Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 March 2014[1]

Case C‑48/13

Nordea Bank Danmark A/S
v
Skatteministeriet

(Request for a preliminary ruling from the Østre Landsret (Denmark))

(Tax legislation — Freedom of establishment — National tax on profits — Group taxation — Taxation of the activities of foreign permanent establishments of domestic companies — Avoidance of double taxation through tax credits (credit method) — Recapture of previous loss relief upon the sale of a permanent establishment within a group of companies that results in the loss of the right of taxation)

1. In this case, the Court must once again look at the cross-border taxation of a group of companies by a Member State and the compatibility of that taxation with freedom of establishment. And once again it will have to examine the ground of justification of 'preservation of the allocation of the power to impose taxes between Member States', which it expressly recognised for the first time in *Marks & Spencer*[2] and the scope of which still does not appear to have been sufficiently clarified.

2. The cases referred are also becoming more complex, however. The Danish request for a preliminary ruling at issue here concerns the taxation of a domestic company together with its permanent establishments situated in other Member States. Although the activities of those foreign permanent establishments were taxed in full by Denmark, the tax paid abroad was set off against the Danish tax, in accordance with the 'credit method'. In the present case, however, the foreign permanent establishments had been entirely loss-making. In accordance with a special rule, the relief for those losses which was granted when taxing the domestic company must now be recaptured because the permanent establishments were sold within the group to companies in respect of which Denmark has no right of taxation.

3. That said, the special case with which these proceedings are concerned is not so unusual as to be of no general significance. Indeed, it gives the Court an opportunity to develop further its case-law on cross-border loss relief in general and the provision of such relief by way of the credit method in particular.

I – **Legal context**

4. In the Kingdom of Denmark, tax is charged on the profits of companies resident in national territory.

1 — Original language: German.

2 — *Marks & Spencer* (C‑446/03, EU:C:2005:763).

5. If such a company has a permanent establishment in another Nordic State (Sweden, Finland or Norway), the Kingdom of Denmark may, in accordance with Article 7 of the Nordic Double Taxation Convention, tax the company also on the share of profits attributable to that foreign permanent establishment. In this connection, however, Article 25 of the Convention provides that the foreign tax charged on the activities of the permanent establishment is to be set off against the Danish tax, but only up to the amount of the assessment to tax in the Kingdom of Denmark on the profits of the permanent establishment.

6. In accordance with the legislation applicable to the main proceedings, account had to be taken, for the purposes of Danish taxation, of the ongoing profits and losses of foreign permanent establishments of domestic companies.

7. In certain cases, however, the loss relief was required to be recaptured. Paragraph 33 D(5) of the ligningsloven (Law on tax assessment) provided:

‘If all or part of a permanent establishment situated in a foreign State … is sold to an affiliated company, … deducted losses which are not matched by profits in subsequent years shall be included in the calculation of taxable income, irrespective of which relief method is applied …’.

8. According to the information provided by the referring court, that rule applied only if the affiliated purchasing company was not taxed together with the selling company. According to the explanatory memorandum to the draft of that law, the rule was intended to ensure that Danish companies could not first gain relief for the losses of their foreign permanent establishments and then later, as soon as those permanent establishments were profit-making, sell them to an affiliated foreign company in order to avoid having to pay tax on those profits in Denmark.

II – **Main proceedings**

9. The applicant in the main proceedings is the company Nordea Bank Danmark A/S. It is the successor in law to a bank which, in 2000, formed the Nordea Group together with a Swedish bank, a Finnish bank and a Norwegian bank.

10. In the period from 1996, or as the case may be 1997, to 2000, the predecessor in law had permanent establishments in the form of bank branches in Sweden, Finland and Norway. Those branches made losses every year. As a result, a total of DKK 204 402 324 — corresponding, at the current exchange rate, to approximately EUR 27 million — was deducted from the basis of assessment to Danish tax.

