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**Opinion Statement ECJ-TF 2/2015
on the decision of the European Court of Justice in Case C-172/13,
European Commission v. United Kingdom (“Final Losses”),
concerning the “*Marks & Spencer* exception”**

Prepared by the CFE ECJ Task Force

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This is an Opinion Statement prepared by the CFE ECJ Task Force¹ on Case C-172/13, *European Commission v United Kingdom*,² which was decided by the Grand Chamber of the Court of Justice of the European Union (ECJ) on 3 February 2015. This case is in some ways a follow-up to the ECJ's decision in *Marks & Spencer*³ and comments on whether the legislative amendments introduced by the United Kingdom are sufficient to ensure compliance with European Union law. After illustrating the case, arguments of the parties and decision of the Court, this Opinion Statement will focus on selected critical points from the Courts decision and Advocate General Kokott's opinion.⁴

I. Background and Issues

1. United Kingdom domestic tax law provides for a system of "group relief" that allows losses incurred by one company to be surrendered to, and offset against the profits of, another company of the same group arising in the same accounting period. Under these rules, group relief had initially been restricted to UK companies and UK permanent establishments. Non-UK losses could never be surrendered and offset against UK profits. Questioning the compatibility of this domestic regime with EU Law, and more specifically with the freedom of establishment, *Marks & Spencer* challenged that exclusion and that issue was eventually referred to the ECJ.⁵ In its decision of 13 December 2005, the Court's Grand Chamber found a restriction of the freedom of establishment, but also viewed that restriction as justified unless there was no possibility to use losses at issue in their home jurisdiction. The Court held that

"as Community law now stands, Articles 43 EC and 48 EC do not preclude provisions of a Member State which generally prevent a resident parent company from deducting from its taxable profits losses incurred in another Member State by a subsidiary established in that Member State although they allow it to deduct losses incurred by a resident subsidiary. However, it is contrary to Articles 43 EC and 48 EC to prevent the resident parent company from doing so where the non-resident 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 and where there are no possibilities for those 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."⁶

2. This reasoning is known as the "*Marks & Spencer* exception"⁷ or the "final losses" doctrine. In short, to ensure non-discriminatory application of group relief, the Court held that losses made by non-resident subsidiaries may be taken into account by a resident parent company but when it is possible in domestic situations and when it is no longer possible to take them into account in the State of the subsidiary.

¹ Members of the Task Force are: Alfredo Garcia Prats, Daniel Gutmann, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, Franck Le Mentec, João Félix Pinto Nogueira, Pasquale Pistone, Albert Rädler†, Stella Raventos-Calvo, Isabelle Richelle, Friedrich Roedler and Kelly Stricklin-Coutinho. Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. The Task Force wishes to thank George Gillham and Rupert Shiers for their valuable comments.

² EU:C:2015:50.

³ Case C-446/03, *Marks & Spencer*, EU:C:2005:763.

⁴ Opinion of A.G. Kokott, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321.

⁵ Referred to the ECJ by the UK High Court in *Marks & Spencer v Inland Revenue* [2003] EWHC 1945 (Ch); the preceding decision by the Special Commissioners, *Marks & Spencer plc v David Halsey*, SPC00352, [2003] STC (SCD) 70 = [2003] EuLR 46, declined to find a violation of EU law.

⁶ C-446/03, *Marks & Spencer*, EU:C:2005:763, at para. 59.

⁷ Found in Case C-446/03, *Marks & Spencer*, EU:C:2005:763, para. 55.

Debate continues as to whether this is also the case where the profit-making and loss-making company are not parent and subsidiary but have a different relationship within the group. Despite criticism and unclear scope,⁸ the “final losses” doctrine has become a constant theme in the Court’s subsequent case law on foreign losses, e.g., in *Lidl Belgium*,⁹ *X Holding*,¹⁰ *A Oy*¹¹ and *K*.¹²

