

Case C-480/19**Request for a preliminary ruling****Date lodged:**

24 June 2019

Referring court:

Korkein hallinto-oikeus (Finland)

Date of the decision to refer:

19 June 2019

Appellant:

E

**INTERLOCUTORY ORDER OF THE KORKEIN
HALLINTO-OIKEUS**Date of the order
19 June 2019

...

Subject matter Request for a preliminary ruling from the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU)

Appellant E

Contested decision

Keskusverolautakunta 10 November 2017 No 58/2017

Subject matter of the proceedings

1. Pursuant to the Laki Verohallinnosta (503/2010, Law on Tax Administration No 503/2010) and the Laki verotusmenettelystä (1558/1995, Law on the Taxation Procedure No 1558/1995), the Keskusverolautakunta (Central Tax Committee) may issue binding preliminary decisions in respect of taxation upon application by a taxable person. In the application for the preliminary decision, the applicant provides the information required for the ruling on the case.
2. A legally valid preliminary decision of the Keskusverolautakunta is to be considered as binding at the request of the applicant regarding the taxation in respect of which it was issued. The order of the Keskusverolautakunta regarding

the preliminary decision may be appealed to the Korkein hallinto-oikeus (Supreme Administrative Court). Entitled to appeal are the applicant and the Veronsaajien oikeudenvallontayksikkö (Office for the protection of the rights of tax beneficiaries), which is to be granted the opportunity to respond to an appeal lodged by the applicant.

3. In the pending proceedings, E requested a preliminary decision from the Keskusverolautakunta as set out below. E lodged an appeal against the preliminary decision of the Keskusverolautakunta at the Korkein hallinto-oikeus.
4. The case involves the interpretation of Articles 63 and 65 of the Treaty on the Functioning of the European Union (TFEU). **[Or. 2]**

Application for a preliminary decision before the Keskusverolautakunta and the ruling thereof

Application to the Keskusverolautakunta for a request for a preliminary decision

5. E was a natural person with unrestricted tax liability in Finland who had invested in the S sub-fund of a Luxembourg SICAV fund. E's investments related to the unit type D of the S sub-fund, which was a so-called distributing unit, with which the income accrued was distributed annually to the investors.
6. The SICAV fund was an undertaking for collective investment in transferable securities, which was subject to supervision by the Luxembourg financial supervisory authority (Commission de Surveillance du Secteur Financier) and complied with the Investment Fund Directive (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 Directive). Pursuant to Paragraph 2(1)(10) of the Sijoitusrahastolaki (Investment Fund Law), an 'undertaking for collective investment in transferable securities' meant an undertaking which, in an EEA State other than Finland, had obtained an authorisation, whose activity related to collective investment (in practice an investment fund) and which met the requirements of the Investment Fund Directive on the basis of the legislation of its State of establishment.
7. According to its legal form, the SICAV fund was a SICAV (Société d'Investissement à Capital Variable), that is to say an investment fund in the form of a company with variable capital. The SICAV fund performed investment fund activity in accordance with the UCITS Directive. Pursuant to the Directive, a fund of this type could be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies). The provisions of the Directive corresponded entirely with regard to the different forms of funds.

