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Article

Case C-28/17 NN A/S v. Skatteministeriet*: A CJEU Judgment that Raises 'Fresh Questions'*

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On 4 July 2018, the Court of Justice of the European Union ruled in Case C-28/17 NN A/S v. Skatteministeriet on the compatibility of paragraph 31(2)(2) of the Danish Corporate Income Tax Code with the freedom of establishment (Article 49 of the Treaty on the Functioning of the European Union). Under this rule, a loss incurred by a Danish permanent establishment in Denmark could be deducted in Denmark only if such a loss could not be used for purposes of foreign taxation. In this contribution, the authors provide a summary of the CJEU judgment in NN and focus on some selected aspects of the CJEU judgment, i.e. (1) the difference of the NN case with the Philips Electronics case (C-18/11), (2) the 'removable' difference in treatment, (3) the 'conditional' objective comparability assessment, (4) the risk of the double use of losses as an overriding reason in the public interest and (5) the reference of the CJEU to losses that are practically impossible to be deducted abroad.

1 Introduction

'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 raise by referring courts, but sometimes those judgments raise fresh questions.'[1] With these words, the Advocate General Campos Sánchez-Bordona opened his Opinion in the *NN* case (C-28/17),[2] and we cannot agree more with him.

Back in 2011, the Court of Justice of the European Union (CJEU) (first chamber) decided in *Philips Electronics* (C-18/11).[3] The case concerned the compatibility of the United Kingdom (UK) group relief system with the freedom of establishment (Article 49 of the Treaty on the Functioning of the European Union – TFEU). The Court ruled in this case that it was contrary to the freedom of establishment if the legislation of an EU Member State allows losses incurred by a permanent establishment (PE) in that Member State (i.e., the UK) of a non-resident company (i.e., the Netherlands) to be transferred by means of group relief to a resident company (i.e., the UK) only if those losses cannot be used for purposes of foreign taxation (i.e., the Netherlands) ('the equivalent condition'), but allows the same transfer of losses in a purely domestic situation without any equivalent condition.[4] In that regard, it was immaterial to the CJEU whether the losses incurred by the UK PE could be taken into account both in the host state (the UK) and the home state (the Netherlands). This is primarily because the host state cannot invoke the risk of the double use of losses as an independent overriding reason in the public interest/justification in order to justify a difference in treatment that is *prima facie* contrary to the freedom of establishment.[5]

Following *Philips Electronics* it was clear that an equivalent condition,[6] when applied by the host state, does not pass the EU fundamental freedoms test. One could even question whether the equivalent condition included in the secondary rule of Article 9(1)(b) of the EU Anti-Tax Avoidance Directive II (ATAD II)[7] is compatible with *Philips Electronics*. Under this rule, '1. To the extent that a hybrid mismatch results in a double deduction: (1) the deduction shall be denied in the Member State that is the investor jurisdiction; and (2) where the deduction is not denied in the investor jurisdiction, the deduction shall be denied in the Member State that is the payer jurisdiction.'

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1 Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 1.

2 CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*.

3 CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*.

4 CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, para. 39.

5 CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, paras 28 and 30.

6 That is, that the loss could not be used for purposes of foreign taxation.

7 EU Anti-Tax Avoidance Directive II (ATAD II): Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144 (7 May 2017).

Although, however, the compatibility of an equivalent condition with EU law seemed to be *acte éclairé*, the Danish judges of the High Court of Eastern Denmark[8] expressed in 2017 their doubts on the difference of the equivalent condition of the Danish legislation with that of the UK group relief system. Most importantly, they were wondering whether the equivalent condition of the Danish legislation could be justified by the risk of the double use of losses, the balanced allocation of taxing powers between the Member States or a combination of both. For these two reasons, they decided to refer to the CJEU for a preliminary ruling.

In the present contribution, we discuss and comment on the CJEU judgment in *NN*. More specifically, in section 2, we provide a summary of the Danish legislation and we present the main findings of the Court decision following the four-step plan that the Court applies when examining national measures. Subsequently, in section 3 of this contribution, we discuss the following issues: (1) the difference between *Philips Electronics* and *NN* (section 3.1), (2) the 'removable' difference in treatment approach of the Court (section 3.2), (3) the 'conditional' *objective* comparability approach (section 3.3), (4) the justification of the risk of the double use of losses (section 3.4) and (5) the reference of the Court to losses whose double deduction is 'actually impossible' (section 3.5).

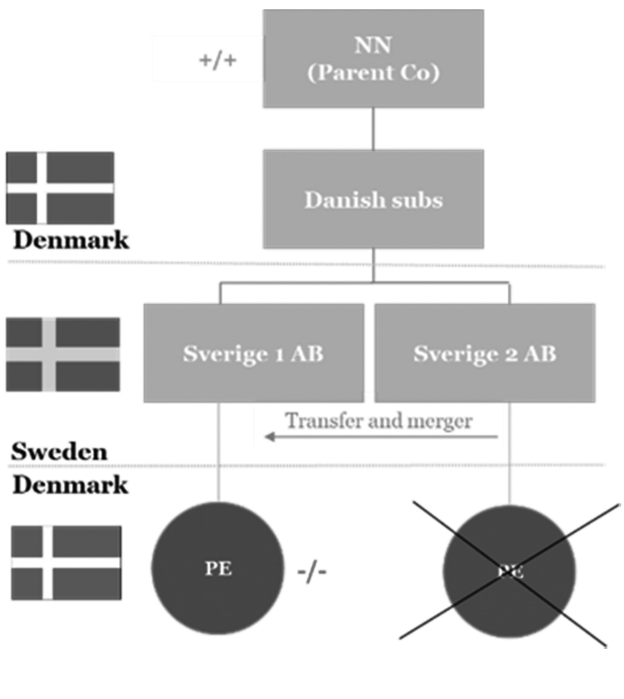
2 Summary of the CJEU judgment in NN

The *NN* case concerns the taxation of Danish group income, comprising of Danish profits and Danish losses. More specifically, it is about the transfer of a current/operational[9] loss incurred by a Danish PE (belonging to a Swedish group company) against the overall Danish group income.

