



Euro Tax Flash from KPMG's EU Tax Centre



[Background](#)

[The CJEU's decision](#)

[EU Tax Centre comment](#)

CJEU decision in the Bevola case on Danish rules on cross-border loss relief

[Denmark - Cross-Border Loss Relief – Final Losses – ‘Marks & Spencer Exception’ - Freedom of Establishment - International Group Relief Regime - Balance Allocation of Taxing Rights - Coherence of the Tax System – Prevention of Double Use of Losses](#)

On June 12, 2018, the Court of Justice of the European Union (CJEU) rendered its decision in the Bevola and Jens W. Trock case ([C-650/16](#)) concerning the compatibility with EU law of the Danish rules on the deductibility of losses from foreign permanent establishments, firstly in cases where the taxpayer did not elect to apply for the Danish international joint taxation scheme and secondly where the ‘Marks & Spencer exception’ applies, i.e. losses are considered final. The CJEU concluded that the Danish legislation is contrary to the freedom of establishment and clarified the applicability of the ‘Marks & Spencer exception’, leaving it however to the referring court to assess whether this is the case in the circumstances at hand.

Background

In 2009, A/S Bevola, a Danish company, sought to deduct from its taxable base in Denmark the losses incurred at the level of its permanent establishment (‘PE’) in Finland, arguing that the PE had ceased to exist during the same year and therefore loss relief could not be claimed in Finland. The Danish tax authorities denied the deduction on the grounds that revenue or expenses attributable to a foreign PE cannot be taken into account in a taxpayer’s taxable base, unless the latter has opted for the Danish international joint taxation scheme. Under this scheme, a Danish company has to integrate the benefits and losses of all its group companies, real properties and PEs for a period of at least 10 years, regardless of their residence.

Bevola appealed the tax authorities’ decision before the Danish Eastern Regional Court, which decided to refer the case to the CJEU on December 19, 2016. In particular, the CJEU was asked whether, in circumstances equivalent to those in the CJEU decision in the Marks & Spencer case ([C-446/03](#)), Danish rules on cross-border loss relief are compatible with the freedom of establishment. Under these rules, deductions for losses in foreign PEs are not

allowed, unless the group elected to apply the Danish international joint taxation scheme. However, it is possible to deduct losses incurred by domestic branches, with or without the scheme.

The CJEU decision

After confirming that the freedom of establishment is applicable to the case at hand, the Court examined whether there is a difference in treatment between Danish companies with a Danish PE and those whose PE is situated in another Member State. Under the Danish rules on cross-border loss relief, deductions for final losses in foreign PEs are not allowed, unless the group elects to apply international joint taxation. However, it is possible to deduct final losses incurred by domestic PEs, with or without the joint taxation scheme. In these situations, the Danish company suffers an unfavorable difference in treatment compared to a company possessing a PE with final losses in Denmark. The Court further observed that this difference in treatment is likely to deter Danish resident companies from exercising their freedom of establishment and that this conclusion is not called in question by the possibility of opting for the international joint taxation scheme, which is subject to strict conditions.

Turning to the question whether this difference in treatment relates to situations that are objectively comparable, the Court first recalled that this should be assessed in light of the purpose of the Danish legislation at issue. As such legislation intends to prevent the double deduction of losses, the Court concluded that the situation of a Danish company with a Danish PE and that of a Danish company with a non-resident PE, are comparable as regards this specific objective. This conclusion is also consistent with the Danish legislation's broader aim to ensure that the taxation of a company is in line with its ability to pay tax.

The Court further examined whether this difference in treatment may be justified by overriding reasons of the public interest and accepted that the need to preserve a balanced allocation of taxing rights between Member States, the need to maintain the fiscal coherence of the Danish tax system, and the need to prevent the double use of losses are appropriate justifications. As regards in particular the need to maintain the fiscal coherence of the Danish tax system, the Court took the view that there is a direct link between a tax advantage, i.e. the possibility to offset the losses of a PE and the corresponding tax levy, i.e. the inclusion of the same PE's profits in the Danish company's taxable results. In addition, this direct link is necessary in light of the objective of the Danish legislation to ensure that the taxation of a company is in line with its ability to pay tax.

Nevertheless, the Court considered that the Danish legislation goes beyond what is necessary to achieve these objectives. Relying on settled case law, it concluded that the deduction of a PE's losses must be allowed to the extent that the Danish company can demonstrate that such losses are definitive. In particular, there is no need to assess the proportionality of the Danish international joint taxation regime, insofar as the Danish legislation generally denies the possibility for resident companies to offset losses of foreign PEs, when those losses are final. In this respect, the requirements set out in the Marks & Spencer case and further detailed in the Commission vs. UK case ([C-172/13](#)) apply. As a consequence, the losses attributable to a foreign PE become definitive when, first, all possibilities of deducting those losses that are available under the law of the PE's residence state have been exhausted and, second, the company has ceased to receive any income from that PE. This is however for the referring court to decide whether those requirements are fulfilled in the case at hand.

EU Tax Centre comment

In this decision, the CJEU provides some useful insights on the applicability of the 'Marks & Spencer exception' to companies with a non-resident PE and in particular to what extent national measures restricting the deductibility of cross-border losses can be considered proportionate. More interesting still, the Court also accepts the need to preserve the coherence of a Member State's tax system as a valid justification in the circumstances at hand. While this justification had already been put forward in the *Krankenheim* case ([C-157/07](#)), the Court had then strictly linked the reintegration of losses at the level of the German head office to the fact that they had previously been taken into account. The Court now seems to extend its scope to all situations where the general possibility for a resident company to set-off losses of its resident PE is correlated to the inclusion in its taxable results of any profit made by that PE.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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