Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 3 September 2015[1]

Case C-388/14

Timac Agro Deutschland GmbH
v
Finanzamt Sankt Augustin

(Request for a preliminary ruling from the Finanzgericht Köln (Germany))

(Freedom of establishment — Article 49 TFEU — Deduction from a company's profits of losses incurred by its establishment established in another Member State — Tax legislation of a Member State providing for the reincorporation of such losses in the event of transfer of the establishment)

1. This request for a preliminary ruling concerns the interpretation of Article 49 TFEU. More specifically, it concerns the deduction by an undertaking established in one Member State of the losses of a permanent establishment situated in another Member State, an issue which the Court has addressed on several occasions since its judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763).

I – **Legal context**

A – *EU law*

2. Article 49 TFEU guarantees the freedom of establishment of nationals of the Member States of the European Union. According to that article:

'… restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

1 — Original language: French.

B – *German law*

3. The first to fourth sentences of Paragraph 2a(3) of the German Law on income tax (Einkommensteuergesetz, 'EStG'), in the version applicable to the 1997 and 1998 years of assessment, provide:

'[1.] If the revenue from the industrial or commercial activities of an establishment situated in a foreign State is exempt from income tax under a double taxation convention, any loss relating to that revenue in accordance with the provisions of national tax law must, at the request of the taxpayer, be deducted in the calculation of the total amount of the revenue, in so far as the taxpayer could offset or deduct the loss if the revenue was not exempt from income tax and provided that such loss exceeds the positive revenue from the industrial or commercial activities of other establishments situated in the same foreign State exempt under that convention. [2.] In so far as the loss is not thereby offset, the deduction of losses is permitted if the conditions of Paragraph 10d are satisfied. [3.] If, in a subsequent tax assessment period, the total amount of revenue from the industrial or commercial activities of permanent establishments situated in that foreign State which is exempt from income tax under the convention is positive, the loss deducted pursuant to the first and second sentences must be reincorporated into the total amount of the revenue calculated for that tax assessment period. [4.] The third sentence shall not apply if the taxpayer demonstrates that it is not generally permitted under the provisions of the foreign State applicable to it to carry forward the deduction of losses to a tax assessment period other than the tax assessment period in which the losses were incurred.'

4. The third and fifth sentences of Paragraph 52(3) of the EStG, in the version applicable in 2005, state:

'The third, fifth and sixth sentences of Paragraph 2a(3), in the version published on 16 April 1997 (BGBl. I, p. 821), shall apply to the 1999 to 2008 tax years in so far as a positive amount arises within the meaning of the third sentence of Paragraph 2a(3), or in so far as a permanent establishment situated in a foreign State within the meaning of Paragraph 2a(4), in the version of the fifth sentence, is converted into a company limited by shares, is transferred or is closed. ... Paragraph 2a(4) shall apply in the following version to the 1999 to 2008 tax years:

"4. If a permanent establishment situated in a foreign State is:

1. converted into a company limited by shares; or

2. transferred for consideration or for no consideration; or

3. closed ..., the loss deducted pursuant to the first and second sentences of subparagraph 3 shall be reincorporated into the total amount of the revenue for the tax assessment period in which the conversion, transfer or closure occurred, applying the third sentence of subparagraph 3 in an analogous manner, in so far as that loss was not reincorporated pursuant to the third sentence of subparagraph 3 nor remains bound to be reincorporated."'

C – *Double Taxation Conventions*

5. Article 4(1) of the Convention concerning the avoidance of double taxation with respect to taxes on income and capital and to trade and property taxes, concluded between the Federal Republic of Germany and the Republic of Austria on 4 October 1954 (BGBl. 1955 II, p. 749), as amended by the Convention of 8 July 1992 (BGBl. 1994 II, p. 122), provides.

'Where a person domiciled in one of the Contracting States derives income, as owner or partner, from an industrial or commercial undertaking whose activities extend to the territory of the other State, the said income shall be taxable by the latter State only in so far as it is attributable to a permanent establishment of the undertaking which is situated in its territory.'

6. Article 7(1) of the Convention concerning the avoidance of double taxation with respect to taxes on income and capital concluded between the Federal Republic of Germany and the Republic of Austria on 24 August 2000 (BGBl. 2000 II, p. 734, 'the German-Austrian Convention'), provides:

'The profits of an undertaking of a Contracting State shall be taxable only in that State unless the undertaking carries on business in the other Contracting State through a permanent establishment situated therein. If the undertaking carries on business as aforesaid, the profits of the undertaking shall be taxable in the other State, but only to the extent to which they are attributable to that permanent establishment.'

