

# Investment funds and WHT

## Recent ECJ case law

Spring 2024

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# A simple question

Does the ECJ case law on the taxation of investment funds show elements of mutual recognition?



**Aalto-yliopisto**

# A simple answer

Partly, yes!



Check for updates

Article

**MJ**

Maastricht Journal of European and Comparative Law  
1–38  
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DOI: 10.1177/10236312231189684  
maastrichtjournal.sagepub.com

**Sage**

**Mutual recognition in investment fund taxation? A reflection based on recent ECJ case law**

**Moritz Scherleitner** \*

**Abstract**  
Recent ECJ case law regarding the taxation of investment funds seems to include elements of mutual recognition, which is a rare phenomenon in the Court's doctrine on direct taxation. Expanding on the rather clear positions of the Court in *E. Veronsaajien oikeudenvolontayksikkö* (Case C-480/19) and *A SCPI* (Case C-342/20), this two-part article strives towards taking a comprehensive and more systematic examination of the issue. Embedded into a broader dogmatic analysis, it will, with certain qualifiers, conclude that mutual recognition elements can be of relevance to the Court when testing national fund taxation systems under the fundamental freedoms.

**Keywords**  
EU tax law, investment fund taxation, mutual recognition, EU direct taxation, fundamental freedoms

**1. Introduction – mutual recognition in fund taxation; two recent examples**  
This article forms the final part of a series of papers that the author has written on the taxation of income paid to and received by investment funds under EU law.<sup>1</sup> The commencement of the

1. Some parts of the present article are – inevitably – based on prior research. This is particularly true for section 3, which is a framework chapter included in other articles as well as descriptions of the cases and references to literature analysed in prior research. The novelty provided by this paper lies in the more detailed, broader and more systematic analysis of

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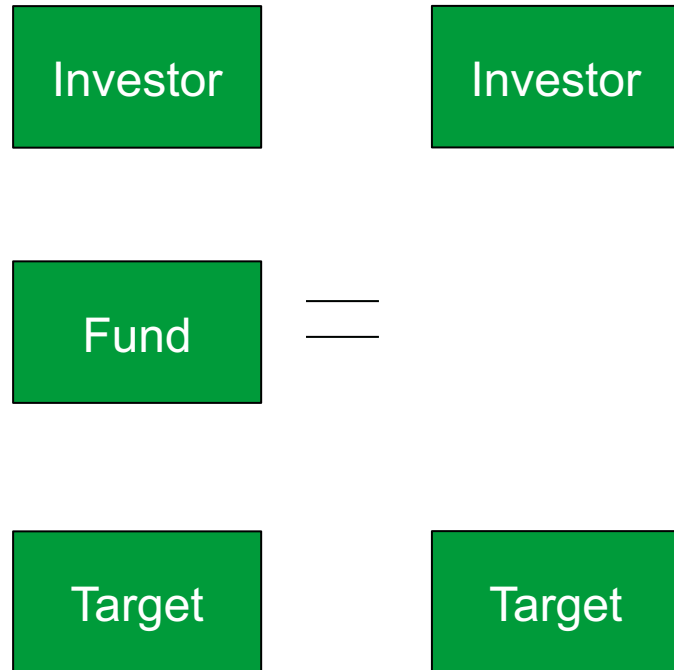
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Electronic copy available at: <https://ssrn.com/abstract=4505276>

# KEY CONCEPTS

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# Investment fund tax regimes



- Ensure (or promote) neutrality between direct investment and investment through the fund.

# Mutual recognition

- Key concept in Internal Market Law:
- Cassis de Dijon -> Goods that have lawfully been produced and marketed in one Member State may also be lawfully marketed in other Member States.
- Long-developed and facet-rich concept
- (Typically) a matter of equivalence.
  - Safeguarding the goal of a measure through an equivalent foreign measure.

# Mutual recognition in direct taxation 1/2

- Conceptually unfit -> interest to tax cannot be fulfilled by other State.
- However, it is not inexistant.
- Terminological issues in literature:
  - for some every "global view" (that is, taking into account the other States' law) = Mutual recognition
    - Then Mutual recognition fairly proliferated.
  - For others, mutual recognition -> the factual replacement of domestic rules by foreign rules.
    - Then mutual recognition comes up, e.g. in accepting foreign nationality / legal personality; certain procedural rules ... and...

# Mutual recognition in direct taxation 2/2

- ... in the context of charitable entities.
- Stauffer:
  - [T]he fact remains that where a foundation recognised as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its **object is to promote the very same interests** of the general public, (...) the authorities of that Member State **cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.**
- That is not absolute mutual recognition (i.e. no need to accept foreign charity just because the other state does so).
- However, if the other state's law promotes the same goal there is a need to accept it as equivalent.



