



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 17 October 2019<sup>1</sup>

**Case C-405/18**

**AURES Holdings a.s.**  
**Other party:**  
**Odvolací finanční ředitelství**

(Request for a preliminary ruling from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic))

(Request for a preliminary ruling — Freedom of establishment — Tax legislation — Corporation tax — Transfer of a company's place of management from one Member State to another — Cross-border cross-period loss relief — Non-allowance of losses incurred prior to the transfer of the place of management to another Member State — Final losses in the case of a transfer of the place of management)

### I. Introduction

1. This case concerns the interpretation of freedom of establishment under Article 49 TFEU read in conjunction with Article 54 TFEU. In particular, the question arises whether freedom of establishment permits a taxpayer, when relocating a company's place of management, to claim in the host State a tax loss incurred in previous years in another Member State.

2. The case is set in the context of an action brought by a Czech company which is claiming a loss before the Czech tax authorities. The company sustained that loss previously in the Netherlands. It was no longer able to take the loss into account there due to the transfer of its place of effective management to the Czech Republic and thus in the absence of economic activity in the Netherlands. Under Czech tax law, it is possible, in principle, to carry forward losses across periods. However, provision is made for this possibility only in respect of losses incurred under Czech fiscal sovereignty.

3. The Grand Chamber of the Court of Justice<sup>2</sup> ruled in 2005 that provision is to be made, exceptionally, for cross-border use of losses within a single tax period in the case of *final losses* in accordance with the principle of proportionality. But does this also apply across a group structure and across periods where the place of management is simply transferred (upon exit) to another Member State? In this regard, the Court has another opportunity — if it still wishes to adhere to the final losses exception<sup>3</sup> — to refine this category.

<sup>1</sup> Original language: German.

<sup>2</sup> Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763).

<sup>3</sup> See the criticism of the legal concept of final losses in the Opinion of Advocate General Mengozzi in *K* (C-322/11, EU:C:2013:183, points 66 et seq. and 87) and in my Opinions in *Commission v United Kingdom* (C-172/13, EU:C:2014:2321, point 41 et seq.) and *A* (C-123/11, EU:C:2012:488, point 50 et seq.).

## II. Legal framework

### A. EU law

4. The framework for the case in EU law is provided by freedom of establishment of companies or firms under Article 49 read in conjunction with Article 54 TFEU.

### B. Czech law

5. The Czech Law on income tax<sup>4</sup> regulates the possibilities for loss relief in Paragraphs 34 and 38n thereof.

6. Under Paragraph 34 of the Law on income tax, it is possible ‘to deduct from the tax base a tax loss incurred in and assessed for the previous tax period or part thereof, and to do so in up to five tax periods immediately following the period for which the tax loss is assessed’.

7. The provisions of Paragraph 38n of the Law on income tax define a tax loss and specify that ‘a tax loss shall be administered in the same way as a tax obligation ... The tax loss shall be assessed ...’.

## III. Main proceedings

8. AURES Holdings a.s. (Aures) (originally AAA Auto International a.s.) is the successor company to the Dutch company AAA Auto Group N.V., including its branch AAA Auto Group N.V. — organisational entity. The company’s place of management was in the Netherlands. On 1 January 2008, it set up an organisational entity in the Czech Republic. Under Czech law, an organisational entity does not have autonomous legal personality.

9. According to Aures, on 1 January 2009 its place of effective management was relocated, that is, the address of the place from which it is effectively managed (‘the place of management’) was moved from the Netherlands to the Czech Republic, to the same address as the aforementioned organisational entity. This change of address was entered in the Czech commercial register on 19 April 2013, while the original official address (registered office) remained in Amsterdam (Netherlands). Aures is registered in the commercial register there and its internal organisation remains governed by Netherlands law. Aures is still a taxable entity in the Netherlands, but does not carry on any economic activity there at present.

10. Before Aures became resident for tax purposes in the Czech Republic, it had suffered a tax loss in the Netherlands in 2007, and apparently also in 2008, of EUR 2 792 187, which had been assessed in the Netherlands in accordance with Netherlands tax law.