7. The first sentence of Article 23(1) of the German-Austrian Convention is worded as follows:

'The taxation of persons residing in the Federal Republic of Germany shall be as follows:

(a) Subject to point (b) below, revenue from the Republic of Austria and assets situated in the Republic of Austria which, pursuant to this Convention, are taxable in the Republic of Austria shall be excluded from the basis of assessment for German taxation.'[2]

II – Facts of the dispute in the main proceedings

8. Timac Agro Deutschland ('Timac Agro') is a company limited by shares that is governed by German law. It belongs to a French group of companies. It had, since 1997, been operating a permanent establishment in Austria. On 31 August 2005, the Austrian permanent establishment was transferred, for consideration, to a company established in Austria belonging to the same group of companies as Timac Agro. The main subject-matter of the contract of sale was moveable and immoveable property. The customer base was sold for EUR 1, since the customers were already customers of the acquiring sister company.

9. The question as to how to treat the losses of this non-resident permanent establishment thus arose because, between 1997 and 2005, the aforementioned Austrian permanent establishment had incurred losses in respect of every tax assessment period except 2000 and 2005, and those losses had been deducted in Germany by Timac Agro.

10. Following a tax inspection, the tax bases of Timac Agro were corrected in respect of the years 1997 to 2004. First, the losses of the Austrian permanent establishment, which were initially deducted from Timac Agro's revenue for 1997 and 1998, were reincorporated into its taxable profit for 2005. Secondly, Timac Agro was not permitted to take into account the losses of that permanent establishment in its tax base for the years 1999 to 2004.

11. Timac Agro objected to those corrections and brought an action before the Finanzgericht Köln. In support of its action, Timac Agro argues that the reincorporation of the losses incurred by its Austrian permanent establishment in respect of 1997 and 1998 and the impossibility of deducting that establishment's losses in respect of the period 1999 to 2004 are incompatible with the freedom of establishment.

2 — Article 23(1)(b) is not relevant to the examination of the questions referred for a preliminary ruling by the national court. Indeed, the national court made no reference to that provision in its decision, and nor did the parties that submitted written observations.

12. As regards the reincorporation in question, the national court considers that the Court of Justice has not yet ruled on whether such reincorporation of losses following the transfer of a non-resident permanent establishment is compatible with EU law.

13. The national court states that although there are some similarities between the facts underlying the judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588) and the facts of the case in the main proceedings, the issue under consideration in that judgment was the reincorporation of the losses of a non-resident permanent establishment to the extent of its profits. By contrast, in the main proceedings, the reincorporation of losses was triggered by the transfer of the non-resident permanent establishment and was not linked to any profits of that establishment.

14. Consequently, in the event that the Court should find that the principles of the judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588) should also apply in the present case, the national court enquires whether the principles relating to definitive losses laid down by the Court in paragraphs 55 and 56 of the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763) ('the Marks & Spencer exception')[3] are intended to apply to the losses incurred in the 1997 and 1998 tax years which, having been reincorporated, are no longer taken into account in Germany.

15. As regards the refusal to take account of the losses of the Austrian permanent establishment for the 1999 to 2004 tax years, the national court states that, under the German-Austrian Convention, the Republic of Austria had exclusive power to tax the revenue of that Austrian permanent establishment. Accordingly, the rules set out in that Convention on the avoidance of double taxation cover not only profits, but also losses. Timac Agro's action could therefore only succeed if that Convention infringed the freedom of establishment.

16. The national court also enquires whether, for the same period, definitive losses within the meaning of the Marks & Spencer exception should be taken into account. It points out that, as yet, it has been unable to identify the criteria to be applied in determining the situations in which the Marks & Spencer exception is to apply.

17. In those circumstances, the Finanzgericht Köln decided to stay the proceedings and to refer questions to the Court of Justice for a preliminary ruling.

III – **The request for a preliminary ruling and the procedure before the Court**

18. By decision of 19 February 2014, received at the Court of Justice on 14 August 2014, the Finanzgericht Köln decided to refer the following questions to the Court under Article 267 TFEU:

'(1) Is Article 49 TFEU … to be interpreted as precluding a provision such as Paragraph 52(3) of the EStG, in so far as the cause of the reincorporation of losses of a [non-resident] permanent establishment previously taken into account by way of a tax reduction [for the resident parent company] is the sale of that permanent establishment to another company limited by shares within the same group as the seller, and not the making of profits?

3 — In that judgment (paragraphs 55 and 56), the Court essentially considered that a restrictive measure concerning the deduction of losses made by foreign subsidiaries could be disproportionate where the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account, which it is for the parent company to demonstrate.

(2) Is Article 49 TFEU … to be interpreted as precluding a provision such as Article 23(1)(a) of the [German-Austrian Convention] — according to which income from Austria is to be exempt from the basis of assessment for German taxation if that income can be taxed in Austria — if losses accrued in an Austrian permanent establishment of a German company limited by shares can no longer be taken into account in Austria because the permanent establishment is sold to an Austrian company limited by shares belonging to the same group as the German company?'

