Scherleitner, Moritz

E, Veronsaajien Oikeudenvallontayksikkö C-480/19: A Remarkable Case

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Veronsaajien oikeudenvalvontayksikkö C-480/19 (hereafter the E case) is the first case dealing with the taxation of income received by a shareholder in an investment fund in her residence state. While the ultimately decisive element for the court to strike down the Finnish rule at stake seems to have been an inconsistency in Finnish law, the case includes various nuances that are of broader relevance. Foremost, this concerns the rather particular perspective taken in by the court in the comparability analysis that appears to include elements of an equivalence test used in the mutual recognition doctrine – an area that is rarely relevant in direct taxation matters.

1. The Road to E – the relevance of this case in the broader setting of case law on investment funds

1.1. The structure of the investigation

The case Veronsaajien oikeudenvalvontayksikkö C-480/19 (hereinafter the E case) deals with a Finnish individual taxpayer, E, who received income from an investment fund. It adds interesting nuances to a longer line of European Court of Justice (ECJ) case law concerned with the taxation of investment funds. This article will, first, work out a benchmark for the analysis (sec. 1.2.), after which the essence of the ECJ’s case law on investment funds will, with a particular focus on the court’s comparability analysis, be summarised (sec. 1.3). Thereupon the E judgment (sec. 2) and its potential implications will be discussed (sec. 3). In the latter section, three issues will be addressed. First, in section 3.1., the global view taken by the court in the comparability analysis and its preparedness to take account of the Luxembourg fund taxation regime in determining whether a Luxembourg fund is in a comparable situation to a Finnish fund will be discussed. This will lead to the second question of whether (elements) of mutual recognition may have played a role in this regard (section 3.2.). Finally, section 3.3. will inquire why the court did not analyse comparability in the context of rules that serve the mitigation of economic double taxation at the level of the shareholder in its residence state. Section 4 will conclude.

1.2. The benchmark of the analysis: Investment fund taxation and the fundamental freedoms

For financial purposes, investment funds may be defined as an ‘entity, which collects capital from a number of investors to create a pool of money that is then re-invested into stocks, bonds and other assets’. In the EU, they are regulated by either the directive on undertakings for collective investment in transferable securities (UCITS) or, if they do not fall under this directive, by the alternative...
Investment funds manager (AIFM) directive. The taxation of investment funds is not dealt with in these directives and not harmonized as such; thus Member States must organize their fund taxation systems.

Although they differ more or less strongly from each other, it is typical for fund taxation regimes to aim at ensuring tax neutral treatment between an investment via the fund and the corresponding direct investment of the fund investor into the target. The interposition of the fund level between the investors and the targets should not lead to a worse or better tax outcome than what would be the result of each investor owning each asset himself. The general reporters of the 2019 IFA Congress dealing with fund taxation regimes around the world refer to this common meta goal as ‘horizontal tax neutrality’. The second – and closely related – neutrality dimension used by Hwang & Weidmann (2019) is referred to as vertical tax neutrality. This pertains to the avoidance of economic double taxation that is ensured by taxing the investment in the fund only once. There are several ways to achieve this: Either the income is taxed only at the level of the investor, only at the level of the fund, or partly at both the level of the former and the latter.

States promote these neutrality dimensions in various ways. Often they provide for some type of special tax regime for investment funds. In this context, states use different techniques whereby it is possible to distinguish between two principal approaches that, in practice, can occur in different notions and may also be mixed. First, there are states that treat fund vehicles as tax transparent. Under such a system, the income flows through to the investor with some possible modification in timing and income character. Secondly, states may treat investment funds as opaque and grant them special tax treatment. This can be a lower rate, an exemption, or a deduction of distributions.

While Member States are sovereign in the design of their direct tax systems, and thus their fund taxation systems, they must exercise their competence in a manner that is compatible with EU law. In this regard, especially the fundamental freedoms are relevant. As an integral part of general internal market law,

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5 Hwang & Weidmann, supra n. 2, at p. 18; compare further on tax neutrality with respect to investment funds, Tomi Viitala, Taxation of Investment Funds in the European Union ch. 3 (BFID Publications 2005).

6 Hwang & Weidmann, supra n. 2, at p. 18.

7 See, including examples for different country practices, id., at pp. 18 et seq. They regard the right for a deduction upon distribution as an additional option. For the corresponding taxation at the investor level, see, id., at pp. 43 et seq.

8 See in more detail, Hwang & Weidmann, supra n. 2, at ch. 1, who summarize countries’ practice on the taxation of (domestic and foreign) mutual funds, hedge funds, and private equity funds. See, for earlier studies, e.g. Viitala, supra n. 5.

9 In detail, see Hwang & Weidmann, supra n. 2, at ch. 1 and the relevant national reports.

10 Such as the Austrian system on the taxation of real estate funds that is semi-transparent. See, Andrei Bodis & Tatjana Polivanova-Rosenauer, Austria, in Investment Funds, IFA Cahiers, vol. 104B, sec. 3.3.2.2. (IFA 2019).

11 See, for instance, the Austrian fund taxation regime as explained in more detail in id.

12 In detail see Hwang & Weidmann, supra n. 2, at ch. 1 and the relevant national reports.

13 With further references, e.g. E, para. 25.

14 The establishment of the internal market is one of the core-goals of the Union. See Art. 3(3) Treaty on the European Union (TEU) in connection with Art. 26 of the Treaty on the Functioning of the European Union. Via the promotion of the internal market, the EU attempts to fulfill its highest goal, that is, the promotion of peace, its values, and the well-being of its people. See Art. 3(1) TEU; and further, e.g. Benjamin Strassburger, Die Dogmatik der EU-Grundfreiheiten: Konkretisiert anhand des nationalen Rechts der Dividendenbesteuerung 7 (Mohr Siebeck 2012); Eric Kemmeren, The CJEU and the Internal Market Concept in Direct Taxation, in EU Tax Law and Policy in the 21st Century 5 et seq. (Werner Haslehner, Georg Kofler & Alexander Rust eds, Wolters Kluwer 2017).
these freedoms, in a direct taxation context, are concerned with prohibiting a Member State from treating a cross-border transaction in a less favourable manner than a comparable internal transaction. In investment fund cases, the free movement of capital usually becomes a factor. This is the only freedom that applies also vis-à-vis third states.

