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Opinion Statement ECJ-TF 4/2022 on the ECJ Decision of 22 September 2022 in *W AG* (Case C-538/20) on the Deductibility of Foreign Final Losses

In this CFE Opinion Statement, submitted to the EU Institutions in November 2022, the CFE ECJ Task Force comments on the ECJ decision of 22 September 2022 in *W AG* (Case C-538/20), on the deductibility of foreign final losses.

1. Executive Summary

The CFE ECJ Task Force acknowledges the different views on the Court of Justice of the European Union's (ECJ) "final loss" doctrine previously established in *Lidl Belgium* (Case C- 414/06)[1] for treaty-exempt permanent establishments (PEs), but also notes that the reasoning of that case was implicitly renounced by the Court in *Timac Agro* (Case C-388/14)[2] and in *W AG* (Case C-538/20).[3] The *W AG* decision makes it clear that comparability should be examined differently depending on whether the exemption is granted by domestic or tax treaty law. The CFE ECJ Task Force has reservations regarding this distinction. For the taxpayer, an exemption has the same economic effects regardless of whether it is adopted through domestic law or tax treaty law. Moreover, *W AG* departs from the Court's reasoning and thinking in *Lidl Belgium*, which also concerned Germany and the same rules. Ideally, the Court should have made this explicit. Finally, it remains to be seen whether *Marks and Spencer* (Case C-446/03)[4] is still "good law" or if *W AG* was one of the final nails in the coffin of the "final loss" doctrine.

2. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *W AG*, in respect of which the ECJ delivered its decision on 22 September 2022. At issue in *W AG* was the ability of a German company, W, to deduct the final losses that it had incurred in its UK PE considering that Germany, as the state of residence, had waived its power to tax the profits (and losses) of that PE under the Germany-United Kingdom Income and Capital Tax Treaty (1964).[5] The ECJ ruled that when a state of residence refrains from exercising its power to tax the profits (and losses) of the foreign PE under a tax treaty, the situation of a company with a foreign PE is not objectively comparable to the situation of a company with a domestic PE. As such, there was no different treatment of comparable situations and, as a corollary, no breach of the freedom of establishment.

3. Background, Facts and Issues

W was a public limited company whose registered office and place of management were in Germany. The company operated a securities trading bank. In August 2004, W opened a PE in the United Kingdom. The PE did not make a profit, so W closed it during the first half of 2007. Due to its closure, the losses incurred by the PE during the

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1. DE: ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronnl*, Case Law IBFD.
2. DE: ECJ, 17 Dec. 2015, Case C-388/14, *Timac Agro Deutschland GmbH v. Finanzamt Sankt Augustin*, Case Law IBFD.
3. DE: ECJ, 22 Sept. 2022, Case C-538/20, *Finanzamt B v. W AG*, Case Law IBFD.
4. UK: ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, Case Law IBFD.
5. *Convention between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion* (26 Nov. 1964) (as amended through 1970), Treaties & Models IBFD. [hereinafter *Ger.-U.K. Tax Treaty* (1964)].

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2004/05, 2005/06 and 2006/07 financial years could not be carried forward in the United Kingdom for tax purposes.

W tried to set off the losses of the UK PE against its taxable profits but the German tax authorities refused to take into account those losses in determining the amount owed by W in Germany by way of corporation tax and business tax for the 2007 tax year. Although W was liable in Germany to pay corporation tax on its entire income, the combined effect of section 1 of the German Corporate Income Tax Act[6] and article XVIII(2) of the Germany-United Kingdom Income and Capital Tax Treaty (1964) meant that the losses incurred by its UK PE were excluded from the basis of assessment of its corporate tax. The same applied to business tax since the provisions of the Trade Tax Act[7] referred to the determination of profits subject to corporate tax for the purposes of calculating that tax.