11. Following the formation of the Nordea Group, those bank branches were closed. Approximately half of the employees were taken over by Swedish, Finnish or Norwegian companies forming part of the Nordea Group, as were some of the customers. The acquiring companies could no longer claim relief against their own taxation for the losses previously made by the permanent establishments.

12. The Danish tax authorities classified those transactions as a partial sale of permanent establishments to affiliated companies for the purposes of Paragraph 33 D(5) of the ligningsloven. They therefore increased the basis of assessment to tax for the year 2000 by the sum of the losses for which relief had been claimed in previous years. Nordea Bank Danmark takes the view, however, that that rule infringes both EU law and the EEA Agreement.

III – **Procedure before the Court**

13. The Østre Landsret (Eastern Regional Court), before which the dispute is now pending, has referred the following question to the Court for a preliminary ruling:

'Are Article 49 TFEU, read together with Article 54 TFEU (formerly Article 43 EC, read together with Article 48 EC) and Article 31 of the EEA Agreement, read together with Article 34 thereof, to be interpreted as precluding a Member State, which allows a company situated in that State to deduct on an ongoing basis losses from a permanent establishment situated in another Member State, from making full recapture from the company in respect of the losses arising from the permanent establishment (in so far as they are not matched by profits in subsequent years) in the event of the permanent establishment closing down, in connection with which part of the establishment's business is transferred to an affiliated company within the group which is resident in the same State as the permanent establishment, and where it must be assumed that the possibilities for applying the losses in question have been exhausted?'

14. In the proceedings before the Court, written observations have been submitted by Nordea Bank Danmark, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Austria, the EFTA Surveillance Authority and the Commission.

IV – **Legal assessment**

15. This case calls for clarification of whether the aforementioned recapture in respect of the losses of a foreign permanent establishment under the Danish taxation of the profits of domestic companies is compatible with the freedom of establishment provided for in the EC Treaty, applicable to the main proceedings, and that provided for in the EEA Agreement.

16. In this connection, there is no need here to distinguish between the examination of an infringement of a company's freedom of establishment in the Member States, which must be assessed in accordance with Article 43 EC in conjunction with Article 48 EC, and in the Kingdom of Norway, to which Article 31 of the EEA Agreement, in conjunction with Article 34 thereof, is applicable. This is because both sets of rules prohibit restrictions on freedom of establishment in an identical manner.[3]

17. Let me say first of all that I share the view of all the parties to the proceedings that a restriction on freedom of establishment must be found to exist in the present case.

18. Freedom of establishment confers on a company inter alia the right to pursue its activities in other Member States through a branch.[4] The Member State in which a company originates is also in principle prohibited from hindering its establishment in another Member State.[5] A company is so hindered where the treatment of an establishment in another Member State is disadvantageous and discriminatory by comparison with that of a purely domestic establishment.[6]

3 — See *A* (C-48/11, EU:C:2012:485, paragraph 21) concerning Article 49 TFEU.

4 — See, inter alia, *Impacto Azul* (C-186/12, EU:C:2013:412 paragraph 32 and the case-law cited).

5 — See, inter alia, *Daily Mail and General Trust* (81/87, EU:C:1988:456, paragraph 16); *AMID* (C-141/99, EU:C:2000:696, paragraph 21); and *Argenta Spaarbank* (C-350/11, EU:C:2013:447, paragraph 20).

6 — See, inter alia, *AMID* (EU:C:2000:696, paragraph 27); *Papillon* (C-418/07, EU:C:2008:659, paragraphs 16 to 23); and *Argenta Spaarbank* (EU:C:2013:447, paragraphs 20 to 34).

19. In the Kingdom of Denmark, companies with foreign branches and those with domestic branches were treated differently by the rule contained in Paragraph 33 D(5) of the ligningsloven. If a Danish company operated a domestic branch and sold that branch to an affiliated company not taxed in Denmark, previous relief on losses made by that domestic branch was not recaptured, in contrast to the case of a foreign branch. The operation of a branch in another Member State was therefore treated less favourably for tax purposes.