1.3. Investment fund cases at the ECJ level

The ECJ was requested several times to decide on questions involving investment funds. These cases include dividend payments made to foreign investment funds from the perspective of the dividend paying company’s source state or from that of the fund receiving the dividends. Whether the inferiorly treated cross-border situation was comparable to an internal situation has been analysed with respect to the object and purpose of the relevant rules in question. In outbound dividend cases, a goal of the domestic rules has been the prevention of economic double taxation. As such, comparability was established on the basis of the ACT/Denkavit formula. According to it, a Member State, in the context of rules mitigating economic double taxation, is creating comparability the moment that it taxes the outgoing dividend. This is due to having exposed the non-resident to the same risk of economic

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15 The application of the fundamental freedoms in a direct tax context frequently adheres to a discrimination approach instead of what is often relevant in non-tax cases, i.e. a (non-discriminatory) restriction approach. See, including critics on the court’s undifferentiated use of terminology, e.g. Joachim Englisch, Grundfreiheiten: Vergleichbarkeit, Rechtfertigung und Verhältnismäßigkeit, in Europäisches Steuerrecht 280 (Michael Lang ed., DSJG Tagungsband 2018); Opinion of AG Michal Bobek Case C-382/16, Hornbach-Baumarkt, 14.12.2017, ECLI:EU:C:2017:974, paras. 38-40.

16 For a analysis of the impact of the fundamental freedoms on Member States’ direct taxation systems, see, e.g. Niels Bammens, The Principle of Non-Discrimination in International and European Tax Law ch. 12-18 (IBFD 2012); Peter Wattel, Conceptual Background of CJEU Case Law in Direct Tax Matters, in European Tax Law 633 (Peter Wattel, Otto Marres & Hein Vermeulen eds, Wolters Kluwer 2019); Marjaana Helminen, EU Tax Law ch. 2 (IBFD 2021); Jasper J.A.M. Korving, Internal Market Neutrality (Sdu Uitgevers The Hague 2019); Christiana H.J.I. Panayi, European Union Corporate Tax Law sec. 3.2. (Cambridge University Press 2021).

17 Differently, for instance, in Case C-303/07, Aberdeen Property Fininvest Alpha, 18.6.2009, ECLI:EU:C:2009:377, paras. 30-36, in which the freedom of establishment was relevant. In the pending Allianzgi case, the applicability of the freedom to provide services is under discussion but, on convincing grounds, denied in the Opinion of AG Juliane Kokott in Case C-545/19, Allianzgi-Fonds Aevn, 6.5.2021, ECLI:EU:C:2021:372, paras. 28-31, in favour of the free movement of capital.

18 For earlier contributions, see, e.g. Giampiero Genta, Dividends Received by Investment Funds: An EU Law Perspective – Part 1, 53 European Taxation 141, 143 (2013); Giampiero Genta, Dividends Received by Investment Funds: An EU Law Perspective – Part 2, 53 European Taxation 141, 143 (2013); António Calisto Pato, Cross-border direct tax issues of investment funds from the perspective of European law, 17 EC Tax Review 197 (2008); Viitala, supra n. 2; M. Tenore, Investment Fund Taxation and Fundamental Freedoms: Four Approaches to Comparability, in Investment Fund Taxation Domestic Law, EU Law, and Double Taxation Treaties (Werner Haslehner ed., Kluwer 2018).


20 One part of Case C-194/06, Orange European Smallcap Fund.

21 Which is not the only, but arguably most frequently, relevant approach to comparability. See, for a critical analysis, references and discussion of other approaches, Englisch, supra n. 15, at pp. 279 et seq. The Pension fund case, Case C-342/10, Commission v. Finland, 8.11.2012, ECLI:EU:C:2012:688, was different since the question of comparability in respect of expenses was at stake that are directly linked to an activity that has generated taxable income in a Member State. In this context, the court applies its Gerritse-doctrine, which goes back to Case C-234/01, Gerritse, 12.6.2003, ECLI:EU:C:2003:340.

22 Case C-194/06, Orange European Smallcap Fund; Case C-303/07, Aberdeen Property Fininvest Alpha; Case C-338/11, Santander Asset Management SGIC Santander; Case C-387/11, Commission v. Belgium; Case C-190/12, Emerging Markets Series of DFA Investment Trust Company; Case C-480/16, Fidelity Funds and Others; in Case C-493/09, Commission v Portugal, no comparability analysis was engaged, but the court went directly to the justification analysis.

23 As summarized in Case C-170/05, Denkavit International BV, 14.12.2006, ECLI:EU:C:2006:783, paras. 34-35, which was delivered two days after Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation, 12.12.2006, ECLI:EU:C:2006:773: ‘In the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the double taxation of, profits distributed by a resident company, resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State. [...] However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income, not only of resident shareholders, but also of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non-resident shareholders becomes comparable to that of resident shareholders.’
double taxation. Sometimes, there are additional goals that are to be taken into account in the comparability analysis such as withholding or distribution requirements. Other outbound dividend cases, such as Pensioenfonds Metaal en Techniek or the pending Allianzgi case, are different because discrimination must be established in relation to a domestic situation that is taxed based on another technique.

