Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 10 January 2019[1]

Case C‑607/17

Skatteverket
v
Memira Holding AB

(Request for a preliminary ruling from the Högsta förvaltningsdomstol (Supreme Administrative Court, Sweden))

(Request for a preliminary ruling — National tax legislation — Freedom of establishment — Deduction of losses of a foreign subsidiary in the State of the parent company in the context of a merger — Justification of non-deductibility of 'final losses' — Proportionality of an absence of cross-border relief for losses — Notion of 'final losses')

I. Introduction

1. The point at issue in this case[2] is whether a Swedish parent company has the right, on the basis of Article 49 TFEU in conjunction with Article 54 TFEU, to deduct the losses in a wholly-owned subsidiary established in Germany from its profits if that subsidiary is wound up by way of a merger with the parent company and it was not able fully to 'use' its losses made in Germany there.

2. The fundamental freedoms do not in principle require cross-border use of losses within a group. Losses arising abroad would thus be forfeited. Only in the case of *final losses* is it possible that cross-border use of losses is necessary, for reasons of proportionality, in accordance with the judgment delivered by the Grand Chamber of the Court of Justice[3] in *Marks & Spencer* in 2005.

3. A number of problems have grown up around these 'final losses', which have already led to several decisions by the Court.[4] However, the decisions thus far have not been able to clarify definitively the conditions for final losses, as is evident from this new reference. In this regard, the Court will presumably repeatedly be given an opportunity — if it still wishes to adhere to the final losses exception[5] — to refine this category.

1 Original language: German.

2 See also Case C‑608/17 and my Opinion of the same date.

3 Judgment of 13 December 2005 (C‑446/03, EU:C:2005:763).

4 Without any claim to be exhaustive: judgments 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).

5 This seems to be suggested by the express application of the *Marks & Spencer* case-law in *Bevola* (judgment of 12 June 2018, *Bevola and Jens W. Trock* (C‑650/16, EU:C:2018:424, paragraphs 63 and 64) to losses of non-resident permanent establishments. On the other hand, a number of voices at the Court have considered the legal concept of final losses to be unnecessary: see, for example, 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 in *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 TFEU in conjunction with Article 54 TFEU and Directive 2009/133/EC[6] ('the Mergers Directive').

5. The Mergers Directive makes provision with regard to losses in the transferring company only in its Article 6:

'To the extent that, if the operations referred to in Article 1(a) were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the takeover of such losses by the receiving company's permanent establishments situated within its territory.'

B. Swedish law

6. The Mergers Directive was transposed into Swedish law in Chapter 37 of the Inkomstskattelag (1999:1229).[7]

7. A merger is defined in Paragraph 3 as a conversion. It must satisfy two conditions at the same time. Firstly, all assets and liabilities and other obligations of one company (the transferring company) must be taken over by another company (the receiving company). Secondly, the transferring company must be dissolved without liquidation. In order for the special tax rules on mergers in Paragraphs 16 to 29 to apply, it is further required that the merger be what is known as a qualifying merger.

8. In order for a merger to be a qualifying merger, it is necessary, under Paragraph 11, for the transferring company to be liable, immediately before the merger, to pay tax in Sweden on revenue from at least part of its economic activities. Furthermore, under Paragraph 12, the receiving company must be liable, immediately after the merger, to pay tax in Sweden on revenue from the economic activities in respect of which the transferring company was taxed. The revenue may not be exempt, fully or in part, from taxation in Sweden under a double taxation agreement.

9. The result of a qualifying merger is, under the first subparagraph of Paragraph 17, that the transferring company is not to enter any revenue or deduct any expenditure, by reason of the merger, in respect of the economic activity referred to in Paragraph 11. Instead, as regards that economic activity, under the first subparagraph of Paragraph 18, the receiving company is to adopt the transferring company's tax situation. That means, inter alia, that the receiving company may deduct deficits in the transferring company from earlier tax years, within certain limits set out in Paragraphs 21 to 26.

6 Council Directive of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 2009 L 310, p. 34), which codified Council Directive 90/434/EEC of 23 July 1990 with the same title (OJ 1990 L 225, p. 1). That directive was amended by Council Directive 2013/13/EU of 13 May 2013 adapting certain directives in the field of taxation, by reason of the accession of the Republic of Croatia (OJ 2013 L 141, p. 30) and is not to be confused with Council Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L 310, p. 1), which deals with the company-law aspects of certain cross-border mergers.