Under Article 31(1) of the Danish Corporate Income Tax Code (CITA), Danish companies and PEs belonging to a group are subject to compulsory national group taxation scheme. This scheme is based on the principle of territoriality. In addition, with regards to Danish PEs of a non-resident group company, paragraph 31(2)(2) of the Danish CITA prescribes that a loss incurred by a Danish PE of a non-resident group company can be set off against the group income taxable in Denmark, only if that loss cannot be taken into account for the calculation of the taxable income of the non-resident company pursuant to the legislation of the state in which it is established.[10] The deduction of a loss incurred by a Danish PE is therefore conditional on the possibility of not having the loss set off at the state of the head office. We will refer to this rule as the 'foreign PE equivalent rule' or the 'Danish rule'.

In the same vein, under paragraph 5G of the Danish Law on assessment, taxable persons in Denmark cannot claim a deduction for expenditure, which under foreign tax rules can be deducted from income that is not taxed in Denmark. This is, for instance, the income of a foreign (group) subsidiary. We call this rule 'the company equivalent condition rule' since it requires that the expenditure incurred in Denmark should not be used for foreign tax purposes. It follows that paragraph 5G does not apply in domestic situations, i.e. situations involving a Danish company with separate establishments (branches) in Denmark.

NN is the parent company of a Danish group that included two Swedish subsidiaries. Each of these subsidiaries had a PE in Denmark. Subsequently, the two PEs were subject to reorganization, under which one PE was absorbed by the other. The merger was tax neutral in Sweden as it was treated as restructuring that was not subject to Swedish taxation. On the other hand, the merger was subject to tax in Denmark as it was treated as transfer of assets at market value. The acquiring PE deducted a part of the acquisition price having regard to the goodwill that belonged to the absorbed PE and, as a result, the acquiring PE was in a loss-making position. Nevertheless, the Danish tax authorities (DTA) refused based on the foreign PE equivalent rule to allow the deduction of the incurred loss of the Danish PE against the overall group taxation income since this loss could be set off against the taxable income in Sweden of the Swedish company that owned the absorbed PE. The facts of the case are depicted as follows:



8 CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 15.

9 As opposed to a final loss based on the *Marks and Spencer* ECJ's jurisprudence (*see* s. 3.5.2).

10 This condition does not apply in situations in which the group has opted for international group taxation, *see* CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 6.

NN challenged the DTA's decision first before the National Tax Tribunal and the High Court of Eastern Denmark that, however, decided to stay proceedings and request a preliminary ruling from the CJEU on the compatibility of the foreign PE equivalent rule with the freedom of establishment and the importance of the *Philips Electronics* case for the underlying case.

2.1 Treaty Standing (Step 1)

Obviously, the case concerned an intra-EU situation (territorial scope) and concerned EU nationals, a Danish PE belonging to a Swedish company (Article 54 TFEU – personal scope). Furthermore, the CJEU assessed the Danish rule based on the freedom of establishment (Article 49 TFEU – material scope). It could not be otherwise since the Swedish company owned a PE in Denmark.

2.2 Prima Facie Difference in Treatment/ Restriction (Step 2)

Having established that the Danish rule had to be examined in the light of the freedom of establishment, the CJEU examined whether the rule established a *prima facie* difference in treatment. In that regard, the Court pointed out that a Danish group that owns a PE in Denmark through a non-resident subsidiary is treated, under the foreign PE equivalent rule, less favourably than of a domestic group.[11] This is because the rule applies only in situations with a cross-border element: the group would have been able to set off the losses of the Danish PE if it had been owned by a Danish subsidiary.[12] As a result, the Danish rule established a *prima facie* difference in treatment that could render the exercise of the freedom of establishment (by the group) less attractive through the *creation of subsidiaries in other Member States*.[13] In other words, the Court ruled that, due to the application of the foreign PE equivalent rule, the group parent company is prevented from exercising its right of establishment *in Sweden*.[14] In our view, this is an important finding that shows whether the Court examined the Danish rule from a home state (state of origin) or host state (state of source) perspective. We will elaborate on this in section 3.1 of this contribution.

2.3 Objective Comparability of the Situations/ Justifications (Step 3)

2.3.1 *Conditional Objective Comparability Assessment*

A restriction on the freedom of establishment is prohibited if it concerns situations that are comparable having regard to the aim pursued by the relevant national provision, and if it is not justified by an overriding reason in the public interest, which does not go beyond what is necessary for the purposes of achieving the objective of that overriding reason.

It was clear that the aim of the Danish rule is the prevention of the double deduction of losses in a situation with a cross-border element. Having this objective in mind, the CJEU held – along the lines of its recent judgment in *Bevola*[15] – that, as a general rule, a group whose non-resident subsidiary has a resident PE is not in a situation comparable to that of a group whose subsidiary, and the latter's PE are also resident.[16] Nevertheless, there is an exception to this rule for situations where '[t]here is no other possibility of deducting the losses of the non-resident subsidiary attributable to the PE which is resident in the Member State in which the subsidiary is established'.[17] In such a case, '[t]he tax-paying capacity of the two group is […] affected in the same way by the losses of their resident PE'[18,19] and therefore the difference in treatment, '*at least in that case*', may concern *objectively* comparable situations.[20]

We will discuss the CJEU's 'conditional' *objective* comparability assessment in section 3.2 of this contribution. In the following section, we focus firstly on the justifications on the restriction.