W challenged this refusal and an action was brought before the *Hessisches Finanzgericht* (Finance Court, Hesse, Germany). By way of a decision of 4 September 2018, that court upheld that action. The tax authorities appealed this decision before the *Bundesfinanzhof* (the German Federal Finance Court), the referring court. The referring court was unsure whether the losses incurred by W's UK PE should be taken into account in calculating the tax payable by W in Germany for the purposes of complying with the freedom of establishment. This was because, in the recent *Bevola* (Case C-650/16) decision,[8] the Danish legislation was found to be in breach of EU law, as it did not allow for the deduction of final losses of the Finnish PE of a Danish company. The facts, in this case, were similar but in *Bevola* an exemption for foreign profits was provided for under domestic law and not a tax treaty as it was in the *W* case. The German Federal Finance Court decided that further clarification was needed and the following questions were referred to the ECJ.

(1) Did freedom of establishment preclude legislation of a Member State which prevented a resident company from deducting losses incurred by its foreign PE where, first, the company had exhausted the possibilities to deduct those losses in the Member State of the PE and, second, it ceased to receive any income through that PE, so that there was no longer any possibility of account being taken of the losses in that Member State ("final" losses), including if the legislation in question contained an exemption for profits and losses pursuant to the underlying tax treaty?

(2) Could this also be applied in the case of local business taxes – i.e. was the prohibition of deduction of final losses from these business taxes incompatible with the freedom of establishment?

(3) In the event of the closure of the permanent establishment in the other Member State, could there be "final" losses when there was at least a theoretical possibility that the company might once more open in a PE in the Member State?

(4) Are the losses final if they can be carried forward to a subsequent tax period on at least one occasion under the law of the state of the PE, of which account is to be taken by the state in which the parent establishment is resident?

(5) Is the obligation to take account of cross-border "final" losses limited by the amount of losses which the company could have calculated in the PE State, were the taking account of losses not precluded there?

In Advocate General Collins' view, the German tax regime did not restrict the freedom of establishment. The Advocate General argued that:[9]

> with regard to a tax regime such as that at issue in the main proceedings, under which a bilateral convention for the avoidance of double taxation, applying the exemption method, subjects to the exclusive power of taxation of the Member State in which they are situated non-resident permanent establishments belonging to a company having its seat in another Member State, the situation of those establishments is not objectively comparable to that of resident permanent establishments of such a company.

As such, the Member State was not precluded from denying the deduction of final losses incurred by a foreign PE from the taxable profits of its resident head office where the relevant tax treaty included the exemption method to avoid double taxation. The same conclusion applied as regards the local business taxes (i.e. question 2).[10]

The Advocate General[11] considered the solution in *Timac Agro*[12] as reconcilable with the Court's approach in the *Bevola*[13] case. The existence of a tax treaty was a decisive factor, as the state of residence was regarded as having effectively and completely waived its power to tax the income of non-resident PEs.[14] However, the Advocate General did acknowledge, earlier on, that the ECJ decision in *Bevola*:[15]

> could be understood to apply to all cases where final losses are incurred by a non-resident permanent establishment irrespective of whether the impossibility of deducting those losses in the State of residence of the parent company results from a unilateral provision of national law or from a bilateral convention for the avoidance of double taxation and whether the method for avoidance of double taxation is the credit method or the exemption method.

The Advocate General also considered the questions of the referring court seeking clarification as to the concept of final losses, in case the first two questions were answered in the affirmative (i.e. if a breach of the freedom of establishment was found). As regards the question whether losses could be considered to be "final" where the foreign

6. DE: Corporate Income Tax Act (*Körperschaftsteuergesetz*, KStG), sec. 1, Primary Sources IBFD.
7. DE: Trade Tax Act (*Gewerbesteuergesetz*, GewStG).
8. DK: ECJ, 12 June 2018, Case C-650/16, *A/S Bevola, Jens W. Trock ApS v. Skatteministeriet*, Case Law IBFD.
9. DE: Opinion of Advocate General Collins, 10 Mar. 2022, Case C-538/20, *Finanzamt B v. W AG*, para. 38, Case Law IBFD.
10. AG Opinion in *W AG* (C-538/20), paras. 55-57.
11. Id., para. 44.
12. *Timac Agro* (C-388/14).
13. *A/S Bevola* (C-650/16).
14. AG Opinion in *W AG* (C-538/20), para. 46.
15. Id., para. 43.

