law.

34 See, for example, judgment of 1 December 2011, *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraph 61). It is stated in certain judgments that the situations must be 'objectively comparable' which might be misleading as it may suggest that what is relevant are the factual differences between two situations, whereas according to settled case-law the comparability of a cross-border situation with a situation internal to the Member State concerned must be examined in the light of the objective pursued by the measures in question. See judgment of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 64).

35 To use the expression used by some parties.

36 Emphasis added.

37 See, for example, judgment 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 51). Accordingly, a tax measure may treat collective investment undertakings differently depending on whether they have been constituted in accordance with contract law or statute if such circumstance is relevant in view of the objective pursued by this measure and that this difference in treatment is compatible with EU rules.

38 Judgment of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377).

39 This is all the more so as recital 83 of the UCITS Directive states that that directive should not affect national rules on taxation. In any case, fundamental freedoms apply only to the extent that the issue is not fully harmonised. See, for example, judgment of 14 March 2013, *Commission* v *France* (C-216/11, EU:C:2013:162, paragraph 27).

46. As I propose to explain below, the test adopted by Finland in Paragraph 32 of the Income Tax Law in the present case is neither specific nor related to whether the entity in question is a UCITS, but rather to whether it constitutes a corporation. This does not in itself mean that the Finnish legislation is not discriminatory. The determining factor in that assessment is whether as a result of characterising the income at issue as dividends, the legislation subjects similar transactions to different tax outcomes.

47. Finally, it may be recalled that a restriction on the free movement of capital is permissible only if justified, in cases of direct discrimination, on grounds expressly provided for by the Treaty [40] or, in the case of indirect discrimination, also by overriding reasons in the public interest and, if that is the case, only if it is suitable for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain it. [41]

48. In the present case, the referring court and the parties have focused their observations on the practice of the Finnish tax administration to treat SICAVs governed by Luxembourg law as companies under Finnish law for the purposes of taxation of distributed income. However, I note that the contested decision is the result of the consecutive application, following a decision tree, of three provisions, each of which has had the effect of precluding the application of other tax schemes, namely:

– Paragraph 32 of the Income Tax Law, in that it distinguishes between dividends and shares in profits;

– Paragraph 33c(1) and (2) of that law, in so far as this provision excludes from the application of Paragraphs 33a and 33b corporations which do not fulfil the conditions of either the first subparagraph or second subparagraph of Paragraph 33c;

– Paragraph 33c(3) of the Income Tax Law, in that this provision qualifies the profits distributed by certain foreign corporations as employment income.

49. In this context, I consider that these provisions need to be considered separately in turn. [42]

A. On the existence of a restriction by reason of the distinction made by Paragraph 32 of the Income Tax Law between profit distributed which constitutes dividends and that which constitutes shares

50. E alleges that the contested decision has treated income distributed by foreign UCITs constituted in the form of a Luxembourg SICAV in the same way as income distributed by domestic public limited companies, which has resulted in higher taxation for their shareholders than for Finnish investment funds and their investors.

51. It is, however, accepted that this distinction is not based on the national substantive law applicable to the funds. Indeed, foreign investment funds without legal personality are treated in exactly the same way as domestic funds without any legal personality. Consequently, no direct discrimination can be established.

40 See, regarding tax measures, Opinion of Advocate General Tizzano in *SEVIC Systems* (C-411/03, EU:C:2005:437, paragraph 55) or, more generally, judgments of 7 May 1997, *Pistre and Others* (C-321/94 to C-324/94, EU:C:1997:229, paragraph 52), and of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 25),.

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

42 It may be tempting to make an overall assessment of the combined effect of these three provisions, but such an approach creates a risk, if it were to be concluded that a restriction exists, that the provisions giving rise to the restriction are not precisely identified, with the result that the Member State amends its legislation beyond what is necessary.