11. In the view of Aures, the tax loss from 2007 and 2008 could not be claimed in the relevant tax period in the Netherlands. It therefore requested that its losses be taken into account in order to reduce its tax base in the Czech Republic. In respect of the tax bases for 2009 and 2010 the losses incurred by Aures were erroneously taken into account. In the absence of profits, there was no offsetting in 2011. Aures is now seeking to claim the remainder of its tax loss in the Czech Republic pursuant to Paragraphs 34 and 38n of the Law on income tax in order to reduce the tax base for the 2012 tax period.

<sup>4</sup> Zákon č. 586/1992 Sb., o daních z příjmů — Law No 586/1992 on income tax, Law on the taxation of income of natural and legal persons, income tax and corporation tax.

12. On 19 March 2014, the tax authority initiated a procedure in relation to Aures. The aim of the tax authority's investigation was to assess the correctness of the tax loss claimed in 2012. The tax authority concluded that the tax loss cannot be set off under Paragraph 38n of the Law on income tax. Aures appealed against the payment assessment, but the appeal was dismissed by the tax appeals authority. Aures brought proceedings against that decision unsuccessfully. It lodged an appeal on a point of law against the judgment.

#### **IV. Request for a preliminary ruling and proceedings before the Court**

13. By decision of 31 May 2018, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to make an order for reference pursuant to Article 267 TFEU and referred the following questions to the Court for a preliminary ruling:

- '(1) Can the concept of freedom of establishment within the meaning of Article 49 TFEU be held to cover a simple transfer of the place of a company's management from one Member State to another Member State?
- (2) If so, is it contrary to Article 49, Article 52 and Article 54 TFEU for national law not to allow an entity from another Member State, when relocating its place of business or place of management to the Czech Republic, to claim a tax loss incurred in that other Member State?'

14. In the proceedings before the Court, Aures, the Czech Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of Spain, the Kingdom of the Netherlands, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Commission submitted written observations on these questions and, with the exception of the Italian Republic and together with the French Republic, took part in the hearing on 13 May 2019.

#### **V. Legal assessment**

15. In the main proceedings Aures is challenging a payment assessment issued by the Czech tax authority in which losses incurred by it in the Netherlands were not taken into account. The request for a preliminary ruling thus concerns the compatibility of the non-allowance of the tax loss with EU law. This is, in turn, against the background of the fact that, under Paragraph 34 of the Czech Law on income tax, losses incurred in the past tax period may be taken into account. However, according to the referring court, this does not apply to losses incurred abroad prior to the transfer of the place of management to the Czech Republic.

##### **A. The first question**

16. The referring court asks, first of all, whether a simple transfer of the place of a company's management from one Member State to another Member State falls within the scope of freedom of establishment under Article 49 TFEU.

17. It must be observed that Article 49 TFEU, read in conjunction with Article 54 TFEU, extends the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered office, their central administration or principal place of business within the European Union.<sup>5</sup>

<sup>5</sup> See judgment of 25 October 2017, *Polbud — Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 32).

18. The Court has ruled that the freedom of establishment encompasses the right to transfer the principal place of business of the company to another Member State.<sup>6</sup> Furthermore, a company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status as a company of the former Member State, may rely on Article 49 TFEU for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State in connection with such a transfer.<sup>7</sup>

19. Consequently, contrary to the view taken by Spain, a simple transfer of the place of management of a company, in this case Aures, falls within the scope of freedom of establishment under Article 49 TFEU read in conjunction with Article 54 TFEU.

## **B. The second question**

20. The referring court also asks whether it is contrary to Article 49 and Article 54 TFEU for national law not to allow an entity from another Member State, when relocating its place of business or place of management to the Czech Republic, to claim a tax loss incurred in that other Member State.

