FACULTY OF LAW
Lund University

Vilma Elisa Maria Isojunno

The ability-to-pay principle as a part of the CJEU's comparability analysis in cross-border corporate loss relief cases

JAEM03 Master Thesis

European Business Law
30 higher education credits

Supervisor: Mariya Senyk

Term: Spring 2021

Contents

Summary

This thesis examines the CJEU's comparability analysis regarding corporate cross-border loss transfer cases and the use of ability-to-pay principle as a part of the analysis. In the beginning of the thesis the basic concepts relating to internal market and taxation and underlying reasons for difficulties in cross-border loss transfer are explained and the importance of loss transfer is defended. After that, the comparability analysis conducted by the CJEU are examined and two significant turning points in the case law are highlighted. In the final part the ability-to-pay principle is considered from different perspectives such as its background and justification for using the principle is examined and the most notable arguments for and against the use of the principle is covered.

The main findings of the thesis are that the ability-to-pay principle is a "new step" employed by the CJEU in its comparability analysis, and it is also necessary part of the analysis from the viewpoint of the functioning of the internal market. Companies face greater risk when establishing secondary establishment in other Member States if their ability-to-pay is not taken sufficiently into account, as the case has previously been. Although not explicitly stated by the CJEU, the ability-to-pay principle is capable of being considered as a general principle of EU law. It also has a clear scope of application and aim of enhancing the functioning of the single market as well as it creates clear and objective rule for establishing comparability.

Preface

"…in this world, nothing can be said to be certain except death and taxes."
– Benjamin Franklin letter to Jean-Baptiste Le Roy in 1789

Vilma Isojunno
27.05.2021 Lund

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
EU	European Union
OECD	Organization for Economic Co-operation and Development
PE	Permanent establishment
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UK	United Kingdom

1 Introduction

1.1 Background

Cross-border loss recognition has been an ongoing issue in the European Union (EU) for long time, and new cases are being brought to the Court of Justice of the European Union (CJEU) on a regular basis. In essence difficulties arise from the fact that direct tax is not fully harmonized in the EU level and only some harmonization is done through negative harmonization with an object to ensure the functioning of internal market.[1] This means that each of the Member States can decide on direct tax matters themselves as long as it does not become an obstacle to free movement. As the tax systems differ from Member State to Member State the treatment of cross-border losses become an important question for businesses operating in multiple EU Member States.

On the one hand, Treaty on the Functioning of the European Union (TFEU) provides four basic freedoms, which are integral part of the EU law and basis for internal market: free movement of goods, people, capital and services.[2] The basic freedoms prohibit taxation, which is discriminatory, or restricts cross-border activity or makes it less attractive.[3] Due to these free movement rights, companies can decide freely, without restrictions, where in the EU they want to establish themselves or their permanent establishments (PEs).

On the other hand, treaties for the avoidance of double taxation usually require PEs to be taxed in the state where they are located, even though they are not separate legal entities. When a company has established a branch in another Member State than where it is established, the offsetting

[1] Peter J. Wattel, 'General EU Law Concepts and Tax Law' in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018) p. 20-21

[2] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 Articles 21, 34, 45, 49, 56, 63

[3] Marjaana Helminen, *EU Tax Law – Direct Taxation* (Chapter 2: Non-Discrimination and Basic Freedoms, 2020 Edition IBFD 2020) <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/etl2020_c02> Accessed 11 March 2021 p 6-8

of foreign loss made by the branch might become cumbersome, compared to purely internal situation. In particularly difficulties in treating cross-border losses arise when exemption method is used, which does not take into account foreign profits or losses.[4] At first glance, it would seem balanced that if profits are not taken into account, losses should not be taken into account either.[5] However, if it would be purely internal situation, there would not be an issue with deduction of losses, especially when many states allow balancing of profits and losses between companies belonging to the same group.[6] Hence, the companies exercising their freedom of movement by having PEs or subsidiaries located in multiple Member States might be in worse situation as their overall ability to pay taxes might not be taken into account in the similar manner as in purely internal situations.

When a restriction in free movement is claimed, the CJEU assesses the restriction first by assessing comparability of the cross-border situation to internal situation and if found comparable, whether the discrimination or restriction can be justified.[7] It has been stated by the CJEU in case *Schumacker* and in many cases after *Schumacker* that "…discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations."[8]. In case Member State treats foreign profits similarly to internal profits, the comparability of the situations is assumed by the CJEU.[9] That is why the application of the same rules to different situations is hardly ever examined, because similar treatment will automatically lead to objective comparability. On the contrary, comparability assessment made by the CJEU has been criticized for using allegedly discriminatory tax legislation in question as the basis of evaluating the comparability of the different situations

[4] Johanna Hey, 'Taxation of business in the EU: Special problems of cross-border losses and exit taxation' in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) p 194-195
[5] Hey, (n 4) p 194-195
[6] Helminen, *EU Tax Law – Direct Taxation* (n 3) p. 31
[7] Ibid p 49
[8] Case C-279/93 Finanzamt Köln-Altstadt v Roland Schumacker [1995] ECR I-00225 para 30
[9] Case C-650/16 A/S Bevola and Jens W. Trock ApS v Skatteministerie [2018] ECLI:EU:C:2018:424 Para 34

at hand. [10] When the evaluation is based on the objective of the national legislation, it allows the denying of objective comparability of the two situations, when the aim of the legislation is to treat domestic and foreign situations differently. If the objective comparability of domestic and foreign situations is denied, the CJEU does not consider if the restriction is justified. Also, coherence of the case law has been questioned.[11]

Often times, from the point of view of the taxpayer foreign loss and domestic loss are comparable, which can lead to unequal treatment of cross-border and internal situation.[12] New direction in the case law was taken in case *Bevola*, where the CJEU assessed the ability-to-pay as a final step to its comparability analysis.[13] It would seem rational to assume that assessing ability-to-pay as a part of comparability analysis will enable better focus of actual situation of a taxpayer. Thorough examination of comparability of internal and cross-border situation is essential as it determines whether the restriction will be examined further.

1.2 Research question and methodology

The thesis aims to examine the use of ability-to-pay principle in light of the CJEU's recent case law concerning the corporate cross-border loss recognition. The following questions will be analysed in this thesis:

1. *What is the scope of application of the ability-to-pay principle in EU law in the area of corporate cross-border loss relief?*
2. *Should the ability-to-pay principle be applied as a part of the comparability analysis used by the CJEU in corporate cross-border loss relief cases to ensure free movement?*

[10] Hey (n 4) p 199-200
[11] Roland Ismer and Harald Kandel, 'A Finale Incomparabile to the Saga of Definite Losses? Deduction of Foreign Losses and Fundamental Freedoms After Bevola and Sofina'(2019) 47(6&7) Intertax < https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Intertax/47.6/TAXI2019058> accessed 15 March 2021 p 573-574
[12] Hey (n 4) p 200
[13] Bevola (n 9) para 39

The latter question cannot be answered before answering the first one. The ability-to-pay principle is not explicitly stated in the primary EU legislation and hence it is important to consider whether, this principle occasionally used by the CJEU is even applicable. After coming to the conclusion that the principle can be used, it should be considered whether it is something that should be assessed by the court when doing the comparability analysis. The second question is important as the CJEU's case law seems to vary quite a bit from each other as well as the approach has been criticized by some scholars.[14]

Legal dogmatic method is used in order to answer the research questions of the thesis. Relevant legislation, case law, opinions of Advocate Generals (AG) and academic literature will be used as sources for this thesis. The legislation in this specific area is very limited and therefore the relevant legislation covers only the EU treaties and also Parent-Subsidiary Directive will be covered shortly. Case law in sections 2 and 3 has been chosen with focus on cases concerning specifically corporate cross-border loss deduction with the aim to find how the assessment of these situations has developed historically. As the scope of this thesis is limited to deductibility of secondary establishment's losses in the parent company, the case law is chosen accordingly. In section 4, the case law has been chosen on the basis that in these corporate cross-border loss relief cases the CJEU has specifically referred to ability-to-pay principle in its assessment. The role of AG is to give an independent expert opinion for the CJEU, therefore some AG opinions have been used in the analysis in order to enrich it with notions not necessarily pointed out by the CJEU in its final rulings. As AG opinions have an effect on the CJEU's rulings, they should be considered also themselves.

1.3 Delimitation

The assessment is limited in argumentation to transfer of loss from a secondary establishment to a parent company and does not consider transfer

[14] Ana P. Dourado, 'Cross-border Loss Relief' in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018) p 408-409

of loss from a parent company to a secondary establishment or between secondary establishments, nor situations where a parent company wants to form a group in the country of residence of the secondary establishment as this would have been too broad discussion due to the limitation in the length of the thesis. It should be noted that these issues are less relevant from the point of view of the ability-to-pay principle if the ability-to-pay cannot be considered from the point of view of the ultimate parent company, as it will be covered in the thesis.

1.4 Outline

The thesis has been divided into four main sections. The first section is introductory section to the research problem and the questions. The second section covers the current state of the cross-border loss recognition in the EU. The section covers underlying reasons for difficulties in current cross-border loss recognition and basic principles and concepts, which are necessary to understand the CJEU's comparability analysis. Also, relevant case law will be analysed. The third section will cover the actual steps of the comparability analysis and aims to clarify the CJEU's reasoning in what is considered as objectively comparable. The third section also examines relevant case law on establishing comparability and will raise some issues relating to the CJEU's analysis. The fourth section will examine the principle of ability-to-pay, where it has been derived and how it has been used in practice in corporate cases by the CJEU. It will be also assessed whether the use of this principle as part of the analysis would solve any of the issues pointed out relating cross-border loss relief, through assessing previous court decisions.

2 Recognition of cross-border losses in the EU

2.1 Cross-border loss recognition and fundamental freedoms

As a rule, companies are taxed according to their earned profits during the tax year. The definition of profits or losses is based on national tax law and might not correlate to actual losses or profits of a company.[15] Many countries allow companies to offset their losses against their own profits of the previous or future years, this is also applicable to PEs and subsidiaries in the EU. Usually, the time period to do so is limited according to the national law. Due to the limitation, the offsetting of losses within a PE or subsidiary might not actualize, which lead to overall higher tax burden. This issue can be resolved by allowing the PE or under certain conditions the subsidiary to deduct their losses against the profit-making head office or the profit-making parent company.

In the EU the possibilities to deduct losses of a foreign PE against the head office are limited, while the possibilities for loss relief within a cross-border group are scarce.[16] However, in a purely domestic situation it is possible. Current state of cross-border loss recognition can be considered as a notable obstacle for cross-border investments.[17]

EU Member States can decide themselves on direct tax matters, though the laws governing tax matters cannot be in conflict with the EU free movement laws and may not create an obstacle to free movement. This means that Member States cannot have legislation, which would restrict cross-border

[15] Michael Lang, 'Has the Case Law of the ECJ on Final Losses Reached the End of the Line' (2014) 54(12) European Taxation <https://www.ibfd.org/sites/ibfd.org/files/content/pdf/et_2014_12_e2_7.pdf> accessed 22 April 2021 p 535

[16] Reinout Kok, 'Domestic and Cross-Border Loss Relief in the European Union', (2010), 38(12), Intertax, <https://kluwerlawonline.com/journalarticle/Intertax/38.12/TAXI2010070> accessed 22 April p 670-671

[17] Hey (n 4) p 196

activities or favour domestic companies over foreign companies. The EU law does not govern how Member States should distribute taxing rights for prevention of double taxation and although prevention of double taxation is pivotal objective of the EU law, double taxation is not against EU law.[18] The harmonization in direct tax matters is done mainly through negative integration, which gives the CJEU a great power to impact the future of EU direct taxation. Most of the developments in direct tax field have been result of CJEU's case law.

The opposite objectives of internal market and national taxation as well as the lack of harmonization in the area of direct taxation in the EU can be considered as core issues for efficient cross-border loss relief in the EU. In the strict sense, if a business cannot deduct its losses against profits in a cross-border situation, while in similar domestic situation the relief would be possible, it makes cross-border activity less attractive.

The system, where cross-border loss relief is denied does not consider the total ability-to-pay of the company and hence might lead to higher taxation than in a purely domestic situation, assuming that the cross-border and domestic situations are comparable with each other. On the other hand, the Member States are sovereign, and the ability to decide on tax matters is an important part of sovereignty of a state. Although, it cannot be excluded that the cross-border loss recognition would not be an issue if the taxation had been completely harmonized within the EU.

