Cross-border losses and *W AG*: The beginning of the end of the "final loss exception"?

Prof. DDr. Georg Kofler*

L'utilisation transfrontalière des pertes est une question controversée depuis les arrêts de principe de la Cour de justice de l'Union européenne dans les affaires Marks & Spencer et Lidl Belgium. Cette ligne de jurisprudence supposait la comparabilité entre les situations nationales et transfrontalières et adoptait l'«exception de la perte finale» pour les filiales étrangères et les établissements stables exonérés. Après une certaine incertitude après les arrêts rendus dans les affaires Timac Agro et Bevola, la Cour de justice de l'Union européenne a, dans son récent arrêt dans l'affaire W AG, clairement tourné le dos à Lidl Belgium et a estimé que les succursales nationales et les succursales exemptées par une convention de double imposition ne sont pas comparables. Cet article examine de manière critique le raisonnement de la Cour de justice de l'Union européenne dans W AG, ses implications plus larges et sa relation avec d'autres lignes de sa jurisprudence dans le domaine fiscal.

Cross-border loss utilization has been a contentious issue since the Court of Justice of the European Union's landmark decisions in Marks & Spencer and Lidl Belgium, which assumed comparability between domestic and cross-border situations and embraced the "final loss exception" for foreign subsidiaries and exempt permanent establishments. Following some uncertainty after Timac Agro and Bevola, in its recent judgment in W AG the Court clearly turned its back on Lidl Belgium and found that domestic and treaty-exempt branches are not comparable in the first place. This Article critically examines the Court's reasoning in W AG, its broader implications, and its relation to other lines of the Court's jurisprudence in the tax area.

Introduction

Cross-border loss utilization has been an issue in EU tax law for many decades. From an Internal Market's perspective, the core question is simple: In purely domestic situations, the automatic aggregation of the profits and losses of different branches of an enterprise within one single tax jurisdiction as well as cross-entity netting of profits and losses under various domestic group taxation regimes offer two advantages:[1] First, there is a cash flow advantage because losses can be immediately netted with profits of the same enterprise or within the group, so that (ideally) tax will be paid later (*e.g.* once the group member returns

* Professor of International Tax Law at Vienna University of Economics and Business, Austria, and chairman of the CFE ECJ Task Force.

[1] Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, paras 20-21.

to profits).[2] Second, there can be a permanent advantage where the branch or group member never returns to profit but rather incurs a "total loss" (or could, for other reasons, not use its own losses, *e.g.*, because of time-limitations of the loss carry-forward).

In cross-border situations, however, the picture changes. Viewed from the perspective of foreign profits, if those are earned by a foreign permanent establishment[3] ("*non-resident establishment*"[4]) they are often exempt from taxation in the home State (either under domestic law[5] or under tax treaty law, *e.g.*, based in Article 23A OECD MC) and (undistributed) profits of a foreign subsidiary are generally outside the parent's home State's taxing jurisdiction (Article 7(1) OECD MC). Switching the perspective to foreign losses, therefore, a "symmetrical" exclusion of foreign losses seems to be a sensible policy choice in light of fiscal sovereignty. From the perspective of taxpayers and the Internal Market, however, the exclusion of cross-border loss utilization can lead to cash-flow disadvantages (because the losses can only be carried forward or back in the State of the permanent establishment or the subsidiary, awaiting better times for setting off) and "overtaxation" (because a "total" foreign loss cannot be utilized in any State) and may therefore deter cross-border economic engagement.

It is hence unsurprising that the issue of cross-border loss utilization has been in the focus of the European Commission's tax policy work[6] as well as the case-law of the Court of Justice of the European Union (hereinafter the "Court") on the freedom of establishment and the so-called "final loss exception", starting nearly

---

[2] See CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 32, and CJEU, 1 April 2014, C-80/12, *Felixstowe Dock and Railway Company Ltd and Others v The Commissioners for Her Majesty's Revenue & Customs*, EU:C:2014:200, para. 19.

[3] It might be noted that the Court, in the past, has described a permanent establishment "*as an autonomous fiscal entity*" (CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 22) and has frequently used the notion of "*residence*" when referring to permanent establishments (*e.g.*, CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 30). However, permanent establishments are neither taxpayers nor persons nor residents in the traditional meaning of international tax law and tax treaty law. It therefore seems that this terminology is not used in a technical sense.

[4] See for that terminology, *e.g.* CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829, para. 53.

[5] See *e.g.* Art. 209(1) of the French General Tax Code.

[6] Although the Commission's work has not yet resulted in binding EU legislation on cross-border loss relief, already in its April 1990 "Guidelines on company taxation" (SEC(90)60 [20 April 1990], p. 5), it had identified the lack of cross-border loss relief for permanent establishments and subsidiaries as a "*factor penalizing transfrontier activities*", and soon thereafter, in December 1990, it has tabled a proposal for a "*directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other Member States*" (Proposal for a Council directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other Member States, COM(90)595 [24 January 1991], *OJ* C 53 of 28 February 1991, p. 20 [the "1990 Proposal"]). That proposal was later withdrawn (see COM(2001)763 final/2 [21 December 2001], p. 24 = *OJ* C 5 of 9 January 2004, p. 2), but the Commission has announced further work on cross-border relief in October 2001 (COM(2001)582 [23 October 2001], pp. 12-13) and again stressed, in November 2003, that offsetting losses cross-border "*remains very important for businesses*" and contemplated a system of "*EU group taxation*" along the lines of the Danish "joint taxation" system of cross-border loss relief with recapture (COM(2003)726 (24 November 2003). Issues of cross-border loss utilization are also addressed in the proposals for a Common (Consolidated) Corporate Tax Base (C(C)CTB) (*e.g.* COM(2016)685 [25 October 2016], and COM(2016)683 [25 October 2016]) and the recently announced "BEFIT" ("Business in Europe: Framework for Income Taxation") (see Pt 4. in the Communication on "Business Taxation for the 21st Century", COM(2021)251 [18 May 2021]).

20 years ago with *Marks & Spencer*[7] and *Lidl Belgium*[8] and resulting in a complex body of decisions and continuing uncertainty in legal practice.[9] The core issue in the Court's case law concerns the cross-border utilization of losses incurred by foreign subsidiaries and exempt permanent establishments from the perspective of the *home* State in light of the freedom of establishment under Article 49 TFEU.[10] Starting with the Grand Chamber's decision in *Marks & Spencer* in 2005 for cross-border group relief, the Court has consistently held that a *current* cross-border utilization of losses and hence a treatment in the same way as domestic losses is not required by the freedom of establishment. Also, the "deduction/reincorporation method" (which was proposed by the Commission as a general measure in 1990,[11] as a part of the CCTB in 2016[12] and its submissions to the Court[13] as well as favored by several Advocates General[14]) could not be derived from the fundamental freedoms but would "in any event require harmonization rules adopted by the Community legislature".[15] However, the principle of proportionality requires that the Member State of the parent company or the head office, respectively, takes into account so-called "*final" or "definitive" foreign losses*. This line of case law, and specifically the "final loss exception" ("*Marks & Spencer* exception"), has since permeated the case law for systems of group relief,[16] group contributions[17] and

[7] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763.
[8] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278.
[9] See also the Commission's 2006 Communication on the "Tax Treatment of Losses in Cross-border Situations" (COM(2006)824 final (19 December 2006)), in reaction to the Court's *Marks & Spencer* judgment, containing a detailed policy analysis and addressing various options of cross-border loss relief within one enterprise (*i.e.* losses incurred by a branch or "permanent establishment" of the company situated in another Member State) and within a group of companies (*i.e.* losses incurred by a group member in another Member State).
[10] *E.g.*, CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439, paras. 20-24; CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, paras 15-16; CJEU, 17 July 2014, C-48/13, *Nordea Bank Danmark A/S v Skatteministeriet*, EU:C:2014:2087, para. 18. And not under the free movement of capital under Art. 63 TFEU, which would extend to third-country situations. See, *e.g.*, for the exclusion of third-country situations involving permanent establishments, CJEU, 6 November 2007, C-415/06, *Stahlwerk Ergste Westig GmbH v Finanzamt Düsseldorf-Mettmann*, EU:C:2007:651, and concerning group taxation regimes, CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439, para. 24.
[11] See Art. 5-10 of the Commission's 1990 Proposal, COM(90)595 (24 January 1991), *OJ* C 53 of 28 February 1991, p. 3.
[12] See Art. 42 of the Commission's Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016)685 (25 October 2016), on "Loss relief and recapture".
[13] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 45.
[14] Opinion of AG Sharpston, 14 February 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:88, para. 25; see also the detailed discussion by Opinion AG Kokott, 23 October 2014, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, paras 49-53.
[15] See CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 58 (regarding group relief) and CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, paras 49-51 (regarding treaty-exemption of foreign permanent establishments).
[16] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763; CJEU, 3 February 2015, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50.
[17] CJEU, 19 June 2019, C-608/17, *Skatteverket v Holmen AB*, EU:C:2019:511; EFTA Court, 13 September 2017, E-15/16, *Yara International ASA v. Norway*, [2017] EFTA Ct. Rep. 434. It should be noted that *Oy AA* (CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439) on the Finnish group contribution system followed a similar reasoning with regard to comparability and justification but did not concern losses.

tax consolidation.[18] This "final loss exception" and its remaining scope is a first "elephant in the room", but will only be addressed briefly below.[19]

That said, beginning with the Fourth Chamber's decision in *Lidl Belgium* in 2008, the Court's *Marks & Spencer* line of reasoning and the "final loss exception" has been transplanted to foreign permanent establishments that are either symmetrically base-exempt (either under a tax treaty[20] or under domestic law[21]), where an asymmetrical "deduction/reincorporation system" applies,[22] or where losses are recaptured despite the application of the credit method.[23] This leads to the second "elephant in the room" and the issue of this paper:[24] The Court's more recent decisions in *Timac Agro*[25] in 2015 and finally *W AG*[26] in 2022 have put the focus back on comparability of domestic and foreign situations, and argued that treaty-exempt permanent establishments are not even in a comparable situation to domestic branches, so that the home State would never be under an obligation to take into account foreign losses, whether "final" or not. This clearly turns the back on *Lidl Belgium*[27] (and *K*[28]) and creates odd distinctions between the legal basis and operation of exemption regimes. Moreover, one might say: If *Lidl Belgium* falls, so should *Marks & Spencer* – which would be a step back for the Internal Market's negative integration and should put renewed pressure on positive harmonization.