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PE had been closed down but there was a possibility, albeit theoretical, that its parent company might open a new PE in the Member State of the PE and that the past losses of the former could be offset against the latter's profits, the Advocate General found that this interpretation would go too far:[16,17]

> Not only would it be practically impossible or excessively difficult for the parent company to demonstrate that such a possibility is not open to it, but that approach would lead to losses incurred by a permanent establishment situated in another Member State never being considered to be final losses, which would render meaningless the obligation to take into account final losses set out in *Marks & Spencer.*

As regards the fourth question, the Advocate General opined that losses incurred by a PE that have been carried forward from tax periods preceding its closure could not be considered to be "final" losses.[18] He agreed with Advocate General Kokott's view in other Opinions[19] that losses that were non-final at the end of an assessment period could not subsequently become final. Otherwise:[20]

> were it possible to regard accumulated (carried forward) losses as final losses, the initially successful activity of the subsidiary (or of the permanent establishment) would be taxed solely in the State in which it is situated, while the subsequently loss-making activity would be financed by the tax revenue of the State of residence of the parent company, which would be contrary to an appropriate allocation of the power to impose taxes.

As regards the fifth question, i.e. whether the amount of losses should be calculated on the basis of the state of residence of the parent company or the state of the PE, Advocate General Collins thought that in order to ensure equal treatment, the amount of final losses to be taken into account should not exceed that calculated by applying the rules of the parent company's state of residence (here, Germany).[21] If the amount of the final losses calculated in accordance with the rules of the parent company's state of residence were to be higher than that calculated in accordance with the rules of the state in which the PE is situated (here, the United Kingdom), it should be limited to the latter amount.[22]

Following the Opinion of the Advocate General and the emerging distinction between rules prohibiting the deduction of final losses of a foreign PE as a result of a tax treaty or the unilateral provisions of domestic law, the decision of the ECJ was eagerly anticipated. The ECJ decision was published on 22 September 2022.[23] Although the ECJ mainly followed the Opinion of the Advocate General, it refrained from discussing the questions relating to the interpretation of final losses.

4. The ECJ Decision

The ECJ decision was much shorter than Advocate General Collin's Opinion, as it only examined the first question and found that there was no breach. Therefore, according to the ECJ, there was no need to address the remaining questions. In *W AG*, the Court accepted the German symmetry argument regarding the interpretation of the treaty exemption method (although one should note that other countries have a different understanding of that method and apply, e.g. a deduction/re-incorporation system).

Citing the *Bevola* case and older case law,[24] the ECJ reiterated that when resident companies enjoy a tax advantage that consists of allowing them to take into account the losses incurred by a resident PE but this is prohibited in respect of the losses incurred by a foreign PE, this creates a difference in treatment which could discourage a resident company from carrying on its business through such a PE.[25] This difference in treatment is permissible only if it concerns situations that are not objectively comparable, or if it is justified by an overriding reason in the public interest proportionate to that objective.[26] Therefore, it was important to examine first the comparability of an internal and a cross-border situation.

As regards Member State rules to prevent or mitigate the double taxation of a resident company's profits, the starting point was that companies that have a PE in another Member State were not, in principle, in a comparable situation to that of companies with a resident PE,[27] unless domestic legislation treated those two categories of establishment in the same way for the purposes of taking into account the losses and profits made by them.[28] Here, the ECJ cited the *Nordea Bank Danmark* (Case C-48/13) and *Timac Agro* cases.[29]

The ECJ made the same distinction as the Advocate General between treaty-based exemption and unilateral (domestic) exemption of a foreign PE's profits and losses. It stated that where:[30]

> the Member State in which a company is resident has waived, pursuant to a double taxation convention, the exercise of its power to tax the profits of the non-resident permanent establishment of that company, situated in another Member State, the situation of a resident company possessing such a permanent establishment is not comparable to that of a resident company possessing a resident permanent establishment in the light of the measures taken by the first Member State in order to prevent or mitigate the double taxation of profits and, symmetrically, the double deduction of resident companies' losses.

