Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 6 October 2021 [1]

Case C-342/20

A SCPI
interested party:
Veronsaajien oikeudenvalvontayksikkö

(Request for a preliminary ruling from the Helsingin hallinto-oikeus, (Administrative Court, Helsinki, Finland))

(Reference for a preliminary ruling – Free movement of capital – Tax legislation – Tax on the income of legal persons – Investment funds – Fiscally transparent entity – Hybrid entity – Investments in immovable property and/or real estate companies in another Member State – Fiscal transparency mechanism – Requirement to be constituted by contract – Exclusion of investment funds constituted in corporate form – Restriction – Comparability – Justification – None)

I. Introduction

1. This request for a preliminary ruling by the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) concerns the interpretation of Articles 49, 63 and 65 TFEU.

2. The request has been made in proceedings between A SCPI, an investment fund established in France, and the Verohallinto (tax authority, Finland) concerning a preliminary decision issued by that authority. In that decision, the tax authority considered that A SCPI was not fiscally transparent for the 2020 tax year and was therefore subject to income tax in Finland.

3. The tax authority's decision is based on provisions recently introduced into Finnish tax legislation, which provide for a difference in treatment between investment funds constituted by contract and those constituted in corporate form.

4. Investment funds constituted by *contract* are considered to be fiscally transparent and are therefore exempt from income tax. Funds constituted by contract do not have legal personality. They function in accordance with contractual provisions negotiated between the investors.

5. Conversely, investment funds having *corporate* form, such as A SCPI, are considered to be fiscally opaque. Consequently, they are subject to income tax in Finland. 'Corporate' form means that the entity in question was constituted in such a way that its functioning is governed by a

[1] Original language: French.

'memorandum and articles of association'. Depending on the type of entity concerned, that entity may or may not have legal personality and/or legal capacity (that is to say, the capacity to perform legal acts or to take part in court proceedings).

6. For the reasons set out below, I am of the view that the difference in treatment established by the Finnish tax legislation between funds constituted by contract and investment funds constituted in corporate form is contrary to the free movement of capital as guaranteed by Articles 63 and 65 TFEU.

7. In essence, I consider that that distinction is arbitrary in that it results in investment funds which are objectively comparable in terms of transparency, irrespective of whether they were constituted by contract or in corporate form, being treated differently.

II. Finnish law

8. Under point 4 of Paragraph 3 of tuloverolaki 1535/1992 (Law 1535/1992 on income tax) of 30 December 1992, as amended by Law 528/2019 ('the Law on income tax'), 'corporation' is to mean, in particular, limited companies, investment funds and special investment funds.

9. In accordance with point 2 of the first subparagraph of Paragraph 9 of that law, natural persons who were not resident in Finland during the tax year and foreign corporations are required to pay tax on income received in Finland (partial tax liability).

10. Paragraph 10 of that law sets out a number of categories of income which are considered to be received in Finland. Such income includes:

– 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 cooperative or other corporation;

– dividends, surpluses derived from a cooperative and other comparable income from a Finnish limited liability company, cooperative or other corporation, and also from shares in the income of a Finnish group;

– profits from the sale of immovable property in Finland or from the sale of shares or units in a Finnish limited liability housing company, other limited liability company or cooperative, over 50% of the total assets of which comprise one or more properties in Finland.

11. Paragraph 20a of the Law on income tax was introduced by Law 528/2019, which entered into force on 1 January 2020 and was applicable from the 2020 tax year.

12. According to the first subparagraph of Paragraph 20a, investment funds within the meaning of point 2 of the first subparagraph of Paragraph 2 of Chapter 1 of the sijoitusrahastolaki 213/2019 (Law 213/2019 on investment funds) and comparable foreign open-ended invested funds constituted by contract and with a minimum of 30 unit holders are exempt from income tax.

13. According to the second subparagraph of Paragraph 20a, that exemption is also to 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 162/2014 on alternative fund managers) 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.

14. According to the fourth subparagraph of Paragraph 20a of the Law on income tax, the exemption of a special investment fund within the meaning of the second subparagraph of Paragraph 1 of Chapter 2 of Law 162/2014 on alternative investment fund managers or of a comparable foreign special investment fund constituted by contract which invests its funds primarily in immovable property and property investment instruments in the way referred to in Paragraph 4 of Chapter 16 of that 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.

III. The dispute in the main proceedings, the question for a preliminary ruling and the procedure before the Court

15. A SCPI is an investment company governed by French law having the form of a company with variable capital (variable-capital immovable property investment company) which invests in immovable property in France and in the countries of the Euro area. The properties in which it invests are let to undertakings. At the end of 2017, the investment fund had a value of around EUR 32 million. The company owned investments in four properties in four different countries in the Euro area. In 2017, the company had 926 members.

