Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 10 March 2022 [1]

Case C-538/20

Finanzamt B
v
W AG,
joined party:
Bundesministerium der Finanzen

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Reference for a preliminary ruling – Articles 43 and 48 EC – Freedom of establishment – Corporation tax – Trade tax – Deduction of losses incurred by a permanent establishment situated in a Member State and belonging to a company situated in another member State – Avoidance of double taxation by exemption of the income of the non-resident permanent establishment – Comparability of the situations – Concept of 'final losses')

I. Introduction

1. By the present request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany), the Court of Justice is asked, in substance, to determine whether a resident parent company has the right, on the basis of Article 43 EC read in conjunction with Article 48 EC, [2] to deduct from its taxable income losses incurred by its non-resident permanent establishment, which has ceased activity as a result of which those losses can no longer be taken into account in the State where that non-resident permanent establishment is located, in circumstances where the profits and losses of that non-resident establishment are exempt from tax in the State of residence of the parent company under a convention for the avoidance of double taxation.

2. The request has been made in the context of a dispute between a company established in Germany, W, and the German tax authorities concerning the latters' refusal to take account, for the purpose of determining the amount of the former's liability to corporation tax and the basis

[1] Original language: English.

[2] Now Articles 49 and 54 TFEU. It is necessary to refer to the provisions of the Treaty establishing the European Community since, at the time of the facts at issue in the main proceedings, the Treaty of Lisbon had not yet entered into force.

of its assessment to trade tax for the 2007 tax year, of the final losses [3] incurred by its branch situated in the United Kingdom. In particular, the issue arises as to whether the approach taken by the Court in the judgment in *Bevola and Jens W. Trock* [4] in relation to the issue of the objective comparability of the respective situations of residents and non-residents with regard to the deductibility of final losses can be transposed to the present case, where the exemption of the profits – and symmetrically of the losses – of the non-resident permanent establishment is derived from a bilateral convention for the avoidance of double taxation and not, as in the case that gave rise to the abovementioned judgment, from a unilateral provision of national law.

II. Legal context

A. Convention for the avoidance of double taxation concluded between Germany and the United Kingdom

3. On 26 November 1964, the Federal Republic of Germany concluded with the United Kingdom of Great Britain and Northern Ireland a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and fortune ('the Convention'). [5]

4. Article III(1) of the Convention is worded as follows:

'The industrial or commercial profits of an enterprise of one of the territories shall be subjected to tax only in that territory unless the enterprise carries on a trade or business in the other territory through a permanent establishment situated therein. If it carries on a trade or business in that other territory through a permanent establishment situated therein, tax may be imposed on those profits in the other territory but only on so much of them as is attributable to that permanent establishment.'

5. Article XVIII(2)(a) of the Convention provides:

'Tax shall be determined in the case of a resident of the Federal Republic as follows:

(a) Unless the provisions of subparagraph (b) below apply, there shall be excluded from the basis upon which Federal Republic tax is imposed any item of income from sources within the United Kingdom and any item of capital situated within the United Kingdom which, according to this Convention, may be taxed in the United Kingdom provided that capital gains referred to in paragraph (1) of Article VIII shall be so excluded only if they are subject to tax in the United Kingdom. The Federal Republic, however, retains the right to take into account in the determination of its rate of tax the items of income and capital so excluded.

[3] The Court clarified the concept of 'final losses' in the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), where it held that national provisions that prevent a resident parent company from deducting from its taxable profits losses incurred in another Member State by a subsidiary established in that Member State whilst allowing the deduction of losses incurred by a resident subsidiary, constitute a restriction on the freedom of establishment capable of justification by overriding reasons in the public interest. In that judgment, the Court held that, in the case of final losses, the restrictive provisions at issue went beyond what was necessary to attain the essential objectives pursued. For a more detailed account of the concept of 'final losses', reference should be made to the explanations set out in the answer to the third question below.

[4] Judgment of 12 June 2018 (C-650/16, EU:C:2018:424, paragraphs 37 and 38).

[5] Convention of 26 November 1964 between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and fortune, as last amended on 23 March 1970, *Bundesgesetzblatt* (Federal Law Gazette) (BGBl. 1966 II, p. 358, BGBl. 1967 II, p. 828 and BGBl. 1971 II, p. 45).

…’

B. German law

6. Paragraph 1 of the Körperschaftsteuergesetz (Law on corporation tax, ‘the KStG’),[6] in the version in force at the time of the facts in the main proceedings, provides:

‘(1) The following corporations, associations of persons and pools of assets which have their management or their registered office on national territory shall have unlimited liability to corporation tax:

1. capital companies (in particular European companies, public limited liability companies, limited liability companies and limited partnerships);

…

(2) The unlimited obligation to pay corporation tax applies to all income.

…’

7. Paragraph 8(2) of the KStG, in the version in force at the time of the facts in the main proceedings, stipulates that all the income of a taxpayer with unlimited tax liability is to be regarded as arising from industrial or commercial activity.

8. Paragraph 2(1) and (2) of the Gewerbesteuergesetz (Law on trade tax, ‘the GewStG’),[7] in the version in force at the time of the facts in the main proceedings, reads as follows:

‘(1) [1]Any industrial or commercial activity which is carried out within national territory shall be subject to the trade tax. [2]An industrial or commercial activity means an industrial or commercial undertaking within the meaning of the Einkommensteuergesetz [(Law on Income Tax, “the EStG”)]. [3]An industrial or commercial activity shall be regarded as carried out within Germany when a permanent business establishment is maintained for that activity on German territory …

(2) [1]Activity carried out by capital companies (in particular European companies, public limited liability companies, limited liability companies and limited partnerships) … shall in all cases be regarded in its entirety as an industrial or commercial activity.