19. Written observations were submitted by the Finanzamt Sankt Augustin, by the German, French, Austrian and United Kingdom Governments, and by the European Commission.

20. All of the parties that submitted written observations — subject to a more nuanced reply from the Commission and the United Kingdom which did not address the first question in its written observations — suggest replying to the questions referred for a preliminary ruling in the negative.[4]

21. Furthermore, all of the parties stated their views at the hearing held on 1 July 2015.

IV – **Analysis**

A – *The prerequisite that the situations must be comparable*

1. Direct taxation and EU law

22. Although direct taxation falls within the purview of the Member States, their powers must be exercised consistently with EU law[5] and, more specifically, with the Treaty provisions on the freedoms of movement, the freedom of establishment enshrined in Article 49 TFEU being at the heart of this case.

23. The Court has consistently held that this freedom is hindered if, under a Member State's legislation, a company residing in that Member State and having a permanent establishment in another Member State suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a permanent establishment in its State of residence.[6]

24. In that context, a provision which allows losses incurred by a permanent establishment to be taken into account in calculating the profits and taxable income of the principal company constitutes a tax advantage.[7] 'Granting or not granting such an advantage for a permanent establishment situated in a Member State other than that in which that company is established must therefore be regarded as a factor likely to affect the freedom of establishment'.[8]

4 — In principle, according to the Commission, when a non-resident permanent establishment is transferred, the reincorporation of losses that were previously allowed may be justified by overriding reasons in the public interest relating to the balanced allocation of the power to impose taxes between Member States and the prevention of tax avoidance. However, the Commission takes the view that such a measure would only be proportionate if reincorporation is limited to the amount of profits made by that establishment, including any profits 'hidden' in the sale price upon transfer. In the event of uncertainty as to the value of the transaction, EU law would not prevent the State of residence of the parent company from checking that the sale price is consistent with the arm's length principle.

5 — See, among many other examples, judgments in *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21); *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 29); *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 36); *Oy AA* (C-231/05, EU:C:2007:439, paragraph 18); *FIM Santander Top 25 Euro Fi* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 14); and *Blanco and Fabretti* (C-344/13 and C-367/13, EU:C:2014:2311, paragraph 24).

6 — See, to that effect, judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 19 and the case-law cited).

7 — See, to that effect, judgments in *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 23); *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 32); and *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 20).

8 — Judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 32).

25. The refusal of that advantage only to permanent establishments situated in another Member State amounts to disadvantageous treatment for tax purposes, since it is liable to deter companies situated in a Member State of the European Union from carrying on business through a permanent establishment situated in another Member State. However, in order for that difference in treatment to amount to a restriction of the kind prohibited by Article 49 TFEU, the case-law of the Court requires that the situations be objectively comparable. [9]

26. In other words, unless justified by an overriding reason in the public interest, [10] such a difference in treatment is compatible with the Treaty provisions on the freedom of establishment only if it relates to situations which are not objectively comparable. [11]

2. The requirement of objective comparability

a) Criteria

27. Even though the notion of discrimination, rather than a mere impediment or restriction, might spring to mind when considering the requirement that purely national and cross-border situations must be objectively comparable in order to penalise, on the basis of the exercise of a freedom of movement, a difference in tax treatment between non-residents and residents (in the present case, between a company established in Germany with a permanent establishment in Austria, and a company established in Germany with a permanent establishment in the same territory), this requirement is a consistent feature of the case-law of the Court concerning the relationship between the Treaty provisions on the major freedoms of movement and direct taxation at national level. [12]

28. In the case-law of the Court, the tax situations of residents and non-residents are in most cases found to be objectively comparable [13] and the comparison must be conducted having regard to the aim pursued by the national tax provisions at issue. [14]

29. However, care should be taken not to limit the analysis to the aim of the measure in question, as this risks producing a biased view of the overall tax situation of the person to whom the measure is addressed.

9 — See, to that effect, judgments in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 46); *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 17); *A* (C-123/11, EU:C:2013:84, paragraph 33); and *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 23).

10 — See, to that effect, judgment in *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 25).

11 — I note that, in the judgment in *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758), the Court departed from this traditional approach and reviewed the comparability of the situations in its examination of the possible justifications for the restriction previously established (paragraphs 28 to 31 and paragraph 52).

12 — Although the Court has become increasingly reluctant to speak of discrimination, while continuing to require that the situations must be comparable, this might be so that it can retain its freedom to examine, as justifications, overriding reasons in the public interest and not only the justifications listed exhaustively in the Treaty. Except for the free movement of goods (which is not in issue), the only justifications for discrimination allowed under the Treaty are public policy, public security and public health. The possibility of relying on these grounds in relation to direct taxation is remote. The Court has indicated in its case-law that these are the only justifications permitted in cases of discrimination, thereby precluding *ipso facto* overriding reasons in the public interest. However, the Court has occasionally contradicted itself in this regard. Thus, in its judgment in *Svensson and Gustavsson* (C-484/93, EU:C:1995:379), after expressly ruling that the discrimination found to exist could not be justified by overriding reasons in the public interest, the Court nevertheless continued its reasoning by examining whether or not to accept the argument of coherence of the tax system. Although that argument was ultimately rejected, the Court, strictly speaking, should not have examined it, as this justification was not expressly provided for by the Treaty.