16. A SCPI is represented by the company 'A' SAS ('A' Asset Management, société par actions simplifiée (simplified joint stock company)). In accordance with the law and its articles of association, all decisions relating to A SCPI are taken by A, which also manages the fund. A SCPI cannot itself carry out any legal act or take part in court proceedings. It is also subject to supervision by the Autorité des marchés financiers française (AMF) (French Financial Markets Authority (AMF)) and is an alternative investment fund within the meaning of Directive 2011/61/EU. [2]

17. The yield produced by the units is paid to investors on an annual basis and corresponds to the net rental income and other net financial income received by A SCPI. The distribution of the earnings is decided by the general meeting. The company is liable for obligations to third parties, but the investors bear secondary liability for the company's obligations.

18. In France, A SCPI is a fiscally transparent entity. It is not subject to income tax. The investors are liable for tax on the share of income which is paid to them, to the extent of the units which they hold in the company. They are also liable for tax on the profit which they make on the sale or redemption of units.

19. A SCPI had planned to sign, in June 2019, a contract for the purchase of shares in two Finnish mutual limited liability property companies which own property used by retail businesses. If A SCPI completes that acquisition, it will carry out property rental activities in Finland, as regards

[2] Directive 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).

the premises which it controls through its shares in a limited liability property company. In addition, A SCPI is planning to make other real estate investments in Finland by purchasing shares in other mutual limited liability property companies or investing directly in real estate.

20. In the context of its proposed real estate investments in Finland, A SCPI requested the tax authority to issue a preliminary decision concerning the 2019 and 2020 tax years.

21. So far as the 2019 tax year is concerned, the tax authorities considered that A SCPI was exempt from income tax in Finland, pursuant to the tax provisions applicable before the entry into force of Paragraph 20a of the Law on income tax.

22. So far as the 2020 tax year is concerned, on the other hand, the tax authority considered that A SCPI was not exempt from income tax in Finland, pursuant to the abovementioned provision.

23. In the part of the preliminary decision relating to the 2020 tax year, which is contested by A SCPI, the tax authority stated that it follows from the prospectus presenting the fund, attached to the application, that A SCPI can be treated as equivalent to a Finnish limited liability company. The profits of the fund are distributed to the members only if a decision to that effect is taken by the general meeting. A SCPI is a variable-capital investment undertaking and therefore does not have the legal form of a special investment fund, constituted by contract, as required by the fourth subparagraph of Paragraph 20a of the Law on income tax.

24. A SCPI brought an action before the Helsingin hallinto-oikeus (Administrative Court, Helsinki) against the tax authority's preliminary decision so far as the 2020 tax year is concerned.

25. A SCPI claimed that Paragraph 20a of the Law on income tax is contrary to EU law in so far as only funds constituted by contract may be considered to be special investment funds exempt from income tax. A SCPI submits that it is in all respects an operator comparable to a Finnish investment fund. The only difference is in the legal form, in the sense that A SCPI has the form of a company, in accordance with the French legislation on investment funds, whereas investment funds compatible with the Finnish sijoitusrahastolaki (Law on investment funds) must be constituted by contract.

26. The referring court has set out the reasons that led to the adoption of Paragraph 20a of the Law on income tax, as indicated in the preparatory materials.

27. First, the objective of that amendment was to increase legal certainty. In the system that preceded its adoption, the tax treatment of foreign investment funds was not formally regulated in Finnish law and was the subject of decisions adopted on a case-by-case basis. In the absence of a definition of the concept of 'investment fund' in the tax legislation, the criteria for equivalent treatment had to be established by administrative practice and the case-law. The rather general nature of the tax provisions had allowed foreign funds to be treated as equivalent to Finnish investment funds.

28. Second, the referring court stated that the adoption of Paragraph 20a of the Law on income tax had not represented a departure in the taxation of investment funds in Finland. Their tax treatment has always depended on the legal form of the investment instrument and that provision did not alter anything in that respect. Finnish investment funds and special investment funds are entities constituted by contract. The objective of the proposed amendment was to clarify the tax legislation solely for funds constituted by contract, whether they were Finnish or foreign.

29. In particular, it is apparent from the proposed amendment that the objective pursued was not to extend the scope of the exemption to other legal forms of entities for collective investment in transferable securities located abroad. In Finland, taxation is based on the legal form of the investment instrument. Finnish investment funds are entities constituted by contract: they are not autonomous legal persons but, rather, sets of assets exempted from tax under special rules. Foreign investment funds may be treated as equivalent to Finnish limited companies on the basis of their legal form.

30. The referring court further states that, under the Finnish legislation applicable to investment funds, investment funds may be constituted only by contract.

