Provisional text

JUDGMENT OF THE COURT (Second Chamber)

7 April 2022 (*)

(Reference for a preliminary ruling – Taxation – Articles 63 and 65 TFEU – Free movement of capital – Restrictions – Tax on the income of legal persons – Exemption for investment funds – Conditions for exemption – Condition related to the fund being in contractual form)

In Case C?342/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland), made by decision of 9 July 2020, received at the Court on 23 July 2020, in the proceedings

A SCPI

interested party:

Veronsaajien oikeudenvalvontayksikkö,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Finnish Government, by H. Leppo, A. Laine and S. Hartikainen, acting as Agents,

– the European Commission, by W. Roels and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49, 63 and 65 TFEU.

2 The request has been made in proceedings brought by A SCPI, a company incorporated under French law, concerning a preliminary decision by the Verohallinto (tax authority, Finland) of 13 June 2019 on the taxation of rental income and the profits from the disposal of immovable property situated in Finland and of shares in companies owning immovable property situated in

Finland which were received by A in that Member State during the 2019 and 2020 tax years (‘the decision of 13 June 2019’).

Legal context

European Union law

3 Article 1(1) to (3) 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) provides:

‘1. This Directive applies to undertakings for collective investment in transferable securities (UCITS) established within the territories of the Member States.

2. For the purposes of this Directive, and subject to Article 3, UCITS means an undertaking:

(a) with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of capital raised from the public and which operate on the principle of risk-spreading; and

(b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings’ assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Member States may allow UCITS to consist of several investment compartments.

3. The undertakings referred to in paragraph 2 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).

…’

4 Article 2(1) and (2) of 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) states:

‘1. Subject to paragraph 3 of this Article and to Article 3, this Directive shall apply to:

(a) EU [alternative investment fund managers (AIFMs)] which manage one or more [alternative investment funds (AIFs)] irrespective of whether such AIFs are EU AIFs or non-EU AIFs;

(b) non-EU AIFMs which manage one or more EU AIFs; and

(c) non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs.

2. For the purposes of paragraph 1, the following shall be of no significance:

(a) whether the AIF belongs to the open-ended or closed-ended type;

(b) whether the AIF is constituted under the law of contract, under trust law, under statute, or has any other legal form;

(c) the legal structure of the AIFM.'

5 Under Article 4(1)(a) of that directive:

'… the following definitions shall apply:

(a) "AIFs" means collective investment undertakings, including investment compartments thereof, which:

(i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and

(ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC'.

Finnish law

6 According to point 4 of Paragraph 3 of the tuloverolaki (1535/1992) (Law on income tax (1535/1992)) of 30 December 1992, as amended by Law 528/2019 of 12 April 2019 ('the Law on income tax'), the term 'undertaking' is to mean, inter alia, a limited liability company, an investment fund and a special investment fund.

7 According to point 2 of the first subparagraph of Paragraph 9 of the Law on income tax, natural persons who were not resident in Finland during the tax year and foreign undertakings are required to pay tax on income received in Finland.

8 Paragraph 10 of that law states:

'Income received in Finland includes:

(1) income from immovable property in Finland or from premises owned through shares in a Finnish limited liability housing company or other Finnish limited liability company or through affiliation to a Finnish housing or other cooperative;

…

(6) dividends, surpluses derived from a cooperative and other comparable income from a Finnish limited liability company, cooperative or other undertaking, and also from a share in the income of a Finnish group;

…

(10) profits from the disposal of immovable property located in Finland or from the disposal of shares or units of a limited liability housing company or of another Finnish limited liability company or cooperative, over 50% of the total assets of which comprise one or more properties in Finland.'

9 Paragraph 20a of that law, applicable from 1 January 2020, provides in its first, second, fourth and seventh subparagraphs:

'Investment funds within the meaning of point 2 of the first subparagraph of Paragraph 2 of Chapter 1 of the sijoitusrahastolaki (213/2019) (Law on investment funds (213/2019)) and comparable foreign open-ended investment funds constituted by contract and with a minimum of

30 unit holders are exempt from income tax.