16. Id., para. 66.
17. Id.
18. Id., paras. 70-71.
19. *See* SE: Opinion of Advocate General Kokott, 10 Jan. 2019, Case C-607/17, *Skatteverket v. Memira Holding AB*, paras 58 and 59, Case Law IBFD; SE: Opinion of Advocate General Kokott, 10 Jan. 2019, Case C-608/17, *Skatteverket v. Holmen AB*, paras 54 and 55, Case Law IBFD and CZ: Opinion of Advocate General Kokott, 17 Oct. 2019, Case C-405/18, *AURES Holdings, a.s. v. Odvolací finanční ředitelství*, paras. 61 to 65, Case Law IBFD.
20. AG Opinion in *W AG* (C-538/20), para. 71.
21. Id., para. 74.
22. Id., para 75.
23. *See W AG* (C-538/20).
24. *A/S Bevola* (C-650/16), paras. 18 and 19 and the case law cited therein.
25. *See W AG* (C-538/20), para. 17.
26. Id., para. 18.
27. Id., para. 20.
28. Id., para. 21.
29. DK: ECJ, 17 July 2014, Case C-48/13, *Nordea Bank Danmark A/S v. Skatteministeriet*, para 24, Case Law IBFD; and *Timac Agro* (C-388/14), para. 28.
30. *See W AG* (C-538/20), para. 22.

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The ECJ argued that this conclusion was aligned with the *Bevola* case,[31] as, in that case, the Member State of residence of the company had not, by means of a tax treaty, waived its power to tax that establishment's profits. It had decided unilaterally, except in the event of the option by the company in question for an international joint taxation scheme, *not* to take into account the profits made and losses incurred by non-resident PEs of resident companies, even though that Member State would have been competent to do so, which is different.[32] As there was no comparability, there was no restriction on the freedom of establishment.[33] The ECJ saw no need to address the question of local business taxes, nor the interpretation of final losses.

5. Comments

This Task Force has already had the opportunity to comment on the case law of the Court relating to cross-border use of losses. A 2009 Opinion Statement analysed the consequences, for the state of residence, of applying either worldwide or territorial taxation and the respective effects on the use of foreign losses in light of the Court's case law.[34] Moreover, a 2015 Opinion Statement on *Commission v. UK* (*Marks & Spencer II*)[35] addressed a number of issues relating to the question of whether losses are "definitive" ("final").[36] Finally, a 2018 Opinion Statement took up questions of comparability, the relevance of the ability-to-pay principle in the context of loss utilization and the definition of "definitive" or "final" losses in light of *Bevola*[37] and other recent decisions.[38]

Although this was a relatively short decision, it raises many important questions and, once again, challenges the precedential value of *Marks & Spencer*,[39] as well as subsequent landmark cases involving foreign loss-making PEs that followed it; namely, *Lidl Belgium*[40] and *Bevola*.[41]

In *W AG*, the ECJ unequivocally makes a distinction between exemption of foreign profits and losses based on domestic rules (the rules of the Member State of the company) and exemption based on a tax treaty. Whilst in both *Bevola*[42] and *W AG* the exemption is symmetrical – i.e. both profits and losses are exempt from the tax base of the company – the basis on which the ECJ is making the distinction is not really clear. How is waiving taxing rights under a tax treaty any different from waiving taxing rights under domestic law? While the Court seems to view the former differently based on its bilateral nature under international law, one should not forget that both domestic and tax treaty-based regimes may be changed unilaterally (namely, in situations in which the Member State is allowed to override the treaty) and that the effects on taxpayers are identical. More generally, a focus on the legal origin of an exemption unnecessarily shifts the focus from the economic effects of the tax measures, which are the same regardless of whether they derive from domestic or tax treaty law. These effects should, however, be decisive if the development of the internal market is taken as a benchmark. By making a legal distinction based on whether domestic tax rules or tax treaty rules apply, the ECJ, arguably, is not contributing to the creation of a level playing field within the EU internal market.

