Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 April 2015 [1]

Case C-66/14

Finanzamt Linz
v
Bundesfinanzgericht, Außenstelle Linz

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Tax legislation — National corporation tax — Freedom of establishment under Article 49 TFEU and Article 43 EC — Prohibition on putting into effect proposed State aid, laid down in the third sentence of Article 108(3) TFEU and the third sentence of Article 87(3) EC — Group taxation — Limitation of goodwill amortisation to the acquisition of domestic shareholdings)

1. Variatio delectat. Further to the Court's examination of many aspects of the French, [2] Netherlands [3] and UK [4] rules on group taxation, the present case will no doubt further enrich and bring new dimensions to its case-law.

2. For Austrian tax law also provides for the possibility of group taxation. Under Austrian tax law, companies within a group, although legally separate, may be treated as a single taxable entity. If such a group acquires new members, the so-called goodwill associated with the newly acquired shareholding is amortised. This usually means a constant reduction, over a period of 15 years, in the group's income which may amount to as much as half of the purchase price of the shareholding. That regime does not, however, apply to acquisitions of foreign shareholdings or acquisitions by taxable entities which, as natural persons, are compulsorily excluded from the group taxation rules or which, as legal persons, choose themselves to opt out of those rules.

3. The highest administrative court in the Republic of Austria is now calling into question whether those various exceptions are compatible with EU law. In its view, this issue raises two different points of EU law. On the one hand, the limitation of goodwill amortisation to the acquisitions of domestic shareholdings by companies subject to group taxation could constitute State aid the implementation of which without authorisation from the European Commission would in principle be prohibited. On the other hand, the referring court considers that there may also be an infringement of the freedom of establishment.

4. This case offers the Court of Justice an extraordinary opportunity to clarify the relationship between the fundamental freedoms and the control of State aid in so far as differences in treatment in the tax laws of the Member States are under scrutiny.

1 — Original language: German.

2 — Judgment in *Papillon* (C-418/07, EU:C:2008:659); see also *Groupe Steria* (C-386/14, EU:C:2015:524).

3 — Judgments in *X Holding* (C-337/08, EU:C:2010:89) and *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758).

4 — Judgments in *ICI* (C-264/96, EU:C:1998:370), *Marks & Spencer* (C-446/03, EU:C:2005:763), *Philips Electronics* (C-18/11, EU:C:2012:532), *Felixstowe Dock and Railway Company and Others* (C-80/12, EU:C:2014:200) and *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50).

I – **Legal framework**

A – *EU law*

5. Article 49 TFEU grants freedom of establishment in the following terms:

‘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. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

6. Article 54 TFEU defines the scope of the freedom of establishment:

‘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.

“Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.’

7. Articles 49 TFEU and 54 TFEU correspond to Articles 43 EC and 48 EC, which applied up until 30 November 2009.

8. As regards State aid, Article 107 TFEU provides:

‘(1) Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(2) The following shall be compatible with the internal market:

…

(3) The following may be considered to be compatible with the internal market:

…’

9. Article 108(3) TFEU makes the following further provision:

‘(3) The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’

10. Articles 107 TFEU and 108 TFEU correspond to Articles 87 EC and 88 EC, which were in force up until 30 November 2009.

B – *National law*

11. The Republic of Austria levies corporation tax on the income of legal persons. In this connection, 'group taxation' offers legal persons affiliated to each other in a group of companies the possibility of being taxed jointly. For the purposes of such group taxation, the taxable results of all the members of the group are attributed to, and taxed at the level of, the parent company.

12. Both domestic and foreign companies may be members of such a tax group. In the case of foreign companies, however, losses alone are (under certain conditions) attributed to the parent company; profits are not.

13. On the valuation of shareholdings within a tax group, Paragraph 9(7) of the Austrian Körperschaftsteuergesetz (Law on Corporation Tax) 1988 as amended by the Steuerreformgesetz (Tax Reform Law) 2005 ('KStG 1988') provides as follows:'(7) For the purposes of calculating profits, partial write-downs to the book value of, … and capital losses from, shareholdings in group members shall not be deductible. Where a member of the group or the group parent acquires a shareholding … in an operating subsidiary corporation with unlimited tax liability … the group member which has itself acquired the shareholding or the group parent shall, from the point at which that corporation becomes part of the group, amortise the associated goodwill as follows:

— Goodwill shall be the difference, corresponding to the size of the shareholding, between the subsidiary corporation's equity capital for commercial-law purposes plus concealed reserves in the non-depreciable fixed assets and the acquisition costs relevant for tax purposes, but not more than 50% of those acquisition costs. The deductible goodwill shall be spread evenly over a period of 15 years.

…

— … The goodwill amortisation shall be limited to the period of time during which the corporation which has made the acquisition … belongs to the group.

…

— The partial amounts of one fifteenth taken into account for tax purposes shall reduce … the taxable book value.'

14. Paragraph 10 KStG 1988 contains a general rule on the tax neutrality of shareholdings in foreign companies that is not limited to tax groups:

'(2) Shares of profits of any kind from international inter-company shareholdings shall be exempt from corporation tax. An international inter-company shareholding exists where taxable entities falling within the scope of Paragraph 7(3) … are proven to have, in the form of shareholdings, for an uninterrupted period of at least one year, a stage of at least one tenth in

(a) foreign corporations comparable to a domestic capital company,

…

(3) For the purposes of calculating income, capital gains, capital losses and other changes in value from international inter-company shareholdings within the meaning of subparagraph (2) shall be disregarded. … The shareholding shall not be neutral for tax purposes if:1. When submitting its corporation tax return for the year in which it acquired an international inter-company shareholding …, the taxable entity declares that capital gains, capital losses and other changes in value from that shareholding are to be tax-effective (option in favour of the tax-effectiveness of the shareholding).

…'

II – **Main proceedings**

15. The main proceedings concern the corporation tax levied on CEE Holding GmbH and its successor in title, IFN-Holding AG, for the years 2006 to 2010.

16. In those years, the two companies were members of a tax group within the meaning of Paragraph 9 of the KStG 1988. In 2005, CEE Holding acquired all the shares in the Slovak company HSF s.r.o.. Since 2008, IFN-Holding has been the successor in title to CEE Holding, following a merger.

17. In respect of the shares in HSF, CEE Holding and IFN-Holding carried out an annual amortisation of goodwill, in accordance with the second sentence of Paragraph 9(7) of the KStG 1988, in the amount of approximately EUR 183 000. However, the Finanzamt Linz refused to recognise the amortisations on the ground that these were possible only in the case of shareholdings in corporations with unlimited tax liability. HSF, however, was established in Slovakia and was not therefore subject to unlimited tax liability in Austria.

18. Both IFN-Holding and its parent company, IFN Beteiligungs GmbH, took legal action against the corresponding tax assessment notices issued by the Finanzamt Linz. They were successful at first instance, the court having held that the second sentence of Paragraph 9(7) of the KStG 1988 infringed the freedom of establishment. The Finanzamt Linz is now appealing against that judgment before the Verwaltungsgerischtshof.