20. In accordance with case-law, however, such a disadvantageous difference in treatment is compatible with freedom of establishment where either it relates to situations which are not objectively comparable (see A below) or it is justified by an overriding reason in the public interest (see B below).[7]

A – *The need for an examination of the objective comparability of the situations*

21. Traditionally, it would therefore be necessary first of all to examine whether companies with a domestic branch and those with a branch in another Member State are in an objectively comparable situation, having regard to the aim pursued by the national provisions at issue.[8]

22. Although I have carried out such examinations myself in the past,[9] it seems to me that the time has come to dispense with them.[10] First, not only is a demarcation with examining a ground of justification not possible but also there are not any readily apparent criteria for determining those cases in which situations must be said not to be objectively comparable in the first place. Secondly, such a finding also made it impossible to strike an appropriate balance between the fundamental freedom and the reason for the difference in treatment in the case concerned.

23. The requirement of objective comparability may be regarded as a doctrinal vestige from a time when, in matters relating to freedom of establishment, the Court accepted only grounds of justification expressly provided for in the Treaty.[11] Consequently, many grounds relied on by a Member State as justification for a difference in treatment between domestic and cross-border situations could be examined only within the context of the objective comparability of those situations.

24. A new state of affairs came into being, however, when the Court also began to recognise unwritten grounds of justification. Grounds in support of a difference in treatment are now regularly considered as part of the examination of the various grounds of justification that are already recognised — or that may be recognised in future. It is not therefore surprising that, in cases where it examines the objective comparability of the situations seriously, the Court essentially looks at the same factors as it later re-examines from the point of view of justification.[12]

7 — *X Holding* (C-337/08, EU:C:2010:89, paragraph 20); *Commission* v *Belgium* (C-250/08, EU:C:2011:793, paragraph 51); *Philips Electronics* (C-18/11, EU:C:2012:532, paragraph 17); and *A* (EU:C:2013:84, paragraph 33). With regard to the free movement of capital, see *K* (C-322/11, EU:C:2013:716, paragraph 36 and the case-law cited).

8 — *X Holding* (EU:C:2010:89, paragraph 22); *Philips Electronics* (EU:C:2012:532, paragraph 17); and *A* (EU:C:2013:84, paragraph 33).

9 — See, most recently, my Opinions in *Philips Electronics* (EU:C:2012:222, point 31 et seq.), and in *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2013:531, point 56 et seq.).

10 — See my Opinions in *A* (EU:C:2012:488, points 40 and 41), and in *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:104, point 32).

11 — See, for example, *Royal Bank of Scotland* (C-311/97, EU:C:1999:216, paragraph 32).

12 — See *K* (EU:C:2013:716, paragraphs 37 et seq. and 49 et seq.).

25. Against that background, the extent of the examination as to the comparability of situations has varied significantly recently, particularly in decisions relating to tax law. Thus, in some cases, the Court regards the mere fact that in both situations the procurement of a tax advantage is sought as sufficient to support a finding that those situations are objectively comparable,[13] while, in others, it undertakes extensive investigations that look closely at the legislation of the Member State concerned.[14] From time to time, however, the Court also dispenses entirely with an examination of the objective comparability of the situations[15] or simply finds the situations to be comparable without giving any reasons for doing so.[16]

26. The Court's entire case-law does not make it clear in which circumstances a difference in the situations compared should preclude their objective comparability. In the present case, for example, it must be concluded that the situations of a foreign branch and of a domestic branch are objectively different, because only in the case of a foreign branch can foreign tax be offset against Danish tax. The question is, however, which criteria are to be used to decide whether that difference is relevant from the point of view of the recapture of loss relief.

27. If it is ultimately concluded that the situations are not objectively comparable, then, unlike in the context of considering a ground of justification, there is no examination of the proportionality of the difference in treatment of domestic and cross-border situations. It is thus no longer possible to strike an appropriate balance between the objectives associated with the fundamental freedom and those underlying the ground for differentiation between domestic and cross-border situations. A balanced solution is therefore guaranteed only where the ground for a difference in treatment is considered in the context of the examination of a ground of justification.