…’

9. Under the first sentence of Paragraph 7 of the GewStG, in the version in force at the time of the facts in the main proceedings, trading profit is the profit, determined in accordance with the provisions of the EStG or the KStG, deriving from industrial or commercial activity, which is to be taken into account in calculating the income for the tax period, increased and reduced by the amounts referred to in Paragraphs 8 and 9 of the GewStG.

6 BGBl. 2002 I, p. 4144, as last amended, during the period concerned by the dispute in the main proceedings, by the Law of 7 December 2006 (BGBl. 2006 I, p. 2782).

7 BGBl. 2002 I, p. 4167.

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

10. W is a public limited company the registered office and place of management of which are located in Germany. It is active in the trading of securities. Its financial year end is 30 June.

11. In August 2004, W opened a branch in the United Kingdom. The branch having made no profit, W decided, in February 2007, to close it down. The Commercial Register of the United Kingdom records that cessation of the branch's operation was completed during the first half of 2007.

12. Due to its closure, the losses incurred by the branch during the 2004/2005, 2005/2006 and 2006/2007 financial years (2005, 2006 and 2007 tax years) could no longer be carried forward in the United Kingdom for tax purposes. The United Kingdom tax authorities therefore informed W that, inclusive of the 2007/2008 financial year and thereafter, it was no longer necessary to submit a tax return for its branch.

13. W claimed that, 'for reasons of EU law', the abovementioned losses incurred by its branch should be taken into account as final losses in determining its taxable income in Germany for the 2007 tax year, notwithstanding that the branch income was exempt from tax in Germany by virtue of the Convention. The Finanzamt B (Tax Office B, Germany) refused to take account of those losses in order to determine the amount of W's liability to corporation tax and the basis of its assessment of trade tax for that tax year.

14. By a judgment of 4 September 2018, the Hessiches Finanzgericht (Finance Court, Hessen, Germany) upheld W's action challenging that refusal. Tax Office B appealed to the referring court against that judgment on a point of law (*Revision*). The Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) joined the proceedings as an intervener in support of Tax Office B.

15. The referring court takes the view that the appeal is well founded as a matter of German law.

16. As regards the assessment to corporation tax, the referring court states that, although W is subject to unlimited corporation tax liability on all its income in accordance with Paragraph 1(1) of the KStG, the losses incurred by its permanent establishment in the United Kingdom cannot reduce the basis of assessment to that tax by reason of Article XVIII(2)(a) of the Convention, which excludes from the basis of assessment of German tax any item of income from sources within the United Kingdom which may be taxed in the latter State. It observes that, although Article III(1) of the Convention expressly mentions 'industrial or commercial profits' only, by reason of Article XVIII(2)(a) of the Convention, 'negative income' – such as the losses claimed by W – is also excluded from the basis for the assessment to German tax. That approach corresponds to the settled case-law of the referring court and the 'principle of symmetry'. [8]

17. As for the assessment to trade tax, the referring court recalls that, under Paragraph 7 of the GewStG, trading profit is determined by reference to the provisions of the KStG. Since, on account of the Convention, the income of W's UK branch, including its 'negative income', is excluded from the basis of the assessment of W's liability to corporation tax, the losses of that branch are similarly excluded from the basis of W's assessment to trade tax.

[8] According to that principle, the exclusion of the possibility of taking into account, in Germany, losses incurred by a permanent establishment situated in the United Kingdom is a consequence of the fact that the profits derived from that establishment are subject to UK tax.

18. The referring court is uncertain, however, as to whether the freedom of establishment enshrined in Articles 43 and 48 EC requires that final losses incurred by W's permanent establishment in the United Kingdom are to be taken into account in determining W's taxable income in Germany for the 2007 tax year. It observes that the case-law of the Court has not yet given a sufficiently clear answer to the question whether final losses incurred in another Member State by a non-resident permanent establishment must be taken into account in the Member State of the parent company where a bilateral convention for the avoidance of double taxation provides for the exemption of the income of the non-resident permanent establishment. If the answer to that question is in the affirmative, the referring court also seeks to ascertain, first, whether the obligation to take final losses into account also applies to an assessment to trade tax and, second, according to which criteria losses are to be regarded as final. It also speculates as to how the amount of such final losses is to be calculated.

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

'(1) Is Article 43, in conjunction with Article 48, of the Treaty establishing the European Community (now Article 49, in conjunction with Article 54 [TFEU]) to be interpreted as precluding legislation of a Member State which prevents a resident company from deducting losses incurred by a permanent establishment in another Member State from its taxable profits where, first, the company has exhausted the possibilities to deduct those losses available under the law of the Member State in which the permanent establishment is situated and, second, it has ceased to receive any income from that establishment, so that there is no longer any possibility of account being taken of the losses in that Member State ("final" losses), if the legislation in question concerns an exemption for profits and losses under a bilateral convention for the avoidance of double taxation between the two Member States?

(2) If the first question is answered in the affirmative: Is Article 43, in conjunction with Article 48, of the Treaty establishing the European Community (now Article 49, in conjunction with Article 54 [TFEU]) to be interpreted as also precluding the legislation under the German [Law on trade tax] which prevents a resident company from deducting from its taxable trading profit "final" losses of the type referred to in the first question of a permanent establishment in another Member State?

(3) If the first question is answered in the affirmative: In the event of the closure of the permanent establishment in the other Member State, can there be "final" losses of the type referred to in the first question, even though there is at least a theoretical possibility that the company might once more open in the Member State concerned a permanent establishment, any profits of which could be offset against the previous losses?