# THE CASE LAW

# Game plan

- We have approx. 13 cases (but not enough time).
- Game plan -> concentrate on a conceptual level on elements of mutual recognition
- A broader account of cases and their various nuances, see the underlying paper: [Mutual Recognition in Investment Fund Taxation? A Reflection Based on Recent ECJ Case Law by Moritz Scherleitner :: SSRN](#)

# The Case Law

## Three groups of investment fund cases

Extension of generic doctrines to investment funds

Mutual recognition in the comparability analysis

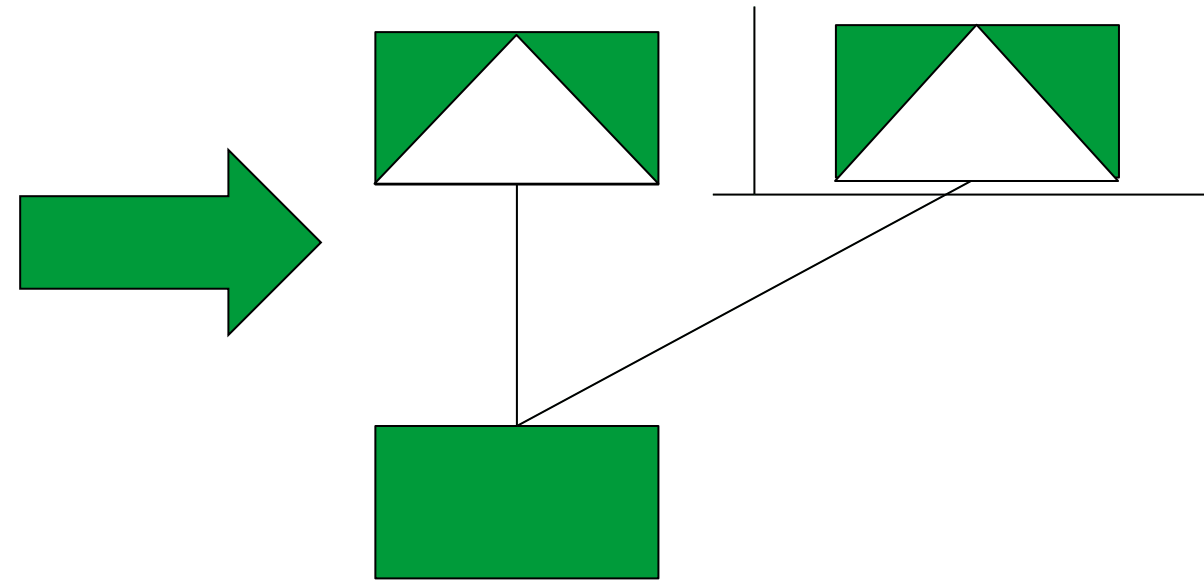
Mutual recognition in the proportionality analysis

# Generic doctrines extended to funds

- Case C-194/06 Orange European Smallcap Fund
- Case C-303/07 Aberdeen Property Fininvest Alpha
- Case C-338/11 Santander Asset Management
- Case C-190/12 Emerging Markets Series of DFA