2.1.1 EU competence in the area of direct taxation

The EU can only enact legislation in the areas where it has been conferred the power to enact by the Member States of the EU. Legislative powers have not been granted to the EU in the area of direct taxation, but it falls within the competence of the Member States, nevertheless this does not mean that the

[18] Marjaana Helminen, 'Taxation of Passive Income', in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) p 224

EU cannot act at all within this area.[19] Articles 114 and 115 of the TFEU provide the basis for harmonization in direct tax matters. These Articles are of general nature and allow harmonization measures, which directly affects functioning of the internal market. Nonetheless, unanimity is required in order to issue directives, which is the only form of harmonization measure available in direct tax matters.[20] Achieving unanimity in direct tax matters among all 27 Member States is difficult as the taxation is considered as sovereign right of a state. For these reasons, the legislation in the area of direct taxation is minimal. The limited possibility to legislate in this area can be seen as harmful for integration in the EU.[21]

The harmonization in direct taxation matters is mostly affected by the decisions of the CJEU. The role of the CJEU is to balance EU principles against national interest of the Member State in question. The case law on direct taxation has been claimed to be inconsistent.[22] The same rule applies to the CJEU's decisions as to enacting legislation in the area of direct taxation, the CJEU can only rule, when there is an obstacle to free movement in the Member State's jurisdiction, making cross-border situation less attractive compared to domestic ones.[23] As the CJEU can only decide whether or not the national tax measure is against free movement, it is up to the Member States to decide themselves how to conduct taxation and tackle double taxation issues.

Primacy of EU law and direct effect are fundamental principles of EU law, which are also applicable to direct taxation. Primacy of EU law, established by the CJEU in case *Costa v. E.N.E.L*, by which EU law shall prevail over national laws of the Member States.[24] The direct effect principle, established in case *Van Gend & Loos*, provides that the rights conferred by

---

[19] Georg Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation', in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) Chapter 2
[20] Peter J. Wattel, 'Taxation in the Internal Market' in Panos Koutrakos and Jukka Snell (Eds), R*esearch Handbook on the Law of the EU's Internal Market,* (Edward Elgar Publishing, 2017) p 328
[21] Pietro Boria, *Taxation in European Union* (2nd edn, Springer 2017) p 34
[22] Wattel, 'Taxation in the Internal Market' (n 20) p 334
[23] Ibid p 335
[24] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 614

the EU law to individuals and undertakings can be invoked before a national, when the right conferred by the EU law is clear, unconditional prohibition, which is a negative obligation and not qualified by any restrictions from the part of the Member States.[25] Primacy together with direct effect ensure the effectiveness of EU law. In direct taxation this means in principle that despite the EU's limited possibilities to legislate in the area of direct taxation, the EU law should still be given the full force taking into consideration the objectives of the internal market. Although the primacy and direct effect principles are well established and unquestionable elements of the EU internal market regime, it is questionable whether these principles are effectively complied with, in relation to cross-border loss relief in the current state of the CJEU's case law.

2.1.2 Area of free movement

The EU internal market is built on the basis of the four freedoms: free movement of people, goods, establishments (services) and capital.[26] The internal market provides that in relation to these categories there shall not be any obstacles or restrictions, which would make the cross-border movement between the Member States less attractive. From a practical point of view, this means that the Member States are obliged to treat nationals from other Member States equally to their own nationals and are not to prevent their nationals from exercising the same freedom.

From the perspective of this study the freedom of establishment is the most relevant. This is because cross-border loss relief can have an effect on decisions such as setting up a branch or subsidiary in a different Member State and therefore being in the scope of the free movement of establishments. If for example establishment of a cross-border subsidiary or PE results in higher tax in the state where the parent company is located, it can make the cross-border movement less attractive.

---

[25] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1
[26] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 Articles 21, 34, 45, 49, 56, 63

The free movement of establishments allow the freedom for companies to choose where in the EU they want to conduct business, and in which form they want to establish themselves. In principle, the Member States are required to have legislation, which provide neutrality for inbound and outbound investments. There should not be any obstacles for exercising freedom of establishment (capital export neutrality) and on the other side Member States must treat foreign companies equally to nationals (capital import neutrality).[27] For instance, this provides that a PE of a company located in the EU is in equal footing in balancing profits and losses as to resident companies of a Member State where the PE is located.[28] The CJEU ruled the applicability of non-discrimination principle in direct tax matters for the first time in famous case *Avoir Fiscal*.[29]

In general, Member States should treat different legal forms of companies neutrally, since favouring one type of legal form might make other types of legal forms less attractive, and this way restrict free movement.[30] Although, treating different legal forms neutrally does not imply to treat them exactly the same. The Member States can treat different legal forms and foreign and resident companies differently, when the different treatment is justified.[31] The different treatment is justified when the situations are not objectively comparable. Comparability will be discussed further in section 3.

---

[27] Christiana H. J. I. Panayi, *European Union Corporate Tax Law* (Cambridge University Press 2013) p 175-176

[28] Helminen, *EU Tax Law - Direct Taxation* (n 3) p 32

[29] Case C-270/83 *Commission of the European Communities v French Republic* [1986] ECR 0273

[30] Christiana H. J. I. Panayi, 'The Taxation of Permanent Establishments: Selected Issues', (2013) 67(4/5) Bulletin for International Taxation <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/bit_2013_04_e2_2> accessed 24 March 2021 p 227

[31] Marjaana Helminen, 'Cross-Border Group Contribution, Freedom of Establishment and Final Losses' (2021) 61(2/3) European Taxation <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2021_02_fi_1> accessed 21 May 2021 p 52-52

2.2 Territoriality and the internal market obstacles

When a company has established itself in a Member State, the Member State exercises its tax jurisdiction by taxing companies residing in its territory.[32] Therefore, when a company establishes a PE in another Member State that Member State is entitled to tax the PE in proportion to the profits, which derive from the PE located its territory. This is called the principle of territoriality. Territoriality also implies that the source state has the primary responsibility for granting loss relief.[33] At the same time the Member States are sovereign to decide on their tax jurisdiction such as taxable income and tax rate. Territoriality and sovereignty in taxation can be problematic from the point of view of the internal market, because it may create borders, when in fact there should not be any borders within the internal market.

Exercising of the freedom of establishment can inherently lead to a situation, where two or more Member States have a similar interest on the same income received by a single company, as it is widely accepted rule, that the resident companies of a Member State are taxed according to their world-wide income. The application of world-wide income as tax basis means that both domestic and foreign income are calculated to the taxable income of the company. This has a consequence, that when a company has established a PE in another EU Member State, both the Member State where the head office is located and the Member State where the PE is located are interested in taxing the profits deriving from the PE. This is due to the fact that the head office is unlimited tax liable on its world-wide income in the state of the residence, and the PE is limited tax liable from income deriving from the PE in its state of the residence. Unless the Member States have decided on how to divide the taxing rights, it is likely that the profits from the PE will be taxed twice.

The EU Member States can eliminate double taxation by concluding double tax agreements with other EU Member States. Double tax

[32] Panayi, *European Union Corporate Tax Law* (n 27) p 171
[33] Ismer and Kandel (n 11) p 574

agreements are usually bilateral agreements, and they are not in the scope of EU law, but they must be in compliance with it.[34] Double tax agreements define how taxing rights are to be divided between the parties of the agreement. Essentially, the taxation right is divided as follows: The Member State, where the PE is located has the initial right to tax the PE for its profits in accordance with the principle of territoriality. Then the Member State where the PE's head office is located can either exempt the profits of the PE from its tax base or take the already paid tax in the state of the PE into account, when calculating the tax base.

Problems arise when companies are trying to import their losses incurred by a PE located in a foreign Member State, back to the Member State where the profit-making head office is located, or losses incurred by a foreign subsidiary back to the profit-making parent company. The outcome of the issue is dependent on national tax legislation of the Member State of the parent company and the tax treaties between the two Member States involved. Double tax agreements play an important role in understanding the complexity of loss transfer even though they do not directly regulate transfer of loss. In cross-border situation, where a Member State does not tax income from foreign sources, it does not grant a loss relief either, although in purely domestic situation, where both entities are located in the same Member State, this would not be an issue. It seems that the idea of an internal market with no borders is hampered if taxation is divided into 27 different markets.

The restriction on cross-border loss recognition is often justified by balanced allocation of the power to impose taxes. The fear is that by allowing cross-border loss recognition would lead to situation, where the companies could choose freely where they want to transfer the taxable income or even allow creation of fully artificial arrangements.[35] It seems quite

[34] Herwig Hofmann, 'Double Tax Agreements: Between EU Law and Public International Law' in Alexander Rust (ed.), *Double Taxation within the European Union* (Wolters Kluwer 2011) p 75–86

[35] Thomas Rønfeldt, 'Comparing Tax Entities in a European Perspective Part I The Issue of Comparable Situations Required for Being Covered by European Union Law'(2016) 44(12) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/44.12/TAXI2016087> accessed 21 May 2021 p 948

disproportionate to systematically deny loss relief because of hypothetical possibility to use that for purpose of tax avoidance.

Taxation is a sensitive subject for Member States as it is a significant part of public finance and directly affects to the budget of the Member States.[36] On the contrary it has been said that this should not be seen as being opposite to the EU's objective as it helps avoiding future deficit in the budgets.[37] Although that argument does not seem to hold, as it could be used to legitimize any kind of excessive taxation measure.

2.2.1 Different double taxation relief methods

The possibility for cross-border loss relief is dependent on the choice of the method of computing double taxation relief used. The method used, depends on the national legislation of the Member State. The common methods used in the EU for eliminating double taxation is to use an exemption or a credit method. The exemption method provides that the resident state of the taxpayer exempts from taxation the income, which derives from another state (source state). In other words, the income is taxed only in the source state. The credit method provides that the income earned in the source state is calculated as taxable income in the residence state, which then gives credit according to the taxes paid in the source state. The EU legislation does not regulate, which method, credit or exemption, should be used. Both methods are seen as equally compatible with the EU law.[38]

The OECD model treaty is usually used as a basis for tax treaties in the EU Member States. Based on the OECD model tax law, the source country of income is entitled to tax, where the residence country should try to prevent double taxation by exempting that income from tax (capital import neutrality) or by taxing on the basis of worldwide income but crediting the

---

[36] Kofler (n 19) p 12

[37] Violeta Ruiz Almendral, 'An Ever Distant Union: The Cross-Border Loss Relief Conundrum in EU Law' (2010) 38(10) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/38.10/TAXI2010051> accessed 22 April 2021 p 484-485

[38] Wattel, 'Taxation in the Internal Market' (n 20) p 342

foreign tax (capital export neutrality).[39] According to the EU law, Member States can apply different exemption methods to foreign sourced dividends than to domestic dividends given that the tax rate is not higher to foreign dividends compared to domestic.[40]

2.2.2 PEs and Subsidiaries

When a company in the EU wants to expand its operations to another EU Member State, the company can either choose to establish itself as a PE or subsidiary in the different Member State. The difference between PE and subsidiary is that PEs such as branches and agencies are not separate legal entities from their head office, unlike subsidiaries.[41] Therefore, subsidiaries are unlimited tax liable in their residence country, whereas PEs are only limited liable in their residence country.[42] The concept of a PE is created only for taxation purposes and from the legal perspective of the state, where the PE is located, a PE is only a company incorporated under foreign law.

There is no uniform definition of permanent establishment in the EU law, but it is understood broadly in the context of the EU direct tax law.[43] Under the OECD Model Convention, which is widely used as a model for double tax treaties, Article 5 defines permanent establishment as "a fixed place of business through which the business of an enterprise is wholly or partly carried on."[44] For instance, a branch, factory or office is listed under this Article in the Model Convention.

A subsidiary is a company incorporated under the laws of the Member State where it resides, but it is under control of an another company.[45] As subsidiaries are separate legal entities from their parent

[39] Ibid p 342
[40] Helminen, 'Taxation of Passive Income' (n 18) p 233
[41] Ulrich Schreiber, *International Company Taxation* (Springer 2013) p 52
[42] Helminen, 'Cross-Border Group Contribution, Freedom of Establishment and Final Losses' (n 31) p 53-54
[43] Panayi, *European Union Corporate Tax Law* (n 27) p 197-198
[44] OECD Model Tax Convention on Income and on Capital, Article 5
[45] Wolfgang Schön, 'International Tax Coordination for a Second-Best World (Part 1)', (2009) 1(1) World Tax Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577035> accessed 22 April 2021 p 106-108

companies, their profits are not calculated to taxable base of their parent company, even though the profits or losses of a subsidiary can impact the parent company. Due to the fact that subsidiaries are separate legal entities and unlimited liable for tax in their residence state, cross-border loss relief is not usually available for subsidiaries and parent companies. Some Member States allow the grouping of companies under certain circumstances, which allow to treat parent and subsidiaries as if they were the same unit. Group regimes will be discussed later in section 2.2.3.

