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Editorial

Curia Locuta, Causa Finita: Some Further Conclusions from W AG

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The Court's decision in W AG *on the cross-border utilization of treaty-exempt foreign losses has not only turned its back on* Lidl Belgium *and sparked an intense debate not only on the implications for other landmark cases, such as* Marks & Spencer *and* K, *but also on the transparency, certainty, and clarity regarding of the Court's (substantive) 'overruling' of its precedents. A number of key issues following W AG have now been addressed by the German Bundesfinanzhof. In two recent judgments, it dealt with the standard of comparability established by W AG and the potential impact of the principle of equality in the light of Article 20 of the Charter and Article 3 of the German Basic Law and the ability-to-pay principle on the cross-border utilization of losses.*

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1. The Court's recent judgment in *W AG*[1] on cross-border loss utilization has revealed some deep cracks in the consistency of the direct tax case law. Almost two decades ago, the landmark decisions in *Marks & Spencer*[2] and *Lidl Belgium*[3] had assumed comparability between domestic and cross-border situations and embraced the 'final loss exception' for foreign subsidiaries and treaty-exempt exempt permanent establishments. After some uncertainty following *Timac Agro*[4] and *Bevola*,[5] 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. By declaring domestic and treaty-exempt foreign losses to be categorically incomparable, the Court has not only 'overruled' *Lidl Belgium* in substance, but has also created uncertainty not only as to the initial premise of *Marks & Spencer* but also as to the viability of other leading cases (such as *K*[6]).[7] What is more, *W AG* has sparked a passionate discourse on the transparency, certainty, and clarity regarding the Court's (substantive) 'overruling' of its precedents: The Court's transition from *Lidl Belgium* to *W AG* is puzzling and highly unsatisfactory, and in his recent editorial in this journal *Axel Cordewener* has labelled *W AG* as 'the clearest case of an "overruling" (in substance, but not with respect to visibility) that can be identified'.[8] In fact, *Lidl Belgium* was not even mentioned, let alone explicitly distinguished.[9] This quiet 'overruling' of the line of reasoning of a rather clear precedent is quite worrying, as previous decisions of the Court have not only a wide practical impact, but also a legal impact far beyond the actual case decided. Indeed, the legal impact of the Court's reasoning and argumentation

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1 CJEU, 22 Sep. 2022, C-538/20, *Finanzamt B v. W AG*, EU:C:2022:717.

2 CJEU, 13 Dec. 2005, C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, EU:C:2005:763.

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

4 CJEU, 17 Dec. 2015, C-388/14, *Timac Agro Deutschland GmbH v. Finanzamt Sankt Augustin*, EU:C:2015:829.

5 CJEU, 12 Jun. 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v. Skatteministeriet*, EU:C:2018:424.

6 CJEU, 7 Nov. 2013, C-322/11, *K*, EU:C:2013:716.

7 For detailed discussions of *W AG* and its implications *see* with further references, e.g., CFE ECJ Task Force, 'Opinion Statement ECJ-TF 4/2022 on the CJEU decision of 22 Sep. 2022 in Case C-538/20, *W AG*, *On the Deductibility of Foreign Final Losses*, 63 Eur. Tax'n 105–110 (2023); Georg Kofler, *Cross-Border Losses and W AG: The Beginning of the End of the 'Final Loss Exception'?*, 2 Cahiers de fiscalité luxembourgeoise et européenne 73–97 (2023), doi: 10.2139/ssrn.4312568; Rita Szudoczky, *Foreign Permanent Establishment Losses Under the Fundamental Freedoms: Does W AG Bring an End to a Rollercoaster Ride?*, 51 Intertax 432–443 (2023), doi: 10.54648/TAXI2023038. For a discussion of the Opinion of AG Collins *see* Georg Kofler, *Should We Cut 'Final' Losses?*, 31 EC Tax Rev. 108–114 2022, doi: 10.54648/ECTA2022010.