3. Following the decision in *Marks & Spencer*, the UK reacted by amending its Income and Corporation Taxes Act 1988 (ICTA 1988),¹³ with effect from 1 April 2006, and provided administrative guidance on the new rules.¹⁴ Those conditions were substantially kept in the Corporation Tax Act 2010 (CTA 2010). The new regime allows for foreign losses to be offset against UK profits if the losses could not be taken into account in the jurisdiction where they were sustained (or broadly any other jurisdiction – this is discussed below) in the period they were incurred, or in previous or future accounting periods.¹⁵ For future periods, the moment to assess whether they could be taken into account is “at the time immediately after the end” of the accounting period in which the losses were sustained¹⁶ (procedurally, however, the claim for relief can be lodged at any time within two years of the end of the period, or longer if HMRC open an enquiry into the tax return of the company claiming the losses for offset¹⁷). Under the CTA 2010 rules, in order to qualify for group relief in the UK, a foreign loss has to satisfy four conditions: (1) the “equivalence condition” (i.e., the foreign loss should have the same nature of the losses allowable under UK’s group relief rules); (2) the “EEA tax loss condition” (i.e., the loss should be considered as a loss under the law of the EEA territory of residence of the foreign subsidiary); (3) the “qualifying loss condition” (i.e., the loss cannot be relieved in the EEA Member State of residence and cannot be relieved in another EEA Member State); and (4) the “precedence” condition (i.e., the loss cannot have been relieved in any territory of residence of an intermediate foreign company).¹⁸ Accordingly, a loss determined under the rules of the State where it was incurred must be recalculated in accordance to UK principles,¹⁹ and only the lower of the two amounts (foreign calculation and UK calculation) will be considered.²⁰
4. Although the UK amended its legislation after the Court’s judgment in *Marks & Spencer*, this case was brought because the Commission took the position that “it continues to impose conditions on cross-border group loss relief which, in practice, make it very difficult to benefit from” and that this infringes

⁸ See, e.g., Opinion of A.G. Kokott, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, paras. 36 et seq. (calling for the abandonment of the “*Marks & Spencer* exception”).

⁹ Case C-414/06, *Lidl Belgium*, EU:C:2008:278.

¹⁰ Case C-337/08, *X Holding*, EU:C:2010:89.

¹¹ Case C-123/11, *A Oy*, EU:C:2013:84.

¹² Case C-322/11, *K*, EU:C:2013:716.

¹³ With the Finance Act 2006.

¹⁴ See HMRC’S guidance in “CTM81500 – Groups: group relief: surrendering company not UK resident”, available at <http://www.hmrc.gov.uk/manuals/ctmanual/ctm81500.htm>.

¹⁵ See sections 188 and 119(3) CTA.

¹⁶ Section 119(1) and (4) CTA. See also the example in CTM8535: “If a company has made a loss in its EEA territory of residence but at the yearend it continues to exist, either trading or with other sources of income, into the next period and there is a possibility that relief may arise in a later period, against trading or other profits then the loss cannot be surrendered. If, as a matter of fact, no profits arose before the carry forward of relief became time barred, this does not alter the position that the loss was carried forward and might have been given as relief. This is a distinct test applied to the situation existing at the time of loss and does not interact with the two-year limit for claims to group relief, which remains unchanged.”

¹⁷ See Schedule 18 paras 14(1)(a) and 74(1)(a) Finance Act 1998.

¹⁸ See Section 113 CTA2010; see also CTM81500 et seq. and in particular CTM81510.

¹⁹ See CTM81560.

²⁰ See Section 128 CTA 2010 and CTM81590.

“the principle of non-discrimination and the freedom of establishment, set down in the Treaty”.²¹ The Commission’s claims were twofold:²²

