Court of Justice of the European Union

*Skatteverket *v* Memira Holding AB

(Case C-607/17)

EU:C:2019:8

EU:C:2019:510

2018 Oct 24;
2019 Jan 10;
June 19

President of Chamber J-C Bonichot,
Judges C Toader, A Rosas, L Bay Larsen, M Safjan
Advocate General J Kokott

Revenue — Corporation tax — Group relief — Parent company and subsidiary of different member states — Parent wishing to absorb subsidiary in merger and deduct subsidiary's losses from corporation tax — Member state of subsidiary's establishment not allowing company's losses to be transferred to another company in event of merger — Member state of parent's establishment permitting transfer of losses in merger between resident companies — Whether contrary to freedom of establishment — Whether subsidiary's losses final so as to render restriction on freedom of establishment disproportionate — FEU Treaty, arts 49FEU, 54FEU

The taxpayer was a Swedish company with a subsidiary in Germany. When the subsidiary ceased activity with considerable debts the taxpayer considered absorbing it in a cross-border merger. However, in that situation the subsidiary's losses would not be eligible for deduction from German corporation tax because under German law it was not possible to transfer losses to another company which was liable for tax in Germany in the event of a merger. The taxpayer asked the Swedish Revenue Law Commission for a ruling as to whether it could rely on the freedom of establishment under articles 49FEU and 54FEU of the FEU Treaty[1] to deduct the subsidiary's losses from its Swedish corporation tax. The commission answered in the negative, determining that, as a matter of Swedish law, the subsidiary's losses could not be taken over by the taxpayer, since the condition that the subsidiary be liable for tax in Sweden was not satisfied, and that, although such a situation would restrict the freedom of establishment, such restriction would be justified. In particular the commission held that since under German law there was no possibility of using those losses in the event of a merger with another undertaking which was liable for tax in Germany, the losses could not be regarded as "final", with the consequence that, as a matter of European Union law, the restriction was proportionate. The taxpayer and the Swedish tax authority challenged that decision. The Swedish court stayed the proceedings and referred to the Court of Justice of the European Union for a preliminary ruling questions concerning the proper assessment of whether the losses were "final".

On the reference—

Held, that, for the purposes of the freedom of establishment under articles 49FEU and 54FEU of the FEU Treaty, the losses of a non-resident subsidiary would not

[1] FEU Treaty, art 49FEU: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited."

Art 54FEU: "Companies or firms formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of member states."

be characterised as "final" if there was a possibility of deducting those losses economically by transferring them to a third party; that, therefore, in assessing the finality of such losses, the fact that the subsidiary's member state of establishment did not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer was provided for by the member state in which the parent company was established in the event of a merger between resident companies, was not decisive, unless the parent company demonstrated that it was impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they were fiscally taken into account by a third party for future tax periods; and that it was irrelevant that, in the member state in which the subsidiary was established, there was no other entity which could have deducted those losses in the event of a merger if such a deduction had been authorised (post, judgment, paras 24–28, 30–33 operative part, paras 1–2). A B

Marks & Spencer plc v Halsey (HM Inspector of Taxes) (Case C-446/03) [2006] Ch 184, ECJ applied. C

The following cases are referred to in the judgment:

A Oy, Proceedings brought by (Case C-123/11) EU:C:2013:84; [2013] STC 1960, ECJ
Marks & Spencer plc v Halsey (HM Inspector of Taxes) (Case C-446/03) EU:C:2005:763; [2006] Ch 184; [2006] 2 WLR 250; [2006] All ER (EC) 255; [2006] STC 237; [2005] ECR I-10837, ECJ D
Skatteverket v Holmen AB (Case C-608/17) EU:C:2019:511; [2020] 4 WLR 19; [2019] STC 1500, ECJ

The following additional cases were cited in the opinion of the Advocate General:

