The CJEU rules on the discriminatory taxation of proceeds paid to resident individuals by UCITS established in another EU Member State

On 29 April 2021, the Court of Justice of the European Union ("CJEU") issued its judgment in the case C-480/19, E. The case concerned an individual resident in Finland who received proceeds from a Luxembourg SICAV. Under Finnish tax legislation, proceeds distributed by Undertakings for Collective Investment in Transferable Securities ("UCITS") established in Finland are characterised as income from capital and are subject to income tax at favourable rates. E asked the Finnish central tax commission to rule that proceeds paid by the Luxembourg SICAV should be equally characterised as income from capital and subject to tax at the same favourable rates. However, the tax commission ruled that a SICAV is not comparable to a Finnish UCITS because, unlike a Finnish UCITS, which can only be in the legal form of a contractual investment fund, a SICAV has a corporate form. Therefore, proceeds paid by a SICAV should be taxed as dividends paid by a company and subject to tax at less favourable rates because the SICAV is exempt from taxation in Luxembourg. The taxpayer appealed the decision of the commission before the Finnish Supreme Administrative Court, which referred the case to the CJEU.

First, the CJEU finds that Finnish tax legislation applies different tax regimes to (a) proceeds that Finnish individuals receive from a Finnish UCITS and (b) proceeds that the same individuals receive from a Luxembourg SICAV being the first (letter (a)) taxed at a lower rate.

Second, the CJEU rules on the comparability between a Luxembourg SICAV and a Finnish UCITS. According to the CJEU, the SICAV and the Finnish UCITS cannot be considered comparable entities just because they are both compliant with Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to UCITS (para. 47). Indeed, this Directive does not provide rules on the taxation of UCITS.

The CJEU states that, based on its case law, the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national tax provisions at issue, as well as their purpose and contents (para. 49). Based on the information provided by the Finnish government and subject to a final review of the Finnish national court, the CJEU finds that (i) the objective of Finnish legislation concerning the taxation of Finnish UCITS is to ensure that the proceeds of the UCITS be taxed only at the level of the investors (para. 50), and, taking into account this objective, (ii) a Luxembourg SICAV and a Finnish UCITS are comparable as they are both exempt from income tax in their State of establishment and their proceeds are subject to tax only at the level of their investors (para. 51).

Consequently, the CJEU concludes that the different tax treatments applicable to proceeds paid by a Luxembourg SICAV and to proceeds paid by a Finnish

UCITS determine a discrimination in breach of the free movement of capital (para. 58).

Under Italian law, the tax regime applicable to resident individuals who invest in UCITS established in other EU Member States is substantially the same as the treatment for investments in Italian UCITS, i.e. a flat 26% tax on distributions. The same is true for investments in Italian alternative investment funds (AIF) and AIF that are set up in EU or EEA States and are managed by licensed alternative investment managers pursuant to Directive 2011/61/EU. However, the tax regime is less favourable if Italian individuals invest in other types of foreign funds, including non-EU funds. More specifically, in this case, regardless of whether the non-EU funds may be comparable to Italian (UCITS or AIF), the income distributed to Italian individuals is subject to personal income tax at the ordinary progressive tax rates, which may go up to around 46% (considering also local surtaxes). The differential treatment for non-EU funds may be considered at variance with the EU free movement of capital, and this recent decision of the Court of Justice may – to a certain extent – reinforce such conclusion because the Court seems to imply that the comparability of a foreign fund to a domestic fund from a tax perspective matters more than the simple regulatory aspect that the fund falls within the scope of a non-tax directive (such as the UCITS or the AIFM directive).

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