Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 21 February 2018 [1]

Case C-28/17

NN A/S
v
Skatteministeriet

(Request for a preliminary ruling
from the Østre Landsret (High Court of Eastern Denmark)

(Preliminary-ruling proceedings - Corporation tax - Freedom of establishment - National legislation which makes the entitlement of a company in a tax group to deduct the losses incurred by a permanent establishment, owned by a non-resident company in the same group, subject to the condition that the non-resident company cannot deduct those losses from the basis of assessment for corporation tax in its country of residence - Prevention of double deduction)

1. The judgments given by the Court, in preliminary-ruling proceedings, on the effect of the freedom of establishment on national provisions governing the direct taxation of companies are intended to settle the matters raised by referring courts, but sometimes those judgments raise fresh questions.

2. That appears to be borne out by the increase in references for a preliminary ruling in which the Court is expressly asked about the interpretation (or about the scope and application) of a previous judgment concerning company taxation. To give just two recent examples:

– In *Bevola and Jens W. Trock*, [2] the court which now seeks a preliminary ruling asked the Court to rule on the deduction of losses of a permanent establishment [3] 'in conditions equivalent to those in the … judgment in *Marks & Spencer*'. [4]

– In *X and X*, [5] the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) sought clarification of earlier judgments, in particular, the judgment in *X Holding*, [6] in relation to the Netherlands tax provisions on consolidated groups of companies.

1 Original language: Spanish.

2 Case C-650/16, pending before the Court, in which my Opinion was delivered on 17 January 2018 (EU:C:2018:15).

3 I shall use the initials 'PE' to refer to permanent establishments or branches.

4 Judgment of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763.

5 Joined Cases C-398/16 and C-399/16, pending before the Court, in which I gave my Opinion on 25 October 2017 (EU:C:2017:807).

6 Judgment of 25 February 2010, C-337/08, EU:C:2010:89.

3. Now, the subject matter of this request for a preliminary ruling is, once again, the contrast between the Danish tax legislation and the freedom of establishment. The Østre Landsret (High Court of Eastern Denmark) bases its uncertainties on the interpretation of the judgment in *Philips Electronics*,[7] the facts of which are so similar to those in the main proceedings that, at first sight, it would be possible simply to transpose the solutions in that judgment to this case.

4. The main proceedings concern the offsetting of the losses of a PE situated in Denmark, owned by a company which is resident in Sweden and is a member of a Danish group of companies. The Danish authorities have not allowed the deduction of those losses for the purposes of the corporation tax payable by the group in Denmark and its refusal has led to the referring court's uncertainties.

I. Legal framework

A. EU law

5. Article 49 TFEU provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

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

6. In accordance with Article 54 TFEU:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

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

B. Danish law

1. Selskabsskatteloven (Consolidated law No 1164 of 6 February 2016 on corporation tax; 'LCT')

7. Paragraph 31(1)(1) provides:

'Companies belonging to groups and associations etc. covered by Paragraph 1(1), points 1 to 2b, 2d to 2j, 3a to 5 and 5b, or Paragraph 2(1)(a) and (b), or by Paragraph 21(4) of the Kulbrinteskatteloven (Law on hydrocarbon tax), shall be taxed as a group (national group taxation).'

7 Judgment of 6 September 2012, C-18/11, EU:C:2012:532 ('judgment in *Philips Electronics*').

That provision also provides that the losses of one group company may be offset by another group company. However, a Danish group may not make use of the same deduction more than once.

8. In accordance with Paragraph 31(2)(1):

'For companies taxed as a group, a group taxation income shall be calculated, consisting of the sum of the taxable incomes of each individual company covered by the group taxation, calculated in accordance with the general rules of tax legislation with the exceptions applying to companies taxed as a group.'

The Danish rules on compulsory group taxation also cover Danish PEs of foreign companies.

