ECJ Direct Tax Compass 2015

Including:

- Summaries of 239 ECJ cases
- Relevant EU direct tax legislation
- Indexing system
ECJ Direct Tax Compass 2015

Why this book?
The ECJ Direct Tax Compass is a collection of summaries of the 239 most significant judgments of the Court of Justice of the European Union – rendered up to 31 January 2015 – which are relevant for EU direct taxation. With its useful search features and valuable content, the booklet serves as a reliable guide through the thicket of ECJ case law on direct taxation.

The book contains a keyword index which facilitates topical searches. The summaries of the direct tax cases are classified according to topics representing the most important clusters of issues addressed by the ECJ from 1986 onwards. These are complemented by important texts of EU legislation. Also, several classification tables enable searches according to the legal basis of the decisions and the justification grounds invoked by the Member States.

The ECJ Direct Tax Compass is an essential reference for all those wishing to gain a better understanding of the ever-expanding field of EU direct taxation.

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Case C-48/13
Nordea Bank Danmark A/S v. Skatteministeriet

Synopsis
Freedom of establishment precludes legislation of a Member State under which, in the event of the transfer by a resident company to a non-resident affiliated company of a permanent establishment situated in another Member State or in another state that is party to the EEA Agreement, the losses previously deducted in respect of the permanent establishment transferred are reincorporated into the taxable profit of the transferring company resident in the first Member State, in so far as that Member State taxes both the profits made by that permanent establishment before its transfer and those resulting from the gain made upon the transfer.

Facts
Nordea Bank Danmark A/S (Nordea Bank) is the successor in law which formed the Nordea Group in 2000, together with Swedish, Finnish and Norwegian banks. Before 2000, the predecessor in law had permanent establishments in Sweden, Finland and Norway, which made losses every year. Upon formation of the Nordea Group, these permanent establishments (branches) were closed. Nevertheless, the acquiring companies could no longer claim relief for the losses incurred previously by the permanent establishments.

Legal background and issue
According to Danish tax legislation, losses incurred by foreign permanent establishments are tax deductible at the level of the Danish resident company. Also, the Denmark-Faroe Islands-Finland-Iceland-Norway-Sweden Income and Capital Tax Treaty (Nordic Convention) provides for the credit method as the method to avoid double taxation.
Furthermore, in case of a total or partial transfer of the foreign permanent establishments, it is provided that the gains or losses in respect of all the assets in the transferred business are subject to tax. As the transfer was regarded as a partial sale of the foreign permanent establishments to the affiliated companies resident outside Denmark, the tax authorities increased the taxable base up to the tax year 2000 with the amount of losses for which tax relief had been claimed in the previous years. Nordea Bank takes the view that this rule infringes both the TFEU and the EEA Agreement.

The issue was whether the freedom of establishment precluded Danish legislation that aims to fully recapture losses arising from a permanent establishment situated in another Member State or in another state that is party to the EEA Agreement, upon the partial or total transfer of that permanent establishment to an affiliated company resident in the same Member State as the permanent establishment.

**Decision**

**Scope**
The case was decided based on the freedom of establishment.

**Discrimination/restriction**
Legislation treating foreign permanent establishments differently than domestic permanent establishments, due to the fact that the losses of a domestic permanent establishment are not recaptured, is liable to deter a Danish company from carrying on its business through a permanent establishment situated in a Member State or in a state that is party to the EEA Agreement other than Denmark. Moreover, a provision which allows losses incurred by a permanent establishment situated in Denmark to be taken into account in calculating the profits and taxable income of a company resident also in Denmark constitutes a tax advantage that is denied to Danish companies which have permanent establishments in another Member State or in another state that is party to the EEA Agreement. Therefore, such a legislation constitutes a restriction prohibited by the freedom of establishment as provided by the TFEU and the EEA Agreement.

**Justifications**
A restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest. In principle, permanent establishments situated in another Member State or in another state that is party to the EEA Agreement are not in a situation comparable to that of resident permanent establishments. However, by making the profits of permanent establishments situated in Finland, Sweden and Norway subject to Danish tax, the Danish legislation has equated those permanent establishments with resident permanent establishments as regards the deduction of losses. The restriction can therefore be justified only by overriding reasons in the public interest.

