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Is the Swedish tax law requirement of contractual form on third states investment funds in line with EU law?

by

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HARN60 Master Thesis

Master's Programme in European and International Tax Law

2019/2020

Spring semester 2020

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The 31th of May 2020

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Words: 11299

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Summary

The aim of this essay is to assess whether or not it is compatible with EU law to require foreign investment funds resident in third countries to have the same legal form as Swedish contractual investment funds, in order to be exempt from withholding tax. Swedish contractual investment funds fulfilling certain requirement are tax exempt which resulting in a different treatment if withholding tax is levied on the non-resident investment fund. The main issue is whether the investment funds are comparable. There is currently uncertainty regarding whether or not legal personality results in non-comparability. However, the author considers that a legal form requirement can be upheld to some extent due to the aim of the Swedish investment fund regime.

Abbreviation list

AG	Advocate General
AIF	Alternative Investment Funds
AIFM directive	Alternative Investment Fund Managers Directive
CJEU	Court of Justice of the European Union
SAC	Swedish Supreme Administrative Court
SAIFMA	Swedish Alternative Investment Funds Manager Act
SDWTA	Swedish Dividends Withholding Tax Act
SMF	Swedish Ministry of Finance
SIFA	Swedish Investment Funds Act
TC	Third country
TFEU	Treaty on the Functioning of the European Union
UCITS	Undertakings for Collective Investment in Transferable Securities
UCITS Directive	Undertakings for Collective Investment in Transferable Securities Directive

1. Introduction

1.1 Background

Investments through investment funds constitute an alternative to direct investments for investors and should therefore be as tax neutral as possible compared to direct investments. In order to achieve such tax neutrality, income flowing from investments to the investment fund and the income distributed from the investment fund to the investors of the investment fund should not be subject to double or multiple taxation but instead be subject to a single taxation.[1] In order to achieve such single taxation different techniques are used by states. The single taxation can be achieved by exempt investment funds from income tax, ignore investment funds for cooperate tax purposes, entitle investment funds to deduct dividends distributed to the investors from the investment funds taxable basis or by only tax the investment funds and not the investors when the investors receive dividends.[2] The taxation of investment funds works well in a purely domestic situations but can be problematic in cross-border situations. In outbound dividends scenarios when dividends are distributed to foreign investment funds, withholding tax may be levied because the source state does not exempt foreign investment funds and the tax treaty between the states does not fully eliminate the withholding tax.[3] The reason the source state does not exempt the withholding tax can be because no such exemption exists in the national law regarding non-resident investment funds or that the foreign investment fund does not fulfill the requirements in the national law for the tax exemption. In such scenarios the cross-border situation and a purely domestic situation are treated differently which can be incompatible with EU law.

Since the free movement of capital, which is defined in Article 63 of the Treaty on the Functioning of the European Union (TFEU), covers both intra-EU and third country (TC) scenarios the aforementioned difference in treatments can also be relevant in TC scenarios. When Member States levy withholding tax on outbound dividends the tax treatment can fall within the scope of Article 49 TFEU on the freedom of establishment and Article 63 TFEU.[4] In the assessment of which freedom that is applicable, only the purpose of the national

[1] See Calisto, A, Cross-border direct tax issues of investment funds from the perspective of European law, EC Tax Review, Issue 5, 2008, page 198.
[2] See Vermeulen, Hein (red.), The tax treatment of collective investment vehicles and real estate investment trusts, IBFD, Amsterdam, 2013, page 5-6.
[3] Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 271.
[4] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 25 and 32.

legislation in TC scenarios is relevant.[5] When the national tax rules, in TC scenarios, do not exclusively apply on situations where parent company exercise decisive influence over the dividends distributing company, Article 63 TFEU is applicable.[6] Such decisive influence does not necessarily exist when the shareholding is, for example, 10 percent or 15 percent.[7]

In order for the tax treatment to be contrary to Article 63 TFEU, the tax treatment shall constitute a restriction.[8] Both an exclusion of non-resident investment funds from a tax advantage and national criteria which applies without distinction to resident and non-resident investment funds which de facto disadvantage cross-border situations constitutes restrictions.[9] However, the main issue in the assessment of whether it is compatible with Article 63 TFEU to levy withholding tax on foreign investment funds have been considered to be whether or not foreign non-resident investment funds are in a comparable situation to domestic investment funds according to literature.[10] If the non-resident and resident investment funds are considered to be in comparable situations the final tax burden shall not be heavier for the non-resident investment fund unless there is an acceptable justification for the different treatment.[11]

In recent years, several non-resident investment funds have been pursuing cases in Sweden regarding withholding tax on received dividends distributed from Swedish limited liabilities companies.[12] Article 63 TFEU have been applicable in TC scenarios since Swedish law do not require a certain percentage of shareholding in the distributing company in order for a resident contractual investment fund to be tax. One of the questions that has arisen is whether a foreign investment funds established as an investment company resident in a TC can be considered

[5] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 29 and 32.
[6] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 30 and 32.
[7] The assessment regarding which freedom that is applicable is the same in outbound and inbound dividends scenarios: Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 32. Regarding 10% see Judgment of 24 November 2016, SECIL, C-464/14, EU:C:2016:896, paragraph 40. Regarding 15% see Judgment of 20 September 2018, EV, C-685/16, EU:C:2018:743, paragraph 40. See also Hji Panayi, Christiana, Haslehner, Werner & Traversa, Edoardo, Research Handbook on European Union Taxation Law, Edward Elgar Publishing Ltd, Cheltenham, 2020 page 576.
[8] See, inter alia, judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, 40-45.
[9] See, inter alia, Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 43-45 and Judgment of 21 January 2002, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 55-56.
[10] See Giampaolo Genta, Dividends Received by Investment Funds: An EU Law Perspective – Part 1, European Taxation volume 53 number 2/3, Journals IBFD, 2013, page 81 and Tomi Viitala, Finnish Case on the Taxation of Dividends from a Luxembourg SICAV Referred to the ECJ, European Taxation volume 60 number 1, Journal Articles & Papers IBFD, 2020, page 32.
[11] See Hji Panayi, Christiana, Haslehner, Werner & Traversa, Edoardo, Research Handbook on European Union Taxation Law, Edward Elgar Publishing Ltd, Cheltenham, 2020 page 234.
[12] See, inter alia, Judgment delivered on the 15 of February 2012, The Administrative Court of Appeal of Sundsvall, case number 862-13, Judgment delivered on the 15 of February 2012, The Administrative Court of Appeal of Sundsvall, case number 968-972-13 and Judgment delivered on the 14 of May 2018, The Administrative Court of Appeal of Sundsvall, case number 630-632-14.

comparable to Swedish contractual investment funds.[13] The question whether Sweden can require non-resident investment funds to have a contractual form has been answered differently. The Swedish Board for Advance Tax Rulings issued an advance ruling in 2017 where the Board did not consider such requirement to be contrary to Article 63 TFEU.[14] However, on 11 February 2020, the Swedish Supreme Administrative Court (SAC) issued a ruling where the SAC stated that such requirement was contrary to Article 63 TFEU.[15] Recently, on 29 April 2020, the Swedish Ministry of Finance (SMF) published a proposal for a new Swedish Dividends Withholding Tax Act where the SMF stated that it is not clear whether or not a requirement of a corresponding legal form is compatible with EU law. Due to, inter alia, the aforementioned reason, the SMF submitted to the national courts to decide whether a corresponding legal form should be a requirement for the exemption of withholding tax regarding the foreign special fund exemption.[16] The answer to the question is essential since the withholding tax results in different treatments between non-resident investment funds and Swedish contractual investment funds. At the time of writing, there is also a pending case regarding whether or not Finland can require foreign investment funds to have a contractual form in an inbound dividends scenario.[17] Although the SAC has considered it to be contrary to Article 63 TFEU to require foreign investment funds resident in TCs to have a contractual form, the author still considers it to be uncertainty. The uncertainty is evident both from the various assessments made but also from the fact that another Member State has requested a preliminary ruling as to whether or not the legal form may constitute a permissible requirement for obtaining a tax advantage in cross-border situations. The problem is that if Sweden can require foreign investment funds resident in TCs to have the same legal form as Swedish contractual investment funds according to EU law, Sweden will lose tax base due to a misinterpretation of EU law if the SAC ruling is followed.

1.2 Aim

The aim of this essay is to assess whether or not it is compatible with Article 63 TFEU to require foreign investment funds resident in TCs to have the same legal form as Swedish contractual

[13] See, inter alia, Judgment delivered on the 14 of May 2018, The Administrative Court of Appeal of Sundsvall, case number 630-632-14.
[14] See Advance tax ruling delivered on the 30 of October 2017, The National Board on Advanced Tax Rulings, case 4/17D.
[15] See Judgment delivered on the 11 of February 2020, The Swedish Supreme Administrative Court, case number 3725-3727-18 and Chapter 4.2.2 in this essay.
[16] Proposal by the Swedish Ministry of Finance Ds 2020:10, page 93.
[17] See C-480/19 Veronsaajien oikeudenvalvontayksikkö (pending case) and Chapter 3.2.1.2 in this essay.

investment funds in order for the foreign investment funds to be exempt from withholding tax. The focus in this essay is on the comparability assessment.

1.3 Method and material

A legal-dogmatic method is used in this essay. The author has used sources of law recognised by the SAC to assess what constitutes Swedish law.[18] The SAC normally uses the legislations, its previous rulings, preparatory works for the legislation and have also recognised the direct and indirect effect of EU law on numerous occasions when interpreting what constitute Swedish law.[19] Literature has also been used as a help to interpret Swedish law but is not used as a source of law. To establish EU law, the author has used an EU legal method. Articles in the TFEU and case-law of the Court of Justice of the European Union (CJEU) have been used as sources of law. Advocate Generals (AGs) opinions have also been used as sources of law when the CJEU clearly follows or directly refers to a point in the AG opinion and Literature has been used as a help to interpret the case law of the CJEU.[20]

1.4 Delimitation

The standstill clause in Article 64(1) TFEU and the impact of tax treaties on the comparability assessment are not analysed in this essay.