The difference between PEs and subsidiaries from the legal point of view seems significant, in the sense that choice between these two models of secondary establishment makes a difference in the number of legal personalities involved in the arrangement in question. In spite of this, the application of double taxation treaties may, in practice, result in tax authority overlooking this fact in the resident country of the PE. In case exemption method is applied by the resident country of the PE in order to eliminate double taxation, the losses cannot be transferred to the resident country, although it may be possible to carry forward loss in the source state.[46] Because the resident state disregards the profits, it does not take losses into account either.

Due to the double tax treaties subsidiaries and PEs are treated similarly from the perspective of computing of taxable income in resident country and also from to the point of view of loss transfer. The treatment of the PEs in case of exemption method is used, has created a misconception that PEs would be separate legal entities.[47] It has been also seen as compatible with the EU law that freedom of establishment does not guarantee that PEs could offset their losses against profits of the head office if the residence state exempts profits from the foreign PE and applies it symmetrically.[48] Interesting observation here is that the residence state of the parent company would have the right to tax the foreign PE if it had not declined to do so in the

[46] Schreiber (n 41) p 105
[47] Thomas Rønfeldt, ’Comparing Tax Entities in European Perspective, Part II’ (2016) 44(12) Intertax < https://kluwerlawonline.com/journalarticle/Intertax/44.12/TAXI2016088> accessed 22 April 2021 p 954
[48] Kok (n 16) p 669-670

double tax treaty. Hence, the choice of the Member State of the parent company determines whether or not foreign PEs and foreign subsidiaries are treated similarly.

In principle non-resident company's PEs are to be taxed similarly to resident companies and parent companies having foreign subsidiary similarly to parent companies with domestic subsidiary.[49] From the perspective of comparability of PEs and subsidiaries, in the case *Marks & Spencer*, the CJEU stated that subsidiaries and branches are not automatically comparable.[50] In fact, Member States are not required to treat subsidiaries and PE's the exact same way unless they are in objectively comparable situation in light of the national rules.[51] Different treatment can be justified for example in case, where subsidiaries and PEs are treated differently in consequence of the fact that a PE is not a separate legal entity but extension of a head office. Even though subsidiaries and PEs are not automatically comparable, it has been claimed that in group taxation regimes the foreign subsidiaries and foreign PEs should be comparable in some cases, as it is the objective of the group regime system to treat subsidiaries as PEs.[52]

2.2.3 Group taxation regimes

Most EU Member States allow domestic companies belonging to the same group to offset their losses incurred in another company against profits of other company inside the same group.[53] The same treatment is hardly available for groups operating cross-border.[54] When allowing to deduct losses against profits of another company in the same group, the domestic group is treated as a same economic unit whereas a cross-border group is not. From the perspective of overall tax burden of the company, the domestic group is

[49] Wattel, 'Taxation in the Internal Market' (n 20) 339
[50] Case C-446/03 *Marks & Spencer plc v David Halsey* [2005] ECR I-10837 paras 36-37
[51] Alexandre Maitrot de la Motte, 'Taxation of business in the EU: General issues', in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) p 179
[52] Bruno da Silva, *The Impact of Tax Treaties and EU Law on Group Taxation Regimes* (Wolters Kluwer 2016) p 366
[53] Helminen, *EU Tax Law - Direct Taxation* (n 3) p 31
[54] Helminen, *EU Tax Law - Direct Taxation* (n 3) p 31

in better position to have its overall ability to pay taxes taken into consideration, when calculating the tax burden.

Group taxation allows the taxation of the whole group of corporations as a single entity and allows the transfer of losses from suffering company to a profit-making company in the same group.[55] Group taxation regimes can also include other features, such as neutralizing intra-group transfers and tax at the level of the parent company.[56] Usually, such regime is only possible for those companies, which are established in the same state as the parent company of the group, provided that they fulfil certain conditions relating to the parent company's control over the related companies.[57] This cross-border restriction is stemming from the fact that a subsidiary is a separate legal entity, and from the perspective of the Member State where the parent company is located the subsidiary is just a foreign company. Due to the principle of territoriality the Member State, where the parent company is located, cannot tax the foreign subsidiary unless the subsidiary conducts business in the same state where the parent company is located.

PEs on the opposite are unlimited liable for tax in the state of the head office as well as limited liable for tax in respect of the income derived from the PE in the state, where it is located. The state of the head office can either take the foreign income derived from a PE into account and credit the already paid tax or decide to exempt the income from taxation, as explained in section 2.2.1. If the state, where the head office is located decides to exempt the foreign income derived from the PE, the PE usually cannot benefit from the group regime and it is treated similarly to a foreign subsidiary.

One of the reasons, why corporate groups are formed is to better accommodate cross-border activities and limit risk, which is present when establishing a new business.[58] In the beginning new businesses are usually not very profitable and therefore allowing the deduction of losses in the group

[55] Schreiber (n 41) p 10
[56] Jasper Korving, 'Group Steria: A Threat to Group Taxation Regimes?' (2016) 25(1) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/25.1/ECTA2016004> accessed 27 May 2021 p 41
[57] Schreiber (n 41) p 10
[58] Silva (n 52) p 12-13

would increase the competitiveness of a tax policy.[59] Not only it can limit risks faced by new businesses but it is also beneficial for shareholders of the company.[60] It cannot be ignored that despite members of the group are different legal entities, they still share the common economic goals and management.[61]

It was observed by the CJEU already in early the case *Marks & Spencer* that the ability to set off losses against the profits of other company in the same group is a tax advantage.[62] The ability to offset losses immediately, compared to waiting that the subsidiary is profitable again is a cash advantage. If foreign companies are left outside from group regimes allowing deduction of losses, the loss will stay with the subsidiary and in some cases due to the limitation in carrying forward of losses, it can be that the losses cannot be used at all. It must be also noted that the restriction for qualifying for group taxation regime originates specifically from the fact that the parent company has established its subsidiary in another Member State and is exercising its freedom of movement. Therefore, such a problem will never occur in a purely domestic situation, which makes establishing of a foreign subsidiary less attractive compared to establishing a domestic subsidiary.

On the contrary the CJEU argued in the case *X Holding* that allowing foreign resident subsidiaries to be part of the group would give the parent company the power to choose in which Member State the losses of the subsidiary are to be taken into account.[63] Therefore not allowing the foreign subsidiary to form a group with parent company in another Member State was not seen as an obstacle to free movement.

---

[59] Silva (n 52) p 31
[60] Petri Mäntysaari, *The Law of Corporate Finances: General Principles and EU Law, Volume I: Cash Flow, Risk, Agency, Information* (Springer 2010) p 71-79
[61] Silva (n 52) p 13
[62] Marks & Spencer plc (n 50) para 32
[63] Case C-337/08 *X Holding BV v Staatssecretaris van Financiën* [2010] ECR I-01215 paras 31-32

2.2.4 Parent-Subsidiary Directive

Subsidiaries distribute their profits to the managing parent company by paying them dividends, which are usually subject to taxation in the state of the parent company. The aim of the Parent-Subsidiary Directive is to eliminate double taxation at the level of parent company and accommodate grouping of companies to ensure functioning of the internal market.[64] The Parent-Subsidiary Directive provides that profits distributed by the subsidiary to the parent company are either exempted from income tax or credited against tax paid by the subsidiary on the same profits.[65] Even though the Parent-Subsidiary Directive eliminates double taxation in regards of distribution of profits, it does not take into account the balancing of losses, which is still up to different national systems and the CJEU to decide whether the balancing of losses is possible or not. It also treats both exemption and credit method equally compatible, even though the exemption method seems controversial from the point of view of the internal market.

2.3 The CJEU's case law on cross-border losses

2.3.1 Cases on Groups

Marks & Spencer[66], which was a company established in the United Kingdom (UK), with multiple subsidiaries in the EU. The UK applied credit method for foreign income from the subsidiaries. The subsidiaries discontinued their operations or were sold and therefore Marks & Spencer tried to claim for group relief in the UK for losses incurred in the EU subsidiaries. It was denied because the group relief was only available for UK companies. The CJEU however ruled that the Member State, where the parent company is located, has to allow loss deduction if the non-resident subsidiary has exhausted all

[64] Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive) [2011] OJ L 345, preamble
[65] Ibid Article 4
[66] *Marks & Spencer plc* (n 50)

possibilities available to take losses into account in its residence state and claim relief for previous accounting periods and there is no possibility to take those losses into account in the residence state of the subsidiary in future periods.[67] *Marks & Spencer* established the criteria that the losses must be definite in order to transfer them to a parent company located in another Member State. This is often referred to as 'Marks & Spencer doctrine'.[68]

In *Papillon*[69] a French company wanted to be taxed under French group tax regime with its French sub-subsidiary, which it held indirectly through non-resident subsidiary. The benefit was denied, because the subsidiary directly owning the sub-subsidiary in France was a non-resident. The CJEU held that there was a restriction to free movement and the measure was disproportionate, because France could request assistance from another Member State and the parent company to provide documentation that the same losses are not deducted twice.[70]

X Holding BV[71] was a parent company located in the Netherlands, with a Belgium subsidiary. X Holding BV wanted to apply to the Netherlands' group regime system with the Belgium subsidiary. However, the application was denied, because the group regime was limited to Dutch companies. The treatment was justified by the allocation of the power to impose taxes between the Member States, because the Netherlands did not have the right to tax the subsidiary located in Belgium.[72] Comparing the case to *Marks & Spencer* it seems that the calculation method for eliminating double taxation has a significant role on deciding, whether it is possible for cross-border groups to benefit from the group regime system. Although, it must be noted that *Marks & Spencer* concerned deduction of final losses

[67] *Marks & Spencer plc* (n 50) para 55
[68] Axel Cordewener, 'Cross-Border Loss Compensation and EU Fundamental Freedoms: The 'Final losses' Doctrine Is Still Alive!' (2018) 27(5) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/27.5/ECTA2018025> accessed 27 May 2021, p 230-236
[69] Case C-418/07 *Société Papillon v Ministère du Budget, des Comptes publics et de la Fonction publique* [2008] ECR I-08947
[70] Ibid paras 55-63
[71] *X Holding BV* (n 63)
[72] Ibid paras 29-33

whereas *X Holding BV* accession of non-resident subsidiary to a group regime system.

Group Steria[73], concerned a French resident company, which was a head of a French consolidation group owning subsidiaries in France and in other EU Member States. The French parent company received tax exempted dividends from a foreign subsidiary, which were deducted from its net total profits, except the expenses relating to the holding of the foreign subsidiary. The French company tried to request repayment for the expenses, which were not previously deducted but this was refused due to the fact that the subsidiaries were located in a foreign Member State. The situation with having dividends from a foreign subsidiary compared to having dividends from a domestic subsidiary were seen as objectively comparable and the measure was held against free movement of establishment. Even though the case did not consider the transfer of loss as such within the group, but other advantages relating to the group taxation regime, the CJEU raised some interesting observations regarding comparison between this case and *X Holding.* The CJEU explained that *X Holding* case should be interpreted as the assessment of the residency as condition to access group taxation regime but it should not be interpreted that any difference in treatment is justified between companies belonging to a tax-integrated group and companies not belonging to a group.[74] Other advantages relating to the group regime system must be examined separate from loss transfer. Whereas in *X Holding* in *Group Steria* the difference in treatment was not justified based on the balanced allocation of the taxing rights, because the disadvantage treatment concerned the dividends received by the resident parent company within the same Member State.[75]

NN A/S[76] was a Danish parent company of a group, which had two Swedish subsidiaries. The Swedish subsidiaries had both PEs in Denmark, which merged and became one PE of the other Swedish subsidiary.

[73] Case C-386/14 *Groupe Steria SCA v Ministère des Finances et des Comptes publics* [2015] ECLI:EU:C:2015:524
[74] Ibid paras 25-27
[75] Ibid para 29
[76] Case C-28/17 *NN A/S v Skatteministeriet* [2018] ECLI:EU:C:2018:526

The merge was not subject to tax in Sweden but in Denmark it was taxed as a transfer of assets at market value and therefore the PE turned out to loss-making. NN applied to deduct the losses of the PE from the overall group income, which was denied by Danish tax authorities, because the losses could be taken into account in Sweden. The CJEU held the measure against free movement of establishment as it was not practically possible for the PE to take the losses into account in Sweden, because the merger was not subject to tax there.