The provisions of the first subparagraph governing the exemption for investment funds also apply to special investment funds within the meaning of the second subparagraph of Paragraph 1 of Chapter 2 of the vaihtoehtorahastojen hoitajista annettu laki (162/2014) (Law on alternative fund managers (162/2014)) and to comparable foreign special investment funds, constituted by contract, provided that they are open-ended funds and have a minimum of 30 unit holders.

…

The exemption for a special investment fund as provided for in the second subparagraph of Paragraph 1 of Chapter 2 of the Law on alternative fund managers or for a comparable foreign special investment fund constituted by contract which invests its funds primarily in immovable property or property investment securities in the manner referred to in Paragraph 4 of Chapter 16 of the aforementioned Law is to be conditional on that fund distributing at least three quarters of the profit for the financial year to its unit holders on an annual basis, without taking unrealised capital gains into account.

…

Where an investment fund or a special investment fund consists of two or more investment compartments, these shall be subject to the provisions relating to investment funds or special investment funds.'

The dispute in the main proceedings and the question referred for a preliminary ruling

10 A is a *société civile de placement immobilier à capital variable* (variable-capital property investment company) governed by French law which invests in immovable properties in the Euro area which are let to undertakings. As an alternative investment fund within the meaning of Article 4(1)(a) of Directive 2011/61, A is subject to the supervision of the Autorité des marchés financiers (Financial Markets Authority, France).

11 A Asset Management SAS, a *société par actions simplifiée* (simplified joint stock company) governed by French law, is responsible for managing A and takes all decisions in relation to it. Both companies have their registered office in France and have no place of business in Finland.

12 Investors who have subscribed to units in A receive returns on an annual basis, corresponding to the net rental income and other net financial income received by A. The distribution of profits is decided upon by that company's general meeting.

13 In France, A is a transparent undertaking for tax purposes that is not subject to income tax. It is the investors who are liable for income tax in respect of the income gained from the return on A's units and from the disposal or redemption of those units.

14 In June 2019, A had planned to sign a contract for the purchase of shares in two mutual limited liability property companies established in Finland which are owners of commercial buildings situated in that Member State, which A intended to let for at least five years. A also intended to carry out other property investments of that kind or to acquire properties directly in Finland.

15 In order to ascertain whether the income and profits derived from those investments would be taxable in Finland, A applied to the tax authority for a binding preliminary decision relating to the 2019 and 2020 tax years.

16 By decision of 13 June 2019, the tax authority took the view, as regards the 2019 tax year and under the tax provisions in force during that tax year, that A could, because of its essential characteristics, be regarded as being in a situation comparable to that of an investment fund within the meaning of point 4 of Paragraph 3 of the Law on income tax. The tax authority consequently found that the income received by A in Finland from the letting or disposal of immovable property situated in that Member State and from the disposal of shares in limited liability companies owning property situated in that Member State were exempt from income tax.

17 By contrast, as regards the 2020 tax year, the tax authority took the view, on the basis of the amendments made to the Law on income tax that were applicable from 1 January 2020, that A, as a variable-capital company, had to be treated as equivalent to a limited liability company governed by Finnish law rather than as equivalent to an investment fund constituted under the law of contract, as referred to in Paragraph 20a of that law.

18 Consequently, the tax authority found that the income received by A in Finland during the 2020 tax year from the letting or disposal of immovable property located in that Member State and from the disposal of shares in limited liability companies owning property in that Member State were taxable in Finland under Paragraph 10, points 1, 6, 10, and the first subparagraph of Paragraph 20a of the Law on income tax.

19 A brought an action before the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland), the referring court, against the decision of 13 June 2019 in so far as it refused to recognise the exemption in respect of the property income derived from Finland for the 2020 tax year. In the context of that action, A submits that Paragraph 20a of the Law on income tax is contrary to EU law and argues that, irrespective of its being constituted under statute, as laid down by the French legislation on investment funds, its functional characteristics are comparable to those of a Finnish investment fund that is exempt from income tax.