The Danish government relied on the need to ensure a balanced allocation of the power to impose taxes between Member States. Firstly, this justification was analysed in connection with the objective of the Danish legislation to avoid the risk of tax avoidance which may occur when Danish companies would transfer
loss-making permanent establishments situated in Finland, Sweden or Norway to affiliated companies resident also in these Member States with the view to obtain future profits to be taxed outside Denmark. Secondly, considering that the objective of this justification is to safeguard the symmetry between the right to tax profits and the right to deduct losses, Denmark may tax the profits made by the permanent establishment only before its transfer (including those resulting from the gains made upon the transfer) when the permanent establishment belonged to the Danish transferring company. Nevertheless, this justification was rejected as the Danish legislation is considered to go beyond what is necessary to attain the objective relating to the need to safeguard the balanced allocation of the power to impose taxes if the Member State taxes the profits made in respect of that permanent establishment before its transfer, including those resulting from the gain made upon the transfer.

1.1.3.2. Subsidiary losses

Case C-264/96
Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer

Decision date: 16 July 1998
Procedure type: Preliminary ruling
AG opinion: Tesauro, 16 December 1997
Justifications: Tax avoidance, coherence/cohesion of the tax system, loss of tax revenue
Decision type: Judgment
Legal basis: Art. 43 EC Treaty, Art. 49 TFEU (Freedom of establishment)
Other EC Treaty Art. invoked: Art. 10 EC Treaty
Host State/Home State: Home State
Keywords: Corporate income tax, admissibility, coherence/cohesion of the tax system, group taxation, group relief, jurisdiction of the ECJ, deduction, carry-forward, losses, tax avoidance, wholly artificial arrangements, third countries, loss of tax revenue
Authentic language: English

Synopsis
The freedom of establishment precludes legislation of a Member State which, in the case of companies established in that Member State belonging to a consortium through which they control a holding company, by means of which they exercise their right to freedom of establishment in order to set up subsidiaries in other Member States, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the
Member State concerned. In circumstances where the holding company's business consists wholly or mainly in the holding of shares in subsidiaries that are established in third countries, Art. 10 of the EC Treaty does not require a Member State to interpret its legislation in conformity with EC law or refrain from applying its legislation in a situation falling outside the scope of EC law.

Facts

Coopers Animal Health (Holdings) Ltd (CAH) was a holding company resident in the UK with shareholdings in twenty-three trading companies. Four subsidiaries of CAH were established in the UK, six in other Member States and thirteen in third countries. CAH was beneficially owned by a consortium consisting of Imperial Chemical Industries plc (ICI) and Welcome Foundation Ltd, both resident in the UK and holding 49% and 51% in CAH respectively. CAH incurred losses for the accounting periods ending in 1985 to 1987. ICI sought, within the rules for group relief, to set off 49% of CAH’s losses against its own taxable profits for the corresponding periods. The Inland Revenue refused this on the ground that CAH did not constitute a holding company within the meaning of the Income and Corporation Taxes Act, since the majority of its subsidiaries were not resident.

Legal background and issue

The Income and Corporation Taxes Act provided for a system of group relief whereby, amongst members of the same group, a surrendering company could, under certain conditions concerning the shareholdings and the activities of the group members, transfer its trading losses or other amounts eligible for relief to another group member. A holding company was defined as a company the business of which consisted wholly or mainly in the holding of shares or securities of trading companies which were its subsidiaries for 90% and resident in the UK.

The issues were:

(i) whether the freedom of establishment precludes legislation of a Member State which, in the case of companies established in that State belonging to a consortium through which they control a holding company, makes a particular form of tax relief subject to the requirement that the holding company's business consist wholly or mainly in the holding of shares in subsidiaries that are established in the Member State concerned; and

(ii) if that legislation at issue was found to be incompatible with EC law, whether it was not to be applied or construed in a way conforming with EC law, where the holding company controlled mainly subsidiaries having their seat in third countries.