31. The referring court is unsure as to the compatibility of Paragraph 20a of the Law on income tax with Articles 49, 63 and 65 TFEU, since only open-ended foreign investment funds, constituted by contract, may be treated as equivalent to the Finnish investment funds that are exempt from income tax, to the exclusion of investment funds constituted in corporate form, like A SCPI.

32. 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?'

33. The request for a preliminary ruling was registered at the Court Registry on 23 July 2020. The Republic of Finland and the European Commission have lodged written observations and answered in writing the questions put by the Court on 18 May 2021.

IV. Analysis

34. The issue raised by the present case forms part of the more general question of fiscally 'hybrid' entities, namely entities considered to be fiscally 'transparent' in one State (where the entity is not taxable as such, only its members being taxable to the extent of the units held) and to be fiscally 'opaque' in another State (where the entity is taxable as such). [3]

35. In the dispute in the main proceedings, A SCPI is treated as a fiscally transparent entity in the State in which it was constituted (France) and as a fiscally opaque entity in the State in which it is planning to make certain real estate investments (Finland).

[3] See, in particular, Parada, L., 'Hybrid Entities and Conflicts of Allocation of Income Within Tax Treaties: Is New Article 1(2) of the OECD Model (Article 3(1) of the MLI) the Best Solution Available?', *British Tax Review*, 2018, No 3, pp. 335 to 376, especially pp. 338 and 339: 'Generally speaking a "hybrid entity" is an entity that is considered to be a taxable or opaque entity in the country of its establishment, that is, it is an entity which is different from its owners and which is subject to corporate income taxation in its country of organisation. In the other country, however, the same entity is regarded as tax or fiscally transparent, that is, there will be no taxation at the level of the entity but rather there will be at the level of the partners. The same phenomenon of hybridity operates in the opposite direction also. That is to say, an entity can be treated as being tax transparent in the country of its establishment, but considered a taxable entity in the other country. These entities are known as "reserve hybrids entities".'

36. While hybrid entities raise complex problems of coordination in the context of double taxation treaties,[4] the question submitted by the referring court is limited to the more specific issue of the compatibility of the Finnish legislation with the free movement of capital and freedom of establishment.

37. More specifically, the referring court asks, in essence, whether a requirement to be constituted by contract, laid down in the tax legislation of a Member State in order for an investment fund to be able to benefit from fiscal transparency, is contrary to the free movement of capital and/or freedom of establishment, in so far as it has the effect of excluding investment funds constituted in corporate form in other Member States even though those funds are objectively comparable, in terms of transparency, to funds constituted by contract.

38. The Finnish Government, in contrast to the Commission, proposes that the question be answered in the negative.

39. I would note that the question of hybrid entities is not without precedent in the Court's case-law. The judgment in *Columbus Container Services* concerned a company governed by Belgian law and considered to be fiscally opaque in Belgium (where it was subject to the advantageous scheme applicable to coordination centres) and to be fiscally transparent in Germany, where its partners were resident.[5] However, there is nothing in that judgment that could be transposed to the present case, since it related specifically to the additional tax imposed in Germany (on the partners) because of the low rate of taxation applied in Belgium (to the company).[6]

40. In the interest of completeness, I also note that the Court examined the grant of State aid to fiscally transparent entities in the judgment of 25 July 2018, *Commission* v *Spain and Others*.[7]

A. The applicable freedom of movement

41. The request for a preliminary ruling refers to freedom of establishment (Article 49 TFEU) and to the free movement of capital (Article 63 TFEU). I would recall that the respective fields of application of those two fundamental freedoms are not necessarily exclusive.[8] Nonetheless, it can hardly be disputed that the present case must be examined solely by reference to the free movement of capital, as the Finnish Government and the Commission have rightly maintained.

42. The investments planned by A SCPI in the context of the dispute in the main proceedings consist in the acquisition of shares in Finnish real estate companies and in direct investment in immovable property in Finland.[9]

4 See, in particular, Parada, L., op. cit., and Brabazon, M., 'Holding Proteus: Emerging Treaty Practice on Hybrid and Fiscally Transparent Entities', *British Tax Review*, 2020, No 5, pp. 670 to 693.

5 Judgment of 6 December 2007 (C-298/05, EU:C:2007:754, paragraphs 13 to 20). See also Opinion of Advocate General Mengozzi in *Columbus Container Services* (C-298/05, EU:C:2007:197, points 19 to 25).

6 Judgment of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 35 to 37).

7 C-128/16 P, EU:C:2018:591.

8 See, by way of illustration, judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraphs 23 to 30), and my Opinion in *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2018:971, points 47 to 49).