Andres v European Commission (Case C-203/16P) EU:C:2018:505, ECJ
Baxter, Société v Premier Ministre (Case C-254/97) EU:C:1999:368; [1999] ECR I-4809, ECJ E
Bechtel v Finanzamt Offenburg (Case C-20/16) EU:C:2017:488; [2017] STI 1453, ECJ
Bevola A/S v Skatteministeriet (Case C-650/16) EU:C:2018:424; [2018] STC 1415, ECJ
Blanco Pérez v Consejería de Salud y Servicios Sanitarios (Joined Cases C-570/07 and C-571/07) EU:C:2010:300; [2010] ECR I-4629, ECJ
Bosal Holding BV v Staatssecretaris van Financien (Case C-168/01) EU:C:2003:479; [2003] All ER (EC) 959; [2003] STC 1483; [2003] ECR I-9409, ECJ F
Cadbury Schweppes plc v Inland Revenue Comrs (Case C-196/04) EU:C:2006:544; [2007] Ch 30; [2006] 3 WLR 890; [2007] All ER (EC) 153; [2006] ECR I-7995, ECJ
Commission of the European Communities v Italian Republic (Case 3/88) EU:C:1989:606; [1989] ECR 4035, ECJ
Denkavit Internationaal BV v Ministre de l'Économie, des Finances et de l'Industrie (Case C-170/05) EU:C:2006:783; [2007] STC 452; [2006] ECR I-11949, ECJ G
Deutscher Apothekerverband eV v 0800 DocMorris NV (Case C-322/01) EU:C:2003:664; [2003] ECR I-14887, ECJ
Euro Park Service v Ministre des Finances et des Comptes publics (Case C-14/16) EU:C:2017:177; [2017] 3 CMLR 17, ECJ
European Commission v Federal Republic of Germany (Case C-591/13) EU:C:2015:230; [2015] 3 CMLR 24, ECJ H
European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Federal Republic of Germany intervening) (Case C-172/13) EU:C:2015:50; [2015] Ch 394; [2015] 2 WLR 1418; [2015] STC 1055, ECJ
Finanzamt Dinslaken v Meindl (Case C-329/05) EU:C:2007:57; [2007] STC 314; [2007] ECR I-1107, ECJ

Finanzamt Köln-Altstadt v Schumacker (Case C-279/93) EU:C:1995:31; [1996] QB 28; [1995] 3 WLR 498; [1995] All ER (EC) 319; [1995] ECR I-225, ECJ

Finanzamt Offenbach am Main-Land v Keller Holding GmbH (Case C-471/04) EU:C:2006:143; [2007] STC 962; [2006] ECR I-2107, ECJ

Gielen v Staatssecretaris van Financiën (Case C-440/08) EU:C:2010:148; [2010] STC 1053; [2010] ECR I-2323, ECJ

Groupe Steria SCA v Ministère des Finances et des Comptes publics (Case C-386/14) EU:C:2015:524; [2016] STC 234, ECJ

Gysbrechts, Criminal proceedings against (Case C-205/07) EU:C:2008:730; [2009] All ER (EC) 711; [2009] 2 All ER (Comm) 951; [2008] ECR I-9947, ECJ

Hervis Sport-és Divatkereskedelmi Kft v Nemzeti Adó-és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága (Case C-385/12) EU:C:2014:47; [2014] 3 CMLR 2, ECJ

Inspecteur van de Belastingdienst/Noord/kantoor Groningen v SCA Group Holding BV (Joined Cases C-39/13 to C-41/13) EU:C:2014:1758; [2014] STC 2107, ECJ

Institut national d'assurance maladie-invalidité v Viola (Case 26/78) EU:C:1978:172; [1978] ECR 1771, ECJ

K, Proceedings brought by (Case C-322/11) EU:C:2013:716; [2013] BTC 847, ECJ

Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn (Case C-414/06) EU:C:2008:278; [2008] STC 3229; [2008] ECR I-3601, ECJ

Masco Denmark ApS v Skatteministeriet (Case C-593/14) EU:C:2016:984, ECJ

Meilicke v Finanzamt Bonn-Innenstadt (Case C-262/09) EU:C:2011:438; [2013] STC 1494, ECJ

NN A/S v Skatteministeriet (Case C-28/17) EU:C:2018:526, ECJ

National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam (Case C-371/10) EU:C:2011:785; [2012] All ER (EC) 883; [2011] ECR I-12273, ECJ

Nordea Bank Danmark A/S v Skatteministeriet (Case C-48/13) EU:C:2014:2087; [2015] STC 34, ECJ

Oy AA, Proceedings brought by (Case C-231/05) EU:C:2007:439; [2007] All ER (EC) 1079; [2008] STC 991; [2007] ECR I-6373, ECJ

R v Inland Revenue Comrs, Ex p Commerzbank AG (Case C-330/91) EU:C:1993:303; [1994] QB 219; [1994] 2 WLR 128; [1993] 4 All ER 37; [1993] ECR I-4017, ECJ

Revenue and Customs Comrs v Philips Electronics UK Ltd (Case C-18/11) EU:C:2012:532; [2013] STC 41, ECJ

Rewe-Zentral AG v Direktor der Landwirtschaftskammer Rheinland (Case 37/83) EU:C:1984:89; [1984] ECR 1229, ECJ

Schmelz v Finanzamt Waldviertel (Case C-97/09) EU:C:2010:632; [2010] ECR I-10465, ECJ

Test Claimants in the FII Group Litigation v Inland Revenue Comrs (Case C-446/04) (Note) EU:C:2006:774; [2012] 2 AC 436; [2012] 2 WLR 1240; [2007] STC 326; [2006] ECR I-11753, ECJ

Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin (Case C-388/14) EU:C:2015:829; [2016] STC 786, ECJ

Van der Weegen v Belgian State (Case C-580/15) EU:C:2017:429; [2017] STI 1455, ECJ

Verder LabTec GmbH & Co KG v Finanzamt Hilden (Case C-657/13) EU:C:2015:331; [2015] 3 CMLR 39, ECJ

Visnapuu v Kihlakunnansyyttäjä, Suomen valtio-Tullihallitus (Case C-198/14) EU:C:2015:751; [2016] 2 CMLR 32; [2016] Env LR 22, ECJ

X Holding BV v Staatssecretaris van Financiën (Case C-337/08) EU:C:2010:89; [2010] STC 941; [2010] ECR I-1215, ECJ

REFERENCE by the Högsta förvaltningsdomstolen (Supreme Administrative Court), Sweden

By an order dated 5 October 2017, in proceedings between the Skatteverket (Swedish Tax Board) and the taxpayer, Memira Holding AB, concerning the possibility for the taxpayer of deducting from its corporation tax the losses of a subsidiary established in another member state where that subsidiary had been absorbed by merger, the Högsta förvaltningsdomstolen, Sweden, stayed the proceedings and referred to the Court of Justice of the European Union for a preliminary ruling, two questions, post, opinion, point 16; judgment, para 19, on the interpretation of article 49FEU of the FEU Treaty, read in conjunction with article 54FEU.

The judge rapporteur was Judge Bonichot.

The facts are stated post, opinion, points 11–15; judgment, paras 9–17.

J Anderberg, agent, for the Swedish Tax Board.

L Staberg, agent, for the taxpayer.

A Falk, *A Alriksson*, *C Meyer-Seitz*, *H Shev*, *H Eklinder*, *L Zettergren* and *J Lundberg*, agents, for the Swedish Government.

T Henze, initially, and *R Kanitz*, subsequently, agents, for the German Government.

David Yates QC (instructed by *Treasury Solicitor*) for the United Kingdom Government.

G De Socio (instructed by *G Palmieri*, agent) for the Italian Government.

S Hartikainen, agent, for the Finnish Government.

K Simonsson and by *N Gossement*, *E Ljung Rasmussen* and *G Tolstoy*, agents, for the European Commission.

10 January 2019. **ADVOCATE GENERAL J KOKOTT** delivered the following opinion.

I. Introduction

1 The point at issue in this case (see also *Skatteverket v Holmen AB* (Case C-608/17 [2020] 4 WLR 19, and my opinion of the same date EU:C:2019:9) is whether a Swedish parent company has the right, on the basis of article 49FEU of the FEU Treaty in conjunction with article 54FEU, 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: *Marks & Spencer plc v Halsey (HM Inspector of Taxes)* (Case C-446/03) [2006] Ch 184; [2005] ECR I-10837.

3 A number of problems have grown up around these "final losses", which have already led to several decisions by the court (without any claim to be exhaustive: *NN A/S v Skatteministeriet* (Case C-28/17) EU:C:2018:526; *Bevola A/S v Skatteministeriet* (Case C-650/16) [2018] STC 1415; *Timac*

Agro Deutschland GmbH v Finanzamt Sankt Augustin (Case C-388/14) [2016] STC 786; *European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Federal Republic of Germany intervening)* (Case C-172/13) [2015] Ch 394; *Proceedings brought by K* (Case C-322/11) [2013] BTC 847; *Proceedings brought by A Oy* (Case C-123/11) [2013] STC 1960 and *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* (Case C-414/06) [2008] ECR I-3601; [2008] STC 3229). 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[1*]—to refine this category.

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 49FEU in conjunction with article 54FEU and Council Directive 2009/133/EC 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 (societas Europaea) or SCE (European co-operative society) between member states (OJ 2009 L310, p 34)[2] ("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) (Law (1999:1229) on income tax.)

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

* *Reporter's note.* The superior figures in the text refer to notes which can be found at the end of the opinion on pp 664–665.

the economic activities in respect of which the transferring company was A
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 sub-paragraph 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 B
activity, under the first sub-paragraph 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.

10 In Swedish law, group relief is normally used to achieve, by the transfer of profits, internal profit and loss compensation within a cross- C
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 European Economic Area (EEA) provided, inter alia, that the subsidiary has been placed into liquidation and that liquidation has been completed. Those provisions do D
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 E
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. F
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 €7·6m 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 G
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, H
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 förvaltningsdomstolen (Supreme Administrative Court), Sweden.