7 Law (1999:1229) on income tax.

10. In Swedish law, group relief is normally used to achieve, by the transfer of profits, internal profit and loss compensation within a cross-border group of companies. Group relief is regulated in Chapter 35a of the Inkomstskattelag (1999:1229). Under Paragraphs 2 and 5, a Swedish parent company may apply group relief to a definitive loss made by a wholly-owned, foreign subsidiary in a State within the EEA provided, inter alia, that the subsidiary has been placed into liquidation and that liquidation has been completed. Those provisions do not apply to mergers, however, according to the referring court.

III. Main proceedings

11. The case concerns a preliminary decision by the Skatterättsnämnden (Revenue Law Commission, Sweden). The preliminary decision is based on the following facts:

12. Memira Holding AB (Memira) is the parent company of a group with subsidiaries in a number of countries, including Germany. The activity in the German subsidiary has led to losses. The economic activity of that subsidiary has now been wound down. In the subsidiary there remain only debts and certain liquid assets. The group is now considering allowing the subsidiary to merge with the Swedish parent company in a cross-border merger. The merger means the subsidiary being dissolved without liquidation. After the merger, the group will have no company remaining in Germany. The group will not operate there either, whether through the parent company or through any other company in the group.

13. The German subsidiary has accumulated losses from previous years of around EUR 7.6 million in total. The losses relate to activity in Germany and arise from its lack of profitability. The losses may be deducted from tax by the subsidiary in Germany and unused losses may be carried over and deducted from any profits the subsidiary makes in future years, without limit of time. However, under German law it is not possible through a merger to carry over losses to another company which is liable for tax in Germany.

14. The Revenue Law Commission found that the company, on merging with the German subsidiary, does not satisfy the conditions for deduction in respect of the deficit on the basis of EU law. According to the Court of Justice, when assessing whether losses are definitive, it is necessary to take into account how the loss is treated under the legislation of the State where the subsidiary is established. Since, under German law, there is no possibility of using the losses on a merger with another company which is liable for tax in Germany, the losses may not be regarded as definitive within the meaning of the Court's case-law. There is thus no infringement of EU law.

15. Both the Skatteverket (Swedish Tax Board) and the applicant Memira have appealed against the preliminary decision before the Högsta förvaltningsdomstol (Supreme Administrative Court, Sweden).

IV. Request for a preliminary ruling and procedure before the Court

16. The Högsta förvaltningsdomstol (Supreme Administrative Court), which is hearing the dispute, has referred the following questions to the Court:

‘(1) Must account be taken, in the assessment of whether a loss in a subsidiary in another Member State is definitive within the meaning given in, inter alia, the case of *A*, and the parent company may thus deduct the loss on the basis of Article 49 TFEU, of the fact that, under the rules of the subsidiary's State, there are restrictions on the possibility for parties other than the party itself which made the loss to deduct the loss?

(2) If a restriction such as that referred to in question 1 must be taken into consideration, must account then be taken of whether, in the case in question, there actually is another party in the subsidiary's State which could have deducted the losses if that were permitted there?'

17. In the proceedings before the Court, Memira, the Kingdom of Sweden, the Federal Republic of Germany, the United Kingdom, the Republic of Finland, the Italian Republic and the European Commission submitted written observations on these questions. The Swedish Tax Board, the Kingdom of Sweden, the Federal Republic of Germany, the Republic of Finland and the European Commission took part in the hearing on 24 October 2018.

V. Legal assessment

A. The questions referred

18. Both questions referred relate to final losses in a subsidiary which ceases to exist as a result of a merger.

19. By its first question, the referring court expressly wishes to know if account must be taken, in determining whether the 'loss in a subsidiary in another Member State is definitive within the meaning given in, inter alia, the case of *A*', of the fact that there are restrictions on third parties using the loss in the State where the subsidiary is established.

20. The specific point at issue is whether freedom of establishment (Article 49 TFEU in conjunction with Article 54 TFEU) obliges Sweden to take into account losses in a subsidiary established in Germany which have been incurred over the years (or, more precisely, are carried over) if the subsidiary is merged with the parent company and thereby placed in liquidation. The losses could not be used in the context of a merger under German tax law and would therefore be forfeited as a result of the liquidation in Germany.

21. If the first question is to be answered in the affirmative, the referring court wishes to know whether the situation is any different if, in the case in question, there is no other party which could have deducted the losses. This clearly means that there is no other company belonging to the group in the subsidiary's State. This aspect can be addressed together with the first question.