2 Investment funds

There is no international general legal definition of what constitutes an investment fund. The terminology has instead different meanings in different states national laws and in practice.[21]

In this essay, the term "investment funds" refers to financial intermediaries that collects money from investors and issues a corresponding number of units or shares (units or shares are hereinafter referred to as units).[22] The collected money is used to collectively purchase financial assets. In exchange for the collected money, the investors are entitled to income and gains

[18] See Jan Vranken, Exciting Times for Legal Scholarship, Recht en Methode in onderzoek en onderwijs 2012 (2), chapter 4. See also Douma, Sjoerd, Legal Research in International and EU Tax Law, Kluwer, 2014, page 19 which refers to jan Vranken and others.

[19] See Mats Tjernberg, OECD:s dokument, tolkningsvärdet för ren intern rätt, Svensk Skattetidning nr 2/2017, 2017, page 122. Regarding the recognitions of EU law see, for example, Judgment delivered on the 30 of Mars 2009, The Swedish Supreme Administrative Court, case number 3264-05 and Judgment delivered on the 11 of February 2020, The Swedish Supreme Administrative Court, case number 3725-3727-18.

[20] See Hettne, Jörgen & Otken Eriksson, Ida (red.), EU-rättslig metod: teori och genomslag i svensk rättstillämpning, 2., omarb. uppl., Norstedts juridik, Stockholm, 2011, page 40, 117, 120 and 121.

[21] See Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 9.

[22] See Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 11.

produced by the fund on its investments.[23] Investment funds can be open-ended or closed-ended. If the investment fund is an open-ended fund, the investors are entitled to repurchase and redeem the units. If the investment fund is a closed-ended fund, the investment fund issues a fixed number of units that can be traded between investors and there is no right for the investor to repurchase or redeem the units.[24] The role of an investment fund can be described as an intermediary between the individual investor and the ultimate user of the capital.[25]

At the EU level, two categories of investment funds have been incorporated into national law through directives, which are Undertakings for Collective Investment in Transferable Securities (UCITS) and Alternative Investment Funds (AIFs).[26] The UCITS Directive[27] establish common basic rules for the authorisation, supervision, structure and activities of UCITS and the information that they need to publish.[28] The sole objective of UCITS is to make collective investment in transferable securities or in other liquid financial assets of capital raised from the public and which operate on the principle of risk-spreading.[29] UCITS are open-ended funds, meaning that the UCITS shall repurchase or redeem its units at the request of the unit-holder.[30] There are two possible legal structures of UCITS. They can be established as investment companies or as common funds. The term common funds cover funds constituted in accordance with contract law or trust law.[31] A common fund constituted in accordance with contract law does not have legal personality and therefore always needs a management company.[32] Investment companies, on the other hand, can be self-managed and therefore do not need a management company under certain conditions.[33] The assets of the UCITS are given in custody to a separate depositary which can neither be the investment company or the management

[23] See Viitala, Tomi, Taxation of investment funds in the European Union, IBFD, Amsterdam, 2005, page 17.
[24] Thuronyi, Victor (red.), Tax law design and drafting Vol. 2, International Monetary Fund, Washington, D.C., 1998, chapter 22, page 2 and Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 22-23.
[25] See Thuronyi, Victor (red.), Tax law design and drafting Vol. 2, International Monetary Fund, Washington, D.C., 1998, chapter 22, page 2.
[26] See Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 12.
[27] 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).
[28] See Recital 4 in the UCITS Directive.
[29] See Article 1(2)a in the UCITS Directive.
[30] See Article 1(2)b and Article 8 in the UCITS Directive. See also Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 22-23.
[31] See Article 1(3) and 1(3)a in the UCITS Directive.
[32] See Article 1(3) in the UCITS Directive and Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 16.
[33] See Article 7 and 29 in the UCITS Directive.

company.[34] The AIFM Directive[35] specifies that AIF are Collective investment undertakings that ”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”.[36] AIFs can be open-ended or closed-ended and the AIFM Directive do not require a certain legal form of the AIF.[37]

3 EU law

3.1 Introduction

Since the focus in this essay is on the comparability assessment, the restriction stage and the justification stage are not analysed in the following. However, the restriction stage and the justification stage are mentioned when it is necessary to understand the comparability assessment. A restriction is permissible if the different treatment concerns two situations which are not objectively comparable.[38] The comparability assessment is made on a case by case basis by relying on the aim of the disputed provision.[39] Since the CJEU does not distinguish between intra-EU and TC scenarios in the assessment of comparability, it is relevant to assess both scenarios.[40] In outbound dividends scenarios when the recipient has been an investment fund, the CJEU has applied different approaches which are analysed in the following chapter.[41]

[34] See Article 22(5) and 25(1) in the UCITS Directive.
[35] 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.
[36] See Article 4(1)(a)(i) in the AIFM Directive.
[37] See Article 2(2)(a) and 2(2)(b) in the AIFM Directive.
[38] See judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 57.
[39] See Hji Panayi, Christiana, Haslehner, Werner & Traversa, Edoardo, Research Handbook on European Union Taxation Law, Edward Elgar Publishing Ltd, Cheltenham, 2020 page 582.
[40] See Lang, Michael, Pistone, Pasquale, Schuch, Josef & Staringer, Claus (red.), Introduction to European tax law on direct taxation, 5th edition, Linde, Wien, 2018, page 83: ”Intra-EU and third-country situations are almost universally comparable, unless there is a good reason for them not to be. As yet, no such good reason has emerged.” and Hji Panayi, Christiana, Haslehner, Werner & Traversa, Edoardo, Research Handbook on European Union Taxation Law, Edward Elgar Publishing Ltd, Cheltenham, 2020 page 582: ”In analysing whether two situations are objectively comparable, the Court of Justice does not apply a different standard in intra-EU and third country cases”. Regarding investment funds see Judgment of 10 May 2012, Santander Asset Management SGIIC, C-338/11, EU:C:2012:286 and Lang, Michael, Pistone, Pasquale, Schuch, Josef & Staringer, Claus (red.), Introduction to European tax law on direct taxation, 5th edition, Linde, Wien, 2018, page 83: ”in Santander Asset Management SGIIC (where some of the joint cases were related to non-Member States), the CJEU simultaneously evaluated the comparability of intra-Community and third-country situations and applied the test without any distinction”.
[41] For a similar division of the approaches see Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018 page 145.

3.2 Comparability

3.2.1 The SCT Approach and the Legal Form Approach

3.2.1.1 Case-law

There are currently two cases from the CJEU regarding investment funds where the CJEU dealt with whether Member States can require non-resident investment funds to have a certain legal form. The first case is the Aberdeen case and the second is the Commission v Belgium case.[42] The Aberdeen case is about withholding tax on outbound dividends received by a non-resident investment fund. The question in the case was whether it was contrary to the freedom of establishment to levy Finnish withholding tax on dividends distributed from a Finnish subsidiary to a Luxembourg SICAV, while exempting such dividends when distributed to Finnish share company or a Finnish investment fund.[43] In the comparability stage, the CJEU stated that when Member States have rules that prevent or mitigate the imposition of series of charges to tax on profits distributed by a resident company, resident and non-resident shareholders are not necessarily in a comparable situation.[44] However, if a Member State imposes a charge to income tax on both resident and non-resident shareholders on dividends distributed from resident companies, the resident and non-resident shareholders becomes comparable.[45] A Member State that has chosen to relive resident parent companies from such series of charges to tax is obliged to extend that relief to non-resident parent companies which are in a comparable situation, since the Member State created the series of changes to tax.[46] The aforementioned approach is hereafter referred to as the series of charges to tax approach (SCT Approach). The Finnish government claimed that, since the Finnish national legislation did ”not allow companies to be set up in Finland with a legal form identical to that of a SICAV under Luxembourg law, that SICAV, because of its legal form and tax treatment, is in a situation which is objectively different from that of companies or investment funds established in Finland”. The differences between the SICAV and a Finnish share company or Finnish investment fund were, inter alia, the following: The Luxembourg SICAV was a non-UCITS open-ended investment company with an aim to make real estate investments in Finland directly and indirectly through a subsidiary in Finland.[47] Regarding Finnish share companies, the share

[42] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377 and Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670.
[43] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 23 and 36.
[44] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 42.
[45] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 43.
[46] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 44.
[47] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 2,17 and 47.

capital was tied up and could not be repaid to the shareholder during the lifetime of the company.[48] The difference was therefore that the SICAV was open-ended while Finnish share companies were closed-ended. Regarding Finnish investment funds, they were contractual funds and prohibited from making real property investments.[49] The differences between the SICAV and Finnish investment funds were therefore the legal form and which assets that were permissible for the fund to invest in. In the assessment of whether a SICAV was in an objectively different situation from that of a Finnish company, the CJEU concluded that there was no objective difference.[50] The CJEU first stated that: ”the circumstance that in Finnish law there is no type of company with a legal form identical to that of a SICAV governed by Luxembourg law cannot in itself justify a difference in treatment, since, as the company law of the Member States has not been fully harmonised at Community level, that would deprive the freedom of establishment of all effectiveness”.[51] The CJEU secondly stated that non-taxation of the received dividends in Luxembourg was of no relevance since Finland did not tax such income when received by a Finnish parent company.[52] The Italian Government had also put forward an argument that since Luxembourg did not tax the income of the SICAV, the series of charges to tax took place at the level of the unit-holders and should be avoided by the Member State where the unit-holder is resident. The CJEU rejected the argument since the series of charges to tax did not take place at the level of the unit-holders but instead already existed when Finland first subjected the resident distributing company to tax and secondly the receiving company to withholding tax, which was a series of charges to tax avoided in a purely domestic situation.[53] Since there was no objective difference between an SICAV and Finnish share company, the CJEU did not assess whether there was an objective difference between an SICAV and a Finnish investment fund.[54]