- a. First, the Commission claimed that Section 119 of the UK Corporate Tax Act 2010, which requires the assessment of the usability of losses for future years “at the time immediately after the end” of the accounting period when the losses were sustained, would make it “virtually impossible for a resident parent company to obtain cross-border group relief”. The Commission argued that under UK rules cross-border group relief may be granted in only two situations, i.e., (1) where no provision is made under the legislation of the State of residence of the non-resident subsidiary for losses to be carried forward and, (2) where the non-resident subsidiary enters liquidation before the end of the tax year in which the losses are sustained. Conversely, “[c]ross-border group relief is thus precluded in the normal commercial situation” (i.e., outside a liquidation) and, moreover, “relief is limited to losses sustained in a single tax period”. Compliance with the *Marks & Spencer* principle would, however, require that the possibility of obtaining tax relief in the State of residence must be assessed (1) at the time when the claim for group relief is made in the United Kingdom and (2) on the basis of the actual facts of the case, and not on the basis of some theoretical possibility (of subsequently taking into account losses sustained by the non-resident subsidiary) which exists only because the foreign subsidiary has not yet been placed in liquidation.
 - b. Second, the Commission raised the obligations imposed on the United Kingdom by the ECJ’s decision. The Commission noted that the new regime in the UK came into force only on 1 April 2006, and argued that UK law should have been given retroactive effect in order to allow cross-border group relief for losses incurred before 1 April 2006.
5. The UK rebutted the Commission’s arguments.²³ It claimed that it followed closely the Court’s guidance and that the “*Marks & Spencer* exception”²⁴ required assessment (of the possibility of loss carry forward) to be made at the end of the period in which the losses arise. Moreover, the UK argued that the requirements of the domestic rules could be met in cases beyond those mentioned by the Commission, as domestic law did not require the subsidiary’s liquidation before the end of the period for loss offset to be permitted. Rather, many factors could be taken into account at the end of the accounting period in order to ascertain the fulfilment of the condition such as the intention to wind up a loss-making subsidiary or the initiation of the liquidation process soon after the end of the accounting period.

II. The Judgment of the Court

6. The Court’s Grand Chamber dismissed the infringement action brought by the Commission against the UK,²⁵ reiterating and refining its previous decision in *Marks & Spencer*. The Court basically reaffirmed that UK Law, by creating a difference in a UK company’s ability to offset losses, between those made by resident and non-resident companies, hinders “the exercise by the group parent company of its freedom of establishment”,²⁶ and that the measure should be tested against “three overriding reasons

²¹ See the Commission’s press release “Taxation: Commission refers UK to the European Court of Justice over cross-border loss relief”, IP/12/1017 (27 September 2012); see also “Corporate taxation: Commission refers the United Kingdom to the European Court of Justice over improper implementation of an ECJ ruling on cross-border loss relief”, IP/09/1461 (8 October 2009).

²² Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, paras. 14-16.

²³ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, paras. 17-18.

²⁴ Case C-446/03, *Marks & Spencer*, EU:C:2005:763, para. 55.

²⁵ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50.

²⁶ See Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 23.

in the public interest, taken together”, i.e., “the need to preserve the balanced allocation of powers of taxation between Member States, the need to prevent the double use of losses and the need to combat tax avoidance”.²⁷ Also, as in *Marks & Spencer*, the Court noted that that these three justifications should be taken together when testing proportionality, which in turn must be appropriate for achieving the objectives mentioned and not go beyond what is necessary to achieve them. And, as in *Marks & Spencer*, the Court ruled that domestic law would be disproportionate if the possibility of offsetting the losses by the parent company was “wholly precluded”. Surrender and offset, however, has to be allowed (only) of “definitive losses”.²⁸ This review of *Marks & Spencer* provided the framework for the analysis of the Commission’s two claims.

7. As for the Commission’s first claim (i.e., that loss deduction is “virtually impossible”), the Court noted that the Commission did not claim that domestic law absolutely prevents loss deduction; it only claimed that it makes it “virtually impossible”. In the Commission’s reading of UK Law this is so because losses could only be deducted in two situations, i.e.,
- when no possibility of use exists in the State where the losses were sustained (e.g., absence of loss carry-forward) and
 - when the subsidiary is already in liquidation at the close of the relevant period.