9 See point 19 of this Opinion.

43. As regards direct investments in immovable property in another Member State, such investments come under the free movement of capital, as I explained in my Opinion in Joined Cases *SEGRO and Horváth*.[10] That classification has been confirmed in the case-law subsequent to that Opinion.[11]

44. As regards the acquisition of shares in companies established in another Member State, it is settled case-law that national legislation intended to apply *only* to the acquisition of shares which enable the holder to exert a definite influence on a company's decisions and to determine its activities fall within the scope of 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 concerned must be examined exclusively in the light of the free movement of capital.[12]

45. In the context of the main proceedings, the Finnish legislation is not intended to apply *only* to the acquisition of shares which enable the holder to exert a definite influence on a company's decisions and to determine its activities. The relevant tax provisions are intended to apply to income from *any* shareholding in a Finnish company, irrespective of the size of that shareholding.[13]

46. Accordingly, pursuant to the case-law cited above, the tax treatment of the acquisition of shares in Finnish real estate companies should be examined exclusively in the light of the free movement of capital.

47. It may nonetheless be helpful to note that the reasoning set out below would still be relevant in the context of freedom of establishment.

B. The existence of a restriction on the free movement of capital

48. According to settled case-law, the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which 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.[14]

[10] C-52/16 and C-113/16 (EU:C:2017:410, points 50 to 57).

[11] See, in particular, judgments of 18 January 2018, *Jahin* (C-45/17, EU:C:2018:18, paragraph 22); of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraphs 52 to 60); and of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraphs 54 and 55).

[12] See, in particular, judgments of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraphs 91 and 92); of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 78); and of 3 September 2020, *Vivendi* (C-719/18, EU:C:2020:627, paragraphs 40 and 41).

[13] See point 10 of this Opinion.

[14] See, in particular, judgments of 13 March 2014, *Bouanich* (C-375/12, EU:C:2014:138, paragraph 43); of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 44 and the case-law cited); and of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 65 and the case-law cited).

49. On the other hand, the existence of mere *discrepancies* between the national tax regimes does not suffice to establish the existence of such a restriction. In the absence of harmonisation at EU level, the disadvantages that could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions on the freedom of movement. [15]

50. In a similar vein, the Court has stated that free movement cannot be understood as meaning that a Member State is required to adjust its tax rules on the basis of those of other Member States 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. [16]

51. In other words, the existence of mere discrepancies between Member States' tax policies cannot, in the absence of harmonisation at EU level, be regarded as contrary to the freedom of movement.

52. In the context of the case in the main proceedings, that would be the case if the Finnish tax regime did not provide for a mechanism of fiscal transparency. In such a situation, the fact that a company established in France, where it benefits from fiscal transparency, was not able to benefit from a similar mechanism in Finland when deciding to invest in immovable property there, could not be classified as a 'restriction on movements of capital'.

53. The problem with which we are concerned is, however, of a different nature. In the case in the main proceedings, the Finnish tax regime does indeed provide for a mechanism of fiscal transparency. The investment fund A SCPI, established in France, cannot benefit from that mechanism on the ground that it does not satisfy the *eligibility criteria* laid down in the Finnish legislation.

54. In such a situation, the problem that arises is no longer that of a discrepancy between national tax regimes, but rather that of the compatibility with the freedoms of movement of eligibility criteria established by a national tax regime (in this instance the Finnish tax regime). [17]

55. In the circumstances of the dispute in the main proceedings, A SCPI was excluded from the tax transparency mechanism on the ground that it was not constituted by contract. It is on the lawfulness of that eligibility criterion that the referring court is seeking a ruling.

56. In the light of the case-law referred to in point 48 of this Opinion, there is scarcely any doubt, in my view, that a requirement to be constituted by contract in order to be able to benefit from fiscal transparency, such as that provided for in Paragraph 20a of the Law on income tax, constitutes a restriction on the free movement of capital. That requirement is likely to deter investment funds constituted in corporate form in other Member States from making investments in Finland.

[15] See, in particular, judgments of 16 July 2009, *Damseaux* (C-128/08, EU:C:2009:471, paragraph 27 and the case-law cited); of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 38 and the case-law cited); of 21 November 2013, *X* (C-302/12, EU:C:2013:756, paragraph 28); and of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 47 and the case-law cited).

[16] Judgments of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 80); of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 72); and of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 35).

[17] See, to that effect, judgment of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraphs 45 and 46).

57. I would note, in that regard, that national legislation which is applicable 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 disadvantage cross-border situations. [18]

58. In the context of the dispute in the main proceedings, the deterrent effect comes from exclusion from the fiscal transparency mechanism and from the corresponding obligation to be subject to income tax in Finland, which affects investment funds constituted in corporate form in another Member State, especially when those funds benefit from fiscal transparency in their Member State of origin.