(4) If the first and third questions are answered in the affirmative: Can the losses of the permanent establishment which, under the law of the State in which that establishment is situated, could have been carried forward to a subsequent tax period on at least one occasion also be considered to be "final" losses of the type referred to in the first question of which account is to be taken by the State in which the parent establishment is resident?

(5) If the first and third questions are to be answered in the affirmative: Is the obligation to take account of cross-border "final" losses limited as to amount by the amounts of losses which the company could have calculated in the State in which the permanent establishment is situated, were the taking account of losses not precluded there?'

20. Written observations were submitted by W, the German, French and Finnish Governments, and the European Commission.

IV. Legal assessment

A. First question

21. By its first question, the referring court wishes to know, in essence, whether Article 43 EC, read in conjunction with Article 48 EC, precludes a tax regime of a Member State that excludes the possibility for a resident company to deduct from its taxable income, for the purpose of determining the amount of corporation tax due in that Member State, final losses incurred by a permanent establishment situated in another Member State where, under a convention for the avoidance of double taxation concluded between those two Member States, the profits and losses of the non-resident permanent establishment are exempt from tax in the State of residence.

22. Having recalled the Court's case-law on final losses arising from the judgment in *Marks & Spencer*,[9] the referring court submits that, in a judgment that it delivered on 22 February 2017, it applied the principles the Court laid down in its *Timac Agro Deutschland*[10] judgment, as a consequence of which it modified its previous case-law which had been based upon the Court's judgment in *Lidl Belgium*.[11] The referring court wonders whether it should continue to follow its judgment of 22 February 2017, having regard to the Court's judgment in *Bevola and Jens W. Trock*,[12] which could be understood as having decided that a company with unlimited tax liability that possesses a non-resident branch which has incurred final losses is in a comparable situation to that of a company with unlimited tax liability whose resident branch has incurred such losses, including in a case like the present, where the justification for not taking the final losses into account is based on the principle of symmetry resulting from a bilateral convention. However, for some authors of German legal literature, whose views the Federal Ministry of Finance shares, there is a fundamental difference between such a case and that in *Bevola and Jens W. Trock*, since the latter involved a unilateral provision of national law. The referring court wonders whether the legal origin of the rule justifies a different assessment of objective comparability of the two situations.

23. The referring court explains that, in order to achieve the objective of avoiding double taxation in the case of income from permanent establishments, the contracting States chose, in Article XVIII(2)(a) of the Convention, to use the exemption method, by which, in contrast to the credit method, the right to tax is attributed to the State where the permanent establishment is

9 Judgment of 13 December 2005 (C-446/03, EU:C:2005:763). See footnote 3 above.

10 Judgment of 17 December 2015 (C-388/14, EU:C:2015:829). For a more detailed account of that judgment, reference should be made to the considerations set out in point 35 of the present Opinion.

11 Judgment of 15 May 2008 (C-414/06, EU:C:2008:278). The Court ruled that Article 43 EC does not preclude a situation in which a company established in a Member State cannot deduct from its tax base losses of a permanent establishment situated in another Member State, to the extent that, by virtue of a convention for the avoidance of double taxation, the income of that establishment is taxed in the latter Member State where those losses can be taken into account in the taxation of the income of that permanent establishment in future accounting periods. The Court reached that conclusion after having found that the tax regime at issue, which allowed such losses to be deducted when they were incurred by resident permanent establishments, involved a restriction on the freedom of establishment that was justified by overriding reasons in the public interest.

12 Judgment of 12 June 2018 (C-650/16, EU:C:2018:424. As will be explained in greater detail in point 42 of the present Opinion, in that judgment the Court held that, as regards final losses attributable to a non-resident permanent establishment, the situation of a resident company possessing such an establishment is not different from that of a resident company possessing a resident permanent establishment from the point of view of the objective of preventing double deduction of the losses, despite the fact that the situations of those two companies are not, in principle, comparable.

situated, the State of residence waiving any right to tax based on its own sovereignty. Since, pursuant to the principle of symmetry, that provision also makes losses of permanent establishments subject to the exemption method, it follows that the Convention is also aimed at avoiding the double use of losses.

24. For 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 European Union, freedom of establishment entails the right to exercise their activity in other Member States through a subsidiary, a branch or an agency. [13]

25. Even though, according to their wording, the provisions of EU law on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment of one of its nationals or of a company incorporated under its legislation in another Member State. [14]

26. Those considerations also apply where, like in the present case, a company established in one Member State carries on business through a permanent establishment in another Member State. [15]

27. It may be observed that the Court has held that a provision that allows losses incurred by a permanent establishment to be taken into account in calculating the profits and taxable income of the company to which it belongs constitutes a tax advantage. [16]

28. Granting such a tax advantage where the losses are incurred by a permanent establishment situated in the Member State of the resident company, but not where they are incurred by a permanent establishment situated in another Member State, has the consequence that the tax situation of a resident company with a permanent establishment in another Member State is less favourable than it would be if the permanent establishment were in the same Member State as the resident company. That difference in treatment is liable to make the exercise of its freedom of establishment by way of setting up permanent establishments in other Member States less attractive for a resident company, and is thus liable to constitute a restriction of the freedom of establishment. [17]

29. It is undeniable that such a difference in treatment exists in the present case. It is apparent from the order for reference that, under the provisions of the KStG, companies that have their management or their registered office in Germany are subject to corporation tax on the totality of their income. However, under the Convention and the exemption method it provides, the United Kingdom has the exclusive power to tax the income of the permanent establishments resident therein, which is thus exempt from tax in Germany. [18] In accordance with the principle of symmetry, the losses incurred by those permanent establishments are excluded from the basis for assessing the corporation tax owed by their parent company in Germany. Thus, all the parties agree that, pursuant to the combined provisions of the KStG and the Convention, a company

[13] Judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 30).