28. Consequently, if there is no need to examine the objective comparability of the situations and such an examination does not produce appropriate results, the Court should in future dispense with it. The merits of a difference in treatment should be assessed solely by reference to whether there is a ground capable of providing a proportionate justification for that difference in treatment.

B – *Justification*

29. In the present case, therefore, the difference in treatment detrimental to foreign branches does not constitute an infringement of freedom of establishment under the EC Treaty and the EEA Agreement only if it is justified by an overriding reason in the public interest.

30. The Member States which are parties to the proceedings take the view that such a justification exists. They rely on the grounds of justification, recognised by the Court, of preservation of the allocation of the power to impose taxes between Member States (see 1 below), preservation of the coherence of a tax system (see 2 below) and prevention of tax avoidance (see 3 below).

1. Allocation of the power to impose taxes

31. The preservation of the allocation of the power to impose taxes between Member States is a ground of justification recognised by the Court in its settled case-law.[17]

13 — *X Holding* (EU:C:2010:89, paragraph 24).

14 — *K* (EU:C:2013:716, paragraph 37 et seq.).

15 — See *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraphs 18 to 26); *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraphs 27 to 39); and *Argenta Spaarbank* (EU:C:2013:447, paragraphs 18 to 34).

16 — *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 38).

17 — See, inter alia, *National Grid Indus* (EU:C:2011:785, paragraph 45); *Commission* v *Spain* (C-269/09, EU:C:2012:439, paragraph 76); *DI. VI. Finanziaria di Diego della Valle & C.* (C-380/11, EU:C:2012:552, paragraph 43); *Argenta Spaarbank* (EU:C:2013:447, paragraph 50); *Imfeld and Garcet* (C-303/12, EU:C:2013:822, paragraph 68); and *DMC* (C-164/12, EU:C:2014:20, paragraph 46).

32. The Kingdom of Denmark considers the recapture of the loss relief to be justified on this ground in conjunction with the aim of preventing tax avoidance. After all, the purpose of loss recapture is to prevent a group of companies from first of all claiming relief in Denmark for the losses of a foreign permanent establishment and then, by selling the permanent establishment within the group, having its profits taxed in another, fiscally more favourable, Member State.

33. The other Member States which are parties to the proceedings consider the ground of justification of preservation of the allocation of the power to impose taxes between Member States to be decisive above all from the point of view of the symmetry of taking into account profits and losses in the same Member State. They argue that, since the sale of the foreign permanent establishment removes it from the scope of the Danish right of taxation, that symmetry is disturbed because future profits made by the permanent establishment will no longer be taxed in Denmark.

34. In the light of that difference in emphasis, it is necessary first of all to clarify what exactly the ground of justification of preservation of the allocation of the power to impose taxes between Member States actually encompasses.

35. To that end, a distinction must first be drawn between the allocation of the power to impose taxes and the preservation of that allocation. The Court has held in its settled case-law that the question of *how* the right of taxation is allocated between Member States is a matter for Member States themselves. This is because, in the absence of any harmonising EU measures, they retain the power to define, both by treaty and also unilaterally, the criteria for allocating their powers of taxation.[18]

36. It is true that, when it first recognised this ground of justification in *Marks & Spencer*, the Court pointed out that a *balanced* allocation of the power to impose taxes warrants protection,[19] a point of view which it has repeated from time to time in later judgments, too.[20]

37. It is in principle safe to assume, however, that the manner in which the Member States have allocated their powers to impose taxes between themselves in a particular situation is not called into question by the Court and thus forms the basis of the '*preservation* of the allocation of the power to impose taxes between Member States'.[21] This must be assumed to be true in the present case, too, in which a company's foreign permanent establishments are taxed both by the source State in which the permanent establishment is situated and by the company's State of residence (Denmark), albeit, in the latter case, subject to set-off of the tax already paid in the source State.