Decision

Scope

A request for a preliminary ruling from a national court may be rejected only if it is manifest that the interpretation of EC law or the examination of the validity of a rule of EC law sought by that court bears no relation to the true facts or the
subject matter of the main proceedings. Because it was a necessary condition to hold shares in a majority of subsidiaries resident in the UK in order to qualify as a holding company, the interpretation of the legislation at issue made it necessary to determine whether it was compatible with the freedom of establishment. The ECJ therefore rejected the argument that the questions referred had no bearing in the ground that ICI would be denied the deduction anyway, since the majority of the companies controlled by CAH were resident in third countries. However, concerning the second issue, the ECJ emphasized that the difference of treatment applied according to whether or not the business of the holding company belonging to the consortium consists wholly or mainly in holding shares in subsidiaries having their seat in non-member countries lies outside the scope of EC law. Consequently, the freedom of establishment does not preclude domestic legislation under which tax relief is not granted to a resident consortium member where the business of the holding company owned by that consortium consists wholly or mainly in holding shares in subsidiaries which have their seat in non-member countries. Nor does Art. 10 of the EC Treaty apply. When deciding an issue concerning a situation which lies outside the scope of EC law, the national court is not required, under EC law, either to interpret its legislation in a way conforming with EC law or to refrain from applying that legislation. Where a particular provision must not be applied in a situation covered by EC law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the state concerned to remove that legal uncertainty in so far as it might affect rights deriving from EC rules.

**Discrimination/restriction**

Under settled case law, the freedom of establishment entails the right for nationals of the Member States to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. This includes the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EC, to pursue their activities in the Member State concerned through a branch or agency. It is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular Member State, like nationality in the case of natural persons. Even though the freedom of establishment is directed mainly to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (Daily Mail and General Trust (Case 81/87)). The legislation at issue did so by denying tax relief to resident companies belonging to a resident consortium which have, via a holding company, exercised their freedom of establishment in order to set up subsidiaries in other Member States, as soon as those subsidiaries form the majority of the holding.

**Justifications**

(i) **Tax Avoidance.** The ECJ dismissed a justification on grounds of preventing tax avoidance, since the legislation did not serve the specific purpose of preventing wholly artificial arrangements. It applied generally to all situations
where the majority of the subsidiaries were foreign, for whatever reason. However, the establishment of a company outside a Member State does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the state of establishment. Furthermore, the risk of charges being transferred, which the legislation at issue is designed to prevent, is entirely independent of whether the majority of subsidiaries are resident in the Member State enacting the legislation. The existence of only one non-resident subsidiary is enough to create the risk invoked.

(ii) Loss of tax revenue. The diminution of tax revenue occurring through the granting of tax relief on losses incurred by resident subsidiaries which cannot be offset by taxing the profits of non-resident subsidiaries is not one of the grounds listed in the EC Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with the freedom of establishment.

(iii) Cohesion of the tax system. The ECJ stressed, referring to its decisions in Commission v. Belgium (C-300/90) and Bachmann (C-204/90), that a justification based on fiscal cohesion required a direct link between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries. However, no such link existed.

Case C-446/03
Marks & Spencer plc v. Halsey (Her Majesty’s Inspector of Taxes)

Decision date: 13 December 2005
Procedure type: Preliminary ruling
AG opinion: Maduro, 7 April 2005
Justifications: Balanced allocation of taxing powers, double deduction, losses, tax avoidance, loss of tax revenue
Decision type: Judgment
Legal basis: Art. 43 EC Treaty (Freedom of establishment)
Host State/Home State: Home State
Keywords: Corporate taxation, losses, carry-forward, wholly artificial arrangements, balanced allocation of taxing powers, double deduction, tax avoidance, loss of tax revenue, territoriality, subsidiary
Authentic language: English

Synopsis
Arts. 43 and 48 of the EC Treaty do not preclude provisions in a regime of group taxation of a Member State which generally prohibit a resident parent company from deducting from its taxable profits losses incurred by a subsidiary established in another Member State, even when these allow the deduc-
tion of such losses incurred by a resident subsidiary. However it is contrary to Arts. 43 and 48 to prohibit the parent company from deducting such losses from a foreign subsidiary, when the latter has exhausted all possibilities available in its state of residence of having the losses taken into account in the present, the past or the future, either by itself or by a third party in case the subsidiary has been sold.