13 — In relation to permanent establishments abroad, the Court has, for example, held, in its judgment in *X Holding* (C-337/08, EU:C:2010:89), that 'the situation of a resident parent company wishing to form a single tax entity with a resident subsidiary and the situation of a resident parent company wishing to form a single tax entity with a non-resident subsidiary are objectively comparable with regard to the objective of a tax scheme such as that at issue in the main proceedings in so far as each seeks to benefit from the advantages of that scheme, which, in particular, allows the profits and losses of the companies constituting the single tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes' (paragraph 24).

14 — See, to that effect, judgments in *X Holding* (C-337/08, EU:C:2010:89, paragraph 22); *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 17); *A* (C-123/11, EU:C:2013:84, paragraph 33); and *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 25).

30. If it is accepted that the likely aim of a measure allowing a taxpayer to deduct losses incurred by its permanent establishments is to reduce the tax base of that taxpayer, and this measure is examined in the abstract, the situation of a company vis-à-vis a resident establishment and the situation of a company vis-à-vis a non-resident establishment will still be comparable. Both wish to benefit from the deduction in order to reduce their tax base.[15]

31. In short, as Advocate General Jääskinen recently explained in his Opinion in *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:429), the factor which is crucial for the purpose of comparing the situations of resident and non-resident taxpayers in order to determine whether there is any prohibited restriction under the Treaty 'is *not so much the objective* of the legislation at issue ..., *but rather* the fact that a Member State's legislation cannot establish a difference in treatment which has the *practical effect* of ultimately placing *a heavier tax burden* on non-residents and which is thus capable of discouraging them from exercising that freedom'.[16]

32. This methodology calls for a preliminary examination of whether or not the Member State in question (in this case, the 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.

b) Application

33. Generally speaking, those cases in which the Court has held that the lack of objective comparability between the respective situations of residents and non-residents renders the difference in tax treatment not incompatible with the freedoms of movement are few and far between.[17]

34. As regards the issue arising in the present case, that is to say, the deduction by a company established in one Member State of the losses incurred by a permanent establishment situated in another Member State, I would summarise the case-law of the Court in the following manner.

35. In cases concerning this issue, the Court has consistently held that a restriction on the freedom of establishment exists after finding to be comparable the situations of, on the one hand, a resident company in one Member State with a permanent establishment in another Member State and, on the other, a resident company in a Member State with a permanent establishment in the same Member State. This finding of comparability may be express[18] or implied.[19]

36. The Court has also found that situations are comparable where a Member State has decided to tax the profits of permanent establishments situated in other Member States. In those situations, the Member State 'has equated those establishments with resident permanent establishments'.[20]

15 — As Advocate General Kokott pertinently noted in her Opinion in *A* (C-123/11, EU:C:2012:488), 'if the Court finds it sufficient here that in both cases resident taxable companies seek to benefit from a tax scheme, an examination of that condition is a mere formality because it will be fulfilled in each case' (point 40).

16 — Point 55. In his Opinion, Advocate General Jääskinen also supports the idea that the situation must be viewed 'as a whole', considering that ' *all taxation* relating to the income [at issue] should rather be *incorporated* into the analysis' (point 62, my emphasis).

17 — These cases include the fundamental non-comparability of the situations of residents and non-residents in relation to tax provisions on advantages linked to the personal and family situation of the taxpayer (unless the non-resident does not have substantial income in his State of residence). See judgments in *Schumacker* (C-279/93, EU:C:1995:31) and, for a recent application, *Kieback* (C-9/14, EU:C:2015:406). See also judgments in *Blanckaert* (C-512/03, EU:C:2005:516) and *Schulz-Delzers and Schulz* (C-240/10, EU:C:2011:591).

18 — See, inter alia, judgments in *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 19); *A* (C-123/11, EU:C:2013:84, paragraph 35); and *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200, paragraph 26).

19 — See judgments in *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraphs 33 and 34); *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraphs 25 and 26); and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraphs 35 to 39).

20 — Judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 24). See, to that effect, also judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773), in which the Court held that 'once a Member State, unilaterally or by a convention, imposes a charge to income tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders becomes comparable to that of resident shareholders' (paragraph 68).

37. By contrast, the respective situations of residents and non-residents are not comparable in relation to the tax system of a Member State if that Member State does not have, or does not exercise, the power to tax non-residents.