To the author’s knowledge, the only inbound case involving investment funds thus far was Orange European Smallcap Fund. In the comparability analysis, the court – erroneously, in the view of some – applied the comparability analysis regarding inbound dividends with respect to the prevention of economic double taxation that was developed in Lenz and Manninen. According to this – still valid – principle (hereinafter Lenz/Manninen comparability), a Member State mitigating economic double taxation for domestic dividends must also extend this treatment to foreign dividends. In the context of the object and purpose of a rule that addresses economic double taxation, a shareholder receiving domestic dividends and one receiving foreign dividends are in a comparable situation as both are exposed to the risk of economic double taxation.

The inbound dimension of Orange European Smallcap Fund is concerned with the taxation of income received by the investment fund in its residence state. On the contrary, the E case is focused on the taxation of the income received as a shareholder in an investment fund in the shareholder’s residence state. To the author’s knowledge, such a setting has not yet been brought before the ECJ, neither with respect to individual shareholders nor corporate shareholders in investment funds.

2. The case: E, Veronsaajien oikeudenvalvontayksikkö C-480/19 –

2.1 Introduction and facts

A Finnish individual taxpayer, E, received income from an investment fund in the form of a company with variable capital (société d’investissement à capital variable; SICAV) incorporated under Luxembourg law. In a request for a preliminary decision to the central tax committee, E submitted that a SICAV incorporated under Luxembourg law should be equated with an investment fund constituted under Finnish law which is a UCITS constituted in accordance with contractual law. As such, the taxpayer claims that the earnings distributed by such a SICAV should be taxed in the same way as the income distributed by investment funds constituted under Finnish law, namely capital income. To
supports its claim, E referred particularly to the similarity of the activities performed by Finnish and Luxembourg funds as well as their corresponding management. The central tax committee declined this view. Although it accepted that the SICAV presented the functional characteristics of a Finnish investment fund, it held that similar general functional characteristics could be observed, for example, in collective investment in the form of public limited companies. Having particular regard to the legal form of the SICAV at stake, the central tax committee considered it to be objectively comparable to a Finnish public limited company carrying on investment activities. This means the income distributed by the fund is seen as foreign dividend income and is thus to be treated in accordance with the special rules of paragraphs 33a-33d of the Finnish Income Tax Act.

Paragraphs 33a-33b of the Finnish Income Tax Act contain provisions for the mitigation of economic double taxation of dividend income at the level of the shareholder. According to these rules, dividends received from a listed company are, partly treated as capital income and partly treated as tax-exempt income. Dividends received from an unlisted company can be treated as partially tax exempt income, capital income, and employment income based on a certain mechanism that takes account of the annual return on the mathematical value of the shares. Paragraph 33c extends this treatment to dividends received from foreign entities that fulfil certain conditions. The SICAV did not meet the relevant criteria due to its legal form not being mentioned in the annex to the parent subsidiary directive and its taxation being below 10%. For the income distributed by foreign entities that – as the SICAV in question – does not fulfil the conditions of paragraph 33c, leg cit foresees the treatment as employment income taxed at progressive rates of up to 50%. Importantly, this also means that the income falls out of the capital income basket which is taxed at 30% and taxed at 34% for the portion of the income that exceeds EUR 30,000.

E appealed to the Finnish Supreme Administrative Court (Korkein Hallintojusufiksi, KHO) and sought for the annulment of the decision of the central tax committee. E submitted that the taxation of the earnings distributed by the SICAV incorporated under the Luxembourg law at issue as income from employment, in accordance with Paragraph 33c, is more stringent than the taxation of earnings distributed by an investment fund constituted under Finnish law as capital income. Consequently, this

37 Case C-480/19, E, Veronsaajien oikeudenvalvontayksikkö, at para. 17.
38 Id., at paras. 19-20.
39 Based on Paragraph 33a of the Finnish Income Tax Act, 85% of dividends distributed by a listed company are capital income, and 15% shall be non-taxable income.
40 Based on Paragraph 33b of the Finnish Income Tax Act, this mechanism works in the following way. Up to an amount corresponding to an annual return of 8% calculated on the basis of the mathematical value of the shares in the tax year, 25% of the dividends distributed by an unlisted company are taxable capital income, and 75% is non-taxable income. Insofar as the amount of dividends received by the taxpayer exceeds EUR 150,000, 85% is capital income and 15% is non-taxable income. For the portion of dividends that exceed the 8% annual return, 75% is income from employment and 25% is non-taxable income. Dividends in consideration for contribution in labour made by the recipient of the dividend are always treated as employment income.
41 Paragraph 33c of the Finnish Income Tax Act states that dividends received from a foreign entity are treated in accordance with the Finnish provisions on the mitigation of economic double taxation included in paragraph 33a-33b if the entity is a company mentioned in the Annex to the 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 (OJ 2011 L 345). Dividends received from other foreign entities constitute taxable income in accordance with the provisions of Paragraphs 33a and 33b if the entity in question is subject to pay at least 10% tax on the income from which the dividends were distributed and is a resident in the EEA or in a country that has a tax treaty with Finland.
42 Case C-480/19, E, Veronsaajien oikeudenvalvontayksikkö, at para. 41.
43 Paragraph 33c Finnish Income Tax Act, last sentence.
44 Income distributed by Finnish and foreign funds that are equated to Finnish funds is, in principle, tax in accordance with these rules.
would be contrary to the free movement of capital. The Finnish Supreme Administrative Court stayed the proceedings and referred the issue to the ECJ.

2.2. Difference in treatment?

The ECJ began by assessing whether there is a difference in the treatment. As mentioned above, E argued that it exists because the income received from an SICAV is not taxed in the same way as income from a UCITS constituted under Finnish law in accordance with contract law. The central tax committee instead regarded the SICAV, being a UCITS constituted in accordance with a statute, as resembling a public limited company established in Finland. It held that the income received from it should be treated in the same way as dividends received from such companies. The ECJ compared the tax treatment of the income that a Finnish natural person received from the SICAV (taxation of up to 50%) with the tax treatment of the income received by a Finnish natural person from a domestic fund (taxation at 30% or 34%) as well as with the tax treatment of the income received by a Finnish natural person by a domestic company (measures to mitigate double taxation apply). A difference to the detriment of the cross-border situation was found to exist in both the comparison with the treatment of income distributed by a UCITS constituted under Finnish law and with respect to income received from public limited companies.