I. Comparability: *Timac Agro* and *W AG* versus *Lidl Belgium*

A. Background

Before focusing on the Court's comparability analysis in cross-border loss cases, it might be sensible to take a look at the underlying international tax rules: Where

---

18 See CJEU, 25 February 2010, C-337/08, *X Holding BV v Staatssecretaris van Financiën*, EU:C:2010:89, which did not concern "final" losses and where the Court found the limitation of the Netherlands' fiscal unity regime to domestic entities justified.
19 See *infra*, section II.B.
20 CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278. More generally, the logic of this case law, including the "final loss exception", seemed to be relevant for all base-exempt income, *e.g.*, the sale of immovable property by an individual taxpayer; see with regard to a treaty-exemption of capital gains CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716.
21 CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424.
22 See CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829; see also CJEU, 23 October 2008, C-157/07, *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH*, EU:C:2008:588.
23 CJEU, 17 July 2014, C-48/13, *Nordea Bank Danmark A/S v Skatteministeriet*, EU:C:2014:2087.
24 See for a more general discussion of these issues before the Court's decision in *W AG* (CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717), see also G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1, General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapter 10, and G. Kofler, "Should We Cut "Final" Losses?", *EC Tax Review*, 2022, pp. 108-114.
25 CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829.
26 CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717.
27 CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278.
28 CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, paras 44-45.

States exempt foreign income either under domestic law or based on a tax treaty (Article 23A OECD MC), the corresponding treatment of foreign losses depends on that State's concrete application of the exemption method.[29] Some States apply the exemption "symmetrically" to profits and losses and hence exempt losses as "negative profits", *i.e.*, a foreign loss is never included in the taxable base in the home State; this can either be based on a so-called "base exemption" under a tax treaty (at issue in *Lidl Belgium*,[30] *Timac Agro*,[31] and *W AG*[32] as well as in *K*[33] for the sale of real estate by an individual taxpayer) or under domestic law (at issue in *Bevola*[34]). This method not only disregards a "total loss" of the foreign permanent establishment, but also deprives cross-border situations of the cash flow advantage of netting *current* profits (of the head office) with *current* losses (of the permanent establishment) on the level of the tax base. However, symmetrically to foreign profits, which generally may be taken into account in calculating the domestic tax rate applied to non-exempt income (so-called "exemption with progression", Article 23A(3) OECD MC), foreign losses could likewise[35] have an impact with regard to the calculation of the tax *rate* on the non-exempt income in the home State (so-called "negative" progressivity).[36]

Other States apply the treaty exemption method only *after* a worldwide tax base has been calculated ("tax exemption"), so that foreign profits are exempt but – asymmetrically – foreign losses reduce the *current* tax base in the home State (rather than being treated as "exempt" foreign negative income).[37] Conversely, subsequent profits of the permanent establishment will be "reinstated" in the home State until the loss previously deducted has been recaptured (at issue in *Krankenheim Ruhesitz am Wannsee*[38] and *Timac Agro*[39]). This so-called "deduction/reincorporation method" can take various forms: Just as in the Commission's 1990 Proposal, the focus may be (merely) on temporary loss relief. In that case, the home State would take into account foreign losses and reinstate them when

[29] See also, *e.g.*, Art. 23 no. 44 OECD MC Comm. 2017.
[30] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278.
[31] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829.
[32] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717.
[33] CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, paras 44-45.
[34] CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424.
[35] It might be noted that the Court seems to read tax treaty provisions similar to Article 23A(3) OECD MC as implying not only "positive", but also "negative" progressivity; see CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, paras 44-45.
[36] *I.e.*, the negative foreign income is taken into account to determine the tax rate ("bracket") on worldwide income, which is then applied to the non-exempt income. However, this "negative progressivity" would only have an effect if either the home State's rate structure were progressive (which is often not the case for the corporate income tax, which typically has a proportionate rate) or if the foreign losses exceeded the non-exempt income. See for progressivity clauses in tax treaties, *e.g.*, F. Pötgens, "Article 23", in *Global Tax Treaty Commentaries (GTTC)*, Amsterdam, IBFD, February 2020, Chapter 2.11.3.3.; A. Rust, "Article 23", in E. Reimer and A. Rust (eds), *Klaus Vogel on Double Taxation Conventions*, 5th ed., Alphen aan den Rijn, Kluwer, 2022, Art. 23 m., no. 91, with further references.
[37] See, *e.g.*, Austrian Verwaltungsgerichtshof, 25 September 2001, 99/14/0217, and, implementing this case law, the explicit provision in § 2(8) of the Austrian Income Tax Act. For the same perspective in case law in Luxembourg, the Netherlands, France, and Spain, as well as for sporadic tax treaty provisions to that effect see A. Rust, "Article 23", in E. Reimer and A. Rust (eds), *Klaus Vogel on Double Taxation Conventions*, 5th ed., Alphen aan den Rijn, Kluwer, 2022, Art. 23 m. no. 24.
[38] CJEU, 23 October 2008, C-157/07, *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH*, EU:C:2008:588.
[39] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829.

the permanent establishment can offset its losses against its own subsequent profits in the source State. The focus on a merely temporal relief would also imply, just as in the Commission's 1990 Proposal, that an automatic reinstatement takes place for certain non-temporary losses, irrespective of whether sufficient branch profits were generated (e.g., after a certain number of years or if the permanent establishment is sold or converted into a subsidiary, such as in *Timac Agro*). However, the "deduction/reincorporation method" could also address both temporary and non-temporary loss situations (without an automatic reinstatement of losses), which would effectively provide for relief also in respect of a *total* loss of the foreign branch.[40]

That said, *Lidl Belgium*,[41] *Timac Agro*,[42] and *W AG*[43] all concerned the German interpretation of the treaty-exemption method: Since tax treaties themselves are generally "silent" on how the exemption method should apply to losses,[44] this remains a question for domestic law or of treaty interpretation. Germany, for example, used the "deduction/reincorporation method" based on domestic law from 1969 until 1998,[45] but reverted to the "symmetry theory" based on its traditional judicial interpretation of the exemption method in tax treaties[46] from 1999 onwards.[47] Both periods have been scrutinized by the CJEU: *Lidl Belgium* and *W AG* dealt with Germany's treaty-based "symmetric exemption", *Krankenheim Ruhesitz am Wannsee*[48] with the "deduction/reincorporation method", and *Timac Agro*[49] with both, *i.e.*, periods before and after 1999. It is also clear from the Court's case law that it accepts a State's treaty interpretation (*e.g.*, the German "symmetry theory" with regard to the symmetrical exemption of foreign positive and negative income) without engaging in such interpretation itself.[50]

---

[40] Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, para. 49.

[41] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278.

[42] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829.

[43] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717.

[44] And so is Art. 23 no. 44 OECD MC Comm. (2017).

[45] Introduced in § (2) 2 of the "Gesetz über steuerliche Maßnahmen bei Auslandsinvestitionen der deutschen Wirtschaft", *Federal Gazette (BGBl)*, I, 1969, p. 1214, as a measure to mitigate the traditional German judicial interpretation that treaty-exempt losses are not taken into account on the level of the tax base (see for this background also German Bundesfinanzhof, 5 June 1986, IV R 268/82, BFHE 146, 447, BStBl II 1986, 659), and later transferred to § 2a (3) of the German Income Tax Act.

[46] See for such long-standing "symmetry theory" ("*Symmetriethese*") in German case law, *e.g.*, German Reichsfinanzhof, 26 June 1935, VI A 414/35; German Bundesfinanzhof, 28 April 1983, IV R 122/79, BFHE 138, 366, BStBl II 1983, 566; German Bundesfinanzhof, 28 March 1973, I R 59/71; German Bundesfinanzhof, 29 November 2006, I R 45/05; German Bundesfinanzhof, 11 March 2008, I R 116/04. It might be noted that, until 2001, this position was also held by Austrian case law; see, *e.g.*, Austrian Verwaltungsgerichtshof, 6 March 1984, 83/14/0107; Austrian Verwaltungsgerichtshof, 21 May 1985, 85/14/0001.

[47] This legislative change (*i.e.*, the deletion of former § 2a (3) of the German Income Tax Act by the "Steuerentlastungsgesetz 1999/2000/2002", *Federal Gazette*, I, 1999, 402) was motivated by three reasons: That the deduction/reincorporation method was "contrary to the system" (of symmetrically exempting profits and losses), that it was difficult to handle for the tax administration, and that consideration of foreign losses through "negative progressivity" was a sufficient consideration of foreign losses (see the legislative materials BT-Drs. 14/23, 167 [9 November 1998]).

[48] CJEU, 23 October 2008, C-157/07, *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH*, EU:C:2008:588.

[49] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829.

[50] See, *e.g.*, CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 10.

B. From *Marks & Spencer* to *Lidl Belgium*: Comparability, Justification and the "Final Loss Exception"

Given the German "symmetry theory", one might, of course, ask if domestic and foreign branches are even comparable, as foreign profits and losses are "symmetrically" exempt, whereas domestic profits and losses are "symmetrically" taken into account. To approach this question, we should take a look at the groundbreaking 2005 *Marks & Spencer* judgment by the Grand Chamber, which is certainly one of the landmarks in the Court's direct tax jurisprudence[51] and its legacy certainly one of the most discussed aspects of EU direct taxation.[52] It concerned losses incurred by the French, German, and Belgian subsidiaries of the UK-based Marks & Spencer group. In 2001, Marks & Spencer announced its intention to divest itself of its Continental European activity; the French subsidiary was sold (to Galeries Lafayette) and the German and Belgian subsidiaries ceased trading. Marks & Spencer's claim for group relief, *i.e.*, for a transfer of the subsidiaries' losses of the taxable years ending in 1998, 1999, 2000, and 2001 to its UK parent, was rejected on the ground that group relief could only be granted for losses recorded in the UK. The challenge under the freedom of establishment was obvious:[53] From the perspective of a comparison between domestic and cross-border situations, the UK should allow cross-border loss-relief because such relief

[51] See I. Richelle, "*Marks & Spencer*: A Landmark Decision?", in W. Haslehner, G. Kofler and A. Rust (eds), *Landmark Decisions of the ECJ in Direct Taxation*, Alphen aan den Rijn, Kluwer, 2015, 93 et seq. The CJEU's decision was preceded and succeeded by lengthy, sophisticated litigation in the UK up to the Supreme Court; see UK Supreme Court, 22 May 2013, *Revenue and Customs v Marks and Spencer plc* [2013] UKSC 30, and UK Supreme Court, 19 February 2014, *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc*, [2014] UKSC 11.