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

16 The 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 Oy*, and the parent company may thus deduct the loss on the basis of article 49FEU, 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 Oy*", 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 49FEU in conjunction with article 54FEU) 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 Oy* [2013] STC 1960 which applied the findings made in *Marks & Spencer* [2016] Ch 184 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"[3].

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 (*Groupe Steria SCA v Ministère des Finances et des Comptes publics* (Case C-386/14) [2016] STC 234, para 39; *Bosal Holding BV v Staatssecretaris van Financien* (Case C-168/01) [2003] ECR I-9409; [2003] All ER (EC) 959, paras 25 and 26; *Finanzamt Offenbach am Main-Land v Keller Holding GmbH* (Case C-471/04) [2006] ECR I-2107; [2007] STC 962, para 45; *Test Claimants in the FII Group Litigation v Inland Revenue Comrs* (Case C-446/04) (Note) [2012] 2 AC 436; [2006] ECR I-11753, para 46; *Rewe-Zentral AG v Direktor der Landwirtschaftskammer Rheinland* (Case 37/83) [1984] ECR 1229, para 18 and *Schmelz v Finanzamt Waldviertel* (Case C-97/09) [2010] ECR I-10465, para 50). The Treaties as primary law remain, in respect of all legal acts adopted by the Union, "their basis, their framework and their bounds" (*Institut national d'assurance maladie-invalidité v Viola* (Case 26/78) [1978] ECR 1771, paras 9–14). 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 49FEU and 54FEU.

29 Freedom of establishment, which article 49FEU grants to European Union nationals, includes, in accordance with article 54FEU, 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: *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (Case C-371/10) [2011] ECR I-12273; [2012] All ER (EC) 883, para 36; *Verder LabTec GmbH & Co KG v Finanzamt Hilden* (Case C-657/13) [2015] 3 CMLR 39, para 34 and *European Commission v Federal Republic of Germany* (Case C-591/13) [2015] 3 CMLR 24, para 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 (see *NN A/S v Skatteministeriet* EU:C:2018:526, para 18; *X Holding BV v Staatssecretaris van Financiën* (Case C-337/08) [2010] ECR I-1215; [2010] STC 941, para 20 and *Test Claimants in the FII Group Litigation* [2012] 2 AC 436, para 167).

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[4] (covert or indirect discrimination) are also prohibited.

35 In *Hervis Sport-és Divatkereskedelmi Kft v Nemzeti Adó-és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága* (Case C-385/12) [2014] 3 CMLR 2, 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: *Hervis Sport*, para 39 et seq. As I have already stated elsewhere, however, it is not sufficient in itself that foreign undertakings are affected in the *majority* of cases (see my opinions in *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Generalitat de Catalunya* (Case C-233/16) EU:C:2017:852, point 34 et seq and *Hervis Sport* EU:C:2013:531, point 41).

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 (see my opinions in *ANGED* EU:C:2017:852, point 38 and in *Hervis Sport* EU:C:2013:531, point 40). A provision which entails covert discrimination must therefore affect foreign undertakings in particular intrinsically (see also, within the scope of freedom of establishment, *Blanco Pérez v Consejería de Salud y Servicios Sanitarios* (Joined Case C-570/07 and C-571/07) [2010] ECR I-4629, para 119).

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.

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: *NN A/S v Skatteministeriet* EU:C:2018:526, para 31; *Bevola* [2018] STC 1415, para 32; *Bechtel v Finanzamt Offenburg* (Case C-20/16) [2017] STI 1453, para 53; *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v SCA Group Holding BV* (Joined Cases C-39/13 to C-41/13) [2014] STC 2107, para 28 and *X Holding* [2010] ECR I-1215, para 22. 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* [2016] STC 786, para 65[5] and my opinion in *European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Federal Republic of Germany and others intervening)* [2015] Ch 394, point 26; in that specific case, however, I accepted a comparability (see point 29).

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 (*Timac Agro Deutschland*, para 65[6]):

> "In 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: *NN A/S v Skatteministeriet*, para 35; *Commission v United Kingdom*, para 22 et seq; *A Oy* [2013] STC 1960, para 35 and *Marks & Spencer* [2006] Ch 184, para 27 et seq.

45 In addition, recently in *Bevola* [2018] STC 1415 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 (paras 38 and 39). 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 A situations are comparable in some respect, if they are not identical[7], this test should in any case be abandoned (I had already suggested this to the court in my opinion in *Nordea Bank Danmark A/S v Skatteministeriet* (Case C-48/13) EU:C:2014:153, points 21–28).