9. According to Paragraph 31(2)(2):

'A loss in a permanent establishment may only be set off against the income of other companies if the rules in the foreign State … in which the company is resident provide that a loss cannot be set off in the calculation of the company's income in the foreign State … in which the company is resident, or if international group taxation has been chosen …'

2. Law on tax assessment (consolidated version No 1162 of 1 September 2016; 'LTA')

10. Paragraph 5G(1) reads:

'Taxable persons … cannot claim a deduction for expenditure which under foreign tax rules can be deducted from income that is not included in the calculation of Danish tax. The same applies if the deduction for expenditure can be transferred under foreign tax rules to a deduction from the income calculated by companies etc. in the group if the income is not included in the calculation of Danish tax.'

Paragraph 5G of the LTA does not apply to Danish PEs of foreign companies.

II. Facts of the dispute and questions referred for a preliminary ruling

11. NN is the parent company of a Danish group which includes, *inter alia*, two subsidiaries resident in Sweden, called Sverige 1 and Sverige 2. These two subsidiaries were, in turn, the proprietors of two PEs situated in Denmark, which, for the purposes of the proceedings, are called B (owned by Sverige 2) and C (owned by Sverige 1).

12. According to the order for reference, 'in 2006 the two permanent establishments were merged, B having been transferred to Sverige 1 in return for shares. The resulting establishment was called A'.

13. In Sweden, the group opted for the merger to be treated for tax purposes as a restructuring of activities, an operation which is tax free because it is treated as a succession. However, in Denmark, the same merger was regarded as a taxable transfer of assets at market value.

14. As a result of the merger, establishment B's goodwill was entered in the accounts as part of its taxable income in Denmark. That goodwill could not be written off in Sweden.

15. NN applied for establishment A's losses to be deducted from the group's profits in the year 2008; this was refused by the Danish tax authorities under Paragraph 31(2)(2) of the LCT.

16. The reason for refusal of the application was that, according to that provision, the offsetting of losses against the integrated taxable income of the group is possible only if, under the provisions of the State of residence of the company which owns the PE (in this case, Sweden), those losses cannot be offset against the gains of that company in the foreign State.

17. According to the Danish authorities, the Swedish tax provisions did not preclude the use of losses incurred by the PE owned by the subsidiary resident in Sweden (in other words, the losses were deductible in the latter Member State).

18. An appeal was lodged against that decision before the Landsskatteretten (National Tax Tribunal, Denmark), which confirmed the decision. An appeal against its judgment was lodged before the Østre Landsret (High Court of Eastern Denmark), which has referred the following questions to the Court for a preliminary ruling:

'(1) What factors are to be taken into account in assessing whether resident companies in a situation such as the present one are subject to an "equivalent condition" within the meaning of paragraph 20 of the judgment of 6 September 2012, *Philips Electronics UK*, C-18/11, EU:C:2012:532, with respect to the setting off of losses, to that applicable to branches of non-resident companies?

(2) If it is presumed that the Danish tax rules do not contain a difference of treatment as dealt with in the judgment of 6 September 2012, *Philips Electronics UK*, C-18/11, EU:C:2012:532, does a prohibition of setting off similar to that described — in a case in which the loss in the non-resident company's permanent establishment is also subject to the host country's power of taxation — in itself constitute a restriction of the right of freedom of establishment under Article 49 TFEU, which has to be justified by reference to overriding reasons of the public interest?

(3) If so, can such a restriction then be justified by the interest in preventing the double use of losses, the objective of ensuring a balanced distribution of powers of taxation between the Member States, or a combination of both?

(4) If so, is such a restriction proportionate?'

III. Summary of the parties' observations

19. In NN's submission, the aim of the first questions is to determine whether a provision like Paragraph 31(2)(2) of the LCT constitutes a restriction of the freedom of establishment.

20. NN submits that the situations of a subsidiary and of a PE, both owned by a foreign company, are governed by different provisions. Paragraph 5G(1) of the LTA is applicable to Danish subsidiaries of foreign companies and not to PEs. In this case, it is necessary to examine whether, in order to calculate the consolidated profits of the Danish group, a Swedish company which carries on its activities in Denmark through a PE is treated less favourably than a local company which is in a comparable, purely national situation.