[52] See, for many, M. Lang, "The *Marks & Spencer* Case – The Open Issues Following the ECJ's Final Word", *European Taxation*, 2006, pp. 54-67; CFE ECJ Task Force, "Opinion Statement of the CFE Task Force on ECJ Cases on the Judgment in the Case of *Marks & Spencer plc v. Halsey* (Case C-446/03)", *European Taxation*, 2007, pp. 51-54; M. de Wilde, "On X Holding and the ECJ's Ambiguous Approach Towards the Proportionality Test", *EC Tax Review*, 2010, pp. 170-182; O. Marres, "The Principle of Territoriality and Cross-Border Loss Compensation", *Intertax*, 2011, pp. 112-125; B. da Silva, "From *Marks & Spencer* to *X Holding*: The Future of Cross-Border Group Taxation in the European Union", *Intertax*, 2011, pp. 257-265; M. Lang, "Has the Case Law of the ECJ on Final Losses Reached the End of the Line?", *European Taxation*, 2014, pp. 530-540; E. Pinetz and K. Spies, "'Final Losses' after the Decision in Commission v. UK ('Marks & Spencer II')", *EC Tax Review*, 2015, pp. 309-319; Y. Brauner, A.P. Dourado, E. Traversa, "Ten Years of *Marks & Spencer*", *Intertax*, 2015, pp. 306-314; A. Cordewener, "Cross-Border Compensation of 'Final Losses' for Tax Purposes – The Drama Continues…", *Maastricht Journal of European and Comparative Law*, 2015, pp. 417-431; L. Cerioni, "The Never-Ending Issue of Cross-Border Loss Compensation within the EU: Reconciling Balanced Allocation of Taxing Rights and Cross-Border Ability-to-Pay", *EC Tax Review*, 2015, pp. 268-280; 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'", *European Taxation*, 2016, pp. 87-93; A. Cordewener, "Cross-Border Loss Compensation and EU Fundamental Freedoms: The 'Final Losses' Doctrine Is Still Alive!", *EC Tax Review*, 2018, pp. 230-236.

[53] Another argument was based on the neutrality of the legal form (*i.e.*, a *horizontal* comparison between two cross-border situations), the UK should allow the cross-border loss transfer because it also allowed the deduction of losses of foreign branches (under the credit method). The Court did not engage with that argument (CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 52), but AG Maduro's Opinion (Opinion AG Poiares Maduro, 7 April 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:201, paras 42 *et seq.*) and subsequent case law (*e.g.*, CJEU, 6 December 2007, C-298/05, *Columbus Container Services*, EU:C:2007:754, paras 51 and 53; CJEU, 4 June 2009, C-439/07 and C-499/07, *KBC Bank NV*, EU:C:2009:339, para. 80; Case C-337/08, *X Holding*, EU:C:2010:89, paras 37-41) made it clear that these situations are not to be regarded as comparable from the perspective of the *home* State. For analysis see, *e.g.*, G. Kofler, "'Horizontal Discrimination' in European Tax Law", in H. Jochum *et al.* (eds), *Practical Problems in European and International Tax Law, Essays in honour of Manfred Mössner*, Amsterdam, IBFD, 2016, p. 187 (pp. 191-197).

is available for losses of UK resident subsidiaries ("group relief"). It was hence argued, in essence, that the freedom of establishment requires a Member State to take into account losses of foreign subsidiaries (over whose undistributed profits it does not exercise taxing jurisdiction) if it does so for domestic subsidiaries (whose profits are taxable in that Member State).

In *Marks & Spencer*, the Court approached that issue without much hesitation: Considering loss-relief mainly as a "cash advantage" (through the "*speeding up of relief of losses of the loss-making entities*"[54]) that was denied in cross-border situations, the Court quickly concluded the existence of a restriction on freedom of establishment. It also rejected the argument that the situations of foreign and domestic subsidiaries are not comparable: While the Court obviously accepted that the UK's regime complies with the Union-recognized principle of territoriality,[55] it nevertheless held that "*the fact that it does not tax the profits of the non-resident subsidiaries of a parent company established on its territory does not in itself justify restricting group relief to losses incurred by resident companies*".[56] This rather superficial assumption of comparability in case of a fragmentation of the tax base over multiple jurisdictions – dubbed as the "*original sin*"[57] – has been heavily criticized.[58] However, both the CJEU and the EFTA-Court have not yet wavered and explicitly or implicitly upheld that line of comparison also in recent cases involving group relief,[59] group contributions,[60] and tax consolidation.[61] The underlying symmetry argument became only relevant on the level of justification: "*[Taken] together*"[62] with the prevention of the multiple use of losses in several jurisdictions ("*double dips*")[63] and the prevention of jurisdiction shopping for loss-utilization ("*risk of tax avoidance*"),[64] the Court acknowledged the need to safeguard the symmetry between the right to tax profits and the right to deduct

[54] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 32.
[55] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 39, referring to CJEU, 15 May 1997, C-250/95, *Futura Participations SA and Singer v Administration des contributions*, EU:C:1997:239, para. 22.
[56] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 40.
[57] See Y. Brauner, A.P. Dourado and E. Traversa, "Ten Years of Marks & Spencer", *Intertax*, 2015, p. 306 (p. 308).
[58] Also, *e.g.*, in the Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, paras 23-29.
[59] CJEU, 3 February 2015, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50, paras 22-23.
[60] CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439, paras 31-38; EFTA Court, 13 September 2017, E-15/16, *Yara International ASA v Norway*, [2017] EFTA Ct. Rep. 434; CJEU, 19 June 2019, C-608/17, *Skatteverket v Holmen AB*, EU:C:2019:511.
[61] CJEU, 25 February 2010, C-337/08, *X Holding BV v Staatssecretaris van Financiën*, EU:C:2010:89, paras 17-24.
[62] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 51; see also CJEU, 3 February 2015, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50, para. 24.
[63] See also, *e.g.*, CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 36; CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 52.
[64] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 43.

losses.[65] It accepted "*those three justifications, taken together*",[66] but then went on to introduce the concept of "final" losses on the level of proportionality:[67] If the foreign loss becomes "final", *i.e.*, if the "*non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account*" and if there "*is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party*", then it is for the parent's residence State to take them into account to prevent a violation of the freedom of establishment under Article 49 TFEU.[68] In any event, whatever the Court might have had in mind back in 2005, the "final losses exception" has turned out to be a quite narrow concept. Just to mention a few of the many restraints:[69] First, in cases of mere *legal* restrictions of loss-utilization in the subsidiary's State ("legal finality", such as, *e.g.*, lack or expiration of a loss carry-forward or carry-backward, anti-abuse provisions, etc.) the parent's Member State may deny cross-border group relief "*without thereby infringing Article 49 TFEU*".[70] Second, even ceasing trading or being put into liquidation alone is not sufficient in itself to satisfy the *Marks & Spencer* exception if some income is still being generated (*e.g.*, the receipt of minimal income or when the company's assets are liquidated).[71] And, third, losses which are regarded as non-final in one taxable year (because they can be carried forward or setting off the losses was precluded under national law) arguably cannot subsequently become "final",[72] which would effectively narrow the scope of "final" losses to the loss incurred in the final taxable period (*e.g.*, a liquidation loss).

---

[65] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 46. This argument of a balanced allocation of taxing powers was further accepted and developed in subsequent case law, and, *e.g.*, also accepted with regard to domestic group contribution systems (CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439, paras 53-56; EFTA Court, 13 September 2017, E-15/16, *Yara International ASA v Norway*, [2017] EFTA Ct. Rep. 434, paras 35-36) and tax consolidation regimes (CJEU, 25 February 2010, C-337/08, *X Holding BV v Staatssecretaris van Financiën*, EU:C:2010:89, paras 27-32), as well as cross-border mergers (CJEU, 21 February 2013, C-123/11, *A Oy*, EU:C:2013:84, paras 41-44).

[66] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 51

[67] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 55.

[68] See, *e.g.*, CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 56; CJEU, 3 February 2015, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50, para. 27.

[69] For a detailed overview see G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1, General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapters 10.2.4. and 10.3.2.

[70] CJEU, 3 February 2015, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50, para. 33.

[71] See CJEU, 21 February 2013, C-123/11, *A Oy*, EU:C:2013:84, paras 51 and 54, and Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, para. 40.

[72] See in that direction CJEU, 3 February 2015, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50, para. 37, and more pronounced, *e.g.*, Opinion AG Kokott, 10 January 2019, C-608/17, *Skatteverket v Holmen AB*, EU:C:2019:9, paras 50-55, and Opinion AG Kokott, 10 January 2019, C-607/17, *Skatteverket v Memira Holding AB*, EU:C:2019:8, paras 57-60; Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, paras 70-71. It should be noted that, *e.g.*, the German Bundesfinanzhof has previously applied the "final loss exception" to accumulated foreign losses; see concerning "final" permanent establishment losses, *e.g.*, German Bundesfinanzhof, 9 June 2010, I R 107/09 (taxable years 2000-2001), and German Bundesfinanzhof, 5 February 2014, I R 48/11 (taxable years 1997-1998).

It should be noted in passing that the logical link between justification and proportionality established by the Court in *Marks & Spencer* was quite sensible. Especially the need to prevent "double dips" and tax avoidance directly connects to the Court's proportionality test and the category of "final losses": Where losses can no longer be used anywhere, "*the risk of double deduction of losses no longer exists*",[73] and neither does the risk that those losses are transferred to the jurisdiction where they are most valuable. Corresponding to this logic, the Court subsequently clarified that domestic tax rules may not only be justified by "*three justifications, taken together*",[74] but also by a combination of two of them, *e.g.*, the need to safeguard the allocation of the power to tax between the Member States either together with the need to prevent tax avoidance[75] or together with the need to prevent the danger that the same losses will be taken into account twice.[76] Surprisingly, in *X Holding*, a case not involving "final" losses, the Court accepted the balanced allocation as a standalone ground of justification.[77] This raised additional doubts whether the Court had essentially abandoned the "*Marks & Spencer* exception" altogether by severing the conceptual link between the grounds of justification and the proportionality-based "finality" of losses.[78] However, the Court has since upheld the full *Marks & Spencer* reasoning in, *e.g.*, *A Oy*.