38. It is that same requirement which accounts for the presumption laid down by the Court in its judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), according to which 'permanent establishments situated in another Member State … are not in a situation comparable to that of resident permanent establishments *in relation to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits*'.[21]

39. This idea is not new. Thus, in its judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773), the Court had already held that the individual shareholders of a parent company not resident in the United Kingdom could not benefit from the same tax credit as the individual shareholders of a parent company resident in the United Kingdom in respect of dividends paid by subsidiaries resident in the United Kingdom when no UK tax was levied on those outbound dividends. The Court had stated in its judgment that matters would be different if, pursuant to a double taxation convention or on the basis of a unilateral decision, the United Kingdom had retained the right to levy UK income tax on outbound dividends.

40. In the light of these considerations, the Court held that Articles 49 TFEU and 63 TFEU 'do not prevent a Member State, on a distribution of dividends by a company resident in that State, from granting companies receiving those dividends which are also resident in that State a tax credit equal to the fraction of the corporation tax paid on the distributed profits by the company making the distribution, when it does not grant such a tax credit to companies receiving such dividends which are resident in another Member State and are not subject to tax on dividends in the first State'.[22]

41. Therefore, to conclude, it is only if the difference in treatment concerns comparable situations that it is possible to find that a restriction on the freedom of establishment exists, a restriction which can only be declared compatible with the Treaty if it is justified by an overriding reason in the public interest.

B – *Application to the present case*

1. The need to distinguish between two periods of application of the German legislation in question

42. Before the 1999 year of assessment, it was possible to deduct from all of the income earned by an undertaking established in Germany the losses incurred by a permanent establishment situated in another Member State. As a rule, those losses were reincorporated in two situations: when the permanent establishment established abroad made profits (in which case, to the extent of those profits), or in the event of the conversion, transfer or closure of the permanent establishment. However, with effect from the 1999 year of assessment, Paragraph 52(3) of the EStG repealed the first sentence of Paragraph 2a(3) of the EStG and made it impossible for such losses to be deducted.

43. This legislative amendment accounts for the two questions referred to the Court by the national court, since each question relates to a different set of legal rules.

21 — Paragraph 24. My emphasis.

22 — Judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 74). For a recent case in which the Court found that the objective difference in situation stemmed from the waiver by a Member State of the exercise of its powers of taxation over the dividends distributed by companies resident in another Member State following the conclusion of a double taxation convention, see judgment in *Kronos International* (C-47/12, EU:C:2014:2200, paragraphs 80 to 82).

2. The first question referred

44. By its first question, the national court asks whether Article 49 TFEU precludes a provision such as Paragraph 52(3) of the EStG, which provides for the reincorporation of losses of a non-resident establishment previously taken into account in order to reduce the tax base of the principal resident company, not because profits were made, but because of the transfer of that establishment to another, also non-resident, company limited by shares belonging to the same group as the transferor.

45. As the national court itself pointed out, this is not the first time that the tax system in question has been referred to the Court.

a) The existence of a restriction

46. In its judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588), the Court considered that this system restricted the freedom of establishment but decided that the reincorporation of losses — in that case, when profits were made by the permanent establishment established abroad which had incurred the losses and not when that establishment was transferred — was justified by the need to guarantee the coherence of the German tax system.[23] The measure was also held to be appropriate to achieve this objective, and proportionate to it.[24]

47. Before concluding that a restriction existed, the Court implicitly accepted that the situations were comparable, stating that, by allowing the principal company to deduct the losses incurred by its permanent establishment situated in Austria, the Federal Republic of Germany had 'granted a tax advantage to the resident company with the permanent establishment situated in Austria, in the same way as if that permanent establishment had been situated in Germany'.[25]

48. The Court then held that, by reincorporating the losses of the permanent establishment situated in Austria into the tax base of the principal company, the German tax system had withdrawn the benefit of that tax advantage and had 'thus subjected resident companies with permanent establishments in Austria to less favourable treatment than that enjoyed by resident companies with permanent establishments situated in Germany'.[26]

49. That conclusion called for an examination of the possible overriding reasons in the public interest capable of justifying the restriction on the freedom of establishment.[27]

b) The existence of a justification

50. In the first place, the Court considered in its judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588) that the reincorporation of losses when profits were made by the permanent establishment established abroad which had incurred those losses was justified by the need to guarantee the coherence of the German tax system.[28] Furthermore, the measure was held to be appropriate to achieve that objective, and proportionate to it.[29]

23 — Paragraph 43.

24 — Ibid. (paragraphs 44 and 45).

25 — Ibid. (paragraph 35).

26 — Judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 37).

27 — Ibid. (paragraph 40). See also, to that effect, judgments in *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 35) and *A* (C-123/11, EU:C:2013:84, paragraph 33).

28 — Paragraph 43.

29 — Ibid. (paragraphs 44 and 45).