47 Accordingly, comparability must be taken to exist. Differences which exist—here the lack of symmetry between taxation of profits and use B of losses[8]—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

C

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) (*Marks & Spencer*, para 43 et seq). In addition, the measure must be appropriate to ensuring the attainment of its objective and not go D beyond what is necessary to attain it (*National Grid Indus* [2011] ECR I-12273, para 42; *Cadbury Schweppes plc v Inland Revenue Comrs* (Case C-196/04) [2007] Ch 30; [2006] ECR I-7995, para 47 and *Marks & Spencer*, para 35).

(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 E

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. F

50 The court[9] 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: (*Marks & Spencer* [2006] Ch 184, paras 55 and 56). G 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 (*A Oy* [2013] STC 1960, paras 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 H 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 (*A Oy*, para 54). 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[10], 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 (*Proceedings brought by K* [2013] BTC 847, para 50; *Lidl Belgium* [2008] ECR I-3601, para 31; *Proceedings brought by Oy AA* (Case C-231/05) [2007] ECR I-6373; [2007] All ER (EC) 1079, para 54 and *Marks & Spencer*, para 45).

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 (see *Masco Denmark ApS v Skatteministeriet* (Case C-593/14) EU:C:2016:984, para 41 and *Meilicke v Finanzamt Bonn-Innenstadt* (Case C-262/09) [2013] STC 1494, para 33).

—Preclusion of transfer of losses in the context of a merger in the subsidiary's state

55 As the court has expressly stated (*Commission v United Kingdom* [2015] Ch 394, para 33), "losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in para 55 of *Marks & Spencer*, by dint of the fact that the member state in which the subsidiary is resident precludes all possibility of losses being carried forward: see *Proceedings brought by K*, paras 75–79 and the case law cited". 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 (*Commission v United Kingdom*, para 33 and *Timac Agro Deutschland*, para 54), 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.

—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 trans-nationally is always to be established as a final loss at the end of the assessment period (*Commission v United Kingdom* [2015] Ch 394, paras 31 and 36). Therefore, any loss which can be carried forward is non-final, at least initially[11]. 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* [2015] Ch 394 that there can be no subsequent change to finality once absent (see para 37). 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[12]. 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[13] 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 European 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".

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*.

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[14]. 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[15], 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.

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* [2018] STC 1415, para 61 et seq. 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[16]. 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[17] 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)[18]. 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"[19]. 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 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 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 B use losses, the taxable person must have exhausted those possibilities. According to *Marks & Spencer* [2006] Ch 184, para 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 C of a merger is not disproportionate.

(3) Answer to the first question

79 The first question should therefore be answered as follows: article 49FEU in conjunction with article 54FEU requires, for the cross-border setting-off of losses, that it is legally possible to use the losses in the D 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.

E

(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 F 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 G 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 H belonging to the company in Germany.

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) (*Marks & Spencer* [2006] Ch 184, para 55 and *A Oy* [2013] STC 1960, end of para 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 Supreme Administrative Court, Sweden be answered as follows:

(1) Article 49FEU in conjunction with article 54FEU 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.

Notes

1. This seems to be suggested by the express application of the *Marks & Spencer*\ [2006] Ch 184 case law in *Bevola* [2018] STC 1415, paras 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 *Proceedings brought by K* (Case C-322/11) EU:C:2013:183, points 66 et seq and 87 and my opinions in *European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Federal Republic of Germany and others intervening)* (Case C-172/13) EU:C:2014:2321; [2015] Ch 394, point 41 et seq and in *Proceedings brought by A Oy* (Case C-123/11) EU:C:2012:488, point 50 et seq).

2. Which codified Council Directive 90/434/EEC of 23 July 1990 with the same title (OJ 1990 L225, 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 L141, p 30) and is not to be confused with Parliament and Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies (OJ 2005 L310, p 1), which deals with the company law aspects of certain cross-border mergers.

3. Thus, most recently *Euro Park Service v Ministre des Finances et des Comptes publics* (Case C-14/16) [2017] 3 CMLR 17, para 19; *Visnapuu v Kihlakunnansyyttäjä, Suomen valtio-Tullihallitus* (Case C-198/14) [2016] 2 CMLR 32, para 40; *Deutscher Apothekerverband eV v 0800 DocMorris NV* (Case C-322/01) [2003] ECR I-14887, para 64 and *Criminal proceedings against Gysbrechts* (Case C-205/07) [2008] ECR I-9947; [2009] All ER (EC) 711, para 33—albeit always in the specific case rejecting a lack of applicability of primary law.