Following *K*,²⁹ the first situation was considered irrelevant by the Court, as such losses would not be “definitive losses” as the term was used in *Marks and Spencer*. As for the second situation (i.e., cases where loss carry-forward is allowed in the State of the subsidiary), the Court rejected the Commission’s claim that deduction is only possible when the subsidiary is liquidated before the end of the accounting period as an incorrect interpretation of domestic law:

“As regards the second situation referred to, it should be noted, first, that the Commission has not established the truth of its assertion that Section 119(4) of the CTA 2010 requires the non-resident subsidiary to be put into liquidation before the end of the accounting period in which the losses are sustained in order for its resident parent company to be able to obtain cross-border group relief. [...] Under Section 119(4) of the CTA 2010, in fact, the assessment as to whether the losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* (EU:C:2005:763), must be made by reference to the situation obtaining ‘immediately after the end’ of the accounting period in which the losses were sustained. It is thus clear from the wording of that provision that it does not, on any view, impose any requirement for the subsidiary concerned to be wound up before the end of the accounting period in which the losses are sustained. [...] Secondly, it should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* (EU:C:2005:763), only if that subsidiary no longer has any income in its Member State of residence. So long as that subsidiary 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 the Member State in which it is resident [...]. [...] Referring to a specific example of a resident parent company which obtained cross-border group relief, the United Kingdom confirmed that it is possible to show that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* (EU:C:2005:763), where, immediately after the end of the accounting period in which the losses

²⁷ See Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 24.

²⁸ See Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, paras. 26 and 27.

²⁹ Case C-322/11, *K*, EU:C:2013:716, paras. 75-79.

have been sustained, that subsidiary ceased trading and sold or disposed of all its income producing assets.”³⁰

8. As for the Commission’s second claim (i.e., that the UK legislation does not permit surrender and offset for periods before 1 April 2006), the Court dismissed this claim by stating that the Commission failed to provide evidence of situations in which relief of losses sustained before that date was denied.

III. Comments

9. The present case of *European Commission v. United Kingdom* offers another landmark in the long line of ECJ decisions on cross-border utilization of losses. Starting in late-2005 with *Marks & Spencer* (itself a case that dealt with losses incurred in the mid-1990s³¹ by companies that ceased operations in the early-2000s³²) the Court dealt with its legacy (and problems of implementation) in cases such as *Lidl Belgium*,³³ *X Holding*,³⁴ *A Oy*,³⁵ and *K*,³⁶ adding increasing complexity and detail to the “*Marks & Spencer* exception”. Ten years ago this exception for “final losses” seemed to apply in particular with regard to the Member States’ “need to prevent the double use of losses” (because there is no remaining risk of such double utilization if a loss becomes “final” in one jurisdiction).³⁷ Indeed, as is also clear from the subsequent litigation in the United Kingdom (up to the UK Supreme Court³⁸), “[t]he judgment in *Marks & Spencer* has not, however, brought about *quieta*, as it has consistently remained unclear with regard to its effects.”³⁹ Hence, even a decade after *Marks & Spencer*, uncertainty regarding its exact meaning remains. It is hence welcome that the Court in *European Commission v. United Kingdom* has given further guidance on the “final losses” doctrine. Moreover, that fact that this decision – just as *Marks & Spencer* – was rendered by a Grand Chamber certainly increases the authority of the ruling.⁴⁰ However, some questions remain unanswered.

10. The operative part of the decision is notably short. It is composed of mere 25 paragraphs.⁴¹ The controversial character of some *obiter dicta* and the need to seek consensus may have dictated the streamlined nature of the decision. Nonetheless, it should be recognized that the Court’s decision was based on the well-known approach to comparability and justification. Most importantly, the Court has not followed Advocate General *Kokott*’s plea to abandon the “*Marks & Spencer* exception”⁴² (which

³⁰ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, paras. 34-38.

³¹ Case C-446/03, *Marks & Spencer*, EU:C:2005:763, para. 20.

³² Case C-446/03, *Marks & Spencer*, EU:C:2005:763, para. 21.

³³ Case C-414/06, *Lidl Belgium*, EU:C:2008:278.

³⁴ Case C-337/08, *X Holding*, EU:C:2010:89.

³⁵ Case C-123/11, *A Oy*, EU:C:2013:84.

³⁶ Case C-322/11, *K*, EU:C:2013:716.