III – **Procedure before the Court of Justice**

19. On 11 February 2014, the Verwaltungsgerichtshof referred the following questions to the Court of Justice under Article 267 TFEU:

'(1) Does Article 107 TFEU (formerly Article 87 EC), in conjunction with Article 108(3) TFEU (formerly Article 88(3) EC), preclude a national measure under which, in the context of group taxation, goodwill is to be amortised in the case where a holding is acquired in a domestic company — thereby reducing the basis of assessment for tax purposes, and hence the tax burden — whereas such amortisation of goodwill on acquisition of a holding is not permissible in other cases of income and corporation tax?

(2) Does Article 49 TFEU (formerly Article 43 EC), in conjunction with Article 54 TFEU (formerly Article 48 EC), preclude legal provisions of a Member State under which, in the context of group taxation, goodwill is to be amortised in the case where a holding is acquired in a domestic company, whereas such amortisation of goodwill may not be carried out in regard to acquisition of a holding in a non-resident corporation (in particular, with a registered office in another EU Member State)?'

20. In the proceedings before the Court of Justice, written observations were submitted in May 2014 by IFN-Holding, as the interested party in the main proceedings, the Republic of Austria and the Commission.

IV – **Legal assessment**

21. The referring court harbours doubts in two respects regarding the compatibility of rules such as the Austrian goodwill amortisation regime: first, in relation to the State aid standstill obligation and, second, in relation to the freedom of establishment. In order to answer the questions referred an interpretation is needed of both the FEU and EC treaties, since both treaties were in force during the period to which the dispute in the main proceedings relates. For ease of reading, however, I shall henceforth refer in principle to the provisions of the TFEU.

22. Before those questions can be answered, however, we must examine their admissibility.

A – *Admissibility*

23. In the opinion of IFN-Holding and the Commission, the first question, on the effect of the provisions concerning State aid, is inadmissible because an answer to that question is not necessary in order to enable judgment to be given on the dispute in the main proceedings.

24. It is true that, in accordance with the second paragraph of Article 267 TFEU, it is in principle a matter for the national court to determine whether it requires an answer to a question on the interpretation of EU law in order to be able to give judgment on the dispute in the main proceedings. It is, however, settled case-law that the Court of Justice may refuse to rule on a question referred for a preliminary ruling, inter alia, where the interpretation of EU law requested by the national court obviously bears no relation to the actual facts of the main action or its purpose. [5]

25. The Commission takes the view that, in the main proceedings, IFN-Holding and its parent company cannot contend that the Austrian legislation infringes the State aid standstill obligation laid down in the third sentence of Article 108(3) TFEU in order to secure for themselves the benefit of the goodwill amortisation regime. In its submission, such a right would exist only if the Austrian provisions infringed the freedom of establishment. Whether, in the present case, there is any aid within the meaning of Article 107(1) TFEU is therefore immaterial to the dispute in the main proceedings.

26. It is of course true that a taxable person cannot in principle rely on the prohibition on putting into effect proposed State aid laid down in the third sentence of Article 108(3) TFEU in order to secure for itself the benefit of a tax advantage that constitutes aid in favour of other taxable entities. [6] This does not mean, however, that the question of whether the Austrian provision at issue in the present case constitutes aid within the meaning of Article 107(1) TFEU has no bearing on the judgment to be given in the main proceedings. After all, the relevance to the judgment to be delivered of a question on the interpretation of EU law does not in principle depend on whether it satisfies the form of order sought by a particular party to the main proceedings but on whether it has a bearing on the outcome of the dispute.

27. Even though the referring court has itself neglected to provide further clarification of the relevance of the first question to the judgment to be given, as Article 94(c) of the Rules of Procedure in principle requires, it is none the less of obvious relevance to the dispute in the main proceedings. After all, the referring court might be compelled to deny the taxable entities the tax advantage sought, notwithstanding any infringement of the freedom of establishment by the Austrian provision (the subject-matter of the second question referred for a preliminary ruling), in order to comply with the

5 — See, in particular, the judgments in *Kachelmann* (C-322/98, EU:C:2000:495, paragraph 17), *Lucchini* (C-119/05, EU:C:2007:434, paragraph 44) and *FOA* (C-354/13, EU:C:2014:2463, paragraph 45).

6 — See to this effect, inter alia, the judgments in *Banks* (C-390/98, EU:C:2001:456, paragraph 80), *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 43) and *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 51).

prohibition on putting into effect proposed State aid laid down in the third sentence of Article 108(3) TFEU. The legal consequence of an infringement by national aid measures of the prohibition on putting into effect proposed State aid is that those measures are rendered unlawful,[7] and, in consequence, invalid.[8]

28. IFN-Holding, however, takes the view that, even if the Austrian provision constitutes aid, it cannot be denied the right to amortise goodwill, in so far as the freedom of establishment was intended to allow it to carry out such amortisation. The reason for this, it argues, is that the only task falling to the national courts in matters of State aid is to protect an individual's rights pending the decision to be issued by the Commission. If, by its first question, the referring court is seeking to deny the taxable entity the legal protection afforded by the freedom of establishment on the ground of the prohibition of putting into effect proposed State aid, it is therefore exceeding its powers.

29. To take such a view, however, is to misunderstand the substance of the prohibition laid down in the third sentence of Article 108(3) TFEU. It is true that the national courts are not empowered to assess the compatibility of aid with the internal market under Article 107(2) and (3) TFEU, since that task falls to the Commission alone.[9] The position is otherwise, however, in the present context of the prohibition laid down in the third sentence of Article 108(3) TFEU. The reason for this is that the latter provision has direct effect.[10] The national court is therefore required, for example, to order that beneficiaries repay any aid unlawfully granted to them.[11] The prohibition on putting into effect proposed State aid may therefore have negative consequences for an individual, even though the Court of Justice has in a number of judgments emphasised that the national courts must, 'for the benefit of' individuals, draw appropriate conclusions from an infringement of the prohibition on putting into effect proposed State aid.[12]

30. As is apparent in particular from more recent case-law, however, the national courts have a duty to give general and comprehensive effect to the prohibition on putting into effect proposed State aid[13] and, in so doing, must also take full account of the interests of the European Union.[14] As I have already explained in my Opinion in *Presidente del Consiglio dei Ministri*, the national court must, therefore, not only guarantee the protection of individual rights but also do everything within its power to give effect to the prohibition laid down in the third sentence of Article 108(3) TFEU in national law.[15] Consequently, that prohibition could also be relied on as against a claim such as that in the present case, which may seek to widen recourse to an unnotified aid measure in order in this way to ensure that the circle of recipients of an aid measure that is unlawful is not extended.[16]

7 — Judgments in *Distribution Casino France and Others* (C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 30) and *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 28).

8 — See, inter alia, the judgments in *Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 16 and 17), *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 63), *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 41) and *Centre d'exportation du livre français* (C-199/06, EU:C:2008:79, paragraph 40).

9 — See, inter alia, the judgments in *Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraph 14), *Lornoy and Others* (C-17/91, EU:C:1992:514, paragraph 30), *van Calster and Others* (C-261/01 and C-262/01, EU:C:2003:571, paragraph 75) and *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 27).

10 — See, inter alia, the judgments in *Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 11 and 13), *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 26) and *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 41).

11 — See, inter alia, the judgment in *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraphs 33 to 36 and the case-law cited).