20 The Veronsaajien oikeudenvalvontayksikkö (Tax Recipients Legal Services Unit, Finland) argues that, in the absence of harmonisation at EU level of the forms which collective investment undertakings may take and the rules relating to taxation of their income, national measures governing the taxation of collective investment undertakings and the forms, methods of operation or activities of such undertakings, may vary from one Member State to another. A, it submits, does not fulfil the conditions for entitlement to the income tax exemption laid down in the fourth subparagraph of Paragraph 20a of the Law on income tax, which confers that exemption solely on funds constituted by contract.

21 The referring court notes that it is apparent from the decision of 13 June 2019 that, as a result of the entry into force of Paragraph 20a of the Law on income tax, A can no longer be treated as equivalent to a Finnish investment fund exempt from income tax, but is now taxable in respect of its property income received in Finland.

22 The referring court states that it is clear from the drafting history related to the adoption of Paragraph 20a of the Law on income tax that the intention of the national legislature was, inter alia, to identify precisely those cases in which a foreign fund should be treated in the same way as an exempt Finnish fund, whether that concerns an investment fund or a special investment fund, in order to improve the foreseeability of taxation, increase legal certainty and remove administrative burdens.

23 The national legislature also intended to ensure undistorted competition by placing Finnish and foreign funds on an equal footing. In the absence of a definition of the concept of investment fund, the general nature of the national tax provisions has, in the past, helped to facilitate the

treatment of foreign funds in the same way as Finnish investment funds, whereas those latter funds would not necessarily have received comparable treatment abroad, or would even have been subject to more restrictive legislation.

24 According to that court, the amendments adopted by the legislature do not seek to call into question the rule that tax treatment in Finland depends on the legal form of the investment instrument, but aim to make tax legislation more precise as regards the situation of funds which are constituted under the law of contract, whether resident or non-resident, without thereby extending the application of the exemption to other types of undertakings for collective investment in transferable securities. That court also states that, according to the Finnish legislation governing investment funds, such funds may be constituted only by contract.

25 The referring court therefore finds that it must answer the question whether A, for the purposes of the 2020 tax year, must be treated in the same way as Finnish investment funds exempt from tax on income received in Finland, or whether it must pay withholding tax in respect of the rental income and profits from its property activities in that Member State.

26 In particular, that court is uncertain whether Articles 49, 63 and 65 TFEU preclude Paragraph 20a of the Law on income tax, under which only open foreign investment funds constituted by contract are treated in the same way as Finnish investment funds that are exempt from income tax, with the result that, for example, investment funds created in the form of a company, such as A, can no longer, since the entry into force of Paragraph 20a of the Law on income tax, be treated in the same way as exempt Finnish investment funds.

27 In those circumstances, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are Articles 49, 63 and 65 TFEU to be interpreted as meaning that they preclude national legislation under which only foreign open-ended investment funds constituted by contract can be regarded as equivalent to Finnish investment funds exempt from income tax, meaning that foreign investment funds established in a legal form other than by contract are subject to withholding tax in Finland, even though there are otherwise no significant objective differences between their situation and that of Finnish investment funds?’

Consideration of the question referred

Preliminary observations

28 It must be noted, first of all, that the dispute in the main proceedings concerns the question whether it is possible for the applicant in the main proceedings, which is an alternative investment fund within the meaning of Directive 2011/61, constituted in France in the form of a company that is not subject to income tax and benefiting in that Member State from the system of tax transparency, to obtain a tax exemption in Finland in respect of the income from rental returns and profits from the disposal of immovable property and of shares in limited liability property companies, received in that Member State.

29 According to the decision of 13 June 2019, that income, which was exempt from tax during the 2019 tax year, became taxable in respect of the 2020 tax year by reason of the entry into force of Paragraph 20a of the Law on income tax, owing, in particular, to the fact that the applicant in the main proceedings is constituted not under the law of contract but under statute.