21. First of all, it must be borne in mind that, according to settled case-law, although direct taxation falls within their competence, Member States must nonetheless exercise that competence consistently with EU law.<sup>8</sup>

22. In order for tax legislation of a Member State to infringe the freedom of establishment of companies, it must result in a difference in treatment to the detriment of the companies exercising that freedom; that difference in treatment must relate to objectively comparable situations and must not be justified by an overriding reason in the public interest or proportionate to that objective.<sup>9</sup>

### ***1. Difference in treatment to the detriment of the company***

23. It is possible under Czech law to deduct a tax loss from an earlier period from the tax base for corporation tax. However, under Paragraph 34 of the Law on income tax, that possibility is reserved solely for taxpayers who have suffered losses in the Czech Republic. The provisions at issue thus apply only to resident companies with domestic losses. Aures was not allowed to take into account its losses because it had sustained its tax loss during an earlier period abroad (in the Netherlands). This treatment excludes companies which transfer their place of management from another EU Member State to the Czech Republic from having losses previously suffered abroad taken into account. This constitutes a difference in treatment compared with companies which relocate their place of management within the Czech Republic.

24. Such a difference in treatment is liable to render less attractive the exercise of freedom of establishment through the transfer of the place of management from other EU Member States to the Czech Republic. It is, however, incompatible with the provisions of the Treaty only if it relates to situations which are objectively comparable and is not justified.

<sup>6</sup> See judgments of 27 February 2019, *Associação Peço a Palavra and Others* (C-563/17, EU:C:2019:144, paragraph 62), and of 25 October 2017, *Polbud — Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 32 et seq.).

<sup>7</sup> See judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 33).

<sup>8</sup> Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 29 and the case-law cited).

<sup>9</sup> See, to that effect, judgments of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 18); of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 20); and of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 167).

## 2. Objective comparability

25. It should be recalled that, according to the case-law of the Court, the comparability of a cross-border situation with an internal situation must be examined having regard to the objective pursued by the national provisions at issue.<sup>10</sup>

26. The objective of cross-period loss relief is to guarantee the ability-to-pay principle subject to the restrictions of the principle of periodicity. According to this technical principle, taxes are always levied for a certain period of time in order to ensure that the State has a continual and gradual stream of tax revenue. By taking losses into account across periods, it is intended to have regard, as far as possible, to a taxpayer's ability to pay, irrespective of any eventualities in the technical period chosen (1 year or 2 years for example).

27. In relation to a worldwide or Union-wide ability to pay, losses sustained are to be regarded as comparable in the context of cross-period loss deduction. Losses suffered domestically and abroad both reduce a taxpayer's ability to pay equally.

28. As far as comparability is concerned, the Court has focused thus far on whether the Member State concerned exercises any relevant tax powers. It thus expressly ruled that since the Federal Republic of Germany does not exercise any tax powers over the profits of a permanent establishment situated in Austria, the deduction of its losses no longer being permitted in Germany, the situation of such a permanent establishment 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.<sup>11</sup> This idea could also be applied to ('imported') losses sustained by companies formerly resident in one Member State which have transferred their place of management to another Member State.

29. However, recently in *Bevola* the Court expressly accepted, as regards final losses attributable to a non-resident permanent establishment, the comparability of taxed domestic and untaxed foreign permanent establishments,<sup>12</sup> such that it would now appear to presume comparability.

30. In any case, the criterion of comparability is vague. Given that all situations are comparable in some respect, if they are not identical,<sup>13</sup> this test should therefore be abandoned.<sup>14</sup> With regard to the transfer of the place of management, foreign and domestic companies are comparable, even though there are certainly doubts as to the comparability of the losses from the different periods to be set off (domestic and foreign losses, on the one hand, and domestic and domestic losses, on the other).

31. Those losses differ in the absence of a link between the unutilised losses and the tax powers of the Czech Republic and the fact that taxable ability to pay can only ever be determined in respect of a *single* tax creditor. The principle of taxation according to ability to pay should thus always be construed as territorial.<sup>15</sup>

<sup>10</sup> Judgments of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 31); of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 32); of 22 June 2017, *Bechtel* (C-20/16, EU:C:2017:488, paragraph 53); of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 28); and of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 22).

<sup>11</sup> Judgment of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 65), with reference to the judgments of 17 July 2014, *Nordea Bank* (C-48/13, EU:C:2014:2087, paragraph 24), and of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraphs 34 and 35).

<sup>12</sup> Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraphs 38 and 39).

<sup>13</sup> According to a German saying, you cannot compare apples with pears. Nevertheless, apples and pears do have things in common (both are pomes for example) and are thus also comparable in this regard.