³⁷ See also, e.g., Opinion of A.G. *Kokott*, 19 July 2012, Case C-123/11, *A Oy*, EU:C:2012:488, para. 48, noting that the “final losses” doctrine “can be understood only against the background of the justifications considered in *Marks & Spencer*. The Court based the justification in that case not only on the objective of preserving the allocation of taxation powers among Member States but also, *inter alia*, on the right of the Member States to prevent losses from being used twice. [...] There will be no fear of losses being used twice where the losses of a foreign subsidiary can no longer be used in its State of residence. Consequently a national provision which refuses to allow the parent company to use the loss even in such a case goes further than is necessary in order to prevent losses from being used twice.”

³⁸ UK Supreme Court, 22 May 2013, *Commissioners for Her Majesty’s Revenue and Customs v Marks and Spencer plc*, [2013] UKSC 30, and UK Supreme Court, 19 February 2014, *Commissioners for Her Majesty’s Revenue and Customs v Marks and Spencer plc*, [2014] UKSC 11.

³⁹ Opinion of A.G. *Kokott*, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, para. 42.

⁴⁰ According to the Statute of the Court, it shall sit in a 13-Judge Grand Chamber “when a Member State or an institution of the Union that is a party to the proceedings so requests” (see Art. 16(3) of Protocol (No 3) on the Statute of the Court of Justice of the European Union).

⁴¹ See the “Findings of the Court” in Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, paras. 21-45.

⁴² Advocate General *Kokott* supported her plea not only by reference to the shortcomings of *Marks & Spencer* also in light of the Court’s subsequent jurisprudence (e.g., in Case C-123/11, *A Oy*, EU:C:2013:84, and Case C-322/11, *K*, EU:C:2013:716), but also

would mean that the home State would not be required to take into account even foreign “final losses”⁴³) but clearly upheld the “final losses” doctrine.

11. Besides upholding *Marks & Spencer* in principle, the Court further clarifies that exception in several aspects:

- a. First, lack of a loss carry-forward in the subsidiary’s state does not lead to losses being available for offset, i.e., “losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* (EU:C:2005:763), by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward”.⁴⁴ This position was already taken by the Court in *K*,⁴⁵ which concerned “adverse consequences arising from particularities” of domestic law of the source State, i.e., the rather unusual rule that domestic law allows no carry-forward at all. The present decision seems to imply, however, that more generally in cases of mere legal restrictions to loss-utilization in the subsidiary’s State (e.g., lack of a loss carry-forward, anti-abuse provisions etc) “the Member State in which the parent company is resident may not allow cross-border group relief without thereby infringing Article 49 TFEU”.⁴⁶
- b. Second, the Court confirms and develops its decision in *A Oy*⁴⁷ by finding that losses may only be considered as definitive “if that subsidiary no longer has any income in its Member State of residence”.⁴⁸ More concretely, “[s]o long as that subsidiary 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 the Member State in which it is resident”.⁴⁹ Examples mentioned in *A Oy* by the Member States (and obviously acknowledged by the Court) include (very small) income from assigning existing leases and capital gains made on the assets and liabilities.⁵⁰ Hence, ceasing trading alone is not sufficient in itself to satisfy the *Marks & Spencer* exception if some income is still being generated (e.g., when the company’s assets are liquidated).⁵¹ The Court’s wording does not make it entirely clear if this is a “black-or-white” test or if a more nuanced proportionality test is required (i.e. it seems to be unclear whether, if there are losses of 100 and a possibility of future trading profits of 10, 90 should be available for surrender). As a side note, in the area of losses of foreign permanent establishments, A.G. *Wathelet* has recently accepted that, if

by three main arguments, i.e., that overruling *Marks & Spencer* would (1) resolve contradictions in relation to the Court’s other case-law on tax matters; (2) be in line with legal certainty; and (3) not infringe the ability-to-pay principle. See Opinion of A.G. *Kokott*, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, paras. 36 et seq. See also the fundamental criticism of the *Marks & Spencer* line of case law in the Opinion of A.G. *Kokott*, 19 July 2012, Case C-123/11, *A Oy*, EU:C:2012:488, paras. 47-54.