2.3. Comparability analysis

As the there was a difference in treatment to the detriment of the cross-border situation, the court proceeded to the comparability analysis. It began by underlying that the fact that the SICAV is a UCITS does not mean that it is in a comparable situation as a Finnish UCITS merely because both are UCITSs. The UCITS directive does not harmonize taxation of a UCITS and the income distributed by them. The court further stressed that comparability is to be assessed having regard to the objective pursued by the national provisions at stake. In determining whether the difference in treatment resulting from that legislation reflects an objectively different situation, only the relevant distinguishing criteria established by the legislation in question are to be considered. Complying with the UCITS directive was not decisive for the purposes of the law under scrutiny and thus the fact alone that both funds are UCITSs does not create a comparable situation.

Based on the explanations of the Finnish Government and subject to the verification by the national court, the ECJ identified two objectives. The first relates to the tax treatment of investment fund activity: ‘the objective of the tax treatment of the activity of investment funds provided for by Finnish tax

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47 See, in more detail on the relevant proceedings, Kristiina Äimä & Aki Kokko, Finland, in CJEU - Recent Developments in Direct Taxation 2019 (Michael Lang et al. eds., Linde 2020); Tomi Viitala, Ajankohtaista sijoitusrahastojen verotuksesta, Verotus, 533-542 (2019); Tomi Viitala, Finnish Case on the Taxation of Dividends from a Luxembourg SICAV Referred to the ECJ, 60 European Taxation 31(2020); more generally on the Finnish tax regime before the codification of previously judge-made criteria dealing with foreign investment funds in Paragraph 20a Finnish Income Tax Act, see Tarja Järvinen, Finland, in Investment Funds, IFA Cahiers, vol. 104B, (IFA 2019); In the pending Case C-342/20, A SCPI, Veronsaajien oikeudenva 2021.6.10.2021, ECLI:EU:C:2021:823, already the new paragraph 20a Finnish Income Tax Act is at stake. In formulating its preliminary question in the E case, the Finnish Supreme Administrative Court already had the EU law conformity of Paragraph 20a Finnish Income Tax Act in mind. See, in more detail, Markus Saarinen & Katriina Pankakoski, Ulkomaisen sijoitusrahastojen verovapauden edellytyset – kansallisen lainssäädännön ja EU-oikeuden välinen jännite sec. 3.3. Edilex (2019).
49 Id
50 The Finnish Government made it clear that a public limited company that carries on an investment activity that is similar in nature to an investment fund would not be exempt from tax but would normally be subject to corporation tax, and the earnings that it distributes would be subject to the rules on the taxation of dividends that are based on partial double taxation. See id., in para. 40.
51 Id., at paras. 32 et seq.
52 Id., at paras. 34-37.
53 Id., at paras.
54 Id., at paras. 45 et seq.
55 Id., at para. 48.
56 Id., at para. 49.
57 Id., at paras. 45-49.
legislation can be regarded as establishing a single tax at the investor level. The second concerns the taxation of dividends: ‘The provisions concerning the tax treatment of dividends received by natural persons are designed to ensure that the income of a company is also taxed at the shareholder level, while providing for the mitigation of the double taxation of that income.’

The court then examined the SICAV and regarded it to be in an objectively comparable situation to a Finnish UCITS because both are exempt from tax, and the income they receive is taxed only on the level of the recipient. Thereupon, the court looked at the criterion that is the fundament of the different treatment which is the legal form. Due to the SICAV being constituted in accordance with a statute, it is equated to a public limited company. Upon the application of the relevant rules for foreign dividend income, this leads to the distributions made by it being taxed as employment income. However, in a domestic situation, income distributed by a domestic (contractual) fund and the income distributed by a domestic company are always capital income although they can potentially be taxed somewhat differently. Thus, for Finnish entities that distribute income, there is no differentiation between employment income and capital income based on the legal form. Rather, Finland decided to treat the earnings distributed by bodies constituted in accordance with contract law and those constituted in accordance with statute as income from capital. As such, the fact that the SICAV is a statutory fund does not place it in a different situation in relation to a Finnish UCITS regarding the tax treatment of the distributed earnings. Thus, they were in a comparable situation. A justification was not brought forward, and Finland lost the case.

3. Analysis – three comments on a remarkable case

3.1. Number one – the relevance of the Luxembourg fund taxation regime

As mentioned above, the court discovered the objective of establishing single taxation at the investor level in the Finnish fund taxation regime. It then held that

it appears that the SICAV incorporated under Luxembourg law finds itself in a situation which is objectively comparable to that of a UCITS constituted under Finnish law. As is apparent from the case file available to the Court, and subject to verification by the referring court, those two entities are exempt from income tax and the earnings received from them is subject to taxation only at the level of the recipients.

This is remarkable for two reasons. First, the court takes what is known as a global view, that is, it examines the situation in its entirety and not from a single state perspective. Although this is not unheard of in ECJ case law, it may not be regarded as the rule. The general reluctance of the court to look across the border in the assessment of national tax rules under the fundamental freedoms is per se well justified. This is because, in a direct taxation context, the ECJ is concerned with striking down discrimination against cross-border situations that is inflicted by an individual Member State. The examination of national laws is to be done in isolation as if, as stated by Schön (2015), the foreign law was non-existent. Yet, the court has expanded this perspective on various occasions, and the E case is another example on this list.