The second case, the Commission v. Belgium case, concerns the difference in treatment between resident investment companies and non-resident investment companies. According to the Belgium legislation both resident and non-resident investment companies were subject to withholding tax on Belgium sourced dividends and interest.[55] However, resident investment

[48] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 21.
[49] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 48 and Vermeulen, Hein (red.), The tax treatment of collective investment vehicles and real estate investment trusts, IBFD, Amsterdam, 2013, page 153.
[50] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 55.
[51] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 50.
[52] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377 paragraph 51 and 52.
[53] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 54.
[54] See Judgment of 18 June 2009, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, paragraph 55.
[55] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 38.

companies were exempt from taxation on received interest and dividends. Resident investment companies could also set of the withholding tax against the corporate tax or be granted a refund.[56] Non-resident investment companies with no permanent establishment in Belgium could not set off the withholding tax or be granted a refund, according to the Belgium tax legislation, which resulted in that the withholding tax was definitive.[57] The aforementioned difference in treatment resulted in a less favorable treatment for non-resident investment funds and the applicable freedom was, inter alia, the free movement of capital.[58] In the comparability stage, the Belgium Government claimed that a resident investment company was in a different situation from that of a non-resident investment company.[59] The CJEU's assessment, in line with the Belgium governments submission, dealt with the SCT Approach, a resident common funds argument, a difference in activities argument and the Distinguishing Criteria Approach.[60] In the ”resident common funds argument” part of the comparability assessment, the Belgium Government argued that: The commissions comparison between resident investment funds and non-resident investment funds was incorrect.[61] The comparison should instead have been made between resident common funds and non-resident investment companies, since the Belgium tax legislation treated resident common funds and non-resident investment companies identically.[62] Resident common funds was according to the Belgium tax legislation transparent for tax purposes and the withholding tax assigned to those funds was therefore definitely levied.[63] The CJEU rejected this approach since non-resident investment funds had legal personality and resident common funds had no legal personality.[64]

3.2.1.2 Analysis of the judgments

The Aberdeen case has been interpreted in different ways in literature. Conclusions have been drawn such as Member States cannot refuse comparability but must instead find a closest possible domestic comparable entity and that minor differences in the legal form, such as variable and fixed capital, do not result in that situations are non-comparable.[65] Two approaches have also been created in literature on the basis of which the present analysis is carried out. The

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[56] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 38-39.
[57] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 39.
[58] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 35 and 40.
[59] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 41.
[60] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 47-57, 59-61, 62-64 and 65-67.
[61] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 58.
[62] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 59.
[63] See Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 28 and Vermeulen, Hein (red.), The tax treatment of collective investment vehicles and real estate investment trusts, IBFD, Amsterdam, 2013, page 155.
[64] see Judgment of 25 October 2012, Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 59.
[65] See Vermeulen, Hein (red.), The tax treatment of collective investment vehicles and real estate investment trusts, IBFD, Amsterdam, 2013, page 153.

two different approaches are ”the formal approach” and ”a substantive approach”. It has been considered that the CJEU ”seemed to give preference to the formal approach” which means that when the recipient has a corporate legal form then the comparison should be made with a domestic company. However, the same author also considered that a comparison with the Finnish contractual investment fund was not made since the outcome in the case would have been the same, which the author considered appears to be supported by the reasoning in opinion of the AG.[66] Another interpretation of the case is that the outcome in the case is connected to the application of the SCT Approach.[67] It has also been considered that it is not clear if the Aberdeen case was affected by the fact that Finnish law did not provide for a specific investment regime that would be more or less similar to the Luxembourg SICAV regime.[68]

According to the author of this essay, the Aberdeen case must be interpreted in the light of the approach used by the CJEU.[69] The CJEU uses the SCT Approach when the aim of the national legislation is to prevent or mitigating series of charges to tax. What makes the resident and non-resident shareholders ”comparable”, when the SCT Approach is applicable, is the fact that the source state expands its tax jurisdiction over the income of the non-resident shareholder. It is clear from the case that, just because a Member State’s national law does not allow companies to be set up in a legal form identical to that of a foreign company does not result in that the companies are not objectively comparable, when the SCT Approach is applied. However, what is not clear from the case is whether the SCT Approach also would have resulted in that non-resident investment companies becomes comparable to resident contractual funds. The author does not consider that the AG’s Opinion gives any guidance on the matter. However, when taking account of the outcome of the case, it seems that the legal form is irrelevant when the SCT Approach is used since an investment company with variable share capital was comparable to Finnish share companies with fixed capital. There is also no logic in why the legal form would lead to non-comparability between non-resident investment companies and resident contractual investment funds as regards the risk of a series of charges to tax on received dividends. In other words, the legal form has no impact on the risk of a series of charges to tax

[66] See Giampaolo Genta, Dividends Received by Investment Funds: An EU Law Perspective – Part 2, European Taxation, volume 53 number 4, Journals IBFD, 2013, chapter 5.2.1 and Opinion of Advocate General Mazák delivered on 18 December 2008, Aberdeen Property Fininvest Alpha, C-303/07, EU:C:2009:377, point 33.
[67]See Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018 page 148.
[68] See Pascal Borsjé & Willem Specken, Taxation and Cross-Border Pooling in the EU Pension Sector: From UCITS to IORP, volume 15 Derivatives & Financial Instruments number 5a/Special Issue, Journals IBFD, 2013, page 30.
[69] See Mario Tenore has also connected the outcome of the Aberdeen case to the ACT GLO/Denkavit Approach which is what the author of this essay refers to as the SCT Approach: Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 148.

and would therefore not result in an objective difference according to the author. The SCT Approach was not even dependent on that the non-resident recipient was taxed in the state of residence since the source state independently created the series of charges to tax. Since it is the tax treatment of the source state that creates the risk of a series of charges to tax, it is probably also irrelevant if the non-resident shareholder is fiscally transparent or opaque in the state of residence when the SCT Approach is applied. However, when the source state does not tax the outbound dividends, the resident and non-resident shareholders are not comparable.[70]

The SCT approach have been used in almost all cases when the source state has levied withholding tax.[71] However, it is important to notice that when the aim of national tax systems have not been to prevent or mitigating series of charges to tax, the SCT Approach has not been applicable.[72] When a national legislation has a different aim than to prevent or mitigating series of charges to tax, it is possible that the legal form can be relevant in achieving the aim according to the author. It can therefore not be excluded that differences in the legal form, such as variable capital and fixed capital, can result in an objective difference when another approach than the SCT approach is used.

Regarding the Commission v. Belgium case, Tomi Viitala has considered that the case highlights the importance of the comparability test when a Member State's tax legislation makes the different tax treatment dependent on the type of fund. He has also considered that if the non-resident investment fund would have been more comparable to a Belgium common fund, the withholding tax could be levied since withholding tax on Belgium common fund was definitely levied.[73] It has also been considered in literature that the Commission v. Belgium case indicates that the comparability of domestic and non-domestic investment entities can, "in principle", depend on, inter alia, the legal form.[74]

According to the author of this essay, it is clear that a Legal Form Approach was used in the Commission v Belgium case since legal personality was used by the CJEU in order to reject the

[70] See Test Claimants in Class IV of the ACT Group Litigation, C-374/04, EU:C:2006:773, paragraph 61-62, 72-74 and Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 146: "The lack of any UK income tax (i.e., "a charge to income tax") on outbound dividends was, indeed, a key element in the CJEU's reasons for denying comparability between resident and non-resident shareholders and, thus, refusing to extend to the latter shareholders the entitlement to the imputation credit.".
[71] See Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 146.
[72] See Judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C-252/14, EU:C:2016:402, paragraph 53, 59 and Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 77.
[73] See Vermeulen, Hein (red.), The tax treatment of collective investment vehicles and real estate investment trusts, IBFD, Amsterdam, 2013 page 155.
[74] See Pascal Borsjé & Willem Specken, Taxation and Cross-Border Pooling in the EU Pension Sector: From UCITS to IORP, volume 15 Derivatives & Financial Instruments number 5a/Special Issue, Journals IBFD, 2013, page 31.

argument that the non-resident investment company should be compared to a Belgian common fund. The Legal Form Approach was used independently in the case and was not part of the SCT Approach. The rejection of the argument led to a more favorable tax treatment than would have been the case if the non-resident investment company instead was considered comparable to a Belgian common fund. It is not clear under CJEU case law, whether the Legal Form Approach also would apply if the Belgian common funds instead were subject to the more favorable tax treatment. The reason why a Legal Form Approach was not used in the Aberdeen case is also unclear. Since the CJEU stated that it was not necessary to assess whether the investment company was comparable to a contractual investment fund, it cannot be considered that a Legal Form Approach was used indirectly in the Aberdeen case.

Due to the aforementioned, the author considers it necessary, as regards investment funds, that the legal approach is applicable or that the national legislation has a different aim than to prevent or mitigating series of charges to tax in order for the legal form to be relevant at the comparability stage.