2.3.2 *Justifications of the Restriction*

Having established that the situations were *objectively* comparable at least in the case where a deduction may not be possible in the state of the non-resident subsidiary, the CJEU considered the overriding reasons in the public interest that the Danish government invoked, i.e. the balanced allocation of taxing powers between the Member States and the risk of the double use of losses.

More specifically, the CJEU rejected the balanced allocation of the taxing powers between the Member States as a justification. This was because the possibility of double deduction would favour neither of Denmark or Sweden to the detriment of the other.[21] On the contrary, it would only entail a loss of tax revenue for one of the

[11] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 29.
[12] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 28.
[13] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 30.
[14] On the contrary, the CJEU did not rule that the rule makes it less attractive for companies having their seat in Sweden to exercise their right to freedom of establishment through a PE in Denmark, cf. CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, para. 16.
[15] CJEU, 12 June 2018, C-650/16, *A/S Bevola, Jens W. Trock ApS.*
[16] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 34.
[17] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 35.
[18] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 35.
[19] The tax-paying capacity/ability to pay argument was also mentioned in *Bevola*, *see* CJEU, 12 June 2018, C-650/16, *A/S Bevola, Jens W. Trock ApS*, para. 39.
[20] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 38.
[21] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 40.

two States. Apparently, the Court viewed this overriding reason as a reflection of the relationship between a 'plus' and a 'minus'[22]: the possibility of deduction of the same 'minus' in two Member States does not jeopardize the allocation of taxing powers between the Member States.

The CJEU judgment in *NN* becomes more interesting when the Court considered the second overriding reason in the public interest, the risk of the double use of losses. In that regard, the CJEU pointed out first that Member States that avoid double taxation of the foreign PE profits, must also be able to prevent the risk of losses being taken into account twice.[23] In that respect, the Court held that, due to the credit method of the Nordic tax convention,[24] the parallel exercise of the powers of taxation by Sweden and Denmark does not entail an actual obligation for the company to pay income tax twice.[25] In those circumstances, the possibility to deduct the losses of the Danish PE in Sweden and Denmark does not appear to be justified.[26] We understand that the Court considered that the credit method of the Nordic tax convention makes a double deduction possible and therefore the Danish rule is necessary because:

> […] In the absence of such a provision (authors: the Danish rule), as noted by the Advocate General in point 75 of his Opinion, cross-border situations would confer an unjustified advantage over comparable national situations, in which a double deduction is not possible. The difference in treatment established by national legislation thus appears to be justified.[27]

We have difficulties in understanding the approach taken by the CJEU at this step which we will discuss in section 3.3 of this contribution below.

2.4 Proportionality Assessment (Step 4)

A difference in treatment shall not go in any case beyond what is necessary for the purposes of achieving the objective of the overriding reason. As noted in section 2.2, the aim of the Danish rule is the prevention of the double deduction of losses in a situation with a cross-border element. In that regard, the CJEU pointed out that (emphasis added):

> 50 A rule such as that laid down in Paragraph 31(2)(2) of the Law on corporation tax would go beyond what is necessary to prevent the double deduction of a loss in the case where the effect thereof would be to deprive a group of *any possibility of deducting the los*s of a resident subsidiary in a cross-border situation such at that at issue in the main proceedings.[28]

In the *NN* case, the loss in Denmark was the result of the merger of two Danish PEs by the group and the choice made by the group – as permitted by Swedish law – that that merger be treated for tax purposes as a restructuring of activities, and, as such, not subject to tax in Sweden.[29] Consequently, '[i]t would not be possible, *in practice*, to set those losses off against the Swedish subsidiary's profits.'[30] Therefore and 'at least in that case' where double deduction was 'actually impossible', the Court decided that the rule fails to have regard for the principle of proportionality.[31]

As a result, the CJEU decided that the Danish rule is in principle compatible with the freedom of establishment when its application is combined with that of a tax convention allowing for a credit corresponding to the income tax paid in Denmark (the state where the PE is situated) against the income tax due at the head office state (the state of the Swedish subsidiary). However, if the effect of the rule is to deprive the group of any effective possibility of deducting the PE losses from the group's overall profits, where it is not possible to set off those losses in the head office state, the rule is not in line with the freedom of establishment.[32]

3 Understanding the CJEU Judgment in NN

3.1 Difference with the Philips Electronics Case

The first issue that we would like to discuss relates to the difference between the *NN* case and the *Philips Electronics* case.

3.1.1 Scope of the Legislation Under Review

As we mentioned in the introduction, the similarity of the 'equivalent condition' of the Danish legislation with that of the UK group relief system was one of the reasons why the judges of the High Court of Eastern Denmark referred the case for a preliminary ruling from the CJEU. Nevertheless, as pleaded by the Danish Government, the Danish law does not establish a difference in treatment akin to that which the Court held to be contrary to the freedom of establishment in *Philips Electronics*. The Court did not explicitly rule on this[33] although it was obvious that the Danish and the UK rules have different scope of application.

More specifically, in *Philips Electronics*, in the context of the UK group relief system, a UK PE of a non-resident company could claim losses surrendered by other UK resident group companies as group relief (or may surrender its own losses as group relief) only if those losses were not relievable abroad. Such an 'equivalent

[22] *See also* CJEU, 13 Dec. 2005, C-446/03, *Marks & Spencer plc*, para. 44.
[23] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, paras 42–43.
[24] Denmark – Faroe Islands – Finland – Iceland – Norway – Sweden Income and Capital Tax Convention (1989).
[25] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 47.
[26] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 47.
[27] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 48.
[28] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 50.
[29] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 53.
[30] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 53.
[31] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 55.
[32] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 57.
[33] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 26.

condition' was not, however, applicable to UK group companies/subsidiaries.[34] In that regard, the CJEU ruled that the UK rules restricted the freedom to choose the appropriate legal form in which to pursue activities in the UK (subsidiary vs PE). The freedom to choose the appropriate legal form in which to pursue activities in another Member State serves, inter alia, to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities under the same conditions as those which apply to subsidiaries.[35] It became apparent from *Philips Electronics* that the application of the equivalent condition only to UK PEs made it less attractive for companies having their seat in other Member State to exercise the right to freedom of establishment through a PE in the UK (as the *host* Member State).