38. The ground of justification of 'preservation' of their allocation of the power to impose taxes thus confers on the Member States the right to exercise and protect that power, which they themselves have defined. That is also the meaning to be ascribed to the Court's case-law to the effect that this ground of justification confers a right 'in particular' to prevent conduct capable of jeopardising the right of a Member State to exercise its fiscal jurisdiction in relation to activities carried out in its territory.[22] Reliance on this ground of justification can also not be ruled out in so far as a Member State taxes activities which are not carried on in its territory, such as, in the present case, the activities of foreign permanent establishments. The Court would otherwise have to deny the Member States the power to tax activities carried on outside their territory.

18 — See, inter alia, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 25); *National Grid Indus* (EU:C:2011:785, paragraph 45); *Argenta Spaarbank* (EU:C:2013:447, paragraph 50); and *DMC* (EU:C:2014:20, paragraph 47).

19 — *Marks & Spencer* (EU:C:2005:763, paragraph 46).

20 — See, inter alia, *Amurta* (C-379/05, EU:C:2007:655, paragraph 58), and *Argenta Spaarbank* (EU:C:2013:447, paragraph 53).

21 — See also *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 38) and the case-law cited, according to which 'the disadvantages which could arise from the parallel exercise of tax competences by different Member States … do not constitute restrictions on the freedom of movement'.

22 — *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 77); *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 47); *SIAT* (C-318/10, EU:C:2012:415, paragraph 45); *Beker and Beker* (C-168/11, EU:C:2013:117, paragraph 57); *Argenta Spaarbank* (EU:C:2013:447, paragraph 53); and *Imfeld and Garcet* (EU:C:2013:822, paragraph 75).

39. The Court's existing case-law concerning this ground of justification shows two ways in which the Member States are able to exercise and protect their power to impose taxes between themselves.

40. First, Member States may ensure that they are not divested of their power to tax income through the transfer of that income to another Member State.[23] This includes the ability to combat fictitious and fraudulent arrangements for moving taxable revenue between Member States.[24]

41. Secondly, and conversely, a Member State is, in addition, not required to take into account losses arising from an activity which is taxed not by it but by another Member State. This is because the ground of justification in question includes preservation of the symmetry between the right to tax profits and the right to deduct losses.[25] The internal market does not therefore allow taxable persons to choose the Member State in which their losses are taken into account.[26]

42. It is clear from the scenarios recognised to date that the ground of justification called 'preservation of the allocation of the power to impose taxes between Member States' is simply an expression of other recognised grounds of justification, specifically with regard to the delimitation of Member States' fiscal sovereignty.

43. First, the idea that the profits and losses arising from an activity must not be taken into account separately is simply an expression of the ground of justification of preservation of the coherence of a tax system. This states that the restriction of a fundamental freedom may be justified where a direct link is established between a tax advantage and the offsetting of that advantage by a particular tax levy.[27] When examining that ground of justification, the Court has already held that such a direct link exists between the taking into account of the profits and the losses arising from an activity in a Member State.[28] To that extent, the Court is right to say that the requirements of coherence of the tax system and the balanced allocation of powers of taxation between Member States coincide.[29]

44. Secondly, preventing the transfer of income from one Member State to another by means of fictitious or fraudulent arrangements is simply a special instance of the recognised ground of justification of preventing tax avoidance. It is settled case-law that a national provision restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned.[30] 'Preservation of the allocation of the power to impose taxes between Member States', for its part, is concerned not with preventing a taxable person from avoiding taxation altogether, but with preventing him from moving taxable revenue to another Member State by means of artificial arrangements. The Court itself recognises this connection when it has occasion to consider the two grounds of justification together.[31]

23 — See *Oy AA* (C-231/05, EU:C:2007:439, paragraph 56); *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 87); and *Argenta Spaarbank* (EU:C:2013:447, paragraph 55).

24 — See *SGI* (C-311/08, EU:C:2010:26, paragraphs 60 to 63), and *SIAT* (EU:C:2012:415, paragraphs 45 to 47).

25 — *Philips Electronics* (EU:C:2012:532, paragraph 24).