8 Axel Cordewener, *We Need to Know When Previous Case-Law Has Been 'Overruled'! – A Plea for More Legal Certainty in EU Tax Law*, 32 EC Tax Rev. 144 at (147) (2023), doi: 10.54648/ECTA2023019.

9 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* e.g., German Bundesfinanzhof, 17 Jul. 2008, I R 84/04, BFHE 222, 398, BStBl II 2009, 630; German Bundesfinanzhof, 9 Jun. 2010, I R 107/09, BFHE 230, 35; German Bundesfinanzhof, 5 Feb. 2014, I R 48/11, BFHE 244, 371; German Bundesfinanzhof, 22 Sep. 2015, I B 83/14, BFH/NV 2016, 375).

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'[10]; the Commission relies on the Court's case law when it initiates infringement proceedings[11]; 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 a factor to establish a sufficiently serious breach of Union law in the area of State liability.[12] Hence, legal certainty would arguably require the Court to disclose shifts in its case law more directly.[13] Several paths are viable: For example, *Rita Szudoczky* argues for the introduction of a special procedure in the Court's rules of procedure for 'overruling' decisions,[14] while *Axel Cordewener* points to existing procedural rules to refer cases to the Grand Chamber, especially in potential cases of an 'overruling', and urges that the issue should also be addressed in the currently pending procedural reform concerning the preliminary ruling procedure.[15]

2. However, the purpose of this editorial is not to discuss W AG again, but rather to highlight some interesting conclusions reached by the Bundesfinanzhof in two subsequent decisions[16]:

1. First, the Bundesfinanzhof accepts the CJEU's distinction between *Bevola* and *W AG*:[17] According to W AG, the comparability with regard to cross-border loss utilization depends on the legal basis for the exemption of profits and losses of a foreign permanent establishment: Since 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'.[18] This confirms *Timac Agro*, but is a clear departure from the comparability standard under Lidl Belgium.[19] Indeed, according to *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 on the basis of the credit method), for which the 'final loss exception' remains intact (for the time being). This reasoning and the distinction between unilateral and treaty-based exemptions has now been adopted by the German Bundesfinanzhof as well.[20] The Bundesfinanzhof rationalized this by arguing that *W AG* aims to distinguish between unilateral, uncoordinated rules on the one hand and agreements between states about the allocation of taxing powers on the other – but likewise fails to explain why this distinction should be relevant in light of EU law.[21] That said, the Bundesfinanzhof confirmed in that respect that the symmetrical exemption of profits and losses is indeed based on a tax treaty (as per *W AG*) and not on unilateral German tax law (as per *Bevola*), even though the incorporation of such tax treaty requires a federal law ('Act of Assent', 'Zustimmungsgesetz') as a measure of 'participation' by the legislature (through

[10] § 99 of the Rules of Procedure of the Court of Justice, [2012] OJ L 265, at 1.

[11] *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 Mar. 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 Mar. 2004, and in *N*, Case-470/04 of 7 Sep. 2006, and on the Commission's Communication on exit taxation (COM(2006)825 of 19 Dec. 2006)'.

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

[13] One might note that undisclosed shifts also 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).

[14] Szudoczky, *supra* n. 7.

[15] Cordewener, *supra* n. 8, at 144–151.

[16] German Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18) (this case was subject of the reference in *W AG*), and German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16) (this case has initially been paused until *Bevola* and then again until *W AG*); a further case i spending as I R42/22 (ex I R 48/17).

[17] German Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18), paras 19–21, and German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), paras 24–26.

[18] CJEU, 22 Sep. 2022, C-538/20, *Finanzamt B v. W AG*, EU:C:2022:717, para. 27.

[19] *See* the submissions by Denmark, Germany, Austria and the Commission in *Bevola* (CJEU, 12 Jun. 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 Feb. 2017, I R 2/15, BFHE 257, 120, BStBl II 2017, 709, and Austrian Verwaltungsgerichtsof, 29 Mar. 2017, Ro 2015/15/0004. *See also* e.g., Opinion AG Kokott, 23 Oct. 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.