4. See, inter alia, judgments in *Commission of the European Communities v Italian Republic* (Case 3/88) [1989] ECR 4035, para 8; *R v Inland Revenue Comrs, Ex p Commerzbank AG* (Case C-330/91) [1994] QB 219; [1993] ECR I-4017, para 14; *Finanzamt Köln-Altstadt v Schumacker* (Case C-279/93) [1996] QB 28; [1995] ECR I-225, para 26; *Société Baxter v Premier Ministre* (Case C-254/97) [1999] ECR I-4809, para 10; *Finanzamt Dinslaken v Meindl* (Case C-329/05) [2007] ECR I-1107; [2007] STC 314, para 21; *Gielen v Staatssecretaris van Financiën* (Case C-440/08) [2010] ECR I-2323; [2010] STC 1053, para 37; *Blanco Pérez v Consejería de Salud y Servicios Sanitarios* (Joined Cases C-570/07 and C-571/07) [2010] ECR I-4629; paras 117 and 118); *Hervis Sport-és Divatkereskedelmi Kft v Nemzeti Adó-és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága* (Case C-385/12) [2014] 3 CMLR 2, para 30 and *Van der Weegen v Belgian State* (Case C-580/15) [2017] STI 1455, para 33; see also my opinion in *Hervis Sport* EU:2013:531, point 34.

5. Which refers to *Nordea Bank Danmark A/S v Skatteministeriet* (Case C-48/13) [2015] STC 34, para 24 and *Denkavit Internationaal BV v Ministre de l'Économie, des Finances et de l'Industrie* (Case C-170/05) [2006] ECR I-11949; [2007] STC 452, paras 34 and 35.

6. With reference to *Nordea Bank*, para 24 and *Denkavit*, paras 34 and 35.

7. 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.

8. See expressly *Revenue and Customs Comrs v Philips Electronics UK Ltd* (Case C-18/11) [2013] STC 41 and *Lidl Belgium GmbH & Co KG v Finanzamt Heilbronn* (Case C-414/06) [2008] ECR I-3601, para 33.

9. *Marks & Spencer*.

10. *Proceedings brought by K* (Case C-322/11) [2013] BTC 847, para 50; *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (Case C-371/10) [2011] ECR I-12273, para 45; *Philips Electronics*, para 23 and *Marks & Spencer* [2006] Ch 184, paras 45 and 46.

11. 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.

12. 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*", 2016 ISR 37 (42).

13. *Lidl Belgium*, para 32; *Proceedings brought by Oy AA* (Case C-231/05) [2007] ECR I-6373, para 55 and *Marks & Spencer* [2006] Ch 184, para 46.

14. The relevant provision in para 8c of the Körperschaftsteuergesetz (Law on corporation tax), as a "restructuring clause", was only recently the subject of a case before the court: *Andres v European Commission* (Case C-203/16P) EU:C:2018:505.

15. The court expressly addresses this point, for example, in *A Oy* [2013] STC 1960, para 52 et seq.

16. 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 *Bevola* [2018] STC 1415, para 65.

17. *Bevola*, paras 39 and 59; see also *NN A/S v Skatteministeriet* (Case C-28/17) EU:C:2018:526, para 35.

18. 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 *NN A/S v Skatteministeriet*, para 35.

19. 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).

19 June 2019. **THE COURT** (**First Chamber**) delivered the following judgment.

1 This request for a preliminary ruling concerns the interpretation of article 49FEU, read in conjunction with article 54FEU of the FEU Treaty.

2 This request has been made in proceedings between the Skatteverket (Swedish Tax Board) and Memira Holding AB ("Memira") concerning the possibility for Memira of deducting from its corporation tax the losses of a subsidiary established in another member state where that subsidiary has been absorbed by merger.

Legal context

Swedish law

3 The tax scheme applicable to mergers of companies is regulated by Chapter 37 of the inkomstskattelag (1999:1229) (Law (1999:1229) on income tax, the "Law on income tax").

4 Paragraphs 16 to 29 of this chapter lay down special tax rules applicable to mergers known as "qualifying" mergers.

5 In order for a merger to be a qualifying merger, under paragraphs 11 and 12 of that chapter it is necessary, on the one hand, 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 activity and, on the other hand, for the receiving company, immediately after the merger, to pay tax in Sweden on revenue from the economic activity in respect of which the transferring company was taxed. Moreover, the revenue in question may not be exempt from taxation in Sweden under a double taxation agreement.

6 The result of a qualifying merger is, under paragraphs 17 and 18 of Chapter 37 of the Law on income tax, 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 of that chapter and that the receiving company is to adopt the transferring company's tax situation for the tax treatment of that activity. That means, inter alia, that the receiving company may deduct losses in the transferring company from earlier tax years, within certain limits set out in paragraphs 21 to 26 of that chapter.

7 Chapter 35a of the Law on income tax provides for cross-border group relief allowing a final loss sustained by a wholly-owned foreign subsidiary in a country belonging to the European Economic Area (EEA) to be transferred, provided, inter alia, that the subsidiary is directly owned, that it has been liquidated and that the parent company does not carry out, via an associated company, an activity in the subsidiary's state after liquidation. Those provisions do not apply to mergers, however, according to the referring court.