2.3.2 Cases regarding PEs

Lidl Belgium[77] concerned a company resident in Germany, which tried to deduct losses from its Luxembourg PE in Germany. The deductions were denied because Germany used exemption method and therefore did not tax the profits of the Luxembourg PE. The CJEU saw that the measure was justified with the need to preserve balanced allocation to impose taxes between the Member States and in order to prevent the double deduction of losses.[78]

Krankenheim[79] was a German resident company with a loss-making PE in Austria. Under double tax treaty Germany exempted income from Austrian PEs. However, Germany initially granted loss relief to the Austrian PE and later, when the PE was profitable withdrew the benefit. According to Austrian laws, the losses of the PE could not be taken into account if they could be offset against losses in the state of the head office. Yet, the CJEU ruled that the treatment was not against EU law and the resident state is not required to adjust their tax system in order to ensure that no restrictions arise from disparities of national tax rules.[80] The treatment was justified relying on coherence of the tax system.[81] This reasoning seems questionable because the

[77] Case C-414/06 *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn* [2008] ECR I-03601
[78] Ibid paras 33-37
[79] Case C-157/07 *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* [2008] ECR I-8061
[80] Ibid paras 49-52
[81] Ibid para 42

disparity in this case actually arose from the fact that Germany and Austria had concluded double tax agreement, where income from foreign PE was exempted from tax in Germany, which did not consider this disparity. If Germany had used credit method, the losses would have been deductible in Germany. It seems untenable to the CJEU to argue that the Member States would not be liable for the coordination choices that they have made, which create a restriction to the internal market. Keeping in mind *Marks & Spencer* ruling that in this case the losses were actually final because the disparity, but the CJEU did not give any significance to this fact.

Nordea Bank[82] was a Danish resident company with loss-making PEs in Nordic countries. Nordea Bank was able to deduct the losses of the Nordic PEs in Denmark, as Denmark applied credit method. When PEs became profitable, they were partially sold to Nordea's subsidiaries in Nordic countries. Due to this the previous losses were reincorporated into Nordea Bank's taxable profit in Denmark also from the part that could not be matched to subsequent profits. The CJEU held that the measure itself could have been justified by prevention of tax avoidance, but it was not deemed to be proportionate. It is questionable that the CJEU did not challenged the argumentation on balanced allocation of the power to impose taxes because reincorporating the previously deducted losses is not actually symmetrical. As seen in this case, the Member State does not bare the same economic risk as the taxpayer, who can only deduct losses when there are matching profits, which make the situation asymmetrical.[83]

Timac Agro[84] was a German resident company with a PE in Austria, which was later transferred to an Austrian subsidiary company belonging to the same group with Timac Agro. Timac Agro was at first able to transfer the losses incurred in the PE to Germany, due to German law, which allowed the loss transfer, even though the profits were tax exempted in Germany. When the PE was transferred to the subsidiary, the losses were

[82] Case C-48/13 *Nordea Bank Danmark A/S v Skatteministeriet* [2014] ECLI:EU:C:2014:2087
[83] Almendral (n 37) p 477
[84] Case C-388/14 *Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin* [2015] ECLI:EU:C:2015:829

incorporated into company's taxable profits and subsequent losses could not be taken into account in Germany. This led to a situation, where Timac Agro could not deduct losses anywhere. The reincorporation of losses was justified, as the losses were not deemed to be final because the PE continued its operation under the Austrian subsidiary.[85] After Germany did not take the foreign losses account, the situations were not considered as comparable anymore and the treatment was not discriminatory.[86]

Bevola[87] was a Danish resident company, which had a loss-making PE in Finland. The company applied loss relief in Denmark, but it was denied because Denmark used exemption method for foreign PEs. Nonetheless, the CJEU deemed that not allowing the loss relief in Denmark was against free movement, as the PE in Finland had ceased its operations and the losses were considered as final.

2.4 Critical analysis of th case law

The issue with allowing PEs and subsidiaries cross-border loss relief is very controversial. Allowing cross-border loss relief has been criticized by stating that the CJEU goes beyond its competences or with claims of issue with double non-taxation.[88] Denying cross-border loss relief for PEs and subsidiaries based on fear of double non-taxation seems illogical argument from the point of view that double taxation is not against EU law and in fact acceptable, when it derives from the disparities of national legislations of the EU Member States as illustrated in the case law. The argument is basically two sides of the same coin as profits and losses. If double taxation, which derives from inherent differences of the national legislations is not against the EU free movement laws, by analogy double non-taxation should not be against EU free movement laws either, or vice versa both should be against EU law.

[85] Ibid paras 53-58
[86] Ibid paras 64-66
[87] Bevola and Jens W. Trock ApS (n 9)
[88] Wattel, 'Taxation in the Internal Market' (n 20) p 336

The CJEU's approach to cross-border losses has changed over time. Previously, it was thought that losses should be deductible somewhere in the internal market, this has however changed to emphasise the symmetry of taxing powers in regards to foreign profits and losses.[89] One of the obvious examples of the total opposite line of arguments is in *Lidl Belgium* and *Krankenheim* judgements.[90] In *Lidl Belgium*[91] the CJEU considered the definiteness of the losses, whereas in *Krankenheim*[92] it was not considered, even though the losses could not be taken into account anywhere. Despite the critical views raised, some authors claim that the case law of the court is consistent.[93]

The case line has been criticized too due to the lack legal certainty and seems to forget that national courts and administrators should give full force and effect to the EU law, but it is not possible with diverging judgements.[94] This goes hand in hand with argument of inconsistent case line because if the outcomes of the judgements are contradicting, then there is no legal certainty. From the point of view of the taxpayer it seems unpredictable, which losses are transferable and, which are not.

It has been established by the CJEU that the cross-border loss relief is available for a foreign secondary establishment in case it has exhausted all possibilities available in its state of residence for having its losses to take into account and the situation is objectively comparable to the domestic situation. This requirement has been criticised that the case law has made the criteria for finality so strict that is hardly possible to exhaust all possibilities in order to take losses into account in the resident state of the PE or the parent company of the subsidiary[95] Even though in theory there is a possibility to take the losses into account, the circumstances can lead into a situation where the offsetting of losses cannot be done in the source state of

[89] Ibid p 340
[90] Michael Lang, 'Has the Case Law of the ECJ on Final Losses Reached the End of the Line' (n 15) p 531-532
[91] Lidl Belgium GmbH & Co. KG (n 77)
[92] Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH (n 79)
[93] Ismer and Kandel (n 11) p 577-580
[94] Cordewener (n 68) p 58-61
[95] Lang, 'Has the Case Law of the ECJ on Final Losses Reached the End of the Line' (n 15) p 536

the PE or residence state of the subsidiary.[96] It is significant advantage for a company to take losses into account immediately compared to loss carry forward situation, which might not actualize. In this respect too, the CJEU rulings do not but much weight on the argument of the cash advantage, which the domestic companies have, when they are able to deduct their losses during the same tax year.

It has been suggested that cross-border groups should be allowed with the exception that transfer of foreign loss would not be included.[97] Although in theory that is not usually possible, the case *Group Steria*[98] shows that other advantages of the group regime system must be allowed to foreign secondary establishments, which cannot be part of the group taxation regime due to their residency. The author, however, disagrees with this argument. The absence of loss relief in cross-border situations goes against the idea of the internal market with no borders.[99] The issue with loss transfer from a secondary establishment to a parent company does not exist in a purely domestic situation, where a parent and a secondary establishment are located in the same Member State. It has even been argued that accounting losses is not even a tax benefit but the only way to calculate tax burden in portion to the real ability-to-pay of the company and therefore it is not a tax advantage contrary to opinion of the CJEU.[100]

All in all, it seems that from the internal market point of view the biggest obstacles are the lack of possibilities to transfer the loss from a secondary establishment to a parent company located in different Member State and the incoherence of the CJEU's judgement, which lack the legal certainty.

[96] Ibid p 536-537
[97] Korving (n 56) p 47-48
[98] Groupe Steria SCA (n 73)
[99] Kok (n 16) p 663-671
[100] Almendral (n 37) p 477-478

3 Comparability analysis

3.1 Elements in the analysis

When the CJEU examines whether a national direct tax measure is against freedom of movement, it starts the analysis with assessing comparability of the domestic and foreign situation. The assessment of comparability is divided into two sections, whether the situations are *prima facie* comparable and whether they are objectively comparable.[101] *Prima facie* comparability is established when the cross-border situation is treated less attractive than the comparable internal situation. The objective comparability of the internal and cross-border situation is assessed based on the aim of the national provision in question.[102]

If comparable situations are treated differently and the losses are final according to *Marks & Spencer* criteria[103], then it is assessed whether difference in treatment can be justified by an overriding reason in the public interest and if that justification is proportional. When comparability is established, only specific justification grounds are accepted by the CJEU to justify restrictive measure.[104] If the CJEU does not find that the situations are objectively comparable, no further justification is needed, as the national measure cannot be considered as against freedom of movement.[105] There is no general rule on when non-resident subsidiaries and PEs are comparable with resident subsidiaries and PEs, because the comparability is analysed based on the objective of the legislation, which then is assessed on a case-by-case basis. In addition, comparability is only assessed from the point of view

[101] Silva (n 52) p 341
[102] *X Holding BV (n 63)* para 22
[103] Marks & Spencer plc (n 50) para 55
[104] Martin Poulsen, ’Freedom of Establishment and the Balanced Allocation of Tax Jurisdiction’, (2012) 40(3) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/40.3/TAXI2012023> accessed 22 April 2021 p 200-211
[105] Rønfeldt, ’Comparing Tax Entities in a European Perspective Part I, The Issue of Comparable Situations Required for Being Covered by European Union Law’ (n 35) p 941

of taxation, but does not take into account other regulatory differences, which apply to different forms of legal entities.[106]

3.1.1 Objective and subject to tax

The CJEU assesses the comparable situation by subject to tax of the entity and the object and purpose of the tax measure.[107] In essence, when assessing the subject to tax, the CJEU looks whether the entity, from whom the losses would be transferred is subject to tax in the Member State where the losses are transferred to or whether the subsequent profits of that entity would be taxable in the Member State, where the losses are transferred. When the CJEU considers the objective and purpose of tax measure, it assesses whether the objective can be attained if similar treatment was allowed to cross-border situations. Although, the subject to tax criteria has been claimed to be more decisive.[108] If the resident state exempts profits from foreign PEs and subsidiaries, the situation is not comparable with domestic one as the cross-border subsidiary or PE is not subject to tax, as established in case *Timac Agro*.[109] However, the subject to tax criteria is controversial, because it seems that the non-comparability could be justified just because the Member State had chosen to treat domestic and foreign income differently by exempting the foreign income from taxation.

3.1.2 Subject of comparison

When the CJEU initiates its comparability analysis, it chooses a subject for comparison in each situation. In practice, the comparison is done either by comparing the foreign and domestic, or in horizontal situations, two foreign, secondary establishments or foreign and domestic parent companies against

[106] Panayi, 'The Taxation of Permanent Establishments: Selected Issues', (n 30) p 5
[107] Peter J. Wattel, 'Conceptual Background of the CJEU Case Law in Direct Tax Matters', in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018) P 321
[108] Ibid p 321
[109] Hein Vermeulen, 'Corporate Income Taxation', in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018) p 376

each other. The comparison may take place on either vertical or horizontal level. Vertical comparability is analysed when cross-border situation is compared to a purely domestic situation, in example residents with foreign PE and residents with domestic PE.[110] Horizontal comparability, on the other hand, refers to situations where comparison is done between two foreign situations, which may be necessary if two foreign companies are treated unequally to each other in the same Member State.[111] It has been pointed out nevertheless, that the reference point for the comparison is not always evident.[112]

In addition, comparability is analysed either via a per-country approach or overall approach.[113] The per-country approach refers to situation, where the CJEU only assesses comparability from the point of view of the Member State in question, whereas when applying the overall approach, it takes into account legislations of both the source and the resident country.[114] The per-country approach is more heavily based on territoriality, the underlying idea being that losses should be able to be offset only when the profits are taxed in that Member State as well. The logic of the CJEU has also been interpreted as being symmetrical in a way that comparable situation will be created if the Member State tax non-domestic activities.[115]

3.2 Objective comparability in CJEU's case law related to cross-border loss transfer

Even though in theoretical level, the comparability analysis seems more or less straightforward and logical, the CJEU's case law on what is considered

---

110 Christoph Marchgraber, *Double (Non-) Taxation and EU Law* (Wolters Kluwer 2018) p 119-120
111 Ibid p 121
112 Motte (n 51) p 180
113 Maria Cruz Barreiro Carril, 'National Tax Sovereignty and EC Fundamental Freedoms: The Impact of Tax Obstacles on the Internal Market' (2010) 38(2) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/38.2/TAXI2010010> accessed 22 April 2021 p 109-111
114 Ibid p 109-111
115 Rønfeldt, 'Comparing Tax Entities in European Perspective, Part II' (n 47) p 958

as comparable is quite the opposite. In fact, there has been multiple occasions, where the CJEU has not examined comparability at all but rather assumed that it exists. In *Marks & Spencer*[116] for instance, the CJEU did not assess comparability in great detail. In that case the CJEU concluded that residency can be a factor to justify differential treatment but that cannot alone justify the denying of cross-border group relief.[117] It seems that the CJEU takes for granted that foreign and domestic situations are comparable, because residency is used as a justification ground. In its later case law the CJEU has been stating many times that residents and non-residents are not as a rule comparable.