58 Id., at para. 50.
59 Id.
60 Id., at para. 51.
61 See sec. 2.
62 Case C-480/19, E, Veronsaajien oikeudenvaltayksikkö, at paras. 52 et seq.
63 Note that AG Hogan reached the same result, however, relying on a different line of argumentation, specifically, a separate analysis of Paragraphs 32, 33c(1)-(2), and 33c(3) with the latter being in breach of EU law. See Opinion of AG Gerard Hogan in Case C-480/19, Veronsaajien oikeudenvaltayksikkö (Revenus versés par des OPCVM), 19.11.2020, ECLI:EU:C:2020:942, paras. 49 et seq.
64 Case C-480/19, E, Veronsaajien oikeudenvaltayksikkö, at para. 50.
65 Id., at para. 51.
66 Compare also Panayi, supra n. 16, at sec. 3.3. (2020); Bammens, supra n. 16, at ch. 14-15.
67 Schön, supra n. 82, sec. 2.3.4.2.
68 For an analysis, see, e.g. id., or Panayi, supra n. 16; Bammens, supra n. 16; Wattel, supra n. 16, at sec. 14.5.4. There are different views as to the preferability of either approach. For a discussion, see, e.g. Wolfgang Schön, Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?, 69 Bulletin for International Taxation, 271, 277;
Regarding the multiple coordinated layers that are involved in a fund taxation regime it does not, prima facie, appear inadequate for the court to engage in a global analysis. Nonetheless, such a derogation from a strict per-country approach can give rise to separate implications. What the court essentially did was (i) identify the goal of the Finnish tax regime, (ii) examine the tax regime to which the Luxembourg fund is subject, and (iii) regard them as comparable because the tax treatment is the same. Undeniably, there is an element of consistency in this thought: The comparability analysis is conducted considering the object and purpose of the rule at stake (here seen as an exemption plus a shift of the tax burden to the investor) in the context of which a system that provides for an exemption of the fund and a shift of the tax burden to the investor appears comparable. However, what if the system works differently? As very briefly outlined in section 1.2., states’ fund taxation systems differ from each other not only in terms of how they technically achieve their goals. Already more fundamentally, they vary in terms of what type of neutrality they aim towards and, importantly, the extent to which they achieve that. Would these differences between fund regimes matter in such a type of comparability analysis; if so, up until what point can these systems be seen as comparable?

The court did not address that. Still, it is not inconceivable that it has opened a source of a plethora of unforeseen issues by analysing comparability in light of the goal of the fund taxation system. Although this fear may be exaggerated and noting that this line of jurisprudence is still at its inception, the increased relevance of this question should not be underestimated. After all, at stake is potential incomparability and, should it prevail, the end of the analysis to the detriment of the taxpayer. Those who regard the comparability analysis conducted in the context of the object and purpose of the rules as including a strong bias in favour of the Member States could see their concerns confirmed if a Member State can get off the hook on the grounds that another State’s fund regime is not comparable. The examination would lack a proportionality analysis, and hence the crucial inquiry as to whether the harm caused to the internal market by the less advantageous tax treatment of the cross-border situation stands in adequate proportion to downsides of not meeting the aim of the relevant national fund regime. What would remain is the mere insight that the goal of the domestic fund regime is not fulfilled by the foreign fund regime, which would, without compelling reason, render the disadvantageous taxation acceptable from the perspective of the fundamental freedoms.

In the E case, the difference in treatment between the respective income received from an SICAV incorporated under Luxembourg law and a UCITS constituted under Finnish law was regarded to concern objectively comparable situations. Therefore, it involves a substantial amount of speculation of what would constitute such incomparability. With both funds being UCITSSs, they are also similar in many aspects. What was seemingly central to the court was the ultimate result, that is, taxation only at the investor level. The fact that the Luxembourg SICAV was subject to a subscription tax was of no concern. There was also no discussion of the mechanics of the relevant rules that led to this result. Yet, to reiterate the concern expressed above, there are various ways to ensure or promote single taxation of investments via funds that may sometimes even be limited to certain income types. Having regard to the wealth of differences, nuances, and uniqueness that exist in fund taxation regimes around

Eric Kemmeren, The internal market approach should prevail over single country approach, in A vision of taxes within and outside European borders, Festschrift in honor of Frans Vanistendael (Luc Hinnekens ed., Deventer 2007).

69 Critical, for instance, Englisch, supra n. 15, at pp. 287 et seq; Englisch, supra n. 33, at sec. 4.1.2.; Strassburger, supra n. 14, at pp. 171 et seq; Juliane Kokott, Das Steuerrecht der Europäischen Union paras. 126 et seq (Beck 2018).

70 There are some exceptions for which the ECJ, not having engaged in a reasonably deep comparability analysis, tests comparability aspects in the justification analysis. See, for this and further, Kokott, supra n. 69, at p. 130, including the reference to Case C-337/08, X Holding, 25.2.2010, ECLI:EU:C:2010:89. at paras 35 et seq

71 Which is a concern that is frequently expressed with respect to a comparability analysis in the context of the object and purpose of the law. Englisch, supra n. 33, at sec. 4.1.2.

72 The missing proportionality test is considered a structural weakness of a comparability analysis conducted in light of the object and purpose of the rules. It is against this background that proposals to abolish this step in favour of continuing immediately at the level of the justification analysis have been made. See Opinion of AG Kokott in Case C-48/13, Nordea Bank, 13.3.2014, ECLI:EU:C:2014:153, at paras. 22 et seq, which the court did not follow.

73 Case C-480/19, E, Veronsaajien oikeudenvalvontayksikkö, at para. 51.

74 The annual subscription tax (taxe d’abonnement) applies to both the contractual and corporate UCITSSs at the standard rate of 0.05% of the UCITSSs’ net assets. See Julien Lamotte & Jacques Wantz, Luxembourg, in Investment Funds, IFA Cahiers, vol. 104B, 14 (IFA 2019), sec. 1.1.1.2.

75 See, in more detail, Hwang & Weidmann, supra n. 2, at pp. 43 et seq.
the world (to all of which the free movement of capital extends), it seems almost guaranteed that there will be instances of incomparability.