[14] Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 16 and the case-law cited).

[15] Judgments of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 20), and of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 17).

[16] See, to that effect, judgments of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 23), and of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 20).

[17] See, to that effect, judgment of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraphs 24 to 26).

[18] The Federal Republic of Germany however retains the right to take that income into account in order to determine the applicable tax rate.

resident in Germany is prevented from deducting the losses incurred by its permanent establishment located in the United Kingdom, whereas it would be able to make that deduction if its permanent establishment were situated in Germany.

30. However, according to settled case-law, such a difference in treatment does not constitute a restriction of the freedom of establishment if it concerns situations which are not objectively comparable, or if it is justified by an overriding reason in the public interest proportionate to that objective. [19]

31. The uncertainties that underlie the referring court's first question relate solely to the requirement of objective comparability. In that respect, the German, French and Finnish Governments submit that the situations at issue are not comparable. Relying, in essence, on *Bevola and Jens W. Trock*, W and the Commission take the opposite view.

32. It is apparent from the Court's case-law that the comparison between a cross-border situation and a domestic situation must be made having regard to the aim pursued by the applicable national provisions. [20] In the present case, the referring court, the German Government and the Commission state that Article XVIII of the Convention is intended to prevent the double taxation of profits and, symmetrically, the double deduction of losses.

33. It is also apparent from the Court's case-law that, in principle, permanent establishments situated in a Member State other than the Member State concerned are not in a situation comparable to that of permanent establishments resident in that Member State in relation to measures laid down by the latter to prevent or to mitigate the double taxation of a resident company's profits. [21]

34. As the French Government rightly observes, according to the Court's case-law, it is otherwise only where, by subjecting the profits of non-resident permanent establishments to tax and/or permitting the deduction of their losses by the resident company to which they belong, [22] the tax regime of the State of residence of that company equates those establishments to resident permanent establishments. [23]

35. In that regard, I would refer, in particular, to the answer the Court gave to the second question referred to it in *Timac Agro Deutschland*. [24] The Court was asked, in essence, whether Article 49 TFEU must be interpreted as precluding a Member State's tax regime, which, in the event of transfer of a permanent establishment situated in another Member State by a resident company to a non-resident company within the same group, excludes the possibility for the resident company to take into account in its tax base the losses of the establishment so transferred where, under a convention for the avoidance of double taxation, [25] the exclusive power to tax the profits of

[19] Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 20 and the case-law cited).

[20] Judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 32 and the case-law cited).

[21] See, to that effect, judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 37 and the case-law cited).

[22] As is clear from the considerations set out in point 29 above, that is not the situation in the present case.

[23] See, to that effect, judgments of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 24), and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 28). Reference may also be made to paragraph 68 of the judgment of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773), where the Court held that 'once a Member State, unilaterally or by a convention, imposes a charge to income tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders becomes comparable to that of resident shareholders'.

[24] Judgment of 17 December 2015 (C-388/14, EU:C:2015:829).

[25] In that case, a convention for the avoidance of double taxation concluded between the Federal Republic of Germany and the Republic of Austria provided for the application of the exemption method.

that establishment lies with the Member State in which it is situated. The Court replied in the negative. In paragraph 65 of the judgment it held that 'since the Federal Republic of Germany does not exercise any tax powers over the profits of … a permanent establishment [situated in Austria], the deduction of its losses no longer being permitted in Germany, the situation of [such] a permanent establishment … is not comparable to that of a permanent establishment situated in Germany in relation to measures laid down by the Federal Republic of Germany in order to prevent or mitigate the double taxation of a resident company's profits'.

36. In my view, it may be inferred from the case-law cited in the preceding points of the present Opinion that the decisive factor for finding that the respective situations of residents and non-residents are not objectively comparable in relation to the tax regime of a Member State – and to the deductibility of losses in particular – is that the Member State does not have the power to tax non-residents. Reference should be made, in that respect, to Advocate General Wathelet's Opinion in *Timac Agro Deutschland*,[26] in which, by reference to Advocate General Jääskinen's Opinion in *Miljoen and Others*,[27] he observed that 'the factor which is crucial for the purpose of comparing the situations of resident and non-resident taxpayers in order to determine whether there is any prohibited restriction under the Treaty "is *not so much the objective* of the legislation at issue …, *but rather* the fact that a Member State's legislation cannot establish a difference in treatment which has the *practical effect* of ultimately placing *a heavier tax burden* on non-residents and which is thus capable of discouraging them from exercising that freedom"' and that 'this methodology calls for a preliminary examination of whether or not the Member State in question (in this case, the State of residence of the principal company seeking to deduct the losses of its permanent establishment established in another Member State) has taxation powers over the income at issue'.

37. As the German Government points out, the Court, in its more recent judgment in *AURES Holdings*, confirmed the decisive nature of the absence of tax powers in the assessment of the comparability of a cross-border situation with an internal situation as regards the deductibility of losses. Thus, in paragraph 41 of that judgment, the Court, referring by analogy to paragraph 65 of the judgment in *Timac Agro Deutschland*,[28] held that 'where the host Member State has no tax jurisdiction over the tax year during which the loss at issue arose, the situation of a company, which has transferred its tax residency to that Member State and subsequently claims a loss there previously incurred in another Member State, is not comparable to that of a company the turnover of which was subject to the tax powers of the previous Member State on the basis of the tax year during which that company incurred that loss'.[29]

38. In the light of the foregoing considerations, I am of the view, like the German, French and Finnish Governments, that, with regard to a tax regime such as that at issue in the main proceedings, under which a bilateral convention for the avoidance of double taxation, applying the exemption method, subjects to the exclusive power of taxation of the Member State in which

[26] Opinion of Advocate General Wathelet in *Timac Agro Deutschland* (C-388/14, EU:C:2015:533, points 31 and 32; emphasis added by the Advocate General).