Lidl Belgium[118] was another case where the CJEU did not assess comparability but merely established that a *prima facie* restriction exists and then continued with assessing possible justifications. However, by doing this the CJEU implicitly assumes that the two situations, having a PE in foreign state and having a PE in resident state of the head office are comparable, because restriction only exist if the two situations are comparable. In addition, the CJEU makes an incorrect statement in *Lidl Belgium* that under international tax law a PE is an autonomous fiscal entity.[119] This is not true even if the resident state of the head office applied exemption method to income deriving from a foreign PE because PEs are only limited tax liable in the country where they are located and legally part of the same entity with the head office as explained the difference in section 2.2.2. The comparability was also established in similar manner in *Krankenheim*[120].

In *Papillon*[121] the CJEU considered the comparability through the objective of the national provision. A resident parent company, which wanted to consolidate with resident sub-subsidiary, which was owned by non-resident subsidiary was considered comparable to situation, where the parent and subsidiary and sub-subsidiary are all residents. The objective of the national measure was to treat subsidiaries and sub-subsidiaries as PEs and

[116] *Marks & Spencer plc* (n 50)
[117] *Marks & Spencer plc* (n 50) paras 37-40
[118] *Lidl Belgium GmbH & Co. KG* (n 77)
[119] *Lidl Belgium GmbH & Co. KG* (n 77) para 21-22
[120] *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* (n 79)
[121] *Société Papillon* (n 69)

therefore it did not make any difference whether the subsidiary in the middle was a resident or a non-resident.[122]

In *X Holding BV*[123] the CJEU established objective comparability by stating that a parent company with a non-resident subsidiary and a parent company with a resident subsidiary are objectively comparable because both companies try to benefit from the advantage of the scheme, namely the computing of profits and losses as a single tax entity, which was the objective of the tax scheme in question.[124] It is difficult to think about any other objective of a group tax regime than that the group is taxed as a single tax entity, which is why parent companies with non-resident subsidiaries and resident subsidiaries should be considered comparable. The CJEU also acknowledged that treating resident subsidiaries and non-resident subsidiaries differently purely because of their residential status would deprive the effect from the free movement laws.[125] It is worth noting that later in the case law the CJEU makes totally opposite statement. The CJEU then ruled that the foreign PEs and non-resident subsidiaries are not comparable in regard to the balanced allocation of the powers to tax among the EU Member States.[126] This statement, however, was made in when the CJEU considered whether the measure was justified and did not raise it in the comparability analysis.

In *Nordea Bank*[127] the CJEU had very limited assessment on comparability. In the case the CJEU stated that foreign a PE and a resident PE are not comparable situation, except when the Member State treat these two situations equally.[128] Because the Member State treated foreign and domestic profits similarly by applying the credit method to foreign profits of the PE, the comparability could not be denied.

In *Timac Agro* the non-comparability of foreign and resident PEs was assumed by the CJEU even before assessing the right to tax of the Member State, where the head office is located.[129] Then the CJEU accepted

---

[122] *Société Papillon* (n 69) paras 28-30
[123] *X Holding BV* (n 63)
[124] Ibid para 24
[125] Ibid para 23
[126] Ibid para 38
[127] *Nordea Bank Danmark A/S* (n 82)
[128] Ibid para 24
[129] *Timac Agro Deutschland GmbH* (n 84) para 27

comparability in the specific circumstances, even though the profit of a foreign PE was tax exempted, but the fact that Germany still allowed the loss transfer and in this way treated the situations comparable, made the situation objectively comparable.[130] However, when Germany denied the transfer of loss, the comparability was denied relying on the fact that Germany used exemption method to prevent double taxation.[131] When the CJEU ruled the incomparability in this case, it did not examine further the situation. Comparing cases *Nordea Bank*[132] and *Timac Agro*[133] to *Marks & Spencer*[134], the CJEU's reasoning seems quite inconsistent. Where in *Marks & Spencer*[135] the comparability was assumed and specifically stated that residency itself cannot justify different treatment, in *Nordea Bank*[136] and *Timac Agro*[137] the outcome was totally opposite. Also, it is notable that the disadvantage claimed in all these three cases are in the level of the head office or the parent company. Where in *Marks & Spencer*[138] the CJEU considered the comparability of parent company with foreign or domestic PE, in *Nordea Bank*[139] and *Timac Agro*[140] the CJEU refers only to comparability of foreign PEs and domestic PEs.

In *Bevola*[141] the CJEU tried to clarify its criticized case law on *Nordea Bank*[142] and *Timac Agro*[143]. The CJEU pointed out that these two cases should not be interpreted as the comparability would be analysed based on the fact that national legislation treats domestic and foreign situations differently.[144] However, this statement seems empty, because the CJEU continues stating that the objective of the law is to avoid double taxation and because the method for preventing double taxation does not take into account

---

[130] Ibid para 28
[131] Ibid paras 63-65
[132] *Nordea Bank Danmark A/S* (n 82)
[133] *Timac Agro Deutschland GmbH* (n 84)
[134] *Marks & Spencer plc* (n 50)
[135] *Marks & Spencer plc* (n 50)
[136] *Nordea Bank Danmark A/S* (n 82)
[137] *Timac Agro Deutschland GmbH* (n 84)
[138] *Marks & Spencer plc* (n 50)
[139] *Nordea Bank Danmark A/S* (n 82)
[140] *Timac Agro Deutschland GmbH* (n 84)
[141] *Bevola and Jens W. Trock ApS* (n 9)
[142] *Nordea Bank Danmark A/S* (n 82)
[143] *Timac Agro Deutschland GmbH* (n 84)
[144] *Bevola and Jens W. Trock ApS* (n 9) para 35

foreign profits, there is no comparability of domestic and foreign situations. The CJEU explains three grounds based on, which the comparability can be established: if the Member State treats foreign and domestic PEs the same way,[145] the assessment of the objective of the national tax measure,[146] or based on the company's ability to pay taxes.[147] Quite surprisingly, the CJEU decided that the two situations are comparable, as the losses were definite, which makes the situation comparable to domestic. The situation is a turnaround to what was seen for example in case *Krankenheim*[148].

In *NN A/S* the CJEU first derived from *Bevola* that a group whose non-resident subsidiary has a resident PE is not comparable with a group whose resident subsidiary has a resident PE.[149] Then the CJEU established comparable situations because the losses of the company were definite, and its ability-to-pay could not be taken into account.[150]

3.3 Analysis of the case law on establishing comparability

The CJEU's case law around assessing comparability seems to have two clear turning points. These are the rulings of the CJEU first in *Nordea Bank*[151] and subsequently in *Bevola*[152]. In *Nordea Bank*[153], the CJEU took its first distinctive step towards more restrictive and seemingly less functional approach on the comparability analysis. In the more recent *Bevola*[154] case, the CJEU however, seems to have started to use a new ground for establishing comparability through the use of ability-to-pay principle.

In the early case line starting from *Marks & Spencer*[155] the CJEU seems in essence, to assume that domestic and cross-border situations

[145] Ibid para 34
[146] Ibid para 35
[147] Ibid para 39
[148] *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* (n 79)
[149] *NN A/S* (n 76) para 34
[150] Ibid para 35
[151] *Nordea Bank Danmark A/S* (n 82)
[152] *Bevola and Jens W. Trock ApS* (n 9)
[153] *Nordea Bank Danmark A/S* (n 82)
[154] *Bevola and Jens W. Trock ApS* (n 9)
[155] *Marks & Spencer plc* (n 50)

are comparable. However, starting most notably from the *Nordea Bank*[156] decision, it appears the opposite was assumed. Unlike prior to *Nordea Bank*[157], in that ruling and there onwards, the CJEU seems to reject comparability of domestic and cross-border situation systematically, before even effectively assessing the case at hand, and without explaining its reasoning to do so. The CJEU stated in *Bevola*, which was also stated in *Nordea Bank* that resident PEs are not comparable with non-resident PEs.[158] In *NN A/S*, the CJEU derived from this that a group whose non-resident subsidiary has a resident PE is not comparable with group whose resident subsidiary has a resident PE.[159] This deduction does not seem to be logical considering that in *X Holding BV* the CJEU concluded that non-resident PEs are not comparable with non-resident subsidiaries, due to the PE being limited liable in resident state and subsidiary unlimited liable.[160] If non-resident PEs and non-resident subsidiaries are not comparable in relation to double taxation, the deduction made in *NN A/S*[161] then cannot be derived from the fact that non-resident PEs and resident PEs are not in comparable situation. At least it would need some explanation.

The comparability assessment in *Lidl Belgium*[162], *Krankenheim*[163] and *Timac Agro*[164] does not seem to be convincing. In all these three cases the foreign PE was exempted from tax in Germany, where their head offices were located. However, in *Lidl Belgium*[165] and *Krankenheim*[166] the comparability of the situations were assumed but in *Timac Agro*[167] it was denied. Moreover, the CJEU's vague reasoning can be also observed by comparing *NN A/S*[168] with *Papillon*[169], where in both cases

156 *Nordea Bank Danmark A/S* (n 82)
157 Ibid
158 *Bevola and Jens W. Trock ApS* (n 9) para 37
159 *NN A/S* (n 76) para 34
160 *X Holding BV* (n 63) para 38
161 *NN A/S* (n 76) para 34
162 *Lidl Belgium GmbH & Co. KG* (n 77)
163 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* (n 79)
164 *Timac Agro Deutschland GmbH* (n 84)
165 *Lidl Belgium GmbH & Co. KG* (n 77)
166 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* (n 79)
167 *Timac Agro Deutschland GmbH* (n 84)
168 *NN A/S* (n 76)
169 *Société Papillon* (n 69)

the loss transfer was within one single Member State and, yet the CJEU assessed the situations completely differently. Where in *Papillon*[170] the CJEU observed that it does not make any difference, whether the subsidiary in the middle is located in different Member State, in *NN A/S*[171] it was deemed as fact, which automatically leads to non-comparability.

The second turning point in the case law was *Bevola*[172]. Before *Bevola*[173] the CJEU seemed to emphasise subject to tax as the main criterion for defining the comparability. In principle it seemed to be a rule that comparability existed when the credit method was used but comparability did not exist when the exemption method was used. When the credit method was used in *Marks & Spencer*[174] comparability of foreign and resident subsidiaries were assumed, however in *Timac Agro*[175], the situation was not comparable, because the exemption method was used, and losses were not taken into account in the state of the parent company. Even though the losses were deemed to be final in *Timac Agro*[176], they could not be taken into account, contrary to *Marks & Spencer*[177] ruling.

It was then established in case *Bevola*[178] that objective comparability could be established based on ability-to-pay. Although, it has been contested whether it is an independent criterion for establishing comparability or derived from the domestic law through the application of fiscal coherence in Denmark.[179]

The fact that the method used for eliminating double taxation place such a huge role has been subject to criticism.[180] For example, in case *Timac Agro*[181] the CJEU concluded that non-resident and resident PE were not in a

[170] Ibid
[171] *NN A/S* (n 76)
[172] *Bevola and Jens W. Trock ApS* (n 9)
[173] Ibid
[174] *Marks & Spencer plc* (n 50)
[175] *Timac Agro Deutschland GmbH* (n 84)
[176] Ibid
[177] *Marks & Spencer plc* (n 50)
[178] Bevola and Jens W. Trock ApS (n 9) paras 38-39
[179] Ismer and Kandel (n 11) p 584
[180] Frans Vanistendael, 'Ability to Pay in European Community Law' (2014) 23(3) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/23.3/ECTA2014013> accessed 27 May 2021 p132-133
[181] *Timac Agro Deutschland GmbH* (n 84)

comparable situation, because the Member State, where the head office was located, used exemption method for foreign income to prevent double taxation.[182] However, when the Member State, where the head office was located, previously allowed the loss deduction on foreign profits, even though it applied exemption method, the non-resident PE and resident PE were considered to be in a comparable situation. This result demonstrates that CJEU assessed the comparability of the situations based only on the Member State's decision to either take the losses into account or not. If the comparability is analysed assuming the non-comparability of parent companies with foreign PEs and parent companies with domestic PEs when the exemption method is applied, there will never be a possibility to take the losses into account, even when the losses are final.[183] This does not seem to be very objective way of analysing comparability if the CJEU only assess the national rule without taking into account how the rule is actually applied. The objective might be justified but not proportionate and proportionality is only assessed if the situations are comparable.