8. A SICAV fund therefore performed the same investment fund activity as the Finnish UCITS investment funds. Accordingly, the activity performed by a SICAV fund was, despite its company form, the same as the activity of Luxembourg FCP (Fonds Commun de Placement) investment funds constituted in accordance with contract law. However, the activity performed by a SICAV fund differed from the activity performed by Finnish and Luxembourg share companies.
9. A SICAV fund was an open-end investment fund, the shares of which were offered to the public for subscription and the number of shares of which varied depending on the subscriptions and redemptions made. A SICAV fund was therefore not just intended for pre-fixed investors, but anyone could freely subscribe to its shares. The SICAV fund was obliged [Or. 3] to carry out subscriptions and redemptions at the request of an investor. A SICAV fund had distributing units, with which the income accrued was distributed six-monthly or annually, and accumulating units, for which no distributions were made for the duration of the fund investment and with which the income accrued was instead added to the fund capital. The increase in value of the accumulating units was credited to the investor when the units were redeemed, as the SICAV fund was obliged to redeem the units at a price based on the net asset value (NAV) of the type of unit.
10. The management of the SICAV fund was organised in the same way as with Finnish investment funds. The SICAV fund had outsourced its management to a separate investment company C S.A. which, according to its legal form, was a Luxembourg share company (Société Anonyme). In the same way as with Finnish investment funds, the SICAV fund also had to have a separate depositary prescribed according to the UCITS legislation. The depositary of the SICAV fund was B S.A., which was likewise a Luxembourg share company. The tasks of B S.A. included holding the funds, controlling the activity and monitoring the cash flow of the SICAV fund, that is to say its activity corresponded to the activity of Finnish depositaries.
11. The SICAV fund was an umbrella fund which had its own sub-funds which were quasi-separate funds within the SICAV fund. The umbrella structure offered investors different investment alternatives with a different risk profile. The sub-funds did not have a separate legal personality and were also not liable to tax, but merely special assets. The division into sub-funds meant assignment of the funds to different unit classes within the SICAV fund. Each sub-fund could have one or more types of unit which entitled the bearer to ownership in the sub-fund concerned. Each sub-fund pursued its own investment policy which established, for example, to which investment instruments, which sector or which geographical area the sub-fund's investments related. The NAV, which determined the value of the type of unit concerned, was calculated separately for each type of unit. The distribution of income for a distributing unit reduced the NAV of the distributing type of unit concerned.

12. The SICAV fund had a separate legal personality and was liable for tax in Luxembourg, but exempt from income tax liability there. The SICAV fund was fundamentally nevertheless obliged to pay a so-called subscription tax annually in Luxembourg on the basis of the NAV amount. The subscription tax rate for the SICAV fund was generally 0.05 per cent, but the tax rate for some unit classes/types could also be 0.01 per cent and some unit classes/types could be completely exempt from that subscription tax.
13. The S sub-fund was a sub-fund of the SICAV fund. As the S sub-fund neither had a separate legal personality nor was liable for tax, [Or. 4] according to the Luxembourg legislation the SICAV fund included the assets of the S sub-fund, that is to say the investments which the SICAV fund was obliged to manage solely in favour of the investors in the S sub-fund. As set out above, the SICAV fund had outsourced the management of the fund and therefore also of the investments to a separate investment company. In this respect, the situation corresponded fully in practice to the fixed assets of Finnish investment funds. The shareholders of Finnish investment funds legally owned the investments in the fund, but did not actually exercise their right of disposal with regard to the fixed assets of the fund; an investment company instead managed the investments in the fund for the investors.
14. The unit type D of the S sub-fund was a distributing unit, with which the earnings accrued were distributed annually to the investors. The annual distribution of the earnings was established in advance with regard to the type of unit concerned and therefore no separate resolution was passed in the fund shareholders' meeting regarding the distribution or non-distribution of the earnings. It was only possible for the annual earnings not to be distributed if this would cause the NAV of the SICAV fund to fall below EUR 1 250 000.
15. The distribution of earnings of the SICAV fund was based on the distribution principles according to the fund prospectus. The distribution principles of the SICAV fund and a Finnish investment fund were established in advance and a distribution of earnings did not require a resolution of the fund shareholders' meeting. In contrast, the distribution of the dividends of a Finnish share company required a resolution and the exercise of discretion of the general meeting. With regard to taxation, the distribution of the earnings of the SICAV fund could not be regarded as dividends within the meaning of Paragraph 33c(3) of the Tuloverolaki (Income Tax Law), but was to be regarded as the distribution of the earnings of an investment fund.
16. The application of Paragraph 33c(3) of the Income Tax Law to the earnings distributed by a SICAV fund would lead to more stringent taxation than if E had made the investment via a Finnish investment fund, because the distribution of earnings of a Finnish fund is taxed as capital income within the meaning of Paragraph 32 of the Income Tax Law. The more stringent taxation of the distribution of the earnings of a SICAV fund compared to that of a Finnish investment fund was in breach of the free movement of capital within the meaning

of Article 63 TFEU, because the SICAV fund and the Finnish investment fund performed the same investment fund activity within the meaning of the UCITS Directive.