Against this background, we can move to the present issue of exempt foreign permanent establishments and the second "elephant in the room": Comparability. The Court's first decision on foreign branch losses, *Lidl Belgium*,[79] dealt with Germany's symmetrical base exemption of profits and losses of a Luxembourg branch. Lidl Belgium, a German (and not a Belgian) partnership, had a loss-making permanent establishment in Luxembourg and asked for *current* relief of those losses against its German profits, which was denied based on an understanding of the treaty exemption method as a "symmetrical" base exemption. As Germany, of course, did *not* exclude losses of *domestic* business activities from its tax base, the question of a potential infringement of the freedom of establishment was brought to the Court. From an EU law perspective, the Court in *Lidl Belgium* equated a permanent establishment with an "*autonomous entity*"[80] and decided the case along the path charted by *Marks & Spencer*.[81] It qualified the current loss relief as a tax advantage,[82] which was not available because of

[73] CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 58; see also Opinion AG Kokott, 19 July 2012, C-123/11, *A Oy*, EU:C:2012:488, para. 48.
[74] CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 51.
[75] See CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439, para. 60.
[76] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 42.
[77] CJEU, 25 February 2010, C-337/08, *X Holding BV v Staatssecretaris van Financiën*, EU:C:2010:89, paras 27-33; see also Opinion AG Kokott, 19 July 2012, C-123/11, *A Oy*, EU:C:2012:488, para. 50.
[78] See also Opinion AG Kokott, 19 July 2012, C-123/11, *A Oy*, EU:C:2012:488, paras 47-54.
[79] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278.
[80] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, paras 21-22.
[81] Indeed, conceptually, the denial of cross-border group relief or group contributions and the exemption of a permanent establishment's losses raise the same issues, since the main difference between those cases was merely that, *e.g.*, in *Marks & Spencer* the entire foreign legal entity was outside the UK taxing jurisdiction, whereas in *Lidl Belgium* only foreign branch income was outside the German taxing jurisdiction.
[82] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 23; CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 18.

the cross-border situation of the Luxembourg branch, and nearly automatically concluded that the treatment "*is less favorable than it would be if the latter were to be established in Germany*".[83] It had no bearing on the Court's discrimination analysis that Germany's tax system was, from an international tax perspective, a consistent, entirely neutral territorial system, as it neither taxed the profits of the Luxembourg branch nor took its losses into account. Again, the "symmetry" argument (*i.e.*, a "balanced allocation of powers of taxation between Member States"[84]) was accepted on the level of justification (together with the prevention of "double dips" [85]): The Court recognized that "*the objective of preserving the allocation of the power to impose taxes between the two Member States concerned*", which is reflected in the provisions of the applicable tax treaty, "*is capable of justifying the tax regime at issue in the main proceedings, since it safeguards symmetry between the right to tax profits and the right to deduct losses*",[86] and subsequent case law clarified that with respect to losses "*the requirements of the balanced allocation of powers of taxation and coherence of the tax system coincide*".[87] The remainder of *Lidl Belgium* reiterated the proportionality discussion of *Marks & Spencer* and the "final loss exception", but concluded that no such "final losses" were present in *Lidl Belgium*, as the relevant losses had indeed been carried forward and subsequently used against profits in Luxembourg.[88] However, had *Lidl Belgium* shown that "final losses" were at issue it would have established "*the situation in which a measure constituting a restriction on the freedom of establishment for the purposes of Article 43 EC* (now Article 49 TFEU) *goes beyond what is necessary to attain legitimate objectives recognised by Community law*".[89]

---

[83] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 25.
[84] CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 43.
[85] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, paras 37-42; see also CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, paras 50-70.
[86] See CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 33.
[87] CJEU, 29 November 2011, C-371/10, *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, EU:C:2011:785, para. 80; CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829, para. 47.
[88] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, paras 49-51.
[89] CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 51. Quite confusingly, however, the Court followed with a statement that seemed to repeat the argument on the balanced allocation of taxing powers again on the level of proportionality: "It must be added that the Court has recognised the legitimate interest which the Member States have in preventing conduct which is liable to undermine the right to exercise the powers of taxation which are vested in them. In this connection, where a double taxation convention has given the Member State in which the permanent establishment is situated the power to tax the profits of that establishment, to give the principal company the right to elect to have the losses of that permanent establishment taken into account in the Member State in which it has its seat or in another Member State would seriously undermine a balanced allocation of the power to impose taxes between the Member States concerned […]." See CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, EU:C:2008:278, para. 52, referring to CJEU, 18 July 2007, C-231/05, *Oy AA*, EU:C:2007:439, para. 55, which in turn references the justification analysis in CJEU, 13 December 2005, C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763, para. 46.

C. From *Lidl Belgium* to *Timac Agro* and *W AG*: Revival of the "Symmetry Argument" and Non-Comparability

Given the Court's line of argumentation, *Lidl Belgium* was generally understood as an extension of *Marks & Spencer* to treaty-exempt permanent establishments within the EU, hence requiring that the *home* State takes into account "final losses".[90] For example, the German Bundesfinanzhof followed *Lidl Belgium* and accepted that a "final loss" of a treaty-exempt permanent establishment must be taken into account in the German head office,[91] and this view was also broadly adopted in legal scholarship.[92] However, this outcome did not remain undisputed. Several Advocates General argued that a symmetrical, territorial system would not even entail any discrimination or urged the Court to reconsider its traditional approach to comparability in such cases.[93] And indeed, in *Nordea Bank Danmark*[94] in 2014 and in *Timac Agro*[95] in 2015 the Court wavered with respect to comparability of taxed domestic ("resident") and exempt foreign ("non-resident") permanent establishments. It noted in *Nordea Bank Danmark* that "*companies which have a permanent establishment in another Member State are not, in principle, in a comparable situation to that of companies possessing a resident permanent establishment*" with respect to measures concerned with the prevention of double taxation,[96] and followed in *Timac Agro* on the post-1999 German "symmetry theory" with a seemingly absolute statement regarding the non-discriminatory nature of Germany's treaty-based exemption:

> "*In the present case, it must be held that, 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* [...]."[97]

[90] See also, *e.g.*, G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1: General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapter 10.3.

[91] See, *e.g.*, German Bundesfinanzhof, 17 July 2008, I R 84/04, BFHE 222, 398, BStBl II 2009, 630; German Bundesfinanzhof, 9 June 2010, I R 107/09, BFHE 230, 35; German Bundesfinanzhof, 5 February 2014, I R 48/11, BFHE 244, 371; German Bundesfinanzhof, 22 September 2015, I B 83/14, BFH/NV 2016, 375.

[92] For a detailed analysis and further references see, *e.g.*, D. Hohenwarter, *Verlustverwertung im Konzern*, Vienna, LexisNexis, 2009; A. Cordewener, "Cross-Border Loss Compensation and EU Fundamental Freedoms: The 'Final Losses' Doctrine Is Still Alive!", *EC Tax Review*, 2018, pp. 230 (p. 230); G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1, General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapters 10.3.

[93] See Opinion AG Kokott, 19 July 2012, Case C-123/11, *A Oy* ECLI:EU:C:2012:488, para. 50; Opinion AG Mengozzi, 21 March 2013, C-322/11, *K*, ECLI:EU:C:2013:183, para. 88; Opinion AG Kokott, 13 March 2014, Case C-48/13, *Nordea Bank Danmark A/S v Skatteministeriet*, ECLI:EU:C:2014:153, para. 21-28; Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, ECLI:EU:C:2014:2321, paras 49-53.

[94] CJEU, 17 July 2014, C-48/13, *Nordea Bank Danmark A/S v Skatteministeriet*, EU:C:2014:2087.

[95] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829.

[96] CJEU, 17 July 2014, C-48/13, *Nordea Bank Danmark A/S v Skatteministeriet*, EU:C:2014:2087, para. 24; CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829, para. 27; CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 37.

[97] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829, para. 65.

This far-reaching statement of the Third Chamber of the Court in *Timac Agro* was broadly understood as a departure from the comparability standard under *Lidl Belgium*,[98] rejecting the existence of an unequal treatment and therefore not only the need for justification but also the obligation of the home State to take into account even "final" losses on the level of proportionality. Others have, however, pointed out that the Court's statement should be understood in light of the fact that *Timac Agro* did not concern "final" losses at all.[99] This confusion was (seemingly) addressed by the Court's Grand Chamber in 2018 in *Bevola*, where foreign losses could be taken into account based on the tax-treaty credit method but were "exempt" under domestic law. The Grand Chamber attempted to clarify that it had not abandoned its approach to comparability of domestic and foreign situations[100] and to reconcile its decisions in *Nordea Bank* and *Timac Agro* with its previous case law, by resorting to link the question of comparability to the existence of "final" losses (and thereby establishing a difference in comparability between "current" and "final" losses, and blurring the line between comparability and proportionality as regards the latter):[101]

> "*[A]s 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.*"[102]

This question of comparability between domestic and cross-border situations, which was at the core of *Timac Agro* and *Bevola*, is this metaphorical second "elephant in the room": Some have argued that after *Bevola* – and in line with *Lidl Belgium* – comparability with taxable domestic situations must be taken to exist (at least where losses are somewhat "final") even if a tax system symmetrically "exempts" foreign profits and losses.[103] Others, however, have tried to reconcile the different outcomes in the Court's case law by distinguishing between base exemption under domestic law (*Bevola*) and under a tax treaty (*Timac Agro*),[104]

[98] See the submissions by Denmark, Germany, Austria and the Commission in *Bevola* (CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, paras 30-31), and for such reading of *Timac Agro* by several national supreme courts in Europe, *e.g.*, German Bundesfinanzhof, 22 February 2017, I R 2/15, BFHE 257, 120, BStBl II 2017, 709, and Austrian Verwaltungsgerichtsof, 29 March 2017, Ro 2015/15/0004. See also, *e.g.*, Opinion AG Kokott, 23 October 2014, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, para. 26.