26 — See *Oy AA* (EU:C:2007:439, paragraph 55); *X Holding* (EU:C:2010:89, paragraph 29); and *A* (EU:C:2013:84, paragraph 43).

27 — See, for example, *Papillon* (EU:C:2008:659, paragraph 44); *DI. VI. Finanziaria di Diego della Valle & C.* (EU:C:2012:552, paragraph 46); and *Welte* (C-181/12, EU:C:2013:662, paragraph 59).

28 — *K* (EU:C:2013:716, paragraph 69).

29 — *National Grid Indus* (EU:C:2011:785, paragraph 80).

30 — See, inter alia, *Aberdeen Property Fininvest Alpha* (EU:C:2009:377, paragraph 63), and *SGI* (EU:C:2010:26, paragraph 65).

31 — *SGI* (EU:C:2010:26, paragraphs 66 and 69).

45. Recognition of the ground of justification of ‘preservation of the allocation of the power to impose taxes between Member States’ as simply being a particular expression of other recognised grounds of justification also explains why the Court sometimes allows the preservation of the allocation of those powers to stand as an independent ground of justification,[32] and sometimes appears to recognise it only in conjunction with other grounds of justification.[33]

46. It is in the interests of the clarity of case-law, however, if, when it comes to examining the justification for a restriction on the fundamental freedoms, the actual ground is brought to the fore rather than being concealed behind the label of ‘allocation of the power to impose taxes’. Hereafter, therefore, I shall examine only those grounds of justification the special manifestations of which have hitherto been subsumed under the concept of ‘preservation of the allocation of the power to impose taxes between Member States’, that is to say, in the present case, preservation of the coherence of a tax system (see 2 below) and prevention of tax avoidance (see 3 below).

2. Fiscal coherence

47. It is settled case-law that the need to preserve the coherence of a tax system may justify the restriction of a fundamental freedom. For this to be the case, a direct link has to be established between a tax advantage and the offsetting of that advantage by a particular tax levy.[34] In such a situation, the holder of a fundamental freedom may be refused a tax advantage where he is not also subject to the taxation directly connected to that advantage. The direct nature of that link must be examined in the light of the objective pursued by the tax rules.[35]

48. The Court has already held that such a direct link exists between the taking into account of the profits and the losses arising from an activity in a Member State.[36]

49. In the present case, however, as the Commission has rightly submitted, the symmetry of taking into account the profits and losses arising from a taxed activity is in principle safeguarded without there being any need for the loss relief to be recaptured. This is because, during the period relevant to the main proceedings, the Kingdom of Denmark had chosen to tax foreign permanent establishments and therefore had to take account of both profits and losses arising from such activities.

50. As Nordea Bank Danmark has correctly pointed out, that symmetry also consists in taxing in Denmark any profits made on the sale of a foreign permanent establishment. Where, as in the present case, the sale is between affiliated companies, which sometimes will not agree an appropriate sale price or indeed any sale price at all, the profit from that sale may, as Danish tax law indeed provides, be determined by reference to an objective market value, in accordance with the ‘arm’s length’ principle. To that extent, the taxation is entirely consistent with the right of a Member State to tax such capital gains on a company’s assets as fall within its tax jurisdiction.[37]

32 — See *National Grid Indus* (EU:C:2011:785, paragraph 48).

33 — See *Marks & Spencer* (EU:C:2005:763, paragraph 51); *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraph 38 et seq.); and *A* (EU:C:2013:84, paragraph 46).

34 — See, inter alia, *Manninen* (C-319/02, EU:C:2004:484, paragraph 42); *Papillon* (EU:C:2008:659, paragraphs 43 and 44); *DI. VI. Finanziaria di Diego della Valle & C.* (EU:C:2012:552, paragraph 46); and *Welte* (EU:C:2013:662, paragraph 59).

35 — See, inter alia, *Papillon* (EU:C:2008:659, paragraph 44), and *Argenta Spaarbank* (EU:C:2013:447, paragraph 42).

36 — *K* (EU:C:2013:716, paragraph 69).