12 — See the judgments in *Féderation nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 12) and *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 27).

13 — See the judgments in *Centre d'exportation du livre français* (C-199/06, EU:C:2008:79, paragraph 41) and *Residex Capital IV* (C-275/10, EU:C:2011:814, paragraph 29).

14 — Judgment in *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 48).

15 — See my Opinion in *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:420, paragraphs 119 to 122).

16 — See to this effect the judgment in *Transalpine Ölleitung in Österreich* (C-368/04, EU:C:2006:644, paragraph 49).

31. The first question referred for a preliminary ruling is therefore admissible.

32. It has become clear, none the less, that the first question referred for a preliminary ruling will be relevant to the dispute in the main proceedings only if the Court finds that the Austrian provision infringes the freedom of establishment, which forms the subject-matter of the second question. For only then will there be any question at all, in the dispute in the main proceedings, of whether taxable entities are to be granted the right to amortise goodwill on the basis of Article 49 TFEU or refused the right to do so in accordance with the third sentence of Article 108(3) TFEU. The second question must therefore be examined first.

B – *Infringement of the freedom of establishment*

33. It must therefore be examined first of all whether a provision such as that at issue, which, in the context of group taxation, allows goodwill to be amortised only in connection with shareholdings in domestic companies, constitutes an infringement of Article 49 TFEU in conjunction with Article 54 TFEU.

1. Restriction of the freedom of establishment

34. In accordance with the second sentence of the first paragraph of Article 49 TFEU and Article 54 TFEU, restrictions on the setting-up of subsidiaries by companies of one Member State in the territory of another Member State are prohibited.

35. It is settled case-law that the foregoing prohibits not only the host State but also the State of origin from hindering the establishment of a company in another Member State. [17] Such a hindrance must be assumed to be present where a domestic parent company with a foreign subsidiary is the subject of a disadvantageous difference in treatment by comparison with a domestic parent company with a domestic subsidiary. [18]

36. In the present case, it follows from the second sentence of Paragraph 9(7) of the KStG 1988 that, in the context of group taxation, an Austrian company is entitled to the tax advantage of goodwill amortisation on the acquisition of a shareholding in another company only in the case where the company so acquired has unlimited tax liability in Austria, which is to say that it is established within national territory. Such amortisation is not possible, on the other hand, in the case where the company acquired is established in another Member State. That difference in treatment hinders the acquisition of shareholdings in subsidiaries that are established in another Member State. Since, for the purposes of the freedom of establishment, the acquisition of such a shareholding is to be treated in the same way as the setting-up of a subsidiary, [19] the Austrian provision thus hinders the establishment of Austrian companies in another Member State.

37. The Republic of Austria cannot call the tax advantage of goodwill amortisation into question by arguing that the possibility also exists that an acquisition will give rise to negative goodwill, which must be written back to profit and therefore constitutes a tax disadvantage. On the one hand, such a possibility does nothing to alter the fact that, in cases of positive goodwill, a tax advantage none the less obtains. On the other hand, it follows from the definition of goodwill as the difference between equity capital plus certain concealed reserves and acquisition costs, in accordance with the first indent

17 — See, inter alia, the judgments in *Daily Mail and General Trust* (81/87, EU:C:1988:456, paragraph 16), *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 35) and *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 18).

18 — See, in particular, the judgments in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 19) and *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraph 23).

19 — See to this effect the judgment in *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraphs 25 to 31).

of the second sentence of Paragraph 9(7) of KStG 1988, that negative goodwill arises only where — to put it simply — the purchase price is lower than the proceeds that might be expected if the company were to be immediately wound up. Negative goodwill therefore indicates that the acquired company's earnings expectations are negative. Such acquisitions are likely to be rare exceptions.

38. The provision at issue thus restricts the freedom of establishment of Austrian companies such as the one at issue in the main proceedings.

2. Objective comparability of situations

39. In its case-law, the Court of Justice sometimes takes the view that a disadvantageous difference in the treatment of a parent company with a foreign subsidiary as compared with a parent company with a domestic subsidiary is compatible with the freedom of establishment where that difference concerns situations which are not objectively comparable. [20]

40. In its judgment in *Rewe Zentralfinanz*, the Court held that parent companies are in a comparable situation as regards losses incurred in respect of write-downs made to the book value of their shareholdings in subsidiaries regardless of whether the shares are held in domestic subsidiaries or subsidiaries in other Member States. [21] It is true that, in that judgment, the Court proceeded on the assumption — inter alia — that, in both cases, the subsidiary's profits are not taxed at the level of the parent company, which, in the present context of group taxation, is not the case, since the legislation at issue here specifically provides that the profits of domestic subsidiaries are to be taxed at the level of the parent company. The Commission has rightly pointed out, however, that, in the present case, goodwill is amortised irrespective of whether the domestic subsidiary makes any profits at all. The attribution of a subsidiary's profits to the income of the parent company is therefore irrelevant from the point of view of the objective comparability of the situations of domestic and foreign shareholdings for the purposes of the provision at issue here.

41. Moreover, in the judgment in *X Holding*, the Court, again in the context of legislation concerning group taxation, held it to be sufficient for the purposes of an assumption as to the objective comparability of situations that a parent company should seek to benefit from the advantage of a tax scheme in connection with both its foreign and domestic subsidiaries. [22] Inasmuch as, in the judgment in *Nordea Bank Danmark*, the Court recently appeared to apply stricter criteria to the objective comparability of situations, to the extent that it held domestic and foreign permanent establishments in principle not to be in an objectively comparable situation, [23] in the most recent judgment in *Commission* v *United Kingdom*, it seems to be unwilling to transpose those criteria to subsidiaries. [24]

42. By contrast, the Republic of Austria contends that the situations are not objectively comparable because, in accordance with Paragraph 10 of the KStG 1988, foreign shareholdings, unlike domestic shareholdings, are in principle treated neutrally for tax purposes. That proposition can, however, be analysed only as part of the following examination of whether there is any ground of justification for

20 — See, inter alia, the judgments in *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraphs 32 to 36), *X Holding* (C-337/08, EU:C:2010:89, paragraph 20) and *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 28); on the other hand, however, see inter alia the judgments in *ICI* (C-264/96, EU:C:1998:370, paragraphs 23 to 30), *Argenta Spaarbank* (C-350/11, EU:C:2013:447, paragraphs 34 and 35) and *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraphs 23 and 24), which make no mention of such a possibility.

21 — Judgment in *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraph 34).

22 — See the judgment in *X Holding* (C-337/08, EU:C:2010:89, paragraph 24).

23 — See the judgment in *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 24).

24 — See the judgment in *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50) in the light of my Opinion in that case (EU:C:2014:2321, points 25 and 26).

the present restriction of the freedom of establishment. The reason for this is that a difference in the treatment of domestic and foreign subsidiaries which is based on the workings of a Member State's tax system may be permissible only under the conditions laid down by case-law as governing the ground of justification of maintaining fiscal cohesion.

43. The present disadvantageous difference in the treatment of the acquisition of foreign subsidiaries is not therefore compatible with the freedom of establishment because that difference concerns a situation which is not objectively comparable to a domestic situation.