22. Although both questions relate to the interpretation of the Court's case-law — the referring court focuses primarily on *A*,[8] which applied the findings made in *Marks & Spencer*[9] to a cross-border merger — they presuppose that there is an impairment of freedom of establishment.

23. However, because in the Mergers Directive EU law makes express legal provision for the tax consequences of cross-border mergers, this more specific rule should be examined first (see under point 25 et seq.). The Court has on several occasions ruled that 'any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law'.[10]

8 Judgment of 21 February 2013 (C-123/11, EU:C:2013:84).

9 Judgment of 13 December 2005 (C-446/03, EU:C:2005:763).

10 Thus, most recently, judgments of 8 March 2017, *Euro Park Service* (C-14/16, EU:C:2017:177, paragraph 19); of 12 November 2015, *Visnapuu* (C-198/14, EU:C:2015:751, paragraph 40); of 11 December 2003, *Deutscher Apothekerverband* (C-322/01, EU:C:2003:664, paragraph 64); and of 16 December 2008, *Gysbrechts and Santurel Inter* (C-205/07, EU:C:2008:730, paragraph 33) — albeit always in the specific case rejecting a lack of applicability of primary law.

24. Even if the Mergers Directive were to constitute such an exhaustive harmonisation, that could not prevent the directive from having to be interpreted in conformity with primary law and, if appropriate, from being examined as an incidental point for its compatibility with the fundamental freedoms. The Court ruled early on that the prohibition of restrictions of freedom to provide services applies not only to national measures but also to measures adopted by the Union institutions.[11] The Treaties as primary law remain, in respect of all legal acts adopted by the Union, 'their basis, their framework and their bounds'.[12] Consequently, if losses cannot be set off under the Mergers Directive, it will then be necessary to examine an impairment of freedom of establishment (see under point 28 et seq.).

B. Use of losses in accordance with the Mergers Directive

25. A situation such as that in the main proceedings indisputably falls within the scope of the Mergers Directive. According to recitals 2 and 3 of the directive, its purpose is to lay down common rules in order, for the effective functioning of the internal market, to remove tax disadvantages for cross-border mergers as compared with mergers of companies of the same Member State. Recital 9 expressly includes in that aim the tax treatment of losses.

26. Accordingly, Article 6 of the directive contains a provision also on the takeover by the receiving company of losses of the transferring company which have not been exhausted for tax purposes. Under that provision, the receiving company may transfer losses of a transferring company resident in another Member State (in this case Germany) to a permanent establishment of the receiving company in that Member State (Germany) if such a transfer is possible between companies of that State.

27. Article 6 of the Mergers Directive thus provides at best for an accumulated loss of the transferring company to be taken into account in the State in which it is established (in this case Germany). There is no mention of losses carried over being taken into account in the Member State of the receiving company (in this case Sweden). It is not unreasonable to conclude that such use of losses is also not required by EU law. This applies in particular if the problem of (foreign) losses of the transferring company was considered in recital 9 of the directive and specifically regulated in a certain manner by Article 6 of the Mergers Directive. Use of the loss carried over in Germany for the purposes of Swedish taxation does not follow from the Mergers Directive in any case.

C. Restriction of freedom of establishment

28. Nevertheless, use of losses could follow from the freedom of establishment of the receiving company granted by Articles 49 and 54 TFEU.

29. Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes, in accordance with Article 54 TFEU, for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency.

30. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment are restrictions on that freedom.[13]

11 Judgments of 2 September 2015, *Groupe Steria* (C-386/14, EU:C:2015:524, paragraph 39); of 18 September 2003, *Bosal* (C-168/01, EU:C:2003:479, paragraphs 25 and 26); of 23 February 2006, *Keller Holding* (C-471/04, EU:C:2006:143, paragraph 45); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 46); of 29 February 1984, *REWE-Zentrale* (37/83, EU:C:1984:89, paragraph 18); and of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 50).

12 Judgment of 5 October 1978, *Viola* (26/78, EU:C:1978:172, paragraphs 9/14).

13 Judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 36); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 34); and of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 56 and the case-law cited).

31. In order for tax legislation of a Member State to infringe 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. [14]

1. Difference in treatment

32. There is no doubt as to a difference in treatment in this case. According to the referring court, Swedish law permits loss relief in the context of a merger only in the case of a qualifying merger. The condition is that the company which will cease to exist (whose losses are to be used) has taxable revenue in Sweden.