51. According to the Court, 'the reintegration of losses provided for by the German tax system at issue in the main proceedings cannot be dissociated from their having earlier been taken into account. That reintegration, in the case of a company with a permanent establishment in another State in relation to which that company's State of residence has no power of taxation … reflects a logical symmetry. There was thus a direct, personal and material link between the two elements of the tax mechanism at issue in the main proceedings, the said reintegration being the logical complement of the deduction previously granted'.[30]

52. It must be stated that the same logical symmetry prevails when a permanent establishment situated abroad is transferred.

53. In its judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588), the Court had already observed that 'the assessment that the restriction arising from the said tax system is justified by the need to ensure the coherence of that system [cannot] be called into question by the fact … that the principal company disposed of its permanent establishment and that the profits and losses made by that establishment throughout its existence end with a negative result'.[31] Indeed, 'the reintegration of the amount of the permanent establishment's losses in the results of the principal company is the indissociable and logical complement of their having previously been taken into account'.[32]

54. In the second place, although it is not necessary for several justifications to be present in order for it to be concluded that a restriction on the freedom of establishment is not incompatible with the Treaty,[33] I take the view that the aim of balanced allocation of the power to impose taxes which, as the Court reiterated in its judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), 'has the objective of safeguarding the symmetry between the right to tax profits and the right to deduct losses',[34] can also be relied on to justify the reincorporation of losses provided for by German law in the event of transfer of a permanent establishment.[35]

55. If a Member State (the Federal Republic of Germany in this case) 'were denied the power to reincorporate the losses thereby deducted into the taxable profit of the [German] company carrying out the transfer, when it has lost the power to tax any future profits, arrangements of the above kind would artificially erode its tax base and, therefore, affect the allocation of the power to impose taxes resulting from the [German-Austrian Convention]'.[36]

56. As the Court explained in its judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), 'the need to safeguard that symmetry means that the losses deducted in respect of the permanent establishment must be capable of being offset by taxation of the profits made by it under the tax jurisdiction of the Member State in question, that is to say, *both the profits made throughout the period when the permanent establishment belonged to the resident company and those made at the time of the permanent establishment's transfer*'.[37]

30 — Judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 42).

31 — Paragraph 53.

32 — Ibid. (paragraph 54).

33 — Judgment in *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 40).

34 — Paragraph 32 and the case-law cited.

35 — Indeed, the requirements of coherence of the tax system and the balanced allocation of powers of taxation coincide (see, to that effect, judgment in *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 80).

36 — Judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 30). That case concerned the Kingdom of Denmark.

37 — Paragraph 33. My emphasis.

57. In the present case, in contrast to the provision made in the Danish legislation giving rise to the judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), any profits made when a permanent establishment established in Austria is transferred are not taxable in Germany. The reincorporation of losses previously taken into account when the transfer takes place is therefore logical.

58. The Court has also considered that the objective of the balanced allocation of the power to impose taxes between Member States could be jeopardised by giving taxpayers 'the option to have their losses taken into account in the Member State in which they are established or in another Member State … as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred'.[38] I am of the view that the same applies when a taxpayer, confronted with the possibility of reincorporating the profits of its non-resident permanent establishment to the extent of the previously-deducted losses, is completely free to decide on the amount of the price of the transfer of that establishment and, thereby, deny a Member State its power to reincorporate any subsequent profits of the establishment into its taxable income.

59. Lastly, in the third place, I would also refer to the objective of preventing tax avoidance which, as the Court has pointed out, is linked to the objective of the balanced allocation of the power to impose taxes.[39]

60. 'Conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory is such as to undermine the right of the Member States to exercise their tax jurisdiction in relation to those activities and jeopardise a balanced allocation between Member States of the power to impose taxes'.[40]

61. Combined with the difficulty in determining the value of intra-group transfers having regard to the arm's length principle which must prevail in these circumstances, the transfer, within the same group, of a permanent establishment established abroad after deducting losses from it could correspond to the situation described above.

62. Consequently, I consider that legislation such as that at issue in the main proceedings is justified in the light of the coherence of the relevant tax system, and that this overriding reason in the public interest may in some circumstances be coupled with the reasons relating to a balanced allocation of the power to impose taxes and the prevention of tax avoidance.

c) Proportionality and inapplicability of the Marks & Spencer exception

63. The proportionality of the legislation in question remains to be examined.

38 — Judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 46).

39 — Judgment in *Oy AA* (C-231/05, EU:C:2007:439, paragraph 62).