[20] German Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18), also noting that earlier case-law had concluded differently, pointing in that regard not only *Lidl Belgium*, but also to its own case law (e.g., German Bundesfinanzhof, 17 Jul. 2008, I R 84/04, BFHE 222, 398, BStBl II 2009, 630; German Bundesfinanzhof, 9 Jun. 2010, I R 107/09, BFHE 230, 35).

[21] For criticism *see* e.g., Georg Kofler, *Cross-Border Loss Relief,* in *Terra Wattel European Tax Law, Volume 1: General Topics and Direct Taxation* (Sjoerd Douma, Otto Marres, Hein Vermeulen, & Dennis Weber eds, 8th ed., Alphen aan den Rijn, Wolters Kluwer 2022), Ch. 10.3.2.

authorization) in the executive branch, before ratification.[22] This constitutional requirement regarding the 'transformation' of international law into the domestic legal order (as a genuine domestic statute that is the 'mirror image' of the international treaty), so the Bundesfinanzhof, is more of a technical nature and does not deprive tax treaties of their character of bilateral international treaties about the allocation of taxing rights, which it explicitly found to be *Acte Clair*.[23]

2. *W AG* also raises a number of questions from a technical point of view. One question stands out: How to deal with 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* in relation 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'.[24] However, the German Bundesfinanzhof had only asked about the 'final loss' doctrine in relation to the trade tax in the event that the first question regarding 'final losses' in the corporate tax framework was answered in the affirmative (which it was not), and the Court therefore refrained from providing an answer.[25] The Bundesfinanzhof has now solved that issue based on the technical structure of the German trade tax: It reasoned that positive and negative income that is exempt from corporation tax under a tax treaty in the first place does not enter the tax base for the trade tax (§ 7 of the Trade Tax Act), so that the explicit domestic deductions relating to income of foreign permanent establishments (§ 9 of the Trade Tax Act) run 'idle'.[26] Therefore, according to the Bundesfinanzhof, the non-consideration of 'final' losses also for trade tax purposes does not violate the freedom of establishment.[27]
3. The Bundesfinanzhof also dealt with a specialclause in the tax treaty between Germany and Italy, according to which Germany only exempts income from permanent establishments that is 'effectively taxed' in Italy in accordance with the tax treaty (paragraph 16 (d) of the Protocol to the Double Taxation Convention Germany/Italy 1989).[28] What about the 'effective taxation' of losses? The Bundesfinanzhof argued that – symmetrically to profits – it was sufficient that the losses of the permanent establishment are included in the Italian tax base (and can be carried forward in Italy) to be treated as 'effectively taxed', so that in the present case the taxing right did not revert to Germany.[29] In other words, the mere existence of such qualified fallback clause ('qualifizierte Rückfallklausel') does not make the treaty-based exemption *per se* 'incomplete' (so that the application of *W AG* would be excluded), but rather requires a case-by-case analysis regarding the applicability of the treaty-based exemption in light of the fallback clause.[30] That said, it should nevertheless be noted that, of course, a 'final loss' is per definition not 'effectively taxed' in the other state.[31] However, this was not decisive for the Bundesfinanzhof from the point of view of the fundamental freedoms.
4. As expected, the discussion in Germany has also raised the question if the non-utilization of foreign 'final' losses could infringe on the Charter of Fundamental Rights of the European Union,[32] in particular on the right to 'equality before the law' under its Article 20.[33] Interestingly, the Bundesfinanzhof seems to accept – at least for the sake of the argument – that the freedom of establishment at issue in this cross-border loss situation (Articles 49, 54 TFEU) likewise opens the

[22] For a recent discussion of this 'transformation' *see* Georg Kofler, *Legislative Tax Treaty Overrides in Austrian, German, and EU Law*, 67 Brit. Tax Rev. 64–93 (2022).