30 Next, it should be noted that, as explained by the Finnish Government, the concept of

‘investment funds’, within the meaning of the Law on investment funds (213/2019), refers only to a UCITS within the meaning of Directive 2009/65 which is constituted in accordance with contract law. The concept of ‘special investment fund’ within the meaning of the Law on alternative fund managers (162/2014) designates one of the legal forms of the alternative investment funds covered by Directive 2011/61 and refers also solely to funds constituted in accordance with contract law. In addition, an alternative investment fund, within the meaning of Directive 2011/61, may also be established in Finland in accordance with statute and carry out investments in property, without, however, being entitled to the exemption provided for in Paragraph 20a of the Law on income tax.

31 Lastly, in accordance with the fourth subparagraph of Paragraph 20a of the Law on income tax, an exemption from income tax is granted to a special investment fund, within the meaning of the Law on alternative fund managers (162/2014), or to a comparable foreign special investment fund created by contract, which invests its assets primarily in immovable property or in property investment instruments, on condition that that fund makes an annual distribution of at least three quarters of the profits for the financial year to its unit holders, without taking unrealised capital gains into account.

32 Without taking a view on A’s compliance with the condition relating to the minimum annual distribution of profits, the referring court observes that that company’s situation is comparable to that of a resident investment fund, with the exception of its being constituted in accordance with statute. The question referred for a preliminary ruling relates exclusively to that latter element.

33 It must therefore be held that, by its question, the referring court asks, in essence, whether Articles 49, 63 and 65 TFEU must be interpreted as precluding national legislation which, by limiting entitlement to the exemption of rental income and of profits from the disposal of immovable property or shares in companies owning immovable property solely to investment funds constituted in accordance with contract law, excludes from entitlement to that exemption a non-resident alternative investment fund constituted in accordance with statute, even though that fund, which benefits from a system of tax transparency in the Member State in which it is established, is not subject to income tax in that latter Member State.

The applicable freedom of movement

34 Since the question submitted for a preliminary ruling refers to the provisions of the FEU Treaty relating both to freedom of establishment and to the free movement of capital, it is necessary to determine which freedom is applicable in the main proceedings (judgment of 6 March 2018, *SEGRO and Horváth*, C?52/16 and C?113/16, EU:C:2018:157, paragraph 52 and the case-law cited).

35 In that regard, it is clear from settled case-law that, in order to determine whether national legislation comes within the scope of one or other of the fundamental freedoms guaranteed by the FEU Treaty, the purpose of the legislation concerned must be taken into consideration (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 28 and the case-law cited).

36 Where it is not clear from the subject matter of that legislation whether it falls predominantly under Article 49 TFEU or Article 63 TFEU, the Court takes account of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates comes within the scope of one or other of those provisions (judgment of 11 June 2020, *KOB*, C?206/19, EU:C:2020:463, paragraph 25 and the case-law cited).

37 In addition, where a national measure relates to the freedom of establishment and the free

movement of capital at the same time, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case in the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it (see, by analogy, judgment of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 19 and the case-law cited).

38 In the present case, the national legislation at issue in the main proceedings concerns the exemption granted to investment funds constituted in accordance with contract law which invest mainly in immovable property or in property investment instruments.

39 In the first place, as regards property investments, in accordance with settled case-law, national measures which govern transactions by which non-residents make such investments on the territory of a Member State may come within the scope of both Article 49 TFEU, relating to freedom of establishment, and Article 63 TFEU, relating to the free movement of capital (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 29).

40 First, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents; that nomenclature still has the same indicative value for the purposes of defining the notion of capital movements (judgment of 6 March 2018, *SEGRO and Horváth*, C?52/16 and C?113/16, EU:C:2018:157, paragraph 56 and the case-law cited).

41 Second, the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment, generates capital movements when it is exercised (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 30 and the case-law cited).

42 That being said, in order for the provisions relating to freedom of establishment to apply, it is generally necessary to have secured a permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed (judgment of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C?386/04, EU:C:2006:568, paragraph 19).