It has been argued on the opposite side that residency is an objective criterion for assessing comparability of domestic groups and cross-border groups, because foreign subsidiaries are not liable for tax due to residency in the state of the parent company and therefore the treatment cannot be discriminatory.[184] It is even suggested that residents and non-residents are only comparable, when they are subject to tax for the income and therefore the only relevant criterion should be subject to tax.[185] However, the author does not agree with these opinions because to some extent the result whether the income or the entity is subject to tax is based on the choices of the Member State. For example, in case of foreign PEs, the fact whether the

---

[182] Ibid paras 63-65

[183] Raul-Angelo Papotti and Carlomaria Setti, 'The CJEU Decision in Timac Agro (Case C-388/14): Another Properly Shaped Piece in the CJEU's Tax Loss Puzzle' (2016) 56 European Taxation <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2016_06_it_1> accessed 27 May 2021 p 253

[184] Silva (n 52) p 350-357

[185] Peter Wattel, 'European Union – Non-Discrimination à la Cour : The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases', (2015) 55 European Taxation < https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2015_12_e2_1> accessed 27 May 2021 p 548-549

PE is subject to tax in the state of the head office is dependent on the method for prevention of double taxation.

The CJEU's inconsistent case law on the comparability analysis and mixing up comparability and justification for restriction has been rightly criticised.[186] The fact that the secondary establishment is established in a foreign Member State and the income derives from a foreign source is used as a ground for denying comparability or used as a justification for different treatment by the CJEU.[187] This approach does not in any way seem to reflect the inherent values underlying freedom of movement. It has been even suggested by AG Kokott[188] and some scholars[189] that comparability analysis should be abandoned and rather focus on the level of justification of the restriction. Although it seems unlikely that the CJEU would take as radical change in its case law as abandonment of comparability test.

The CJEU stated in its judgement of the case *Columbus Container Services*, that the Member States have the freedom to choose the conditions applicable to different establishments, provided that foreign establishments are not discriminated against comparable national establishments.[190] This is the point that the CJEU seems to miss in its comparability analysis. The Member States are free to legislate in area of direct taxation, provided that the national legislation is treating comparable foreign establishments similarly to national establishment but still, when determining whether a cross-border situation is comparable to domestic situation the CJEU basis its evaluation on the framework of the national legislation, which may differentiate these two situations from another. In other words, the comparability analysis, which is a premise to finding

[186] Ibid p 547-548; Case C-48/13 *Nordea Bank Danmark A/S v Skatteministeriet* [2014] ECLI:EU:C:2014:2087, Opinion of AG Kokott para 24

[187] Wattel, 'European Union – Non-Discrimination à la Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases' (n 185) p 547-548

[188] Case C-48/13 *Nordea Bank Danmark A/S v Skatteministeriet* [2014] ECLI:EU:C:2014:2087, Opinion of AG Kokott para 22

[189]Marchgraber, (n 110), p 119; Joachim Englisch, 'Taxation of Cross-Border Dividends and EC Fundamental Freedoms', (2010) 38(4) Intertax <https://kluwerlawonline-com.ludwig.lub.lu.se/journalarticle/Intertax/38.4/TAXI2010025> accessed 27 May 2021p 203

[190] Case C-298/05 *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt.* [2007] ECR I-10451 para 53

discrimination may in fact find situations incomparable on the basis of national legislative decisions, which do not treat these situations similarly. This makes the comparability analysis to be limited to national choices of the Member State. Therefore, the new turning point in the case *Bevola*[191], is welcomed, as that way the non-comparability cannot be ruled based on the fact that the Member State has chosen to treat the two situations differently but also the taxpayer's actual situation is taken into account.

[191] *Bevola and Jens W. Trock ApS* (n 9)

4 The ability-to-pay principle as part of the comparability analysis

4.1 The ability-to-pay principle, where does it derive from?

The ability-to-pay principle seems actually to be imbedded in the very basis of tax theory. The central idea of taxation is to gather funding for public expenses. It is usually considered that the tax burden needs to be distributed among the taxpayers in a justifiable manner. In essence, the principle means that tax should be carried according to the actual capacity of the taxpayer, also assuming that there is a bare minimum, which is exempted from tax. Therefore, the deductibility of losses is also an important aspect of the ability-to-pay principle.

The ability-to-pay originates from taxation of individuals, which needs to take into account their specific circumstances and needs and even though companies are not similar to individuals, the ultimate beneficiaries are still individuals.[192] This principle was used for the first time by the CJEU in case *Schumacker*, which concerned personal deductions of a person working in different EU Member State than where he was resident. There the Court found non-residents and residents objectively comparable based on the fact that the non-resident could not have its personal and family situation taken into account in calculating tax benefits.[193] Even though the taxation of businesses and individuals differs to a significant degree as well as the application of this principle in individual and business case law, it is still important to understand where the principle originates from. [194]

---

[192] Chiara Bardini, 'The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ' (2010) 38(1) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/38.1/TAXI2010001> accessed 27 May 2021 p 3

[193] *Schumacker* (n 8) para 37

[194] For deeper analysis on the application of the ability-to-pay principle in relation to individual and business taxation in EU case law see: Vanistendael (n 180) p 121-134

The ability-to-pay principle is not written explicitly in the primary or secondary EU law. However, that does not mean that this principle could not be derived from EU law or used by the CJEU. The CJEU can be involved in a way in judicial law-making through developing general principles of EU law. The general principles of EU law are basic principles of law, which are found from the EU treaties or have been developed by the CJEU in its case law. The purpose of these principles is to fill-in gaps to ensure the coherence of the EU legal system.[195] In order to establish the general principles, the CJEU has to have competence in the area, the principle should be commonly accepted in the EU, and it has to be linked to the objective or function of the EU, with the objective to develop the existing legal order established in the EU treaties.[196]

The competence of the CJEU in the area of direct taxation has been assessed and confirmed already in section 2.1.1. Although some scholars argue that it is not itself a general principle but can be derived from general principles and fundamental rights.[197]

Ability-to-pay principle can be taken into account in both states, the state of residence of the secondary establishment and the state of residence of the parent company. It is not sufficient that both the secondary establishment and the parent company can have their ability-to-pay taken into account in respect of the income they derive from the state of the residency. For instance, in cases where the secondary establishment is making loss and at the same time the parent company is profitable, it makes a difference whether the ability-to-pay is assessed as a single economic unit or based on only the income attributable to each entity. Due to limitation rules in loss carry-forward the secondary establishment might not be able to take the loss into account, even though it would be profitable again in the future. Therefore, it is reasonable to assume that the resident state of the parent company or head

---

[195] José A. Gutiérrez-Fonz and Koen Lenaerts, 'The Constitutional Allocation of Powers and General Principles of EU Law', (2010) 47(6) Common Market Law Review <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/47.6/COLA2010069> accessed 27 May 2021 p 1629

[196] Ibid 1631-1636

[197] Joachim Englisch, 'Chapter 19: Ability to Pay' in Cécile Brokelind (ed) *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD, 2014)

office is actually the one, which can take into account the ability-to-pay of the entire group. In addition, it has to be recalled that the infringement of EU free movement law cannot occur in between of two Member States but is necessarily due to discriminatory action or rule in one Member State, since there is no real legal space acting as a 'no-man's land' outside national regimes.

4.1.1 Commonly accepted principle?

The ability-to-pay principle is derived historically and theoretically from the theories behind the benefit and faculty principles.[198] These approaches, especially the faculty principle, have been implemented historically already for centuries within as well as outside Europe on a constitutional level.[199] The ability-to-pay principle has been considered thus, undoubtedly, to be the main criterion for the distribution of tax burden within the EU Member States.[200] In addition, it has been argued that the contemporary taxation is closely linked to values of universality and equality, the application of which necessitates the choice of a criterion for the distribution of tax burden, and that this criterion chosen by nearly every actor is the ability-to-pay principle.[201]

The acceptance of this principle has however, been contested in some national jurisdictions.[202] However, it would appear that every system of taxation enabling the deduction of losses reflects the idea of ability-to-pay, as they acknowledge the limit to taxation. It should also be noted that the CJEU has for a long time applied the ability-to-pay principle in individual taxation cases. There would seem to be no reason to differentiate between individual and corporate taxation in this context. Therefore, it could be concluded, that the principle is commonly accepted in the EU.

---

198 Gianluigi Bizioli and Ekkehart Reimer, 'Equality, Ability to Pay and Neutrality', in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) p 60-61
199 Ibid p 61-65
200 Ibid p 65
201 Ibid p 65
202 Englisch, 'Chapter 19: Ability to Pay' (n 197); Almendral (n 37) p 478;

4.1.2 A general principle or derivate of general principles and fundamental rights?

The status of the ability-to-pay principle as a general principle of EU law has been questioned on the basis of EU's lack of competence in the relevant field. It has been argued that because direct taxation is not competence of the EU as such, there is no legal base based on which the CJEU could rule ability-to-pay as a general principle, but that it is therefore, rather a derivate from the equality principle.[203]

The principle of equality is one of the well-established general principles. It can even be found in the Treaty on European Union[204] (TEU) and Charter of Fundamental Rights[205]. The principle of equality entails that foreign and domestic persons, services, goods and capital are to be treated the same way as well as there should not be any obstacles for exiting from home jurisdiction and measures protecting national economic interest are prohibited.[206] The principle can be also understood as obligation for the Member States to divide tax burden equally.[207] This would clearly seem to indicate a connection with the ability-to-pay principle. However, the ability-to-pay principle can be considered as going even beyond equality principle as it sets out cap on excessive taxation and substantial requirement for taxation.[208] This would indicate that the ability-to-pay principle would be separate from the equality principle. The ability-to-pay principle can be seen

[203] Luca Cerioni, 'The Never-Ending Issue of Cross-Border Loss Compensation within the EU: Reconciling Balanced Allocation of Taxing Rights and Cross-Border Ability-To-Pay' (2015) 24(5) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/24.5/ECTA2015027> accessed 27 May 2021 p 274-276
[204] Consolidated version of the Treaty on European Union [2012] OJ C 326/01 Article 2
[205] Charter of Fundamental Rights of the European Union [2012] OJ, C 326/02 Title III especially in tax matters Articles 20-21
[206] Bizioli and Reimer (n 198) p 67
[207] Adam Zalasinski, 'The Limits of the EC Concept of 'Direct Tax Restriction on Free Movement Rights', the Principle of Equality and Ability to Pay, and the Interstate Fiscal Equity', (2009) 37(5) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/37.5/TAXI2009030> accessed 27 May 2021 p 293
[208] Bizioli and Reimer (n 198) p 59

as a main criterion for justifying the allocation of tax burden in the EU Member States.[209]

Ability-to-pay principle has been also seen as reflecting principles of solidarity and social justice, mentioned in the TEU Article 2, because it takes into account the minimum subsistence needed by the taxpayer.[210] It is quite clear that ability-to-pay is closely connected element to solidarity, as solidarity by definition seems to refer to the non-existence of link between benefits received and contributions paid, and contributions being linked to income level. However, just as with the principle of equality, the solidarity principle does not in itself set boundaries to or suggest how much each contributor should contribute to the system. Thus, it would seem that while application of ability-to-pay is an indication of solidarity, solidarity principle does not seem cover all the aspects of that principle. This would seem to suggest that the principle is not merely a derivative of existing general principles, but one in its own right.

Overall, it is suggested that the European ability-to-pay principle exist as a concept, but it has not been formally introduced by the CJEU.[211] On the opposite side some scholars hold the opinion that it cannot be considered as a general principle, because it is not independent from national legislation.[212] This approach seems questionable in the light of the most recent case law of the CJEU, which will be considered in the following section. The author considers that although the CJEU has not specifically referred to ability-to-pay principle as a general principle of EU law, there would be no obstacles to do so. Ability-to-pay principle may be employed in enhancing the functioning of the freedom of movement, by enabling a more objective and equal assessment of comparability of domestic and cross-border situations in direct taxation. Considering the most recent case law, it seems that the principle should be seen as an EU-wide principle, which requires Member States to take into account the ability-to-pay at EU level. In consideration of these factors required to establish a general principle, namely the competence in the

[209] Ibid p 59-65
[210] Englisch, 'Chapter 19: Ability to Pay' (n 197)
[211] Bardini, (n 192) p 18
[212] Ismer and Kandel (n 11) 582-584

area, commonly accepted principle, and link between the functioning of the EU, with the object to develop existing legal order, the author deems that the ability-to-pay could be considered as a general principle of EU law.