[23] German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), paras 26–27, referring to CJEU, 6 Oct. 2021, Case C-561/19, *Consorzio Italian Management e Catania Multiservizi*, EU:C:2021:799.

[24] *See* Opinion AG Collins, 10 Mar. 2022, C-538/20, *Finanzamt B v. W AG*, EU:C:2022:184, para. 53.

[25] It might be noted that AG Collins had suggested that 'an affirmative answer to the first question should also lead to an affirmative answer to the second question', i.e., that 'final losses' would have to be taken into account not only for corporate tax but also for trade tax purposes (Opinion AG Collins, 10 Mar. 2022, C-538/20, *Finanzamt B v. W AG*, EU:C:2022:184, para. 55). AG Collins has argued that with regard to the German trade tax 'the solution adopted by the Court in para. 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' (Opinion AG Collins, 10 Mar. 2022, C-538/20, *Finanzamt B v. W AG*, EU:C:2022:184, para. 57, referring to CJEU, 12 Jun. 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v. Skatteministeriet*, EU:C:2018:424, para. 38), which might have implied 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.

[26] German Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18), para. 17, referring to German Bundesfinanzhof, 9 Jun. 2010, I R 107/09, BFHE 230, 35.

[27] German Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18), paras 18 and 22.

[28] *See* German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), paras 15–26.

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[30] *See* for this approach already Roland Ismer & Harald Kandel, *A Finale Incomparabile to the Saga of Definitive Losses? Deduction of Foreign Losses and Fundamental Freedoms After Bevola and Sofina*, 47 Intertax 573 at (585) (2019), doi: 10.54648/TAXI2019058; Roland Ismer, *Kein Abzug von Verlusten einer Freistellungsbetriebsstätte – FA B/W AG*, 60 Deutsches Steuerrecht 1996 at (1996–1997) (2022).

[31] For a discussion if losses that entered into the carry-forward could be considered 'final' in the first place *see* e.g., Georg Kofler, *supra* n. 21, Ch. 10.2.4.

[32] *See* [2012] OJ C 326, at 391.

[33] *See* especially Jens Schönfeld & Thomas Sendke, *Finale Verluste – ein Fall für die (EU-)Grundrechte?*, 32 Internationales Steuerrecht 333–341 (2023).

applicability of the Charter, which binds Member States 'only when they are implementing Union law' (Article 51(1) of the Charter).[34] However, with regard to the freedom of establishment the Bundesfinanzhof pointed out that *W AG* had shown that there were no comparable circumstances between taxpayers who maintain a permanent establishment in another EU Member State, whose (positive and negative) income is exempt from taxation by the state of residence due to a tax treaty, and purely domestic cases. From this, it concludes that it seems impossible that there are different standards for the comparability test in the context of the general principle of equality (Article 20 of the Charter) on the one hand and those established by the CJEU for the discrimination analysis under the freedom of establishment (Articles 49, 54 TFEU) on the other.[35]

5. Finally, the Court in *Bevola* had linked comparability to a (cross-border) ability-to-pay principle, stating 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'.[36] 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 inappropriate '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'.[37] Ability to pay therefore appeared to be tied up,[38] and the Bundesfinanzhof did so straightforwardly in light of the principle of equal treatment under Article 3 of the German Basic Law ('Grundgesetz'): First, it argued that a treaty-based symmetrical exemption of profits and losses is a sufficient factual reason for the non-utilization of foreign losses. The effect of the exemption is that such foreign profits and losses are left to the taxing jurisdiction of the source state and are hence excluded from domestic taxation. Second, this justification is not weakened by the fundamental ability-to-pay-principle: In the international context, the Bundesfinanzhof notes, the ability-to-pay-principle is limited by the principle of territoriality. Indeed, it is widely accepted that the exemption of profits of foreign permanent establishments, while undermining the ability-to-pay principle, is justified by the bilateral allocation based on the territorial connection of the income to the source state.[39] This reasoning, according to the Bundesfinanzhof, applies equally to the taxation of profits and to the utilization of losses.[40]