At the time of writing, there are several pending cases regarding investment funds.[75] In one of the pending cases the Finnish Supreme Administrative Court have asked for a preliminary ruling regarding inbound dividends.[76] As in the Aberdeen case the question regards the treatment of a SICAV. However, the SICAV is a UCITS fund in the pending case and if the SICAV would be considered comparable to a Finnish company in this case it would lead to a disadvantage in taxation as compared to if the SICAV would be consider comparable to a Finnish UCITS fund constituted in accordance with contract law.[77] Since the more favorable tax treatment for investment funds only covers contractual funds the CJEU must determine whether or not legal form is an acceptable criterion.[78] It is possible that the CJEU will apply a mutual recognition approach since the UCITS Directive recognise both legal forms.[79] There are also two other cases regarding whether Italy can deny a non-resident open-ended real estate

[75] See C-478/19 UBS Real Estate (pending case), C-479/19, UBS Real Estate (pending case), C-480/19 Veronsaajien oikeudenvalvontayksikkö (pending case) and C-545/19 - Allianzgi-Fonds Aevn (pending case).

[76] See C-480/19 Veronsaajien oikeudenvalvontayksikkö (pending case).

[77] See Tomi Viitala, Finnish Case on the Taxation of Dividends from a Luxembourg SICAV Referred to the ECJ, European Taxation volume 60 number 1, Journal Articles & Papers IBFD, 2020, page 31.

[78] See Tomi Viitala, Finnish Case on the Taxation of Dividends from a Luxembourg SICAV Referred to the ECJ, European Taxation volume 60 number 1, Journal Articles & Papers IBFD, 2020, page 33.

[79] In the area of direct taxation, there is no general mutual recognition of UCITS: Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 80 and Opinion of Advocate General Pitruzzella delivered on 5 September 2019, Köln-Aktienfonds Deka, C-156/17, EU:C:2019:677, point 96: ”The redistribution obligation applies without distinction to both Netherlands and non-resident UCITS”. However, there may be a mutual recognition when the difference between the investment funds are covered by the UCITS directive. See also Vermeulen, Hein (red.), The tax treatment of collective investment vehicles and real estate investment trusts, IBFD, Amsterdam, 2013, page 150 and 151.

investment fund a relief on mortgage registration tax and Land Registry fee when the national legislation only grant that tax advantage when a real estate investment fund is closed-ended.[80]

3.2.2 The Distinguishing Criteria Approach and the Aim Approach

3.2.2.1 Introduction

According to the Distinguishing Criteria Approach, ”only the relevant distinguishing criteria established by the” national legislation “must be taken into account in determining whether the difference in treatment resulting from that legislation reflects an objectively different situation”.[81] The Distinguishing Criteria Approach is to a large extent specific to the case law of withholding tax on outbound dividends received by non-resident investment funds.[82] However, the approach has also been applicable when a pension fund has been the recipient of the outbound dividends and in an inbound dividends scenario regarding companies.[83] In five of the six cases, residence was the distinguishing criterion.[84] In one of the cases it is more unclear which criterion or criteria that was/were distinguishing, which is the Fidelity Funds case.

The first three cases, in which the distinguishing criteria approach was applicable, are: the Santander case, the Commission v Belgium case and the Emerging Markets case. In all three cases, the CJEU found that in the light of residence being the distinguishing criterion, the comparability assessment had to be carried out only at the level of the investment vehicle.[85]

After the aforementioned three cases the CJEU have combined the Distinguishing Criteria Approach with the Aim Approach when the Distinguishing Criteria Approach have been applicable. According to the Aim Approach, ”the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national provisions

[80] See C-478/19, UBS Real Estate (pending case) and C-479/19, UBS Real Estate (pending case).
[81] See Judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C-252/14, EU:C:2016:402, paragraph 49, Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 51 and Judgment of 20 September 2018, EV, C-685/16, EU:C:2018:743, paragraph 89. See also Judgment of 10 May 2012, Santander Asset Management SGIIC, C-338/11, EU:C:2012:286, paragraph 28, Judgment of 25 October 2012,Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 65,67 and Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 61 where the CJEU used a slightly different wording.
[82] See Judgment of 10 May 2012, Santander Asset Management SGIIC, C-338/11, EU:C:2012:286, paragraph 28, Santander Asset Management SGIIC, C-338/11, EU:C:2012:286, paragraph 28 and Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 51. Se also: Haslehner, Werner C. (red.), Investment fund taxation: domestic law, EU law, and double taxation treaties, Kluwer Law International, Alphen aan den Rijn, the Netherlands, 2018, page 148.
[83] See Judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C-252/14, EU:C:2016:402, paragraph 49 and Judgment of 20 September 2018, EV, C-685/16, EU:C:2018:743, paragraph 89.
[84] See Judgment of 10 May 2012, Santander Asset Management SGIIC, C-338/11, EU:C:2012:286, paragraph 29, Judgment of 25 October 2012,Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 67, Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 62, Judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C-252/14, EU:C:2016:402, paragraph 50 and Judgment of 20 September 2018, EV, C-685/16, EU:C:2018:743, paragraph 89-90.
[85] See Judgment of 10 May 2012, Santander Asset Management SGIIC, C-338/11, EU:C:2012:286, paragraph 39, Judgment of 25 October 2012,Commission v Belgium, C-387/11, EU:C:2012:670, paragraph 67 and Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 63.

at issue as well as their purpose and content". The Distinguishing Criteria Approach and the Aim Approach have been applicable in three cases which are: the PMT case, the Fidelity Funds case and the EV case. The Fidelity Fund case is the only case that is about outbound dividends received by an investment fund. Common to all three cases is that the comparability assessment is done after the CJEU first has referred to the Aim Approach and secondly the Distinguishing Criteria Approach.[86] The CJEU therefore makes a comparability assessment based on both the approaches.[87] When the Aim Approach has been used, the SCT Approach has constituted a component of the Aim Approach, but the two approaches are referred to independently in this essay.[88]

In the following chapters, the Emerging Markets case and the Fidelity Funds case will be analysed in more detail in order to answer the question of whether or not a Member State can invoke other requirements in the national legislation than residence when residency is a distinguishing criterion for the tax advantage. Lastly the KA Deka case will be analysed, which is a recent case regarding outbound dividends received by an investment Fund, were only the Aim Approach was relevant. The KA Deka case is of great importance in this essay since the national provisions in the case have a similar aim as the Swedish national provisions assessed in this essay. Since Swedish contractual investment funds are exempt from taxation on received dividends, the Commission v Finland case and the College Pension Plan of British Columbia case are not analysed in the following.[89]

3.2.2.2 The Emerging Markets case

3.2.2.2.1 The Judgment

The Emerging Markets case is about outbound dividends distributed to an investment fund resident in a TC. Poland had a tax exemption for dividends distributed from companies established in Poland to investment funds that fulfilled the requirements in Article 6(1)(10) of the law on corporation tax (the Polish CIT Law). The aforementioned Article stated that

[86] See Judgment of 2 June 2016, Pensioenfonds Metaal en Techniek, C-252/14, EU:C:2016:402, paragraph 48-49, Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 50-51 and Judgment of 20 September 2018, EV, C-685/16, EU:C:2018:743, paragraph 88-89.

[87] For a similar conclusion see Tomi Viitala, Finnish Case on the Taxation of Dividends from a Luxembourg SICAV Referred to the ECJ, European Taxation volume 60 number 1, Journal Articles & Papers IBFD, 2020, page 32: "It is clear from ECJ case law that, in assessing comparability, the aim pursued by the national tax rule, as well as its purpose and content, must be examined. Moreover, the ECJ has held that only distinguishing criteria established by the legislation in question must be taken into account in the comparability analysis. The Court does not often see a clear-cut difference between the different legs of this analysis but rather makes an overall assessment of comparability.".

[88] See, inter alia, Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 50, 53-56 and Judgment of 13 November 2019, College Pension Plan of British Columbia, C-641/17 , EU:C:2019:960, paragraph 65-66.

[89] See Judgment of 8 November 2012, Commission v Finland, C-342/10 , EU:C:2012:688 and Judgment of 13 November 2019, College Pension Plan of British Columbia, C-641/17 , EU:C:2019:960.

investment funds were exempt from taxation if they operated in accordance with the provisions of the law on investment funds (the Polish LIF). The requirements in the Polish LIF were essentially the same as the requirements in the UCITS Directive.[90] The legislation in question was considered to constitute a restriction on Article 63 TFEU because the national legislation required the registered office of investment funds to be situated in Poland for the exemption of taxation to be granted. The registered office requirement was based on the literal wording of Article 6(1)(10) of the Polish CIT Law according to literature.[91]

In the comparability stage, the CJEU divided its assessment in three parts. In the first part of the comparability assessment, the CJEU used the SCT Approach but with a slightly different wording. The conclusion in the first part of the comparability assessment was that a resident investment and a non-resident investment fund were in a comparable situation and Poland did not provide for an equivalent treatment.[92]

In the second part of the comparability assessment, the CJEU used the Distinguishing Criteria Approach and concluded that "the only distinguishing criteria" in the tax legislation was "based on the place of residence of the investment fund, since only investment funds established in Poland" could qualify for the tax exemption.[93] The CJEU further stated that "In the light of that distinguishing criterion, the assessment of whether the situations are comparable must be carried out only at the level of the investment vehicle, since the rules at issue do not take into account the tax situation of their unit-holders".[94]

In the third part of the comparability assessment, it was assessed whether an investment fund established in Poland or an investment fund with its registered office in another Member State were not comparable to an investment fund with its registered office in a TC, because an investment fund with its registered office in a TC is not subject to the UCITS directive.[95] The CJEU rejected the aforementioned argument on two alternative grounds.[96] The first ground was that the fact that investment funds resident in a third countries were "not part of the European

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[90] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 66.

[91] See Tomasz Lewicki, Polish Corporate Income Tax Treatment of Collective Investment Vehicles from a Domestic Law and Tax Treaty Perspective, European taxation volume 50 number 6, Journals IBFD, 2010, page 239.

[92] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 58-60.

[93] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 61 and 62.

[94] Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 63.

[95] Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 58-60.

[96] Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 67-68.

