JUDGMENT OF THE COURT (Third Chamber)

17 December 2015 (*)

(Reference for a preliminary ruling — Tax legislation — Corporation tax — Freedom of establishment — Non-resident permanent establishment — Avoidance of double taxation by exemption of the income of the non-resident permanent establishment — Taking account of losses incurred by that permanent establishment — Reincorporation of the losses deducted previously in the event that the non-resident establishment is transferred — Definitive losses)

In Case C-388/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Köln (Finance Court, Cologne, Germany), made by decision of 19 February 2014, received at the Court on 14 August 2014, in the proceedings

Timac Agro Deutschland GmbH

v

Finanzamt Sankt Augustin,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, C. Toader, A. Rosas, E. Jarašiūnas and C.G. Fernlund (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2015,

after considering the observations submitted on behalf of:

– the Finanzamt Sankt Augustin, by U. Strake and H. Brandenberg, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the French Government, by D. Colas, J.-S. Pilczer and S. Ghiandoni, acting as Agents,

– the Austrian Government, by C. Pesendorfer, E. Lachmayer, A. Wild and M. Klamert, acting as Agents,

– the United Kingdom Government, by J. Kraehling, acting as Agent, and by S. Ford and N. Saunders, Barristers,

– the European Commission, by W. Roels and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Timac Agro Deutschland GmbH (‘Timac Agro’), a company limited by shares that is governed by German law, and the Finanzamt Sankt Augustin (Tax office, Sankt Augustin) concerning, first, the reincorporation by the latter of losses deducted previously, in respect of the tax years 1997 and 1998, incurred by a non-resident permanent establishment of that company on the transfer of that establishment to a non-resident sister company, and, secondly, the refusal of the Tax office, Sankt Augustin, to take into account the losses in respect of the tax years from 1999 onwards incurred by that establishment following that transfer.

Legal context

German law

3 The first to fourth sentences of Paragraph 2a(3) of the Law on income tax (Einkommensteuergesetz, ‘the EStG’), in the version applicable to the tax years 1997 and 1998, provide:

‘If the revenue from the industrial or commercial activities of an establishment situated in a foreign State is exempt from income tax under a double taxation convention, any loss relating to that revenue in accordance with the provisions of national tax law must, at the request of the taxpayer, be deducted in the calculation of the total amount of the revenue, in so far as the taxpayer could offset or deduct the loss if the revenue was not exempt from income tax and provided that such loss exceeds the positive revenue from the industrial or commercial activities of other establishments situated in the same foreign State exempt under that convention. In so far as the loss is not thereby offset, the deduction of losses is permitted if the conditions of Paragraph 10d are satisfied. If, in a subsequent tax assessment period, the total amount of revenue from the industrial or commercial activities of permanent establishments situated in that foreign State which is exempt from income tax under the convention is positive, the loss deducted pursuant to the first and second sentences must be reincorporated into the total amount of the revenue calculated for that tax assessment period. The third sentence shall not apply if the taxpayer demonstrates that it is not generally permitted under the provisions of the foreign State applicable to it to carry forward the deduction of losses to a tax assessment period other than the tax assessment period in which the losses were incurred.’

4 The third and fifth sentences of Paragraph 52(3) of the EStG, in the version applicable in 2005, state:

‘The third, fifth and sixth sentences of Paragraph 2a(3), in the version published on 16 April 1997 (BGBl. I, p. 821), shall apply to the 1999 to 2008 tax years in so far as a positive amount arises within the meaning of the third sentence of Paragraph 2a(3), or in so far as a permanent establishment situated in a foreign State within the meaning of Paragraph 2a(4), in the version of the fifth sentence, is converted into a company limited by shares, is transferred or is closed. ... Paragraph 2a(4) shall apply in the following version to the 1999 to 2008 tax years:

“4. If a permanent establishment situated in a foreign State is

1. converted into a company limited by shares; or

2. transferred for consideration or for no consideration; or

3. closed …, the loss deducted pursuant to the first and second sentences of subparagraph 3 shall be reincorporated into the total amount of the revenue for the tax assessment period in which the conversion, transfer or closure occurred, applying the third sentence of subparagraph 3 in an analogous manner, in so far as that loss was not reincorporated pursuant to the third sentence of subparagraph 3 nor remains bound to be reincorporated."'