Facts

Marks & Spencer (M&S), a company incorporated and registered in England and Wales, was the parent company of a number of companies established in the United Kingdom and in other states. In March 2001, Marks & Spencer announced its intention to divest itself of its continental European activity. By 31 December 2001, the French subsidiary had been sold to third parties, while the other subsidiaries, including those established in Belgium and Germany, had ceased trading. Each of the subsidiaries had operated in the Member State in which it had its registered office. The subsidiaries had no permanent establishment in the United Kingdom and had never traded there. M&S claimed group tax relief for losses incurred by its subsidiaries from 1998 to 2001. The claims for relief were rejected on the ground that group relief could only be granted for losses recorded in the United Kingdom.

Legal background and issue

Under UK law, corporate tax was charged on the profits of companies that were resident or conducted trading activities in the UK through a branch or agency. Such companies were taxed on worldwide income while non-resident companies were taxed only on income attributable to their branch in the UK. A group relief system only allowed resident groups of companies to offset their profits and losses within the group. In order to accommodate the judgment of the ECJ in Case C-264/96 ICI, the law was changed in 2000 and has since provided that losses made by a UK branch of a non-resident company may be surrendered to another group company for offset against its UK taxable profits and losses made by a group company established in the UK may be surrendered to the branch for offset against its profits in the UK.

The issues were whether:

(i) the freedom of establishment precluded provisions of a Member State which prevent a resident parent company from deducting losses incurred in another Member State by a subsidiary established in that Member State, although they allow deduction of losses incurred by a resident subsidiary; and

(ii) it made a difference if, depending on the law of the Member State of the subsidiary, it was possible in certain circumstances to obtain relief for some or all of the losses incurred by the subsidiary in the Member State of the subsidiary.

Decision

Scope

The provisions at issue had to be examined in the light of the freedom of establishment. Under settled case law, Member States must exercise their competence
concerning direct taxation in consistence with EC law. Even though, according to their wording, the provisions concerning the freedom of establishment are directed towards ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.

**Discrimination/restriction**
The UK group relief regime constituted a tax advantage for the companies to which it applied. By speeding up the relief of the losses of loss-making group members by allowing them to be set off immediately against the profits of other group members, such relief conferred a cash advantage on the group. The exclusion of such an advantage in respect of the losses incurred by subsidiaries established in other Member States, and which did not conduct any trading activities in the UK, hindered the parent company to exercise its freedom of establishment by deterring it from setting up subsidiaries in other Member States. Therefore, applying a different tax treatment to losses incurred by resident subsidiaries and losses incurred by non-resident subsidiaries constituted a restriction of the freedom of establishment. Such restriction is permissible only if it pursues a legitimate objective compatible with the EC Treaty and is justified by overriding reasons in the public interest. In addition, its application must be appropriate and not go beyond what is necessary to attain the objective pursued.

**Justifications**
By taxing resident companies on their worldwide profits and non-resident companies solely on the profits from their activities in the UK, the UK was acting in accordance with the principle of territoriality enshrined in international tax law and recognized by EC law. However, the fact that it did not tax the profits of the non-resident subsidiaries of a parent company established on its territory did not in itself justify restricting group relief to losses incurred by resident companies.

(i) **Balanced allocation of taxing powers.** Although a reduction in tax revenue cannot be regarded as an overriding reason in the public interest, the preservation of a balanced allocation of taxing rights could make it necessary to apply to the economic activities of companies established in a Member State only the tax rules of that Member State in respect of both profits and losses. Cross-border loss compensation would significantly jeopardize a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first and reduced in the second Member State to the extent of the losses transferred.