Differentiation based on seat -> Court applied  
ACT/Denkavit comparability

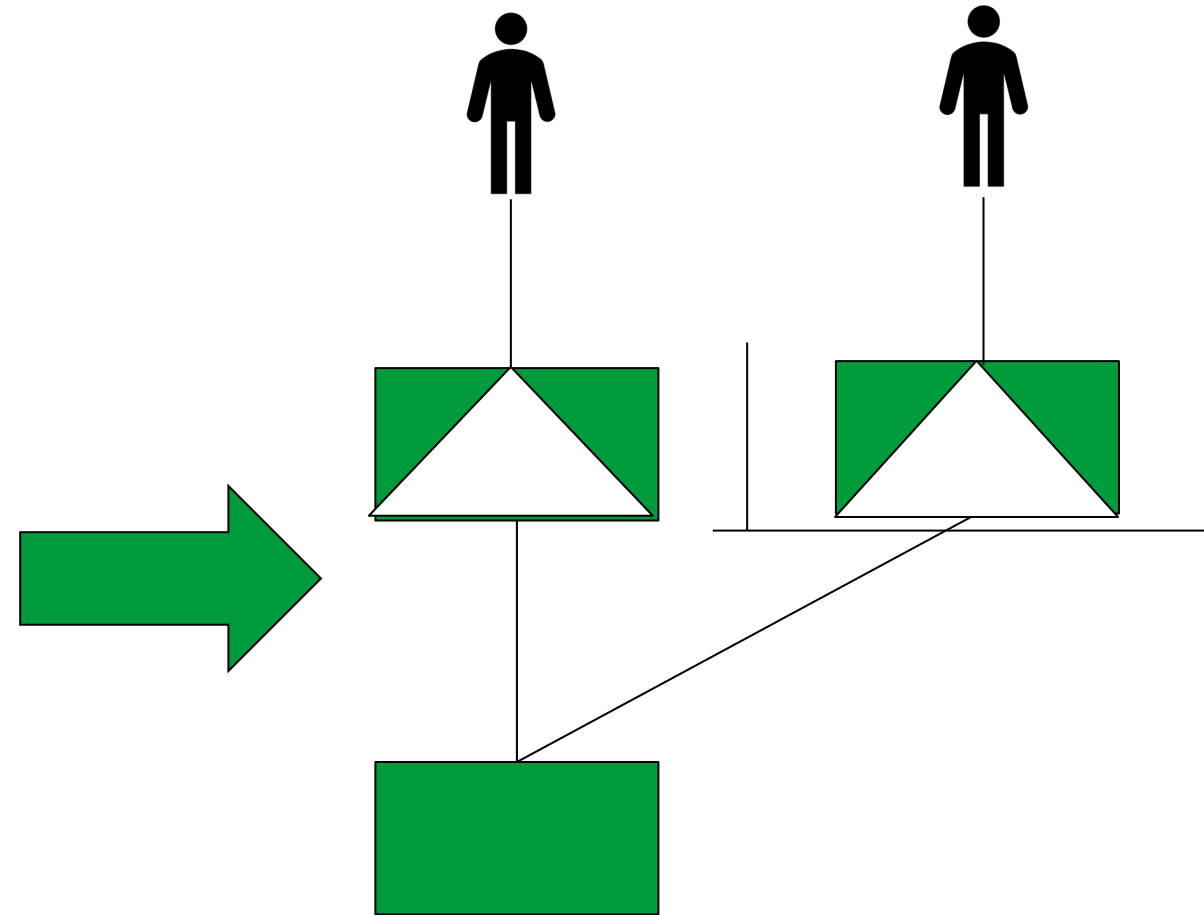
(i.e. comparability in the light of source state rules  
targeting economic double taxation due to taxation in  
source state causing economic double taxation)



# Extension of generic doctrines to funds

van Caster & van Caster (C-326/12)

- Tax transparent system:
- Is it allowed to bind the – usually punishing – lumpsum taxation to the fund's precise fulfilment of documentation and disclosure obligations foreseen in German law?
- No!
  - **equivalent foreign** documentation has to be accepted, as long as it allows to get the information required (Meilicke II)



# MUTUAL RECOGNITION IN THE COMPARABILITY ANALYSIS

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# Mutual recognition in comparability

- Case C-342/20 A SCPI v. Veronsaajien oikeudenvallvontayksikkö,
- Case C-480/19 E, Veronsaajien oikeudenvallvontayksikkö
- Case C-156/17 Köln-Aktienfonds Deka