The question raised in the application for a preliminary decision

17. With regard to the taxation of E in Finland, are the distributed earnings of a Luxembourg SICAV fund taxed as capital income within the meaning of Paragraph 32 of the Income Tax Law or as income from employment pursuant to Paragraph 33c(3) of the Income Tax Law? **[Or. 5]**

Preliminary decision of the Keskusverolautakunta of 10 November 2017 for the tax years 2017 and 2018

18. In its preliminary decision issued to E, the Keskusverolautakunta found that the income distributed by the Luxembourg SICAV fund was to be regarded as dividends in Finland and that, with regard to the taxation of E in Finland, that income was taxed as income from employment pursuant to Paragraph 33c(3) of the Income Tax Law.
19. In its decision, the Keskusverolautakunta referred to the provisions of Paragraphs 3(4) and 33c of the Income Tax Law and Articles 63 and 65 TFEU.
20. In its decision, the Keskusverolautakunta found that there was no definition of an investment fund in the Income Tax Law. In the case-law, the opinion was expressed that, when deciding on the taxation in Finland of the income of a foreign party, it was of central importance that consideration was given to legal and functional characteristics of that party with regard to corresponding Finnish parties. On account of functional characteristics, the present SICAV had traits of a Finnish investment fund. However, its activity involved collective investments and corresponding general functional characteristics were to be identified for example in the case of collective investments in the form of share companies.
21. As the Keskusverolautakunta took account of the case-law and assumed that the UCITS Directive cannot impact taxation, it took the view that, particularly as a result of its legal form, the SICAV was objectively most closely to be treated in the same way as an undertaking for collective investment in transferable securities in the form of a Finnish share company. The Keskusverolautakunta was also of the opinion that the foreign SICAV was not treated differently to domestic parties, because it (or actually the earnings distributed by it) was taxed in the same way as a Finnish undertaking for collective investment in transferable securities in the form of a Finnish share company (or actually the earnings distributed by a Finnish undertaking for collective investment in transferable securities in the form of a Finnish share company).

Summary of the essential arguments of the parties

22. With his appeal to the Korkein hallinto-oikeus, *E* requested that the preliminary decision issued by the Keskusverolautakunta be annulled and that it be established as a new preliminary decision that, with regard to taxation in Finland, the distribution of the earnings of the SICAV fund be taxed as capital income of *E* within the meaning of Paragraph 32 of the Income Tax Act and not as income from employment pursuant to Paragraph 33c(3) of the Income Tax Act.
23. As grounds, *E* argued that, insofar as the similarity between a foreign fund and a Finnish investment fund was to be examined with regard to taxation, compliance with the UCITS Directive was undisputed and an [objective] expression of the similarity of the funds (notwithstanding [Or. 6] that the UCITS Directive did not harmonise taxation). The Directive made restrictions with regard to the activity performed and the capital structure of the funds, which meant that UCITS funds could only be treated in the same way as the forms of activity performing an activity under the UCITS Directive with regard to taxation. The published national case-law on funds in the form of a company did not concern UCITS funds.
24. *E* expressed the opinion that, with regard to taxation, the distribution of the earnings of a SICAV fund could not be regarded as dividends within the meaning of Paragraph 33c(3) of the Income Tax Law, but was to be regarded as distribution of the earnings (as a profit share) of an investment fund, because the characteristics typical of a distribution of earnings from investment funds were linked therewith and it was the same as the distribution of earnings of a Finnish investment fund.
25. *E* is also of the opinion that taxation of the distribution of the earnings of the SICAV fund in the full amount as income of *E* from employment on the basis of Paragraph 33c(3) of the Income Tax Law would constitute more stringent taxation than the taxation of the distribution of the earnings of a Finnish investment fund as capital income pursuant to Paragraph 32 of the Income Tax Law. Taxation under Paragraph 33c(3) of the Income Tax Law was therefore in breach of the free movement of capital under Article 63 TFEU.
26. The *Veronsaajien oikeudenvaltontayksikkö* claimed before the Korkein hallinto-oikeus that, on account of the functional characteristics, the Luxembourg SICAV fund had traits of a Finnish investment fund. The activity of the SICAV fund involved collective investments and there were also corresponding functional common traits for example in the case of collective investments in the form of share companies or limited partnerships. Despite some of its characteristics being typical of investment funds, the SICAV fund considered overall was most closely to be treated in the same way as a Finnish share company performing investment activity.
27. The *Veronsaajien oikeudenvaltontayksikkö* expressed the opinion that, in the situation described in the application for a preliminary decision, the dividend