37 — See *National Grid Indus* (EU:C:2011:785, paragraph 46), and *DMC* (EU:C:2014:20, paragraphs 48 and 49).

51. The fact, as the Kingdom of the Netherlands, for example, argues by way of objection, that, in the absence of the Danish recapture rule, taxable persons would have to be granted relief on their losses while subsequent profits made by them would not be amenable to taxation is irrelevant in this regard. In the context of the taxation of an activity, the possibility that any future profits may no longer be amenable to taxation, because of the economic failure of the activity or because a Member State loses its power to impose taxes following the relocation of the company's seat, for example, is normal.

52. However, the Republic of Austria in particular has contested that there is symmetry by submitting that the taxation of profits in the present case is more in the nature of a formality. Since the Kingdom of Denmark applies the credit method to the taxation of foreign permanent establishments, tax already paid in the source State must be offset. If the tax rate in Denmark is equal to or lower than that in the source State, profits made by foreign permanent establishments will ultimately not be taxed at all in Denmark. Even if the tax rate in the source State is lower, however, Denmark will still not have a full right of taxation.

53. That objection is justified in so far as, in the context of the credit method, the taxation of a foreign permanent establishment gives rise to fiscal results different from those that would arise under the normal taxation of domestic activities. The revenue that Denmark receives from the taxation of foreign permanent establishments will, as a rule, be comparatively lower. There is also some imbalance between the full relief on the losses they incur and the taxation — ultimately, of only some at most — of their profits.

54. Nevertheless, the taxation of a foreign permanent establishment by way of the credit method cannot be regarded as being the same as its non-taxation under the exemption method. The Court looked at the latter situation in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, and ultimately allowed the Member State in question to recapture *ex post* loss relief which had been granted notwithstanding the fact that there was no power of taxation because income from a foreign permanent establishment was exempt from tax.[38] Contrary to the view taken by the Federal Republic of Germany, however, that judgment cannot be transposed to the present case, since the Kingdom of Denmark *did* wish to exercise its power of taxation in respect of foreign permanent establishments and there was at least a possibility that some of their profits would also be taxed.

55. In the present case, however, there is no need to decide whether, for the purposes of fiscal coherence, a Member State's power of taxation which is limited by the credit method also entitles that Member State to take account of losses incurred only to a limited extent. For it is not the stated and recognisable objective of the Danish recapture rule to establish an appropriate ratio between the taking into account of profits and losses arising from activities taxed by way of the credit method. Rather, the rule is intended only — as also the Kingdom of Denmark itself has submitted — to prevent the full loss relief available under the credit method from being abused in a particular case. As a rule, however, Danish tax law specifically confers the advantage of full loss relief on taxable persons, even if such loss relief cannot be counterbalanced in the absence of future profits.

56. Given that the Danish rule is formulated in this way, reliance on the ground of justification of preservation of the coherence of a tax system would also be precluded in the light of the settled case-law to the effect that national legislation may be regarded as appropriate for securing attainment of the objective sought only if it genuinely reflects a concern to attain that objective in a consistent and systematic, in other words logical, manner.[39]

57. The restriction on freedom of establishment at issue here cannot therefore be justified by the need to preserve the coherence of a tax system.

38 — See *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (EU:C:2008:588).

39 — See, inter alia, *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraph 39 and the case-law cited).

3. Prevention of tax avoidance

58. It is settled case-law that, for the purposes of preventing tax avoidance, a national provision restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned.[40] If the legislation is specifically aimed at preventing the transfer of profits to another Member State, the Court appears to impose even less stringent requirements, stating that, for the purposes of preserving the allocation of the power to impose taxes between Member States, even legislation which is not specifically designed to prevent purely artificial arrangements may be justified.[41]

59. As is clear from the explanatory memorandum to the Danish law, the rule at issue here is aimed at preventing a group of companies from first of all claiming tax relief in Denmark for losses made by a foreign permanent establishment but then having subsequent profits taxed exclusively in another State. It is easy to see how this might create an opportunity for tax avoidance, particularly given the course traditionally followed by an investment, that is to say a loss-making phase — resulting from the initial investments — followed by a profit-making phase. For that reason, transferring the activity of a foreign permanent establishment within a group of companies, even if the company taking it over no longer qualifies for relief on its losses, may be advantageous if the foreign rate of tax is lower than the Danish rate.