40 — Idem. In actual fact, the overriding reasons in the public interest accepted as justifying national rules that do not permit losses relating to a business pursued abroad to be taken into account, when that business is not taxed, are far more numerous and are combined in a range of ways in the case-law of the Court. Advocate General Kokott reviewed them in the Opinion delivered in *Commission* v *United Kingdom* (C-172/13, EU:C:2014:2321). In the Advocate General's opinion, 'the Court now describes this as "ensuring the cohesion of the tax system" [see judgment in *K*, C-322/11, EU:C:2013:716, paragraphs 64 to 71], "preservation of the allocation of the power to impose taxes between Member States" [see judgments in *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 45; *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraph 31; *X Holding*, C-337/08, EU:C:2010:89, paragraph 28; *A*, C-123/11, EU:C:2013:84, paragraph 42; *K*, C-322/11, EU:C:2013:716, paragraph 55; and *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 32], "safeguarding the symmetry" between taxation of profits and deduction of losses [see judgments in *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 58, and *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 32 and the case-law cited], preventing "losses being used twice" [see judgments in *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraphs 47 and 48; *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraphs 35 and 36; and *A*, C-123/11, EU:C:2013:84, paragraph 44] or preventing "tax avoidance" [see judgments in *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 49; *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraphs 35 and 36; and *A*, C-123/11, EU:C:2013:84, paragraph 45]. See also *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 80) and *K* (C-322/11, EU:C:2013:716, paragraph 72), which regard the justifications of tax cohesion and the allocation of the power to impose taxes as at least partially identical. This case-law is further reinforced by the Court's statements regarding the objective comparability of situations which, as I have explained, … attach crucial importance to the issue of whether or not a Member State taxes a foreign activity' (point 31).

64. When there are no possibilities open to a Member State to tax possible profits made upon the transfer of a non-resident permanent establishment that has incurred losses, national legislation such as that at issue in the main proceedings seems to me to be not only appropriate for the purpose of achieving the objectives pursued, but also proportionate to those objectives.

65. It is true that, in its judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763), the Court held that the restrictive measure at issue was disproportionate. In that judgment, the Court considered that the freedom of establishment had been impaired when a non-resident subsidiary had exhausted the possibilities available in its State of residence of having the losses taken into account, and that there was, moreover, no means of having such losses taken into consideration in the future.[41] In that exceptional case, the resident parent company must be entitled to deduct the losses of such a non-resident subsidiary from the income taxed in its own State of residence.

66. The national court made it clear that it was uneasy with this exception to the justification for a restriction on the freedom of establishment, which the Court has consistently imposed since its judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763). The recent views taken by some Advocates General in that connection,[42] the volume of academic literature devoted to the issue[43] and the written observations submitted by the various Member States and the Commission in the present case confirm the difficulties in applying that exception. However, the Court has recently expressly confirmed its application.[44]

67. In any event, it must be stated that the intervention of the Republic of Austria dispelled all doubts as to the possible existence of definitive losses. The losses at issue in the main proceedings are not definitive[45] and it is therefore not necessary to go on to examine whether or not the exception can be applied.

68. Furthermore, without prejudice to the jurisdiction of the national court in this respect, there is nothing in the documents forwarded to the Court indicating that the taxpayer adduced evidence in rebuttal.

3. The second question referred

69. By its second question, the national court asks whether Article 49 TFEU precludes a provision such as Article 23(1)(a) of the German-Austrian Convention — according to which income from Austria is to be exempt from the basis of assessment for German taxation if that income can be taxed in Austria — if losses accrued in an Austrian permanent establishment of a German company limited by shares can no longer be taken into account in Austria because the permanent establishment is sold to an Austrian company limited by shares belonging to the same group as the German company.

41 — Paragraph 55.

42 — See, in this regard, the Opinions of Advocate General Kokott in *A* (C-123/11, EU:C:2012:488, points 47 to 54) and in *Commission* v *United Kingdom* (C-172/13, EU:C:2014:2321, points 49 to 53), and the Opinion of Advocate General Mengozzi in *K* (C-322/11, EU:C:2013:183, points 63 to 89).

43 — For a recent attempt to summarise the difficulties posed by the Marks & Spencer exception in the light of the development of the case-law of the Court over the past ten years, see Lang, M., 'Has the Case Law of the ECJ on Final Losses Reached the End of the Line?', *European Taxation*, December 2014, p. 530 to 540. For an attempt to define the notion of definitive losses in the light of the Court's recent case-law, see, inter alia, Pezella, D., 'Final Losses under EU Tax Law: Proposal for a Better Approach', *European Taxation*, February/March 2014, p. 71 to 79.

44 — See judgment in *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraphs 33 to 36).

45 — According to the written observations of the Austrian Government, the losses of the Austrian permanent establishment accrued up to 2005 were in principle recoverable and capable of being deferred. The deferred losses could thus be set against any capital gain arising from the transfer, with any balance continuing to exist in principle for an unlimited period as deferred losses of Timac Agro. These losses could therefore be used at a later point in time if the applicant in the main proceedings resumed its business in Austria (paragraph 44 of the written observations of the Austrian Government). The losses could also be passed on to the transferee limited company if the permanent establishment was transferred 'in a tax neutral manner' (paragraph 46 of the written observations of the Austrian Government).