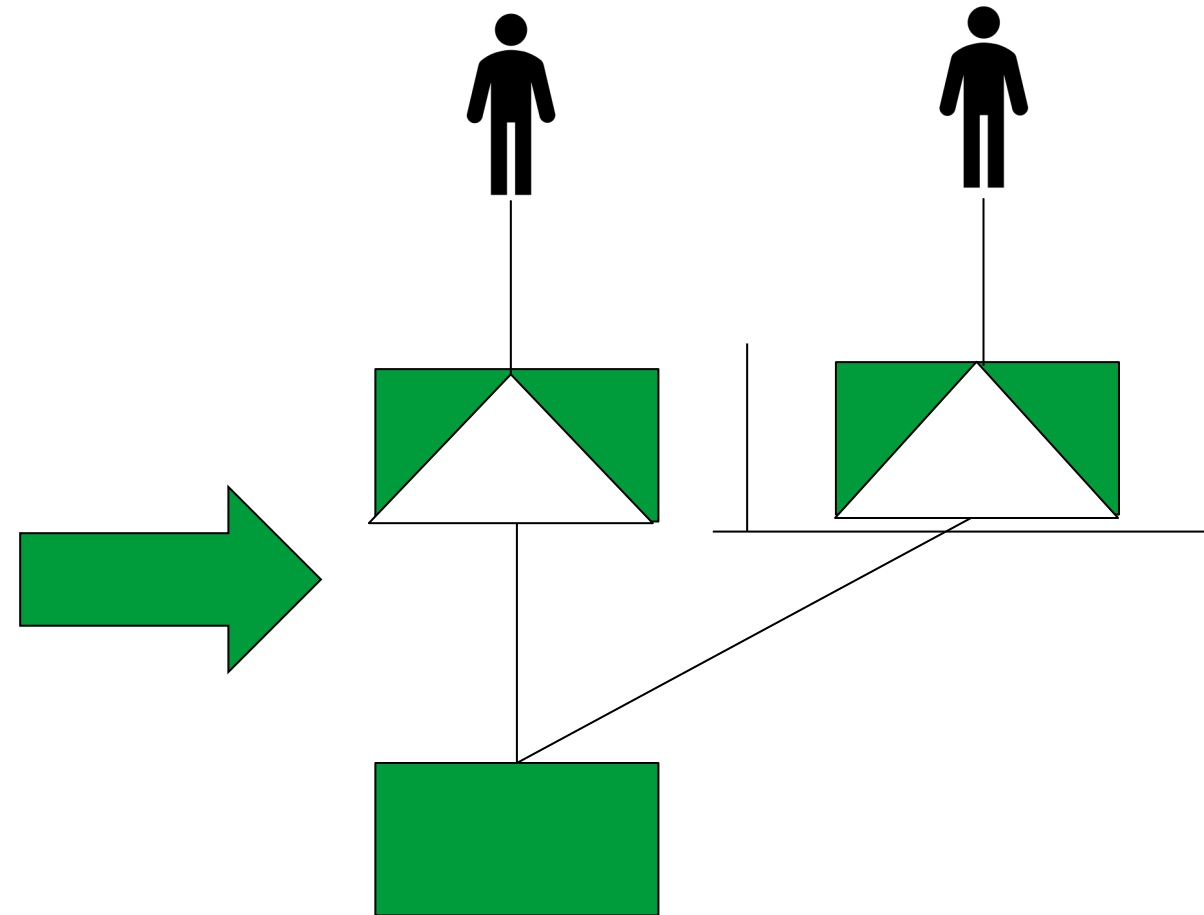
Neutrally applying systems – every fund that fulfils the criteria can access the regime

(but, of course, it will be typically domestic funds)

# Mutual recognition in comparability

## Case C-342/20 A SCPI

- Finnish fund:
  - exempt
  - goal neutrality between direct and indirect investment.
- French fund
  - tax transparent
- Does this fulfil the goal of the FIN system?
- Yes!!
- Situations comparable, Finland lost.