It is unclear how *W AG* relates to the Court's previous case law. The German legal framework at stake in this case was the same as that at issue in *Lidl Belgium*. Even if the applicable treaty was a different one, the Court did not pay any attention to possible differences in the wording of the relevant provisions of the treaties. While, in *Lidl Belgium*, the Court simply transferred the *Marks & Spencer* reasoning and the "final loss" doctrine to treaty-exempt foreign PEs (and eventually held against the taxpayer only because the loss was not "final"), the Court in *W AG* dismissed comparability and did not even get to the point of addressing the question of whether "final" losses existed. Has *W AG* now, at least in its reasoning, "overruled" the *Lidl Belgium* decision without even mentioning it? In the CFE ECJ Tax Force's view, the answer is clearly yes. Whilst it is not unheard of for the ECJ to deviate from previous decisions especially after the passing of some time, it is not very often that it does so when the impugned legislation and tax treaty exemption provisions are exactly the same, i.e. German rules and treaty interpretation after the year 1999. Ideally, the Court should have made this explicit.

However, *W AG* is in line with the second part of *Timac Agro*.[43] There, the ECJ made a seemingly absolute statement regarding the non-discriminatory nature of Germany's base exemption without really distinguishing between a unilateral or tax treaty exemption, even though that case entailed treaty-based exemption. The ECJ held in that case that:[44]

> since the Federal Republic of Germany does not exercise any tax powers over the profits of such a permanent establishment, the deduction of its losses no longer being permitted in Germany, the situation of a permanent establishment situated in Austria is not comparable to that of a permanent establishment situated in Germany in relation to measures laid down by the Federal Republic of Germany in order to prevent or mitigate the double taxation of a resident company's profits.

31. Id., para, 24 and *A/S Bevola* (C-650/16).
32. *See W AG* (C-538/20), para. 25.
33. Id., paras. 27-28.
34. *See* Confédération Fiscale Européenne, *Opinion Statement of the CFE ECJ Taskforce on Losses Compensation within the EU for Individuals and Companies Carrying Out Their Activities through Permanent Establishments: Paper Submitted by the Confédération Fiscale Européenne to the European Institutions in July 2009*, 49 Eur. Taxn. 10, p. 487 et seq. (2009), Journal Articles & Opinion Pieces IBFD.
35. UK: ECJ, 3 Feb. 2015, Case C-172/13, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, Case Law IBFD.
36. CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2015 on the Decision of the European Court of Justice in European Commission v. United Kingdom ("Final Losses") (Case C-172/13), Concerning the "Marks & Spencer Exception"*, 56 Eur. Taxn. 2/3 (2016), Journal Articles & Opinion Pieces IBFD.
37. *A/S Bevola* (C-650/16).
38. CFE ECJ Task Force, *Opinion Statement ECJ-TF 3/2018 on the ECJ Decision of 12 June 2018 in Bevola (Case C-650/16), Concerning the Utilization of "Definitive Losses" Attributable to a Foreign Permanent Establishment*, 59 Eur. Taxn. 2/3 (2019), Journal Articles & Opinion Pieces IBFD.
39. *Marks & Spencer plc* (C-309/06).
40. *Lidl Belgium* (C-414/06).
41. *A/S Bevola* (C-650/16).
42. Id.
43. *Timac Agro* (C-388/14).
44. Id., para. 65.

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This statement, which concerned the same legal framework as in *Lidl Belgium*, was understood as a departure from that seminal case. However, as pointed out subsequently, in *Timac Agro,* there were no final losses at stake.[45] In *Bevola*, the ECJ seized on this point but, in doing so, it conflated the issue of comparability with proportionality.[46] The ECJ, in that case, found comparability of domestic and foreign situations but the wording suggests that this was limited to situations where there are final losses,[47] especially in light of the ability to pay principle.[48] In other words, the ECJ seems to have rejected the general argument of non-comparability made in *Timac Agro*, but only in situations in which there were final losses. However, whether the losses are final or not is an issue that determines the proportionality of the legislation and not the comparability of situations. In addition, it was not entirely clear from *Bevola* whether this conclusion applies to situations in which base exemption is the result of domestic law only or a tax treaty as well.