Union's uniform regulatory framework, set up by the UCITS Directive" did not by itself result in that the situation of investment funds resident in third countries were in fact different.[97] In the second ground the CJEU referred to the AGs opinion and stated that because the "main criterion" in the national tax legislation was based on the place of residence, a comparison between the regulatory framework governing funds established in third countries and the uniform regulatory framework applied in the EU is not relevant because "such a comparison forms no part of the applicable legislation at issue".[98]

The final conclusion made by the CJEU was that when the tax legislation of a Member State, such as the Polish CIT law, adopts the place of residence of investment funds as the "main distinguishing criterion" regarding taxation of dividends from companies established in the Member State, non-resident investment funds and investment funds whose registered office is in the Member State are objectively comparable.[99]

3.2.2.2.2 Analysis of the Judgment

Initially it shall be emphasised that the CJEU in the third part of the comparability assessment only addressed the relevance of the fact that investment funds in TCs were not subject to the uniform rules in the UCITS Directive and did not address the relevance of the requirements in the Polish LIF. However, in the second part of the comparability assessment the CJEU stated that the only distinguishing criteria was the place of residence, since only investment funds established in Poland could qualify for the tax exemption. The aforementioned statement raises the question whether Poland was unable to invoke a potential non-compliance of the requirements in the Polish LIF. In order to answer the aforementioned question, it is necessary to go back to the AG's opinion.

In the AG's opinion, AG Mengozzi stated that account shall only be taken to the distinguishing criteria established by the national legislation.[100] He further stated that the residence criterion was the primary distinguishing criteria because non-resident investment funds could not qualify for the exemption.[101] Due to the distinguishing criterion AG Mengozzi rejected the argument, made by the Member States, that the only requirement investment funds

[97] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 67.
[98] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 68.
[99] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 69.
[100] See Opinion of Advocate General Mengozzi delivered on 6 November 2013, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2013:710, point 34.
[101] See Opinion of Advocate General Mengozzi delivered on 6 November 2013, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2013:710, point 35.

had to fulfill was the requirements concerning the establishment and operation of investment funds in the Polish LIF. AG Mengozzi further stated that the requirements in the Polish LIF only applied secondary and exclusively on investment funds that were established in Poland.[102] Residence was also later referred to as the "main distinguishing criterion" which was the wording the CJEU also used in the second ground of the third part of the comparability assessment and in the conclusion.[103]

According to the author, the aforementioned indicates that since the tax exemption was dependent on the residence, the residence requirement became the only distinguishing criteria which had two effects. The first effect was that the requirements in the IF Law was not relevant in the comparability stage. The second effect was that the comparability assessment was only made at the level of the investment vehicle. The legal framework for the investment fund in the TC, regarding the formation and operation of the investment funds, was instead relevant in the justification stage in the case, which also AG Mengozzi suggested.[104]

3.2.2.3 The Fidelity Funds case

3.2.2.3.1 The Judgment

The Fidelity Funds case is about withholding taxed on dividends distributed from companies resident in Denmark to UCITS resident in other Member States. The Danish Law on withholding tax was applicable on both UCITS resident in Denmark on their entire income and non-resident UCITS on the dividends they receive from Danish companies.[105] However, according to Article 65(8) of the Law on withholding tax, the Minister for Taxation could adopt rules that exempted funds which falls in the scope of Article 16C of the Law on the assessment of income tax from taxation on received dividends.[106] Such a rule was adopted which required, first, that the UCITS was resident in Denmark and, secondly, that the UCITS had a status of an

[102] See Opinion of Advocate General Mengozzi delivered on 6 November 2013, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2013:710, point 36.
[103] See Opinion of Advocate General Mengozzi delivered on 6 November 2013, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2013:710, point 38.
[104] See Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 88 and Opinion of Advocate General Mengozzi delivered on 6 November 2013, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2013:710, point 45. See also Judgment of 10 April 2014, Emerging Markets Series of DFA Investment Trust Company, C-190/12, EU:C:2014:249, paragraph 84: "the justification based on the need to maintain the effectiveness of fiscal supervision can only be accepted where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions", paragraph 66: "'the UCITS Directive'), the requirements of which are, in essence, reproduced by the law on investment funds" and Jiménez, Adolfo Martín (red.), The external tax strategy of the EU in a post-BEPS environment, IBFD, Amsterdam, 2019, page 343: "However, as already seen in Emerging Markets Series, the main interpretative issue lies at the level of the justification to preserve fiscal supervision: the US legal framework for investment funds must be comparable to the UCITS Directive".
[105] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 5, 8 and Opinion of Advocate General Mengozzi delivered on 20 December 2017, Fidelity Funds and Others, C-480/16, EU:C:2017:1015, point 3.
[106] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 8.

Article 16 Fund which was the case when the UCITS fulfilled the conditions in Article 16C of the Law on the assessment of income tax.[107] Article 16C of the Law on the assessment of income tax contained a distribution requirement. In order to fulfill the distribution requirement, the UCITS had to ”make a minimum distribution and withhold from that distribution the tax payable by its members”, which was changed after 1 June 2005 to not require an actual distribution and instead require the UCITS to ”calculate a minimum distribution which is taxed in the hands of its members by means of a deduction at source made by” the UCITS.[108]

The question the referring court asked the CJEU was if it was contrary to EU-law to subject non-resident UCITS to withholding tax on received dividends from companies resident in Denmark, while exempting such dividends when the UCITS was resident in Denmark provided that the distribution requirement was fulfilled.[109] In the consideration of the question referred, the CJEU stated that it was clear from the case file and was not disputed that only UCITS resident in Denmark could qualify for the exemption of withholding tax.[110] The national legislation was considered to constitute a restriction on Article 63 TFEU due to the fact that only UCITS resident in Denmark could obtaining the exemption from withholding tax.[111]

In the comparability stage, the CJEU stated that the Aim Approach and the Distinguishing Criteria Approach were applicable.[112] The Danish legislation had two aims. The first aim was to ensure equal tax burden between private individuals that invest in companies established in Denmark through a UCITS and private individuals that invest directly in companies established in Denmark. The legislation was therefore considered to prevent economic double taxation.[113] With regard to the aforementioned aim the CJEU used the SCT Approach and concluded that non-resident UCITS and resident UCITS were in comparable situations.[114] The second aim was ”to ensure that the dividends distributed by companies established in Denmark do not elude the Kingdom of Denmark’s power to impose taxes on account of the exemption they enjoy at the level of UCITS, and are actually taxed once”.[115]

Regarding the second aim, the CJEU stated that the aim, in essence, was ”not to forego all taxation of dividends distributed by companies resident in Denmark, but to defer their taxation

[107] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 9.
[108] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 30.
[109] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 28.
[110] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 31.
[111] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 43-45.
[112] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 50 and 51.
[113] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 52.
[114] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 53-56.
[115] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 52.

to the level of the" unit-holders of the UCITS. The CJEU further stated that the aim was given effect by the fact that UCITS resident in Denmark had to fulfill the distribution requirement, which contained an obligation to deduct withholding tax on distributed dividends from the UCITS in order to be exempt from withholding tax on received dividends.[116] The CJEU stated that Denmark was not able to tax non-resident UCITS on dividends distributed from the non-resident UCITS, but only on received dividends from Danish sources.[117] Regarding resident UCITS, Denmark's taxation power covers both received and distributed dividends. The CJEU therefore considered that it was a difference between resident and non-resident UCITS.[118] However, the CJEU did not considered the aforementioned distinction, between resident and non-resident UCITS, to be decisive when taking account of the aim, subject and content of the legislation.[119] Different "method of taxation" could therefore not be considered decisive.[120] The CJEU instead considered "the substantive conditions of the power to tax unit-holders' income" to be decisive.[121] What was considered decisive for the second aim was therefore Denmark's power to tax unit-holders. The fact that non-resident UCITS could have unit-holders resident in Denmark which Denmark was able to tax, resulted in that resident and non-resident UCITS were in a comparable situation when account was taken of the second aim.[122] The CJEU also stated that the absence of the possibility for Denmark to tax non-resident unit-holders which received dividends from non-resident UCITS was logical when Denmark moved the level of taxation from the UCITS level to the unit-holder level.[123]

The conclusion made by the CJEU regarding the first and the second aim was that the residence criterion could not be justified by objective difference between resident and non-resident UCITS.[124]

3.2.2.3.2 Analysis of the Judgment

The CJEU had no reasoning about which criteria that were the distinguishing criteria. However, it was clear both from the questioned referred and the consideration of the question that only resident UCITS could benefit from the exemption. It is also clear from the reasoning of the CJEU that the court used residence as the criterion which had to be justified by an objective

[116] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 57.
[117] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 58.
[118] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 59.
[119] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 59.
[120] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 60.
[121] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 60.
[122] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 61.
[123] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 62.
[124] See Judgment of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 63.

difference between resident UCITS and non-resident UCITS which is assessed by taking account of the aim of the legislation. The CJEU did not assess whether the distribution requirement was justified by an objective difference between resident UCITS fulfilling the distribution requirement and non-resident UCITS not fulfilling the distribution requirement with account taken of the aim of the legislation. The distribution requirement was only used by the CJEU to establish that the second aim was connected to the legislation. This is logical due to the fact that the aim shall be connected to the ”national provisions” according to the Aim Approach.

A conclusion that can be drawn from the case is that other requirements in the national legislation than residence can according to the Aim Approach be relevant when establishing the aim of the national legislation even if residence is a distinguishing criterion. However, when residence is a distinguishing criterion, the residence criterion has to be justified by an objective difference between resident and non-resident entities when account is taken of the aim of the national legislation. It is therefore not relevant to assess if another requirement than residence can be justified by an objective difference between resident entities fulfilling the other requirement and non-resident entities not fulfilling the other requirement. The aforementioned effect of the Distinguishing Criteria Approach seems likely when taking account of, first, the Emerging Markets case and, secondly, the Fidelity Funds where other requirements than residence also were relevant.