[27] Opinion of Advocate General Jääskinen in Joined Cases *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:429, point 55).

[28] Judgment of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829).

[29] Judgment of 27 February 2020, *AURES Holdings* (C-405/18, EU:C:2020:127, paragraph 41; see also paragraph 45). Admittedly, the circumstances of that judgment are different to those under consideration here. Nevertheless, in my view, the decisive element of the absence of tax powers, which the Court acknowledged in that judgment, applies to a situation such as that which arises in the main proceedings. It should be noted that, in her Opinion in *AURES Holdings* (C-405/18, EU:C:2019:879, points 28 and 30), Advocate General Kokott, while suggesting the abandonment of the comparability criterion, also observed that, 'as far as comparability is concerned, the Court has focused thus far on whether the Member State concerned exercises any relevant tax powers'.

they are situated non-resident permanent establishments belonging to a company having its seat in another Member State, the situation of those establishments is not objectively comparable to that of resident permanent establishments of such a company.

39. It follows that the difference in treatment between those two categories of permanent establishments, as described in point 29 above, does not constitute a restriction prohibited by the provisions of the Treaty relating to freedom of establishment.

40. The referring court wonders whether the abovementioned findings are called into question in the light of the Court's approach in the judgment in *Bevola and Jens W. Trock*.[30]

41. To my mind, that question should be answered in the negative.

42. The case in *Bevola and Jens W. Trock*[31] concerned Danish legislation under which it was not possible for a resident company to deduct from its taxable profits losses incurred by its permanent establishment in another Member State, even where those losses could definitively no longer be taken into account in that Member State, unless the resident company had opted for a scheme of joint international taxation which was subject to strict conditions.[32] By contrast, a resident company would have been able to make that deduction had its permanent establishment been situated in Denmark. The Court found that such legislation gave rise to a difference in treatment between Danish companies that possessed a permanent establishment in Denmark and those whose permanent establishment was situated in another Member State, which was liable to make the exercise of freedom of establishment by a Danish company setting up permanent establishments in other Member States less attractive. As regards the comparability of the situations, having recalled the principle stated in point 33 of the present Opinion, the Court held, in paragraph 38 of the judgment in *Bevola and Jens W. Trock*, that 'however, as regards losses attributable to a non-resident permanent establishment which has ceased activity and whose losses could not, and no longer can, be deducted from its taxable profits in the Member State in which it carried out its activity, the situation of a resident company possessing such an establishment is not different from that of a resident company possessing a resident permanent establishment, from the point of view of the objective of preventing double deduction of the losses'.[33]

43. The solution thus adopted by the Court could be understood to apply to all cases where final losses are incurred by a non-resident permanent establishment irrespective of whether the impossibility of deducting those losses in the State of residence of the parent company results from a unilateral provision of national law or from a bilateral convention for the avoidance of double taxation and whether the method for avoidance of double taxation is the credit method[34] or the exemption method. It appears to me that that interpretation of the judgment in *Bevola and Jens W. Trock*, put forward by W and the Commission in the present case, would mean that the Court had substantially modified the approach that it had developed in its earlier case-law.

30 Judgment of 12 June 2018 (C-650/16, EU:C:2018:424).

31 Judgment of 12 June 2018 (C-650/16, EU:C:2018:424).

32 Under Paragraph 8(2) of the Selskabsskatteloven (Danish Law on corporation tax), taxable income does not include income or expenditure relating to a permanent establishment or real property situated in a foreign State, on the Faroe Islands or in Greenland, subject to Paragraph 31A(1) of that law. Under the latter provision, the ultimate parent company can opt for international joint taxation, that is, decide that all the companies in the group, resident or non-resident, including their permanent establishments and real property, inside or outside Denmark, are to be taxed in Denmark.

33 Judgment of 12 June 2018 (C-650/16, EU:C:2018:424).

34 Under the credit method, unlike the exemption method, both States retain their respective powers of taxation. Taxpayers earning foreign-source income are thus taxed in their State of residence on their worldwide income, including foreign-source income, the latter State merely undertaking to offset the tax paid in the source State against its own tax attributable to the foreign-source income.

44. For my part, like the German, French and Finnish Governments, I consider that the solution the Court adopted in paragraph 38 of the judgment in *Bevola and Jens W. Trock*[35] is reconcilable with the approach it took in paragraph 65 of its earlier judgment in *Timac Agro Deutschland*.[36]

45. In *Timac Agro Deutschland*,[37] the State of residence concluded a bilateral convention for the avoidance of double taxation which applied the exemption method to income derived in the source State. It thereby waived its power to tax the income of permanent establishments located in the source State. By contrast, in *Bevola and Jens W. Trock*,[38] the State of residence unilaterally chose, through a provision of national law, not to tax the income generated by non-resident permanent establishments belonging to resident companies, notwithstanding that it would have been competent so to do.

46. It is thus in the first case only that the State of residence can be regarded as having effectively and completely waived its power to tax the income of non-resident permanent establishments. As explained earlier, that factor is decisive in order to find that the respective situations of residents and non-residents are not objectively comparable in relation to the tax regime of a Member State, including, in particular, to the deductibility of losses.