59. Such discordance in the tax treatment of funds constituted in corporate form that are established in other Member States (fiscal transparency in the Member State of origin, fiscal opacity in Finland) is likely to have significant negative repercussions in tax terms and therefore to deter those funds from making investments in Finland.

60. More specifically, fiscal transparency is in most cases a deliberate choice made by investors, who structure their investment strategy in accordance with that choice. In such a context, exclusion from fiscal transparency in a Member State will have a deterrent effect with respect to investments in that State, since that exclusion will be incompatible with the strategy put in place by the investors. In the dispute in the main proceedings, it is precisely that deterrent effect that led A SCPI to bring an action against the preliminary decision whereby the tax authority had refused it the benefit of fiscal transparency.

61. In the interest of completeness, I would add that it cannot be ruled out that the requirement to be constituted by contract, laid down in Paragraph 20a of the Law on income tax, is *indirectly discriminatory* on the basis of the origin of the investment fund, as the Commission has maintained.

62. According to settled case-law, the freedoms of movement guaranteed by the FEU Treaty prohibit not only direct (or overt) discrimination based on origin, but also all indirect (or covert) forms of discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result. [19]

63. The requirement to be constituted by contract will have an indirectly discriminatory effect where the Finnish (non-fiscal) legislation applicable to investment funds requires that they be constituted under a contract. [20] In that case, only investment funds established in other Member States (constituted in corporate form) would be capable of being excluded from the fiscal transparency mechanism provided for in Paragraph 20a of the Law on income tax. That indirectly discriminatory effect might even be reinforced by the existence, in the Member State of origin, of a requirement for certain investment funds to have been constituted in corporate form. [21]

[18] See in particular, to that effect, judgments of 4 June 2002, *Commission* v *France* (C-483/99, EU:C:2002:327, paragraphs 39 to 42); of 13 May 2003, *Commission* v *United Kingdom* (C-98/01, EU:C:2003:273, paragraph 47); of 11 November 2010, *Commission* v *Portugal* (C-543/08, EU:C:2010:669, paragraphs 68 to 72); and of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 55).

[19] See, in particular, judgments of 12 February 1974, *Sotgiu* (152/73, EU:C:1974:13, paragraph 11); of 3 February 1982, *Seco and Desquenne & Giral* (62/81 and 63/81, EU:C:1982:34, paragraph 8); of 13 June 2002, *Sea-Land Service and Nedlloyd Lijnen* (C-430/99 and C-431/99, EU:C:2002:364, paragraph 36); and of 25 February 2021, *Novo Banco* (C-712/19, EU:C:2021:137, paragraph 31).

[20] See, in that regard, the information supplied by the referring court, as summarised in points 28 to 30 of this Opinion.

[21] According to the explanations supplied by the referring court, it seems that, in the context of the dispute in the main proceedings, A SCPI was required by the French legislation to be constituted in corporate form. See point 25 of this Opinion.

64. In answer to a number of questions put by the Court in that regard, the Finnish Government nonetheless stated that under the Finnish legislation investment funds may be constituted in corporate form, although such funds are then excluded from the fiscal transparency mechanism provided for in Paragraph 20a of the Law on income tax, in the same way as funds constituted in corporate form established in other Member States. If that is indeed the case, which it is for the referring court to determine, I consider that the arrangement cannot be classified as 'indirect discrimination'.

65. In any event, I would emphasise that the classification as 'indirect discrimination' is not decisive for the answer to the question referred to the Court, in so far as the existence of a restriction on the free movement of capital seems to me to be indisputable, for the reasons set out above.

C. The comparability of investments funds constituted by contract and those constituted in corporate form

66. Under Article 65(1)(a) TFEU, Article 63 TFEU is 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. The scope of that derogation from the free movement of capital, which by its nature must be given a strict interpretation, is expressly restricted by Article 65(3) TFEU, according to which the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments'.

68. The differences in treatment permitted by Article 65(1)(a) TFEU must therefore be distinguished from the discrimination prohibited by Article 65(3) TFEU. In that regard, the case-law shows that, for national tax legislation such as that at issue in the main proceedings to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest. [22]

69. Still according to the case-law of the Court, the comparability of a cross-border situation with an internal situation must be examined by reference to the aim pursued by the national provisions at issue. [23]

70. Pursuant to that case-law, it is therefore necessary to ascertain whether investment funds constituted in corporate form in other Member States (which are excluded from the fiscal transparency mechanism established in Paragraph 20a of the Law on income tax) are in a comparable situation to investment funds constituted by contract in Finland (which benefit from that mechanism) in the light of the national tax rules.

[22] See, in particular, judgments of 10 May 2012, *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 23 and the case-law cited); of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480, paragraph 48); and of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 24).

[23] See, in particular, judgments of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 32); of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 31 and the case-law cited); and of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 64 and the case-law cited).