3.2.2.4 The KA Deka case

3.2.2.4.1 The Judgment

The Köln-Aktienfonds Deka case, is about Köln-Aktienfonds Deka (KA Deka) which was an investment fund constituted under German law and established in Germany. KA Deka was an open-ended UCITS with no legal personality. During the financial years 2002/2003 to 2007/2008, KA Deka received dividends from companies established in the Netherlands which were subject to a withholding tax of 15 percent.[125] The issue in the case was that KA Deka was not able to benefit from the repayment of tax under Dutch law and the relevant freedom was Article 63 TFEU. According to Article 28.2 of the Dutch Law on the Taxation of dividends of 1965, Fiscal investment enterprises (FIEs) could request for refund of withholding tax.[126] In order for an investment enterprise to be qualified as an FIE it had to fulfill the requirements in

[125] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 16 and 17.
[126] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 5.

Article 28 of the Law on cooperation tax of 1969 (CITA).[127] Article 28 of the CITA contained several requirements, but focus was only on three requirements in the judgement.

The first requirement was the shareholder requirement that distinguished between the situations when the investment undertaking's shares or certificates of participations were officially listed on the Amsterdam Stock Exchange and when the shares or certificates of participations were not listed on the Amsterdam Stock Exchange. When the shares or certificates of participations were not listed on the Amsterdam Stock Exchange, the investment undertaking was subject to more strict conditions.[128]

The second requirement was the market requirement, that required the shares or certificates of participations to be admitted on to trading on a market in financial instruments as referred to in the Law on financial markets and their supervision. The market requirement was also fulfilled if the fund or the fund manager was authorised or exempt from the authorisation.[129]

The third requirement was the redistribution requirement, which obligated the investment undertaking to distribute all proceeds of its investments to its shareholders or participants within 8 months of the end of its financial year.[130]

In addition to the refund of received dividends, CIVs established in the Netherlands were subject to a cooperation tax rate of zero percent and was required to pay withholding tax on dividends distributed from the CIV to its unit-holders.[131] Something that the CJEU did not mentioned, but was clear from the AGs Opinion, was that Article 28 of the CITA, before the legislative changes in 2007, stated that the investment undertaking had to be established in Netherlands.[132] However, as is clear from both the AGs opinion and the judgment, the requirements for the refund of withholding tax were in practice applicable without distinction to resident and non-resident investment funds.[133]

In the assessment of both the shareholder requirement and the market requirement, the CJEU initially stated that the national legislation ”did not distinguish between resident investment

[127] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 8.
[128] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 12-14.
[129] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 15 and Opinion of Advocate General Pitruzzella delivered on 5 September 2019, Köln-Aktienfonds Deka, C-156/17, EU:C:2019:677, point 18.
[130] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 9,10 and 68.
[131] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 5 and 7.
[132] See Opinion of Advocate General Pitruzzella delivered on 5 September 2019, Köln-Aktienfonds Deka, C-156/17, EU:C:2019:677, point 8 and footnote 3. See also, for example, Raymond P.C. Adema, The Fidelity Funds Case: A Commentary on the ECJ's Decision and Its Potential Impact on the Köln-Aktienfonds Deka Case, volume 21 Derivatives & Financial Instruments number 5, Journal Articles & Papers IBFD, 2019, chapter 5.2.
[133] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 54 and Opinion of Advocate General Pitruzzella delivered on 5 September 2019, Köln-Aktienfonds Deka, C-156/17, EU:C:2019:677, point 25, 96.

funds and non-resident investment funds, in that the conditions for the refund of dividend tax applied without distinction to those two types of fund”.[134] In the assessment of the redistribution requirement the CJEU stated that the requirement was worded in general terms and did not distinguish between resident investment funds and non-resident investment funds.[135]

In the restriction stage the CJEU stated, regarding all three requirements, that even if the national legislation applies without distinction to resident and non-resident operators, the national legislation can still constitute a restriction on the free movement of capital if the national criteria de facto disadvantage cross-border situations.[136]

In the assessment of the shareholder requirement, the CJEU stated that it was for the referring court to ascertain whether the more lenient conditions that according to the national legislation was applicable when the shares or participations were listed on the Amsterdam Stock Exchange ”could, by its nature or de facto, be met only by resident investment funds, wheres non-resident investment funds, whose shares and participations” listed ”on another stock exchange, did not generally,” fulfill the more lenient conditions.[137]

Regarding the market requirement, the CJEU stated that it was for the referring court to verify if the conditions ”are not, by their nature or de facto, likely to be met only by resident investment funds and do not, de facto, exclude non-resident investment funds which meet similar conditions in their Member State of establishment”.[138]

In the restriction stage regarding the redistribution requirement, the CJEU stated that even if a non-resident investment fund did not fulfill all the condition for the refund, because the non-resident investment fund fulfilled different conditions in its state of establishment, it could not be excluded that the non-resident investment fund was in a situation essentially comparable to a resident investment fund fulfilling the conditions for the refund.[139] A non-resident investment funds shall be able to provide proof ”that they are, in particular because of the regulatory framework in force in their State of establishment, in a” comparable situation to resident investment funds that fulfill the conditions for the refund. If the non-resident investment funds

[134] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 54.
[135] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 69.
[136] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 55 and 70.
[137] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 57, 58 and Opinion of Advocate General Pitruzzella delivered on 5 September 2019, Köln-Aktienfonds Deka, C-156/17, EU:C:2019:677, point 86, 87.
[138] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 59 and 60.
[139] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 74.

are not allowed to provide such proof, the national legislation would be considered to de facto disadvantage non-resident investment funds.[140]

In the comparability stage regarding the redistribution requirement, the CJEU only used the Aim Approach. The CJEU initially stated that the redistribution requirement was linked to the objective of the FIE regime and that the objective of the FIE regime was ”that the return on investments made by a private individual through an investment undertaking must be the same as the return on investments made individually through a direct investment”. It was also clear that the national legislature had considered it essential that the investment undertaking shall pass on the profits of investments as quickly as possible to the holders that had invested in the investment undertaking.[141] What was compared was if a non-resident investment fund that did not fulfill the redistribution requirement was comparable to a resident investment fund that fulfilled the redistribution requirement.[142] The decisive factor in the comparability assessment was ”the main objective underlying” the redistribution requirement.[143] If the objective was to ensure that the profits made by the investors through an investment fund reached those investors as soon as possible, a non-resident investment fund that did not distribute such income to its investors was not comparable to a resident investment fund that fulfill the redistribution requirement.[144] If the objective instead was the taxation of the profits, the situation of a non-resident investment fund that was deemed to have distributed the profits to its shareholders, which are also taxed on the received dividends, was in a comparable situation to a resident investment fund that fulfilled the redistribution requirement. The CJEU did not consider it necessary with an actual distribution in order for the taxation of profit objective to be fulfilled.[145] In the end it was left for the referring court to determine the main objective of the redistribution requirement.[146]

3.2.2.4.2 Analysis of the judgment

The tax advantage was dependent on whether or not the investment fund was established in the Netherlands according to the national legislation before 2007. However, such a distinction was not applicable in practice. The CJEU also stated that the redistribution requirement was worded in general terms and did not distinguish between resident and non-resident investment funds.

[140] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 75.
[141] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 77.
[142] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 80 and 81.
[143] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 79.
[144] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 80.
[145] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 81.
[146] See Judgment of 30 January 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, paragraph 79.

The fact that residence had no relevance in practice constitutes a major difference when comparing the KA Deka case to the other cases when the Distinguishing Criteria Approach have been applicable. The fact that the Distinguishing Criteria Approach was not used in the KA Deka case can therefore be connected to that the residence criterion had no relevance in practice. The fact that a national legislation has a residence criterion in the national legislation do not therefore result in that the Distinguishing Criteria Approach is applicable. The Distinguishing Criteria Approach seems instead to be dependent on the application in practice and that the national requirement under scrutiny does not require the investment fund to be resident in the relevant Member State. Since the Distinguishing Criteria Approach was not applicable in the KA Deka case, the CJEU assessed whether the redistribution requirement was justified by an objective difference between a resident investment fund fulfilling the redistribution requirement and a non-resident investment fund not fulfilling the distribution requirement with account taken of the aim of the FIE regime. In the Fidelity Funds case, the CJEU initially stated that it was not disputed that only UCITS resident in Denmark could qualify for the exemption of withholding tax. If residence instead had no relevance in practice, in the Fidelity Funds case, the Danish distribution requirement would probably been assessed independently in the comparability assessment.

When the redistribution requirement was assessed, the CJEU stated in the restriction stage that a strict compliance with the conditions in the national legislation could not be upheld against non-resident investment funds. The non-resident investment fund shall instead be able to provide proof that they are in a comparable situation to resident investment funds that fulfills the requirements. In the comparability stage it was clear that the aim of the FIE regime was that the return on the investments shall be the same when the investments are made through an investment undertaking as when the investment are made directly. That aim allowed the actual distribution to be a requirement that was allowed to be upheld against non-resident investment funds if the actual distribution was considered to be the main objective underlying the redistribution requirement. This shows the great importance of what the referring court considers to be the aim of the legislation regarding investment fund. For instance, in the Fidelity funds case the referring court considered that one of the aims was equal tax burden between direct investments and indirect investments through an investment fund which resulted in that the SCT Approach was applicable. As apparent from the KA Deka case, the aim does not only have to cover the taxation but can also cover, for instance, the return on the investments which can include an actual distribution to the unit-holders.