Double Taxation Conventions

5 Article 4(1) of the Convention concerning the avoidance of double taxation with respect to taxes on income and capital and to trade and property taxes concluded between the Federal Republic of Germany and the Republic of Austria on 4 October 1954 (BGBl. 1955 II, p. 749), as amended by the Convention of 8 July 1992 (BGBl. 1994 II, p. 122), provides:

'Where a person domiciled in one of the Contracting States derives income, as owner or partner, from an industrial or commercial undertaking whose activities extend to the territory of the other State, the said income shall be taxable by the latter State only in so far as it is attributable to a permanent establishment of the undertaking which is situated in its territory.'

6 Article 7(1) of the Convention concerning the avoidance of double taxation with respect to taxes on income and capital concluded between the Federal Republic of Germany and the Republic of Austria on 24 August 2000 (BGBl. 2000 II, p. 734, 'the German-Austrian Convention'), provides:

'The profits of an undertaking of a Contracting State shall be taxable only in that State unless the undertaking carries on business in the other Contracting State through a permanent establishment situated therein. If the undertaking carries on business as aforesaid, the profits of the undertaking shall be taxable in the other State, but only to the extent to which they are attributable to that permanent establishment.'

7 The first sentence of Article 23(1) of the German-Austrian Convention is worded as follows:

'The taxation of persons residing in the Federal Republic of Germany shall be as follows:

(a) Subject to point (b) below, revenue from the Republic of Austria and assets situated in the Republic of Austria which, pursuant to this Convention, are taxable in the Republic of Austria shall be excluded from the basis of assessment for German taxation.'

8 Article 12(b) of the Protocol annexed to that Convention provides, with respect to Article 24 of the Convention:

'Where persons resident in Germany incur, from the business year 1990 (1989/90) onwards, losses in permanent establishments situated in Austria, losses incurred up to the 1997 (1996/97) business year inclusive shall be taken into account in accordance with Paragraph 2a(3) of the EStG. Reincorporation pursuant to the third sentence of Paragraph 2a(3) of [the EStG] shall not apply as from the tax year 1994. Where the tax advantage provided for cannot be effected in accordance with those provisions in the Federal Republic of Germany, given the definitive nature of the taxation and the impossibility of restarting the procedure by reason of the expiry of the period laid down for determination of the tax, account may be taken in the Republic of Austria in the form of a deduction of losses. Losses incurred as from the business year 1998 (1997/98) must be taken into account in the State where the establishment is situated in accordance with the principle of reciprocity. The above rules shall apply only in so far as they do not cause losses to be taken into account twice.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Timac Agro is a company limited by shares that is governed by German law and belongs to a French group. It had, since 1997, been operating a permanent establishment situated in Austria. On 31 August 2005, that establishment was transferred, for consideration, to a company established in Austria belonging to the same group of companies as Timac Agro.

10 The question as to how to treat the losses of that non-resident permanent establishment thus arose because, between 1997 and 2005, that establishment had incurred losses in respect of every tax assessment period except 2000 and 2005.

11 Following a tax inspection, the tax bases of Timac Agro were corrected in respect of the years 1997 to 2004. First, the losses of the permanent establishment situated in Austria, which were initially deducted from Timac Agro's revenue for 1997 and 1998, were reincorporated into that company's taxable profit for 2005. Secondly, Timac Agro was not permitted to take into account the losses of that permanent establishment in its tax base for the years 1999 to 2004.

12 Timac Agro objected to those corrections and brought an action before the Finanzgericht Köln (Finance Court, Cologne). In support of its action, Timac Agro argues that the reincorporation of the losses incurred by its permanent establishment in Austria in respect of 1997 and 1998 and the impossibility of deducting that establishment's losses in respect of the period 1999 to 2004 are incompatible with the freedom of establishment.

13 As regards the reincorporation of the losses in question, the referring court considers that the Court of Justice has not yet ruled on whether such reincorporation following the transfer of a non-resident permanent establishment is compatible with EU law.

14 The referring court states that although there are some similarities between the facts giving rise to the judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588) and the facts in the case brought before it, the issue under consideration in that judgment was the reincorporation of losses into the tax base of the non-resident permanent establishment to the extent of its profits. By contrast, in the main proceedings, the reincorporation of losses was triggered by the transfer of the non-resident permanent establishment and was not linked to any profits of that establishment.