income distributed by a Luxembourg SICAV fund in compliance with the Investment Fund Directive was also to be regarded as dividends in the case of taxation in Finland and the dividends received constituted fully taxable income from employment pursuant to Paragraph 33c(3) of the Income Tax Law.

National legislation

28. Pursuant to Paragraph 2(1)(1) in Chapter 1 of the Sijoitusrahastolaki (48/1999, Investment Fund Law No 48/1999, repealed by the new Sijoitusrahastolaki 213/2019, Investment Fund Law No 213/2019), investment fund activity within the meaning of this law is the procurement by the public of funds for collective investment and the investment of those funds mainly in financing instruments or real estate and real estate securities or other investment projects and the management of investment funds and specialised funds and the marketing of fund units. **[Or. 7]**
29. Pursuant to Paragraph 2(1)(2) in Chapter 1 of Investment Fund Law No 48/1999, repealed by the new Investment Fund Law No 213/2019, investment funds within the meaning of this law are the funds procured in the investment fund activity and invested according to the rules established in Finland and according to Chapter 11 and the obligations resulting therefrom.
30. Pursuant to Paragraph 3(4) of the Tuloverolaki (1736/2009, Income Tax Law in the version of Amending Law No 1736/2009), corporations within the meaning of this law are share companies, cooperative associations, savings banks, investment funds, universities, mutual insurance companies, grain storage warehouses, non-profit associations or profit-making associations, foundations and institutions.
31. Pursuant to Paragraph 32 of the Income Tax Law in the version of Amending Law No 716/2004, taxable capital income, in accordance with the more detailed provisions below, is earnings from assets, profit from the transfer of assets and other such income which may be assumed to have been accrued from assets. Capital income includes interest income, dividend income in accordance with the provisions in Paragraphs 33a to 33d, rental income, profit shares, earnings from life insurance, capital income from forestry, income from mineral substances and capital gains. Capital income is also the capital income share in distributed business income, in the income share of the partner in a consortium and in the income from reindeer husbandry.
32. Pursuant to Paragraph 33c(1) of the Income Tax Law in the version of Amending Law No 530/2016, dividends received from a foreign corporation constitute taxable income in accordance with Paragraphs 33a and 33b of this law, if the corporation is a company within the meaning of Article 2 of Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States in the version of Council Directive 2013/13/EU and Council Directive 2014/86/EU.

33. Pursuant to Paragraph 33c(2) of the Income Tax Law in the version of Amending Law No 1237/2013, dividends received from foreign corporations other than those mentioned in sub-paragraph 1 constitute taxable income in accordance with the provisions of Paragraphs 33a and 33b, if the corporation is obliged, without options or exemption, to pay at least ten per cent tax on its income from which the dividends were distributed and:
- 1) according to the tax legislation of a State belonging to the European Economic Area, the corporation has its registered office in that State and, according to a convention preventing double taxation, the corporation does not have its registered office in a State outside the European Economic Area; or
 - 2) a convention preventing double taxation, which applies to the dividends distributed by the corporation, is in force between the corporation's State of residence and Finland in the tax year. **[Or. 8]**
34. Pursuant to Paragraph 33c(3) of the Income Tax Law in the version of Amending Law No 1237/2013, dividends received from foreign corporations other than those mentioned in sub-paragraphs 1 and 2 constitute fully taxable income from employment.