43 In the present case, however, it is apparent from the request for a preliminary ruling that A has neither business premises nor any other establishment in Finland from which it manages, even if only in part, its real estate investments in Finland or takes decisions concerning those investments.

44 In the second place, as regards the acquisition of shareholdings in capital companies, it follows from the Court’s settled case-law that the tax treatment of dividends paid by such companies may come not only within the scope of Article 63 TFEU but also within that of Article 49 TFEU (see, to that effect, judgment of 20 September 2018, *EV*, C?685/16, EU:C:2018:743, paragraph 33 and the case-law cited).

45 In that respect, it has previously been held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company’s decisions and to determine its activities comes within the scope of Article 49 TFEU on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in the light of the free movement of capital (judgment of 13 March 2014, *Bouanich*, C?375/12, EU:C:2014:138,

paragraph 28 and the case-law cited).

46 As observed in paragraph 38 above, the legislation at issue in the main proceedings concerns the tax treatment of income from real estate investments carried out by collective investment undertakings.

47 Although it does not exclude from its scope situations coming within the scope of the freedom of establishment, that legislation covers investments carried out with a view to making a financial investment, without any intention to influence the management and control of the undertaking. It is therefore liable predominantly to affect the free movement of capital. Any restrictions on freedom of establishment resulting from that legislation are an inevitable consequence of the restriction of the free movement of capital and do not, therefore, justify an independent examination of that legislation in the light of Article 49 TFEU (see, to that effect, judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 33 and the case-law cited).

48 Regard being had to the foregoing, the national measure at issue in the main proceedings should be examined exclusively in the light of Articles 63 and 65 TFEU.

Whether there is a restriction on the free movement of capital

49 It follows from settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that 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 (judgments of 30 April 2020, *Société Générale*, C?565/18, EU:C:2020:318, paragraph 22 and the case-law cited, and of 16 December 2021, *UBS Real Estate* , C?478/19 and C?479/19, EU:C:2021:1015, paragraph 36 and the case-law cited).

50 Specifically, the less favourable treatment by a Member State of income paid to non-resident collective investment undertakings, compared with the treatment of income paid to resident collective investment undertakings, is liable to deter undertakings established in a State other than that Member State from pursuing investments in that same Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (see, to that effect, judgment of 13 November 2019, *College Pension Plan of British Columbia*, C?641/17, EU:C:2019:960, paragraph 49 and the case-law cited).

51 The exemption of income received by a resident collective investment undertaking, whereas income received by a non-resident collective investment undertaking is subject to a definitive withholding tax, constitutes such less favourable treatment (see, to that effect, judgment of 13 November 2019, *College Pension Plan of British Columbia*, C?641/17, EU:C:2019:960, paragraph 50).

52 In the present case, the national legislation at issue introduces a difference in treatment that is based not on the State of residence of the collective investment undertaking, but on the legal form taken by that undertaking. Only collective investment undertakings constituted under the law of contract may be eligible for the tax exemption under the conditions laid down by that legislation.

53 According to the wording of the fourth subparagraph of Paragraph 20a of the Law on income tax, the condition relating to the fund being formed in accordance with contract appears to relate solely to foreign funds. However, as the referring court and the Finnish Government observe, investment funds and special investment funds may be constituted, in conformity with Finnish law, solely in contractual form, with the result that the exemption laid down by that provision is limited to collective investment undertakings constituted in accordance with contract law, irrespective of the

State of residence of those undertakings.

54 In that regard, it must be stated that national legislation which applies without distinction to resident and non-resident operators may constitute a restriction on the free movement of capital. It follows from the Court's case-law that even a differentiation based on objective criteria may de facto place cross-border situations at a disadvantage (see judgments of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 55 and the case-law cited, and of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 39).

55 That is, inter alia, the case where national legislation which applies without distinction to resident and non-resident operators reserves a tax advantage in situations in which an operator complies with conditions or obligations which are, by their nature or in fact, specific to the national market, in such a way that only operators present on the national market are capable of complying with those conditions or obligations, and non-resident operators which are comparable do not generally comply with those conditions or obligations (judgments of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 56 and the case-law cited, and of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 40).