4.2 The use of the ability-to-pay principle in the case law of the CJEU in corporate loss relief cases

The case law relating to corporate taxation referring to ability-to-pay as a ground for establishing comparability is limited, because it was first explicitly mentioned in the *Bevola* case, which is fairly recent judgement of the CJEU. It can be argued that the principle already existed before that judgment, but it did not explicitly mention the principle by name. A great example of this is the *Marks & Spencer*[213] case, where the CJEU ruled in essence that definite losses must be deducted somewhere. AG Sánchez-Bordona in his opinion of the *Bevola* case explains the reasoning behind that judgement referring that the rule established in *Marks & Spencer* ensures the balance between tax burden and actual economic capacity of the taxpayer.[214] Although, not mentioning it by name, he explains the ability-to-pay principle, which in his opinion derives from the principle of tax justice.[215]

In the judgement of *Bevola* the CJEU states the intention of the national provision is the prevention of double taxation and double deduction of losses, which in general ensures that the company is taxed according to its ability-to-pay.[216] The objective of double taxation treaties on the other hand, according to the CJEU is the allocation of the right to tax between the states involved in order to prevent double taxation of profits. It also follows from the balanced allocation of the powers to impose taxes, which is the justification ground relied by the Member State, that Member States should be able to tax corresponding profits and losses in order to prevent double

---

[213] *Marks & Spencer plc* (n 50)
[214] Case C-650/16 *A/S Bevola and Jens W. Trock ApS v Skatteministeriet* [2018] ECLI:EU:C:2018:424, Opinion of AG Sánchez-Bordona, paras 34-38
[215] Ibid para 37
[216] *Bevola and Jens W. Trock ApS* (n 9) 39

deduction of losses.[217] Therefore, it cannot be claimed that the principle of ability-to-pay has been raised in this case purely due to the national law containing such a principle. The ability-to-pay principle seems to actually be integrated also in the idea of double taxation treaties and allocation of taxing rights, which try to ensure that the taxpayer is not taxed too much or not at all. Through this argumentation the CJEU seems to consider the objective comparability from the perspective of aim of the national measure and does not use the ability-to-pay as an independent criterion as such from the comparability test.

In addition, the CJEU also refers to the opinion of AG Sánchez-Bordona, who brought up the argument, that from the point of view of the parent company's capacity to pay tax, there is no difference on definite loss, which is incurred by resident PE and non-resident PE, the ability-to-pay of the parent company is equally affected.[218] The author sees that in this argument the CJEU establishes new step in the comparability analysis, when they argued: "… Yet 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. The two situations are thus comparable in this respect too, as the AG has explained in point 59 of his Opinion."[219] Here the CJEU does not consider anymore only the aim of the national legislation but also the actual situation of the taxpayer, who cannot have its ability-to-pay considered anywhere, therefore requiring that the taxpayer's EU wide ability-to-pay must be considered somewhere.

The case *NN A/S* also supports the argument of a new independent step in the comparability analysis. In this case, the CJEU states that even though in principle the domestic and cross-border situations are not comparable, an exception must be made, when the taxpayer's tax paying capacity is not taken into consideration.[220] In this case, the CJEU used the

[217] *Marks & Spencer plc* (n 50) paras 45-47
[218] *Bevola and Jens W. Trock ApS* (n 9) para 39
[219] Ibid para 39
[220] NN A/S (n 76) para 31-38

principle of ability-to-pay in a similar manner as in *Bevola*[221], by taking into account the actual circumstances of the taxpayer and establishing the comparability on basis of the fact that taxpayer's ability to pay had to be taken into account at least in some taxing Member State. It should be pointed out that this case concerned deduction of losses of a domestic parent company with, foreign subsidiary whose domestic PE suffered loss. Therefore, in this case the scope of application of the "new step" in the analysis was extended to subsidiaries.

AG Kokott has also expressly mentioned in subsequent cases *Holmen AB*[222] and *Memira Holding*[223], concerning the concept of final losses, that according to *Bevola* comparability can be also established based on ability-to-pay, even when the secondary establishment is not subject to tax in the state of the parent company. The CJEU, however, eventually did not consider comparability in these cases, as it focused on examining the concept of definite losses established in the *Marks & Spencer*[224] case. However, the fact that AG Kokott still in her opinion raises this factor shows that the "new step" has been accepted at least in her view.

In the light of the previously mentioned case law, it would seem that the principle of ability-to-pay is an EU wide principle, which requires the Member States to apply this principle in relation to definite losses of a parent company with secondary establishment in another EU Member State. Although, due to the requirement for definite losses, the primary obligation to take into account these losses still lies on the Member State, where the secondary establishment is situated.

[221] *Bevola and Jens W. Trock ApS* (n 9)
[222] Case C-608/17 *Skatteverket v Holmen AB* [2019] ECLI:EU:C:2019:511, Opinion of AG Kokott, Para 37
[223] Case C-607/17 *Skatteverket v Memira Holding AB* [2019] ECLI:EU:C:2019:510, Opinion of AG Kokott, para 45
[224] *Marks & Spencer plc* (n 50)

4.3 The usefulness and the role in the comparability analysis

The use of ability-to-pay principle in the comparability analysis would seem to bring certain benefits especially in relation to the clarity of the assessment. There are, nevertheless, also arguments against the use of the principle in as a part of the comparability analysis. These relate to most prominently to allocation of taxing powers as an overriding justification to nonapplication of the principle, and to CJEU's lack of competence in the area of direct taxation in general.

To understand whether the application of the ability-to-pay principle as a part of the comparability analysis would be beneficial and justified, it is necessary to study the arguments both for and against its application in this way. These arguments will be addressed in turn below.

4.3.1 Clarifying comparability analysis?

As it has been established already in previous sections, from the point of view of the parent company who suffers definite loss in secondary establishment located in another Member State, the situation is the same as in purely domestic circumstances. Considering the interest of the EU internal market, an outcome where the parent company in such cross-border circumstances cannot have the losses of its subsidiary or PE deducted against its profits, is not desirable. The risk of such an outcome renders intra EU cross-border movement considerably less favourable compared to establishing secondary establishment in the same Member State as the parent company. The comparability analysis exercised by the CJEU has not only allowed for such undesirable and poorly justified results, but also has not provided much legal certainty. This is because the comparability analysis seems, as highlighted earlier, to have developed somewhat incoherently, initially assuming comparability of domestic and cross-border situations, then assuming the opposite. Only recently has the CJEU moved towards creation of an objectively more justified approach when taking into account the ability-to-pay principle in its assessment. This new trend seems welcome as it provides a clear and objective rule for establishing comparability without the need to assume its existence or refer to allegedly provisions of national law.

The correctness of the use of this “new step” in the case law has, nevertheless, been contested as it differs from previous case law.[225] However, considering the inconsistent state of the CJEU’s previous case law, deviating from it to establish a more consistent rule would not seem harmful. The application of a new clearer basis for the comparability analysis would no doubt result in more legal certainty compared to sticking with the old regime, where the results of the comparability analysis are heavily dependent on the national legislation. It seems evident that assessing comparability on the basis of the premises of national legislation does not provide a coherent and objectively justifiable result. The precedents set by such an assessment do not seem useful either, as they rarely can be compared by analogy to another situation, because of the endless diversity of national legislations. In comparison the employment of the ability-to-pay principle as a basis for the assessment would provide considerably more reliable tool for both national and the EU court for assessing the comparability of situations.

The cross-border loss relief necessitates that the situations are comparable, and that the losses are definite.[226] The definitiveness of the losses have not been assessed in this thesis and therefore it cannot be deduced that the application of ability-to-pay principle would solve the entire issue relating to the lack of cross-border loss recognition in the EU. However, it would offer a more rigid instrument for analysing comparability.

[225] Vassilis Dafnomilis and Hein Vermeulen, ’Case C-28/17 NN A/S v. Skatteministeriet: A CJEU Judgment that Raises ‘Fresh Questions’’, (2019), 28(2) EC Tax Review <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/28.2/ECTA2019012> accessed 27 May 2021 p 95-96

[226] Ismer and Kandel (n 11) 585-586

4.3.2 Allocation of taxing powers overriding justification?

The balanced allocation of taxing powers has been accepted based on fiscal sovereignty of the Member States and symmetry of taxation. When something is excluded from taxation, the Member State does not have a responsibility under the EU law to take the losses into account.[227] The balanced allocation of taxing powers is strongly linked to territoriality, sovereignty and often used in a protectionist manner in practice.

It has been claimed that territoriality would clash with the ability-to-pay principle and that the territoriality should prevail over ability-to-pay.[228] On the contrary it has also been argued that fiscal coherence should not be seen as going against the ability-to-pay, but rather helping to maintain it, whenever the taxation system is built on ability-to-pay principle.[229] This seems logical, as the idea underlying fiscal coherence is to ascertain that the taxation system works as intendent. Therefore, if the taxation system embodies the ability-to-pay principle, upholding of fiscal coherence has the aim upholding this principle. The function of the double tax treaties on the other hand, has been claimed to be to divide the tax revenue between the Member States and not to ensure fair taxation within one Member State.[230] Thus, it has been argued that the objective of balanced allocation of taxing powers is not to justify the breaking up of the single market into multiple smaller tax areas but to instead prevent the eventuality that tax regime within one Member State may effectively erode a tax system of another Member State.[231]

Furthermore, it has been argued in connection to allowing transfer of loss that Member States might reduce the possibilities for deducting domestic losses in order to make other Member State to accept the

[227] Vanistendael (n 180) p 133
[228] Almendral (n 37) p 479
[229] Englisch, 'Chapter 19: Ability to Pay' (n 197)
[230] Englisch, 'Chapter 19: Ability to Pay' (n 197)
[231] Wolfgang Schön,' Losing Out at the Snooker Table: Cross-Border Loss Compensation for PE's and the Fundamental Freedoms' (2008) L. Hinnekens/P. Hinnekens (Eds.) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596586> accessed 27 May 2021 p 813-830

losses incurred in the first state.[232] This argument, however does not seem to be convincing, considering the reason why losses are taken into account in the first place to ensure that no excess tax is paid. Also, the cross-border loss transfer would result in redistribution of the losses and it is difficult to predict the countries, which would benefit from this. The fact however remains, that cross-border situations are taxed more heavily than domestic, which cannot be justified by the loss of tax revenue, which would be caused, if cross-border situations were to taxed according to their ability-to-pay.

It can be also said that double non-taxation is not according to the ability-to-pay principle, because the principle does not provide that taxpayers should not pay at all, but that they should pay according to their objective ability. Therefore, the use of ability-to-pay cannot justify a situation, where companies are trying to shop around jurisdictions for the purpose of minimizing tax liability. In addition, it has been established that freedom of movement cannot be relied upon when the freedom is being abused.[233]

The parent companies or head offices are unlimited tax liable for their worldwide income in the state of the residence. It has been said that the worldwide taxation is a consequence of ability-to-pay principle, because the ability-to-pay does not make a distinction based on where the income derives but how much the taxpayer can pay taxes.[234] Hence, the distinction between foreign and domestic income is artificial.[235] Taken the perspective of the worldwide income basis there is no issue with the symmetry in regards to deduction of losses and taxation of profits and the taxpayers situation is taken overall into account.[236] In fact, in his opinion in *Marks & Spencer* case, AG Maduro argued that principle of territoriality is used for prevention of conflicts between Member States and not to justify evasion of obligations

[232] Gianmaria Alberto Carlo Favaloro, 'European Union - Negative Harmonization in Tax Matters: EU Case Law on Cross-Border Transfer of Losses', (2020) 60(8) European Taxation < https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2020_08_e2_1> accessed 27 May 2021 p 382
[233] Poulsen (n 104) 204-206
[234] Schön,' Losing Out at the Snooker Table: Cross-Border Loss Compensation for PE's and the Fundamental Freedoms' (n 231)
[235] Ibid p 813-830
[236] Cerioni (n 203) p 273

imposed by EU laws.[237] He also pointed out that the residence state of a parent company with a non-resident subsidiary cannot rely on the principle of territoriality as the parent company is unlimited tax liable in that state, which gives the state the competence to grant the relief.[238]

Considering these arguments, the confrontation between ability-to-pay principle and allocation of taxing rights seems artificial if the situation of the Member State is assessed from the point of view of the aim of the EU and national legislation. The Member States right for allocation of taxing power cannot thus overrule the interests of the functioning of the internal market.

4.3.3 CJEU ruling beyond its competence?

Unlike the opposite might be argued, invoking ability-to-pay principle in the EU law does not exceed the EU competences in area of direct taxation but it is more objective way to assess that the national law of Member State is consistent with the EU free movement laws. Although, the concern about the competence creep in the EU in general is justified, it would seem that the use of the ability-to-pay principle is more closely connected to functioning of the freedom of movement, than to direct taxation itself. If the comparability assessment is made based only on the allegedly discriminatory national rule itself, the CJEU has no ability to protect the rights of companies exercising freedom of movement, even where the actual circumstances, which the companies face are comparable. This is liable to endanger the effectiveness of EU law in practice. The Member States of the EU have to follow the EU law even in their own competence areas.