70. I agree with the French Government's submission, both in its written observations and at the hearing on 1 July 2015, that this question is based on the incorrect premiss that the losses incurred by the Austrian establishment of the applicant company in the main proceedings can no longer be taken into account in Austria because the establishment was sold to an Austrian company limited by shares.

71. The information supplied by the Austrian Government in the context of its written observations undeniably shows that the losses at issue in the main proceedings were not definitive.

72. Accordingly, the second question can be interpreted as enquiring whether Article 49 TFEU precludes a Member State's tax system, such as that at issue in the main proceedings, which, pursuant to a double taxation convention exempting from tax the income earned by permanent establishments situated in the other Member State party to the convention, prevents losses incurred by those establishments being taken into account.

a) Principal finding: objective non-comparability of the situations and absence of a restriction

73. In accordance with Articles 7(1) and 23(1) of the German-Austrian Convention, and unlike the situation which prevailed in respect of the pre-1999 tax years, the Federal Republic of Germany — by means of a legislative amendment — waived the tax power it previously exercised over losses relating to the 'revenue from the industrial or commercial activities of an establishment situated in a foreign State [which] is exempt from income tax under a double taxation convention'. [46]

74. Consequently, since there can be no tax advantage if there is no power of taxation, [47] the situation of a company such as Timac Agro does not seem to me to be comparable to that of a company established in Germany with a permanent establishment in Germany.

75. Furthermore, in view of the allocation of taxation powers provided for by the German-Austrian Convention, I fail 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.

76. In the absence of situations that are objectively comparable, legislation such as that at issue does not amount to a restriction on the freedom of establishment. [48]

b) Alternative finding: existence of a justification

77. However, if the Court should find that the situations are comparable and that a restriction exists, I consider that such a restriction would be justified.

46 — The first sentence of Paragraph 2a(3) of the EStG in the version applicable to the 1997 and 1998 years of assessment.

47 — According to the principle set out in paragraph 24 of the judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), previously applied in the judgment in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773).

48 — The fact of the matter is that the difference in treatment stems from 'the [Member States'] competence to define the criteria for allocating their powers of taxation as between themselves, with a view to eliminating double taxation' (judgment in *Gilly*, C-336/96, EU:C:1998:221, paragraph 30), the allocation of these powers necessarily occurring before the exercise of the powers of taxation.

78. The Court was previously called upon to consider a general mechanism for the exclusion of losses in *Lidl Belgium* (C-414/06, EU:C:2008:278). In that case, the national court asked whether Article 49 TFEU precluded a national tax system which does not allow a resident company, for the purposes of determining its profits and calculating its taxable income, to deduct losses incurred in another Member State by a permanent establishment belonging to it, when that tax system allows losses incurred by a resident permanent establishment to be deducted.

79. In that judgment, the Court considered that the overriding reasons in the public interest relating to the need, first, to preserve the allocation of the power to impose taxes between the Member States concerned and, secondly, to prevent the danger that losses may be taken into account twice were well-founded.[49]

80. The Court also took the view that this kind of tax system was appropriate for ensuring the attainment of the abovementioned objectives[50] and was proportionate,[51] the company in question having failed to show that its non-resident subsidiary had exhausted the possibilities for having the losses incurred in the Member State in which it was situated taken into account for the accounting period concerned and also for previous accounting periods and there was no possibility for that subsidiary's losses to be taken into account in that State for future periods.[52]

81. The Court concluded that 'Article [49 TFEU] does not preclude a situation in which a company established in a Member State cannot deduct from its tax base losses relating to a permanent establishment belonging to it and situated in another Member State, to the extent that, by virtue of a double taxation convention, the income of that establishment is taxed in the latter Member State where those losses can be taken into account in the taxation of the income of that permanent establishment in future accounting periods'.[53]

82. It must be stated that all of the factors leading to that conclusion are present in the system at issue in the main proceedings and the Court's answer should be identical.

V – **Conclusion**

83. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Finanzgericht Köln as follows:

'(1) Article 49 TFEU does not preclude a national tax system which, having allowed losses incurred by a permanent establishment situated in a Member State other than the Member State where the company to which that establishment belongs is established to be taken into account, provides, for the purposes of calculating the tax on that company's income, for the fiscal reincorporation of such losses on account of the transfer of that establishment to another company limited by shares belonging to the same group as the transferor.

(2) Article 49 TFEU does not preclude a national tax system which does not allow a resident company to deduct from its tax base losses relating to a permanent establishment belonging to it and situated in another Member State, where, under a double taxation convention, the income of that permanent establishment is exempt from tax in the first Member State and subject to tax in the other.'

49 — Judgment in *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraphs 30 to 37).

50 — Ibid. (paragraph 43).

51 — Ibid. (paragraph 53).

52 — It should be recalled that these are the conditions set out in paragraphs 55 and 56 of the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763).

53 — Judgment in *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 54 and the operative part of the judgment).