52. With regard to the existence of possible indirect discrimination, it is true that Finnish law allows only the establishment of collective investment undertakings that have a contractual form. However, that fact is not in itself sufficient to establish the existence of indirect discrimination. As I have already explained, for the latter to occur, the criterion used must have the effect that it places non-nationals or non-residents at a disadvantage, even if the language of that provision is otherwise applicable without distinction.

53. In the present case, the difference in treatment between SICAVs governed by Luxembourg law in comparison to mutual funds governed by Finnish law is the consequence of the distinction made by the Finnish legislation between shares in profits and dividends. Quite apart from the fact that this is a distinction frequently made by national legislatures, one cannot, I think, readily infer from the mere fact that Finnish law does not permit the creation of investment funds in the form of a company that the Finnish legislature thereby intended to give preference to domestic investment funds.

54. In any case, I note that if the Court held that the comparability is to be assessed in the light of the aim pursued by the measure at issue, it has also ruled - admittedly in the context of sex discrimination but I see no reason why the non-discrimination test should really be any different in the present context – that, to assess the existence of a difference in treatment, all persons subject to the national legislation in which the difference in treatment arises need to be taken into consideration since, in principle, it is the scope of that legislation which determines the circle of persons liable to be included in the comparison. [43]

55. Accordingly, since in the present case the distinction made by Finnish legislation between shares and profit dividends does not apply to profits distributed by investment funds only, but more generally to profits distributed by any taxable entity, it can be presumed that the objective pursued by this distinction and, consequently, the frame of reference for assessing the comparability of the situations, lies at this level.

56. Although it is for the national court to ascertain precisely what the purpose of this distinction actually is, one may deduce from the provisions in question that Paragraph 33c (1) and (2) is intended, at least in part, to exclude from the scope of Paragraphs 33a and 33b income which, at least on the surface, can be considered not to have been subject to double taxation. [44]

57. Accordingly, in the light of this aim, the profits paid by SICAVs governed by Luxembourg law can be considered to be different to the profits distributed by a mutual fund governed by Finnish law, since the latter is not taxed at source.

43 See, to that effect, judgments of 6 December 2007, *Voß* (C-300/06, EU:C:2007:757, paragraphs 40 and 41), and of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 47). Similarly, in the domain of State aid, the Court analyses the existence of a selective advantage by reference to a reference framework. See, to that effect, my Opinion in Joined Cases *UNESA and Others* (C-105/18 to C-113/18, EU:C:2019:395, point 80).

44 Indeed, in the absence of legal personality, an entity cannot, in principle, be subject to obligations. However, this is not necessarily true. Indeed, since tax law is generally considered to be an autonomous branch of law in most Member States, it cannot be excluded that, in some of those States, entities without legal personality might be subject to an income tax, as in Finland, but unlike in that Member State, they are not exempted. Consequently, the profit share they distribute might be subject to double taxation and, therefore, from the point of view of the objective pursued by the mechanisms aimed at limiting the effects of double taxation, these entities should be considered as being in a comparable situation to that of corporations. Therefore, from that point of view, Paragraph 32 of the Income Tax Law might raise some concerns as to whether that equivalence is discriminatory, but those concerns are rather the consequence of the use, as a criterion, of the absence of legal personality of the concerned entity rather than the fact they are not a taxable entity. However, since in the present case, i) this issue was not raised by the referring court, ii) it is not certain whether there are Member States that proceed in this way, and iii) the income at issue was considered to have been distributed by an entity with legal personality, I will not examine that issue.

58. One may, in any event, note that by classifying profits paid by Luxembourg SICAVs as dividends - a qualification which also exists under Luxembourg law – the Finnish legislation at issue may prove to be more advantageous for investors, since as a result investors may be entitled to the application of Paragraphs 33a and 33b of the Income Tax Law, the aim of which is to mitigate the double taxation of profits. Indeed, it is only on that condition that those profits may be subject to the mechanisms provided for in those provisions. [45]

59. Having regard to the above, I take the view that a provision such as Paragraph 32 of the Income Tax Law does not, as such, create a restriction on the freedom of movement. If there is discrimination to the detriment of Luxembourg SICAVs, such discrimination is not attributable to the provisions of Paragraph 32, but rather results from the provisions creating an exception to the application of this regime to certain companies. As I will now explain, such discrimination occurs at a subsequent stage of the application of the relevant provisions.