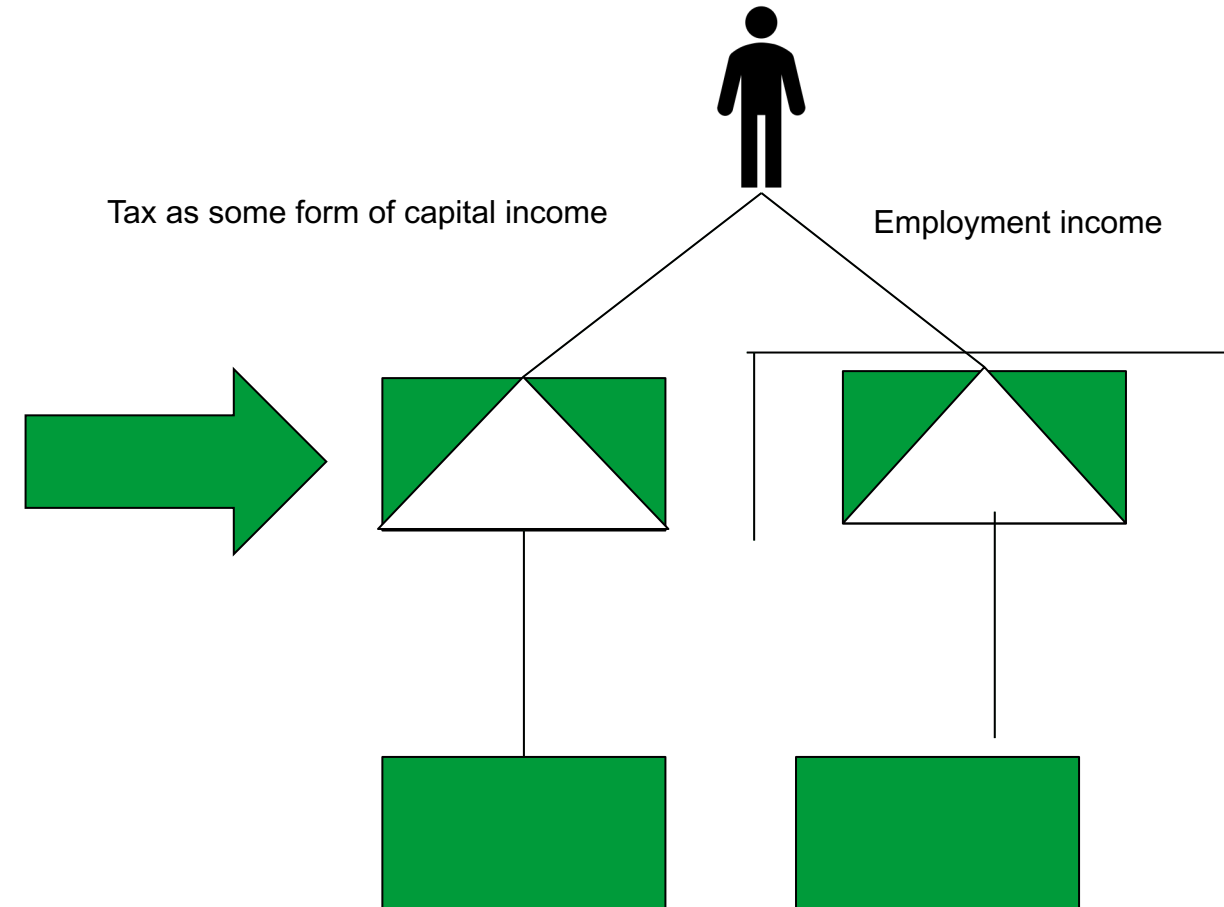




# Mutual recognition in comparability

## Case C-480/19 E

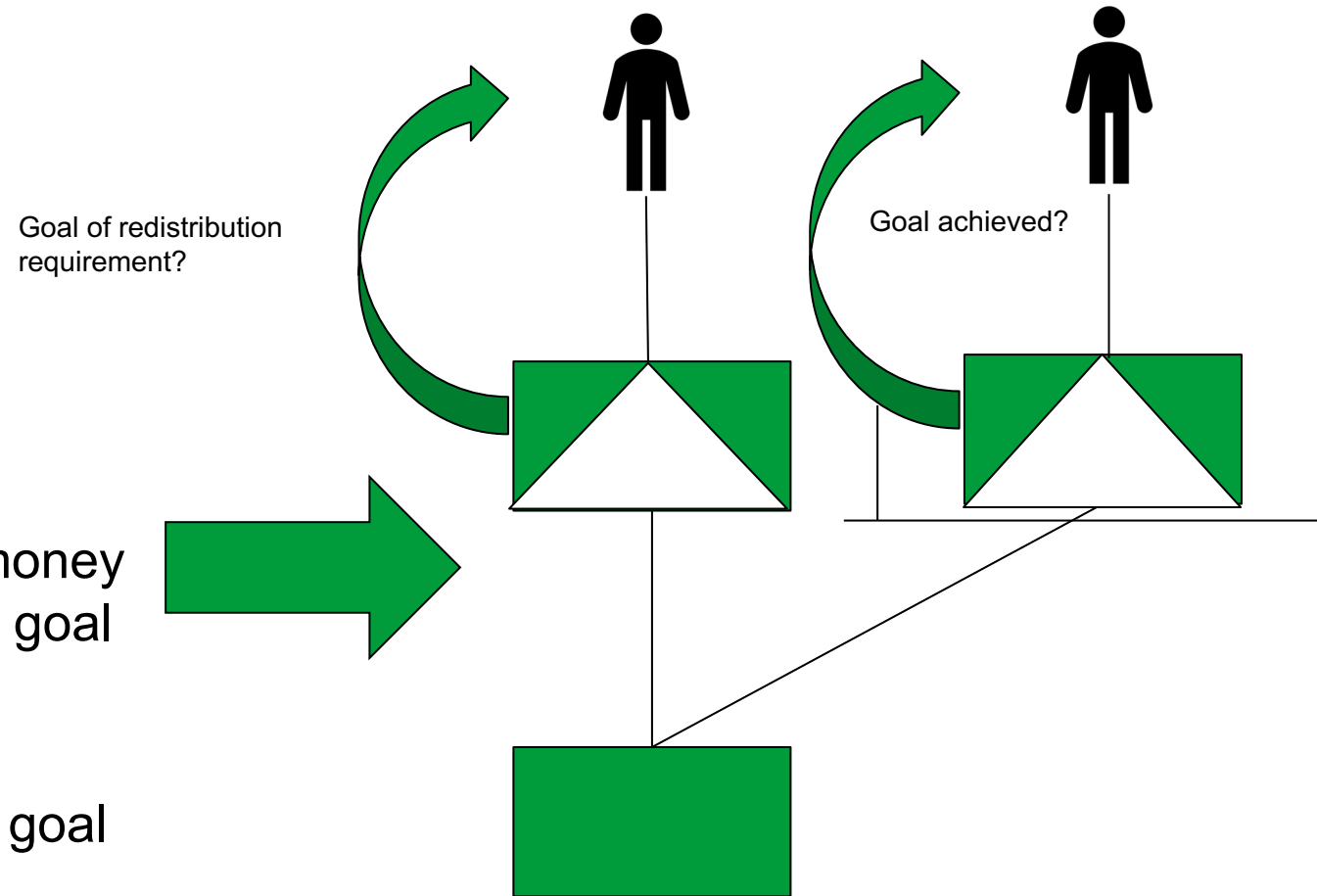
- Finland;
  - Exemption
  - goal to achieve single tax at the level of the investor
- Luxembourg:
  - Exemption
- Does this fulfil the goal of the FIN system?
- Yes!!
- Situations comparable, Finland lost.