Relevant legislation and case-law of EU law

Treaty on the Functioning of the European Union

35. Pursuant to Article 63(1) TFEU, within the framework of the provisions set out in that Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries are to be prohibited.
36. Pursuant to the wording of Article 65(1)(a) TFEU, the provisions of Article 63 [TFEU] are 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.
37. Article 65(3) TFEU specifies that the national provisions referred to in paragraph 1 of that article are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

Case-law of the Court of Justice

38. The judgment delivered by the Court of Justice in Case C-632/13, *Hirvonen*, involved the free movement of Union citizens on the basis of Article 21 TFEU. With its question, the referring court wanted to clarify whether Article 45 TFEU precludes provisions in a Member State's legislation which mean that a person resident in another Member State — who receives all or almost all his

income in the first Member State — can choose between two entirely different regimes of taxation, that is to say, either to be taxed at source at a lower tax rate but without the right to such tax relief as is applicable under the ordinary income tax regime, or to be taxed on his income under the latter regime and thus be able to benefit from the tax relief in question.

39. In paragraph 28 of that judgment, the Court of Justice found that, in that regard, it should be noted that, although direct taxation fell within their competence, the Member States had to none the less exercise that competence consistently with EU law (see, *inter alia*, judgment in *Gielen*, C-440/08, ECLI:EU:2010:148, paragraph 36 and the case-law cited). **[Or. 9]**
40. In paragraph 29 of the judgment, the Court of Justice found that it should also be noted that the rules regarding equal treatment forbade not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, led in fact to the same result (see, *inter alia*, judgment in *Gielen*, C-440/08, ECLI:EU:2010:148, paragraph 37 and the case-law cited).
41. In paragraph 30 of the judgment, the Court of Justice found that, in accordance with the settled case-law of the Court, discrimination could arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, *inter alia*, judgments in *Schumacker*, C-279/93, ECLI:EU:C:1995:31, paragraph 30, and *Gschwind*, C-391/97, ECLI:EU:C:1999:409, paragraph 21).
42. The judgment delivered by the Court of Justice in Case C-303/07, *Aberdeen Property Fininvest Alpha*, involved freedom of establishment on the basis of Article 43 EC (now Article 49 TFEU). With its question, the referring court sought to clarify whether Articles 43 and 48 EC and Articles 56 and 58 EC are to be interpreted as meaning that, in order to safeguard the fundamental freedoms set out therein, a share company or investment fund constituted under Finnish law and a SICAV constituted under Luxembourg law must be regarded as comparable, despite the fact that a form of company entirely comparable to the SICAV is not recognised in Finnish law, having regard, first, to the fact that the SICAV, which is a company under Luxembourg law, is not mentioned in the list of companies referred to in Article 2(a) of Directive 90/435, with which the Finnish withholding tax applicable in the present case is consistent, and, second, to the fact that the SICAV is exempt from income tax under the domestic tax legislation of the Grand Duchy of Luxembourg. In these circumstances, is it contrary to the above articles of the EC Treaty for the Luxembourg-based SICAV as the recipient of dividends in Finland not to be exempt from the withholding tax to be paid on the dividends?
43. In paragraph 50 of the judgment mentioned above, the Court of Justice found that, in the first place, the circumstance that in Finnish law there was no type of company with a legal form identical to that of a SICAV governed by Luxembourg law could not in itself justify a difference in treatment, since, as the company law

of the Member States had not been fully harmonised, that would deprive the freedom of establishment of all effectiveness. **[Or. 10]**

44. In paragraph 55 of the judgment, the Court of Justice found that, in those circumstances, the differences between a SICAV governed by Luxembourg law and a share company governed by Finnish law, relied on by the Finnish and Italian Governments, were not sufficient to create an objective distinction with respect to exemption from withholding tax on dividends received. Consequently, there was no further need to examine to what extent the differences between a SICAV governed by Luxembourg law and an investment fund governed by Finnish law, said to exist by those governments, were relevant for establishing such an objective difference in situation.
45. In paragraph 56 of the judgment, the Court of Justice also found that it followed that the difference in treatment between non-resident SICAVs and resident share companies with respect to the exemption from withholding tax on dividends distributed to them by resident companies constituted a restriction of freedom of establishment, prohibited in principle by Articles 43 and 48 EC.
46. ...