B. On the measure consisting in the exclusion of corporations which do not fulfil the conditions of either the first subparagraph or second subparagraph of Paragraph 33c from the scope of application of Paragraphs 33a and 33b of the Income Tax Law

60. Pursuant to Paragraph 33c (1) and (2) of the Income Tax Law, dividends received from a foreign corporation are excluded from the application of Paragraphs 33a and 33b, unless that corporation is a company within the meaning of Article 2 of Directive 2011/96 or was not obliged to pay at least 10% tax on the income from which the dividends were distributed [46] and if, cumulatively, that corporation does not have its registered office in the State belonging to the EEA or if there is no convention preventing the double taxation of the dividends distributed.

61. In so far as Paragraph 33c(1) and (2) provides that these conditions apply only to foreign companies, that provision establishes a difference in treatment based on nationality. [47] Moreover, since corporations governed by Finnish law and those governed by foreign law might both be subject to double taxation, the situations thus differentiated must be considered, in the light of the aim of that measure, as comparable. [48] In those circumstances, the conclusion that Paragraph 33c(1) and (2) establishes direct discrimination on grounds of nationality and, consequently, a restriction on the free movement of capital, is inevitable.

62. Since the discrimination is direct, it can be justified solely on a ground set out in the Treaties, provided that the measure is proportionate to the achievement of that ground.

63. In this regard, it may be noted that Article 65(1)(b) TFEU states 'that the provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States … to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions'.

45 On the contrary, if the tax authorities had applied the tax scheme applicable to dividends to the profits distributed by a foreign entity without legal personality, this treatment might have constituted discrimination and thus a restriction of a fundamental freedom, since in doing so the investors would have lost all possibility of benefiting from the provisions of Paragraphs 33a and 33b of the Income Tax Law.

46 Although the provisions in question do not specify it, it appears from the file that the term 'tax' in this instance refers only to taxes based on the profits made by a fiscal entity.

47 Given that, formally, Paragraph 33c(1) and (2) of the Income Tax Law refers to foreign companies, it seems to me to be excluded that the distinction made by this provision is between companies which have paid a tax and those which have not.

48 See, to that effect, judgment of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896, paragraph 55).

64. In the present case one may assume that the objective pursued by Paragraph 33c(1) and (2) is to ensure that only income distributed by foreign tax entities which has already been taxed at source can benefit from the mechanisms limiting the effects of double taxation. Such an objective can be considered to be covered by the considerations set out in Article 65(1)(b) TFEU relating to the prevention of infringements of the tax legislation, which obviously include obtaining undue advantages. [49]

65. Moreover, that distinction seems to be appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. [50] I reach that conclusion for the following reasons.

66. First, the provisions of Paragraph 33c(1) and (2) of the Income Tax Law do not exclude a foreign corporation from benefiting from the mechanisms laid down in Paragraphs 33a and 33b of that law, but rather their objective is to lay down conditions for ensuring that only profits that have already been taxed may benefit from this mechanism.

67. Second, those provisions retain a tax rate of 10% for a corporation not covered by Article 2 of Directive 2011/96, whose rate is lower than the Finnish corporate tax rate.

68. Therefore, the measure consisting in the exclusion of certain foreign corporations from the scope of Paragraphs 33a and 33b, although constituting direct discrimination, appears to be justified by reference to a ground set out in the TFEU itself and proportionate to it. In these particular circumstances that measure should be considered to be compatible with EU law, provided, however, that that reduction mechanism is intended solely to correct this difference in the multi-stage taxation of those profits, which is a matter for the referring court to verify.

C. On the measure consisting in the classification of the dividends distributed by certain foreign companies as employment income

69. Pursuant to Paragraph 33c(3) of the Income Tax Law, profits distributed by a foreign corporation which do not meet the conditions set out in Paragraph 33c(1) and (2) of that law are taxed not as capital income, but rather as employment income. As the Commission has pointed out, this provision introduces a form of direct discrimination in respect of foreign corporations, since it applies only to such entities.