3. Justification

44. A restriction of the freedom of establishment can, none the less, be justified by an overriding reason in the general interest. [25]

45. The Court of Justice has recognised in settled case-law that Member States may restrict the fundamental freedoms in order to maintain the cohesion of the tax system. [26]

46. For that purpose, a direct link must be established between a tax advantage and the offsetting of that advantage by a particular tax levy, [27] in principle in relation to one and the same taxpayer and with respect to the same tax. [28] In such a situation, the beneficiary of a fundamental freedom can be denied a tax advantage if he is not also subject to the tax levy which, in the Member State's tax system, is inseparably linked to the tax advantage sought. This serves to prevent an 'unjustified' tax advantage. [29]

47. The direct nature of the link between the advantage and the tax levy must be assessed in the light of the objective pursued by the tax regime concerned. [30] In this regard, a direct link requires as a minimum that the tax advantage be conditional on the tax levy. The Member State's tax system must not therefore make it possible to obtain the tax advantage without the tax levy. [31]

25 — See, inter alia, the judgments in *Lankhorst-Hohorst* (C-324/00, EU:C:2002:749, paragraph 33), *Papillon* (C-418/07, EU:C:2008:659, paragraph 33) and *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 23).

26 — See, inter alia, the judgments in *Bachmann* (C-204/90, EU:C:1992:35, paragraph 28), *Manninen* (C-319/02, EU:C:2004:484, paragraph 42), *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 68), *Papillon* (C-418/07, EU:C:2008:659, paragraph 43), *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 33) and Grünewald (C-559/13, EU:C:2015:109, paragraph 48).

27 — See the judgments in *Svensson and Gustavsson* (C-484/93, EU:C:1995:379, paragraph 18), *ICI* (C-264/96, EU:C:1998:370, paragraph 29), *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraph 62), *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 58) and *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraph 36).

28 — See, inter alia, the judgments in *Verkooijen* (C-35/98, EU:C:2000:294, paragraph 57), *Bosal* (C-168/01, EU:C:2003:479, paragraph 30), *DI VI Finanziaria SAPA di Diego della Valle* (C-380/11, EU:C:2012:552, paragraph 47) and *Grünewald* (C-559/13, EU:C:2015:109, paragraph 49); on the subject of exceptions to that principle, see inter alia the judgments in *Manninen* (C-319/02, EU:C:2004:484, paragraphs 45 and 46) and *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraphs 47 to 49); see also my Opinion in *Manninen* (C-319/02, EU:C:2004:164, points 50 to 65).

29 — See the judgment in *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraph 75).

30 — See, in particular, the judgments in *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraph 39), *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 47) and *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 92); similarly, see not least the judgment in *Manninen* (C-319/02, EU:C:2004:484, paragraph 43).

31 — See to this effect the judgments in *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 73), *Commission* v *Portugal* (C-493/09, EU:C:2011:635, paragraph 39), *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 87), *Santander Asset Management SGIIC and Others* (C-338/11 to C-347/11, EU:C:2012:286, paragraph 52), *Emerging Markets Series of DFA Investment Trust Company* (C-190/12, EU:C:2014:249, paragraph 93) and *Grünewald* (C-559/13, EU:C:2015:109, paragraph 51).

48. Likewise, in matters of value added tax law too, the Court of Justice requires a direct link to support the finding that a supply of goods or a supply of services is effected 'for consideration', [32] that is to say on the basis of reciprocal performance, and is therefore taxable. [33] Advocate General Mengozzi was therefore right to speak of the need to establish a 'precise compensatory effect' in the relationship between a tax advantage and a tax levy for the purposes of the ground of justification of safeguarding the cohesion of the tax system. [34] In the Member State's tax system, the tax advantage must therefore constitute the 'reciprocal performance' by the State for a particular tax levy.

49. In the present case, a number of tax levies under the Austrian tax system have been put forward as ones for which the tax advantage of goodwill amortisation might represent the 'reciprocal performance'.

a) Attribution of the subsidiary's profits

50. First of all, the Republic of Austria sees a direct link between the amortisation of goodwill and the attribution of the subsidiary's results to the parent company for tax purposes. In its submission, that attribution differs according to whether the subsidiary is domestic or foreign. Thus, on the one hand, the profits of domestic subsidiaries alone are attributed to the parent company for the purposes of group taxation; the profits of foreign subsidiaries are not. On the other hand, losses recorded by domestic subsidiaries are always attributed to the parent company, whereas those of foreign subsidiaries are so attributed only temporarily.

51. When it comes to the assessment of fiscal cohesion, the only important factor is the existence of a particular tax levy. In the context of the attribution of results, therefore, the only conceivable compensatory levy lies in the taxation of the subsidiary's profits at the level of the parent company, since the attribution of losses itself constitutes a tax advantage for the parent company.

52. It is true that the attribution of profits operates in relation to the same taxable entity, namely the parent company, and with respect to the same tax, namely Austrian corporation tax. Under Austrian corporation tax law, however, it is not a condition of the amortisation of goodwill associated with a shareholding in a subsidiary that the subsidiary should make profits that are attributed to the parent company.

53. It is my view that, in the context of fiscal cohesion, even the mere possibility of profits being taxed is capable of constituting a tax levy. [35] Even to the extent that that is the case, however, it is not possible to establish a direct link with goodwill amortisation. For, even in cases where the parent company sets up the domestic subsidiary itself, and does not therefore acquire it, the subsidiary's profits are attributed to the parent. In those cases, however, the goodwill associated with the shareholding cannot be amortised because there has been no acquisition. The attribution of a subsidiary's profits is therefore independent of the amortisation of the goodwill from the shareholding. To that extent, there is no direct link between the two within the meaning of the relevant case-law.

32 — See Article 2(1)(a) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) and Article 2, point 1, of Sixth Council Directive 77/388 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), which preceded it.

33 — See, inter alia, the judgments in *Tolsma* (C-16/93, EU:C:1994:80, paragraphs 13 to 20) and *Fillibeck* (C-258/95, EU:C:1997:491, paragraphs 12 to 17); see also the Opinion of Advocate General Stix-Hackl in *Bertelsmann* (C-380/99, EU:C:2001:129, point 32).

34 — Opinion of Advocate General Mengozzi in *Beker and Beker* (C-168/11, EU:C:2012:452, point 56).

35 — See to this effect my Opinion in *X* (C-686/13, EU:C:2015:31, points 49 to 55 and the case-law cited).

54. The foregoing becomes even more apparent in the light of the fact that the attribution of a subsidiary's profits exhibits a direct link with a tax advantage other than goodwill amortisation. For, according to case-law, there is a 'logic of symmetry' in the consideration of both profits and losses. [36] The attribution of a subsidiary's profits to its parent company is therefore directly linked to the consideration of the subsidiary's losses, too. Consequently, the attribution of the profits of domestic subsidiaries alone is such as to constitute a ground of justification only for the fact that the losses of foreign subsidiaries are attributed to the parent company only under certain conditions for the purposes of Austrian group taxation. [37]

55. The attribution of a subsidiary's profits thus exhibits no direct link with the amortisation of the goodwill associated with the shareholding in that subsidiary. The fact that the profits of foreign subsidiaries are not attributed for the purposes of group taxation cannot therefore justify the restriction at issue here.

b) Tax neutrality of the shareholding in a foreign subsidiary

56. As a further ground capable of necessitating the contested restriction aimed at maintaining fiscal cohesion, the Republic of Austria submits that shareholdings in foreign companies are always treated in a fiscally neutral manner for the purposes of group taxation. In accordance with Paragraph 10(2) and (3) of the KStG 1988, concerning international inter-company shareholdings, no account is taken for tax purposes of profits, capital gains, capital losses or other changes in value from shareholdings in a foreign subsidiary.