56 As observed in paragraph 53 above, investment funds and special investment funds may be established in Finland only in contractual form.

57 It is true that, since EU law has not been harmonised in this regard, the Member States are free to determine the legal form according to which funds may be created within their territory.

58 Member States are also free to provide for, for the purposes of encouraging the use of collective investment undertakings, a specific tax regime applicable to those undertakings and to the dividends and other income received by them, and to define the material and formal conditions which must be respected in order to benefit from such a regime (see, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 43 and the case-law cited).

59 Furthermore, the free movement of capital cannot be understood as meaning that a Member State is required to adjust its tax rules on the basis of those of another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a taxpayer as to investment in another Member State may be to the taxpayer's advantage or not, according to circumstances (judgments of 7 November 2013, *K*, C?322/11, EU:C:2013:716, paragraph 80 and the case-law cited, and of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 72).

60 However, as the Advocate General observed, in essence, in points 53 and 54 of his Opinion, where a Member State provides for a tax advantage in favour of certain collective investment undertakings, the conditions under which that advantage is granted must not constitute a restriction on the free movement of capital (see, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka*, C?156/17, EU:C:2020:51, paragraph 46).

61 Regard being had to the lack of harmonisation referred to in paragraph 57 above, the free movement of capital would be rendered ineffective if a non-resident collective investment undertaking, constituted according to the legal form authorised or required by the legislation of the Member State in which it is established and which operates in accordance with that legislation, were to be deprived of a tax advantage in another Member State in which it invests solely on the ground that its legal form does not correspond to the legal form required for collective investment undertakings in that latter Member State.

62 That assessment is not called into question by the fact that, as explained by the Finnish Government, the creation in Finland of alternative investment funds within the meaning of Directive 2011/61 in accordance with statute is permitted and that those funds are authorised to carry out investments in immovable property, while, however, not being entitled to the exemption laid down by Paragraph 20a of the Law on income tax.

63 Thus, collective investment undertakings established in Finland may adopt the legal form that enables them to obtain the exemption, whereas non-resident collective investment undertakings are subject to the conditions laid down by the legislation of the Member State in which they are established.

64 Consequently, although the condition relating to contractual form does not constitute a condition which only resident collective investment undertakings are capable of fulfilling, the fact remains that that condition is liable to place those undertakings at an advantage over collective investment undertakings constituted under statute in accordance with the legislation of the Member State in which they are established.

65 It follows that such legislation is liable to deter non-resident collective investment undertakings from investing in immovable property in Finland and therefore constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU.

66 That being said, pursuant to Article 65(1)(a) TFEU, Article 63 TFEU is, nonetheless, to 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.

67 It is apparent from settled case-law that Article 65(1)(a) TFEU, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. That provision cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C?135/17, EU:C:2019:136, paragraph 60 and the case-law cited).

68 The differences in treatment permitted by Article 65(1)(a) TFEU must not constitute, according to Article 65(3) TFEU, a means of arbitrary discrimination or a disguised restriction. The Court has held, consequently, that such differences in treatment are permitted only when they concern situations which are not objectively comparable or, otherwise, when they are justified by an overriding reason in the public interest (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C?135/17, EU:C:2019:136, paragraph 61 and the case-law cited).

Whether situations are objectively comparable

69 It is apparent from the Court’s case-law that the comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue as well as to the purpose and content of those provisions (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 47 and the case-law cited).

70 Moreover, only the relevant distinguishing criteria laid down by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that

legislation reflects an objective difference in situations (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 48 and the case-law cited).

71 In the present case, the Finnish Government states, first, that the purpose of the exemption provided for in Paragraph 20a of the Law on income tax is to avoid the double taxation of income from investments and to endeavour to treat investments made through funds as direct investments for tax purposes. In accordance with that provision, the treatment for tax purposes is determined by the legal form of the undertaking and depends on whether tax is to be levied both at the level of the undertaking and at that of its owner, as in the case of limited liability companies, or whether taxation takes place only at the level of the owner, as in the case of limited partnerships, investment funds and special investment funds.