Requirement for the request for a preliminary ruling

47. The Korkein hallinto-oikeus has to give a ruling on the question of whether the earnings distributed to E by a SICAV fund, active under the UCITS Directive, constitute income from employment or capital income under the Income Tax Law.
48. The Investment Fund Directive has been implemented in Finland through Investment Fund Law No 48/1999 (which was repealed by the new Investment Fund Law No 213/2019). In Finland, the contract form within the meaning of Article 1(3) of the Directive was chosen as the form of activity of an investment fund, whereas the SICAV fund has the statute form within the meaning of the same paragraph of that article.
49. The ruling by the Keskusverolautakunta means that income received by a natural person residing in Finland from an undertaking for collective investment in transferable securities based in another Member State of the Union and constituted in accordance with statute within the meaning of Investment Fund Directive 2009/65/EC is entirely taxed as income from employment under the Income Tax Law. The income tax for income from employment may be over 50 per cent.
50. Income received by a natural person residing in Finland from a Finnish investment fund constituted on the basis of provisions under contract law is entirely taxed as capital income under the Income Tax Law. The income tax for capital income is 30 per cent. If the amount of the taxable capital income of a taxable person exceeds EUR 30 000, the income tax paid on the capital income is 34 per cent. **[Or. 11]**

51. In order to be able to determine the income tax for the present income for the taxation of E to be carried out in Finland, the first issue to be resolved in this case is which Finnish corporation that distributes earnings is a SICAV fund to be treated in the same way as. In this respect, the Korkein hallinto-oikeus is confronted with the question of whether a national interpretation which leads to the result described because the legal form of an undertaking for collective investment in transferable securities based in another Member State does not correspond to the legal structure of the national investment fund is contrary to Articles 63 and 65 TFEU.
52. The case also requires interpretation of whether undertakings for collective investment in transferable securities, which have been constituted in compliance with the Investment Fund Directive and have a different form, must be treated the same in relation to the taxation of the investments of their investors. Pursuant to Recital 83 of the Investment Fund Directive, that Directive is not to affect national rules on taxation, including arrangements that may be imposed by Member States to ensure compliance with those rules in their territory. In the opinion of the Korkein hallinto-oikeus, the Court of Justice has not expressly taken a position in its case-law on the effect of the Investment Fund Directive on taxation.
53. The Korkein hallinto-oikeus is not aware of any preliminary ruling of the Court of Justice on the interpretation of Articles 63 and 65 TFEU on the matter described above. In addition, a provision — which does not apply in the present case — will come into effect in Finland on 1 January 2020, on the basis of which solely open-end foreign investment funds constituted in accordance with contract law shall be treated in the same way as a Finnish investment fund with regard to income taxation. As the delivery of a ruling in the main proceedings requires an interpretation of the provisions of EU law cited above, it is necessary to obtain a preliminary ruling of the Court of Justice in the present case.
54. ...

Interlocutory order of the Korkein hallinto-oikeus on requesting a preliminary ruling from the Court of Justice of the European Union

55. ... [Or. 12]

Question referred

1. Are Articles 63 and 65 TFEU to be interpreted as meaning that they preclude a national interpretation according to which income received by a natural person residing in Finland from an undertaking for collective investment in transferable securities based in another Member State of the Union and constituted in accordance with statute within the meaning of the Investment Fund Directive 2009/65/EC (UCITS fund in the form of an investment company) is not, for the purposes of income tax, treated in the same way as income received from a

Finnish investment fund constituted in accordance with contract law within the meaning of the same Directive (UCITS fund in contract form), because the legal form of the UCITS located in the other Member State does not correspond to the legal structure of the national investment fund?

... [Or. 13] ...

WORKING DOCUMENT