To an extent, *W AG* has clarified this point but the decision builds on the conflated issues arising from *Bevola*. A combined reading of these cases would suggest that there is comparability between domestic and foreign situations as regards final losses, but not when those losses are exempt as a result of a tax treaty.

The Court takes tax treaties into account in assessing compatibility in a variety of cases, for instance, in the decision in *Amurta* (Case C-379/05)[49] and later cases,[50] wherein the impact of a tax treaty was taken into account as far as the neutralization of the different treatment of domestic and outbound dividends was concerned. In those cases, however, what was at stake was the combined application of source and residence state rules. In assessing the obligations of the source state, the ECJ took into account whether the different treatment was neutralized by a tax treaty but refused to take into account whether the different treatment was neutralized by the domestic rules in the *other* Member State – i.e. the residence state. In *W AG*, the ECJ was not asked to determine comparability and/or the neutralization of the different treatment based on the tax rules of the Member State of the PE. The analysis was only from the perspective of the Member State of the company. What one can deduce from the *Amurta* line of cases is that the ECJ shows deference when tax treaties form part of the legal background and takes into account their impact as far as different treatment is concerned. This, however, does not explain why domestic rules, which again form part of the legal background from a one state perspective are not taken into account. In other words, apart from this admittedly far-stretched similarity, there is no convincing reason why domestic exemption and treaty exemption under the same Member State's rules should yield different results with regard to taking into account foreign PE losses.

Even if one were to assume that the ECJ's decisions in *Timac Agro* and *W AG* effectively overruled *Lidl Belgium* (with regard to tax treaty exemption) while upholding *Bevola* (for unilateral domestic exemption), however unconvincing the distinction between domestic and treaty-based exemption, what does this mean in the wider context?

What about losses of a cross-border subsidiary rather than a PE? Profits and losses of such a foreign-controlled subsidiary are also (symmetrically) "exempt", but the question is if *Timac Agro*, *W AG* and *Bevola* are relevant here as well. If so, is the foreign subsidiary "exempt" under domestic law (because the tax system of the parent's state does not include foreign profits of non-resident entities) or under tax treaty law (because article 7(1) first sentence of the OECD Model (2017)[51] allocates the exclusive taxing right to the subsidiary's residence state)? And would the outcome depend on e.g. the existence of CFC legislation in the parent's state or the fact that the parent state taxes dividends received from the foreign subsidiary? This all goes to the core of the issue: is *Marks & Spencer* still good law? And does it matter that, even after *Timac Agro*, the Court has upheld *Marks & Spencer's* implicit comparability and "final loss" doctrine quite recently in e.g. *Holmen* and *Memira* (Case C-607/17)? And is it relevant that both *Marks and Spencer* and *Bevola* were Grand Chamber decisions whereas *Timac Agro* and *W AG* were not?

While the future of the cases in this area remains to be seen, it would be surprising if final losses of a foreign group company could never be taken into account, but final losses of a foreign PE could be taken into account if the Member State of the company applies a worldwide system of taxation and exempts the profits of foreign PEs unilaterally at its own budgetary expense and without any reciprocity (i.e. not in the context of a tax treaty). This is irrespective of the fact that the jurisdiction of the parent company (in a group relief scenario) also applies worldwide taxation, because the norm is that profits of foreign subsidiaries are excluded, being separate legal entities, unless the corporate veil can be pierced due to impropriety. Such an interpretation would also effectively mean that the *Marks & Spencer's* final loss test has become inapplicable to group companies, which was the scenario under that landmark case!