33. The Swedish rules do not therefore link to a cross-border situation, but solely to the taxability of revenue. Losses also could not be transferred to a parent company by way of a merger with a subsidiary established in Sweden which generates only tax-exempt revenue there. According to their wording, the Swedish rules do not differentiate between a domestic and a foreign situation. The rules in question do not have direct discriminatory character.

34. However, all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result [15] (covert or indirect discrimination) are also prohibited.

35. In *Hervis Sport*, the Court held that indirect discrimination can exist where the *majority* of undertakings which are adversely affected by the steeply progressive scale of the tax, on account of their high turnover, belong to a group with a link in another Member State. [16] As I have already stated elsewhere, however, it is not sufficient in itself that foreign undertakings are affected in the *majority* of cases. [17]

36. Instead, stricter conditions are necessary. It is intended only to cover cases which do not constitute discrimination from a purely formal perspective, but have the same effect. [18] A provision which entails covert discrimination must therefore affect foreign undertakings in particular intrinsically. [19]

37. This is the case with the link to the taxability of revenue. It is true that there may also be tax-exempt (that is, non-taxable) domestic revenue in respect of which it would not be possible to use losses in the case of a merger. There may also be non-resident undertakings with domestic revenue (in particular revenue from permanent establishments) in respect of which it would be possible to use losses to some extent in the case of a cross-border merger.

14 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).

15 See, inter alia, judgments of 5 December 1989, *Commission* v *Italy* (C-3/88, EU:C:1989:606, paragraph 8); of 13 July 1993, *Commerzbank* (C-330/91, EU:C:1993:303, paragraph 14); of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 26); of 8 July 1999, *Baxter and Others* (C-254/97, EU:C:1999:368, paragraph 10); of 25 January 2007, *Meindl* (C-329/05, EU:C:2007:57, paragraph 21); of 18 March 2010, *Gielen* (C-440/08, EU:C:2010:148, paragraph 37); of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300; paragraphs 117 and 118); of 5 February 2014, *Hervis Sport- és Divatkereskedelmi Kft.* (C-385/12, EU:C:2014:47, paragraph 30); and of 8 June 2017, *Van der Weegen and Others* (C-580/15, EU:C:2017:429, paragraph 33); see also my Opinion in *Hervis Sport- és Divatkereskedelmi Kft.* (C-385/12, EU:C:2013:531, point 34).

16 Judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi Kft.* (C-385/12, EU:C:2014:47, paragraph 39 et seq.).

17 See my Opinions in *ANGED* (C-233/16, EU:C:2017:852, point 34 et seq.) and *Hervis Sport- és Divatkereskedelmi Kft.* (C-385/12, EU:C:2013:531, point 41).

18 See my Opinions in *ANGED* (C-233/16, EU:C:2017:852, point 38), and in *Hervis Sport- és Divatkereskedelmi Kft.* (C-385/12, EU:C:2013:531, point 40).

19 See also, within the scope of freedom of establishment, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 119).

38. However, company tax law is inherently characterised by the dualism of revenue which is taxable domestically and not taxable abroad. Taxable revenue therefore has a territorial connection by nature. The link with regard to the use of losses in the context of a merger to the taxability of the transferring company's revenue produces a structural disadvantage for a merger with foreign companies.

39. This difference in treatment is liable to render less attractive the exercise of freedom of establishment through the creation of subsidiaries in other Member States, as it would not be possible to use losses in respect of the parent company in the case of a merger. It is, however, incompatible with the provisions of the Treaty only if it concerns situations which are objectively comparable.

2. Comparability

40. 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.[20] The request for a preliminary ruling does not explicitly state what (subjective) objective is pursued by the Swedish legislature with its tax rules in the context of a merger.

41. However, the objective of all tax rules is in principle to generate revenue for the State. It can certainly thus be argued that the restriction on setting off losses in respect of which there has been no taxable revenue is intended to safeguard tax revenue. The Swedish rules expressly provide for this connection where a transfer of losses by way of a merger is linked to the existence of taxable revenue.

42. Germany considers that there is no comparability in this regard, making reference to the Court's judgment in *Timac Agro Deutschland*[21] and my Opinion in *Commission* v *United Kingdom.*[22]

43. Thus far, with regard to the comparability of domestic and foreign permanent establishments, the Court has focused on whether the Member State concerned also exercises any tax powers over the foreign permanent establishment. It thus expressly ruled[23] that '[i]n the present case, it must be held that, since the Federal Republic of Germany does not exercise any tax powers over the profits of such a permanent establishment, the deduction of its losses no longer being permitted in Germany, the situation of a permanent establishment situated in Austria is not comparable to that of a permanent establishment situated in Germany in relation to measures laid down by the Federal Republic of Germany in order to prevent or mitigate the double taxation of a resident company's profits.' This idea could also be applied to subsidiaries resident abroad and not taxed in national territory.