15 In the event that the Court of Justice should find that the principles arising from that judgment are also intended to be applied in a case such as that in the main proceedings, the referring court enquires whether the principles relating to definitive losses laid down by the Court in paragraphs 55 and 56 of the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763) are intended to be applied to the losses relating to the tax years 1997 and 1998 which, having been reincorporated, are no longer taken into account in Germany.

16 As regards the refusal to take into account the losses of the permanent establishment situated in Austria for the 1999 to 2004 tax years, the referring court states that, under the German-Austrian Convention, the Republic of Austria had exclusive power to tax the revenue of that establishment. The rules set out in that Convention on the avoidance of double taxation cover not only profits but also losses. Timac Agro's action could therefore only succeed if that Convention infringed the freedom of establishment.

17 The referring court also enquires whether, in the case before it, there are definitive losses for the purposes of the principles set out in paragraphs 55 and 56 of the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763). It points out that, as yet, it has been unable to identify the criteria to be

applied in determining the situations in which those principles are to apply.

18 In those circumstances the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 49 TFEU to be interpreted as precluding a provision such as Paragraph 52(3) of the EStG, in so far as the cause of the reincorporation of losses of a foreign permanent establishment previously taken into account by way of a tax reduction is the sale of that permanent establishment to another company limited by shares within the same group as the seller, and not the making of profits?

2. Is Article 49 TFEU to be interpreted as precluding a provision such as Article 23(1)(a) of the German-Austrian Convention — according to which income from Austria is to be exempt from the basis of assessment for German taxation if that income can be taxed in Austria — if losses accrued in an Austrian permanent establishment of a German company limited by shares can no longer be taken into account in Austria because the permanent establishment is sold to an Austrian company limited by shares belonging to the same group as the German company?’

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding a Member State’s tax regime, such as that at issue in the main proceedings, under which, in the event of transfer by a resident company to a non-resident company belonging to the same group of a permanent establishment situated in another Member State, the losses previously deducted in respect of the establishment transferred are reincorporated into the taxable profit of the transferring company where, under a double taxation convention, the revenue of such a permanent establishment is exempt from tax in the Member State in which the company to which that establishment belonged has its seat.

20 It should be noted that freedom of establishment entails, for 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 European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 17 and the case-law cited).

21 Whilst the provisions of the FEU Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of a company incorporated under its legislation, in particular through a permanent establishment (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 18 and the case-law cited).

22 Freedom of establishment is hindered if, under a Member State’s tax regime, a resident company having a subsidiary or a permanent establishment in another Member State suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a permanent establishment or a subsidiary in the first Member State (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 19 and the case-law cited).

23 The Court has already held that the taking into account of losses incurred by a non-resident

permanent establishment in calculating the profits and taxable income of the company to which that establishment belongs constitutes a tax advantage (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 20 and the case-law cited).

24 Furthermore, it follows from the case-law of the Court that reincorporation of such losses which applies only in the event of transfer of a non-resident permanent establishment means that a company having a permanent establishment in a Member State other than that in which the company has its seat is denied such an advantage compared with a company having a permanent establishment in the same Member State, and, therefore, constitutes disadvantageous treatment (see, to that effect, judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 21).

25 It also follows from that case-law that that disadvantageous treatment is liable to deter a resident company from carrying on its business through a permanent establishment situated in a Member State other than that in which it has its seat and therefore constitutes a restriction prohibited in principle by the provisions of the Treaty that relate to freedom of establishment (see, to that effect, judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 22).

26 Such a restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 23 and the case-law cited).

27 As regards comparability of the situations, it must be pointed out that, in principle, permanent establishments situated in a Member State other than the Member State concerned are not in a situation comparable to that of resident permanent establishments in relation to measures laid down by that Member State in order to prevent or mitigate the double taxation of a resident company's profits (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 24).

28 However, by permitting the deduction of losses incurred by a permanent establishment situated in Austria, the Federal Republic of Germany granted a tax advantage to the resident company to which that permanent establishment belonged, in the same way as if that permanent establishment had been situated in Germany, and, therefore, equated it with a resident permanent establishment so far as concerns the deduction of losses (see, to that effect, judgments in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588, paragraph 35, and *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 24). In those circumstances, the situation of a resident company with a permanent establishment situated in Austria is accordingly comparable to that of a resident company with a permanent establishment situated in Germany.