# Mutual recognition in comparability

## Deka

- Dutch fund:
  - exempt + (inter alia) redistribution requirement
  - Goal unclear to Court.
- German fund
  - tax transparent
  - If goal of Dutch system is to get the money to the investors -> not comparable as goal not achieved
  - If goal of Dutch system is to ensure immediate taxation > comparable, as goal achieved.



# MUTUAL RECOGNITION IN THE PROPORTIONALITY ANALYSIS

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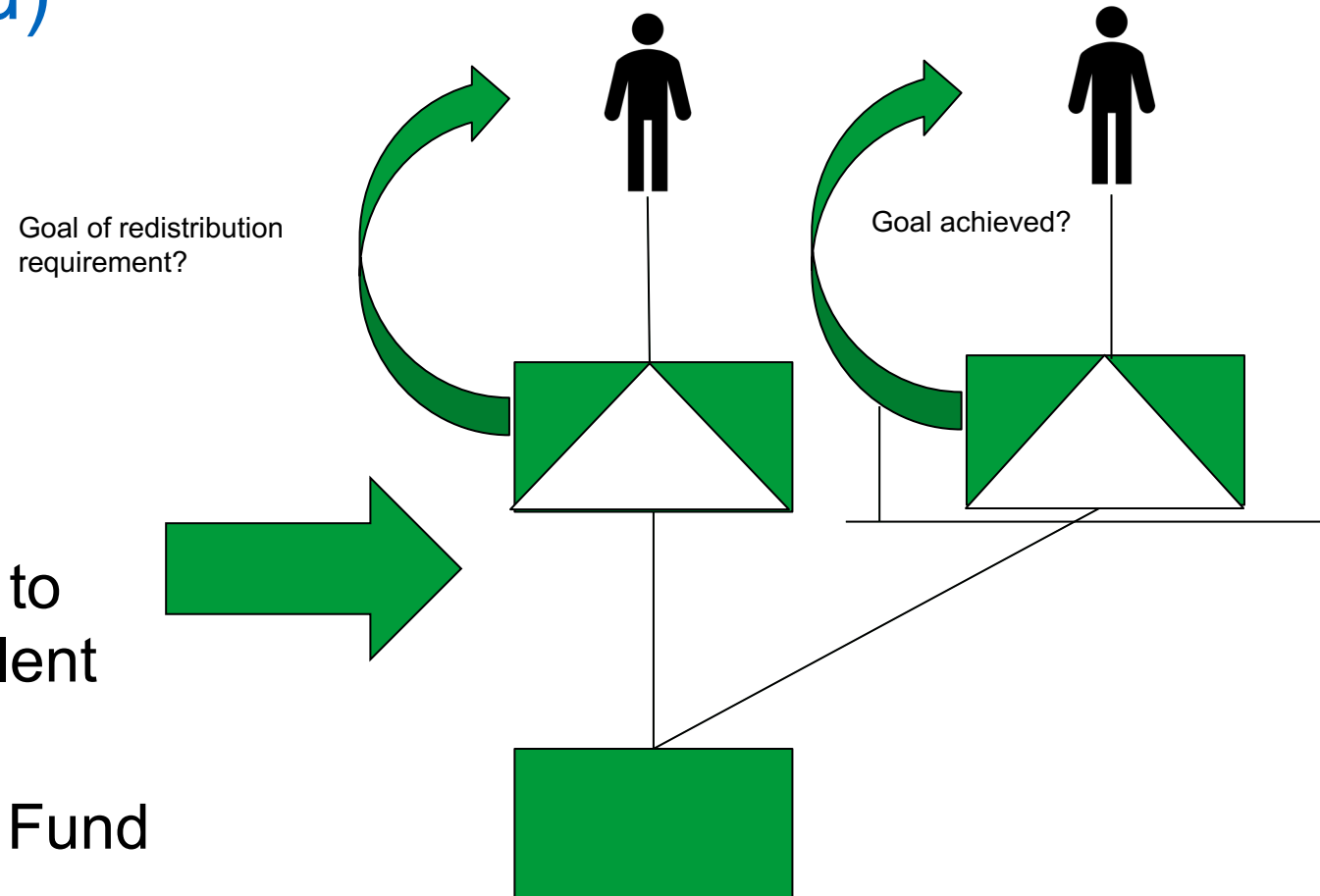
# Mutual recognition in proportionality analysis