57. A particular consequence of that tax-neutral treatment, it contends, is that capital gains from shareholdings in foreign subsidiaries are not taxable. Capital gains from shareholdings in domestic subsidiaries, on the other hand, are taxed. This, however, is necessary in order to offset the earlier amortisation of the goodwill associated with those shareholdings.

58. The line of argument put forward by the Republic of Austria is informed by the notion of symmetry between the taxation of profits and the taking into account of losses, which has also been observed on numerous occasions in the case-law. [38] In the judgment in *K* in particular, the Court of Justice recognised that there may be a close link for the purposes of fiscal cohesion between the taking into account of losses generated by a capital investment, on the one hand, and the direct taxation of returns on that investment, on the other. [39]

59. Consequently, in order to maintain fiscal cohesion, there may in principle be some justification for refusing to grant the tax advantage represented by the taking into account of a loss — such as the amortisation of goodwill associated with the acquisition of a shareholding, at issue here — if the taxable entity concerned is not also subject to the levy represented by the taxation of the corresponding profit — such as the capital gain at issue here. Even the taxable entity IFN-Holding concedes that, if it were to be granted the right to amortise the goodwill associated with its foreign shareholding, it would also have to pay tax on any capital gains from the disposal of that shareholding.

60. Such justification is none the less ruled out in the present case.

36 — See the judgment in *K* (C-322/11, EU:C:2013:716, paragraphs 65 to 69).

37 — See to this effect, inter alia, the judgments in *Marks & Spencer* (C-446/03, EU:C:2005:763) and *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50).

38 — See, inter alia, the judgments in *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 45), *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 58) and *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraphs 32 and 33).

39 — Judgment in *K* (C-322/11, EU:C:2013:716, paragraph 69).

61. The reason for this is that Austrian corporation tax law does not make the tax advantage in the form of goodwill amortisation conditional on the existence of a levy in the form of the taxation of capital gains. After all, goodwill cannot be amortised even in the case where the taxable entity exercises its option to make a foreign shareholding tax-effective, in accordance with Paragraph 10(3), point 1, of the KStG 1988, thus rendering the disposal of such a shareholding taxable. If this means that, under the Austrian scheme of legislation, the right to amortise goodwill associated with foreign shareholdings is refused irrespective of whether that shareholding is treated in a fiscally neutral manner, the legislation at issue clearly does not pursue the objective of creating a link between the refusal to permit the amortisation of goodwill and the fiscal neutrality of the shareholding.

62. Even if one were to assume, as the Republic of Austria argues, that that is the objective pursued, account would have to be taken of the settled case-law to the effect that national legislation is considered appropriate for ensuring attainment of the objective pursued only if it attains it in a consistent and systematic manner,[40] that is to say only if it is coherent. In any event, in the light of the option provided for in Paragraph 10(3), point 1, of the KStG 1988, that requirement is not satisfied. After all, bearing in mind the purported objective of the provision in question, there would be no coherence in ruling out the amortisation of goodwill even in cases where the tax-effectiveness option is exercised.

63. Consequently, the fiscal neutrality of shareholdings in foreign subsidiaries, as provided for in principle in Austrian law, also cannot justify the refusal to permit the amortisation of goodwill associated with such shareholdings.

c) Equivalence of the acquisition of permanent establishments and subsidiaries

64. Finally, the ground of justification of maintaining fiscal cohesion must now be assessed in the light of the objective which the Austrian Government associated with its draft law introducing the amortisation of goodwill arising from domestic subsidiaries.

65. According to the information supplied by the referring court, the objective of that law is to treat the acquisition of a holding in a legally independent subsidiary in the same way as the acquisition of a legally dependent permanent establishment. For, while it is generally possible under Austrian law to amortise the goodwill arising from the acquisition of a permanent establishment, the legislation at issue here provides for the same possibility in connection with the acquisition of a subsidiary in the context of group taxation too.

66. In the light of that objective, the Republic of Austria argues that the right to amortise the goodwill associated with shareholdings in foreign subsidiaries is rightly refused because goodwill cannot be amortised on the acquisition of a foreign permanent establishment either. This is certainly the case where the relevant double taxation agreement provides for the application of the exemption method to income from foreign permanent establishments and Austria therefore has no right of taxation in respect of such income.

67. However, irrespective of whether the objective of treating the acquisition of domestic and foreign subsidiaries in the same way as the acquisition of permanent establishments is even capable of satisfying the conditions applicable to the ground of justification of maintaining fiscal cohesion, that objective is not in every case attained in a coherent and systematic manner, as the relevant case-law requires.[41] After all, as IFN-Holding has rightly pointed out, the aforementioned entities are not

40 — See, inter alia, the judgments in *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55), *Commission* v *Italy* (C-531/06, EU:C:2009:315, paragraph 66), *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 94), *Petersen* (C-341/08, EU:C:2010:4, paragraph 53) and *Blanco* (C-344/13 and C-367/13, EU:C:2014:2311, paragraph 39).

41 — See point 62 above.

treated in that way in particular where the relevant double taxation agreement provides that income from a foreign permanent establishment is to be taxed in Austria, in accordance with the credit method. In that event, goodwill amortisation is taken into account even in the case of foreign permanent establishments because income from those permanent establishments is taxed in Austria, subject to a deduction for the foreign tax. The legislation at issue here, however, does not make exclusion of the right to amortise the goodwill associated with shareholdings in foreign subsidiaries dependent on whether the agreement with the State in which the subsidiary has its registered office provides for the application of the exemption or credit method to income from permanent establishments.

68. The ground of justification of maintaining the cohesion of the Member State's tax system also cannot be relied upon, therefore, in connection with the objective of treating the acquisition of a holding in a legally independent subsidiary in the same way as the acquisition of a legally dependent permanent establishment.

d) Interim conclusion

69. In conclusion, since no further grounds of justification are apparent, the restriction on the freedom of establishment at issue here is not justified by an overriding reason in the general interest.

4. Answer to the second question referred for a preliminary ruling

70. The answer to the second question must therefore be that a provision such as that at issue, which, in the context of group taxation, allows goodwill to be amortised only in relation to domestic shareholdings, infringes Article 49 TFEU in conjunction with Article 54 TFEU and Article 43 EC in conjunction with Article 48 EC.