<sup>14</sup> I had proposed this to the Court inter alia in my Opinions in *Nordea Bank* (C-48/13, EU:C:2014:153, points 21 to 28) and, building on that, *Memira* (C-607/17, EU:C:2019:8, point 46) and *Holmen* (C-608/17, EU:C:2019:9, point 38).

<sup>15</sup> See, for further detail, Kokott, J., *Das Steuerrecht der europäischen Union*, Munich 2018, § 3, paragraph 48 et seq., in particular paragraphs 54 and 55, a view almost certainly not shared by Advocate General Campos Sánchez-Bordona, Opinion in *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:15, point 37 et seq.), who evidently proceeds on the basis of a worldwide ('actual') capacity.



32. Comparability must nevertheless be presumed in this case. Consideration must be given to the abovementioned differences between losses incurred abroad before the company transferred its place of business to national territory and domestic losses from earlier tax periods when it comes to assessing justification. There is therefore a restriction of freedom of establishment.

### **3. Justification and proportionality**

33. A restriction of freedom of establishment may be justified by overriding reasons in the public interest. Justifications can be the preservation of the balanced allocation of the power to impose taxes between Member States (point 34 et seq.) and the avoidance of double use of losses (point 46 et seq.). In addition, the measure (here non-allowance of losses previously sustained abroad) must be proportionate, that is, appropriate to ensuring the attainment of its objective and not go beyond what is necessary to attain it (point 50 et seq.).<sup>16</sup>

#### **(a) The justification of the preservation of the balanced allocation of the power to impose taxes**

34. The balanced allocation of the power to impose taxes between Member States is a legitimate objective recognised by the Court.<sup>17</sup> That objective is an expression of the fiscal sovereignty of the Member States. This includes a State's right to protect its tax revenue, in particular with regard to profits generated in its territory (principle of territoriality, see 1.). Fiscal sovereignty also includes a State's right to organise its system of tax law autonomously (principle of autonomy, see 2.) and having regard to the principle of symmetry (see 3.). Lastly, it would be incompatible with a balanced allocation of the power to impose taxes between Member States if the taxpayer were free to choose the applicable system of tax law (see 4.). The balanced allocation of the power to impose taxes may make it necessary to apply to the economic activities of taxpayers resident in one of those Member States only the tax rules of that State in respect of both profits and losses.<sup>18</sup>

##### **(1) Consideration of the principle of territoriality**

35. The Court has ruled on a number of occasions that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country.<sup>19</sup> This also includes taking into account losses eligible at the time of exit. The right to tax capital gains therefore goes hand in hand with the duty for the exit State (here the Netherlands) to take losses into account.

36. The simple decision by a company to transfer its place of management to another Member State does not therefore establish a territorial link in the host State for past profits or losses, as these were made while residence for tax purposes was still in the previous Member State. The taking into account by the host State of a profit or a loss occurring before the transfer of the place of management could not only call into question the balanced allocation of powers of taxation between

<sup>16</sup> See judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 42); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 47); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 35).

<sup>17</sup> Judgments of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 50); of 6 September 2012, *Philips Electronics* (C-18/11, EU:C:2012:532, paragraph 23); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 45); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraphs 45 and 46).

<sup>18</sup> Judgments of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 50); of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 31); of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 54); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 45).

<sup>19</sup> Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraphs 44 and 45); of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 53 and the case-law cited); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 49); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 46).

the Member States but also lead to double taxation or double deduction of losses.<sup>20</sup> If the exit State enjoys the power of taxation for profits (in particular for hidden reserves), the host State can therefore have neither a right to tax those profits nor a duty to take into account the losses (corresponding to the hidden reserves). Non-allowance of losses previously incurred abroad is therefore a corollary of the principle of territoriality and thus follows from the Court's case-law on exit taxation.

## (2) *Consideration of the principle of autonomy*

37. This is also consistent with the principle of autonomy. As the Court has already ruled, the fundamental freedoms cannot have the effect of requiring the Member State of residence of a company to grant that company a use of losses for an amount originating solely from the tax system of another Member State.<sup>21</sup> Otherwise, the first Member State would see its fiscal autonomy limited by the exercise of fiscal power of the other Member State.<sup>22</sup>

38. As the Court has expressly stated,<sup>23</sup> 'losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer*,<sup>[24]</sup> by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward'. A Member State would then have to adapt its tax legislation to that of another Member State.