71. I would emphasise at the outset that the question submitted by the referring court is explicitly founded on the premiss that an investment fund such as A SCPI, although constituted in corporate form, *is in fact in a comparable situation* to investment funds established in Finland that were constituted by contract. According to the actual wording of that question, in fact, apart from the legal form, 'there are … no significant objective differences between their situation and that of Finnish investment funds'.

72. I would add that there can scarcely be any doubt, in my view, that *some* investment funds constituted in corporate form are in fact comparable to investment funds constituted by contract, for the purposes of the application of a fiscal transparency mechanism such as that provided for in Paragraph 20a of the Law on income tax.

73. The purpose of a fiscal transparency mechanism is to align the tax treatment of the entities concerned with their actual legal situation. In other words, the objective is to treat transparently in *fiscal* terms certain entities which are transparent in *legal* terms.

74. That, precisely, is the purpose of Paragraph 20a of the Law on income tax. As the referring court has explained, that provision exempts certain entities which are not autonomous legal persons but mere sets of assets, formed for group investment purposes by a number of members. [24]

75. Thus, that fiscal transparency mechanism is intended to exempt from income tax certain coordinating structures that in practice do not form an actual screen between economic activities and investors. As the Finnish Government has explained, the objective of Paragraph 20a of the Law on income tax is to treat investment in such funds as 'direct investments' by the members in the underlying assets.

76. The opposite of such transparent structures constituted by contract is the commercial limited liability company. Traditionally, such a company is recognised as having legal personality; it has legal capacity; it has its own capital; it has the power to decide on its investments and on how its profits are distributed; and it provides its shareholders with limited liability (to the extent of their investment).

77. Thus, unlike investment structures constituted by contract, limited liability companies form an opaque screen between economic activities and investors. On that basis, limited companies are traditionally subject to income tax, while the distribution of profits in the form of dividends will be taxed separately in respect of the shareholders. Being opaque for legal purposes, the limited company is also treated opaquely for tax purposes.

78. Between these two extremes (transparency of contractual arrangements on the one hand, opacity of limited liability companies on the other), many types of structure coexist and are characterised by greater or lesser transparency.

79. It is precisely in that respect that the requirement to be constituted by contract, laid down in Paragraph 20a of the Law on income tax, seems to me to be open to criticism on the ground of excessive formality.

[24] See point 29 of this Opinion.

80. Admittedly, there can hardly be any doubt that certain entities constituted in corporate form may be considered to be opaque when the procedures followed resemble those of a traditional limited liability company as described above (legal personality, legal capacity, own capital, power to decide on investments and on the distribution of profits, limited liability).

81. However, other entities constituted in corporate form are comparable, in terms of transparency, to entities constituted by contract.

82. By way of illustration, it is sufficient to refer to the characteristics of the investment fund at issue in the dispute in the main proceedings, namely A SCPI, as described by the referring court.[25] It seems to me that that entity, although constituted in corporate form, is characterised by a high degree of transparency. First, A SCPI does not have legal capacity (it cannot carry out a legal act or take part in court proceedings). Second, A SCPI's net profits are paid to the investors every year. Third, although A SCPI is liable for obligations vis-à-vis third parties, the investors have secondary liability in that respect.

83. To my mind, notwithstanding that it was constituted in corporate form, an investment fund presenting such characteristics is comparable, in terms of transparency, to an investment fund constituted by contract. Such an entity is a mere coordinating structure that does not form an actual screen between the economic activities pursued and the investors. The fact that the distribution of the profits must be formally decided by the general meeting does not seem to me to be decisive in that respect,[26] provided that the major part of the net profits are actually paid to the investors every year.[27]

84. In other words, by confining itself to a formalistic concept of 'transparency', focused on the requirement to have been constituted by contract, Paragraph 20a of the Law on income tax excludes certain investment funds constituted in corporate form which in practice are just as 'transparent' as investment funds constituted by contract. In that sense, that provision establishes an arbitrary difference in treatment between situations that are comparable.

85. The validity of the reasoning set out above is corroborated, in my view, by the recent judgment in *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)*, as the Commission has rightly asserted.[28] Admittedly, that judgment did not concern the tax regime applicable to investment funds, but the tax treatment of the income distributed by such funds. Nonetheless, the Court expressly held, in that context, that 'the fact that a SICAV [société d'investissement à capital variable (investment fund in the form of a company with variable capital)] incorporated under Luxembourg law is *constituted in accordance with statute* does not place that undertaking in a different situation in relation to a UCITS [undertaking for collective investment in transferable securities] constituted under Finnish law *in accordance with contract law* as regards the tax treatment of the distributed earnings'.[29]

[25] See points 16 and 17 of this Opinion.

[26] See points 17 and 23 of this Opinion.