On the other hand, the Danish rules were not discriminatory based on the legal form of the company operating in Denmark. Denmark was applying an equivalent rule to both Danish PEs belonging to a non-resident company (the foreign PE equivalent rule) and group subsidiaries owned by a non-resident parent company (the foreign company equivalent rule). As a result, the Danish legislation did not restrict, in view of the Danish Government, the freedom of the group to choose the appropriate legal form in Denmark.[36]

3.1.2 Home State/State of Origin vs Host State

What's more, it seems that the Court examined the Danish rule having regard that Denmark primarily taxes in its capacity as the *home state/state of origin*. On the other hand, *Philips Electronics* concerned a restrictive provision of the UK as the *host state*. The above is particularly evident from the wording that the CJEU used in the comparability assessment of the situations in both cases. More specifically, in *Philips Electronics*, the CJEU compared two cross-border situations, i.e. the situation of a non-resident company with a UK PE and that of a resident group company that is the subsidiary of a non-resident parent company.[37] In that regard, the Court ruled that:

> 19 […] The situation of a non-resident company with only a permanent establishment in the national territory and that of a resident company *(authors: that is the subsidiary of a non-resident parent company)* are, having regard to the objective of a tax regime such as that at issue in the main proceedings, objectively comparable in so far as concerns the possibility of transferring by means of group relief losses sustained in the United Kingdom to another company in that group.

On the other hand, the CJEU compared in *NN* a cross-border situation with an internal one and ruled that, in principle, as regards the measures intended to prevent the double deduction of losses, that a group whose non-resident subsidiary has a resident PE is also not in a situation comparable to that of a group whose subsidiary, and the latter's PE, are also resident.[38] However, the above situations become *objectively* comparable if there is no other possibility of deducting the losses of the non-resident subsidiary attributable to the PE, which is resident in the Member State in which the subsidiary is established.[39]

It becomes apparent that the *NN* case concerned a restrictive provision of Denmark as the home state/state of origin. This could be besides the reason why the CJEU held that the Danish rule could be justified by the risk of the double use of losses. We will elaborate on this in section 3.3 of this contribution.

3.2 'Removable' Difference in Treatment

The second issue that we would like to discuss relates to the approach that the CJEU applied when examining the difference in treatment that the Danish rule established (step 2). As mentioned in section 2.2. the CJEU ruled that the Danish foreign PE rule established a *prima facie* difference in treatment and stated in paragraph 29 that (emphasis added):

> 29 In that regard, it should be noted that the tax legislation at issue in the main proceedings *does indeed establish such a difference in treatment*. The tax treatment of a Danish group which owns a permanent establishment in Denmark through a non-resident subsidiary is, under Paragraph 31 (2)(2) of the Law on corporation tax, less favourable than that of a group in which all of the companies have their registered offices in Denmark.

Nevertheless, when assessing the *objective* comparability of the situations, the CJEU pointed out that (emphasis added):

> 36 Admittedly, Paragraph 31(2)(2) of the Law on corporation tax *removes the difference in treatment* 'if the rules in the foreign State … in which the company is resident provide that a loss cannot be set off', by accepting, in that case, that the losses of the resident permanent establishment of the non-resident subsidiary may be set off against the group's income.[40]

We understand that in paragraph 36 the Court was trying to explain that, if the rules of the foreign state

[34] CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, para. 15.
[35] CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, para. 14.
[36] On the contrary, the foreign PE equivalent rule was introducing a difference in treatment because it applied only in situations with a cross-border element and therefore not in situations where the Danish PE would had been owned by a Danish subsidiary.
[37] CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, para. 18.
[38] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 34.
[39] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 35.
[40] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 36.

do not allow the deduction of the losses of the resident PE of the non-resident subsidiary, the difference in treatment identified in paragraph 29 is removed since, then, Denmark would allow the losses to be deducted. In other words, double deduction would not be possible, like in a domestic situation. Both domestic and cross-border situation are thus treated the same. Therefore, if the deduction of the losses of the resident PE is not possible abroad, a group with a PE in Denmark owned through a non-resident subsidiary is not treated less favourably than that of a group in which all of the companies have their registered offices in Denmark. In both situations, Denmark should allow the deduction of the loss incurred by the Danish PE. Although the above finding seems logical, we have difficulties in 'placing' paragraph 36 at the third step of the CJEU's assessment (*objective* comparability of the situations). This paragraph clearly forms part of the second step of the CJEU's assessment because it refers to the difference in treatment that the Danish rule introduces.

The same is true concerning paragraph 37 in which the CJEU stated that:

> 37 However, it cannot be excluded that such a deduction, even when permitted by the legislation of the foreign State, may not be possible in practice, particularly in the case where the non-resident subsidiary has definitively ceased all activity.

Although in the *NN* case, the Swedish transferring subsidiary formerly owning the Danish PE had not definitely ceased all activity in Sweden but in Denmark, the loss recognized in Denmark could not be sustained in Sweden because, under the Swedish rules, the merger of the PE was treated as a tax neutral transaction that did not give rise to tax liability in Sweden. As a result, the loss in Denmark was not 'possible in practice' under the Swedish legislation to be claimed in Sweden as well. Again, however, we submit that this finding – albeit important – does not relate to the comparability of the situations at hand but on the difference in treatment that the Danish rule established. As a result, we are of the opinion that for the sake of a better understanding of the *NN* case, paragraphs 36 and 37 shall be read in conjunction with paragraphs 28 and 29 of the CJEU judgment (thus *before* the assessment of the *objective* comparability of the situations).