39. The same holds for taking into account losses which can no longer be used in the exit State (the Netherlands) in the wake of an exit. An obligation to take the losses into account in the host State (the Czech Republic) runs counter to the autonomy enjoyed by the Member States. Taking losses into account in the Czech Republic would therefore depend on whether or not legal provision is made for losses to be used in the Netherlands and, if so, in what amount.

## (3) *Consideration of the principle of symmetry*

40. The same conclusion follows from the principle of symmetry. According to the Court's case-law,<sup>25</sup> where the place of management is transferred from the exit State to another Member State, the exit State may tax the company's profits at the last possible moment (the time of exit), but it must also take into account its losses.

41. The principle of symmetry represents the application of the principle of coherence to the relationship between profits and losses.<sup>26</sup> It is based on an 'inverse' logic. The duty to take losses into account and the right to tax profits are two sides of the same coin and go together symmetrically or inversely.<sup>27</sup> The obligation to deduct losses thus rests only on the State which also has access to the

<sup>20</sup> As was expressly stated, in the opposite case, in the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 59).

<sup>21</sup> See judgments of 21 December 2016, *Masco Denmark and Damixa* (C-593/14, EU:C:2016:984, paragraph 41), and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 33).

<sup>22</sup> See, to that effect, judgments of 21 December 2016, *Masco Denmark and Damixa* (C-593/14, EU:C:2016:984, paragraph 41), and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438, paragraph 33).

<sup>23</sup> Judgment of 3 February 2015, *Commission v United Kingdom* (C-172/13, EU:C:2015:50, paragraph 33), and of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraphs 75 to 79 and the case-law cited).

<sup>24</sup> Judgment of 13 December 2005 (C-446/03, EU:C:2005:763).

<sup>25</sup> See judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 56 et seq.), and of 7 September 2006, *N* (C-470/04, EU:C:2006:525 paragraph 46 et seq.).

<sup>26</sup> Kokott, J., *Das Steuerrecht der europäischen Union*, Munich 2018, § 5 paragraph 87.

<sup>27</sup> See, inter alia, judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 58 and 59), and of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 60 et seq.).

corresponding profits. This is expressed in the formulation adopted by the Court according to which ‘the requirements of coherence of the tax system and the balanced allocation of powers of taxation coincide’.<sup>28</sup> If a State cannot tax profits from past periods, this justifies it also not being required to take into account losses from past periods.

42. It also follows from the principle of symmetry that, in the absence of a right to tax profits generated by Aures in the Netherlands, the Czech Republic is likewise not obliged to take into account the losses suffered there in the past.

*(4) No free choice of the system of tax law*

43. Lastly, the fiscal sovereignty of the Member States would be undermined if taxpayers were free to choose where they pay taxes and where they take into account their losses (‘risk of tax avoidance’).<sup>29</sup> As Sweden points out, the possibility of transferring losses incurred in the previous year by a non-resident company to a resident permanent establishment by relocating the place of management entails the risk that the company will transfer its place of management to the permanent establishment that generates the greatest profits at the highest tax rate. It is there that the financial value of the (transferable) losses is highest.

44. This would, in essence, lead to a right to choose for the taxable person, as Germany asserted at the hearing. By transferring its place of management, it would also be able to decide on the optimal tax utilisation of losses previously incurred. Such a right to choose does not, however, follow from EU law.<sup>30</sup>

*(5) Interim conclusion*

45. Accordingly, the justification of the preservation of the balanced allocation of the power to impose taxes between Member States applies.

*(b) The justification of avoidance of double use of losses*

46. Avoidance of double use of losses can also justify the refusal to take losses into account. The justification of avoidance of double use of losses has been recognised by the Court since the judgment in *Marks & Spencer*.<sup>31</sup> Accordingly, Member States must at least have the possibility to be able to prevent a double loss deduction.<sup>32</sup>

47. In fact, extending deduction of losses (particularly losses incurred in a preceding tax period) to foreign losses runs the risk of a double use of losses.