72 Second, that government submits that a collective investment undertaking constituted in accordance with statute and a special investment fund governed by Finnish law constituted in accordance with contract law are not in a comparable situation, given the objective of protecting investors in the event of funds becoming insolvent that is pursued by the Law on investment funds (213/2019) and by the Law on alternative fund managers (162/2014).

73 In that regard, it should be noted, in the first place, that, as regards the objectives of avoiding the double taxation of investment income and of treating indirect investments, carried out through funds, in the same way as direct investments for tax purposes, the fact that a collective investment undertaking has been formed in accordance with statute does not necessarily place it in a different situation to that of a collective investment undertaking formed in accordance with contract law.

74 Such objectives may also be achieved where a collective investment undertaking has been constituted under statute but benefits, in the Member State in which it is established, from an exemption from income tax or from a system of tax transparency.

75 That is confirmed, moreover, by the fact, referred to by the Finnish Government, that, under the national legislation, an alternative investment fund constituted in legal form in accordance with statute entails the taxation of income both at the level of that fund and at that of investors, whereas, for a fund constituted under the law of contract, taxation occurs solely at the level of the investors.

76 In the second place, as regards the arguments put forward by the Finnish Government relating to there being greater protection for investors where an investment fund is formed in accordance with contract law, it must be observed that, although those considerations show the reasons which may have led the national legislature to require resident investment funds to be constituted in that form, such considerations, with respect to the exemption from income tax granted by Paragraph 20a of the Law on income tax, do not enable an objective distinction to be made between collective investment undertakings constituted under the law of contract and those constituted in a different legal form.

77 It must therefore be held, with regard to the national provisions that have in view an exemption which is intended to treat, for tax purposes, investments through funds in the same way as direct investments, that a non-resident collective investment undertaking constituted under statute, which benefits from an exemption in respect of its income or from a system of tax transparency in its State of residence, is in a comparable situation to a resident investment fund formed in accordance with contract law.

78 In those circumstances, it is necessary to examine whether the restriction established by the legislation at issue in the main proceedings may be justified by overriding reasons in the public

interest.

Whether there is an overriding reason in the public interest

79 It should be recalled that, according to the Court's settled case-law, a restriction on the free movement of capital is permissible if it is justified by overriding reasons in the public interest, if it is suitable for securing the attainment of the objective which it pursues and if it does not go beyond what is necessary in order to attain that objective (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 60 and the case-law cited).

80 In the present case, it follows from the information provided by the referring court concerning the drafting history of Paragraph 20a of the Law on income tax that that provision was adopted in order to improve the foreseeability of taxation, to increase legal certainty, to eliminate administrative burdens and to ensure undistorted competition between resident and non-resident investment funds.

81 The Finnish Government submits that the restriction of the exemption laid down by Paragraph 20a of the Law on income tax to special investment funds constituted under the law of contract is justified by overriding reasons in the public interest that are related to ensuring the effectiveness of tax supervision, the collection of taxes and the need to ensure the coherence of the tax system.

82 The Finnish Government states that that provision derogates, under precise and non-discriminatory conditions, from the general rule for the taxation of special investment funds, thus making it possible to ensure effective tax supervision and the recovery of taxes.

83 As regards the coherence of the tax system, the Finnish Government submits that the exemption laid down by that provision concerns special investment funds within the meaning of Finnish law and all foreign funds treated as such. A fund established in the form of a company is, it submits, treated in the same way as a Finnish limited liability company, which is also subject to income tax on investment activity.

84 In that regard, it should be recalled, in the first place, that, in accordance with the principle of legal certainty, in areas covered by EU law, the Member States' legal rules must be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed (judgment of 15 April 2021, *Finanzamt für Körperschaften Berlin*, C?868/19, not published, EU:C:2021:285, paragraph 50 and the case-law cited).