45. *See* DK: Opinion of Advocate General Sánchez-Bordona, 17 Jan. 2018, Case C-650/16, *A/S Bevola, Jens W. Trock ApS v. Skatteministeriet*, para. 57, Case Law IBFD and DE: Opinion of Advocate General Wathelet, 3 Sept. 2015, Case C-388/14, *Timac Agro Deutschland GmbH v. Finanzamt Sankt Augustin*, para. 67, Case Law IBFD.
46. *See* CFE ECJ Task Force, *supra* n. 38.
47. *See A/S Bevola* (C-650/16), para. 38, wherein it is stated:
    as regards losses attributable to a non-resident permanent establishment which has ceased activity and whose losses could not, and no longer can, be deducted from its taxable profits in the Member State in which it carried on its activity, the situation of a resident company possessing such an establishment is not different from that of a resident company possessing a resident permanent establishment, from the point of view of the objective of preventing double deduction of the losses.
48. *A/S Bevola* (C-650/16), para 39. *See also* CFE ECJ Task Force, *supra* n. 38.
49. NL: ECJ, 8 Nov. 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, Case Law IBFD.
50. *See*, for example, IT: ECJ, 19 Nov. 2009, Case C-540/07, *Commission of the European Communities v. Italian Republic*, Case Law IBFD and ES: ECJ, 3 June 2010, Case C-487/08, *European Commission v. Kingdom of Spain*, Case Law IBFD.
51. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.

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A further issue that was not addressed by the ECJ but was considered by Advocate General Collins was the interpretation of final losses. Although, over the years, the ECJ has dealt with this concept,[52] the scope of it is still vague, as also shown by the latest questions referred. The ECJ did not have to answer any of these questions, but it seems that the final loss doctrine is still applicable in cases of domestic exemption, such as *Bevola*.[53]

Therefore, the questions still persist. Does hypothetical usability of losses (for example, if a PE can be reopened in the future) prevent them from being considered final? Advocate General Collins thought that this reading was too strict, as mentioned above. Can carried forward losses ever become final? The Advocate General was not keen on this, as it would disrupt the appropriate allocation of the power to impose taxes. Another important question left unaddressed is how to calculate the loss – under the home state's rules or the source state's rules? Whilst the *Marks & Spencer* case seems to suggest that the losses to be deducted should be calculated on the basis of the home state's (i.e. the state of the parent company) rules,[54] it is unclear what the situation is if the source state rules are stricter and the allowable loss is lower there. Advocate General Collins argued that the lower amount of loss as determined both under home state and source state rules should be accepted.[55]

6. The Statement

The CFE ECJ Task Force, while it acknowledges the different views on the ECJ's "final loss" doctrine previously established in *Lidl Belgium* for treaty-exempt PEs, notes that the reasoning in that case has been implicitly renounced by the Court in *Timac Agro* and in *W AG*. The *W AG* decision makes it clear that comparability should be examined differently depending on whether the exemption is granted by domestic or tax treaty law. The CFE ECJ Task Force has reservations regarding this distinction. For the taxpayer, exemption has the same economic effects regardless of whether it is adopted through domestic law or tax treaty law. Moreover, *W AG* departs from the Court's reasoning and thinking in *Lidl Belgium*, which also concerned Germany and the same rules. Ideally, the Court would have made this explicit. Finally, it remains to be seen whether or not *Marks and Spencer* is still "good law" or if *W AG* was one of the final nails in the coffin of the "final loss" doctrine.

52. *See* FI: ECJ, 21 Feb. 2013, Case C-123/11, *Veronsaajien oikeudenvalvontayksikkö and Valtiovarainministeriö v. A Oy*, paras. 49-55, Case Law IBFD; FI: ECJ, 7 Nov. 2013, Case C-322/11, *K*, paras. 74–82, Case Law IBFD; *European Commission v. United Kingdom of Great Britain and Northern Ireland* (C-172/13); and SE: ECJ, 19 June 2019, Case C-608/17, *Skatteverket v. Holmen AB*, Case Law IBFD.
53. *A/S Bevola* (C-650/16).
54. *Marks & Spencer plc* (C-309/06), para. 72.
55. *See* AG Opinion in *W AG* (C-538/20), paras. 74-75.

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