28 See judgments of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraphs 50 et seq. and 65 et seq.); of 4 July 2013, *Argenta Spaarbank* (C-350/11, EU:C:2013:447, paragraph 53); and of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 80); and my Opinions in *Timac Agro* (C-388/14, EU:C:2015:533, point 47); *Nordea Bank* (C-48/13, EU:C:2014:153, point 43); and *National Grid Indus* (C-371/10, EU:C:2011:563, point 99).

29 Judgments of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 38 et seq.); of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 51 et seq.); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 49 et seq.).

30 See, for comparisons with a right to choose for the taxable person, judgments of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 32); of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 55); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 46); and my Opinions in *Memira* (C-607/17, EU:C:2019:8, points 61 and 62); and *Holmen* (C-608/17, EU:C:2019:9, points 77 and 78).

31 Judgments of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 35 et seq.); of 29 March 2007, *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraph 47); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 47).

32 See judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 47 and 48).



48. This risk becomes tangible here because Aures is in a position to carry on economic activity both at the registered office in the Netherlands and at its place of permanent establishment in the Czech Republic (which has been the place of management since 1 January 2009). Taking into account the tax losses incurred in the Netherlands in the Czech Republic is therefore subject to the risk that the same losses would also be taken into account (again) in future in the Netherlands.

49. This holds true especially because provision is made in the Netherlands for a nine-year period for taking losses into account and it is not clear from the Netherlands loss carry-forward assessment notice whether the losses had already been taken into account in the Czech Republic.

***(c) Compliance with the principle of proportionality***

***(1) Equally appropriate, less severe method***

50. The taking into account of the losses previously suffered by Aures in the Netherlands would also have to be proportionate. It must therefore be appropriate to attaining legitimate objectives and not go beyond what is necessary.<sup>33</sup>

51. It should be stated, first of all, that taking into account the losses sustained by Aures in the Netherlands under the Law on income tax is appropriate to attaining the objectives of the preservation of the balanced power to impose taxes, avoidance of double use of losses and prevention of tax avoidance.

52. Legal measures are also needed to attain these objectives. Double use of losses could also possibly be prevented by means of exchange of data, information requirements and so on. However, such an approach would not be appropriate in any case having due regard to the preservation of the balance of the power to impose taxes between Member States.

53. An equally appropriate, less severe method in this regard is not evident. Furthermore, the preservation of the balanced allocation of the power to impose taxes between Member States outweighs the taxpayer's interest in having its losses made in the Netherlands now utilised in the Czech Republic, and thus in choosing the system of tax law applicable to it.

***(2) Disproportionality on account of the existence of final losses?***

54. According to the Court's case-law on 'final' losses, it is nevertheless disproportionate if the Member State refuses to allow a parent/principal company to take losses into account even though the foreign subsidiary/permanent establishment has exhausted all possibilities of having the losses taken into account and it is no longer possible for those losses somehow still to be used. This would be the case, however, only if the losses sustained by Aures are actually final losses within the meaning of the *Marks & Spencer* ruling.<sup>34</sup>

<sup>33</sup> See judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 42); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 47); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 35).

<sup>34</sup> Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 55).

55. That is not so. First, the situation at issue is not similar to the situation for which the Court developed the legal concept of final losses (see point 56 et seq.). The legal concept is contentious in any case,<sup>35</sup> has led to many ensuing problems<sup>36</sup> and should not therefore be extended further to other situations. Second, losses which can be carried forward are not generally final (point 61 et seq.). Third, there is no finality of the losses because the registered office continues to be in the Netherlands (point 66 et seq.). Fourth, extending the case-law on final losses would lead to a conflict with the case-law on exit taxation (point 72 et seq.).

*(i) No situation comparable with final losses*

56. According to the Court's ruling in *Marks & Spencer*, losses sustained by a foreign subsidiary could be taken into account in the tax base of the domestic parent company provided they are final.<sup>37</sup> In *Bevola* the Court also applied that case-law to foreign permanent establishments.<sup>38</sup>

57. However, contrary to the view asserted by Aures, no such situation exists here, as, first, this case-law applies only to losses incurred in the same tax period as the profits, which can no longer be taken into account at the subsidiary/permanent establishment, but only at the parent/principal company. That case-law did not concern a cross-period loss carry-forward for a single taxpayer.