On the other hand, the above reflections could also be opposed, and it could be argued that the decisive point for the Finnish rule to fail was not the fact that the Luxembourg fund is in a situation objectively comparable to a Finnish fund but rather the inconsistency that the court discovered in the Finnish law. As mentioned, the court held that Finland has taken the view that both the earnings distributed by bodies constituted in accordance with contract law and with a statute are income from capital. This brings the Luxembourg statutory fund into a comparable situation which means that the difference in treatment must be justified. The court’s reasoning may be criticized as not being entirely correct since, based on paragraph 33b of the Finnish Income Tax Act, dividends paid by Finnish companies can also be treated as employment income under certain circumstances. The logic behind this system, that is, the differentiation based on certain proxies between the nature of the shareholders’ active or passive involvement in a private limited company’s business was also not discussed. Furthermore, it is not that distributions by foreign statutory bodies are taxed as employment income by default. Rather, this is only valid for distributions by entities that do not meet the criteria enshrined in paragraph 33c of the Finnish Income Tax Act. There is a rationale behind these criteria as well, and they have also not been discussed by the court. Especially the minimum tax criterion included in paragraph 33c Finnish Income Tax Act would have been worth a consideration as the court has already taken in a global view in the comparability analysis.

However, these imprecisions aside, what matters is that the criteria for the taxation of the distribution as employment income are different for foreign distributing bodies and, in the underlying case, it was merely the legal form of the foreign fund that was decisive for the taxation as employment income. This can be demonstrated by intellectually transferring the entire situation into Finland for which the tax treatment of the distribution would not have been employment income by default. Considering that also Finnish funds are tax exempt, which was also the benchmark for the court’s analysis, it is of no concern that the fund was not taxed. The taxation of the fund will be readdressed in section 3.3. when the absence of a Lenz/Manninen comparability analysis will be discussed. Thus far, however, the author advocates with the court concerning the outcome of the rules: The taxation of the distribution as employment income is certainly difficult to explain. Notably, this should not have been different even if the foreign fund, in the context of the goal of the Finnish fund taxation regime, had been regarded to be in a situation that is not comparable to that of a Finnish fund.

3.2. Number two – is there an element of mutual recognition?

In one of the early landmark cases on the fundamental freedoms, Cassis de Dijon, the ECJ developed the concept of mutual recognition. It essentially means that goods lawfully produced and marketed in one Member State (the Member State of origin) can be sold in another Member State (the Member State of destination) without further restrictions. Thus, the host Member State must, in principle, accept the standards of the home Member State as being equivalent to its own. Yet, the assumption can be rebutted by the host Member State upon it successfully invoking a written or unwritten justification in

76 Case C-480/19, E, Veronsaajien oikeudenvaalontayksikkö, at para. 52. On the conditions for income distributed from Finnish distributing bodies being regarded as employment income – that is not directly dependent on the legal form – see sec. 2.


78 See, however, Opinion of AG Gerard Hogan in Case C-480/19, E, Veronsaajien oikeudenvaalontayksikkö, at paras. 69 et seq.


80 Compare, in essence, id.
defence of the need to uphold its own standards which must withstand a proportionality analysis.\textsuperscript{81} The idea behind mutual recognition lies in taking away a secondary regulatory burden in the host state provided that the host state’s interests are already fully safeguarded by the home Member State. For instance, when the exporting state has applied its rules on product safety, the importing state must not additionally apply its own rules unless it can justify doing so.\textsuperscript{82}

It is common ground among tax scholars that this principle is widely unsuitable for the field of direct tax law.\textsuperscript{83} The interest of one state to tax income cannot be safeguarded by another state simply because both want to tax.\textsuperscript{84} This was made clear by the court in Kerckhaert-Morres in which the court held that the parallel exercise of fiscal sovereignty is not prohibited by the Treaty on the Functioning of the European Union (TFEU).\textsuperscript{85} Yet, it would go too far to state that mutual recognition is completely irrelevant for direct taxation. Rather, this can well apply in the context of a number of procedural rules.\textsuperscript{86} In addition, the recognition of legal personality is an important matter of mutual recognition,\textsuperscript{87} and Reimer (2013) worked out further examples on, as he calls it, the ‘periphery’ of tax law that get in touch with this doctrine.\textsuperscript{88}

Although this is speculative, it seems conceivable that the court was, to some extent, guided in E by the logic of mutual recognition. While it has regarded the Luxembourg fund to be in a comparable situation as a Finnish fund in the light of the object and purpose of the Finnish rules this, actually, boils down to an equivalence test used for the purposes of mutual recognition. If this is indeed the case, it would be ground-breaking because the primary question would then become whether the foreign fund regime fulfils the goals of the domestic tax regime. This argument is certainly underdeveloped and in need of further research. Even if it is ultimately valid, this would by no means lead to the mutual recognition doctrine becoming generally relevant in a direct taxation context. It is and remains conceptually inappropriate for this field. Yet, there may be exceptions to this principle, and fund taxation could be an area where at least parts of the mutual recognition idea could apply. Member States could have to recognize equivalent foreign fund regimes. This means that they would have to treat them, or distributions by them, in the same manner as domestic funds unless they can justify why they can do it differently. To discourage the readers’ enthusiasm, it is worth mentioning that, in the subsequent UBS real estate case,\textsuperscript{89} the court would have had the opportunity to pursue this. It could have examined the foreign system and questioned whether it fulfils the goal of the Italian system, that is, to limit systemic risks on the real estate market. It did not do so. Rather, and subject to various foregoing verifications by the referring court, it regarded the rule as possibly being justified on the need to limit systemic risks on the real estate market, which is a new justification grounds accepted by the ECI.\textsuperscript{90}