As a final point, we observe that the CJEU followed in paragraphs 36 to 37 a *removable* difference in treatment approach: although the Danish rule was held to establish a *prima facie* difference in treatment (paragraphs 28 and 29 of the CJEU judgment), such a difference in treatment could be removed/neutralized if the losses of the Danish PE could not be taken into account in Sweden (paragraphs 36 and 37 of the CJEU judgment). We are of the opinion that the CJEU applied a removable difference in treatment because of the wording of the Danish rule that directly refers to the rules of the foreign state. This approach resembles that applied in *Amurta* concerning the possible neutralization of the difference in treatment established in the source state by means of a tax treaty credit granted by the state of residence.[41]

3.3 Conditional Objective Comparability Assessment

The third issue that we would like to discuss relates to the approach that the CJEU applied when assessing the *objective* comparability of the domestic (group with a resident subsidiary owning a resident PE) and cross-border situation (group with a non-resident subsidiary owning a resident PE). We call this approach 'conditional' *objective* comparability assessment.

As stated in section 2.3.1, after concluding that the Danish rule established a *prima facie* difference in treatment, the CJEU examined whether the rule concerns *objectively* comparable situations having regard to the objective of the Danish rule. In the case at hand, the objective of the Danish rule was the prevention of the double deduction of losses.[42] In brief, the CJEU ruled that, as a general rule, a group with a resident PE owned by a non-resident subsidiary is not *objectively* comparable to that of a group with a resident PE owned by a resident subsidiary having regard to the aforementioned objective. Nevertheless, the Court made an important exception to this rule concerning situations where '[t]here is no other possibility of deducting the losses of the non-resident subsidiary attributable to the permanent establishment which is resident in the Member State in which the subsidiary is established.'[43] In such a case, the situations are *objectively* comparable given the tax-paying capacity of the two groups that is affected the same by the losses of their resident PE.

We note that the *objective* comparability assessment in *NN* has been clearly based on an analogous application of the comparability assessment of *Bevola*. This case concerned the application of the final losses exception and the 'importation' of final losses of a Finnish PE in Denmark. In this case, the Court ruled that the situation of a company with a non-resident PE is not objectively comparable to that of a company with a resident PE having regard to the objective of the avoidance of double taxation of the company's profits.[44] Nevertheless, the above situations become *objectively* comparable as regards losses attributable to a non-resident PE that has ceased activity and whose losses could not, and no longer can, be deducted from its taxable profits in the Member State in which it carried on its activity.[45] We

41 CJEU, 8 Nov. 2007, C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*.
42 CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 32.
43 CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 35.
44 CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 37.
45 CJEU, 12 June 2018, C-650/16, *A/S Bevola, Jens W. Trock ApS*, para. 38.

think that it is important to note that Denmark was the home state/state of origin in *Bevola* (whereas Finland was the host state).[46] On the other hand, *NN* concerned the transfer of a current/operational loss incurred by a Danish PE against the overall Danish group income and thus not the 'importation' of Danish losses in Sweden. Despite this difference, the CJEU applied, in both *NN* and *Bevola*, a conditional *objective* comparability assessment: the situations were regarded as *objectively* comparable only in so far as there was no other possibility of the losses to be taken into account in the other Member State (Finland in *Bevola* and Sweden in *NN*).[47,48]

We submit that the above approach seems to be theoretically and dogmatically flowed. First, it prerequisites an assessment of whether there is no other possibility of deducting a final (*Bevola*) or an operational (*NN*) loss in another Member State. Such an assessment, however, should, in our view, form part of the last step of the CJEU's step-plan, namely the proportionality step as was the case in *Marks & Spencer*.[49] Secondly, such an assessment seems to be inconsistent with the guiding principle, under which the comparability assessment is performed, i.e. the consideration of the objective of the national provision under review. On the other hand, in *NN* and *Bevola* the CJEU seems to have introduced a second principle, i.e. the consistency of the aim of the national provision with the facts of the case at hand. We cast our doubts on the correctness of this approach.

3.4 The Risk of the Double Use of Losses as an Overriding Reason in the Public Interest

As noted in section 2.3.2, the CJEU in *NN* ruled that the Danish rule could, in principle, be justified by the risk of the double use of losses. In the following sections, we will discuss: (1) the approach taken by the CJEU in *Philips Electronics* towards the risk of the double use of losses as an overriding reason in the public interest (section 3.4.1), (2) the Advocate General's opinion in *NN* (section 3.4.2) and (3) the Court's answer in *NN* (section 3.4.3).

3.4.1 Philips Electronics and the Risk of the Double Use of Losses

In the Danish Government' submission, the prevention of the double deduction of losses can be added to the list of the acceptable overriding reasons in the public interest. However, as the Advocate General noted, '[i]ts position does not initially appear to be compatible with that set out in the judgment in *Philips Electronics*'.[50,51]

As previously mentioned, the UK legislation at issue provided that the possibility of transferring, through group relief to a resident company, losses incurred by the PE of a non-resident company situated in that Member State could be granted under the condition that those losses cannot be used for purposes of foreign taxation. However, the transfer of losses incurred in that Member State by a resident company was not limited by any equivalent condition. This constituted a difference in treatment that made it less attractive for companies having their seat in other Member States to exercise the right to freedom of establishment through a branch.