58. Second, the latter decision only concerned the case where a permanent establishment has been closed and its losses could thus no longer be used. In this case, the registered office of Aures continues to be in the Netherlands, such that it is still possible to take the losses into account there.

59. Third, as is pointed out by the Czech Republic and the Netherlands in particular, the case-law on final losses concerns the termination of the taxable entity's activity. That cannot be said to be the case with Aures in the context of the transfer of its place of management.

60. Fourth, it was the reverse situation in the *Bevola* decision in so far as losses sustained by a foreign permanent establishment were to be taken into account at a resident principal company. The State in which the registered office was located was therefore the only possibility as the place in which the losses could be used. However, the registered office in the present case continues to be in the Netherlands. Transferring the place of management to the Czech Republic does not in any way affect Aures' original and continued residence for tax purposes in the Netherlands.

*(ii) Losses which can be carried forward are not generally final*

61. Furthermore, losses which can be carried forward are not generally final. The Court has ruled that it is not contrary to the fundamental freedoms if a loss which can be set off transnationally is always to be established as a final loss at the end of the assessment period.<sup>39</sup>

<sup>35</sup> See Opinion of Advocate General Mengozzi in *K* (C-322/11, EU:C:2013:183, points 66 et seq. and 87), and my Opinions in *Commission v United Kingdom* (C-172/13, EU:C:2014:2321, point 41 et seq.) and *A* (C-123/11, EU:C:2012:488, point 50 et seq.).

<sup>36</sup> See, for example, without any claim to be exhaustive, the Court's subsequent case-law which has become necessary thus far: judgments of 19 June 2019, *Memira Holding* (C-607/17, EU:C:2019:510); of 19 June 2019, *Holmen* (C-608/17, EU:C:2019:511); of 4 July 2018, *NN* (C-28/17, EU:C:2018:526); of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424); of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829); of 3 February 2015, *Commission v United Kingdom* (C-172/13, EU:C:2015:50); of 7 November 2013, *K* (C-322/11, EU:C:2013:716); of 21 February 2013, *A* (C-123/11, EU:C:2013:84); and of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278).

<sup>37</sup> See judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 56 et seq.).

<sup>38</sup> Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 64). See the critical assessment in Desens, M., in Musil/Weber-Grellet (ed.), *Europäisches Steuerrecht*, 2019, § 2 GewStG, paragraph 47.

<sup>39</sup> See judgment of 3 February 2015, *Commission v United Kingdom* (C-172/13, EU:C:2015:50, paragraphs 31 and 36).

62. That decision was made in treaty infringement proceedings brought against the United Kingdom, which had implemented the *Marks & Spencer* ruling. The Commission considered that the new United Kingdom rules under which final losses must be established at the end of the tax period in which they were sustained also infringed EU law. The Court took the opposite view, however.<sup>40</sup>

63. If it is not contrary to the fundamental freedoms that only losses which can be established as final at the end of a tax period are to be regarded as final, it can be inferred from this that there can be no subsequent change to finality once absent.<sup>41</sup> In any case, the statements made in *Commission v United Kingdom* indicate that at most the loss in the subsidiary made in the last year of liquidation must still be able to be set off (transnationally) somehow, but not the losses accumulated up to then and carried forward under national (here Netherlands) law.

64. As I have already stated in my Opinions in *Holmen* and *Memira Holding*,<sup>42</sup> and as France and the United Kingdom rightly asserted at the hearing, losses which were regarded as non-final at the end of an assessment period cannot subsequently become final losses. Otherwise a Member State would be able to determine another Member State's duty to take losses into account by making changes to its tax law as required. That is contrary to the principle of autonomy.

65. The losses sustained by Aures were not final at the end of the relevant assessment period (2007 and 2008) because they were eligible to be carried forward. This holds at least for the losses from 2007 (which were carried forward to 2008) and, in my view, also for the further losses from 2008, as they were utilisable in the Netherlands for a further 9 years.

*(iii) No finality of the losses because of the continued presence of the registered office*

66. The non-finality of the 'new' losses from 2008 could at most be affected by the exit if the possibility of taking those losses into account were actually to cease to exist.