(ii) **Double deduction/multiple use of losses.** Member States must be able to prevent a double consideration of losses, and the UK group relief regime avoided such.

(iii) **Tax avoidance.** The exclusion of group relief for losses incurred by non-resident subsidiaries prevented that within a group of companies losses were transferred to high-tax jurisdictions, where the tax value of such losses was higher.
In the light of all three justifications, the UK group relief provisions pursued legitimate objectives compatible with the EC Treaty, which were justified by overriding reasons in the public interest. The provisions also ensured accomplishment of these objectives, but went beyond what is necessary for cases in which the non-resident subsidiary had exhausted all possibilities to deduct the losses incurred in its Member State of residence and the losses could not be carried forward by the subsidiary or a third party to which the subsidiary was sold. Where the resident parent company demonstrated to the tax authorities that these conditions were fulfilled, the freedom of establishment precluded rules denying the possibility for the resident parent company to deduct the losses incurred by its non-resident subsidiary. Otherwise, as Community law now stands, since other identifiable less restrictive measures would in any event require harmonized rules adopted by the EC legislature, the freedom of establishment does not preclude provisions of a Member State which generally prevent a resident parent company from deducting losses incurred in another Member State by a subsidiary established in that Member State, although they allow it to deduct losses incurred by a resident subsidiary. Also, in any event, Member States are free to adopt or maintain rules that have the specific purpose to preclude from a tax benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law.

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**Case C-347/04**

**Rewe Zentralfinanz eG v. Finanzamt Köln-Mitte**

- **Decision date:** 29 March 2007
- **Procedure type:** Preliminary ruling
- **AG opinion:** Maduro, 31 May 2006
- **Justifications:** Balanced allocation of taxing powers, double deduction, tax avoidance, fiscal supervision, coherence/cohesion of the tax system, territoriality
- **Decision type:** Judgment
- **Legal basis:** Art. 43 EC Treaty, Art. 49 TFEU (Freedom of establishment)
- **Other EC Treaty Art. invoked:** Art. 56 EC Treaty, Art. 63 TFEU (Free movement of capital)
- **Other EU legislation:** Mutual Assistance Directive (for the exchange of information) 77/779/EEC
- **Host State/Home State:** Home State
- **Keywords:** Corporate income tax, shareholding, substantial shareholding, subsidiary, deduction, losses, double deduction, write-down, balanced allocation of taxing powers, fiscal supervision, coherence/cohesion of the tax system, territoriality, tax avoidance, wholly artificial arrangements, proportionality, exchange of information (see also administrative assistance)
- **Authentic language:** German
Synopsis

The non-deductibility of losses incurred by a German resident parent company, in respect of write-downs to the book value of its shareholdings in subsidiaries established in other Member States, constitutes an unjustified restriction on the freedom of establishment when such losses on shares of domestic subsidiaries are deductible.

Facts

In 1989, ITS Reisen GmbH (ITS, whose legal successor is Rewe Zentralfinanz eG) established a wholly owned subsidiary in the Netherlands (KTH), which in turn established a holding company (ITIH) there. ITIH acquired participations inter alia in Spanish and UK companies engaged in tourism business. In 1993 and 1994, ITS wrote the participation in KTH down to correspond to a reduced fair market value because of losses incurred by these subsidiaries of ITIH. The deductions resulting from the write-down totalled over EUR 23.5 million and were denied by the tax authorities. On appeal by Rewe, the Cologne Finance Court referred a question to the ECJ on the compatibility of the relevant German legislation with EC law.

Legal background and issue

Under German rules, the deduction of write-downs to the book value of a participation in a subsidiary was treated differently according to whether the subsidiary concerned was established in Germany or outside. Write-downs on domestic participations were immediately tax deductible from all positive income of a taxpayer without restriction. In contrast, write-downs on participations in foreign subsidiaries could only be offset against (future) positive income of the same kind from the same state where the subsidiary was resident, unless the participation was held in a foreign subsidiary, which was engaged in 'active' business. Tourism-related activities were excluded from the scope of 'active' business. The issue was whether the freedom of establishment and the free movement of capital precluded such rules.