It has been also claimed that CJEU does not respect the Member States right to allocation of taxing powers as it requires to extend their taxing jurisdiction to subsidiaries, which are not subject to tax in that Member State and the CJEU does not have competence to do so.[239] This argument however,

[237]Case C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837, Opinion of AG Maduro, para 62
[238] Ibid para 63
[239] Silva (n 52) p 350-350; Wattel, 'Taxation in the Internal Market' (n 20) p 342

is not completely accurate or sound. It should be clear that even national competence is not justification for discrimination. If the national tax legislation of a Member State treats differently domestic and cross-border situations so as to place the cross-border cases in a less favourable actual situation, this is the result of discrimination, which cannot be justified merely on competence claims. In effect, when securing the equal treatment of companies by scrutinizing the acceptability of national tax rules, the CJEU does not prescribe the contents of tax law, but only evaluates its compatibility with the internal market rules.

Conclusion

The recent change in the case law, which was brought by *Bevola*[240], relating to assessment of comparability in corporate cross-border loss recognition cases in the EU, has been welcomed. The comparability analysis, which relies only on the objective of the national legislation is not of kind, which would be sufficient to uphold common internal market goals. Basing the comparability analysis purely on the aim of the legislation, which has chosen to treat domestic and cross-border situations differently inevitable lead to situation, where comparability is denied, even though factually the two situations would be comparable. The use of the ability-to-pay principle as a "new step" in the comparability analysis seems to be necessary in order to sufficiently take into account the objective comparability of domestic and foreign situation and foster the right to free movement.

The scope of application of the ability-to-pay principle in corporate cross-border loss relief seems to be clear in the light of the most recent case law of the CJEU. The ability-to-pay principle, which is commonly accepted in the EU and shares common elements with the principles of solidarity and equality, has been developed in the CJEU's case law as an independent principle, which has a clear aim to uphold the idea of one single market. The EU ability-to-pay principle requires that the Member States to take into account the ultimate parent company's EU wide ability-to-pay, when a secondary establishment, PE or subsidiary, located in another EU Member State has suffered definite loss. The primary responsibility for taking the ability-to-pay into account is still on the Member State, where the secondary establishment is located, which also means that the cash advantage, which the domestic companies receive, cannot be enjoyed by the parent companies with cross-border secondary establishments. However, this is in itself great improvement and brings clarity to the CJEU's incoherent case law by giving a clear and objective rule for assessing comparability.

[240] *Bevola and Jens W. Trock ApS* (n 9)

It also appears that the confrontation between the Member State's right to allocation of taxing powers and the ability-to-pay principle is artificial as both can actually support each other. The idea of the principle of ability-to-pay is integrated into any national tax jurisdiction, which allow the deduction of losses against profits. Therefore, if the ability-to-pay principle is applied in purely domestic situations it should be also allowed for cross-border situations. The fact that direct taxation is not harmonized in the EU does not mean that the Member States should be allowed to deprive the practical effectiveness of the EU free movement laws, only relying on their national competence.

Bibliography

Books

Bizioli G and Reimer E, ‘Equality, Ability to Pay and Neutrality’, in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020)

Boria P, *Taxation in European Union* (2nd edn, Springer 2017)

Dourado A P, ’Cross-border Loss Relief’ in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018)

Englisch J, ’Chapter 19: Ability to Pay’ in Cécile Brokelind (ed) *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD, 2014)

Hofmann H, ‘Double Tax Agreements: Between EU Law and Public International Law’ in Alexander Rust (ed.), *Double Taxation within the European Union* (Wolters Kluwer 2011)

Hey J, ‘Taxation of business in the EU: Special problems of cross-border losses and exit taxation’ in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020)

Helminen M, *EU Tax Law – Direct Taxation* (2020 Edition, IBFD 2020) <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/doc

ument/etl2020_c02> (accessed 11 March 2021)

-- ’Taxation of Passive Income’, in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020)

Kofler G, ‘EU Power to Tax: Competences in the Area of Direct Taxation’, in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020)

Maitrot de la Motte A, ’Taxation of business in the EU: General issues’, in Christiana H. J. I. Panayi, Werner Haslehner, Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020)

Marchgraber C, *Double (Non-) Taxation and EU Law* (Wolters Kluwer 2018)

Mäntysaari P, *The Law of Corporate Finances: General Principles and EU Law, Volume I: Cash Flow, Risk, Agency, Information* (Springer 2010)

Schreiber U, *International Company Taxation* (Springer 2013)

Silva B, *The Impact of Tax Treaties and EU Law on Group Taxation Regimes* (Wolters Kluwer 2016)

Vermeulen H, ’Corporate Income Taxation’, in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018)

Wattel P J, ’Conceptual Background of the CJEU Case Law in Direct Tax

Matters', in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018)

-- 'General EU Law Concepts and Tax Law' in Peter J. Wattel, Otto Marres, Hein Vermeulen (eds), *European Tax Law* (Student Edition, Wolters Kluwer 2018)

-- 'Taxation in the Internal Market' in Panos Koutrakos and Jukka Snell (Eds), R*esearch Handbook on the Law of the EU's Internal Market,* (Edward Elgar Publishing, 2017)

Panayi C H J I, *European Union Corporate Tax Law* (Cambridge University Press 2013)

Articles

Almendral V R, 'An Ever Distant Union: The Cross-Border Loss Relief Conundrum in EU Law' (2010) 38(10) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/38.10/TAXI2010051> Accessed 22 April 2021 476 – 501

Bardini C, 'The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ' (2010) 38(1) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/38.1/TAXI2010001> accessed 27 May 2021 2-20

Barreiro Carril M C, 'National Tax Sovereignty and EC Fundamental Freedoms: The Impact of Tax Obstacles on the Internal Market' (2010) 38(2) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/38.2/TAXI2010010> accessed 22 April 2021 105-113

Cerioni L, ’The Never-Ending Issue of Cross-Border Loss Compensation within the EU: Reconciling Balanced Allocation of Taxing Rights and Cross-Border Ability-To-Pay’ (2015) 24(5) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/24.5/ECTA2015027> accessed 27 May 2021 268-280

Cordewener A, ’Cross-Border Loss Compensation and EU Fundamental Freedoms: The ’Final losses’ Doctrine Is Still Alive!’ (2018) 27(5) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/27.5/ECTA2018025> accessed 27 May 2021, 230-236

Dafnomilis V and Vermeulen H, ’Case C-28/17 NN A/S v. Skatteministeriet: A CJEU Judgment that Raises ‘Fresh Questions’’, (2019), 28(2) EC Tax Review <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/EC+Tax+Review/28.2/ECTA2019012> accessed 27 May 2021 90 – 100

Favaloro G A C, ’European Union - Negative Harmonization in Tax Matters: EU Case Law on Cross-Border Transfer of Losses’, (2020) 60(8) European Taxation < https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2020_08_e2_1> accessed 27 May 2021 381-384

Englisch J, ’Taxation of Cross-Border Dividends and EC Fundamental Freedoms’, (2010) 38(4) Intertax <https://kluwerlawonline-com.ludwig.lub.lu.se/journalarticle/Intertax/38.4/TAXI2010025> 197-221

Gutiérrez-Fonz J A and Lenaerts K, ’The Constitutional Allocation of Powers and General Principles of EU Law’, (2010) 47(6) Common Market Law Review <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/47.6/COLA2010069> accessed 27 May 2021 1629 – 1669

Ismer R and Kandel H, ’A Finale Incomparabile to the Saga of Definite Losses? Deduction of Foreign Losses and Fundamental Freedoms After Bevola and Sofina’ (2019) 47(6&7) Intertax <https://kluwerlawonline-com.ludwig.lub.lu.se/JournalArticle/Intertax/47.6/TAXI2019058> accessed 15 March 2021, 573-589

Kok R, ’Domestic and Cross-Border Loss Relief in the European Union’, (2010), 38(12), Intertax, <https://kluwerlawonline.com/journalarticle/Intertax/38.12/TAXI2010070> Accessed 22 April 663-671

Lang M, ’Has the Case Law of the ECJ on Final Losses Reached the End of the Line’ (2014) 54(12) European Taxation <https://www.ibfd.org/sites/ibfd.org/files/content/pdf/et_2014_12_e2_7.pdf> Accessed 22 April 2021, 530-540

Helminen M, ’Cross-Border Group Contribution, Freedom of Establishment and Final Losses’ (2021) 61(2/3) European Taxation <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2021_02_fi_1> Accessed 21 May 2021 51-59

Jasper Korving, ’Group Steria: A Threat to Group Taxation Regimes?’ (2016) 25(1) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/25.1/E

CTA2016004> accessed 27 May 2021 40-48

Panayi C H J I, ’The Taxation of Permanent Establishments: Selected Issues’, (2013) 67(4/5) Bulletin for International Taxation <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/bit_2013_04_e2_2> Accessed 24 March 2021 226-237

Poulsen M, ’Freedom of Establishment and the Balanced Allocation of Tax Jurisdiction’, (2012) 40(3) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/40.3/TAXI2012023> accessed 22 April 2021 200-211

Papotti R A and Setti C, ’The CJEU Decision in Timac Agro (Case C-388/14): Another Properly Shaped Piece in the CJEU’s Tax Loss Puzzle’ (2016) 56 European Taxation <https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2016_06_it_1> accessed 27 May 2021 246-254

Rønfeldt T, Comparing Tax Entities in a European Perspective Part I The Issue of Comparable Situations Required for Being Covered by European Union Law <https://kluwerlawonline.com/journalarticle/Intertax/44.12/TAXI2016087> Accessed 21 May 2021 938 – 949

-- ’Comparing Tax Entities in European Perspective, Part II’ (2016) 44(12) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/44.12/TAXI2016088> Accessed 22 April 2021 950 – 959

Schön W, ’International Tax Coordination for a Second-Best World (Part 1)’, (2009) 1(1) World Tax Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577035> Accessed 22 April 2021 67-114

-- ’ Losing Out at the Snooker Table: Cross-Border Loss Compensation for PE's and the Fundamental Freedoms’ (2008) L. Hinnekens/P. Hinnekens (Eds.) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596586> accessed 27 May 2021 813-830

Vanistendael F, ’Ability to Pay in European Community Law’ (2014) 23(3) EC Tax Review <https://kluwerlawonline.com/journalarticle/EC+Tax+Review/23.3/ECTA2014013> accessed 27 May 2021 121-134

Wattel P J, ’European Union – Non-Discrimination à la Cour : The ECJ’s (Lack of) Comparability Analysis in Direct Tax Cases’, (2015) 55 European Taxation < https://research-ibfd-org.ludwig.lub.lu.se/#/doc?url=/document/et_2015_12_e2_1> accessed 27 May 2021 542-553

Zalasinski A, ’The Limits of the EC Concept of ’Direct Tax Restriction on Free Movement Rights’, the Principle of Equality and Ability to Pay, and the Interstate Fiscal Equity’, (2009) 37(5) Intertax <https://kluwerlawonline.com/journalarticle/Intertax/37.5/TAXI2009030> accessed 27 May 2021 282 – 297

Legislation

Charter of Fundamental Rights of the European Union [2012] OJ, C 326/02

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01

Consolidated version of the Treaty on European Union [2012] OJ C 326/01

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive) [2011] OJ L 345

OECD Model Tax Convention on Income and on Capital

Table of Cases

NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (26/62) [1963] ECR 1

A/S Bevola and Jens W. Trock ApS v Skatteministerie (C-650/16) [2018] ECLI:EU:C:2018:424

A/S Bevola and Jens W. Trock ApS v Skatteministeriet (Case C-650/16) [2018] ECLI:EU:C:2018:424, Opinion of AG Sánchez-Bordona,

Case C-298/05 *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt.* [2007] ECR I-10451

Commission of the European Communities v French Republic (C-270/83) [1986] ECR 0273

Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH (C-157/07) [2008] ECR I-8061

Finanzamt Köln-Altstadt v Roland Schumacker (C-279/93) [1995] ECR I-00225

Flaminio Costa v E.N.E.L. (6/64) [1964] ECR 614

Groupe Steria SCA v Ministère des Finances et des Comptes publics (C-386/14) [2015] ECLI:EU:C:2015:524

Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn (C-414/06) [2008] ECR I-03601

Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) (C-446/03) [2005] ECR I-10837

Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) (C-446/03) [2005] ECR I-10837, Opinion of AG Maduro

NN A/S v Skatteministeriet (C-28/17) [2018] ECLI:EU:C:2018:526

Nordea Bank Danmark A/S v Skatteministeriet (Case C-48/13) [2014] ECLI:EU:C:2014:2087

Skatteverket v Holmen AB (C-608/17) [2019] ECLI:EU:C:2019:511, Opinion of AG Kokott

Skatteverket v Memira Holding AB (C-607/17) [2019] ECLI:EU:C:2019:510, Opinion of AG Kokott

Société Papillon v Ministère du Budget, des Comptes publics et de la Fonction publique (C-418/07) [2008] ECR I-08947

Timac Agro Deutschland GmbH v Finanzamt Sankt Augustin (C-388/14) [2015] ECLI:EU:C:2015:829

X Holding BV v Staatssecretaris van Financiën (C-337/08) [2010] ECR I-01215