[99] As indeed argued by AG Campos Sánchez-Bordona in his Opinion, 17 January 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, EU:C:2018:15, para. 57, and also pointed out in the Opinion AG Wathelet, 3 September 2015, Case C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:533, para. 67.

[100] CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 33.

[101] CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 38; see also CJEU, 4 July 2018, C-28/17, *NN A/S v Skatteministeriet*, EU:C:2018:526, para. 35.

[102] CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 38.

[103] See for that general conclusion for all cases concerning the lack of symmetry between taxation of profits and use of losses also Opinion AG Kokott, 10 January 2019, C-608/17, *Skatteverket v Holmen AB*, EU:C:2019:9, para. 39, and Opinion AG Kokott, 10 January 2019, C-607/17, *Skatteverket v Memira Holding AB*, EU:C:2019:8, para. 47.

[104] See R. Ismer and H. Kandel, "A Finale Incomparabile to the Saga of Definitive Losses? Deduction of Foreign Losses and Fundamental Freedoms After *Bevola* and *Sofina*", *Intertax*, 2019, p. 573 (pp. 581-584), who indeed assume that comparability would not exist in the case of an exemption under a tax treaty.

and that in the latter situation domestic and cross-border situations would not be comparable at all.

Enter the *W AG* case.[105] Methodologically, *W AG* concerns the same German treaty-based base exemption of foreign permanent establishments at issue already in *Lidl Belgium* and *Timac Agro*. Faced with the uncertainty after the Court's recent case law, the referring German Bundesfinanzhof inquired, *inter alia*, if "final losses" of treaty-exempt foreign branches (in the UK in 2004-2007) need to be taken into account in the home State (in Germany).[106] Largely following along the lines set by AG Collins,[107] the Fourth Chamber in *W AG* indeed found that domestic and treaty-exempt foreign permanent establishments are treated differently, but that they are not in an objectively comparable situation to begin with (so that not even a restriction on the freedom of establishment guaranteed by Articles 49 and 54 TFEU could be established, let alone the need to justify it or take into account "final losses" on the level of proportionality). Four steps of reasoning in *W AG* are decisive:

First, "*comparability of an internal situation with a cross-border situation must be examined having regard to the aim pursued by the national provisions at issue*".[108] Under that standard, taxed domestic and exempt foreign branches are, in principle, not comparable: Citing *Bevola*,[109] the Court found that with regard to

> "*measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits, companies which have a permanent establishment in another Member State are not, in principle, in a comparable situation to that of companies possessing a resident permanent establishment*".[110]

Second, however, they may become comparable based on domestic or treaty rules: Referring to *Nordea Bank Danmark*[111] (concerning the Danish credit method, both under treaty and domestic law) and *Timac Agro*[112] (concerning the pre-1999 German "deduction/reincorporation method"), the Court held that

> "*[t]he situation is different where national tax legislation itself treats those two categories of establishment in the same way for the purposes of taking into account the losses and profits made by them*".[113]

---

105 CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717.
106 See German Bundesfinanzhof, 6 November 2019, I R 32/18, BFHE 269, 205, BStBl II 2021, 68.
107 Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, paras 21-50.
108 CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 19, referring to CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 32; see also, *e.g.*, CJEU, 25 February 2010, C-337/08, *X Holding BV v Staatssecretaris van Financiën*, EU:C:2010:89, para. 22.
109 See CJEU, 12 June 2018, C-650/16, *A/S Bevola ad Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 37.
110 CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 20.
111 CJEU, 17 July 2014, C-48/13, *Nordea Bank Danmark A/S v Skatteministeriet*, EU:C:2014:2087, para. 24.
112 CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829, para. 28.
113 CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 21.

Third, the Court again refers to *Timac Agro*[114] (this time concerning the post-1999 German "symmetry theory") and addresses the question of an exemption based on a tax treaty:

> "*However, where 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*".[115]

As Germany has "*waived its power to tax the profits made and losses incurred*" by a foreign permanent establishment "*under a double taxation convention*",

> "*a resident company which has such an establishment is not in a situation comparable to that of a resident company which has a permanent establishment situated in Germany in the light of the objective of preventing or mitigating the double taxation of profits and, symmetrically, the double taking into account of losses*".[116]

Fourth, the Court had to address the obvious tension between its comparability analysis in *W AG* and the Grand Chamber decision in *Bevola*, where the Court had accepted comparability (at least regarding "final" losses) in a situation where Denmark could have taxed foreign branches under the tax treaty[117] but exempted under domestic law. Here, the Court drew a (unfortunate and largely unmotivated) distinction between exemption under domestic law and exemption under tax treaty law: "*It is true*", the Court stated, that in *Bevola*:

> "*the Court held, as regards losses attributable to a non-resident permanent establishment which had ceased activity and whose losses could not, and no longer could have been deducted from its taxable profits in the Member State in which it carried on its activity, that the situation of a resident company possessing such an establishment did not differ 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. It added that the ability to pay tax of a company possessing a non-resident permanent establishment which has definitively incurred losses is affected in the same way as that of a company whose resident permanent establishment has incurred losses, with the result that the two situations are comparable in that regard.*[118] […] *However, in that case, the Member State of residence of the company which requested that the final losses incurred by its non-resident permanent*

[114] CJEU, 17 December 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:829, para. 65.
[115] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 22.
[116] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 27.
[117] *I.e.*, under the credit method in the Nordic Convention.
[118] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 24, referring to CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, paras 38 and 39.

establishment be taken into account had not, by means of a double taxation convention, 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 permanent establishments of resident companies, even though that Member State would have been competent to do so, which is different."[119] ■

After *W AG*, comparability seems to depend on the legal basis for the exemption: The comparability analysis in *Bevola* is confirmed for unilateral exemption (where the applicable tax treaty would permit taxation based on the credit method), whereas *Timac Agro* and its finding of non-comparability is confirmed for treaty-based exemption (where domestic law would otherwise tax the income based on the principle of worldwide taxation). Likewise, the Court has approvingly referred to its previous decisions where comparability was indeed established by the Member State's applicable legal framework, *i.e.*, the credit method (*Nordea Bank Danmark*) or the asymmetrical "deduction/reincorporation method" (*Timac Agro*).[120] Expanding on *Bevola*, one might also assume that comparability – at least with regard to "final losses"[121] – is not excluded if no tax treaty is applicable at all.

Before addressing the potential broader impact of *W AG*, one may wonder why the Court – seemingly arbitrarily – distinguished between domestic and treaty-based exemption in the first place. The underlying reasoning may be found in AG Collins' Opinion, who – referring to AG Wathelet's Opinion in *Timac Agro*[122] – related comparability to the question "*of whether or not the Member State* […] *of residence of the principal company seeking to deduct the losses of its permanent establishment established in another Member State* […] *has taxation powers over the income at issue*".[123] Or, in AG Wathelet's words, "*there can be no tax advantage if there is no power of taxation*".[124] This all implies that the Court views tax treaties (and, by extension, their interpretation by domestic courts) as something different

---

[119] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 25.

[120] For deeper analysis of these cases see G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1, General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapters 10.3.3. and 10.3.4.

[121] See CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, paras 20 and 22 *versus* para. 24.

[122] Opinion AG Wathelet, 3 September 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:533, paras 31 and 32.

[123] Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, para. 36.

[124] Opinion AG Wathelet, 3 September 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:533, para. 74. AG Wathelet's Opinion in *Timac A*gro further noted that, "*in view of the allocation of taxation powers provided for by the German-Austrian Convention*", he fails "*to see how the Federal Republic of Germany could guarantee the objective of the deductibility of losses which is, according to the German Government, to grant temporarily a cash-flow advantage. In the absence of the power to tax any subsequent profits made by the establishment which incurred the losses when that establishment is situated in Austria, the situations are not comparable*" (see Opinion AG Wathelet, 3 September 2015, C-388/14, *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin*, EU:C:2015:533, para. 75). However, one might point out that the "deduction/reincorporation method", also at issue in *Timac Agro* for taxable periods before 1999, did exactly that. As noted before (in section II.A.), the exemption method in tax treaties is typically "silent" on the treatment of losses, so that it is for domestic law or treaty interpretation to fill that void. Notably, the OECD MC Comm. confirms that "*States May, as State of residence R, allow a loss incurred in State E (or S) as a deduction from the income they assess. In such a case State R should be free to restrict the exemption under paragraph 1 of Article 23 A for profits or income which are made subsequently in the other State E (or S) by deducting from such subsequent profits or income the amount of earlier losses which the taxpayer can carry over in State E (or S)*" (see Art. 23 no. 44 OECD MC Comm. 2017).

from domestic law, as a seemingly irrevocable waiver of sovereignty and taxing powers over profits. While tax treaties have always had special roles in the Court's case law – from creating balance[125] to destroying coherence,[126] from linking tax systems[127] to separating them[128] –, from the perspective of EU law they are still merely parts of the domestic legal order of the Member States: Indeed, the Court has not only confirmed that it is not competent to deal with issues of tax treaty interpretation, but also that is does not have jurisdiction to either rule on a State's possible infringement of tax treaty provisions or to examine the relationship between a national measure and the provisions of a tax treaty.[129] Properly understood, tax treaties are not waivers of sovereignty, they can rather be terminated in a relatively short period of time (Article 32 OECD MC), changed through negotiations, and (in many Member States) simply overridden by subsequent domestic law.[130] This makes the distinction between unilateral and bilateral measures even less convincing.[131] Also, the seeming similarity to exit taxes that are frequently triggered by the fact that a State would "lose" the right to tax accrued (but unrealized) gains because of a tax treaty (*e.g.*, if assets are moved to a foreign, treaty-exempt permanent establishment)[132] is not necessarily convincing:[133] Exit taxes may likewise be triggered irrespective of the existence of a tax treaty (*e.g.*, because a taxpayer transfers his residence to a non-treaty State, but the exit State may no longer tax gains from foreign assets held by that taxpayer under domestic law), and the Court seems to treat a Member State's "loss" of taxing right equally, whether based on domestic law or treaty law.[134] Moreover,

[125] CJEU, 5 July 2005, C-376/03, *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, EU:C:2005:424; see also, *e.g.*, G. Kofler and C. Ph. Schindler, "'Dancing with Mr D': The ECJ's Denial of Most-Favoured-Nation Treatment in the 'D' Case", *European Taxation*, 2005, pp. 530-540.