Decision

Scope

The ECJ decided the case on the basis of the freedom of establishment, as ITS owned 100% of the shares in its Netherlands resident subsidiary undoubtedly giving ITS a definite influence on the latter’s decisions and allowing it to determine its activities.

Discrimination/restriction

The ECJ held that the difference in tax treatment between losses on shares in resident and non-resident subsidiaries resulting from the German provisions constituted a restriction on the freedom of establishment. Even if a German resident parent company can offset losses stemming from shareholdings in foreign subsidiaries against future positive income generated by those foreign subsidiaries, the rule still entails a cash-flow disadvantage compared to a parent company with
a German subsidiary. Such cash-flow disadvantage may dissuade companies from carrying on activities through intermediary subsidiaries established in other Member States. The ECJ refuted the argument of the German government that such a difference in treatment does not constitute a restriction, as the situations of a German subsidiary and a subsidiary resident in another Member State were not comparable. The Court pointed out that the different tax treatment at issue did not concern the situation of subsidiaries, according to whether or not they are established in Germany, but that of parent companies resident in Germany, according to whether or not they had subsidiaries established in other Member States. Those parent companies are in a comparable situation.

**Justifications**

The German government argued that even if the provisions at issue impose a restriction, such restriction may be justified by overriding reasons in the public interest. It put forward a number of grounds for justification, in particular:

(i) **Balanced allocation of taxing powers.** Germany argued that it does not have to take into account losses relating to a subsidiary since it does not tax the profits of that subsidiary. The ECJ rejected that, since refusing a tax advantage to a resident company because it has developed a cross-border economic activity, which does not result in immediate tax revenues for Germany, is unjustified. In addition, the ECJ noted that this ground was accepted in the Marks & Spencer case only in conjunction with two other grounds (tax avoidance and taking into account tax losses twice).

(ii) **Prevention of multiple use of losses (double deduction).** The ECJ pointed out that the losses at issue are not comparable to operating losses incurred by non-resident subsidiaries abroad, dealt with in the Marks & Spencer case. The losses at issue are incurred by the parent company because of a drop in the book value of its shareholdings in foreign subsidiaries. A separate treatment of the losses suffered by the subsidiaries and the losses incurred by the parent company cannot amount to using the same losses twice.

(iii) **Preventing tax avoidance.** The argument was that the restriction prevents a particular form of tax avoidance, when German companies (in particular in the tourism sector) transfer habitually loss-making activities to subsidiaries in other Member States, solely in order to reduce their taxable profits in Germany. The ECJ held that the mere fact that in tourism the tax authorities perceive significant and continuing losses incurred by foreign subsidiaries cannot suffice to establish the existence of purely artificial arrangements, as required by settled case law. Since the German provisions do not specifically aim to exclude purely artificial arrangements designed to circumvent German tax law, they are disproportionate.

(iv) **Effectiveness of fiscal supervision.** The ECJ rejected this justification by pointing at the existence of the Mutual Assistance Directive and the fact that the German tax authorities are entitled to demand the evidence from the parent company itself to determine whether or not to grant a deduction.
(v) **Cohesion of the tax system.** Germany argued that the exemption of dividends paid by the Dutch subsidiary in the hands of the German parent under the Germany–Netherlands tax treaty constitutes an advantage, which can be offset by a disadvantage in the form of denying the deduction of losses in question. This was rejected since such losses were taken into account when a foreign subsidiary carried on 'active' activities, while dividends would be still exempted under the tax treaty. Furthermore, German-resident companies with shareholdings in domestic subsidiaries could both deduct the losses at issue and benefit from an exemption of the domestic dividends.

(vi) **Territoriality.** The ECJ pointed out the German legislation at issue does not implement the principle of territoriality. The purpose of that principle is to establish the need to take into account in the application of EC law the limits on the Member States' power to tax. The legislation at issue concerned German resident parent companies subject to unlimited liability to tax in Germany. No issue of competing tax jurisdictions was involved, even if those companies were granted the advantage claimed by the applicant.