44. However, the Court has developed a settled case-law concerning the cross-border use of losses between subsidiaries and parent companies where comparability has been implicitly or expressly accepted.[24]

20 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).

21 Judgment of 17 December 2015 (C-388/14, EU:C:2015:829, paragraph 65), which refers to the judgment of 17 July 2014, *Nordea Bank* (C-48/13, EU:C:2014:2087, paragraph 24), and the judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraphs 34 and 35).

22 C-172/13, EU:C:2014:2321, point 26; in that specific case, however, I accepted a comparability (see point 29).

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

24 Judgments of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 35); of 3 February 2015, *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraph 22 et seq.); of 21 February 2013, *A* (C-123/11, EU:C:2013:84, paragraph 35); and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 27 et seq.).

45. In addition, recently in *Bevola* the Court again expressly accepted, as regards final losses attributable to a non-resident permanent establishment, the comparability of taxed domestic and untaxed foreign permanent establishments. [25] This would seem to have to apply a fortiori to taxed domestic and untaxed foreign controlled subsidiaries.

46. Lastly, the criterion of comparability is vague. Given that all situations are comparable in some respect, if they are not identical, [26] this test should in any case be abandoned. [27]

47. Accordingly, comparability must be taken to exist. Differences which exist — here the lack of symmetry between taxation of profits and use of losses [28] — in the case of a foreign transferring company as opposed to a domestic transferring company are to be taken into consideration only in respect of the justification. There is thus a restriction of freedom of establishment.

3. Justification

48. 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 and the avoidance of double use of losses (even though they were only taxed once). [29] In addition, the measure must be appropriate to ensuring the attainment of its objective and not go beyond what is necessary to attain it. [30]

(a) First question: need to take account of the absence of a transfer of losses by way of a merger under the rules of the transferring company's State

49. By the first question, the referring court would like to know whether account must be taken, in connection with the justification for the Swedish restriction on loss deduction, of the fact that, under the law of the [State of the] transferring company (in this case German law) it is not possible to use the losses in the case of a merger with another party liable to tax in Germany.

50. The Court [31] has ruled that the fundamental freedoms do not in principle require cross-border use of losses within a group. Only in the case of *final losses* is it disproportionate if the Member State refuses the parent company use of losses even though the foreign subsidiary 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 must be demonstrated by the taxable person. [32] However, it could not be shown by a liquidation following a merger that there was no possibility of taking into account the losses that existed in the subsidiary's State of residence. [33]

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

26 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.

27 I had already suggested this to the Court in my Opinion in *Nordea Bank* (C-48/13, EU:C:2014:153, points 21 to 28).

28 See expressly judgments of 6 September 2012, *Philips Electronics* (C-18/11, EU:C:2012:532), and of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 33).

29 Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 43 et seq.).

30 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).

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

32 Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraphs 55 and 56).

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

(1) The justification of avoidance of double use of losses

51. The justification of avoidance of double use of losses might be relevant here. Double use of losses does not appear to be ruled out in the present case. According to the referring court, Memira still has certain liquid assets. With regard to this justification, it is for the national court to determine whether Memira has in fact proved that the German subsidiary has really exhausted all the possibilities of taking account of the losses which exist in Germany.[34] If that is not the case, there are also no final losses.

(2) The justification of preservation of the balanced allocation of the power to impose taxes

52. As regards the balanced allocation of the power to impose taxes between Member States, it should be pointed out that it is a legitimate objective recognised by the Court,[35] which may make it necessary to apply to the economic activities of taxable persons established in one of those Member States only the tax rules of that State in respect of both profits and losses.[36]

53. In the present case, however, it is not possible, on the basis of this justification, to assume the existence of final losses to be used, for two reasons. First, use of the subsidiary's losses made in Germany over the years would undermine the fiscal autonomy of the Member States (see i). Second, the condition of losses which are usable in law, but not in fact is not satisfied in this case (see ii).