67. This too is not the case for Aures, as its registered office continues to be in the Netherlands. As the United Kingdom and France also state, there is always a possibility of resuming economic activities. The losses could thus be set off against future profits. Aures would be able to achieve this at any time if it carries on any economic activities at its registered office.

68. This is confirmed by the existing entry for Aures in the Netherlands commercial register. In addition, as I have already stated in point 53, it is possible to take losses into account in the Netherlands for up to 9 years. At the time when the losses suffered by Aures in the Netherlands were not allowed to be used in the Czech Republic, it was therefore still possible to take the losses into account in the Netherlands (by resuming economic activity).

69. Furthermore, most Member States make provision for exit taxation. Thus, in principle, unrealised capital gains (hidden reserves) generated domestically in the course of residence for tax purposes are taxed if, on account of the exit by the taxpayer, the Member State's own powers of taxation cease to exist.<sup>43</sup> Under Article 5 of the Directive laying down rules against tax avoidance practices,<sup>44</sup> which is not relevant here *ratione temporis*, the Member States are even required to provide for such exit taxation from 1 January 2020.

<sup>40</sup> See judgment of 3 February 2015, *Commission v United Kingdom* (C-172/13, EU:C:2015:50, paragraphs 31 and 36).

<sup>41</sup> See judgment of 3 February 2015, *Commission v United Kingdom* (C-172/13, EU:C:2015:50, paragraph 37).

<sup>42</sup> See my Opinions in *Memira* (C-607/17, EU:C:2019:8, point 58 and 59) and *Holmen* (C-608/17, EU:C:2019:9, point 54 and 55).

<sup>43</sup> As is expressly stated in the judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 48); of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 60 and the case-law cited); and of 25 April 2013, *Commission v Spain* (C-64/11, not published, EU:C:2013:264, paragraph 31).

<sup>44</sup> 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 (OJ 2016 L 193, p. 1).

70. Should Aures also relocate its registered office from the Netherlands, any existing hidden reserves would be able to be taxed for the last time in the Netherlands as exit taxation. The losses established could then be set off against those ‘profits’. However, final losses exist only if it is no longer possible for those losses somehow still to be used.

71. According to the Court’s case-law, it cannot be shown even by a liquidation following a merger that there is no possibility of taking into account the losses that existed in the subsidiary’s State of residence.<sup>45</sup> If a liquidation is not sufficient, simply relocating the place of business whilst maintaining the registered office in the ‘exit State’ is also not sufficient to show that losses are final.

*(iv) Threat of a conflict with the case-law on exit taxation*

72. Lastly, extending the case-law on final losses would also lead to a conflict with the case-law on exit taxation.

73. If final losses were assumed to exist here purely on account of the exit and the Court’s case-law on final losses was also applicable to cross-period loss relief, the host State would have to take into account losses (which had already been incurred prior to the exit). This would apply even though the host State has powers of taxation of its own only after the move has taken place. The Court’s case-law on exit taxation (see above, point 35 et seq.) clearly shows that a company’s profits generated prior to an exit (and also, in accordance with the principle of symmetry, the company’s losses) fall within the competence of the exit State (here: the Netherlands) and not of the host State (here the Czech Republic).<sup>46</sup>

74. For this reason, too, the legal concept of final losses should not be extended to cross-period loss deduction in the context of an exit.

*(3) Conclusion*

75. Because there are no final losses, the fact remains that the Czech rules at issue concerning non-allowance of losses sustained in a previous tax period in another Member State are proportionate.

**VI. Proposed answer**

76. On those grounds, I propose that the Court answer the questions referred by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) as follows:

- (1) The simple transfer of the place of a company’s management from one Member State to another Member State falls within the scope of freedom of establishment under Article 49 TFEU.
- (2) The exclusion of cross-period loss relief in the case of a cross-border transfer of the place of management does constitute a restriction of freedom of establishment. However, it is justified by the preservation of the balanced allocation of the power to impose taxes between Member States.

<sup>45</sup> Judgment of 21 February 2013, *A* (C-123/11, EU:C:2013:84, paragraphs 51 and 52).

<sup>46</sup> Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraphs 44 and 45); of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 53 and the case-law cited); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 49); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 46).