As all the justifications advanced were rejected, the Court upheld that the German rules inflicted a restriction on the freedom of establishment.

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**Case C-231/05**

**Oy AA**

*Decision date:* 18 July 2007  
*Procedure type:* Preliminary ruling  
*AG opinion:* Kokott, 12 September 2006  
*Justifications:* Balanced allocation of taxing powers, tax avoidance  
*Decision type:* Judgment  
*Legal basis:* Art. 43 EC Treaty, Art. 49 TFEU (Freedom of establishment)

*Other EC Treaty Art. invoked:* Art. 56 EC Treaty, Art. 63 TFEU (Free movement of capital)

*Other EU legislation:* Parent-Subsidiary Directive 90/435/EEC  
*Host State/Home State:* Host State  
*Keywords:* Corporate income tax, subsidiary, shareholding, substantial shareholding, group taxation, deduction, business profits, balanced allocation of taxing powers, tax avoidance, proportionality

*Authentic language:* Finnish

**Synopsis**

It is permissible for a Member State to allow a resident subsidiary to deduct a transfer of profits made under the intra-group financial transfer system only when the receiving parent company is resident in the same Member State. Although the non-deductibility of financial transfers made to parent compa-
Companies of other Member States constitutes a restriction on the freedom of establishment, it is justified by the need to safeguard the balanced allocation of taxing rights between Member States and the prevention of tax avoidance and it is proportionate to those objectives.

Facts
A Finnish resident company, Oy AA intended to give a group contribution of its profits to its UK resident grand-grand-parent company, AA Ltd running at a loss, in order to secure the latter’s financial position. Oy AA asked for a preliminary decision from the Finnish Central Tax Board whether or not the transfer qualified as a tax-deductible expense for Oy AA. The requirement under Finnish law that the transferee had to be a company established in Finland was not fulfilled, thus, the contribution could not have been taxed in the hands of the transferee by Finland. Therefore, the Finnish Central Tax Board ruled that the financial transfer was not tax deductible for Oy AA. The taxpayer appealed to the Finnish Supreme Administrative Court against that decision, which referred a question for a preliminary ruling on the compatibility of the Finnish rules on intra-group financial transfers to the ECJ.

Legal background and issue
The Finnish legislation on intra-group financial transfers stated that a national parent company holding a 90% shareholding in a subsidiary that is also a national company of Finland could deduct a financial transfer made in favour of its subsidiary from its taxable business income. Transfers could also be made in the reverse order, i.e. from the subsidiary to the parent. According to the relevant rules, in the case of an intra-group financial transfer, the transfer constitutes taxable income in the hands of the transferee. Further, in order for the transfer to be deductible, the corresponding expense and income were to be entered in the accounts of both the transferor and transferee.

The issue of the case was whether or not a system whereby a subsidiary established in a Member State may deduct from its taxable income an intra-group financial transfer which it makes in favour of its parent company only if the parent company is established in the same Member State, is compatible with EC law.

Decision
Scope
The Court first stated that the question referred had to be answered in the light of the freedom of establishment alone, since the legislation concerned only relations within a group of companies. In the case at hand, any restriction on the free movement of capital would be an unavoidable consequence of any possible obstacle to the freedom of establishment and therefore did not justify an independent examination from the point of view of the freedom of capital. Further, since the Parent-Subsidiary Directive does not concern the first taxation of income arising from a business activity of a subsidiary and does not govern the financial
consequences for the subsidiary of an intra-group financial transfer, it cannot constitute a basis for giving an answer to the referred question.

Discrimination/restriction
According to the Finnish rules on financial transfers, a transfer made by a subsidiary in favour of a parent company with its corporate seat in Finland is deductible from the taxable income of the subsidiary, while a transfer by a subsidiary in favour of a parent company not established in Finland is not deductible from such income. Thus, the subsidiaries of foreign parent companies receive less favourable tax treatment than that enjoyed by the subsidiaries of Finnish parent companies.