[27] This requirement is effectively laid down, for certain real estate investment funds, in the fourth subparagraph of Paragraph 20a of the Law on income tax.

[28] Judgment of 29 April 2021 (C-480/19, EU:C:2021:334).

[29] Judgment of 29 April 2021, *Veronsaajien oikeudenvalvontayksikkö (Income paid by UCITS)* (C-480/19, EU:C:2021:334, paragraph 54), emphasis added.

86. In other words, and as I propose in the present case, the Court held that a distinction based on the legal form of the investment fund represented, in that context, an arbitrary difference in treatment between comparable situations.

87. I would make clear, for the sake of completeness, that it remains open to a Member State, subject to compliance with the obligations arising under EU legislation, to make the benefit of fiscal transparency conditional on *material* transparency criteria. I am thinking, in that respect, of the entity in question lacking legal capacity, it being required to distribute most of the annual net profits, or of its shareholders not having limited liability.

88. In order to substantiate its argument that investment funds constituted by contract and those constituted in corporate form are not in comparable situations, the Finnish Government has asserted that investment funds constituted by contract offer additional security to investors, notably in the event of insolvency, by allowing them to be the direct owners of the underlying assets.

89. I find that assertion unconvincing. As the Commission has rightly observed, the Finnish Government has not provided any specific reason why being the direct owner of the underlying assets, in the context of a fund constituted by contract, would offer greater security in the event of financial difficulties than being the owner of shares in an investment fund constituted in corporate form. I would highlight, in that regard, that investment funds constituted by contract do not allow the liability of investors to be limited in the event of financial difficulties, unlike certain funds constituted in corporate form (in particular those constituted in the form of a limited company).

90. In any event, and as I have explained above, it is open to the Finnish Government to establish material criteria that must be observed, in order to guarantee investor security, by any investment fund (constituted by contract or in corporate form) wishing to benefit from fiscal transparency. I am thinking, for example, of a requirement to be subject to supervision by the national financial markets authority, in the same way as A SCPI in the dispute in the main proceedings. [30]

D. The lack of justification based on overriding reasons in the public interest

91. I have stated that the requirement to be constituted by contract in order to be able to benefit from fiscal transparency, as laid down in Paragraph 20a of the Law on income tax, constitutes a restriction on the free movement of capital. I have also shown that that requirement establishes an arbitrary difference in treatment between situations that are comparable, namely the situations of investment funds having a similar degree of transparency, irrespective of whether they were constituted by contract or in corporate form.

92. It remains for me to examine the possibility that that difference in treatment may be justified by overriding reasons in the public interest.

[30] See point 16 of this Opinion.

93. The Court has consistently held that national measures which restrict the free movement of capital may be justified by one of the reasons set out in Article 65 TFEU or by overriding reasons in the public interest, provided that those measures are appropriate for securing the attainment of the objective which they pursue and do not go beyond what is necessary to attain that objective. [31]

94. I am not convinced by any of the justificatory grounds set out in the file submitted to the Court.

95. In the first place, the referring court has stated that the objectives referred to in the government's proposal that led to the adoption of Paragraph 20a of the Law on income tax included the desire to establish more specific criteria for the application of the fiscal transparency mechanism to foreign investment funds. That new provision had thus made it possible to increase both the foreseeability of the tax and legal certainty. It also led to the removal of administrative burdens.

96. In a similar vein, the Finnish Government argued, before the Court, that there is a link between the precise demarcation of the exemption and the guarantee of the effectiveness of fiscal control and of the collection of taxes.

97. To my mind, the desire to increase legal certainty cannot in any event constitute a legitimate reason that would justify a restriction on the freedoms of movement. If that were the case, Member States would be at liberty to impose such restrictions on condition that those restrictions were provided for in rules guaranteeing a high degree of legal certainty.

98. Admittedly, the Court has held on numerous occasions that a *lack* of legal certainty affecting national rules might prove to be incompatible with EU law. According to settled case-law, in areas covered by EU law, the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed. [32]

99. However, that case-law does not in any way imply that the objective of legal certainty may justify a restriction on the freedoms of movement resulting from other aspects of the national rules in question.

100. Nor, moreover, and as the Commission has rightly observed, can administrative or practical difficulties justify, in themselves, a breach of a fundamental freedom guaranteed by the Treaty. [33]

101. In the second place, the Finnish Government has referred briefly to the objective of cohesion in the tax regime, emphasising in that respect that the exemption concerns investment funds which can be set up according to the Finnish legislation and all the funds which can be treated as equivalent to such funds.

[31] See, in particular, judgments of 1 October 2009, *Woningstichting Sint Servatius* (C-567/07, EU:C:2009:593, paragraph 25); of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 74); of 22 October 2013, *Essent and Others* (C-105/12 to C-107/12, EU:C:2013:677, paragraph 50); and of 16 July 2020, *Adusbef and Others* (C-686/18, EU:C:2020:567, paragraph 105).