Having considered that the situations (resident PE vs resident subsidiary) are *objectively* comparable (*see* section 3.1.2), the CJEU considered the overriding reasons in the public interest invoked by the UK Government, namely the balanced allocation of taxing powers between the Member States and the risk of the double use of losses. The CJEU rejected the former overriding reason and did not consider the latter since (emphasis added):

> 33 The host Member State […] 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.[52]

Furthermore, even if the risk of the double use of losses could be considered independently, the risk that those losses may be used both in the host Member State where the PE 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 PE is situated to impose taxes.[53]

It became apparent from *Philips Electronics* that the Court did not recognize the risk of the double use of losses as an independent justification *when invoked by the host Member State*.[54] Furthermore, the Court applied a

[46] H. Vermeulen & V. I. Dafnomilis, *ECJ Decision in Bevola (Case C-650/16): A Missing Piece in the Marks & Spencer (Case C-446/03) Puzzle*, 59(2/3) Eur. Tax'n. (2019).

[47] *See also* Axel Cordewener, *Cross-Border Loss Compensation and EU Fundamental Freedoms: The 'Final Losses' Doctrine Is Still Alive!*, 27(5) EC Tax Rev. 234 (2018).

[48] Please note that the tax-paying capacity argument was also invoked by the CJEU in *Bevola,* CJEU, 12 June 2018, C-650/16, *A/S Bevola, Jens W. Trock ApS*, para. 39.

[49] CJEU, 13 Dec. 2005, C-446/03, *Marks & Spencer plc.*

[50] Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, paras 62 et seq.

[51] More on *Philips Electronics*, *see* Mark Persoff, Dennis Weber & Alexander Fortuin, *The Netherlands, UK*, 19(1) EC Tax Rev. (2010): 45–51.

[52] Roel Monteiro and Martje Kiers stated that the phrase 'in a situation such as that in the main proceedings' and 'in any event' still leaves room for different interpretations as to whether the risk of the double use of losses can be considered an independent overriding reason in the public interest. In that regard, they concluded that the CJEU's wording is vague, unclear and does not improve legal certainty. *See* Roel Monteiro & Martje Kiers, *The Court's Position on Cross-Border Losses: A Quest for the Well-Being of EU Citizens?* 22 (2) EC Tax Rev.(2013): 94.

[53] CJEU, 6 Sept. 2012, C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v. Philips Electronics UK Ltd*, para. 33.

[54] On the other hand, the risk of the double use of losses when invoked by the home State has been already considered an independent overriding reason in the public interest. We are of the opinion, however, that recognition of the justification of the risk of the double use of losses as an independent justification shall not depend on whether the

balanced allocation of taxing powers reasoning even if it could be argued that the risk of the double use of losses could be regarded as an independent justification.

3.4.2 *The View of the Advocate General*

In his Opinion in *NN*, the Advocate General Campos Sánchez-Bordona discussed whether the justification of the risk of the double use of losses could justify the Danish foreign PE equivalent rule although '[i]t is difficult based on *Philips Electronics* to classify the prevention of the double deduction of loses as an overriding reason in the public interest'.[55] It is important to note that the Advocate General considered that Denmark was taxing in its capacity as the host State and Sweden in its capacity as the home State.[56]

In that regard, the Advocate General opined that perhaps the time has arrived to moderate the assertions of *Philips Electronics* (read otherwise: to overrule *Philips Electronics*) in view of, among others, the EU legislation that had paid special attention to the fight against double deduction since the judgment in *Philips Electronics* was delivered.[57] More specifically, the Advocate General referred to the rules of the ATAD 2016/1164 and 2017/952 on the hybrid mismatches and especially to that of Article 9 (1) (b) of the ATAD II.[58,59] In his view, the ATAD 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.'[60] As a result, the Advocate General suggested that in *NN* the risk of the double use of losses shall '[p]erhaps be categorised as an (independent) overriding reason in the public interest, without necessarily having to be linked to the fight against tax evasion.'[61]

3.4.3 *The CJEU's Answer in NN*

3.4.3.1 The Risk of the Double Use of Losses as an Independent Justification?

In response to the Danish Government's submission that the risk of the double use of losses shall be considered an independent justification, the CJEU provided a very clear-cut answer:

> 42 In that respect, the Court has already ruled that Member States must be able to prevent the risk of losses being taken into account twice (judgments of 13 December 2005, Marks & Spencer, C-446/03, EU:C:2005:763, paragraph 47, and of 15 May 2008, Lidl Belgium, C-414/06, EU:C:2008:278, paragraph 35).

Could this Court's laconic answer be considered an overruling of its previous judgment in *Philips Electronics*? We are not so certain on this point. This is because the Court seems to have examined the Danish rule having regard that Denmark is, primarily, the home state.[62] In that regard, it should not be forgotten that the ultimate parent company of the NN group was resident in Denmark and that all companies and PEs belonging to the group and established in Denmark were subject to compulsory joint taxation. On the contrary, in *Philips Electronics*, the ultimate parent company was established in the Netherlands. Furthermore, the UK PE was not forming part of a consolidation group/fiscal unity/joint taxation scheme with any UK group company.

Furthermore, the fact that the Court may have assessed the Danish rule from a home State perspective is, in our view, supported in paragraphs 29 and 33 to 35 of the CJEU judgment in *NN*. More specifically, in paragraph 29, the CJEU stated that the Danish legislation restricts the freedom of establishment of the parent group company through the creation of subsidiaries in Denmark. If the Court had identified a difference in treatment in the host State, it would have stated that the Danish rule makes it less attractive for foreign companies (in Sweden) to exercise their right for establishment in Denmark. In addition, in paragraphs 33 to 35, the CJEU applied, by analogy, the findings of *Bevola* that was a case referring to a restrictive provision of Denmark as home state. Finally, the CJEU cited in paragraph 42 of the *NN* judgment the *Marks and Spencer*[63] and *Lidl Belgium*[64] cases that are both referring to discriminatory/restrictive provisions of home states. For the abovementioned reasons, we are of the opinion that

state invoking this justification is the host or the home Member State. In other words, it would be more understandable if the risk of the double use of losses would have been considered an independent justification in any case and the Court would have followed the reasoning of para. 29 of *Philips Electronics* in order to reject it when invoked by the host Member State.