C – *Infringement of the prohibition on putting into effect proposed State aid*

71. By its first question, the referring court also wishes to ascertain whether a provision such as the second sentence of Paragraph 9(7) of the KStG 1988, concerning the amortisation of goodwill in the context of group taxation, infringes the prohibition on putting into effect proposed State aid, laid down in the third sentence of Article 108(3) TFEU in conjunction with Article 107(1) TFEU. Since it has been concluded, in relation to the second question, that the Austrian provision infringes the freedom of establishment, the first question must also be answered, in order to clarify whether EU law has the effect of giving a taxable entity such as IFN-Holding a right to avail itself of goodwill amortisation regime. [42]

72. The third sentence of Article 108(3) TFEU provides that a Member State is not to put a proposed aid measure into effect until the Commission has adopted a final decision. This also prohibits the putting into effect of aid which a Member State has introduced but not notified following its accession to the European Union. The provision contained in the second sentence of Paragraph 9(7) of the KStG 1988 satisfies the latter two conditions, since, according to the information supplied by the referring court, it was published in the Austrian Official Gazette in 2004 and, moreover, up until the time of the order for reference, had not been notified to the Commission.

42 — See point 32 above.

73. The prohibition laid down in the third sentence of Article 108(3) TFEU would therefore preclude the provision on the amortisation of goodwill at issue here in so far as it constitutes aid within the meaning of the definition given in Article 107(1) TFEU. To satisfy that definition, it would have to be an advantage granted by the State or through State resources [43] which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States.

1. Tax advantage

74. Preferential tax treatment which, although not involving a transfer of State resources, places the beneficiaries in a more favourable financial situation than other taxpayers also falls within the scope of Article 107(1) TFEU. [44]

75. The provision governing the amortisation of goodwill at issue here is therefore in principle covered by Article 107(1) TFEU because, for certain taxable persons, it reduces the basis of assessment to Austrian corporation tax for a period of 15 years and thus has the effect of lowering the level of tax liability for a number of tax periods.

76. However, IFN-Holding and the Republic of Austria question whether that provision ultimately gives rise to any advantage at all. In their submission, it is true that the second sentence of Paragraph 9(7) of the KStG 1998 authorises the amortisation of goodwill in the context of group taxation. At the same time, however, the first sentence of that provision rules out a write-down of the shareholding by reason of other subsequent reductions in the value of the asset.

77. That argument is none the less not capable of rebutting the fact that goodwill amortisation as such is a tax advantage. That advantage is not cancelled out by the exclusion of other write-downs of shareholdings in the context of group taxation. The reason for this is that, whilst the amortisation of goodwill is carried out on the acquisition of any shareholding, other subsequent reductions in the value of a shareholding occur only in exceptional cases. Moreover, the exclusion of other write-downs applies, in the context of group taxation, to all shareholdings and not just to those that carry a right to the amortisation of goodwill. Therefore, the amortisation of goodwill leads, in special cases, to an advantageous derogation from this general rule.

78. The Austrian provision therefore grants an advantage within the meaning of Article 107(1) TFEU.

2. Selectivity of the advantage

79. The referring court's doubts are, rightly, concerned primarily with whether the provision governing the amortisation of goodwill has the effect of 'favouring certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU, that is to say whether it grants a 'selective' advantage within the meaning of case-law.

a) Selectivity in matters of tax law

80. The examination of such selectivity in the tax regimes operated by the Member States presents a number of difficulties.

43 — See, inter alia, the judgments in *Spain* v *Commission* (C-342/96, EU:C:1999:210, paragraph 41), *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 84) and *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 21).

44 — See, inter alia, the judgments in *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 14), *Commission* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 72) and *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23).

81. Case-law repeatedly takes as its starting point the premiss that a tax regime is not selective if it applies to all economic operators without distinction. [45] According to case-law, however, the mere fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions is not in itself capable of establishing its selectivity. [46] On the other hand, a tax regime also cannot always be said not to be selective on the ground that all economic operators are able without distinction to avail themselves of the tax advantage which it makes available, provided that they satisfy its conditions. For, in that event, a tax regime would always have to be deemed not to be selective.

82. As far as tax advantages are concerned, therefore, case-law has made any finding as to their selectivity subject to special conditions. According to that case-law, the ultimately decisive factor is whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage are selected in a non-discriminatory manner. [47] To answer that question, it is necessary to begin by identifying the common or 'normal' tax regime applicable in the Member State concerned. It is in relation to that common or 'normal' tax regime that it is necessary, secondly, to assess whether the advantage granted by the tax measure in question is selective to the extent that that measure derogates from the common regime by differentiating between economic operators who, in the light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation. [48] Even if those conditions are satisfied, the favourable treatment may be justified by the nature or general purposes of the system of which it is a part, in particular where a tax regime results directly from the basic or guiding principles of the national tax system. [49]

83. Such an equality test to establish whether or not tax regimes are selective is necessary because — unlike subsidies in the narrow sense in the form of cash benefits — tax advantages are granted in the context of a tax system to which undertakings are permanently and inevitably subject. Tax systems, however, grant advantages in many different ways, the purpose of those advantages often being simply to ensure that the tax achieves the precise objective it pursues. That said, according to case-law, advantages that are not subsidies in the narrow sense are classified as aid only if they are similar in character to such subsidies and have the same effect. [50] Thus, it is only where a Member State also uses its existing tax system as a means of distributing cash benefits for purposes other than those of that tax system that there are sufficient grounds for treating such tax advantages as subsidies in the narrow sense. [51]

84. It also follows from that finding, however, that an unjustifiable difference in treatment operated in the tax system of the Member State is not sufficient to support the conclusion that a tax advantage is selective within the meaning of Article 107(1) TFEU. For that finding shows only that the tax regime is similar in character to a subsidy in the narrow sense and has the same effect.

45 — See, in particular, the judgments in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35), *Commission* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 73), *3M Italia* (C-417/10, EU:C:2012:184, paragraph 39) and *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 23).

46 — See to this effect in particular the judgment in *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42).

47 — See also to this effect the judgment in *Eventech* (C-518/13, EU:C:2015:9, paragraph 53).

48 — See the judgments in *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 49), *P* (C-6/12, EU:C:2013:525, paragraph 19) and *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 35).

49 — See the judgments in *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 65 and 69) and *P* (C-6/12, EU:C:2013:525, paragraph 22); see also to this effect, inter alia, the judgments in *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 33), *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 42), *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 145) and *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraphs 42 and 43).

50 — See, inter alia, the judgments in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* (30/59, EU:C:1961:2, p. 43), *Air Liquide Industries Belgium* (C-393/04 and C-41/05, EU:C:2006:403, paragraph 29), *Bouygues and Bouygues Télécom* v *Commission* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101) and *Ministerio de Defensa and Navantia* (C-522/13, EU:C:2014:2262, paragraph 22).

51 — See also to this effect the judgment in *P* (C-6/12, EU:C:2013:525, paragraphs 22 to 27).

85. Furthermore, in accordance with Article 107(1) TFEU, the recipients of a subsidy must be either 'certain undertakings' or 'the production of certain goods'. It is for that reason that the Court of Justice, in particular in the judgment in *Gibraltar*, has held that a tax system must characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category.[52] The equality test must therefore be followed by a further step aimed at clarifying whether the group of taxable entities benefiting from a tax regime sufficiently constitute specific undertakings or the production of certain goods within the meaning of Article 107(1) TFEU.

b) The selective nature of the various differences in treatment

86. In the present case, it must therefore be examined first of all whether the provision on the amortisation of goodwill constitutes a difference in treatment which has no basis in the Austrian tax system, but rather pursues non-tax related aims. If that were the case, it would then have to be further clarified whether the taxpayers benefiting from that provision constitute 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU.