21. NN contends that the Court has already resolved that uncertainty in the judgment in *Philips Electronics*; the criteria laid down in that judgment may be transposed to this case in view of the fact that, in a purely domestic situation and in accordance with Danish law, there is no obstacle to the offsetting of the loss against the group's consolidated taxable profits.

22. NN contends that, in this case, preservation of the [allocation of the] power to impose taxes between Member States is not a sufficient justification, in the absence of other factors.[8] What underlies it is the safeguarding of the symmetry between the right to tax profits and the right to deduct losses.[9]

23. NN further contends that the legislation is not justified by the wish to prevent the double deduction of losses. Even if the losses could be deducted in Sweden, which is not the case here, Denmark's taxation powers would not be affected. NN submits that it can be inferred from paragraphs 22 to 33 of the judgment in *Philips Electronics* that the restriction identified is not justified either by the combined objective of ensuring a balanced allocation of the power to impose taxes between the Member States and preventing the double deduction of the same loss.

24. Lastly, NN argues that, even supposing that the restriction established by Danish law could be justified, it would not be proportionate in the specific case for there is no loss under the Swedish legislation, meaning that the same loss would not be used twice.

25. The Danish Government submits that in this case there is no restriction of the freedom of establishment in accordance with the judgment in *Philips Electronics*: under the Danish provisions, the NN group would not have been entitled to a greater deduction if A had been a Danish subsidiary instead of a Danish branch of a Swedish subsidiary. The rules laid down in Paragraph 31(2)(2) of the LCT and Paragraph 5G(1) of the LTA treat the two situations in the same way.

26. The situation of a Danish PE and that of a Danish subsidiary of a non-resident company are objectively comparable, since there will only be a risk of double deduction of losses in cross-border situations.

27. The Danish Government contends that the second question seeks to establish whether the provisions of the TFEU on freedom of establishment apply to non-discriminatory measures like those in Paragraph 31(2)(2) of the LCT. Since the contested provision does not create a difference in treatment between objectively comparable situations, there is no restriction at all on the freedom of establishment.

28. If, hypothetically speaking, there were such a difference in treatment which restricted the freedom of establishment, the Danish Government argues that it would be justified, for it is intended to prevent and avoid the double deduction of losses. The Danish Government submits, therefore, that the situation is not identical to that in *Philips Electronics*.

29. The Danish Government points out that the need to have provisions to prevent the double deduction of losses has been recognised by the Organisation for Economic Co-operation and Development ('OECD') and by the European Union. Articles 2 to 9 of Directive (EU) 2016/1164[10] show that such prevention is a legitimate aspiration.

8 NN cites, in that connection, the judgments of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraphs 43 and 51; of 29 March 2007, *Rewe Zentralfinanz*, C-347/04, EU:C:2007:194, paragraph 41; and of 18 July 2007, *Oy AA*, C-231/05, EU:C:2007:439, paragraph 51.

9 Judgment of 15 May 2008, *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraph 33.

10 Council Directive of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

30. From the perspective of proportionality, the Danish Government maintains that Paragraph 31(2)(2) of the LCT does not go beyond what is necessary to achieve the aim it pursues. The provision applies irrespective of whether the loss is actually deducted in the other Member State. If the mere fact that a loss had actually been deducted in a Member State precluded that loss from also being deducted in Denmark, taxpayers could plan double deduction, deducting the loss in Denmark first and then later using it in the other Member State in future tax years.

31. The Commission submits that tax relief which enables the losses of one company to be offset against the gains of other companies within the same group constitutes a tax advantage and, in accordance with paragraph 20 of the judgment in *Philips Electronics*, Paragraph 5G of the LTA creates a restriction of freedom of establishment by establishing a measure liable to make the setting up of a PE in Denmark less attractive for companies from other Member States. Companies established in other Member States which have subsidiaries or PEs in Denmark therefore suffer discrimination compared with exclusively Danish groups which do not carry on cross-border activities.

32. The Commission contends that, in accordance with the legislation at issue, the situation of PEs is comparable to that of resident companies.

33. The Commission, citing the judgment in *Philips Electronics*, contends that neither the balanced allocation of the exercise of the power to impose taxes between the Member States nor the prevention of the double deduction of losses justify the restriction.