[32] See, in particular, judgments of 30 January 1985, *Commission* v *Denmark* (143/83, EU:C:1985:34, paragraph 10); of 26 February 1991, *Commission* v *Italy* (C-120/88,-EU:C:1991:74, paragraph 11); of 6 March 2003, *Commission* v *Luxembourg* (C-478/01, EU:C:2003:134, paragraph 20); and of 15 April 2021, *Finanzamt für Körperschaften Berlin* (C-868/19, not published, EU:C:2021:285, paragraph 50).

[33] See, in particular, judgments of 16 December 1986, *Commission* v *Greece* (124/85, EU:C:1986:490, paragraph 12); of 12 July 1990, *Commission* v *Italy* (C-128/89, EU:C:1990:311, paragraph 22); of 27 November 2008, *Papillon* (C-418/07, EU:C:2008:659, paragraph 54); and of 3 July 2019, *Delfarma* (C-387/18, EU:C:2019:556, paragraph 30).

102. That argument must also be rejected. According to consistent case-law, in order for an argument based on such a justification to succeed, a direct link must be established between the grant of 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. [34]

103. It is sufficient to observe that the Finnish Government has not relied on the existence of such a direct link, which is necessary in order for such a justification to succeed.

104. Last, and in the third place, according to the explanations provided by the referring court, Finnish investment funds might be subject in other Member States to stricter legislation than that applicable in Finland to foreign funds, which would raise a problem from the viewpoint of the neutrality of competition. One of the objectives pursued by Paragraph 20a of the Law on income tax is to place Finnish and foreign funds on an equal footing.

105. As the Commission has observed in essence, it follows from the Court's case-law that unfavourable tax treatment in one Member State which is found to be contrary to the fundamental freedoms of movement cannot be considered to be compatible with EU law on the ground that tax advantages may be granted in another Member State. [35]

106. For the sake of completeness, I would further observe that no justification can be identified in paragraph 43 of the judgment in *Köln-Aktienfonds Deka*. [36] Admittedly, the Court stated in that paragraph that Member States are free to provide for, for the purposes of encouraging the use of collective investment undertakings, a specific tax regime applicable to those undertakings.

107. However, the scope of that observation, which forms part of a series of introductory considerations set out by the Court before it answered the questions referred to it, must be understood in the light of the following paragraphs of that judgment, where the Court observes that the Member States must exercise their fiscal autonomy in accordance with the requirements of EU law, in particular those imposed by the Treaty provisions on the free movement of capital. [37]

108. The Court adds that, consequently, the establishment of a regime specific to collective investment undertakings, in particular the nature of the conditions that must be satisfied in order to benefit from it and the evidence to be provided for that purpose, *must not constitute a restriction on the free movement of capital*. [38]

109. In other words, the introduction of such a regime is not a valid reason that is capable of justifying a restriction on the free movement of capital.

[34] See, in particular, judgments of 28 January 1992, *Bachmann* (C-204/90, EU:C:1992:35, paragraph 21); of 14 September 2006, *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568, paragraph 53 and the case-law cited); of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 45); and of 13 November 2019, *College Pension Plan of British Columbia* (C-641/17, EU:C:2019:960, paragraph 87).

[35] See in particular, to that effect, judgments of 28 January 1986, *Commission* v *France* (270/83, EU:C:1986:37, paragraph 21); of 26 October 1999, *Eurowings Luftverkehr* (C-294/97, EU:C:1999:524, paragraph 44); of 15 July 2004, *Lenz* (C-315/02, EU:C:2004:446, paragraph 43); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 49); and of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraphs 75 and 78).

[36] Judgment of 30 January 2020 (C-156/17, EU:C:2020:51).

[37] Judgment of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 45).

[38] Judgment of 30 January 2020, *Köln-Aktienfonds Deka* (C-156/17, EU:C:2020:51, paragraph 46).

110. In the light of the foregoing, it must be considered that the restriction on the free movement of capital resulting from the requirement to be constituted by contract in order to benefit from fiscal transparency is not justified by an overriding reason in the public interest.

V. Conclusion

111. In the light of all of the foregoing considerations, I propose that the Court answer the question for a preliminary ruling referred by the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) as follows:

Articles 63 and 65 TFEU must be interpreted as meaning that a requirement to be constituted by contract, laid down in the tax legislation of a Member State in order for an investment fund to be able to benefit from fiscal transparency, is contrary to the free movement of capital, in so far as it results in the exclusion of investment funds constituted in corporate form in other Member States although those funds are objectively comparable, in terms of transparency, to funds constituted by contract.