

Fund income and selective application of CIT reliefs 3/15/25



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C-18/23 (F S.A. v. Dyrektor Krajowej Informacji Skarbowej)

This judgement of the European Court of Justice (ECJ) dealt with an important issue relating to the free movement of capital within the European Union. The case concerned a Polish law that restricts the tax exemption for internally managed collective investment undertakings (CIUs) from other EU countries to those managed by external entities. The said tax exemption was denied for CIUs that are managed internally. This restriction was contested as incompatible with EU law, in particular with the free movement of capital.

The referring court, the Regional Administrative Court in Gliwice, Poland, posed the following question to the ECJ:

"Must the provisions of [Directive 2009/65], and in particular Article 29(1) thereof, in conjunction with Articles 18, 49 and 63 [TFEU], be interpreted [as] precluding the laying down in national legislation of formal requirements, such as in the main proceedings, for taking advantage of exemptions from corporation tax by undertakings for collective investment whose registered office is in a Member State of the European Union other than the Republic of Poland, or in another State in the European Economic Area, that is to say from the requirement that they be managed by persons who have, for the pursuit of their activity, the authorisation of the competent financial market supervisory authorities of the State in which the registered office of those undertakings is situated?"

ECJ's reasoning for its decision

- **Applicability of Directive 2009/65:** The ECJ concluded that Directive 2009/65 was not applicable to the dispute as F Fund, the CIU in question, raised capital without promoting the sale of its units to the public within the European Union.¹
- **Relevance of TFEU provisions:** While the referring court mentioned Articles 18, 49, and 63 TFEU, the ECJ determined that the case should be examined exclusively in light of the Treaty provisions on the free movement of capital (Article 63 TFEU).²
- **Restriction on free movement of capital:** The ECJ found that the Polish law's condition on external management, despite being aimed at investor protection, goes beyond what is necessary and constitutes a disproportionate restriction on the free movement of capital.³
- **Objectively comparable situations:** The ECJ ruled that the situations of internally managed and externally managed CIUs were objectively comparable, particularly considering the objective of the tax exemption, which was to treat investments made through CIUs similarly to direct investments.⁴
- **Lack of justification for the restriction:** The ECJ concluded that the Polish law's requirement for external management was not a suitable means of achieving the objective of investor protection, especially considering that CIUs from other EU countries were already subject to the supervision of their home Member State's financial market supervisory authorities.⁵

- **Derogation from Article 63 TFEU:** The ECJ noted that Article 65(1)(a) TFEU permits Member States to distinguish between taxpayers based on residence or investment location, but this provision must be interpreted strictly and not apply to all tax legislation that draws such distinctions.⁶

Summary of the ECJ Decision

The ECJ ruled that the Polish law, which restricts the tax exemption only to externally managed CIUs from other EU countries, is not compatible with Article 63(1) TFEU, which guarantees the free movement of capital. The ECJ found that, although Member States have the right to determine the forms of management of CIUs in their territory, the Polish law's condition for external management, although aimed at protecting investors, goes beyond what is necessary and constitutes a disproportionate restriction on the free movement of capital. The ECJ concluded that Member States must not discriminate against CIUs from other EU countries solely based on their form of management, especially if these CIUs are already subject to supervision by the financial market supervisory authorities of their home Member State.

Additional points to consider:

This judgement is likely to impact other Member States that have similar restrictions on tax exemptions for internally managed CIUs.

The ECJ's decision emphasises the importance of ensuring a level playing field for all CIUs within the EU, regardless of their form of management.

This case emphasises the need for Member States to justify any restrictions on the free movement of capital with clear and compelling reasons of public interest.

¹ Article 1(2)(a) and Article 3(b) of Directive 2009/65

² Judgment of 7 April 2022, Veronsaajien oikeudenvontayksikkö (Exemption of contractual investment funds), C-342/20, EU:C:2022:276, paragraph 45

³ Judgment of 7 April 2022, Veronsaajien oikeudenvontayksikkö (Exemption of contractual investment funds), C-342/20, EU:C:2022:276, paragraph 50

⁴ Judgment of 7 April 2022, Veronsaajien oikeudenvontayksikkö (Exemption of contractual investment funds), C-342/20, EU:C:2022:276, paragraph 76

⁵ Judgment of 18 October 2012, X, C-498/10, EU:C:2012:635, paragraph 37

⁶ Judgment of 7 April 2022, Veronsaajien oikeudenvontayksikkö (Exemption of contractual investment funds), C-342/20, EU:C:2022:276, paragraph 67