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\textsuperscript{81} See, e.g. Case C-14/02, ATRAL, 8.5.2003, ECLI:EU:C:2003:265, paras. 62 et seq.
\textsuperscript{83} E.g. id.; Bammens, supra n. 16, at sec. 13.4.3.3.4. Wattel, supra n. 16, at sec. 3.2.7.1; Comprehensively Ekkehard Reimer, Taxation – an Area without Mutual Recognition?, in Allocating Taxing Powers within the European Union (Isabelle Richelle, Wolfgang Schön & Edoardo Traversa eds., Springer 2013). Interestingly, the proposal made by Genta, supra n. 18, at sec. 5.2.3.2., which appears to address outbound dividend cases seems to implicitly include elements of mutual recognition.
\textsuperscript{84} Id.
\textsuperscript{85} Case C-513/04, Kerckhaert and Morres, 14.11.2006, ECLI:EU:C:2006:713. paras. 20 et seq.
\textsuperscript{86} For instance, in Case C-250/95, Futura Participations and Singer v Administration des contributions, 15.5.1997, ECLI:EU:C:1997:239, 23 et seq., the court held that the host state (Luxembourg) was, in principle, required to recognize the accounting rules imposed by the origin state (France) unless there was a justification for refusing to do so. See, for an analysis, Bammens, supra n. 16, at 13.4.3.3.3. – 13.4.3.3.5.
\textsuperscript{87} See Reimer, supra n. 83, at p. 205, emphasizing that a Member State cannot deny legal personality of a foreign entity solely on the grounds that this entity has been established under the law of another Member State or taken its seat/place of effective management in it.
\textsuperscript{88} Reimer, supra n. 83, at ch. 3; and Joachim Englisch & Ekkehart Reimer, Diskriminierungs- und Beschränkungsverbote im direkten Steuerrecht, in Europäisches Steuerrecht paras. 7.173 et seq. (Harald Schaumburg & Joachim Englisch eds, Otto Schmidt 2020).
\textsuperscript{89} Case C-478/19, UBS Real Estate, 16.12.2021, ECLI:EU:C:2021:10159.
\textsuperscript{90} Id, at paras. 73.
3.3. Number three – missing considerations on the Lenz/Manninen comparability

As mentioned in section 1.3., the landmark cases concerning the comparability of inbound dividends with respect to the prevention of economic double taxation are Lenz and Manninen. In them, the ECJ developed the principle based on which a Member State mitigating economic double taxation for domestic dividends must also extend this treatment to foreign dividends since, in light of the object and purpose of such a rule, it does not make a difference whether a resident shareholder receives domestic dividends or foreign dividends.44

In the E case, this perspective, that is, comparability in the context of the Finnish rules on the mitigation of economic double taxation, was not discussed.45 A possible explanation may lie in its irrelevance. While the court established a difference in the treatment of the income distributed by the Luxembourg fund (taxation of up to 50%) vis-à-vis the treatment of the income of distributed by a Finnish fund (taxation at 30% or 34%) and the treatment of the income distributed by a Finnish public limited company (rules on the mitigation of double taxation apply),46,47 it established comparability with respect to the Finnish fund48 and thereupon could stop the analysis because it was clear that the Finnish rule is void. Stated differently, after the first comparability was established and in the lack of any justifications, there was no need to continue as the result of the Finnish rule being precluded by the free movement of capital was already certain.

Although this reasoning would be understandable, it still remains that there is a difference between the taxation of the income received by a fund and the income distributed by a company. It could immediately be stated that this does not matter and refer to the fact that, after the E case, there will be equal treatment between the distribution of a Finnish fund and the distribution of the Luxembourg SICAV. In addition, there is the fact that both income categories are applied with respect to both domestic and foreign distributing bodies. So, what is the problem?

A thought experiment may demonstrate the issue. Say the income from the fund is taxed at 34%. Assume now that the application of the rules on the mitigation of economic double taxation on the same distribution would lead to a more advantageous tax outcome. Is there a difference in treatment? Possibly yes. What would be at stake would be a distribution that is taxed at 34% and, if the entire situation was shifted across the border, the outcome would – in this assumption – be better tax treatment.49 Having regard to the fact that the Finnish Central Tax Committee equated the Luxembourg fund to a public limited company and keeping in mind the explanation of the Finnish Government that a public limited company engaged in the activities of an investment fund is taxed as an ordinary company and its distributions are subject to the rules on the mitigation of economic double taxation, this is well conceivable. Now the critical question arises: Are these situations comparable in the light of the object and purpose of the Finnish rules on the mitigation of economic double taxation?50

The first issue that needs to be resolved is whether the existence of one comparability prevents the existence of a second comparability. This seems unlikely. After all, the ECJ does not equate the foreign vehicle with a Finnish one – that will remain a task for the national courts. It does, however,

91 Case C-315/02, Anneliese Lenz v Finanzlandesdirektion für Tirol.
92 Case C-319/02, Manninen.
93 It may be mentioned that the first case was Case C-35/98, Verkooijen which, however, does not contain a comparability analysis. Rather, the court seems to simply have accepted comparability. Compare also Englisch, supra n. 33, at sec. 4.1.1.1.,
94 Case C-315/02, Anneliese Lenz v Finanzlandesdirektion für Tirol, at paras. 30 et seq. Notably, the court does not demand there to be, in fact, economic double taxation. It is thus not necessary that the profits out of which the dividends are paid are taxed. See further going Bammens, supra n. 16, at sec. 14.2.6.2.2.
95 See sec. 2.3.
96 Case C-480/19, E, Veronsaajien oikeudenvalvontayksikkö, at para. 32-43.
97 On the Finnish rules on the mitigation of double taxation, see sec. 2.
98 As explicitly held in Case C-480/19, E, Veronsaajien oikeudenvalvontayksikkö, at para. 55.
99 Otherwise stated, the assumption is that the complex Finnish rules on the mitigation of economic double taxation lead to a tax outcome that is better than being taxed at 34%.
100 Case C-480/19, E, Veronsaajien oikeudenvalvontayksikkö, at para. 40.
101 Which is notably not a question that was discussed in the id. See sec. 2.3.
102 Compare on this, for instance, Englisch & Reimer, supra n. 88, at para. 7.128 who stress that there may well be a need to engage in several comparability analyses.
consider comparability in the context of the object and purpose of the relevant rule – or rules – that have led to a difference in treatment to the detriment of the cross-border situation. Regarding the Lenz/Manninen principle mentioned above, it would not be absurd to contend that such comparability (also) exists. What is of interest is a Finnish natural person that would enjoy the application of the rules on the mitigation of double taxation concerning the income distributed from a domestic company. Shareholders receiving foreign dividends are, by default, regarded to be in the same situation since they face the same risk which means that the domestic system needs to be extended to the cross-border dividend. In effect, this would mean that the better treatment applies.