34. In the specific situation at issue in the main proceedings, in which there is no possibility of deducting the losses in Sweden, the Commission observes that the possibility that double non-deduction may occur shows the disproportionate nature of the restriction of freedom of establishment.

35. At the hearing, the German Government maintained that the prevention of double deduction justified the Danish legislative measures and that the position adopted by the Commission in following the case-law laid down in the judgment in *Philips Electronics* could undermine the validity of Directive 2016/1164. The Commission categorically denied that this was its position.

IV. Procedure before the Court of Justice

36. The order for reference was received at the Registry of the Court on 19 January 2017.

37. Written observations were lodged by NN, the Danish Government and the European Commission.

38. The hearing was held on 29 November 2017 and was attended by NN, the Danish and German Governments and the European Commission.

V. Assessment

A. Introductory remark

39. Although, in the first question, the national court refers particularly to paragraph 20 of the judgment in *Philips Electronics* (specifically, the expression ‘equivalent condition’ used therein), the presentation of its uncertainties is, in general, consistent with the approach adopted by the Court when analysing whether the regulation of direct taxation by Member States constitutes an obstacle to

the freedom of establishment contrary to the TFEU.[11]

40. The Court determines, first, whether there is a difference in the treatment of comparable situations which is liable to restrict the freedom of establishment. Next, if that is the case, the Court analyses whether the restriction is justified for overriding reasons in the public interest. Lastly, if the restriction is justified, the Court examines whether the restriction is proportionate.

41. I shall adopt the same method, without prejudice to the fact that, in my opinion, a single answer, rather than four successive answers, should be given to the questions referred by the Østre Landsret (High Court of Eastern Denmark).

42. In any event, the dispute with which the reference for a preliminary ruling is concerned would be neutralised if, as was pointed out at the hearing, the losses incurred by the PE could be deducted in Denmark provided that the NN group succeeded in proving to the Danish authorities that there was no risk that those losses would also be offset in Sweden.[12] It is for the referring court to confirm that assumption.

B. Substantive analysis

43. The Danish system for the prevention of double deduction is framed around two provisions: a) a general provision, Paragraph 5G of the LTA, and b) a provision specifically governing PEs, Paragraph 31(2)(2) of the LCT.

44. Paragraph 5G of the LTA provides that companies established in Denmark may not, for the purposes of calculating their Danish income, claim a deduction for expenditure which under foreign tax rules can be deducted from income that is not included in the calculation of Danish tax. That same rule applies to expenditure which, under foreign tax legislation, may be deducted from income received by companies in a consolidated group, if that income is not included in the calculation of Danish tax. According to the order for reference, that provision also applies to the companies and other entities referred to in Paragraphs 31 and 32 of the LCT.[13]

45. As regards PEs established in Denmark which are owned by foreign companies, the rule is contained in Paragraph 31(2)(2) of the LCT, within the taxation regime for groups of companies: the losses of such establishments may be offset against the income of other companies only if, under the provisions of the foreign State where the company is resident, those losses cannot be offset for the purpose of calculating the company's income in that foreign State or international group taxation has been chosen.

46. Group taxation is compulsory in Denmark and it applies to Danish establishments owned by foreign companies that are members of the group. In a situation where Denmark exercised its taxation powers in full over those establishments, there would be no cause for integrated group taxation to be exposed to any distortion. However, the Danish legislation refers to the possibility of interference owing to the exercise of the taxation powers of the State in which the company is resident (in this case, Sweden). That is the reason for the statutory provision laid down in Paragraph 31(2)(2) of the LCT.

11 The four questions are also broadly similar to the related questions which the referring court submitted in *Philips Electronics*.

12 When questioned by the Court, the Danish Government agreed that that possibility could not be ruled out.

13 Paragraph 38 of the order for reference.

47. The referring court[14] interprets Paragraph 5G of the LTA in conjunction with Paragraph 31(2)(2) of the LCT, in terms which it is important to set out: 'If a Danish company which wishes to make a deduction for a loss in a foreign subsidiary company in the same group taxation can show, on the other hand, that there is no possibility of the loss being deducted in taxation abroad, there will be no restriction of deduction under Paragraph 5G(1) …'[15]

48. In the context of this dispute, in order to determine whether a difference in treatment exists between a purely internal situation and a cross-border situation it is necessary to examine, first, whether or not the existence of a PE, and not a subsidiary company, is relevant.