29 The restriction can therefore be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 25 and the case-law cited).

30 The Federal Republic of Germany underlines the fact that the income derived by a permanent establishment situated in Austria, whether obtained while the permanent establishment belonged to a company established in Germany or when that establishment was transferred, is exempt from tax in Germany, the power to tax that income lying with the Republic of Austria under the German-Austrian Convention.

31 The Federal Republic of Germany explains that the reincorporation at issue in the main proceedings corresponds to the amount of the losses previously deducted. Such reincorporation thus constitutes the offsetting for tax purposes of the share of the resident company's profits that was not previously taxed.

32 In addition, the purpose of the tax regime at issue in the main proceedings is to ensure that taxpayers cannot escape the reincorporation rules by fixing sale prices below market price or by other arrangements, or prevent taxes from being levied *a posteriori*.

33 The Federal Republic of Germany takes the view that the tax regime at issue in the main proceedings is therefore justified both by the overriding reason in the public interest linked to the need to ensure a balanced allocation of the power to impose taxes between the Member States and that linked to the coherence of the tax system, as well as by that linked to the prevention of tax avoidance.

34 As regards, first of all, the need to safeguard a balanced allocation of the power to impose taxes between the Member States, it should be recalled that this is a legitimate objective recognised by the Court, which may make it necessary to apply to the economic activities of companies established in one of those Member States only the tax rules of that State in respect of both profits and losses (judgment in *K*, C-322/11, EU:C:2013:716, paragraph 50 and the case-law cited).

35 That objective, as the Court has already stated, is designed, inter alia, to safeguard the symmetry between the right to tax profits and the right to deduct losses, in particular in order to prevent taxpayers from choosing freely the Member State in which profits are to be taxed or losses are to be deducted (judgment in *K*, C-322/11, EU:C:2013:716, paragraph 51 and the case-law cited).

36 In the main proceedings, if the German-Austrian Convention were not applied, the Federal Republic of Germany would have the right to tax the income generated by a permanent establishment situated in Austria but belonging to a company established in Germany.

37 However, the application of that Convention has meant that the Federal Republic of Germany has not exercised any tax powers in respect of that income. To deprive the Federal Republic of Germany of the possibility of reincorporating into the taxable profit of the resident company the losses deducted previously in respect of the permanent establishment situated in Austria in the event of transfer of that establishment would thus be tantamount to allowing that company to choose freely the Member State in which those losses could be deducted (see, to that effect, judgment in *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraph 34).

38 In those circumstances, the reincorporation at issue in the main proceedings allows the symmetry between the right to tax income and the right to deduct losses to be safeguarded, and, therefore, ensures a balanced allocation of the power to impose taxes between the Member States concerned.

39 Next, as regards the justification based on the need to preserve the coherence of the national tax system, it must be borne in mind that this too is a legitimate objective recognised by the Court. In order for an argument based on that justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (judgment in *K*, C-322/11, EU:C:2013:716, paragraphs 65 and 66).

40 In the context of the reincorporation of losses of a non-resident permanent establishment which have previously been deducted, the Court has made clear that the reincorporation of those losses cannot be dissociated from their having earlier been taken into account. Thus, the Court has held that that reincorporation, in the case of a company with a permanent establishment in a Member State other than that in which it is established and in relation to which that company's Member State of residence has no power of taxation reflects a logical symmetry. There was thus a direct, personal and material link between the two elements of that tax mechanism, the said reincorporation being the indissociable complement of the deduction previously granted (see, to that effect,

judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588, paragraph 42).

41 In the main proceedings, it is sufficient to find that in so far as the Federal Republic of Germany does not have the right to tax the income generated by a permanent establishment situated in Austria, the reincorporation of the relevant losses into the taxable profit of the resident company to which that permanent establishment belonged reflects a logical symmetry and is thus the indissociable complement of the deduction previously granted. Accordingly, a tax regime such as that at issue in the main proceedings is also justified by the need to guarantee the coherence of the German tax system.

42 As regards, lastly, the objective relating to the prevention of tax avoidance, it must be noted that this is an objective capable of justifying a restriction on the freedom of establishment guaranteed by the Treaty. In accordance with the case-law of the Court, in order for an argument based on that justification to succeed, the specific objective of that restriction must be to prevent conduct consisting in the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities in the national territory (judgment in *K*, C-322/11, EU:C:2013:716, paragraph 61 and the case-law cited).