(i) Consideration of the fiscal autonomy of the Member States

54. As the Court has already ruled, the fundamental freedoms cannot have the effect of requiring the Member State of residence of that parent company to grant that company a use of losses for an amount originating solely from the tax system of another Member State, if the first Member State is not to see its fiscal autonomy limited by the exercise of fiscal power of the other Member State.[37]

– Preclusion of transfer of losses in the context of a merger in the subsidiary's State

55. As the Court has expressly stated,[38] 'losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer*, [[39]] by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward'.[40] A Member State would then have to adapt its tax legislation to that of another Member State.

56. If, according to the Court's case-law,[41] losses cannot be characterised as definitive by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward, this must also apply to a preclusion of a transfer of losses to a third party (here in the context of a merger). For that reason, the Swedish rules are not disproportionate.

34 See also, to that effect, judgment of 21 February 2013, *A* (C-123/11, EU:C:2013:84, paragraph 54).

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

36 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).

37 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).

38 Judgment of 3 February 2015, *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraph 33).

39 Judgment of 13 December 2005 (C-446/03, EU:C:2005:763).

40 See judgment of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraphs 75 to 79 and the case-law cited)

41 Judgments of 3 February 2015, *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraph 33), and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 54).

– Finality of losses carried over

57. In any case, 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.[42] Therefore, any loss which can be carried forward is non-final, at least initially.[43] This is important in the present case because loss relief is being sought for losses carried over for years in Germany.

58. Such accumulated (carried forward) losses which are regarded as non-final in one year (because they can be carried forward or setting off the losses was precluded under national law) cannot subsequently become final losses because they cannot be carried forward further on account of the liquidation.

59. Otherwise, the initially successful activity in Germany would be taxed solely in Germany, while the subsequently loss-making activity would be financed by the tax revenue of other States. This would run counter to the preservation of an appropriate allocation of the power to impose taxes.

60. Along the same lines, the Court considers in *Commission* v *United Kingdom* that there can be no subsequent change to finality once absent.[44] In any case, the statements made in that judgment 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 German) law.[45] Freedom of establishment does not therefore require any cross-border setting-off of those carried over losses.

– Right to choose for the taxable person

61. Furthermore, the principle of autonomy of systems of tax law precludes a right to choose for taxable persons. The Court has expressly held[46] that to give companies the right to elect to have their losses taken into account in the Member State in which they are established or in another Member State would seriously undermine a balanced allocation of the power to impose taxes between the Member States, since the tax base would be increased in the first State, and reduced in the second, by the amount of the losses surrendered.

62. However, the restriction on using losses to companies with taxable revenue in Sweden in the context of a merger can be explained in particular by the fact that there would otherwise be a right to choose within a group, as the Commission also stresses. The group would be able freely to choose in which Member State (State in which any receiving company within the group is established) it wishes to use the losses of its companies in the event of failure. Account should be taken of this aspect in accepting the existence and determining the definition of 'final losses'.

42 Judgment of 3 February 2015, *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraphs 31 and 36).

43 The Federal Republic of Germany therefore takes the view that only the loss arising in the last year is to be regarded as the 'final loss', because it is impossible in fact to carry forward, while the carried forward losses cannot lose their character as non-final losses.

44 See judgment of 3 February 2015 (C-172/13, EU:C:2015:50, paragraph 37).

45 This is also how the Court is understood in some cases; see Germany's observations in this case and, for example, David Eisendle, 'Grenzüberschreitende Verlustverrechnung im Jahre 11 nach Marks & Spencer', *ISR* 2016, 37 (42).

46 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).

63. Mergers with subsidiaries having high accumulated losses could be shifted to countries which — like Sweden — permit losses to be transferred by way of a merger if it is not possible to preserve losses in a merger in the subsidiary's State. Such a merger would be most effective depending on the Member State in which the group has relevant profits and would have to pay the highest tax. This holds all the more since the Swedish merger rules do not require both companies to belong to one group, as was the case in *Marks & Spencer*.[47]

64. That judgment also establishes — in accordance with the principle of territoriality — a precedence of loss utilisation in the State of establishment, in this case Germany. Even though German tax law does not permit losses to be transferred by way of a merger, it does allow losses to be preserved, and therefore used by the new shareholders, where shares are transferred for the purposes of restructuring an ailing company.[48] For this reason, too, Memira cannot elect to have its losses taken into account in Sweden.

(ii) Differentiation between finality in fact and in law?

65. Against this background, almost all the parties to the proceedings distinguish, in assessing the finality of a loss, between losses which cannot be used in law and in fact (final losses).

