



**AG Opinion in Case C-480/19, E: different tax regimes for different types of UCITS?**

20-11-2020

On 19 November AG Hogan delivered his Opinion in the pending case *E-Veronsaajien oikeudenvalvontayksikkö (Revenus versés par des OPCVM)* C-480/19 referred to the Court of Justice of European Union (“CJEU”) by the Finnish Supreme Administrative Court. The case dealt with a Finnish resident individual (“MR E”) who had invested in a Luxembourg entity, (*Société d’Investissement à Capital Variable, hereinafter* “SICAV”) that was regulated in accordance with Directive 2009/65/EC of the European Parliament and of the Council (“UCITS Directive”).

Under Finnish law, UCITS may only be incorporated in a contractual form (as investment funds). Due to the lack of legal personality, the capital income derived through Finnish UCITS are regarded as shares in profits (and not as corporate dividends) in the hands of the investors and are subject to tax at a rate of 30% (or 34% when the capital income exceeds EUR 30,000). Distributions from foreign UCITS, having a corporate form, are treated as dividends received from foreign companies and are generally subject to a lighter taxation in the hands of the investors (shareholders) in order to avoid economic double taxation. In this respect, however, insofar as the distributing UCITS does not pay at least 10% tax on the profits out of which the dividends are distributed, such dividends are deemed to be employment income subject to progressive taxation, which is usually higher than the flat rate tax levied on capital income.

Due to the fact that the Luxembourg SICAV was exempt from tax in Luxembourg, the proceeds distributed by that SICAV to MR E were characterized as employment income and, thus, subject to a worse tax treatment as compared to that which would have applied to the proceeds from the investment in a Finnish UCITS. The case went before the Finnish Supreme Administrative Court, who decided to stay the proceedings and ask the CJEU whether such a difference in tax treatment constituted a breach of the free movement of capital, as provided by Articles 63 and 65 of the Treaty on the Functioning of the European Union.

Amongst other points, AG interestingly concluded that the Luxembourg SICAV is not comparable to Finnish UCITS. In this respect, the AG recalled that the UCITS Directive provides that an investment undertaking may be constituted in accordance with contract law or statute, but concluded that such a fact might only be relevant for the assessment of the existence of a restriction if the tax measure in question pursued an objective, the attainment of which depended on the fact that the fund is

a UCITS. In this respect, the AG drew a distinction between the case at stake and the previous CJEU's decision in the Aberdeen Property *Fininvest* Alpha case (case C-303/07), in which the Court took instead the position that a Luxembourg SICAV was comparable to a Finnish company and was therefore entitled to the domestic exemption from withholding tax applicable to Finnish source dividends. Indeed, the AG argued that the comparability analysis, which is necessary for the assessment of the existence of a restriction, must take into account the objective pursued by the tax measure. The AG found that, in the Aberdeen Property *Fininvest* Alpha case, the aim pursued by the tax measure at stake was to relieve resident parent companies from economic double taxation in respect to Finnish source dividends. In that case, as the AG noted, as long as the parent companies were actually incorporated, the precise corporate form of those taxable entities did not appear to be relevant in order to assess whether they were in a comparable situation.

In the present case, according to AG Hogan, the relevant Finnish tax rules did not rely on the distributing entity being a UCITS, but rather on it being set up as a separate legal entity rather than as a contractual fund. As a consequence, the AG took the view that, for the purpose of the question referred to the CJEU, the Luxembourg SICAV was not to be compared to a Finnish UCITS, but had to be treated as other corporate entities. He thus concluded that the recharacterization of the capital income (i.e. the dividends distributed by the Luxembourg SICAV) as employment income, which did not occur in cases of domestic dividends distribution, was contrary to the free movement of capital.

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For further information: **Maisto e Associati**

**Milan**

Piazza F. Meda 5  
20121  
T: +39.02.776931

**Rome**

Piazza d'Aracoeli 1  
00186  
T: +39.06.45441410

**London**

2, Throgmorton Avenue  
EC2N 2DG  
T: +44.207.3740299

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