[126] CJEU, 11 August 1995, C-80/94, *G. H. E. J. Wielockx v Inspecteur der Directe Belastingen*, EU:C:1995:271.

[127] See, *e.g.*, CJEU, 14 December 2006, C-170/05, *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie*, EU:C:2006:783; CJEU, 8 November 2007, C-379/05, *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam*, EU:C:2007:655; CJEU, 17 September 2015, C-10/14, C-14/14 and C-17/14, *J.B.G.T. Miljoen and Others v Staatssecretaris van Financiën*, EU:C:2015:608. For analysis see, *e.g.*, G. Kofler, "Tax Treaty 'Neutralization' of Source State Discrimination under the EU Fundamental Freedoms?", *Bulletin for International Taxation*, 2011, pp. 684-690.

[128] CJEU, 14 December 2000, C-141/99, *Algemene Maatschappij voor Investering en Dienstverlening NV (AMID) v Belgische Staat*, EU:C:2000:696, and for analysis from a tax treaty perspective G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1, General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapter 10.5.

[129] See, *e.g.*, CJEU, 16 July 2009, C-128/08, *Jacques Damseaux v Belgian State*, EU:C:2009:471, para. 22; CJEU, 6 December 2007, C-298/05, *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt*, EU:C:2007:754, para. 46; CJEU, 19 September 2012, C-540/11, *Daniel Levy and Carine Sebbag v État belge - SPF Finances*, EU:C:2012:581, paras 18 *et seq.*

[130] See generally, *e.g.*, G. Kofler, "Legislative Tax Treaty Overrides in Austrian, German, and EU Law", *British Tax Review*, 2022, pp. 64-93.

[131] Also critical regarding the distinction between unilateral and bilateral exemption, *e.g.*, A. Schnitger, "Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Internationales Steuerrecht*, 2022, p. 769 (p. 770); M. Schilcher, "Keine unionsrechtliche Pflicht zur Berücksichtigung finaler Verluste ausländischer DBA-Freistellungsbetriebsstätten", *Steuer- und WirtschaftsKartei*, 2022, p. 1260 (p. 1265); CFE ECJ TASK FORCE, "Opinion Statement ECJ-TF 4/2022 on the ECJ decision of 22 September 2022 in Case C-538/20, *W AG*, on the deductibility of foreign final losses", available at https://taxadviserseurope.org/. Anticritical, however, W. Mitschke, "Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Internationales Steuerrecht*, 2022, p. 771 (p. 771).

[132] *E.g.*, CJEU, 21 May 2015, C-657/13, *Verder LabTec GmbH & Co. KG v Finanzamt Hilden*, EU:C:2015:331; see also, *e.g.*, CJEU, 29 November 2011, C-371/10, *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam*, EU:C:2011:785.

[133] *Contra* W. Mitschke, "Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Internationales Steuerrecht*, 2022, p. 771 (p. 771).

[134] See for an exit tax case not involving a tax treaty, *e.g.*, CJEU, 7 September 2006, C-470/04, *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo*, EU:C:2006:525.

it is hard to see the difference between a unilateral and a bilateral exemption when it comes to "final losses": The Court's Grand Chamber in *Bevola* has clearly accepted that with regard to "final losses" of a foreign permanent establishment "*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*".[135] *W AG* leaves unexplained why this notion of comparability with regard to "final losses" would be any different where the exemption is based on a tax treaty.[136]

Moreover, is the impact on a taxpayer's ability to pay not the same irrespective of the unilateral or bilateral basis for exemption? Here, the Court in *Bevola* had linked comparability to a (cross-border) ability-to-pay principle, noting that base exemption aims at ensuring taxation in line with the taxpayer's ability to pay, which requires the prevention of both double taxation and a double deduction of losses, but that a taxpayer is "*affected in the same way*" whether its domestic establishment has incurred losses or a foreign permanent establishment has "*definitively incurred losses*".[137] This argument was not taken up by the Court in *W AG*. However, AG Collins has straightforwardly rejected the relevance of the ability-to-pay principle for treaty-exempt permanent establishments, finding it not appropriate "*to add to the exemption method under the Convention a purpose that is not already expressed in the specific objectives of avoiding double taxation and avoiding double deduction of losses*".[138] Ability to pay hence seems like a loose end to be tied up in the future, also because it might be relevant under the principle of equality enshrined in Article 20 of the Charter of Fundamental Rights of the European Union.[139]

The Court's transition from *Lidl Belgium* to *Timac Agro* and eventually *W AG* is even more puzzling and unsatisfactory. *Lidl Belgium* was not even mentioned, let alone explicitly distinguished.[140] This quiet "overruling" of the line of reasoning

---

135 CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 38.
136 See also A. Schnitger, "Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Internationales Steuerrecht*, 2022, p. 769 (p. 770).
137 CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 39; see also, in more detail, Opinion AG Campos Sánchez-Bordona, 17 January 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, EU:C:2018:15, paras 37-39. This implies that comparability is inextricably linked to the objective of the tax system to tax income in accordance with taxpayer's ability to pay. It remains unclear, however, why the Court considers the situation of domestic losses only to be comparable to that of *definitive* foreign losses, since these are defined, in the Court's own case law, as losses that could not *ever* be taken into account anywhere else but in the residence State. But the taxpayer's ability to pay is clearly already affected where a loss is not definitive: if a taxpayer's current global income is 0, there is no ability to pay and thus no tax should be payable in the relevant tax year. This holds true regardless of whether it results from foreign or domestic losses. The fact that losses might be carried forward does not change the lack of capacity to pay taxes in the year when the loss is incurred.
138 Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, para. 48, referring to the reasoning of the German Bundesfinanzhof, 6 November 2019, I R 32/18, BFHE 269, 205, BStBl II 2021, 68.
139 See *OJ* C 326 of 26 October 2012, p. 391.
140 One might, of course, argue that the Court in *Lidl Belgium* did not find that cross-border loss utilization was required by the freedom of establishment (because the losses in that case were not "final", as they could be taken into account in Luxembourg in future taxable periods) so that it was not technically "overruled". However, the Court's reasoning in *Lidl Belgium* clearly implied that Germany would have had to take into account the foreign loss had it been final. This understanding was, *e.g.*, also adopted by the German Bundesfinanzhof (see German Bundesfinanzhof, 17 July 2008, I R 84/04, BFHE 222, 398, BStBl II 2009, 630; German Bundesfinanzhof, 9 June 2010, I R 107/09, BFHE 230, 35; German Bundesfinanzhof, 5 February 2014, I R 48/11, BFHE 244, 371; German Bundesfinanzhof,

of a rather clear precedent is quite unsettling because prior decisions of the Court not only have broad *practical* impact, but also *legal* impact well beyond the actual case decided. Indeed, the legal impact of the Court's reasoning and argumentation with regard to the interpretation of the freedoms is far-reaching: For example, the Court itself may reply to a preliminary reference by reasoned order (instead of judgment), *inter alia*, where "*the reply to such a question may be clearly deduced from existing case-law*" (§ 99 of the Rules of Procedure of the Court of Justice); the Commission relies on the Court's case law when it initiates infringement proceedings;[141] and, moreover, the legal impact of preceding case law not only underpins the Court's *acte claire* doctrine, but "*settled case-law of the Court*" is also a factor to establish a sufficiently serious breach of Union law in the area of State liability.[142] Legal certainty would arguably require the Court to disclose shifts in its case law more directly. Also, undisclosed shifts create odd incentives: In hindsight, Member States which had immediately reacted to *Lidl Belgium* by permitting the utilization of cross-border losses would, after *W AG*, arguably see themselves as having unnecessarily "over complied" with EU law (and might have an incentive to wait and see regarding other judgments not addressed to them directly), whereas "holdout States" that ignored *Lidl Belgium* in the first place got rewarded by that subsequent shift in case law and can claim that they have always been right (and might take similar positions on other issues as well).

Another tension remains unresolved, as *W AG* does not mention or distinguish *K*:[143] That case concerned a loss arising from the sale of immovable property in France by a Finnish individual taxpayer, and the Court affirmed comparability because the treaty exemption was – as usual (Article 23A(3) OECD MC) – with progression and the taxpayer's residence State (Finland) was not precluded "*from taking into account of income related to an asset situated in France in the calculation of the tax of a taxpayer residing in Finland*".[144] It did not even matter for the Court, that, in fact, Finland did not exercise this progressivity as it taxed income from capital assets at a fixed rate.[145] This taxing right *in abstracto* in terms of the tax rate was sufficient for the Court to assume comparability, even if it was not exercised *in concreto* (because of the non-progressive rate on the gain in Finland) and despite the fact that the exempt foreign income did not increase Finland's tax base (because of the treaty-based exemption). Unconvincing as this connection

22 September 2015, I B 83/14, BFH/NV 2016, 375). See also, with further references, M. Schilcher, "Keine unionsrechtliche Pflicht zur Berücksichtigung finaler Verluste ausländischer DBA-Freistellungsbetriebsstätten", *Steuer- und WirtschaftsKartei*, 2022, p. 1260 (p. 1266); CFE ECJ Task Force, "Opinion Statement ECJ-TF 4/2022 on the ECJ decision of 22 September 2022 in Case C-538/20, *W AG*, on the deductibility of foreign final losses", available at https://taxadviserseurope.org/.

141 See, *e.g.*, the Commission's infringement proceedings against Belgium, Denmark and the Netherlands regarding those Member States' exit tax provisions for companies (IP/10/299, 18 March 2010), in which the Commission noted that its "*opinion is based on the Treaty as interpreted by the Court of Justice of the European Union in De Lasteyrie du Saillant, Case C-9/02 of 11 March 2004, and in N, Case-470/04 of 7 September 2006, and on the Commission's Communication on exit taxation (COM(2006)825 of 19 December 2006)*."

142 See, *e.g.*, CJEU, 5 March 1996, C-46/93 and C-48/93, *Brasserie du pêcheur und Factortame*, EU:C:1996:79, para. 57, and CJEU, 30 September 2003, C-224/01, *Gerhard Köbler*, EU:C:2003:513, para. 56.