German law

8 It follows from the findings of the referring court, which have not been contested by the German Government, that, under German law, it is not possible to transfer losses between companies liable for tax in Germany in the event of a merger.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Memira is a Swedish company exercising, via its subsidiaries, activities in the sector of ophthalmic surgery. In Germany, it has only one subsidiary, which owns and operates clinics. The activity in the subsidiary led to losses and Memira provided a loan to the subsidiary to finance its operations, without success. The subsidiary has therefore ceased activity and only debts and certain liquid assets remain on its balance sheet.

10 Memira is considering absorbing its German subsidiary in a cross-border merger which would lead to that subsidiary being dissolved without liquidation and Memira subsequently no longer exercising any activity, either directly or indirectly, in Germany.

11 Of the losses sustained by Memira's German subsidiary, it was not possible to set off an amount of €7·6m against earlier profits. They will be eligible for deduction from German corporation tax in relation to that subsidiary either by deducting them from current profits or from earlier profits without limit of time. However, they will not be eligible for deduction in the situation envisaged by Memira and mentioned in the previous paragraph since, under German law, it is not possible to transfer losses to another company which is liable for tax in Germany in the event of a merger.

12 In that context, Memira applied for a preliminary decision by the Skatterättsnämnden (Revenue Law Commission), Sweden in order to determine, if it implements its planned merger, whether it could rely on the freedom of establishment to deduct the losses of its German subsidiary from its Swedish corporation tax; the Revenue Law Commission gave a negative answer.

13 In that regard, the preliminary decision was that the losses of Memira's German subsidiary cannot be taken over by the parent company on the basis of the provisions of Swedish law on taxation on qualifying mergers, since the condition that the subsidiary be liable for tax in Sweden is not satisfied. Nor can deduction be allowed under the rules on group relief, since these rules do not cover a situation such as that envisaged by Memira.

14 The Revenue Law Commission accepted that such a situation would restrict the freedom of establishment but noted that, according to the reasoning of *Marks & Spencer plc v Halsey (HM Inspector of Taxes)* (Case C-446/03) [2006] Ch 184; [2005] ECR I-10837, that restriction may be justified provided that the principle of proportionality has been respected and, therefore, that the losses at issue do not fall within one of the situations covered by para 55 of that judgment, in which the losses are regarded as "final".

15 Relying on the case law of the Court of Justice, the Revenue Law Commission noted that, when assessing whether the losses in question are final, it is necessary to take into account how those losses are treated under the legislation of the state where the subsidiary is established. In that regard, it stated that since, under German law, there is no possibility of using those losses in the event of a merger with another undertaking which is liable for tax in Germany, the losses may not be regarded as final.

16 Three members of the Revenue Law Commission, by a dissenting opinion, on the contrary claimed that the losses of Memira's German subsidiary should be regarded as final to the extent that there is no

German undertaking or any undertaking with a permanent establishment in Germany in Memira with which the subsidiary could be merged. Accordingly, the fact that, under German law, it is not possible to transfer losses in the event of a merger with another undertaking liable for tax in Germany is irrelevant to the assessment of whether the subsidiary's losses are final.

17 Both the Tax Board and Memira challenged the preliminary decision of the Revenue Law Commission before the Högsta förvaltningsdomstolen (Supreme Administrative Court), Sweden.

18 The Supreme Administrative Court holds that the case law of the Court of Justice, in particular *Proceedings brought by A Oy* (Case C-123/11) [2013] STC 1960, does not specify whether, in order to assess the finality of a subsidiary's losses, account should be taken of the possibilities afforded by the legislation of the subsidiary's state of establishment to other legal entities of taking into account these losses and, if so, how that legislation should be taken into account.

19 In those circumstances, the Supreme Administrative Court, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> "(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, [*A Oy*] and the parent company may thus deduct the loss on the basis of article 49FEU, 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?"

Consideration of the questions referred

20 It must, as preliminary point, be recalled that, in paras 43–51 of the judgment in *Marks & Spencer* [2006] Ch 184, the court has held that a restriction of the freedom of establishment which limits the right of a company to deduct the losses of a foreign subsidiary, whereas the losses of a resident subsidiary may be deducted, is justified by the need to preserve the balanced allocation of the power to impose taxes between the member states and to prevent the risk of losses being used twice and of tax avoidance.