49. As I stated in my Opinion in *Bevola and Jens W. Trock*,[16] the essential difference between a subsidiary and a PE is that the former has legal personality while a PE does not. A PE is simply an instrument integrated into the structure of the company which creates and uses the PE for its activities in various forms (agencies, branches and so on). A company can open a PE in its own State of residence or in another Member State and its freedom to choose either option must not be restricted, in principle, by tax measures either (Article 49 TFEU).

50. For tax purposes, from a purely internal point of view, the fact that a PE and the company creating it are established in the same Member State eliminates any problems regarding the scope of that (single) State's power to tax their profits. From a purely national perspective, a PE is included in the assets of the legal person using the PE to pursue its activities. For tax purposes, a PE's losses or gains are usually imputed directly and immediately to the profits of the company which owns it, in the State of residence.

51. That is not the case, however, when a PE is situated in a State other than that of the company that created it. In that situation, a PE may be treated as a separate tax entity, in accordance with the international legal practice reflected in the model tax convention drawn up by the OECD, in particular Articles 5 and 7 thereof.[17]

52. In keeping with that approach, profits made by the PE will normally come within the sphere of the taxation powers of the State where the PE is established, without being imputed to the company creating the PE and resident in the State *of origin*, unless there is a mechanism created by statute or convention that provides for an exception from this rule.

53. Under Danish law, a PE of a foreign company conducts itself, for tax purposes, in the same way as a subsidiary company, to the point that it is considered to be an integral component of the Danish tax group. However, when a subsidiary or a PE of a foreign company is subject, to a greater or lesser degree, to the taxation powers of the State in which the latter is resident (in this case, Sweden) and that involvement is liable to create distortion, the Danish tax laws rely on the mechanisms described above, for the purpose of preventing the double deduction of losses.

54. Based on that premiss, it is necessary to examine whether, in providing that, under the conditions set out above, losses may not be deducted by groups of companies carrying on cross-border activities, the LCT and the LTA restrict the freedom of establishment of such groups and whether their situation is comparable to that of *wholly* Danish groups which are governed by more favourable tax rules.

14 The referring court cites in that connection a judgment given in 2010 (without stating the date), TfS 2011.687.

15 Paragraph 41 of the order for reference.

16 Case C-650/16, EU:C:2018:15.

17 The Court has already had occasion to decide that, for the purposes of the allocation of powers of taxation, it is not unreasonable for the Member States to find inspiration in international practice and, particularly, the model conventions drawn up by the OECD. See judgments of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 31, and of 23 February 2006, *van Hilten-van der Heijden*, C-513/03, EU:C:2006:131, paragraph 48.

55. From a formal point of view, the advantage conferred on the *wholly* Danish group and the associated restriction placed on the Danish group which has non-resident subsidiaries seems to me to be undeniable: the parent company of the latter may deduct the losses of one of its foreign entities only if the conditions laid down in Paragraph 31(2)(2) of the LCT or Paragraph 5 of the LTA are satisfied; however, the *wholly* Danish group may deduct the losses of any of its subsidiaries from the consolidated profits without being subject to any of those conditions.[18] In principle, such a difference in treatment makes it less attractive for groups to exercise freedom of establishment through companies established in other Member States.

56. Are the two groups in comparable situations? In order to address this matter, it is essential to have regard to the objective of the provision concerned,[19] which in this instance is to prevent double deduction.