43 As to the relevance of that justification in the light of circumstances such as those at issue in the main proceedings, it must be acknowledged that there is a risk that a group of companies might organise its business in such a way that it deducts from its taxable income in Germany the losses incurred by a loss-making permanent establishment situated in Austria, and then, once that establishment has become profitable, transfers the establishment's business to another company of the same group which is liable to tax in another Member State.

44 By reincorporating the losses thus deducted into the taxable profit of the transferring company established in Germany in the event of a transfer of the permanent establishment situated in Austria, the tax regime at issue is thus capable of preventing practices aimed at escaping the tax normally due on the profits generated by activities in Germany.

45 In the light of these considerations, it must be held that a tax regime, such as that at issue in the main proceedings, may be justified by overriding reasons in the public interest linked to the need to safeguard the balanced allocation of the power to impose taxes between the Federal Republic of Germany and the Republic of Austria, as well as the coherence of the German tax system and prevention of tax avoidance.

46 It remains necessary, however, to ascertain whether such a regime goes beyond what is necessary in order to attain those objectives.

47 It must, as a preliminary point, be noted that the requirements of the balanced allocation of powers of taxation and coherence of the tax system coincide (judgment in *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 80). Furthermore, the objectives of safeguarding the balanced allocation of the power to impose taxes between Member States and the prevention of tax avoidance are linked (judgment in *Oy AA*, C-231/05, EU:C:2007:439, paragraph 62 and the case-law cited).

48 As regards the proportionality of the tax regime at issue in the main proceedings, it should be recalled that the balanced allocation of the power to impose taxes has the objective of safeguarding the symmetry between the right to tax profits and the right to deduct losses. The need to safeguard that symmetry means that the losses deducted in respect of the permanent establishment must be capable of being offset by taxation of the profits made by it under the tax jurisdiction of the Member State in question, that is to say, both the profits made throughout the period when the

permanent establishment belonged to the resident company and those made at the time of the permanent establishment's transfer (judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraphs 32 and 33).

49 Such offsetting is, moreover, capable of ensuring fiscal coherence since that offsetting is the indissociable complement of the losses having previously been taken into account (see, to that effect, judgment in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588, paragraph 54).

50 Furthermore, it must be noted that that offsetting can also prevent tax avoidance since it removes the risk of conduct aimed at escaping the tax normally due in the State of residence of the company to which the permanent establishment belongs.

51 In the main proceedings, it is common ground that, as regards the income generated by a permanent establishment situated in Austria belonging to a company established in Germany, both the income obtained prior to the transfer of that permanent establishment and that obtained at the time of the transfer is exempt from tax in Germany. It follows from this that the losses deducted previously in respect of the establishment transferred cannot be offset by taxation of the income of that establishment. Accordingly, the reincorporation of such losses into the taxable profit of the transferring company is a measure that is proportionate to the intended aims, namely the safeguarding of a balanced allocation of the power to impose taxes, the need to ensure fiscal coherence and the prevention of tax avoidance.

52 Lastly, in order to answer the referring court's query with regard to the principles relating to definitive losses set out in paragraphs 55 and 56 of the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763), it must be made clear that the finding as to the proportionality of the reincorporation at issue in the main proceedings does not mean that the Member State of residence of the transferring company is not required to observe the principles set out in those paragraphs, that reincorporation having no bearing on the characterisation of the loss concerned.

53 Where the transferring resident company demonstrates that the reincorporated losses are definitive losses for the purposes of paragraph 55 of the judgment in *Marks & Spencer* (C-446/03, EU:C:2005:763), it is contrary to Article 49 TFEU to preclude the possibility for that company of deducting from its taxable profits in the Member State of its residence the losses incurred by a non-resident establishment (judgment in *Commission* v *United Kingdom*, C-172/13, EU:C:2015:50, paragraph 27).

54 As regards the definitive nature of a loss, it will, first of all, be recalled that that loss cannot be characterised as definitive by dint of the fact that the Member State in which the permanent establishment is situated precludes all possibility of losses being carried forward (judgment in *Commission* v *United Kingdom*, C-172/13, EU:C:2015:50, paragraph 33 and the case-law cited).

55 Secondly, losses may be characterised as definitive only if that permanent establishment no longer has any income in the Member State in which it is situated, since, so long as it continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in that Member State either by the establishment itself or by a third party (judgment in *Commission* v *United Kingdom*, C-172/13, EU:C:2015:50, paragraph 36 and the case-law cited).