55 Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 63.

56 Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 75.

57 Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 64.

58 More specifically, this Article lays down that '1. To the extent that a hybrid mismatch results in a double deduction: (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.'

59 Although the ATAD II rules address in many instances the possibility of double deduction of losses with regards to hybrid mismatch situations falling within the scope of the EU Directive, one could easily argue whether Art. 9(1)(b) of the Directive is compatible with *Philips Electronics* that in essence suggests that the source state cannot justify denial of a relief on grounds that relief is also available in the residence country. Hence, one could argue that where the payer jurisdiction is a Member State, the fact that the investor jurisdiction grants a deduction will not justify the payer jurisdiction denying a deduction (as required by Art. 9(1)(b) of the Directive if the deduction is not denied in the investor jurisdiction) where the payer jurisdiction has taxing rights over the profits.

60 Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 70.

61 Advocate General Campos Sánchez-Bordona, 17 Jan. 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 73.

62 And secondarily, the source state (state where the Danish PE is situated).

63 CJEU, 13 Dec. 2005, C-446/03, *Marks & Spencer plc.*

64 CJEU, 15 May 2008, C-414/06, *Lidl Belgium GmbH & Co. KG.*

in *NN* the CJEU examined the Danish rule having regard that Denmark taxes (primarily) as the home state (*see also* section 3.1.2).

3.4.3.2 The Assessment of the Risk of the Double Use of Losses in the Specific Case

Having clarified that Member States must be able to prevent the risk of losses being taken into account twice, the Court examined whether the justification of the risk of the double use of losses could be accepted in the case at hand. More specifically, the CJEU observed that, when a PE is taxed in two Member States, its losses could be deducted in both states, i.e. in the PE state and the state of the head office.[65] In that regard, according to the Court, the credit method of the Nordic tax convention makes such a double deduction possible.[66] Therefore, the Danish rule at hand is necessary because it safeguards that losses cannot be deducted twice and therefore the difference in treatment that the rule established appeared to be justified.[67] It is important to note, however, that the Court seems to rule that, only if the application of the Danish rule is combined with that of a convention that prevents double taxation by means of a credit mechanism, the Danish rule seems to be justified by the need to prevent the risk of the double use of losses.

Nevertheless, we have difficulties in understanding the CJEU's argumentation. This is because, even under the credit mechanism of the Nordic tax convention, it is, in our view, not possible for the group to achieve a permanent double deduction of losses. Even if losses could be deducted in both Sweden and Denmark, this is, in our view, only a *temporal effect* due to the application of the recapture mechanism. Based on this mechanism, in a later year no double tax relief would be granted up to the amount of the profits of the PE, which are equal to the previously deducted losses. It should be stressed that the recapture mechanism has already passed the EU test in *Krankenheim*.[68] In the latter case, the CJEU decided that national legislation which allows, for the purpose of computing the taxable base of a resident company, a deduction of losses generated through that company's PE in another Member State, but provides for a subsequent recapture of these losses when, and to the extent that, the PE at issue makes profits, is compatible with the freedom of establishment. It is also irrelevant whether or not those losses have been taken into account, or can be carried forward in the Member State where the PE is situated.

Therefore, we are of the view that the risk of the double use of losses is not realistic in *NN* since Sweden (as the state of the head office) would recapture the losses of the PE in Denmark in a later year.

[65] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 43.
[66] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 47.
[67] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 48.
[68] *See* CJEU, 23 Oct. 2008, C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH.*

3.5 Losses that Are Practically Impossible to Be Deducted Abroad

3.5.1 The 'Always Somewhere' Principle

The assessment of the practical impossibility of the deduction of the losses of the Danish PE in Sweden was an important element of the CJEU's review. It could be found in step 2 (*prima facie* difference in treatment),[69] in step 3 (*conditional* objective comparability of the situations) and in step 4 (proportionality assessment). Concerning steps 2 and 3 we refer to sections 3.2 and 3.3 of this contribution respectively. In this section, we will focus on step 4 in which the CJEU considered whether the difference in treatment is proportionate to the objective of the Danish rule, namely the prevention of the double deduction of losses. In that regard, the CJEU stated in paragraph 54 that (emphasis added):

> 53 However, in the case in the main proceedings, the loss is the result of the merger of two Danish branches in the group and the choice made by the group – as permitted by Swedish law – that that merger be treated for tax purposes as a restructuring of activities, and, as such, not subject to tax in Sweden. Consequently, it would not be possible, *in practice*, to set those losses off against the Swedish subsidiary's profits.[70]
>
> 54 In a similar case, the national provisions at issue in the main proceedings – the consequence of which, according to the referring court, is to deprive the Danish group of *any effective possibility* of deducting the losses of the resident permanent establishment of its non-resident subsidiary – fail to have regard for the principle of proportionality.[71]

In other words, although the objective of the avoidance of double deduction is a legitimate overriding reason in the public interest, the application of the rule in situations where no double deduction would be possible, in practice, makes the rule disproportionate. As a result, the difference in treatment cannot be justified in the specific case. It becomes apparent that the 'always somewhere' principle[72] that the CJEU applied in its *Marks and Spencer* jurisprudence (with the most recent example that of the *Bevola* case) also applied in this case (although, as previously noted, the *NN* case concerned

[69] Or, as noted in s. 3.2, it should be step 2.
[70] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 53.
[71] CJEU, 4 July 2018, C-28/17, *NN A/S v. Skatteministeriet*, para. 54.
[72] More on the 'always somewhere principle', *see* P. Wattel, *Fiscal Cohesion, Fiscal Territoriality and Preservation of the (Balanced) Allocation of Taxing Powers; What Is the Difference?*, in Dennis Weber (ed.), The influence of EU law on direct taxation, recent and future developments, Kluwer Law International 2007, at 154; B. da Silva, *From Marks & Spencer to X Holding, A (Critical) Overview and Some Open Issues*, in *From Mark&Spencer to X Holding, The Future of' Cross-Border Group Taxation* 6 (Eucotax series, D. Weber & B. da Silva eds, Wolters Kluwer 2011) and 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*, 24(5) EC Tax Review. (2015):268–80.

the deduction of an operational loss – and thus not a final loss – in Denmark).