4 Swedish internal law

4.1 Resident investment funds and Swedish investment companies

4.1.1 Financial regulation

Sweden have three types of investment funds which are Swedish UCITS funds[147], Swedish special funds[148] and AIFs. The requirements for Swedish UCITS funds and Swedish special funds were first regulated in the Swedish Investment Funds Act[149] (SIFA). The name of the SIFA was changed to the Swedish UCITS Act[150] when the Swedish Alternative Investment Funds Manager Act[151] (SAIFMA) was adopted in 2013. Due to the changes made in the Swedish legislation in 2013, the Swedish UCITS Act mainly regulates Swedish UCITS funds and the SAIFMA regulates Swedish special funds and alternative investment funds. The aforementioned legislations stipulate the legal framework for conducting fund operations and the legal relationships (hereinafter financial regulation). The main motive behind the Swedish legislation of fund savings is the protection of the investors according to the preparatory works of the Swedish legislations.[152]

Swedish UCITS funds shall fulfill the requirements set out in the UCITS directive, while Swedish special funds are national investment funds that in some respects differs from the requirements set out in the UCITS Directive.[153] A Swedish UCITS fund must be open to the public and are obligated to sell fond-units to anyone that wants to buy.[154] Swedish special fund shall either be open to the public or open to a limited group of investors.[155] As a main rule, there is no limitations for the public or the limited group of investors to acquiring Swedish special funds units. However, if the Financial Supervisory Authorities approves it, the fond provisions may contain limitations on the opportunity to acquiring Swedish special funds units.[156] When it comes to the redemption of the units, it also differs between Swedish UCITS funds and Swedish special funds. While units of Swedish UCITS fund are redeemable immediately or in some circumstances as soon as possible, Swedish special funds must be open for redemption of the units at least once a year.[157] However, in both cases the redemption price is connected to

[147] In Swedish: Värdepappersfond.
[148] In Swedish: Specialfond.
[149] Lag (2004:46) om investeringsfonder.
[150] Lag (2004:46) om värdepappersfonder.
[151] Lag (2013:561) om förvaltare av alternativa investeringsfonder.
[152] See Government Bill 2002/03:150 page 125 and Government Bill 2012/13:155 page 170.
[153] See Government Bill 2011/12:1 page 395.
[154] See 1:1(3) in the Swedish UCITS Act and Government Bill 2002/03:150 page 252.
[155] See 12:4 in the SAIFMA.
[156] See 12:6 in the SAIFMA.
[157] See Chapter 4 Article 13 in the Swedish UCITS Act and Chapter 12 Article 6 in the SAIFMA.

the market value of the assets and not the market value of the fund units.[158] The right for the investors to redeem the units are connected to the protection of the investors according to the preparatory works.[159] However, the fact that special funds can be closed for a maximum of one year was not considered to neglect the protection of the investors.[160]

Both Swedish UCITS funds and Swedish special funds have a contractual form and do not have legal personality.[161] The reason Swedish UCITS funds and Swedish special funds can only have the contractual form can be traced back to the preparatory works of the first investment fund act adopted in 1974. In the considerations regarding whether investment funds in the form of investment companies would be covered by the legislation, it was considered of great importance that the opportunity existed for the unit-holders to redeem their units at any time and that the redemption price did not depend on the current market value of the units.[162] The reason why Sweden did not include investment companies in the Swedish Investment Fund Act 1974 was since Swedish limited liability companies did not have variable share capital and could not freely issue and repurchase its own shares.[163] In a later preparatory work it has been stated that foreign investment companies with variable share capital have essentially the same functions as contractual funds.[164] With the chosen contractual form, the unit-holders have the right to redeem the units, the management of the fund is placed on a management company and the assets in the fund are stored by a depositary. The relationship between the unit-holders, management company and the depositary can be said to be made up of assignment agreements, where the management company and the depositary undertake a certain assignment for a certain remuneration. The remuneration is often paid indirectly by the unit-holder through the fund assets.[165]

AIF can, inter alia, have the legal form of a Swedish limited liability company.[166] Swedish investment company[167] is a definition used in the Swedish Income Tax Act[168] (SITA) and can

[158] See Chapter 4 Article 10 in the Swedish UCITS Act and Chapter 12 Article 5 in the SAIFMA.
[159] See Government Bill 2012/13:155 page 174.
[160] See Government Bill 2002/03:150 page 256.
[161] See Chapter 4 Article 1 in the Swedish UCITS Act, Chapter 12 Article 1 in the SAIFMA and Government Bill 2012/13:155 page 174.
[162] See Government Bill 1974/128 page 94.
[163] See Government Bill 1974/128 page 95-97.
[164] See Government Bill 2011/12:1 page 396.
[165] See Government Bill 2002/03:150 page 115.
[166] See Government Bill 2012/13:155 page 387.
[167] In Swedish: Investmentföretag.
[168] Inkomstskattelag (1999:1229).

also have the legal form of a Swedish limited liability company.[169] A Swedish limited liability company have fixed share capital.[170]

4.1.2 Tax law

The SITA contains special tax rules for Swedish UCITS funds and Swedish special funds. The terms Swedish UCITS funds and Swedish special funds are not defined in the SITA since it was not considered necessary due to the fact that the terms have the same meaning as in the Swedish financial regulations.[171] Swedish UCITS funds and Swedish special funds are not legal persons but are treated as such in the ITA and are therefore fiscally opaque.[172]

From 1990 to 2012, Swedish UCITS funds and Swedish special funds were subject to income tax on received dividends and were entitled to deduct dividends distributed to the unit-holders from the investment funds taxable basis.[173] Therefore, in practice, the Swedish investment funds paid no tax on received dividends.[174] The aforementioned investment funds were also subject to a notional taxation, but it was not applicable on received dividends.[175] The same applied and still applies for Swedish investment companies.[176] The purpose behind the aforementioned tax rules was to achieve neutrality between direct ownership and indirect ownership through an intermediary.[177]

In accordance with the changes made in 2012, Swedish investment funds were and are tax exempt from income tax.[178] Through the changes made in 2012, a unit-holder taxation of 0,4 percent of the assets in the investment fund, calculated in accordance with certain rules in the SITA, was introduced (hereinafter the unit-holder taxation). The unit-holder taxation is not dependent on the tax residence of the investment fund, does not replace the ordinary income tax on received dividends for the Swedish tax resident unit-holders and there are certain Swedish tax resident unit-holder which are not subject to the unit-holder taxation.[179] The reason behind the unit-holder taxation was to achieve equivalence between owning shares directly and owning shares indirectly through an investment fund. The idea was that the unit-holder taxation

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[169] See Chapter 39 Article 15 in the SITA.
[170] See Government Bill 2012/13:155 page 186.
[171] See Government Bill 2012/13:155 page 390.
[172] See Chapter 2 Article 3 SITA and Government Bill 2012/13:155 page 389.
[173] See Government Bill 2011/12:1 page 397.
[174] See Dahlberg, Mattias (red.), Reglering och beskattning av investeringsfonder, Iustus, Uppsala, 2012, page 70.
[175] See Government Bill 2011/12:1 page 397.
[176] See Chapter 39 Article 14 in the SITA and Andersson, Mari, Dahlberg, Mattias, Saldén-Enérus, Anita & Tivéus, Ulf, Inkomstskattelagen: en kommentar Del 2 29-67 kap., Upplaga 20, Norstedts juridik, Stockholm, 2020, page 1283.
[177] See Government Bill 1989/90:100 page 564.
[178] See Chapter 6 Article 5 in the SITA.
[179] See Chapter 2 Article 2, Chapter 42 Article 43-44 in the SITA and Dahlberg, Mattias (red.), Reglering och beskattning av investeringsfonder, Iustus, Uppsala, 2012, page 71.

should compensate for that directly owned shares must be taxed for each dividend, while indirectly owned shares through an investment fund only are taxed when the fund distribute dividends to the unit-holder or the unit is sold.[180] The reason Sweden abolished the taxation at the Swedish UCITS fund level was due to the UCITS-IV Directive which enabling Swedish UCITS funds to be merged with foreign UCITS funds without causing any tax consequences in Sweden.[181] If the Swedish tax system had not been changed there would have been a significant risk that Sweden would lose tax base.[182] Taxation at the Swedish special fund level was also abolished, as different rules for the two types of funds were considered unnecessarily complicated and could lead to non-rational motives being decisive for the choice of fund and investment strategies.[183]

If an AIF has the legal form of a Swedish limited liability company, the tax rules applicable on such companies are also applicable on the AIF.[184] In order for a Swedish limited liability company to qualify as a Swedish investment company, the following three requirement shall be fulfilled in the SITA: The Swedish limited liability company shall exclusively or almost exclusively manage financial instruments or similar assets, shall have as the main purpose to offer the shareholders a spread of risks and there shall be a large number of individual shareholders.[185]

4.2 Non-resident investment funds

4.2.1 The Swedish Dividend Withholding Tax Act and preparatory works

Non-resident investment funds have limited tax liability in Sweden and are therefore not liable to income tax on received dividends according to Swedish law.[186] Instead, dividends received by non-resident investment funds can be subject to withholding tax. According to the Swedish Dividend Withholding Tax Act[187] (SDWTA), withholding tax on outbound dividends is levied at 30 percent of the dividend received by, inter alia, non-resident individual taxpayers or foreign legal entities when the dividends are distributed from, inter alia, Swedish limited liability companies resident in Sweden.[188] However, taxation is normally limited to 15 percent due to

[180] See Government Bill 2011/12:1 page 403.
[181] See Government Bill 2011/12:1 page 401.
[182] Dahlberg, Mattias (red.), Reglering och beskattning av investeringsfonder, Iustus, Uppsala, 2012, page 10.
[183] See Government Bill 2011/12:1 page 401.
[184] See Government Bill 2012/13:155 page 387.
[185] See Chapter 39 Article 15 in the SITA.
[186] See Chapter 2 Article 2, Chapter 6 Article 7, Chapter 6 Article 10a and Chapter 6 Article 13 in the SITA.
[187] Kupongskattelag (1970:624).
[188] See Article 1, Article 4 paragragh 1 and Article 5 in the SDWTA.