143 CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716.

144 CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, para. 45.

145 CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, paras 44-45.

between comparability and progressivity is, its use in *K* still rests uneasy with *Timac Agro* and *W AG*, as the respective tax treaties in the latter two cases likewise provided for exemption with progression.[146] It seems that the only potentially relevant difference between those cases is that *K* concerned an individual taxpayer (subject to a flat rate in his home State, though) and *Timac Agro* and *W AG* concerned corporate taxpayers. However, it would seem incoherent to apply two different standards of comparability regarding cross-border loss utilization depending on the nature of the taxpayer.[147]

W AG also raises a number of questions from a technical standpoint.[148] One stands out: How would the Court treat a situation where a foreign permanent establishment is exempt both under domestic law and tax treaty law? This situation was indeed raised in *W AG* with regard to the structurally territorial German trade tax ("*Gewerbesteuer*"), under which "*income, whether positive or negative, of non-resident permanent establishments is excluded from the basis of assessment to trade tax, irrespective of whether the applicable convention for the avoidance of double taxation has recourse to the exemption method or to the credit method or that no such convention applies*".[149] The German Bundesfinanzhof, however, had only asked about the "final loss" doctrine with regard to the trade tax in case that the first question regarding "final losses" in the corporate tax framework was answered in the affirmative (which it was not). AG Collins, despite proposing to answer that question to the negative, has also suggested that "*an affirmative answer to the first question should also lead to an affirmative answer to the second question*",[150] *i.e.*, that "final losses" would have to be taken into account not only for corporate tax but also for trade tax purposes. AG Collins has argued that with regard to the German trade tax "*the solution adopted by the Court in paragraph 38 of the judgment in* Bevola and Jens W. Trock *as regards the objective comparability of the respective situations of non-residents and residents in relation to the deductibility of final losses should equally apply to the assessment to trade tax*",[151] which might further imply that "final" losses would indeed have to be taken into account in the home State if the exemption of the foreign permanent establishment is based on both domestic and tax treaty law. Another loose end to be tied up by future case law.

---

146 See Article 15(3) of the Austria-Germany DTC (1954) in *Timac Agro* and Article XVIII(2) of the Germany-UK DTC (1966, as amended in 1971) in *W AG*.
147 See also M. Schilcher, "Keine unionsrechtliche Pflicht zur Berücksichtigung finaler Verluste ausländischer DBA-Freistellungsbetriebsstätten", *Steuer- und WirtschaftsKartei*, 2022, p. 1260 (p. 1268).
148 For example, one issue highlighted in German literature is that the exemption method in tax treaties might be subject to various conditions (*e.g.*, activity clauses, subject-to-tax provisions, etc.). Is this still the treaty-based exemption that the Court has focused on in *Timac Agro* and *W AG*? Here it is argued that comparability should not be rejected if the concrete situation would be covered by such exception to the exemption method. See, *e.g.*, R. Ismer and H. Kandel, "A Finale Incomparabile to the Saga of Definitive Losses? Deduction of Foreign Losses and Fundamental Freedoms After *Bevola* and *Sofina*", *Intertax*, 2019, p. 573 (pp. 585); R. Ismer, "Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Deutsches Steuerrecht*, 2022, p. 1996 (pp. 1996-1997).
149 See Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, para. 53.
150 Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, para. 55.
151 Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, para. 57, referring to CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, para. 38.

Summary and Conclusions: What Remains of the "Final Loss Exception"?

After *W AG*, comparability with regard to cross-border loss utilizations seems to depend on the legal basis for the exemption of profits and losses of a foreign permanent establishment: As Germany had "*waived its power to tax the profits made and losses incurred*" by a foreign permanent establishment "*under a double taxation convention*", "*a resident company which has such an establishment is not in a situation comparable to that of a resident company which has a permanent establishment situated in Germany in the light of the objective of preventing or mitigating the double taxation of profits and, symmetrically, the double taking into account of losses*".[152] This confirms *Timac Agro*, but is a clear departure from the comparability standard under *Lidl Belgium*.[153] Indeed, after *W AG* and the rejection of comparability in case of an exemption under a tax treaty, there is no need for the home State to take into account even "final" losses on the level of proportionality. In contrast, *W AG* seems to have confirmed the Grand Chamber's analysis in *Bevola* with regard to unilateral exemptions (where the applicable tax treaty would permit taxation based on the credit method), for which the "final loss exception" remains intact (for now). Likewise, the Court has (not yet) departed from the "final loss" considerations if a Member State applies the credit method (*Nordea Bank Danmark*) or the asymmetrical "deduction/reincorporation method" (*Timac Agro*).[154]

This leads to the obvious question after *W AG*: Is this the beginning of the end of the "final loss exception"? Whatever one may think about the Court's reasons nearly two decades ago in *Marks & Spencer* and *Lidl Belgium* to bring forward the "final loss exception" as a half-way solution between a breakthrough for the Internal Market (for example, via the "deduction/reincorporation method") and a sovereignty-preserving victory for Member States (by simply denying cross-border loss utilization), the (undisclosed) turnaround specifically in *W AG* is puzzling and might well be the (quiet) beginning of the end of the "final loss exception": As *W AG* has abandoned the "final loss" exception for foreign treaty-exempt branches initially acknowledged in *Lidl Belgium*, this arguably puts the whole body of *Marks & Spencer* case law in doubt, even though the Court has upheld the final loss exception in *Commission v UK*, *Holmen*, and *Memira*,[155] all of

[152] CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 27.
[153] See the submissions by Denmark, Germany, Austria and the Commission in *Bevola* (CJEU, 12 June 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v Skatteministeriet*, EU:C:2018:424, paras 30-31), and for such reading of *Timac Agro* by several national supreme courts in Europe, *e.g.*, German Bundesfinanzhof, 22 February 2017, I R 2/15, BFHE 257, 120, BStBl II 2017, 709, and Austrian Verwaltungsgerichtsof, 29 March 2017, Ro 2015/15/0004. See also, *e.g.*, Opinion AG Kokott, 23 October 2014, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, para. 26.
[154] For deeper analysis of these cases see G. Kofler, "Cross-Border Loss Relief", in S. Douma, O. Marres, H. Vermeulen and D. Weber (eds), *Terra/Wattel European Tax Law*, Vol. 1, General Topics and Direct Taxation, 8th ed., Alphen aan den Rijn, Wolters Kluwer, 2022, Chapters 10.3.3. and 10.3.4.
[155] See CJEU, 3 February 2015, Case C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50; CJEU, 19 June 2019, C-607/17, *Skatteverket v Memira Holding AB*, EU:C:2019:510; CJEU, 19 June 2019, C-608/17, *Skatteverket v Holmen AB*, EU:C:2019:511.

which were handed down after *Timac Agro*. Moreover, the Court's recent decision in *VP Capital NV* explained that the rule adopted in *Bevola* "*falls within the scope of the Court's case-law relating to account being taken, in the Member State of residence of the parent company, of definitive losses incurred by a subsidiary or by a permanent establishment situated, during the same tax period, in another Member State*".[156]

However, *Lidl Belgium* was decided based on the blueprint of *Marks & Spencer*: If comparability is now clearly rejected by the Court in *W AG* where a State could tax the profits and losses of a *foreign branch* under domestic law (but agreed in a tax treaty to exempt), how could comparability be assumed to exist in cases of *foreign subsidiaries*, which are outside the parent's State's taxing jurisdiction altogether? Moreover, the foreign subsidiary is not only outside the parent's State's taxing jurisdiction for reasons of domestic law (and perhaps customary international law), the exemption also typically follows from an applicable tax treaty: Under Article 7(1) first sentence OECD MC, "*[p]rofits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein*". This means that, unless the subsidiary has a permanent establishment in the parent's State, the subsidiary's State of residence has the exclusive taxing right and the parent's State is generally barred from taxing the subsidiary's profits.[157] It is hard to see how the logic of *Marks & Spencer* can be upheld in light of *W AG*.[158] Does the Court view the "exemption" of the profits of a foreign subsidiary as a purely unilateral one? Did it, for example, matter for the Court in *Marks & Spencer* that the UK operated an indirect credit system for the taxation of dividends?[159]

And even if the Court were to uphold comparability in *Marks & Spencer*-style situations, the first "elephant in the room", *i.e.*, the "final loss exception", remains. While this concept has been refined and operationalized by the Court,[160] its

---

[156] CJEU, 10 November 2022, C-414/21, *VP Capital NV v Belgische Staat*, EU:C:2022:871, para. 29.

[157] Of course, there might be applicable CFC rules (*e.g.*, based on Articles 7 and 8 of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] *OJ* L 193/1) or similar provisions under which the parent's State May exercise taxing jurisdiction over (some of) the subsidiary's profits. For the relationship between tax treaty law and such rules see, *e.g.*, G. Kofler, "Some Reflections on the 'Saving Clause'", *Intertax*, 2016, pp. 574-589.

[158] See also, *e.g.*, A. Schnitger, "Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Internationales Steuerrecht*, 2022, p. 769 (p. 770); M. Schilcher, "Keine unionsrechtliche Pflicht zur Berücksichtigung finaler Verluste ausländischer DBA-Freistellungsbetriebsstätten", *Steuer- und WirtschaftsKartei*, 2022, p. 1260 (pp. 1268-1269); CFE ECJ Task Force, "Opinion Statement ECJ-TF 4/2022 on the ECJ decision of 22 September 2022 in Case C-538/20, *W AG*, on the deductibility of foreign final losses", available at https://taxadviserseurope.org/.

[159] See in that direction, *e.g.*, R. Ismer, „Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Deutsches Steuerrecht*, 2022, p. 1996 (p. 1996); W. Mitschke, „Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG", *Internationales Steuerrecht*, 2022, p. 771 (p. 772).