47. It is true that, in paragraph 39 of the judgment in *Bevola and Jens W. Trock*,[39] the Court also observed that 'the national provisions at issue, intended to prevent double taxation of profits and double deduction of losses of a non-resident permanent establishment, aim more generally to ensure that the taxation of a company possessing such an establishment is in line with its ability to pay tax' and that 'the ability to pay tax of a company possessing a non-resident permanent establishment which has definitively incurred losses is affected in the same way as that of a company whose resident permanent establishment has incurred losses'.

48. However, like the referring court, I am not persuaded that the ability to pay tax – which, moreover, the referring court has not put forward as one of the Convention's objectives – is a decisive factor in determining whether the respective situations of residents and non-residents are objectively comparable in relation to the tax regime of a Member State in a case such as the one at issue where, under a bilateral convention for the avoidance of double taxation applying the exemption method, that Member State has completely waived its power to tax non-resident permanent establishments, which are thus subject to the exclusive power of taxation of the Member State in which they are situated. In that sense, I agree with the referring court that 'the objective of taxation on the basis of ability to pay tax, as referred to in the judgment [in *Bevola and Jens W. Trock*[40]], is a general, abstract principle of taxation[, and that it is not appropriate] to add to the exemption method under the Convention a purpose that is not already expressed in the specific objectives of avoiding double taxation and avoiding double deduction of losses'.

49. In the light of the foregoing, I take the view that, in the absence of situations that are objectively comparable, a tax regime such as that at issue in the main proceedings does not amount to a restriction of the freedom of establishment. Therefore I propose that the Court answer the first question in the negative, to the effect that Article 43 EC, in conjunction with

35 Judgment of 12 June 2018 (C-650/16, EU:C:2018:424).

36 I would also refer to the judgments of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), and of 27 February 2020, *AURES Holdings* (C-405/18, EU:C:2020:12), the latter post-dating that delivered in *Bevola and Jens W. Trock*.

37 Judgment of 17 December 2015 (C 388/14, EU:C:2015:829).

38 Judgment of 12 June 2018 (C-650/16, EU:C:2018:424).

39 Ibid.

40 Ibid.

Article 48 EC, does not preclude legislation of a Member State which prevents a resident company from deducting final losses incurred by a permanent establishment in another Member State from its taxable profits where that legislation exempts profits and losses by reference to a bilateral convention for the avoidance of double taxation between the two Member States.

50. Given the answer that I propose to the first question, there is no need for the Court to answer the second to fifth questions, which were referred in the event that the first question received an affirmative answer. However, both in the interest of completeness and in view of the possibility that the Court might take a different view of the proposed answer to the first question, I shall address each of these questions in turn.

B. Second question

51. By its second question, the referring court asks whether Article 43 EC, read in conjunction with Article 48 EC, also precludes legislation, such as the GewStG, which prevents a resident company from deducting from its taxable trading profit final losses incurred by a non-resident permanent establishment.

52. The referring court explains that the trade tax is a non-personal municipal tax, to which all industrial or commercial activity is subject, provided that it is carried out within the national territory. It is charged irrespective of the taxpayer's personal circumstances and in addition to income tax or corporation tax. The trade tax was intended to provide compensation for the specific burdens that industry, trade and crafts impose on municipalities. Since 1988, trade tax has, in essence, been levied on trading profits, calculated as the profit, pursuant to the EStG or the KStG, derived from industrial or commercial activity, subject to certain add-backs and deductions, in accordance with Paragraphs 8 and 9 of the GewStG, respectively. In particular, under Paragraph 9(3) of the GewStG, the sum of the profit and the add-backs is reduced by the part of the trade profit of a national undertaking attributable to a permanent foreign establishment of that undertaking.

53. The referring court explains that income, whether positive or negative, of non-resident permanent establishments is excluded from the basis of assessment to trade tax, irrespective of whether the applicable convention for the avoidance of double taxation has recourse to the exemption method or to the credit method or that no such convention applies.

54. The referring court considers that, if freedom of establishment were to require that final losses incurred by non-resident permanent establishments be taken into account in the Member State of the parent company in order to determine liability to corporation tax, they should also be taken into account in the basis of the assessment to trade tax. It indicates, however, that the German tax authorities and some commentators object to that solution on the ground that the trade tax is structured so as to have a domestic connection and is non-personal. Furthermore, Tax Office B submits that the United Kingdom has no non-personal tax comparable to the trade tax. Referring to the Court's judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*,[41] it claims that EU law cannot oblige the Federal Republic of Germany to bear the consequences of such a choice by the State from where the income is derived.

[41] Judgment of 23 October 2008 (C-157/07, EU:C:2008:588).

55. In my view, if, as the referring court appears to suggest and which it is for that court to determine, trade tax resembles an income tax, notwithstanding certain differences between trading profits and the profits subject to corporation tax,[42] an affirmative answer to the first question should also lead to an affirmative answer to the second question.

56. The fact that the trade tax 'has a structural domestic connection (principle of territoriality)', to use the referring court's expression, does not, to my mind, undermine that assessment. As the Commission rightly submits, in a situation such as that referred to in the first question, the resident parent company's situation in relation to the trade tax is not different from its situation in relation to the corporation tax, since, in both cases, only domestic income is subject to tax. As the referring court and the German Government observe, where a bilateral convention for the avoidance of double taxation providing for the exemption method applies, income, whether positive or negative, of non-resident permanent establishments is excluded from the basis of assessment of trade tax as a result of the reference to 'the profit … determined in accordance with the provisions of the … KStG' in the first sentence of Paragraph 7 of the GewStG.[43]

57. Therefore, I consider that, if the answer to the first question is in the affirmative, the solution adopted by the Court in paragraph 38 of the judgment in *Bevola and Jens W. Trock*[44] as regards the objective comparability of the respective situations of non-residents and residents in relation to the deductibility of final losses should equally apply to the assessment to trade tax.