57. The Court replied in the affirmative to that same question in paragraphs 19 and 20 of the judgment in *Philips Electronics*, rejecting the opposing argument put forward by the United Kingdom. The Court's decision was that there was a restriction on the freedom of a non-resident company to establish itself in another Member State and that the situations were objectively comparable where, 'under the national legislation of a Member State, the possibility of transferring, by means of group relief and to a resident company, losses sustained by the permanent establishment in that Member State of a non-resident company is subject to a condition that those losses cannot be used for the purposes of foreign taxation, and where the transfer of losses sustained in that Member State by a resident company is not subject to any equivalent condition'.[20]

58. As the Commission contends — a contention which has not been rebutted convincingly by the Danish Government — the assessment of comparability conducted in the judgment in *Philips Electronics* can be transposed to this case, also from the perspective of the aim of the Danish provision. In relation to the aim of preventing the double deduction of losses, the provisions which relate to purely domestic situations and those which relate to the existence of cross-border elements seek to ensure that the same expenditure or loss is taken into account only once.

59. Since the Danish provisions at issue create, in respect of comparable situations, a difference in treatment which may deter non-resident companies from setting up an establishment in Denmark, and vice versa,[21] the next step requires consideration of whether there is any justification for that restriction which might make it compatible with Article 49 TFEU.

60. The prevention of double deduction resulting from the overlapping taxation powers of two or more States explains the existence of provisions like the articles of the LCT and LTA at issue in the proceedings. The fact that the existence of these provisions is *explicable* does not mean that it is always *justified* from the perspective of impeding the exercise of freedom of establishment.

61. Any justification requires the existence of overriding reasons in the public interest;[22] the Court has accepted as such reasons, inter alia, safeguarding the exercise of the taxation powers of the Member States, maintaining the coherence of the tax system and the prevention of tax evasion.

18 In the wholly domestic situation, the PE is treated as part of the assets of the company which owns it, such that its losses are losses of that company.

19 Judgment of 25 February 2010, *X Holding*, C-337/08, EU:C:2010:89, paragraph 22.

20 Judgment in *Philips Electronics*, paragraph 20.

21 Judgments of 25 February 2010, *X Holding*, C-337/08, EU:C:2010:89, paragraph 20, and of 2 September 2015, *Groupe Steria*, C-386/14, EU:C:2015:524, paragraph 21.

22 Judgment of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 35.

62. In the Danish Government's submission, the prevention of the double deduction of losses can be added to the list of acceptable justifications. However, its position does not initially appear to be compatible with that set out in the judgment in *Philips Electronics*, in which the Court:

– Instead created a link between the double deduction of losses and the exercise of the taxation powers of the PE's State of residence.[23]

– Pointed out that that objective did not 'as such, allow the Member State in which the permanent establishment is situated to exclude the use of losses on the ground that those losses may also be used in the Member State in which the non-resident company has its seat.'[24]

– Declared that 'the host Member State, in whose territory the permanent establishment is situated, therefore cannot, in order to justify its legislation in a situation such as that in the main proceedings and in any event, plead as an independent justification the risk of the double use of losses.'[25]

63. It is difficult, therefore, based on the judgment in *Philips Electronics*, to classify the prevention of the double deduction of losses as an overriding reason in the public interest. Moreover, that judgment ruled out reliance on the prevention of double deduction in that regard, 'even if such a ground, considered independently, could be relied on'.[26]

64. However, perhaps the time has arrived to moderate those assertions made in the judgment in *Philips Electronics*, in view of the fact that the EU legislature has paid special attention to the fight against double deduction since that judgment was delivered.

65. After the OECD issued its conclusions of 13 and 14 March 2013 in relation to Base Erosion and Profit Shifting (BEPS), the final reports on which were published on 5 October 2015, the Commission[27] and the Council[28] addressed the need to find common, and also flexible, solutions at EU level which are in keeping with the OECD's BEPS conclusions.

66. According to Directive 2016/1164,[29] adopted as a result of the ensuing legislative process, 'it is essential for the good functioning of the internal market that, as a minimum, Member States implement their commitments under BEPS and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion.' In particular, the directive stresses that it is essential 'to lay down rules in order to strengthen the average level of protection against aggressive tax planning in the internal market.'[30]

23 Judgment in *Philips Electronics*, paragraph 30: 'the risk that those losses may be used both in the host Member State where the permanent establishment is situated and also in the Member State where the non-resident company has its seat has no effect on the power of the Member State where the permanent establishment is situated to impose taxes.'