66. Losses which cannot be used because they are not legally recognised in the Member State in which they arose or are not usable because of legal restrictions (for example, they cannot be carried forward or back) are not intended to constitute final losses in accordance with the Court's case-law. Only losses which would be usable in law but cannot be used in fact in future could be regarded as final losses. This is compelling on account of the autonomy of systems of tax law (point 54 et seq.).

67. It nevertheless seems doubtful whether there can actually be losses which are usable in law, but not in fact. I would like to illustrate this with an example. The only case where a loss remains despite the possibility of carrying forward or back losses without restriction would be the case of an undertaking which is loss-making on the whole and which has never made sufficient profit, even after all economic assets have been sold. In that case, even the loss from the last year could not have any effect (in fact) despite the possibility of carrying back the loss.

68. However, even in this case there would still be the possibility of transferring those losses to a purchaser with the sale of the undertaking,[49] provided this is permitted by the Member State of establishment. The purchaser will take into account the value of the existing losses through the purchase price for the undertaking, with the result that the seller thus 'realises' those losses.

69. If the legal order in question permits a transfer of losses to other persons, it is also always possible in fact to use those losses. It may not be particularly successful in a specific case because the purchaser of a loss-making undertaking will not necessarily pay much money for such an undertaking. Nevertheless, this does not affect the usability in fact of the losses.

47 Judgment of 13 December 2005 (C-446/03, EU:C:2005:763).

48 The relevant provision in Paragraph 8c of the Körperschaftsteuergesetz (Law on corporation tax), as a 'restructuring clause', was only recently the subject of a case before the Court (judgment of 28 June 2018, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505).

49 The Court expressly addresses this point, for example, in the judgment of 21 February 2013, *A* (C-123/11, EU:C:2013:84, paragraph 52 et seq.).

70. The definitive nature of the losses in that case is thus also based either on the legal order of the Member State (preclusion of any possibility of transferring losses) or on the decision by the taxable person not to sell the company, but to place it in liquidation by way of a merger. In both cases, however, it is not obvious why non-use of losses in another Member State should be disproportionate. It is also not without reason the Court requires that all possibilities of having the losses taken into account have been exhausted. This includes the losses being transferred to a third party by way of a sale.

(iii) Final losses within the meaning of Bevola?

71. This is also not precluded by the recent judgment in *Bevola*.[50] First, in that case the Court 'merely' applied the *Marks & Spencer* exception to 'final' losses of permanent establishments and did not call into question the reservations made above.[51] In particular, it did not make any more specific comments on when final losses exist.

72. Second, the arguments raised in that more recent judgment relate primarily[52] to the ability-to-pay principle tax. This may be understandable in the case of permanent establishments as permanent establishments legally form a dependent part of a taxable person's undertaking. This line of argument would not hold, however, in the case of subsidiaries and sub-subsidiaries. They are autonomous legal entities which also have an independent financial ability to pay (if this is understood to mean the ability to pay taxes based on their revenue).[53] The Court — rightly — did not decide that it is necessary for the correct taxation of the parent company's ability to pay to take into account the losses of the subsidiary.

73. From the point of view of tax law, group relief constitutes a breach of the ability-to-pay principle because the ability to pay of a number of legal entities is added together. The inclusion of other legal entities cannot therefore be justified in any case by the principle of taxation according to the ability to pay.

74. On the contrary, it even runs counter to the principle of taxation according to the ability to pay if a Member State takes account of only one side (that is, only revenue or only expenditure). In addition, to my knowledge there is neither a general principle of tax law nor a general principle of EU law to the effect that relief should somehow be granted for all losses at the end of a life cycle of a legal entity. In particular, the ability-to-pay principle does not require losses to be exported to other Member States.

75. Consequently, in accordance with the judgment in *Bevola*, there are no deductible final losses which can be exported from Germany to Sweden in this case.

(iv) Interim conclusion having regard to a 'fair internal market'

76. This conclusion based on case-law is also compelling from the point of view of a 'fair' internal market, which has been brought back into focus again in the light of the 'BEPS debate'.[54] A possibility of setting off final losses transnationally would, specifically in the particular situation at issue, favour above all large groups operating across borders as opposed to smaller undertakings (which do not

50 Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 61 et seq.).

51 On the contrary, the Court has expressly given the national court the task of determining whether the conditions for accepting the existence of a final loss are actually satisfied; see judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 65).

52 Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraphs 39 and 59); see also judgment of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 35).

53 The acceptance of a legally relevant transnational ability to pay for groups would probably, first and foremost, open up new organisational prospects for large international groups. Doubts are thus raised in the judgment of 4 July 2018, *NN* (C-28/17, EU:C:2018:526, paragraph 35).