Applying the discrimination test, the Court examined the comparability of the situation of a subsidiary having its parent company in the same Member State and that of a subsidiary the parent company of which is resident in another Member State. The Court first recalled the aim of the Finnish legislation which is to allow a balancing out of the results within a group of companies which comprises both profit-making and loss-making members. Having regard to that aim, the mere fact that the corporate seat of a parent company is in another Member State does not differentiate the subsidiaries of such a parent company from the subsidiaries of a parent company which has its corporate seat in Finland. Although a parent company that is established in another Member State is not subject to tax in Finland, and therefore Finland cannot guarantee that a financial transfer by a Finnish subsidiary is taxed in the hands of the foreign parent, such aim can be achieved through means other than the legislation at issue. Namely, Finland could make the deductibility of the intra-group transfer subject to conditions concerning the treatment applied to the transfer by the Member State of the transferee. Consequently, the parent company being established outside Finland does not suffice alone to render the positions of the two categories of subsidiary incomparable.

In conclusion, the difference in treatment at hand constitutes a restriction on the freedom of establishment as it made it less attractive for companies established in other Member States to acquire, create or maintain subsidiaries in Finland.

Justifications
A restriction on the freedom of establishment can be justified by overriding reasons in the public interest as long as the national measure constituting a restriction is appropriate to achieve the intended aim and is proportionate to that aim.

Several justification grounds were raised by the Member States involved, inter alia, the coherence of the tax system and the principle of territoriality. Referring to the Marks & Spencer case (C-446/03), the Court only examined the justification grounds accepted there. In that case the Court had accepted the need to safeguard the balanced allocation of the power to impose taxes between the Member States in conjunction with two other grounds of justification, namely the risks of the double use of losses and of tax avoidance.

(i) Balanced allocation of taxing powers. The Court pointed out that the need to safeguard a balanced allocation of the power to tax between Member States cannot justify a Member State systematically refusing to grant a tax
advantage to a resident subsidiary on the ground that the income of the parent company having its seat in another Member State is not capable of being taxed in the first Member State. However, this justification may be allowed where the system in question is designed to prevent conduct capable of jeopardizing the right of the Member States to exercise their taxing powers in relation to activities carried on in their territory. As such, allowing intra-group cross-border financial transfers would result in allowing groups of companies to choose freely the Member States in which the profits would be taxed, much the same as a system in which one could choose where to deduct one’s losses. Due to such choice by the taxpayer, the Member State of residence of the transferor would be forced to renounce its taxing rights on income generated on its territory; thus, the balanced allocation of the right to tax between Member States would be undermined.

(ii) Prevention of multiple use of losses. It was found not to be relevant, as the Finnish group contribution system did not concern the deductibility of losses.

(iii) Prevention of tax avoidance. The Court acknowledged that the possibility of transferring taxable income of a subsidiary to a parent company with its corporate seat in another Member State carries the risk that, by means of purely artificial arrangements, income transfers may be organized within a group of companies towards companies established in Member States applying the lowest rates of taxation or in Member States in which such income is not taxed.

Thus, the need to safeguard the balanced allocation of the power to tax between the Member States and the need to prevent tax avoidance in combination were capable of justifying the Finnish system.

Although the legislation was not specifically designed to exclude purely artificial arrangements, the system could still be regarded as proportionate, having regard to the objectives it pursues, taken as a whole. In this regard, the Court reminded that any extension of the Finnish intra-group financial transfer system to cross-border situations would have the effect of allowing groups of companies to choose freely the Member State in which their profits would be taxed.

The Court emphasized that such an adverse consequence could not be prevented by less restrictive measures, for example, by allowing a deduction of the cross-border transfer only (i) where it constitutes taxable income of the transferee company, or (ii) where the opportunities for the transferee company to transfer its losses to another company are limited, or (iii) where the intra-group financial transfer is specifically justified by the economic situation of the transferee when the transferee is established in a Member State applying a lower rate of tax than Finland, since in the end the choice of the Member State of taxation would remain within a group of companies.

Thus, the Finnish intra-group financial transfer system was found to be a proportionate restriction on the freedom of establishment.
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