21 In para 55 of that judgment, the court nonetheless held that, even though that restriction is justified in principle, it is disproportionate for the parent company's state of establishment to preclude the possibility for the parent company to take into account at its level for tax purposes the losses of a non-resident subsidiary that are classified as final in a situation in which:

—the non-resident subsidiary has exhausted the possibilities available in its state of establishment of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting these losses against the profits made by the subsidiary in previous periods, and

—there is no possibility for the foreign subsidiary's losses to be taken into account in its state of establishment for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

The first question

22 By its first question the referring court seeks, in essence, to establish the significance which should be accorded, in the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of para 55 of the judgment in *Marks & Spencer*, to the fact that the subsidiary's member state of establishment does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, but the parent company's member state nevertheless authorises such a transfer via a merger between resident companies.

23 The court is therefore called upon to clarify whether a situation such as that envisaged by Memira is included in those referred to by the court in the second indent of para 55 of the judgment in *Marks & Spencer* [2006] Ch 184, in which there is no possibility for the losses of the foreign subsidiary to be taken into account in its state of establishment for future periods.

24 It should be recalled in that regard that the grounds relied on by the court in the second indent of para 55 of the judgment in *Marks & Spencer* expressly envisaged that the impossibility that requires the losses to be final may be applied to the situation in which they are taken into account by a third party for future periods, in particular where the subsidiary has been sold to that third party.

25 In a situation such as that envisaged by Memira, and even if all the other impossibilities referred to in para 55 of the judgment in *Marks & Spencer* have been met, the losses would not be characterised as final if there is a possibility of deducting those losses economically by transferring them to a third party.

26 In fact, as Advocate General Kokott stated in points 65–70 of her opinion, it cannot be excluded from the outset that a third party may take into account for tax purposes the losses of the subsidiary in that subsidiary's state of establishment, for example following a sale of that subsidiary for a price including the tax advantage represented by the deductibility of losses for the future (see *A Oy* [2013] STC 1960, para 52 et seq, and judgment delivered today, *Skatteverket v Holmen AB* (Case C-608/17) [2020] 4 WLR 19, para 38).

27 Consequently, in a situation such as that envisaged by Memira, it is for Memira to demonstrate that the possibility referred to in the previous paragraph is precluded, with the mere fact that the subsidiary's state of establishment does not allow the transfer of losses in the event of a merger cannot, in itself, be sufficient to regard the losses of the subsidiary as being final.

28 Consequently, the answer to the first question is that, for the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of para 55 of the judgment in *Marks & Spencer* [2006] Ch 184, the fact that the subsidiary's member state of establishment does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer is provided for by the member state in which the parent company is established in the event of a merger between resident companies, is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are fiscally taken into account by a third party for future tax periods.

The second question

29 By its second question, the referring court asks, in essence, whether, if the fact mentioned in the first question becomes relevant, account must be taken of the fact that there is, in the state of establishment of the subsidiary, no other entity which could have deducted the losses in the context of a merger if a deduction had been authorised in that country.

30 In that regard and as stated in the answer to the first question, the restrictions on the transfer of losses by merger stemming from the legislation of the subsidiary's state of establishment are not decisive so long as the parent company has not adduced evidence that it is impossible for those losses to be used by a third party, in particular after a sale for a price including the tax value of the losses.

31 If such evidence is adduced and the other conditions referred to in para 55 of the judgment in *Marks & Spencer* have been met, the fiscal authorities are required to find that the losses of a non-resident subsidiary are final and that it is therefore disproportionate to not allow the parent company to take them into account at its level for tax purposes.

32 From that perspective, in the assessment of the finality of the losses, whether or not there were other entities in the state of establishment of the loss-making subsidiary which could have had the losses of that subsidiary transferred to them via a merger if such a possibility had been afforded is irrelevant.

33 Consequently, the answer to the second question should be that, if the fact referred to in the first question becomes relevant, the fact that there is, in the state of establishment of the subsidiary, no other entity which could have deducted those losses in the event of a merger if such a deduction had been authorised is irrelevant.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. For the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of para 55 of the judgment in *Marks & Spencer plc v Halsey (HM Inspector of Taxes)* (Case C-446/03) [2006] Ch 184, the fact that the subsidiary's member state of establishment does not does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer is provided for by the member state in which the parent company is established in the event of a merger between resident companies,

is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are fiscally taken into account by a third party for future tax periods.

2. If the fact referred to in the first question becomes relevant, the fact that there is, in the state of establishment of the subsidiary, no other entity which could have deducted those losses in the event of a merger if such a deduction had been authorised is irrelevant.

SUSANNE ROOK, Barrister

Supreme Court

*Christianuyi Ltd and others *v* Revenue and Customs Commissioners

2019 Dec 3 — Lord Wilson, Lord Carnwath, Lord Kitchin JJSC

APPLICATION by the taxpayers for permission to appeal from the decision of the Court of Appeal [2019] EWCA Civ 474; [2019] 1 WLR 5272

Permission to appeal was refused.