70. No explanation has been provided by the Finnish Government as to a possible explanation for this classification and it is not evident what kind of explanation, drawn from the Treaties, could justify the resulting significant difference in treatment.

71. Even if there is one, in order for such a distinction to be justified, the measure applied would have to be proportionate to the aim pursued. It is of course understandable that there is a need for a Member State to ensure that the benefit of mechanisms designed to mitigate the effects of double taxation apply only to income concerned by that issue. Nevertheless, in order to be proportionate, non-compliance with the conditions for the application of the mechanisms whose aim is to limit the effects of double taxation of profits must logically be sanctioned by the loss of the benefit of those mechanisms and, therefore, the income must be taxed in full.

49 See, for example, judgment of 11 October 2007, *ELISA* (C-451/05, EU:C:2007:594, paragraph 81).

50 See, to that effect, judgment of 9 March 2017, *Piringer* (C-342/15, EU:C:2017:196, paragraph 53).

72. That has not occurred in this case because the triggering of the different classification of the profit for tax purposes – employment income as distinct from the capital income – turns solely on the identity and residence status of the foreign entity and not on the question of whether these profits would otherwise run the risk of double taxation. One cannot realistically say that income that does not meet these conditions should automatically be reclassified as employment income. This is all the more so since, pursuant to Paragraph 32 of the Income Tax Law, dividends paid by corporations constitute, in principle, capital income.

73. Even though Paragraph 33c(3) of the Income Tax Law concerns income distributed by tax entities that have not been subject to taxation at source so that, in the light of the aim pursued by that measure, mutual funds governed by Finnish law and SICAVs governed by Luxembourg law must be considered as being in an identical situation, the profits that they distribute are nonetheless treated differently. The profits from the Finnish entities are treated as capital income, whereas the dividends paid by a SICAV are deemed to be employment income and, as we have seen, are subject to progressive taxation at a higher level.

74. It seems clear, therefore, that by taxing dividends paid by a SICAV governed by Luxembourg law as employment income on the sole ground that they do not fulfil the conditions to benefit from the mechanism provided for in Paragraphs 33a and 33b of the Income Tax Law, Finnish tax law has established a restriction pursuant to Article 65 TFEU, which cannot be proportionate to any overriding reason relating to the public interest.

75. In this respect, I would stress that the existence of such discrimination cannot affect the validity of the measure consisting in a difference in treatment of dividends and shares in profits. Admittedly, discrimination may result from the effects of a provision. However, in the present case, the fact that the distributed income has been treated by the contested decision as dividends does not necessarily lead to the conclusion that the entire Finnish legislation is discriminatory. It is only because the Income Tax Law provides that, where a company does not meet the conditions set out in Paragraph 33c(1) and (2) thereof, the distributed income must be treated as employment income (as distinct from capital income) that such discrimination occurs. It is therefore only Paragraph 33c(3) of the Income Tax Law which is to be considered incompatible with EU law.

V. Conclusion

76. In view of the above, I therefore propose that the Court should answer the question referred to it as follows:

Articles 63 and 65 TFEU are to be interpreted as not precluding national legislation according to which income paid to a natural person residing in Finland by a collective investment undertaking having its registered office in another Member State of the European Union and having the statutory form within the meaning of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) is to be taxed as a dividend and not a profit share. Those provisions are also to be interpreted as not precluding national legislation which rules out the application of mechanisms to reduce the effects of double taxation when such profits are distributed by companies that have been taxed in another Member State at a rate lower than the rate provided for in that legislation, provided that that reduction mechanism is intended solely to correct this difference in the multi-stage taxation of those profits, which is a matter for the referring court to verify. However, those provisions must also be interpreted as precluding that same legislation from reclassifying dividends paid by such companies as income from employment, while that same legislation states that dividends constitute, in principle, capital income.