58. In the course of the proceedings before the referring court, Tax Office B claimed that, in the United Kingdom, there is no non-personal tax similar to the trade tax. It inferred therefrom that 'the exclusion of the deduction of losses for trade tax assessment is mainly a consequence of the fact that, from the outset, the United Kingdom, as the source State, does not allow deduction of losses for trade tax assessment'. I find that argument unconvincing. As the Commission observes, correctly in my view, the possible income of the UK permanent establishment is subject to corporation tax and is therefore taxable, irrespective of whether other income taxes, in addition to corporation tax, may apply.

59. Tax Office B's reference to the Court's judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*,[45] in which it held that 'a Member State cannot be required to take account, for the purposes of applying its tax law, of the possible negative results arising from particularities of legislation of another Member State applicable to a permanent establishment situated in the territory of the said State which belongs to a company with a registered office in the first State', is irrelevant. As W and the Commission rightly assert, the situation described there is different to that giving rise to the present case, in which the impossibility of taking account of final losses incurred by the non-resident permanent establishment does not result from the legislation of the State where it is located – in particular from the fact that that State does not have a tax similar to the trade tax – but from the fact that that establishment discontinued its activities, with the consequence that it no longer earns any income.

[42] Under the first sentence of Paragraph 7 of the GewStG, the latter profit is to be increased as prescribed in Paragraph 8 or reduced as set out in Paragraph 9 thereof.

[43] In the absence of such a convention or where the applicable convention for the avoidance of double taxation provides for the credit method, the income of the non-resident permanent establishments is, by virtue of Paragraph 9(3) of the GewStG, deducted from the trading profit and therefore not subject to trade tax.

[44] Judgment of 12 June 2018 (C-650/16, EU:C:2018:424).

[45] Judgment of 23 October 2008 (C-157/07, EU:C:2008:588, paragraph 49).

C. Third question

60. By its third question the referring court seeks clarification as to the concept of 'final losses'. In particular, referring to the Court's judgments in *Memira Holding* and *Holmen*,[46] it inquires as to whether losses can be considered to be 'final' where the permanent establishment situated in a Member State has been closed down but there is a possibility, albeit theoretical, that its parent company might open a new permanent establishment in the same Member State and that the past losses of the former could be offset against the latter's profits.

61. The referring court observes that the Hessiches Finanzgericht (Finance Court, Hessen) found that final losses exist in the present case. By closing down its permanent establishment, dismissing its employees and transferring the lease for the rented premises, W did everything to terminate the activity of its establishment in the United Kingdom, which showed that it was likely W would no longer generate, through an establishment situated in that State, any income and, a fortiori, any profit from which the losses incurred prior to its closure could be deducted in the future.

62. It is apparent from paragraph 55 of the Court's judgment in *Marks & Spencer*[47] that the losses of a non-resident subsidiary are to be characterised as final where:

– 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 subsidiary's losses to be taken into account in the State of its 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.

63. Those considerations also apply in the case of losses incurred by a non-resident permanent establishment.[48]

64. In subsequent judgments the Court explained the criterion of the final nature of losses. Thus, in *Memira Holding* and *Holmen*,[49] the Court was asked to clarify the situation referred to in the second indent of paragraph 55 of the judgment in *Marks & Spencer*,[50] where there is no possibility that the losses of the foreign subsidiary can be taken into account in its State of establishment in future tax years. It found that the fact that that State does not allow the transfer of losses is not, in itself, sufficient for the subsidiary's losses to be considered to be final losses. The losses cannot be characterised as such if there is a possibility that those losses may be deducted by their transfer to a third party. A third party may, for tax purposes, take into account the subsidiary's losses in the State where the latter is established, for example following a sale of that

[46] Judgments of 19 June 2019, *Memira Holding* (C-607/17, EU:C:2019:510), and of 19 June 2019, *Holmen* (C-608/17, EU:C:2019:511).

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

[48] Judgment of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278). See also judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 64).

[49] Judgments of 19 June 2019, *Memira Holding* (C-607/17, EU:C:2019:510, paragraphs 22 to 28), and of 19 June 2019, *Holmen* (C-608/17, EU:C:2019:511, paragraphs 34 to 40).

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

subsidiary for a price that takes into account the tax advantage represented by the deductibility of those losses. The parent company must be in a position to show that such a possibility is precluded.

65. A strict reading of the *Memira Holding* and *Holmen* judgments [51] could suggest that losses incurred by a non-resident permanent establishment which has been definitively closed down [52] cannot be regarded as final where the parent company, situated in the other Member State, could thereafter open a new permanent establishment in the same State as the previous permanent establishment, to which the past losses could be transferred, irrespective of whether such a transfer is possible or not under the law of the latter State. In such a situation, the losses would not fulfil the conditions set out in the second indent of paragraph 55 of the *Marks & Spencer* judgment. [53]

66. However, that interpretation appears to go too far in circumstances where the parent company does not yet own another permanent establishment in the State where the closed permanent establishment was situated and the possibility that it could, at any time in the future, open a new permanent establishment in that State, to which the past losses could be transferred, is purely hypothetical. Not only would it be practically impossible or excessively difficult for the parent company to demonstrate that such a possibility is not open to it, but that approach would lead to losses incurred by a permanent establishment situated in another Member State never being considered to be final losses, which would render meaningless the obligation to take into account final losses set out in *Marks & Spencer*. [54]

67. In the light of the foregoing, I consider that, if the answer to the first question is in the affirmative, the answer to the third question should be in the negative.