24 Ibid., paragraph 32.

25 Ibid., paragraph 33.

26 Ibid., paragraph 28.

27 On 18 March 2015, the Commission presented a communication to the European Parliament and the Council on tax transparency to fight tax evasion and avoidance (COM (2015) 136 final) which was followed, on 17 June 2015, by the Action Plan for a Fair and Efficient Corporate Tax System in the EU.

28 Conclusions of 8 December 2015 (Doc. 15068/15).

29 Directly affected by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (OJ 2017 L 144, p. 1).

30 Recitals 2 and 3.

67. An important part is played in that regard by so-called hybrid mismatches; in accordance with Article 2(9) of Directive 2016/1164, a hybrid mismatch is 'a situation involving a taxpayer or … an entity where … (g) a double deduction outcome occurs.' The latter is defined, in the same article as 'a deduction of the same payment, expenses or losses in the jurisdiction in which the payment has its source, the expenses are incurred or the losses are suffered (payer jurisdiction) and in another jurisdiction (investor jurisdiction).'

68. To the extent that a hybrid mismatch results in a double deduction, the outcome, according to Article 9(1) of Directive 2016/1164 is that '(a) the deduction shall be denied in the Member State that is the investor jurisdiction; and (b) where the deduction is not denied in the investor jurisdiction, the deduction shall be denied in the Member State that is the payer jurisdiction.'

69. One of the objectives of the amendment of Directive 2016/1164 by Directive 2017/952 is to regulate hybrid PE mismatches: 'Hybrid permanent establishment mismatches occur where differences between the rules in the jurisdictions of permanent establishment and of residence for allocating income and expenditure between different parts of the same entity give rise to a mismatch in tax outcomes and include those cases where a mismatch outcome arises due to the fact that a permanent establishment is disregarded under the laws of the branch jurisdiction. Those mismatch outcomes may lead to a double deduction or a deduction without inclusion, and should therefore be eliminated.' [31]

70. Naturally, I am not proposing that the provisions of a directive whose transposition deadline has not yet expired should be applied to this case. [32] I do believe, however, that Directive 2016/1164 reflects a widespread concern, the strength of which was probably not evident — and, of course, was not expressly reflected in legislation — when the judgment in *Philips Electronics* was given.

71. The Court did provide some guidance in its case-law on the link between the prevention of double deduction and the fight against tax evasion. In the judgment in *Brisal and KBC Finance Ireland*, [33] the Court stated that 'the desire to prevent double deduction of [in that case] business expenses' 'may be linked to the fight against tax evasion'.

72. However, the prevention of double deduction should also be considered in relation to conduct where there is no reason why any fraudulent intent should exist. Thus, in the judgment in *Marks & Spencer*, after declaring that 'Member States must be able to prevent that from occurring', the Court acknowledged that the danger that losses would be used twice did not always correspond to the justification relating to the fight against tax evasion. [34]

73. Using losses twice may, therefore, be the result of the combined application of different tax provisions, including where no intention to defraud exists. However, it remains conduct which, in line with the school of thought favoured by the OECD, must also be rejected under EU law. That is why, as I pointed out above, the aim of preventing such conduct may perhaps be categorised as an (independent) overriding reason in the public interest, without necessarily having to be linked to the fight against tax evasion.

74. From that perspective, there is, in the abstract, nothing to preclude the application of Paragraph 31(2) of the LCT in relation to the objective of preventing double deduction. Attention must now turn, therefore, to the application of that provision in practice, as carried out by the Danish tax authorities in this case.

31 Recital 10 of Directive 2017/952.

32 The deadline will expire on 31 December 2019, apart from in relation to Article 9a, governing 'reverse hybrid mismatches', for which the deadline is 31 December 2021.