[160] Most notably in CJEU, 21 February 2013, C-123/11, *A Oy*, EU:C:2013:84, paras 49-55; CJEU, 7 November 2013, C-322/11, *K*, EU:C:2013:716, para. 74-82; CJEU, 3 February 2015, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2015:50; CJEU, 19 June 2019, C-608/17, *Skatteverket v Holmen AB*, EU:C:2019:511.

precise scope is (still) ambiguous,[161] intensely debated[162] and awaiting further clarification.[163] It is not even clear that the concept has the same meaning in all situations.[164] In that regard, *Marks & Spencer* has not settled the issue, *i.e.*, not "*brought about* quieta*, as it has consistently remained unclear with regard to its effects*",[165] and frequent calls for its extremely restrictive application[166] or even complete abandonment[167] are made. In any event, the Court has attached a number of limitations to the "final loss exception"[168] so that, as AG Kokott has succinctly pointed out, it is indeed "*very difficult to identify any cases in which it might apply*".[169] The "final loss exception" is also hard to justify conceptionally, not only because the initial link to the Court's accepted justifications based on the prevention of "double dips" and "loss shifting" has been severed over time,[170] but also because it leads to arbitrary outcomes. From an Internal Market perspective, it is too narrow as it ignores cash-flow disadvantages (and therefore treats cross-border investments less favorably), whereas from a Member States' perspective it might even be overshooting: Assume, for example, that a foreign subsidiary has a profitable phase (with the profits not taxable in the parent's home State) and turns into a loss-making phase that ends with its liquidation, and that the subsidiary's profits and losses are equal over its period of existence (*i.e.*, the subsidiary had an "overall" profit or loss of zero). It seems that there might still be a "final" loss under *Marks & Spencer* (*e.g.*, the liquidation loss), even though there is no "overall" ("total") loss of the foreign subsidiary, and its utilization in the parent's State might lead to better treatment of the cross-border situation than of a purely domestic situation. In the past two decades, the Court might well have realized that *Marks & Spencer*'s "final loss exception" is hard to apply in practice, conceptually vague, or even a dead-end street altogether. This would then put additional pressure on legislative solutions for cross-border loss utilization, such

[161] See, in this regard, Opinion AG Geelhoed, 23 February 2006, C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:139, para. 65; Opinion AG Kokott, 19 July 2012, Case C-123/11, *A Oy*, EU:C:2012:488, paras 47-54; Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, paras 42-53; Opinion AG Mengozzi, 21 March 2013, C-322/11, *K*, EU:C:2013:183, paras 63-89.
[162] See the references *supra* in footnote 51.
[163] Some highly interesting questions regarding the scope of "final losses" were asked by the German Bundesfinanzhof, 6 November 2019, I R 32/18, BFHE 269, 205, BStBl II 2021, 68, in *W AG* and have been addressed in the Opinion by AG Collins (Opinion AG Collins, 10 March 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:184, paras 60-75), but could be left unanswered by the Court (see CJEU, 22 September 2022, C-538/20, *Finanzamt B v W AG*, EU:C:2022:717, para. 30). For a discussion of these issues see, *e.g.*, G. Kofler, "Should We Cut 'Final' Losses?", *EC Tax Review*, 2022, pp. 108-114.
[164] See E. Pinetz, K. Spies, "'Final Losses' after the Decision in Commission v. UK ('Marks & Spencer II')", *EC Tax Review*, 2015, p. 309 (pp. 314-318).
[165] Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, para. 42.
[166] See Opinion AG Geelhoed, 23 February 2006, C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:139, para. 65, pointing out that the "final loss exception" "*has introduced an additional disparity in the interrelation between national tax systems, thereby further distorting the exercise of the freedom of establishment and free movement of capital within the Community*".
[167] See for that call the Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, paras 42-53, which would, however, imply that the home State would not be required to take into account even foreign "final" losses.
[168] For a brief overview see *supra* section II.B.
[169] Opinion AG Kokott, 23 October 2014, C-172/13, *European Commission v United Kingdom of Great Britain and Northern Ireland (Marks & Spencer II)*, EU:C:2014:2321, paras 38-41.
[170] See *supra* section II.B.

as the recently announced "BEFIT" ("Business in Europe: Framework for Income Taxation").[171]

Overall, the Court's case law might be in a transitional phase with regard to cross-border losses and in search of a new direction. This is exemplified by the more recent case law on the question of whether non-resident taxpayers are entitled, under the fundamental freedoms, to set off losses that they have incurred in their *home* State against (unrelated) positive income that they derive in the *source* State. Generally, a source State that only takes into account profits and losses arising from activities in its own territory is not only consistent with the international principle of territoriality but also with the fundamental freedoms. This was confirmed in *Futura*: While residents were subject to worldwide taxation, the Luxembourgian law at issue in *Futura* provided that non-residents were only liable to tax in relation to their domestic source income earned by their permanent establishment and, conversely, limited loss utilization and carry-forward to losses arising from the non-resident taxpayer's activity in Luxembourg. "*Such a system*", the Court found, "*which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any discrimination, overt or covert, prohibited by the Treaty*".[172]

It is true that the Court has deviated from this understanding of territoriality with regard to a taxpayer's "personal and family circumstances" and found that, under certain circumstances, the *host* State has to take into account negative rental income from the taxpayer's owner-occupied dwelling in the *home* State either through "negative" progressivity on the level of the tax *rate*[173] and with regard to a reduction of the tax *base*.[174] Although the precise scope of this case law is still unclear, it was widely accepted – and implicitly confirmed in *Centro Equestre*[175] – that it is not relevant for corporate taxpayers, which, per definition, do not have a personal sphere ("personal and family circumstances") and hence do not raise issues of *subjective* ability to pay. This view was challenged by the Court in *Sofina*.[176] In that case, Sofina, a Belgian, loss-making company, received portfolio dividends from various French companies. French tax law differentiated between domestic and cross-border portfolio dividends. In the case of non-resident

[171] See Pt. 4. in the Communication on "Business Taxation for the 21st Century", COM(2021)251 (18 May 2021), the Commission's 2023 work program in Annex to COM(2022)548), and the call for evidence: Ares(2022)7086603 (13 October 2022).

[172] CJEU, 15 May 1997, C-250/95, *Futura Participations SA and Singer v Administration des contributions*, EU:C:1997:239, para. 22; see also CJEU, 15 February 2007, C-345/04, *Centro Equestre da Lezíria Grande Lda v Bundesamt für Finanzen*, EU:C:2007:96, para. 22.

[173] CJEU (Grand Chamber), 21 February 2006, C-152/03, *Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais v Finanzamt Germersheim*, EU:C:2006:123 (where the taxpayers had already opted, under § 1(3) of the German Income Tax Act, to be treated as residents in line with *Schumacker*); CJEU, 18 July 2007, C-182/06, *État du Grand Duchy of Luxemburg v Hans Ulrich Lakebrink and Katrin Peters-Lakebrink*, EU:C:2007:452.

[174] CJEU, 16 October 2008, C-527/06, *R. H. H. Renneberg v Staatssecretaris van Financiën*, EU:C:2008:566; CJEU, 9 February 2017, C-283/15, *X v Staatssecretaris van Financiën*, EU:C:2017:102.

[175] CJEU, 15 May 1997, C-250/95, *Futura Participations SA and Singer v Administration des contributions*, EU:C:1997:239; CJEU, 15 February 2007, C-345/04, *Centro Equestre da Lezíria Grande Lda v Bundesamt für Finanzen*, EU:C:2007:96.

[176] CJEU, 22 November 2018, C-575/17, *Sofina SA and Others v Ministre de l'Action et des Comptes publics*, EU:C:2018:943.

corporate shareholders, such as Sofina, France levied a (treaty reduced) 15% final withholding tax. In contrast, resident corporate shareholders had to include dividends in their taxable income, which also meant, *e.g.*, that if losses exceeded the dividend income in a given year, the dividends received decreased those general losses, but effectively remained untaxed in that year. Finding unjustified discrimination, in essence, the Court in *Sofina* required France to take into account Sofina's Belgian losses when taxing the French-source dividends.

This is a quite surprising outcome, as the Court implicitly chose to take the (completely unrelated) non-dividend income of the recipient into consideration (over which France had no tax jurisdiction under either domestic law or tax treaty law) when comparing the tax treatment of domestic and outbound dividends.[177] Needless to say that such an approach raises numerous technical and policy issues. What is even more striking is the disparity to *Marks & Spencer*: While one might argue that, in the reverse situation, the *Marks & Spencer* line of case law has also undermined the international tax law concept of territoriality, those cases nevertheless took a very cautious approach by limiting cross-border loss transfers to "final" or "definitive" losses, whereas *Sofina* requires an annual analysis and rejects an approach akin to a "*reverse final loss exception*".[178] Carried to its logical conclusion,[179] after *Sofina* and *W AG* that disparity would be even more extreme: The residence State can ignore treaty-exempt source State losses of its residents (*W AG*), whereas the source State might have to take unrelated residence State losses into account (*Sofina*). This would be a truly odd result, not only from the perspective of international tax law, but also from the perspective of the Internal Market.

---

[177] For critical analyses of *Sofina* and its implications see, *e.g.*, G. Kofler, "Foreign Losses and Territoriality: Did *Sofina* Revolutionize Source State Taxation?", *CFE Tax Advisers Europe – 60th Anniversary Liber Amicorum*, Amsterdam, IBFD Amsterdam, 2019, pp. 147-168; CFE ECJ Task Force, "Opinion Statement ECJ-TF 3/2019 on the ECJ Decision of 22 November 2018 in *Sofina* (Case C-575/17) on Withholding Taxes, Losses and Territoriality", *European Taxation*, 2020, pp. 91-97.

[178] CJEU, 22 November 2018, Case C-575/17, *Sofina SA and Others v Ministre de l'Action et des Comptes publics*, EU:C:2018:943, para. 30; see also CJEU, 17 September 2015, C-10/14, C-14/14 and C-17/14, *J.B.G.T. Miljoen and Others v Staatssecretaris van Financiën*, EU:C:2015:608, para. 51; CJEU, 2 June 2016, C-252/14, *Pensioenfonds Metaal en Techniek v Skatteverket*, EU:C:2016:402, paras 64-65.

[179] Indeed, if the Court chooses to follow along the lines of *Sofina* in future cases, this could unsettle established principles of international taxation. Taken to the extreme, the reasoning in *Sofina* would not only concern dividends but rather attach a "no-loss condition" to all source State taxing rights. It is indeed hard to see why *Sofina*'s logic would not likewise prevent *source* State taxation where, for example, a profit-making permanent establishment belongs to a loss-making foreign head office. Concluding so, however, would not only overthrow the allocation of taxing rights under Article 7 OECD MC, but also create an additional distortion in comparison to the taxation of profits of resident corporations (which are certainly not required to take into account the losses of their shareholders).