87. The referring court considers that the provision at issue may grant a selective advantage on a number of counts, namely by treating legal persons differently from natural persons (see section (i)), by treating entities liable for corporation tax within the context of group taxation differently from those liable to corporation tax outside that context (see section (ii)) and, within the context of group taxation, treating taxable entities with domestic shareholdings differently from entities with foreign shareholdings (see section (iii)).

88. The referring court has therefore selected three different 'normal' tax regimes as the basis for its examination. In so far as it suspects that the goodwill amortisation regime is selective because it is available only to legal but not to natural persons, it selects as its reference framework the entire body of Austrian law on the taxation of profits. On the other hand, in so far as it addresses the preferential treatment, from the point of view of corporation tax, of undertakings subject to group taxation, the referring court takes corporation tax law as its reference framework. Finally, in so far as it focuses, within the context of group taxation, on the preferential treatment of undertakings with domestic as opposed to foreign shareholdings, the reference framework has to be the law relating to group taxation. The reference framework therefore varies according to the difference in treatment under consideration. This makes apparent the fact — as the Court, too, found in the judgment in *Gibraltar*[53] — that the determination of a 'normal' tax system cannot be decisive. The examination of the difference in treatment in question is alone decisive.

i) Preferential treatment of legal persons

89. The first difference in treatment of which the referring court complains lies in the fact that it is only legal persons, who are governed by the KStG 1988, who are eligible for goodwill amortisation; natural persons, who are taxed in accordance with the Austrian Law on Income Tax, are not eligible.

90. For such preferential treatment to be present, legal and natural persons would have to be in a comparable factual and legal situation.

52 — See the judgment in *Commission* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104).

53 — See the judgment in *Commission* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 90, 91 and 131).

91. First of all, it must be made clear that the criteria to be applied when examining the comparability of factual and legal situations for the purposes of Article 107(1) TFEU, on the one hand, and in connection with a fundamental freedom, on the other hand, are different. Whereas, in the context of fundamental freedoms, the Court of Justice usually finds, in particular in matters relating to tax law, that situations are comparable,[54] the same cannot obtain when it comes to the selectivity of tax advantages. The reason for this is that, unlike the restriction of a fundamental freedom, selectivity usually involves a difference in the treatment of undertakings of the same State rather than a difference in the treatment of domestic and foreign undertakings.[55] However, it is only in the case of cross-border as opposed to purely domestic discrimination that the Treaties, depending on the purpose of that discrimination, call for a particularly strict approach.

92. On the basis of that criterion, legal and natural persons are not in a comparable situation under the Austrian tax system. The reason for this is that, in Austrian law, legal and natural persons each have their own tax laws, the provisions of which obviously differ widely when it comes to the determination of the basis of assessment. Furthermore, there is a fundamental factual difference between the two groups inasmuch as only legal persons, subject to corporation tax, have shareholders who share in the company's income and are themselves subject to tax on their earnings.

93. The fact that legal persons alone are able to avail themselves of the amortisation of goodwill, but natural persons are not, does not therefore constitute selective favourable treatment of legal persons for the purposes of Article 107(1) TFEU.

ii) Favourable treatment of tax groups

94. The next question is whether the amortisation of goodwill selectively favours companies subject to group taxation over companies that are taxed outside the context of group taxation.

95. The Republic of Austria does not consider the two groups of undertakings to be comparable in this regard because it is only in the context of group taxation that a subsidiary's results are attributed to the parent company.

96. In accordance with the spirit and purpose of group taxation, a parent company and its subsidiaries are to be treated as a single taxable entity. To that end, the results of legally independent subsidiaries are combined with those of the parent company. In those circumstances, the Court of Justice recognised in principle in the judgment in *Papillon* — in relation to a restriction of the freedom of establishment — that there may be a need to regulate the valuation of shareholdings differently within the context of group taxation as compared with outside the context of group taxation in order to ensure that losses are not taken into account twice.[56] This must *a fortiori* be the case when it comes to the assessment of selectivity.[57]

97. In addition, the referring court has explained that one of the objectives of the Austrian goodwill amortisation regime is to treat the acquisition of a permanent establishment in the same way as the acquisition of a subsidiary.[58] Whilst in the first case of the acquisition of the assets of a permanent establishment, goodwill can in principle be amortised, this is not in principle possible in the case of the acquisition of a shareholding in a legally independent company. However, in so far as it partially rescinds the legal independence of the acquired company for tax purposes by attributing its results to

54 — See my Opinion in *Nordea Bank Danmark* (C-48/13, EU:C:2014:153, point 25 and the case-law cited).

55 — See the judgment in *Spain* v *Commission* (C-73/03, EU:C:2004:711, paragraph 28).

56 — See the judgment in *Papillon* (C-418/07, EU:C:2008:659, paragraphs 45 to 47).

57 — See point 91 above.

58 — See point 65 above.

the parent company, the Austrian group taxation regime approximates the acquisition of a shareholding to the acquisition of a permanent establishment. From the point of view of the objective of the legislation, shareholdings falling within the context of group taxation are thus in a different legal situation from shareholdings falling outside that context.

98. Reference should also be made to the argument put forward by IFN-Holding — which the referring court might have to examine — to the effect that any company that acquires a shareholding can choose to form a tax group with the company so acquired and thereby enjoy the advantage of goodwill amortisation. If, in those circumstances, a company decides not to form a tax group, however, it is by virtue of that decision alone not in a comparable situation.

99. Consequently, the provision on the amortisation of goodwill at issue here also cannot be classified as selective on the ground that that tax advantage is available only to companies that are subject to group taxation.

iii) Favourable treatment of undertakings with domestic shareholdings

100. Finally, the limitation of goodwill amortisation to the acquisition of domestic shareholdings, which, as we have seen, already constitutes an infringement of the freedom of establishment,[59] might also constitute selective favourable treatment to the detriment of undertakings that acquire foreign shareholdings.

101. For that to be the case, undertakings that acquire domestic and foreign shareholdings would first of all have to be in a comparable situation and the favourable treatment would not have to be justified by the nature or general objectives of the regime.

102. This question appears to have been answered already so far as shareholdings in subsidiaries in other Member States are concerned. Thus, when examining whether there had been an infringement of the freedom of establishment, I concluded, first of all, that parent companies which acquire a domestic shareholding are in a comparable situation to companies which acquire a shareholding in another Member State.[60] Secondly, I found that the difference in the treatment of parent companies also could not be justified by the need to maintain the cohesion of the Austrian tax system.[61]

103. I have pointed out before, in *Presidente del Consiglio dei Ministri*, that, on account of the criteria for examining selectivity which have been laid down by case-law, the questions that arise in matters of State aid law are effectively the same as those that arise in the course of examining an infringement of the fundamental freedoms. In that Opinion, I suggested that, to avoid conflicting assessments, the same criteria be applied in both cases.[62] This, however, applies only to cases where aid may be selective because it favours domestic situations over foreign ones. After all, it would in such circumstances make no sense at all to find, on the one hand, that there has been an infringement of a fundamental freedom, while finding, on the other hand, in relation to the prohibition on State aid, that there are good reasons for the difference in treatment under the national tax system. To this extent, the foregoing is an exception to the principle that, when it comes to examining selectivity, a finding as to the comparability of situations is subject to more stringent requirements.[63]

59 — See points 33 to 70 above.