33 Judgment of 13 July 2016, C-18/15, EU:C:2016:549, paragraph 38.

34 Judgment of 13 December 2005, C-446/03, EU:C:2005:763, paragraphs 47 to 50.

75. Once a loss in the activities of the PE situated in Denmark, but owned by the Swedish subsidiary of the Danish group, has been identified, the amount of that loss could, theoretically, be deducted from the basis of assessment for tax in the host State (Denmark) or from the basis of assessment applicable to the company which pays tax in its State of residence (Sweden). A provision like Paragraph 31(2)(2) of the LCT seeks to prevent a company from *using* the same expenditure or loss twice. Otherwise, cross-border situations would be treated more favourably than national situations, for, at national level, logically, the same tax authority cannot allow double deduction [35] but that may be possible in a transnational context.

76. The disputed provision therefore creates the intended effect of ensuring that the loss is taken into account only once and is, in the abstract, appropriate to the aim of preventing double deduction. It is, however, essential that, in addition to ensuring the attainment of the objective pursued, the provision does not go beyond what is necessary to attain it. [36]

77. The interpretation of that provision by the Danish authorities in these proceedings may lead to a disproportionate situation which results in *double non-deduction*. That occurs if the emphasis is placed not on *actual* deductibility in another State but on the mere *theoretical* possibility thereof as a reason for refusing to allow losses to be used in Denmark.

78. Assuming that the fight against double deduction justifies this type of national legislative measure, the aim of the measure is that deduction should be refused by only one of the States with jurisdiction but not by both. [37] The rationale of the system is based on a fundamental premiss: the same loss is to be used only once.

79. That outcome, I repeat, cannot be reached by relying on *merely* hypothetical deductibility in the other Member State. Refusal to allow the deduction in accordance with that criterion does not stand up to scrutiny from the perspective of the principle of proportionality and nor does it adequately reflect the necessary balance between the tax burden and the actual taxpaying capacity of the taxpayer.

80. Danish law shows signs that it does not seek a total prohibition of the deduction of losses but rather to ensure that losses are used only once. That is apparent from the interpretation by the Østre Landsret (High Court of Eastern Denmark) of Paragraph 5G(1) of the LTA in relation to Danish companies: Danish companies are permitted to deduct the losses of a foreign subsidiary which is a member of their tax-integrated group if they 'can show … that there is no possibility of the loss being deducted in taxation abroad'. [38]

81. Whether it is a practice limited to the referring court or settled case-law, that approach reduces the risk that the prevention of double deduction leads to the extreme situation where the deduction of the loss is categorically refused. There is no objective reason why that criterion should not also be applied in relation to the PEs referred to in Paragraph 31(2)(2) of the LCT.

82. Naturally, for that criterion to be applicable, it will be necessary to establish that the losses could not have been taken into account in the other Member State because the company which owns the PE had exhausted all possibilities of using those losses in that State, including the possibility of using them in future tax years.

35 Paragraph 31(1)(1) of the LCT provides that a Danish group may not apply the same deduction more than once.

36 Judgment of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 35.

37 That is the Community legislature's aim in including, in Directives 2016/1164 and 2017/952 (Article 9(1)), the OECD's conclusions on the fight against base erosion.

38 Order for reference, paragraph 41, transcribed at point 47 of this Opinion.

83. It is for the referring court to ascertain whether that occurred in the instant case, for it alone has at its disposal the relevant evidence for determining definitively whether the losses could have been deducted from the basis of assessment of the subsidiary company of the NN group resident in Sweden.

VI. Conclusion

84. In the light of the foregoing considerations, I suggest that the Court reply as follows to the Østre Landsret (High Court of Eastern Denmark):

(1) Article 49 TFEU does not, in principle, preclude national legislation, like that applied in the main proceedings, pursuant to which, where a group of companies is taxed in Member State A, the losses of a permanent establishment resident in that Member State but owned by a company resident in Member State B may be offset against the income of other group companies only if, in accordance with the rules of Member State B, those losses cannot be offset for the purposes of calculating the income of that company in Member State B.

(2) That national legislation is not compatible with Article 49 TFEU to the extent that, in circumstances like those in the main proceedings, the deduction of losses is not permitted in Member State A where the taxpayer has proved that it is definitely not possible to deduct the losses in Member State B, a matter which it falls to the referring court to assess.