D. Fourth question

68. By its fourth question, the referring court seeks to ascertain whether losses incurred by a permanent establishment which have been carried forward from tax periods preceding its closure can be considered to be 'final' losses. It observes that the Federal Ministry of Finance takes the view that only losses arising in the last tax period can be taken into account as 'final losses'.

69. The Court touched upon – but did not explicitly decide – this issue in its judgment in *Commission* v *United Kingdom*, [55] in which it recognised the compatibility with the freedom of establishment of a national provision whereby the assessment as to whether the losses of a non-resident subsidiary are final within the meaning of paragraph 55 of the judgment in *Marks & Spencer* [56] is to be made 'as at the time immediately after the end' of the accounting period in which the losses arose.

[51] Judgments of 19 June 2019, *Memira Holding* (C-607/17, EU:C:2019:510), and 19 June 2019, *Holmen* (C-608/17, EU:C:2019:511).

[52] As the German and Finnish Governments rightly observe, the closing down of a permanent establishment differs from the liquidation of a subsidiary, in the sense that a permanent establishment is legally part of the company to which it belongs. Even if it has definitively closed down a permanent establishment in another Member State, that company has the right subsequently to open a new permanent establishment in that State.

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

[54] Ibid.

[55] Judgment of 3 February 2015 (C-172/13, EU:C:2015:50).

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

70. Nevertheless, it does not appear that that judgment permits any definitive conclusions to be drawn from it by way of an answer to the fourth question. In several of her Opinions, Advocate General Kokott has been more explicit with respect to this issue,[57] taking the view that losses that were non-final at the end of an assessment period cannot subsequently become final. According to her, were it possible to regard accumulated (carried forward) losses as final losses, the initially successful activity of the subsidiary (or of the permanent establishment) would be taxed solely in the State in which it is situated, while the subsequently loss-making activity would be financed by the tax revenue of the State of residence of the parent company, which would be contrary to an appropriate allocation of the power to impose taxes.

71. I find Advocate General Kokott's view of this issue persuasive. Like the German, French and Finnish Governments, I propose that the fourth question be answered in the negative.

E. Fifth question

72. By its fifth question, the referring court asks, in essence, whether the amount of final losses of the non-resident permanent establishment to be taken into account in the Member State of the parent company's residence should be limited to the amount of final losses which, had it been possible, would have been taken into account in the Member State where the permanent establishment is located.

73. In the case which gave rise to the judgment in *A*,[58] the Court was asked, inter alia, whether, in the event that the parent company was allowed to take its non-resident subsidiary's losses into account in connection with a merger, those losses should be determined in accordance with the law of the State of residence of the parent company or the law of the State of the subsidiary's residence. The Court began by recalling that, in the present state of EU law, freedom of establishment does not, as a matter of principle, imply the application of a particular law to the calculation of the merged subsidiary's losses taken over by the parent company (paragraph 58 of the judgment). The Court then pointed out that, in principle, that calculation must not lead to unequal treatment as compared with the calculation that would have been made in a similar case where the losses of a resident subsidiary were taken over (paragraph 59 of the judgment). Lastly, the Court held that that question cannot be addressed in an abstract and hypothetical manner, but must be analysed where necessary on a case-by-case basis (paragraph 60 of the judgment).

74. Like W, the Commission and the Finnish Government, I am of the view that the same principles apply with regard to calculation of the losses incurred by a non-resident permanent establishment for the purposes of taking account of those losses in the State of the parent company's residence. Thus, in the present case, in order to ensure equal treatment for the deductibility of final losses between resident companies possessing a non-resident permanent establishment and resident companies possessing a resident permanent establishment, the amount of final losses to be taken into account should not exceed that calculated by applying the rules of the parent company's State of residence (here, Germany).

75. However, if the amount of the final losses calculated in accordance with the rules of the parent company's State of residence were to be higher than that calculated in accordance with the rules of the State in which the permanent establishment is situated (here, the United Kingdom), it should

[57] Opinions of Advocate General Kokott in *Memira Holding* (C-607/17, EU:C:2019:8, points 58 and 59); *Holmen* (C-608/17, EU:C:2019:9, points 54 and 55); and *AURES Holdings* (C-405/18, EU:C:2019:879, points 61 to 65).

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

be limited to the latter amount. Otherwise, resident companies possessing a resident permanent establishment would be placed at an advantage in relation to resident companies possessing a non-resident permanent establishment. Furthermore, in the absence of such a limit, the Member State of the parent company's residence would be obliged to bear the adverse consequences of applying the tax legislation of the Member State in which the non-resident permanent establishment is situated.

V. Conclusion

76. In the light of the foregoing, I therefore propose that the Court answer the first question referred for a preliminary ruling by the Bundesfinanzhof (Federal Finance Court, Germany) as follows:

Article 43, in conjunction with Article 48, of the Treaty establishing the European Community (now Article 49, in conjunction with Article 54, of the Treaty on the Functioning of the European Union) does not preclude legislation of a Member State which prevents a resident company from deducting losses incurred by a permanent establishment in another Member State from its taxable profits where, first, the company has exhausted the possibilities to deduct those losses available under the law of the Member State in which the permanent establishment is situated and, second, it has ceased to receive any income from that establishment, so that there is no longer any possibility of account being taken of the losses in that Member State ('final' losses), where the legislation in question exempts profits and losses by reference to a bilateral convention for the avoidance of double taxation between the two Member States.