60. That said, for the purposes of preventing tax avoidance, a national provision must, however, not go beyond what is necessary to attain that objective. For that reason, first, the taxable person must be given an opportunity to provide evidence of any commercial justification.[42] Secondly, the corrective tax measure must be confined to the part which exceeds what would have arisen if the companies did not have a relationship of interdependence.[43]

61. It is true that, in the context of a bulk procedure, as taxation is, it is impossible to require that every single case must compulsorily be the subject of an individual examination. Rather, situations which typically have a particular outcome or stem from a particular motivation must be amenable to general regulation.

62. In the present case, however, the limits of a — still permissible — generalisation of tax avoidance have in any event been exceeded. First, a taxable person has no way of adducing evidence to rebut an accusation of tax avoidance, even though it is clear that, where a permanent establishment is transferred within a group of companies, in particular with a view to reducing the duplication of capacity, there may be sensible economic reasons for a sale, as the present case, too, demonstrates. Secondly, as the present case likewise shows, it is, as the EFTA Surveillance Authority argues, disproportionate to require previous loss relief to be recaptured in full in the case of any — even partial — sale of a permanent establishment. After all, such a requirement would also apply to cases in which the permanent establishment is essentially just being wound up.

63. Thirdly and finally, the recapture of all loss relief is not in any way proportionate to the avoidance of taxation on future profits which the Danish rule is intended to make good. The Kingdom of Denmark can legitimately access only those profits originating from the time before the sale. Any subsequently improved opportunities for profit would after all fall within the power of taxation of the Member State competent at that time. As the Commission has rightly pointed out, however, future profits already to be expected at the time of the sale find expression in the determination of a sale price in accordance with the arm's length principle.[44]

40 — See, inter alia, *Aberdeen Property Fininvest Alpha* (EU:C:2009:377, paragraph 63), and *SGI* (EU:C:2010:26, paragraph 65).

41 — *SGI* (EU:C:2010:26, paragraph 66).

42 — See *SGI* (EU:C:2010:26, paragraph 71).

43 — See *SGI* (EU:C:2010:26, paragraph 72).

44 — See above, point 50.

64. If, on the other hand, the Kingdom of Denmark does not consider that value to be appropriate because, in its view, a transfer within a group of companies may present a greater benefit than a transfer to a third party, it must be pointed out that any such greater benefit would not arise in the first place if the permanent establishment continued to be operated under Denmark's tax jurisdiction. The very purpose of the rule at issue, however, is, ultimately, to ensure that the permanent establishment remains within Denmark's tax jurisdiction.

65. Consequently, the objective of preventing tax avoidance is also incapable of justifying the restriction on freedom of establishment at issue here, since the Danish provision goes beyond what is necessary in order to achieve that objective.

4. Conclusion with respect to justification

66. The restriction on freedom of establishment at issue here is not therefore justified by an overriding reason in the public interest. For that reason, there is, moreover, no need to examine the argument put forward by Nordea Bank Danmark to the effect that a justification is in any event, in accordance with *Marks & Spencer*, precluded by the fact that a taxable person cannot be refused loss relief if — as in the present case because the bank branches were closed — there is no possibility of obtaining loss relief in the source State.

V – **Conclusion**

67. The reply to the question referred must therefore be as follows:

Article 43 EC in conjunction with Article 48 EC and Article 31 of the EEA Agreement in conjunction with Article 34 thereof preclude a Member State which, using the credit method, allows a company resident in that State to deduct on an ongoing basis losses made by a permanent establishment situated in another Member State, from making full recapture in respect of the losses made by that permanent establishment (in so far as they are not matched by profits in subsequent years) if recapture is provided for whenever part of that company's business is transferred to an affiliated company which is resident in the same State as the permanent establishment.