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ADVANCED LL.M.
INTERNATIONAL TAX LAW
POSTER PROGRAMME · LLM CATEGORY

FREE MOVEMENT OF CAPITAL · CJEU · INVESTMENT FUNDS

Reconstructing *Comparability* of Investment Funds under EU Law

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1 BACKGROUND & RELEVANCE

Europe's competitiveness depends on **integrated capital markets**. A recurring obstacle is **tax fragmentation**: citizens should be able to invest across Member States without complex procedures and double taxation.

Where a foreign investment fund suffers a **withholding tax** not levied on domestic competitors, a question of *equality before the law* arises. Yet **Art. 65 TFEU** permits some different treatment — and the EU has never agreed what an investment fund *is* for tax purposes.

> *After reading the analysis, the reader will probably be more confused than before — but at a much higher level.*
>
> PETER WATTEL, ON THE COURT'S COMPARABILITY ANALYSIS

2 FOUNDATIONS

The first mutual fund was founded in **Amsterdam in 1774** by Adriaan van Ketwich — *"Eendragt Maakt Magt"* — to spread risk for small investors. A fund collectivises investment management through a pool of assets, a manager and a depositary.

- **Tax neutrality** drives where capital flows: the vehicle should be tax-transparent or tax-exempt.
- **Horizontal** neutrality — fund vs. direct investment in the same assets.
- **Vertical** neutrality — avoiding economic double taxation.

The **UCITS** and **AIFM** directives regulate only the financial side of funds — never their legal nature or fiscal treatment, leaving coordination to the Court.

3 RESEARCH QUESTION & METHOD

Under what conditions is a **foreign investment fund** in *"the same situation"* as a domestic one when assessing discriminatory withholding taxation under the free movement of capital?

The thesis reconstructs the **comparability step** in the CJEU's *rule of reason*, via a systematic review of case law — from *Orange European Smallcap* to *Franklin Mutual*.

THE RULE OF REASON IN DIRECT TAXATION

- **1a PRIMA FACIE** Does the measure distinguish cross-border from comparable domestic situations?
- **1b TELEOLOGICAL** Does an objective difference explain the treatment, given the purpose?
- **2 JUSTIFICATION** Is the discrimination justified by an overriding public interest?
- **3 PROPORTIONALITY** Is the measure suitable and no more restrictive than necessary?

5 KEY FINDING

Comparability nominally opens the *rule of reason*, but cannot bear the analytical weight assigned to it. It is at once:

- **Over-inclusive** — the Court stretches it to reach results better explained at the justification stage.
- **Under-determined** — its criteria shift with the objective of each national measure.

Relying on "different tax arrangements" to deny comparability is **tautological**: it merely says the situations differ because the taxpayers differ.

4 RECONSTRUCTING COMPARABILITY — SEVEN PRINCIPLES

The case law reveals an increasingly **functional approach**: what matters is not whether resident and non-resident funds are *formally* identical, but whether the distinguishing criteria are **objectively connected** to the tax regime at issue.

- a Source state ≠ residence state
- b Different taxation techniques
- c Objective of the legislation
- d Only criteria actually used matter
- e Substance over ancillary features
- f Subjective level of comparison
- g Beyond the tax on dividends

6 PROPOSAL & CONCLUSION

The real normative labour happens at **justification** and **proportionality**. Comparability should be openly **relocated** as a substantive analysis *within* the proportionality judgment — at the suitability / necessity stage, intertwined with adequacy.

Over decades the Court has dismantled formal barriers: a fund cannot lose an advantage merely for wearing a different *"legal coat."*

> *This functional and sophisticated approach to comparability does not rely primarily on the different features of the vehicles, which merely reflect how legal systems structure them. Those features matter only when interlinked with the object and scope of the fiscal provision.*
>
> FROM THE CONCLUSION