85 However, as the Advocate General observed in points 97 and 99 of his Opinion, the objective of legal certainty cannot justify a restriction on the freedoms of movement. If that were the case, the Member States would be free to impose such restrictions as long as they are worded unambiguously.

86 In the second place, as regards the objective of ensuring undistorted competition between resident funds and those that are non-resident, that would lead to accepting that the unfavourable tax treatment of collective investment undertakings constituted under statute is justified by the fact that those undertakings are treated more favourably in other Member States than Finnish investment funds constituted under the law of contract.

87 It is, however, clear from the Court's settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist (judgment of 9 October 2014, *van Caster*, C?326/12,

EU:C:2014:2269, paragraph 31 and the case-law cited).

88 In the third place, as regards the need, referred to by the Finnish Government, to guarantee the effectiveness of fiscal supervision, such a need constitutes an overriding reason in the public interest capable of justifying a restriction on the free movement of capital (see, to that effect, judgments of 9 October 2014, *van Caster*, C?326/12, EU:C:2014:2269, paragraph 46, and of 22 November 2018, *Huijbrechts*, C?679/17, EU:C:2018:940, paragraph 36). Similarly, the need to ensure the effective collection of tax is a legitimate objective capable of justifying a restriction on fundamental freedoms (judgment of 22 November 2018, *Sofina and Others*, C?575/17, EU:C:2018:943, paragraph 67).

89 However, in order to guarantee the effectiveness of fiscal supervision, the tax authority may require the taxpayer to provide the proof that it considers necessary in order to determine whether the conditions for according the tax advantage in question, provided for in the legislation at issue, have been met and, consequently, whether to grant the advantage requested (see, by analogy, judgment of 27 January 2009, *Persche*, C?318/07, EU:C:2009:33, paragraph 54), as well as for ensuring the effective collection of tax.

90 As regards the administrative burden on the tax authorities of the Member States of taxation that would result from taxpayers being allowed the opportunity to provide the information to demonstrate that those conditions have been met, it should be noted that administrative disadvantages are not alone sufficient to justify a barrier to the free movement of capital (see, to that effect, judgment of 9 October 2014, *van Caster*, C?326/12, EU:C:2014:2269, paragraph 56 and the case-law cited).

91 In the fourth place, the Court has previously held that the need to preserve the coherence of a tax system may justify legislation restricting fundamental freedoms (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 65 and the case-law cited).

92 However, for an argument based on such a justification to succeed, according to settled case-law, a direct link has to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, the direct nature of that link falling to be examined in the light of the objective pursued by the legislation in question (judgment of 16 December 2021, *UBS Real Estate*, C?478/19 and C?479/19, EU:C:2021:1015, paragraph 66 and the case-law cited).

93 In the present case, the Finnish Government has not shown that the tax advantage granted to investment funds constituted under the law of contract was offset by a particular tax levy, which would thus justify excluding non-resident collective investment undertakings constituted under statute from entitlement to that advantage.

94 In the light of all of the foregoing, the answer to the question referred for a preliminary ruling is that Articles 63 and 65 TFEU must be interpreted as precluding national legislation which, by limiting entitlement to the exemption of rental income and of profits from the disposal of immovable property or shares in companies owning immovable property solely to investment funds constituted in accordance with contract law, excludes from entitlement to that exemption a non-resident alternative investment fund constituted in accordance with statute, even though that fund, which benefits from a system of tax transparency in the Member State in which it is established, is not subject to income tax in that latter Member State.

Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 63 and 65 TFEU must be interpreted as precluding national legislation which, by limiting entitlement to the exemption of rental income and of profits from the disposal of immovable property or shares in companies owning immovable property solely to investment funds constituted in accordance with contract law, excludes from entitlement to that exemption a non-resident alternative investment fund constituted in accordance with statute, even though that fund, which benefits from a system of tax transparency in the Member State in which it is established, is not subject to income tax in that latter Member State.

[Signatures]

* Language of the case: Finnish.