3. The German Bundesfinanzhof's recent follow-up decisions[41] have clarified some interesting details concerning *W AG*. In particular, the principle of equality in the light of Article 20 of the Charter and Article 3 of the German Basic Law or the ability-to-pay principle do not compel the utilization of treaty-exempt foreign

[34] German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), para. 30. Indeed, it is established case-law of the CJEU that the Charter rights are relevant in cases where a Member State attempts to justify the restriction of a fundamental freedom (*see* e.g., CJEU, 30 Apr. 2014, C-390/12, *Robert Pfleger and Others*, EU:C:2014:281, paras 35–36; CJEU, 10 Mar. 2016, C-235/14, *Safe Interenvios, SA v. Liberbank, SA and Others*, EU:C:2016:154, para. 103; CJEU, 21 Dec. 2016, C-201/15, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, EU:C:2016:972, paras 63–64), but it is still disputed if the mere exercise of a fundamental freedom likewise triggers the applicability of the Charter (*see* for that discussion Georg Kofler, *Europäischer Grundrechtsschutz im Steuerrecht*, in *Europäisches Steuerrecht* DStJG 41, 125–185 (Michael Lang ed., Otto Schmidt Köln 2018), and what impact it might have that a national measure might indeed constitute a 'restriction', but not a 'discrimination' because of non-comparability of the situations (such as in *W AG*) (*see* the detailed analysis by Schönfeld & Sendke, *supra* n. 33, at 333, (334–336)). In might be noted that previously the Bundesfinanzhof has flatly rejected the applicability of the Charter in a case of cross-border double taxation of an inheritance (*see* German Bundesfinanzhof, 19 Jun. 2013, II R 10/12, BFHE 241, 402, BStBl II 2013, 746).

[35] German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), para. 31.

[36] CJEU, 12 Jun. 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 Jan. 2018, C-650/16, *A/S Bevola and Jens W. Trock ApS v. Skatteministeriet*, EU:C:2018:424, EU:C:2018:15, para. 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 in *Bevola* considered 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.

[37] Opinion AG Collins, 10 Mar. 2022, C-538/20, *Finanzamt B v. W AG*, EU:C:2022:184, para. 48, referring to the reasoning of the German Bundesfinanzhof, 6 Nov. 2019, I R 32/18, BFHE 269, 205, BStBl II 2021, 68.

[38] For a detailed discussion in light of Art. 20 of the Charter and Art. 3 of the German Grundgesetz *see* Schönfeld & Sendke, *supra* n. 33, at 333 (336–341).

[39] German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), para. 33. *See also* e.g., Moris Lehner, *Die Reform der Kapitaleinkommensbesteuerung im Rahmen des Verfassungs – und Europarechts*, in, *Einkommen aus Kapital*, DStJG 30, 61 at (73 et seq.) (Wolfgang Schön ed., Otto Schmidt Köln 2007); *see also* e.g., Austrian Constitutional Court (VfGH), 11 Mar. 1965, B 210/64, B 211/64, VfSlg 4928/1965; Austrian Constitutional Court (VfGH), 23 Jun. 2014, SV 2/2013-14, VfSlg 19.889/2014.

[40] German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16), para. 34.

[41] German Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18), and German Bundesfinanzhof, 12 Apr. 2023, I R 44/22 (ex I R 49/19, I R 17/16).

'final' permanent establishment losses. Moreover, the Bundesfinanzhof has adopted a case-by-case approach to fallback clauses and, in the case of territorial trade tax, has – in a more technical approach – given priority to the treaty exemption over the national exclusion of foreign income and has therefore not found any infringement of the freedom of establishment.