- **Case C-480/16 Fidelity Funds**
- Case C-545/19 AllianzGI-Fonds AEVN
- Case C-537/20 L Fund v. Finanzamt D
- **Case C-480/19 C-479/19 UBS Real Estate**
- Case C-252/14 Pensioenfonds Metaal en Techniek (PMT)

# Mutual recognition in proportionality

## Fidelity (+Allianzgi + L-Fund)

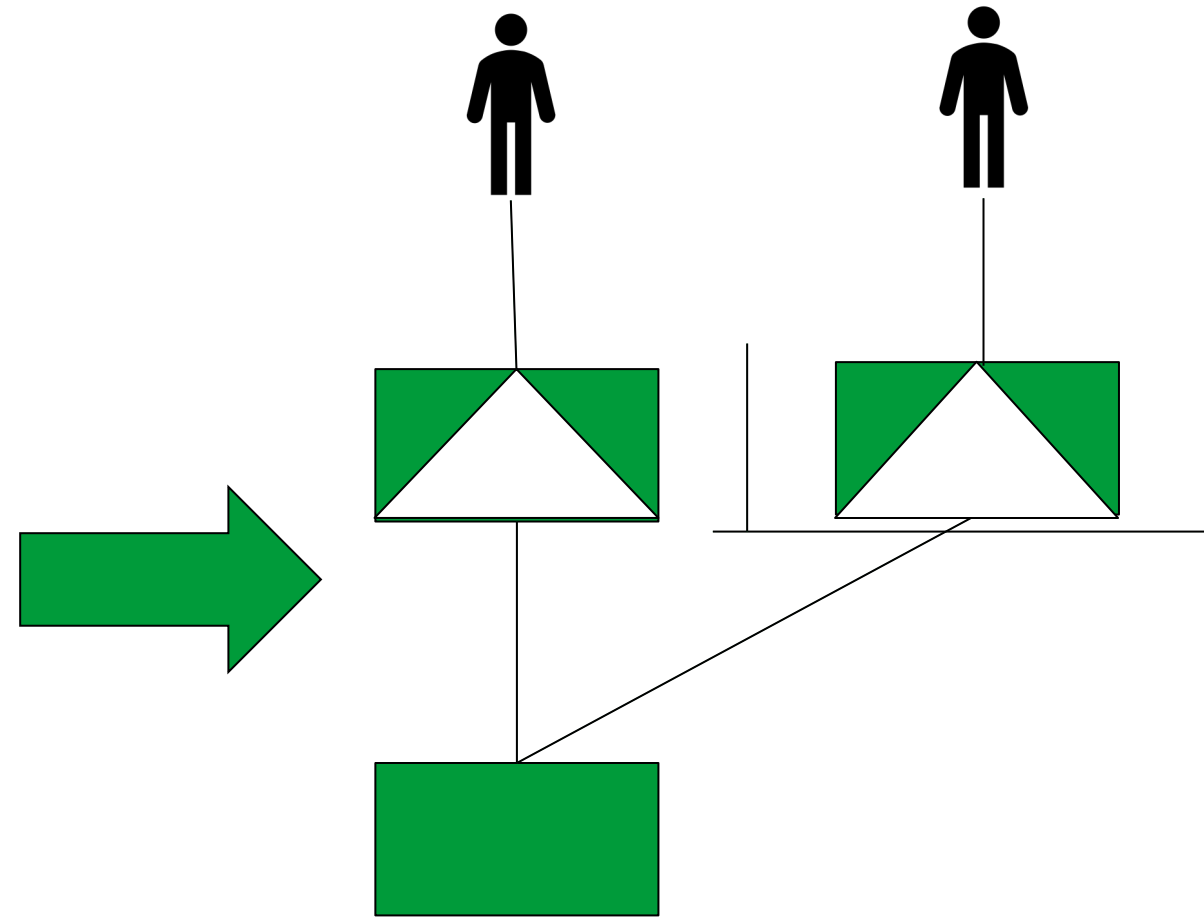
- Denmark fund:
  - exempt + (inter alia) redistribution requirement
- Differentiation based on seat → ACT/Denkavit comp.
- Coherence accepted
- Yet, exemption must be extended to foreign funds subject to an equivalent system.
- Nuances added in Allianzgi and L Fund