As mentioned, the court did not address these issues. However, if the above thought experiment is of any value, the question remains as to why not. What first comes to mind is the inexistant risk of economic double taxation in the underlying case. The fund is exempt from income tax which means that the income received from it does not expose the shareholder to the same risk of economic double taxation as the income received from a domestic company that is subject to income tax. Yet, this concurs with the court’s statement in Lenz – confirming the earlier Verkooijen case – according to which an advantage in the state of the distributing company cannot offset the unfavourable treatment in the other Member State. Transferring this logic to this particular case would provide the following reading: The advantage, here the tax exemption, of the fund cannot offset the disadvantage, i.e. the less favourable taxation vis-à-vis a distribution from a domestic company. In Manninen, however, the court held that the situations are incomparable if the source state has already eliminated economic double taxation. Based on this, it may be argued that there is no comparability due to Luxembourg having already eliminated the risk of economic double taxation via the exemption of the fund. At least to the author, this would appear to be a reasonable explanation. If it is true, it would have been welcomed if the court had been more explicit on it. After all, it would be a very important nuance to the Lenz/Manninen comparability if it must be tested whether the abstract risk for economic double taxation de facto materialized. It should not be forgotten that there is a subscription tax at the level of the SICAV. Although this is a different tax levied from different base, there is a case pending (Allianzgi) in which a similar tax may be considered in the assessment of a disadvantage based on AG Kokott’s proposal.

It must be mentioned that the overall relevance of a Lenz/Manninen comparability is an assumption itself. Instead of looking at comparability in the light of a potential risk to economic double taxation, it would also be conceivable to focus on the goals of the underlying system that mitigates economic double taxation. When a domestic system is at stake that simply provides an exemption or a general reduced rate for dividend income, considerations may be different as they are with systems, such as the Finnish one, that reserve the mitigation of economic double taxation only to such shareholders that are deemed to passively invest in the company and are thus regarded as actually earning capital income. Again, this is not discussed in the judgement, which is a pity.

4. Conclusion

The E case is the first that deals with the income received from an investment fund at the level of the shareholder in its residence state. The above analysis signifies a number of remarkable elements included in it – particularly the court’s taking account of the Luxembourg’s fund regime in the comparability analysis. Although this is speculation, it is conceivable that elements of the mutual recognition doctrine may have guided the court in this respect.

103 See the above references to C-315/02, Anneliese Lenz v Finanzlandesdirektion für Tirol and Case C-319/02, Manninen.
104 Case C-35/98, Verkooijen, at para. 61, including further references.
105 Case C-480/19, E. Veronsaajien oikeudenvaalvontayksikkö, at para. 51.
106 ECJ Manninen, at para. 34: ‘It is true that, in relation to such legislation, the situation of persons fully taxable in Finland might differ according to the place where they invested their capital. That would be the case in particular where the tax legislation of the Member State in which the investments were made already eliminated the risk of double taxation of company profits distributed in the form of dividends, by, for example, subjecting to corporation tax only such profits by the company concerned as were not distributed.’
107 The court may have regarded this to be hypothetical, in which case it would be consequential not to engage in this discussion. However, it is, in the author’s view at least, nonetheless a question of relevance.
108 Opinion of AG Juliane Kokott in Case C-545/19, Allianzgi-Fonds Aevn, paras. 43 et seq.
While the E case is the first of its kind, it is – by far – not the first case on the Finnish investment taxation system brought before the Court. Finland has already lost Aberdeen,¹⁰⁹ Commission v. Finland,¹¹⁰ and now it also lost the E case. Most likely, this will be no different with the pending case, A SCPI, Veronsaajien oikeudenvauntayksikkö (C-342/20), for which Finland is again the source state and has taxed the income received by a foreign statutory fund while it exempts that of domestic and foreign contractual funds.¹¹¹ Although this outcome is also proposed by AG Saugmandsgaard Øe, it is unlikely that the court will follow his reasoning as it includes an apparent misunderstanding of the Finnish fund taxation regime.¹¹² Rather, it may be expected that the case is resolved based on the question of whether the different legal form of the claimant, A SCPI, in light of the object and purpose of the national rules that grant an exemption to domestic and foreign contractual funds, render it to be in an incomparable situation to a Finnish contractual fund. Finnish literature is very sceptical on that, as is the author.¹¹³ If that ultimately holds true, there will (have to) be another ECJ-induced reform of the Finnish fund taxation regime.

¹⁰⁹ Case C-303/07, Aberdeen Property Fininvest Alpha.
¹¹⁰ Case C-342/10, Commission v. Finland.
¹¹¹ See on this paragraph 20a of the Finnish Income Tax Act which has been in force since 1.1.2020. For an overview, see, e.g. Saarinen & Pankakoski, supra n. 47, at ch. 2.
¹¹² See Opinion of AG Henrik Saugmandgaard Øe in Case C-342/20, A SCPI, Veronsaajien oikeudenvauntayksikkö (Exonération des fonds d'investissement contractuels), 6.10.2021, ECLI:EU:C:2021:823, who understands the goal of the Finnish system to ensure tax transparency, which is not the case.