56 As regards the losses at issue in the main proceedings, the Republic of Austria has indicated that not all the possibilities for taking those losses into account have been exhausted in Austria.

57 It is, however, for the referring court to determine whether Timac Agro has in fact adduced proof of the definitive nature of the losses concerned.

58 Having regard to all the foregoing considerations, the answer to the first question is that Article 49 TFEU must be interpreted as not precluding a Member State's tax regime, such as that at issue in the main proceedings, under which, in the event of transfer by a resident company to a non-resident company within the same group of a permanent establishment situated in another Member State, the losses previously deducted in respect of the establishment transferred are reincorporated into the taxable profit of the transferring company where, under a double taxation convention, the income of such a permanent establishment is exempt from tax in the Member State in which the company to which that establishment belonged has its seat.

The second question

59 It is apparent from the order for reference that, unlike the tax years 1997 and 1998, as from the tax year 1999, following an amendment of the German tax regime, the losses of a non-resident permanent establishment are no longer taken into account in Germany if the Member State in which the establishment is situated has the exclusive power to tax its profits.

60 It is also apparent from the order for reference that, under the German-Austrian Convention, such power lies with the Republic of Austria.

61 It must, therefore, be considered that, by its second question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding a Member State's tax regime, such as that at issue in the main proceedings, which, in the event of transfer by a resident company to a non-resident company within the same group of a permanent establishment situated in another Member State, excludes the possibility, for the resident company, of taking into account in its tax base the losses of the establishment transferred where, under a double taxation convention, the exclusive power to tax the profits of that establishment lies with the Member State in which the establishment is situated.

62 In that regard, it should be borne in mind that, first, a tax regime which allows losses incurred by a permanent establishment situated in the territory of the Member State concerned to be taken into account in calculating the profits and taxable income of a resident company to which that establishment belongs constitutes a tax advantage, and, secondly, denial of that advantage where the losses are incurred by a permanent establishment situated in a Member State other than that in which that company is established is liable to deter a resident company from carrying on its business through a permanent establishment situated in another Member State, and, therefore, constitutes a restriction prohibited in principle by the provisions of the Treaty that relate to freedom of establishment (see, to that effect, judgment in *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraphs 23 to 26).

63 In accordance with the case-law referred to in paragraph 26 of the present judgment, such a restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest.

64 As regards comparability of the situations, as has been pointed out in paragraph 27 of the present judgment, a permanent establishment situated in another Member State is not, in principle, in a situation comparable to that of a resident permanent establishment in relation to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits.

65 In the present case, it must be held that, since the Federal Republic of Germany does not exercise any tax powers over the profits of such a permanent establishment, the deduction of its losses no longer being permitted in Germany, the situation of a permanent establishment situated in Austria is not comparable to that of a permanent establishment situated in Germany in relation to measures laid down by the Federal Republic of Germany in order to prevent or mitigate the double taxation of a resident company's profits (see, to that effect, judgment in *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 24 and the case-law cited).

66 In those circumstances, the answer to the second question is that Article 49 TFEU must be interpreted as not precluding a Member State's tax regime, such as that at issue in the main proceedings, which, in the event of transfer by a resident company to a non-resident company within the same group of a permanent establishment situated in another Member State, excludes the possibility, for the resident company, of taking into account in its tax base the losses of the establishment transferred where, under a double taxation convention, the exclusive power to tax the profits of that establishment lies with the Member State in which the establishment is situated.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 49 TFEU must be interpreted as not precluding a Member State's tax regime, such as that at issue in the main proceedings, under which, in the event of transfer by a resident company to a non-resident company within the same group of a permanent establishment situated in another Member State, the losses previously deducted in respect of the establishment transferred are reincorporated into the taxable profit of the transferring company where, under a double taxation convention, the income of such a permanent establishment is exempt from tax in the Member State in which the company to which that establishment belonged has its seat.**

2. **Article 49 TFEU is to be interpreted as not precluding a Member State's tax regime, such as that at issue in the main proceedings, which, in the event of transfer by a resident company to a non-resident company within the same group of a permanent establishment situated in another Member State, excludes the possibility, for the resident company, of taking into account in its tax base the losses of the establishment transferred where, under a double taxation convention, the exclusive power to tax the profits of that establishment lies with the Member State in which the establishment is situated.**

[Signatures]

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* Language of the case: German.