# Mutual recognition in proportionality

## UBS Real Estate

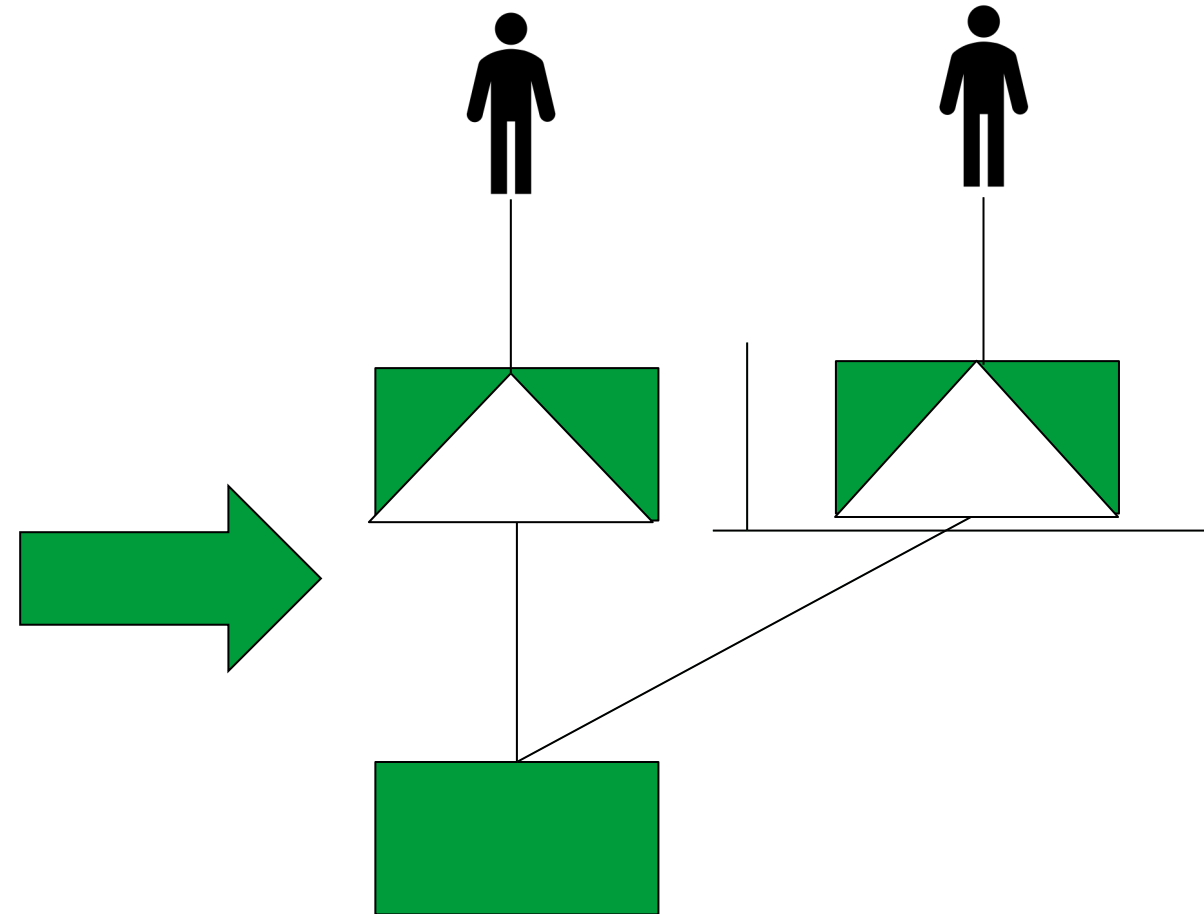
- Italy
  - Granting of tax advantages to closed funds only (not open)
  - Italian funds -> closed
- Comparability assumed
- Justification limit systemic risks in the real estate market.
- Proportionality analysis to national Court.
- Mutual recognition? **Arguably**: yes!
- If the foreign system would equivalently ensure the Italian policy interest -> discriminating against it not proportionate (my view)



# Mutual recognition in proportionality

## PMT

- Swedish pension funds -> capital yield tax
- Foreign pension funds -> WHT.
- ECJ (incorrectly in the eyes of many):
  - The goal of the Swedish system (neutral taxation independent of economic climate) cannot be reached with respect to foreign funds -> not comparable.
- The later UBS Real Estate case shows the better approach.
- If the policy goal is not automatically to be accepted:
  - Don't use it as a yardstick in comparability analysis
  - But test its general acceptability in the justification analysis, and then provide for a more nuanced proportionality analysis.



# Conclusion

- Mutual recognition elements exist, but not in simple cases.
- Consequent:
  - accepts the multilayered structure of funds
  - continues a national design decision across the border.
- However, very narrow conception of equivalence (e.g. Fidelity, Deka).
- On the other hand, rather loose approach with respect to the relevance of other taxes (E, Allianzgi).



# Thank you for your attention

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