3.5.2 Interrelation with the Marks & Spencer Exception

Given the application of the 'always somewhere principle', the question arises on the relationship between the *NN* case and the *Marks & Spencer* jurisprudence of the CJEU.[73] More specifically, the question arises on the relationship between the concept of losses that are practically impossible to be deducted abroad (*NN*) and the concept of final losses (*Marks and Spencer*).

More specifically, back in 2005, the CJEU ruled in *Marks and Spencer* that the Member State of the parent company is obliged to take into account the *final losses of the non-resident subsidiary* if (1) the latter subsidiary has exhausted the possibilities available in its state of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and (2) there is no possibility for the non-resident subsidiary's losses to be taken into account in its state of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.[74] It is important to note the Court has applied the *Marks & Spencer* exception also to final losses of a foreign PE under certain conditions.[75]

On the other hand, in *NN*, the CJEU ruled that the Member State of the parent company shall allow the deduction of a *domestic loss* if there is no *effective* possibility for the group of deducting those losses against the non-resident subsidiary's profits.

It becomes apparent that the *Marks and Spencer* exception applies to losses arising in the source state that are final and therefore shall be imported in the state of residence. The application of this exception has been already confirmed in several CJEU judgments and more recently in the Grand Chamber judgment of the CJEU in *Bevola* with regards to the losses of an exempt PE in Finland belonging to a Danish company. In that regard, the Court confirmed that, if the losses of the foreign PE meet the conditions set in *Marks and Spencer*, they shall be considered final, so the Member State of residence (Denmark) shall import them. This applies regardless of the method that the latter state applies in order to avoid double taxation of the foreign PE profits. Furthermore, we observe that it seems from the current status of the CJEU jurisprudence on final losses that only losses which are final due to factual means (e.g. liquidation of the non-resident subsidiary, closure of the PE) qualify as final losses for the application of the *Marks and Spencer* exception. On the other hand, losses that are final due to juridical means (e.g. expiration of the statutory time limit of loss carry forward) seem not to qualify as final losses.

On the other hand, the losses of the Danish PE in *NN* were operational. As a result, the final losses exception could not apply to them from the very beginning. What's more, even if the losses were final, one could argue that it should have been Sweden (the state of residence of the Swedish subsidiary) that has to apply the *Marks and Spencer* exception and 'import' the losses of the Danish PE. On the contrary, the question in *NN* was whether Denmark as the home state of the NN group could deny the deduction of a *domestic* loss with a cross-border element.

As a final point, we would like to note that in *NN* the Court attributed importance to the fact that the Danish PE could not be claimed in Sweden since the transaction was treated as restructuring *under the Swedish tax rules* and it did not give rise to tax liability there.[76] In our view, it is unclear whether such an approach shall apply by analogy also to cases involving final losses of non-resident subsidiaries and PEs. This is because the current status of the CJEU jurisprudence on final losses seems to suggest that losses that are final due to juridical means (i.e. due to the legislation of the state of source)[77] do not qualify as final losses. As a result, the state of residence shall not consider them.

4 Conclusion

In this contribution, we provided a summary of the CJEU judgment in *NN* and focused on some selected aspects of the CJEU judgment. First, we are of the opinion that the *NN* case is different from the *Philips Electronics* case. As a result, it was logical that the CJEU did not apply its reasoning in *Philips Electronics* – especially with regards to the justification of the risk of the double use of losses – also to the *NN* case. Nevertheless, the acceptance of this justification in *NN* does not sound realistic because double deduction in a cross-border situation would, in our view, have only a temporal effect given the recapture mechanism by the state of the head office.

Furthermore, we observed that it is clear from *NN* that the Court applied a 'removable' difference in treatment approach like that of *Amurta* and a conditional *objective* comparability assessment like that of *Bevola*. In that regard, we casted our doubts on the correctness of the latter approach as it seems to contradict the principles under which the comparability assessment is usually performed by the CJEU. As a final point, we

[73] CJEU, 23 Oct. 2008, C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH*; CJEU, 21 Feb. 2013, C-123/11, *A Oy* and CJEU, 7 Nov. 2013, C-322/11 *K.*

[74] CJEU, 13 Dec. 2005, C-446/03, *Marks & Spencer plc*, para. 59.

[75] *See* CJEU, 17 Dec. 2015, C-388/14, *Timac Agro Deutschland GmbH and* CJEU, 12 June 2018, C-650/16, *A/S Bevola, Jens W. Trock ApS.*

[76] CJEU, 4 July 2018, C-28/17 *NN A/S v. Skatteministeriet*, para. 54.

[77] CJEU, 23 Oct. 2008, C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* GmbH; CJEU, 21 Feb. 2013, C-123/11, *A Oy* and CJEU, 7 Nov. 2013, C-322/11 *K.*

observed that the CJEU applied the 'always somewhere principle' in *NN* even though the case concerned the deduction of an operational loss in Denmark and thus not a final loss.

Having discussed and commented the CJEU judgment in *NN*, we are wondering whether the opening sentence of the Advocate General's Opinion in *NN* concerning the 'fresh questions' that the CJEU judgments can raise also applies to the *NN* case. The Advocate General was obviously referring to the *Philips Electronics* case and the fresh questions that this case can raise in today's anti-tax avoidance environment. Nevertheless, we are of the opinion that the CJEU judgment in *NN* raises more … fresh questions relating to the way that the CJEU examined the Danish rule.