54 In simple terms, this means the tax structure of multinational groups which have available (lawful) possibilities within the existing tax systems for minimising their assessment bases in high-tax countries and for shifting profits to low-tax countries (Base Erosion and Profit Shifting).

generally operate across borders). For example, if Memira knows that all losses incurred from the German business model can ultimately be set off against the profits of other companies belonging to the group in other Member States, then, in attempting to position itself in the German market, Memira can compete very differently from a German competitor that has to assume that its losses will be forfeited if it ceases its commercial activity in Germany. For Memira the 'German losses' would be a much lesser burden than for a domestic competitor without a similar group structure.

77. Bearing this in mind and consistently applying the Court's case-law (see point 51 et seq. and the case-law cited therein), the following conclusion is therefore reached: If the use of losses is precluded by law in the State of the subsidiary, there are no final losses. If it is possible for that State to use losses, the taxable person must have exhausted those possibilities. According to the judgment in *Marks & Spencer*,[55] this includes realising the losses by transferring them to a third party, which did not occur in this case. It can also therefore be stated that there are no final losses in the case of Memira.

78. Accordingly, the preclusion by Sweden of the allocation of losses of a subsidiary resident abroad and not taxed in national territory in the context of a merger is not disproportionate.

(3) Answer to the first question

79. The first question should therefore be answered as follows: Article 49 TFEU in conjunction with Article 54 TFEU requires, for the cross-border setting-off of losses, that it is legally possible to use the losses in the subsidiary's State and that that possibility is taken by the taxable person. Such possibility of use includes a realisation of losses by way of a merger with a third party or a realisation by way of a sale of the company to a third party. The former option is not possible in Germany, while the latter is possible to a limited extent, but was not taken by Memira. The conditions for recognising the existence of a final loss are not therefore met in any case.

(b) Second question: need to take account of the possibility of a merger within the group in the case in question

80. By its second question, the referring court would like to know whether, in the event that a merger with preservation of losses is precluded in the State of establishment, the assessment of finality is affected if, in the case in question, there actually is 'no other party in the subsidiary's State which could have deducted the losses if that were permitted there'.

81. This question is quite difficult to understand, as it is hardly conceivable that there would be no other party in the whole of Germany which could have deducted the losses. It presumably means whether final losses also exist if, as Italy has argued in detail in its observations, in the case in question Memira has another company belonging to the group in Germany with which a merger would have been possible or whether it is sufficient for rejecting finality that the losses would be forfeited in abstract terms in the case of a merger with a company belonging to the group in Germany.

82. The answer follows from the fact that there cannot be losses which are usable in law, but not in fact (see above, point 67 et seq.). It is immaterial in this regard whether in the case in question Memira has another group belonging to the company in Germany.

55 Judgment of 13 December 2005 (C-446/03, EU:C:2005:763, paragraph 55).

83. In addition, the answer to the second question also follows from the Court's case-law. According to that case-law, cross-border use of 'foreign' losses is conceivable only where the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account, if necessary by transferring those losses to a third party, and there is no possibility for those losses to be taken into account by a third party (in its State of residence).[56] The Court refers expressly to a third party, rather than to another person belonging to the group, as is pointed out by more or less all the Member States participating in the proceedings.

84. Accordingly, either a transfer to some third party is possible (including the economic transfer of losses in the case of a sale of the company to the new shareholders), such that final losses within the meaning of the *Marks & Spencer* case-law are ruled out, or the Member State has precluded a transfer of losses by law (as in Germany, for example, for a merger). In that case, it is not disproportionate if such preclusion is also taken into consideration in the parent company's State.

VI. Conclusion

85. On those grounds, I propose that the questions referred by the Högsta förvaltningsdomstol (Supreme Administrative Court, Sweden) be answered as follows:

(1) Article 49 TFEU in conjunction with Article 54 TFEU requires, for the cross-border setting-off of losses, that it is legally possible to use the losses in the subsidiary's State and that that possibility is taken by the taxable person. Such possibility of use includes a realisation of losses by way of a merger with a third party or a realisation by way of a sale of the company to a third party.

(2) It is irrelevant to this conclusion whether in the case in question the group has other companies in the subsidiary's State to which it would have been possible to transfer losses.

56 Judgments of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 55), and of 21 February 2013, *A* (C-123/11, EU:C:2013:84, end of paragraph 56).