double taxation agreements.[189] Foreign investment funds constituted in accordance with contract law or trust law do not generally meet the requirements for being classified as foreign legal entities.[190] According to the literature, the decisive factor for taxation in these cases will be whether the investment fund or unit-holders are to be regarded as being entitled to the distributed dividends. If the fund is deemed to be entitled to the distributed dividend, support is lacking in Swedish internal law to levy withholding tax on the dividends received by the investment fund.[191]

The SDWTA contains several exemptions from withholding tax. An exemption was introduced 2012 regarding fund companies and foreign special funds (hereinafter the investment fund exemption). When it comes to fund companies there is a reference in the SDWTA to a provision in the UCITS Fund Act which stipulates three requirements which have to be fulfilled in order to be granted the exemption from withholding tax. The three requirements are that, the UCITS fund shall be authorised in the jurisdiction where the fund is resident for activities where the sole purpose is to make collective investments in certain assets through capital raised from the public, applying the risk spreading principle and allowing for repurchasing or redemption of the units at the request of the holders. When it comes to foreign special funds, there is no definition in the legislation.[192] Nor is any definition given in the preliminary work, but it is mentioned in general that a foreign special fund is not a closed-ended fund, a fund that invests in assets other than financial instruments or a fund that do not apply the risk spreading principle. However, the purpose was not to establish certain criteria, but a general assessment should be made if the foreign investment fund corresponds to a Swedish special fund.[193]

Before 2012 there was no explicit exemption from withholding tax for foreign investment funds corresponding to a Swedish UCITS fund or Swedish special fund. The investment fund exemptions in the SDWTA was introduced since it was considered to be indications in the case law of the CJEU that it would be contrary to EU-law to have withholding tax on outbound dividends received by investment funds corresponding to Swedish UCITS fund or Swedish special fund.[194]

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[189] See Government Bill 2011/12:1 page 400.
[190] See Dahlberg, Mattias (red.), Reglering och beskattning av investeringsfonder, Iustus, Uppsala, 2012, page 64 and Jilkén, Daniel, Grip, Ulrika & Dufwa, Johanna, Kupongskattelagen: en kommentar, 1. uppl., Norstedts juridik, Stockholm, 2013, page 30.
[191] See Dahlberg, Mattias (red.), Reglering och beskattning av investeringsfonder, Iustus, Uppsala, 2012, page 64.
[192] See Article 4 paragraph 9 in the SDWTA.
[193] See Government Bill 2012/13:155 page 393.
[194] See Government Bill 2011/12:1 page 408 and 409.

4.2.2 The Swedish Supreme Administrative Court

On 11 February 2020, SAC issued its first ruling regarding withholding tax on outbound dividends distributed to an investment fund.[195] The dividends were received by the foreign investment funds during the years of 2006-2008. The question was if an investment fund established in a TC, on the ground that it was a legal person, was not comparable to Swedish contractual investment funds. The problem according to the non-resident investment fund was that the SDWTA did not allow for a tax deduction when the dividends received by the non-resident investment fund were distributed to the unit-holders.

The SAC initially concluded that the distinguishing criteria were the nationality of the investment fund and the character of the investment fund. In the assessment of whether a legal form requirement was compatible with Article 63 TFEU, the SAC applied the Distinguishing Criteria Approach and the Aim Approach in the comparability stage. Regarding the Distinguishing Criteria Approach, the SAC stated that although the case law of the CJEU suggests that the comparability assessment should primarily be made in relation to circumstances related to nationality, this does not exclude that other distinguishing criteria, such as the legal form of the investment funds, can also have significance if they are relevant. In the application of the Aim Approach the SAC stated that the purpose behind the rules in the SITA regarding the deduction of tax for distributed dividends was to prevent series of charges to tax when dividends are distributed to certain taxpayers which are intermediary owners. Due to that aim, the SAC stated that if the intermediary is taxed on received dividends the aim is equally relevant regardless of the recipient's legal form. The SAC further stated that the scope of the rules also suggests that the intermediary owner's character as a legal person is not relevant in the assessment of whether the situations are comparable, since Swedish investment companies also could deduct tax on distributed dividends. Due to the aforementioned, the SAC concluded that the fact that the non-resident investment fund was a legal person did not exclude that the fund was comparable to a Swedish contractual investment fund regarding the taxation of dividends. Since the legal form was not relevant the SAC sent the case back to the Administrative Court of Appeal that found the non-resident investment fund to be comparable to Swedish contractual investment funds.[196]

[195] See Judgment delivered on the 11 of February 2020, The Swedish Supreme Administrative Court, case number 3725-3727-18.

[196] See Judgment delivered on the 26 of May 2020, The Administrative Court of Appeal of Sundsvall, case number 396-398-20.

5 Conclusion

The legal form of a non-resident investment fund can only be relevant in the assessment of whether the foreign investment fund falls under the foreign special fund exemption in the SDWTA since there is no support in the SDWTA for requiring a certain legal form when applying the fund company exemption. Since the current SDWTA only covers foreign investment companies and not generally foreign investment funds constituted in accordance with trust law, only the foreign investment company legal form will be analysed in the following.[197] The aim of the investment fund regime applicable on Swedish resident special funds is not clear according to the author. It is possible to consider that the aim of the investment fund regime is to prevent series of charges to tax or achieve equal tax burden between direct investments and indirect investments through an intermediary (hereinafter referred to as equal tax burden).[198] However, the author considers that the aim is to achieve neutrality between direct investment and indirect investments through an investment fund. The reason the requirements in the Swedish financial regulation are not repeated in the SITA is because the term "Swedish special fund" has the same meaning in both regulations. It is therefore possible to connect the aim of the tax exemption, which indeed is to achieve equal tax burden, and the aim of the requirements in the financial regulation according to the author.[199] The aim to protect the investors and the aim to achieve equal tax burden constitutes two parts of the common aim, which is to achieve neutrality between direct investment and indirect investments through an investment fund according to the author.

Regarding the comparability assessment, it shall initially be stated that Distinguishing Criteria Approach is not applicable. The tax exemptions for non-resident investment funds and Swedish special funds are regulated in different laws due to the different method of taxation, but both exemptions result in the exemption from taxation on received dividends and the same requirements in the financial regulation are applicable.[200] Residence has therefore no relevance in practice. The requirements, inter alia the legal form requirement, in the financial regulation are also worded in general terms and do not distinguish between resident and non-resident investment funds. The legal form requirement can therefore be assessed independently in the comparability assessment. In other words, since the Distinguishing Criteria Approach is not applicable, it is relevant to assess if the legal form requirement can be justified by an objective

[197] See Chapter 4.2.1 in this essay.
[198] See the Chapter 4.2.2: The SAC ruling regarding the legislation applicable before 2012.
[199] See Chapter 4.1.1, Chapter 4.1.2 in this essay.
[200] See Chapter 4.1.2 and Chapter 4.2.1 in this essay.

difference between a resident Swedish special fund fulfilling the legal form requirement and a non-resident foreign investment fund not fulfilling the legal form requirement.[201]

If the aim of the Swedish investment fund regime is considered to prevent series of charges to tax or achieve equal tax burden, the SCT Approach is applicable. Since the legal form is irrelevant when the SCT Approach is applicable, a foreign investment company and a Swedish special fund will be considered comparable if not a Legal Form Approach also is applicable.[202]

However, if the aim of the Swedish investment fund regime is considered to achieve neutrality between direct investments and indirect investments through an investment fund, the Aim Approach is applicable. According to the Aim Approach, the legal form requirement shall be linked to the aim of the investment fund regime and the main objective underlying the legal form requirement is decisive in the comparability assessment.[203] The legal form requirement is linked to the aim of the investment fund regime since the contractual legal form enables the unit-holders to redeem their units which is connected to the protection of the investors. The legal form requirement also enables the investors to acquire units from the investment fund, which according to the author, is connected to the aim of the investment fund regime since it constitutes a fundamental requirement. The main objective underlying the legal form requirement is not that the investment fund shall have a contractual form since the reason investment companies cannot qualify as Swedish special funds is connected to the fact that Swedish companies have fixed share capital.[204] The main objective underlying the legal form requirement is instead connected to the possibility for unit-holders to redeem their units and the possibility for investors to acquire units from the investment fund according to the author. A foreign investment company with variable share capital shall therefore be considered to be comparable to a Swedish special fund since that legal form also enables the investment fund to be open and enables the unit-holders to redeem their units. However, if the investment company has fixed share capital, the investment company will not be able to function as a Swedish special fund. In such a scenario the foreign investment fund with fixed share capital shall provide proof that the fund is able to function as a Swedish special fund regarding the possibility for unit-holders to redeem their units and the possibility for investors to acquire units.[205]

[201] See Chapter 3.2.2.4.2 in this essay.
[202] See chapter 3.2.1.2 in this essay.
[203] See Chapter 3.2.2.4.2 in this essay.
[204] See Chapter 4.1.1 in this essay.
[205] See Chapter 3.2.2.4.2 in this essay.

At the time of writing, there is uncertainty regarding the Legal Form Approach. It is possible that the Legal Form Approach would be applicable and that a foreign investment company with legal personality instead shall be compared to a Swedish AIF or a Swedish investment company since they can have legal personality.[206]

The author's final conclusion is therefore that the legal form requirement probably can be either upheld or upheld to some extent towards investment funds resident in TCs.

[206] See Chapter 3.2.1.2 in this essay

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