60 — See points 39 to 43 above.

61 — See points 44 to 69 above.

62 — See my Opinion in *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:420, point 134).

63 — See point 91 above.

104. The goodwill amortisation regime at issue here therefore constitutes treatment that favours undertakings which acquire domestic shareholdings over undertakings which acquire foreign shareholdings and which are in a comparable factual and legal situation. That difference in treatment is not justified by basic or guiding principles of the Austrian tax system. To that extent, the Austrian goodwill amortisation regime must therefore be deemed to be equivalent to a subsidy in the narrow sense.

105. However, such favourable treatment is selective only where the favoured undertakings, that is to say those which acquire domestic shareholdings in the context of group taxation, constitute 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU.

106. In the judgment in *Presidente del Consiglio dei Ministri*, the Court of Justice held to be selective a tax regime which, at the same time, constituted an infringement of a fundamental freedom by the host State because only foreign operators of aircraft and recreational craft were subject to the tax at issue.[64] The Court thus recognised that domestic undertakings in a particular sector are 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU.

107. The present case, however, concerns the restriction of a fundamental freedom by the State of origin. The Austrian goodwill amortisation regime does not favour domestic undertakings over foreign undertakings in a particular sector. Rather, the favourable treatment consists in the fact that the acquisition of domestic shareholdings is subsidised for all domestic undertakings irrespective of their sector.

108. Most recently, the General Court, when assessing two aid decisions issued by the Commission in the converse situation of the limitation of goodwill amortisation to the acquisition of *foreign* shareholdings under Spanish tax law, held that that regime was not selective. By way of grounds, the General Court stated that the regime was in principle available to any undertaking and did not exclude any category of undertakings.[65] As part of the appeal which the Commission has brought against those judgments of the General Court,[66] the Court of Justice will possibly have to rule on the lawfulness of that decision.

109. Whether or not the grounds given by General Court are convincing in every respect, its starting point, of requiring that there should be — as the Court of Justice put it in the judgment in *Gibraltar*[67] — a category of undertakings privileged by the tax regime in question by virtue of the properties which are specific to them, is none the less justified.

110. That is not the case here.

111. On the one hand, there is nothing to indicate that the Austrian goodwill amortisation regime favours the production of certain goods. After all, the acquisition of domestic shareholdings is not restricted to certain sectors but could in theory occur in any sector. On the other hand, there is no indication either that only certain undertakings are able to benefit from that regime. These would have to be clearly identifiable individual undertakings. It seems to me, however, that any company could potentially acquire a domestic shareholding, which rules out from the outset any possibility of identifying individual undertakings which benefit from the Austrian regime.

64 — Judgment in *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709).

65 — See the judgments in *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938, paragraphs 56 to 66) and *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939, paragraphs 52 to 62).

66 — Cases C-20/15 P (*Commission* v *Autogril España*) and C-21/15 P (*Commission* v *Banco Santander and Santusa*).

67 — See the judgment in *Commission* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104).

112. I am aware that the Court of Justice has in some cases adopted a very broad understanding of the concept of a category of undertakings privileged by virtue of the properties which are specific to it. Thus, for example, it held to constitute such a category undertakings whose primary business is the manufacture of goods [68] and undertakings which are engaged in export activities and make certain investments governed by the provisions at issue. [69]

113. Too broad an understanding of the selectivity of national provisions, however, harbours the risk of adversely affecting the division of competences between the Member States and the European Union, laid down in Articles 2 to 6 TFEU, and the division of internal competences between the European Parliament and the Council, laid down in Article 14 TFEU, on the one hand, and the Commission, laid down in Article 17 TFEU, on the other. For, where there is State aid within the meaning of Article 107(1) TFEU, the Commission usually has broad discretion under Article 107(3) TFEU to determine whether and under what circumstances it will or will not endorse the political decisions taken in the Member States, even though it has no powers of its own under the Treaties to legislate in the policy areas concerned.

114. In matters of tax law in particular, however, the decisive criterion is whether a provision is selective, because the other conditions laid down in Article 107(1) TFEU are almost always satisfied. It is thus settled case-law that it is not necessary to establish that the aid in question is actually distorting competition or having a real effect on trade between Member States, but only to examine whether the aid is liable to distort competition and affect trade between Member States. [70] Moreover, it is not even necessary for the beneficiary undertakings themselves to be involved in trade between Member States, it being sufficient that they might be so involved in future or that their foreign competitors might try to expand into the domestic market. [71]

115. The criterion relating to the selectivity of a national provision therefore requires careful handling. If the provision concerns neither one or more individually identifiable sectors capable of being defined by reference to their economic activity, nor individually identifiable undertakings, as the wording of Article 107(1) TFEU requires, then the provision in question cannot in principle be assumed to be selective.

116. Consequently, in the present case, the limitation of goodwill amortisation to the acquisition of domestic shareholdings also does not constitute treatment favourable to ‘certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU.

iv) Interim conclusion

117. A provision such as the second sentence of Paragraph 9(7) of the KStG 1988, concerning the amortisation of goodwill in the context of group taxation, cannot therefore — since it is not selective — be classified as aid within the meaning of Article 107(1) TFEU.

68 — Judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598).

69 — See the judgment in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraphs 120 to 128).

70 — See, inter alia, the judgments in *Italy* v *Commission* (C-372/97, EU:C:2004:234, paragraph 44), *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 78) and *Eventech* (C-518/13, EU:C:2015:9, paragraph 65).

71 — See the judgments in *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 143) and *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 80).

3. Answer to the first question referred for a preliminary ruling

118. The answer to the first question must therefore be that a provision such as that in this case, which limits goodwill amortisation to the acquisition of domestic shareholdings by legal persons in the context of group taxation, does not infringe the third sentence of Article 108(3) TFEU in conjunction with Article 107(1) TFEU or the third sentence of Article 88(3) EC in conjunction with Article 87(1) EC, as the case may be.

V – **Conclusion**

119. In the light of the foregoing, I propose that the two questions referred for a preliminary ruling by the Verwaltungsgerichtshof be answered as follows:

(1) The third sentence of Article 108(3) TFEU in conjunction with Article 107(1) TFEU and the third sentence of Article 88(3) EC in conjunction with Article 87(1) EC do not preclude a national measure such as that at issue in the main proceedings, under which, in the context of group taxation, goodwill is to be amortised in the case where a shareholding is acquired in a domestic company — thereby reducing the basis of assessment for tax purposes, and hence the tax burden — whereas such amortisation of goodwill on the acquisition of a shareholding is not permissible in other cases of income and corporation tax.

(2) Article 49 TFEU in conjunction with Article 54 TFEU and Article 43 EC in conjunction with Article 48 EC preclude legal provisions of a Member State, such as those at issue in the main proceedings, under which, in the context of group taxation, goodwill is to be amortised in the case where a shareholding is acquired in a domestic company, whereas such amortisation of goodwill may not be carried out in regard to the acquisition of a holding in a non-resident corporation.