⁴³ Advocate General *Kokott* rejected a system of loss-utilization with recapture as a possible alternative: “A system of relief for losses incurred by non-resident subsidiaries which was practicable for the internal market could only connect their current relief with the incorporation of future profits, as has already been discussed in *Marks & Spencer*. Such a solution would offer the parent company both the cash flow advantage and the advantage of relief in respect of the total loss. However, this solution would result in a broad degree of equal treatment of losses incurred by non-resident and resident subsidiaries. It would thus undermine the principle in established case-law that a Member State is required to take into account a loss from foreign activity only if it also taxes that activity.” See Opinion of A.G. *Kokott*, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, para. 49.

⁴⁴ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 33.

⁴⁵ Case C-322/11, *K*, EU:C:2013:716, paras. 75-79.

⁴⁶ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 33.

⁴⁷ Case C-123/11, *A Oy*, EU:C:2013:84.

⁴⁸ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 36.

⁴⁹ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 36, referring to Case C-123/11, *A Oy*, EU:C:2013:84, paras. 53 and 54.

⁵⁰ Case C-123/11, *A Oy*, EU:C:2013:84, para. 53.

⁵¹ According to the Court’s decision in *A Oy*, the mere cease in trade of a subsidiary that is placed on liquidation is not sufficient, *per se*, to conclude that the loss is definitive; see Case C-123/11, *A Oy*, EU:C:2013:84, paras. 51 and 54, and Opinion of A.G. *Kokott*, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, para. 40.

losses of a wound-up permanent establishment “stick” with the taxpayer and could (theoretically) be used as carry-forwards if that taxpayer were to resume an activity in the source State, are not “final”.⁵²

- c. Third, on one view the Court accepts that the assessment of “finality” of losses, i.e., the determination that there is no possibility for the losses being taken into account, is to be made “immediately after the accounting period”.⁵³ As UK legislation requires such assessment “immediately after” (and not “before the end”) of the accounting period, the UK noted (and the Court acknowledged) that this requirement does not necessitate that the subsidiary is (completely) wound up.⁵⁴ “Final losses” can therefore also exist “where, immediately after the end of the accounting period in which the losses have been sustained, that subsidiary ceased trading and sold or disposed of all its income producing assets”.⁵⁵ In assessing, at the end of the accounting period in which the losses were sustained, whether losses are “final”, “[e]vidence of an intention to wind up a loss-making subsidiary and initiation of the liquidation process soon after the end of the accounting period would be factors to be taken into account”.⁵⁶ On this view, “finality” of losses needs to be determined immediately after the period in which the losses were incurred, and not – as, e.g., the UK Supreme Court⁵⁷ and other domestic courts⁵⁸ have thought – at any later time even if it is clear by then that the loss would not be used in any period after it arose. Hence, if (immediately after the end of the accounting period) there is still some hope of using a subsidiary's losses (e.g., through future profits), no relief in the parent's State need be granted, even if it subsequently becomes clear that no such future profits materialised (and, e.g., the subsidiary was later liquidated). However, it is notable that the Court referred twice to the decision of the UK Supreme Court but did not contradict its conclusion on this point.⁵⁹
- d. Fourth, and intimately related, if the Court has accepted the timing of assessment under UK law (“immediately after the accounting period”), it might have accepted a (rather surprising) further limitation of the “*Marks & Spencer* exception”: The Commission had pointed out that, under the UK rules, “only the loss in respect of a single accounting period may therefore be transferred”,⁶⁰ and it indeed seems to be the UK's position⁶¹ that only the losses sustained in the accounting period that has just ended (and, under certain circumstances, those incurred in the accounting period that immediately follows⁶²) can become “final” and qualify for loss relief, but not losses from any previous years, whether

⁵² Opinion of A.G. *Wathelet*, 3 September 2015, Case C-388/14, *Timac Agro Deutschland*, ECLI:EU:C:2015:533, para. 67 with note 45.

⁵³ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, paras. 34-24.

⁵⁴ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 35.

⁵⁵ See the UK's position as restated in Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 37.

⁵⁶ See for that understanding of UK legislation Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 18.

⁵⁷ UK Supreme Court, 22 May 2013, *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc*, [2013] UKSC 30.

⁵⁸ See, e.g., German Bundesfinanzhof, 9 June 2010, I R 107/09, German Bundesfinanzhof, 9 November 2010, I R 16/10, and Fiscal Court Hamburg (Germany), 6 August 2014, 2 K 355/12

⁵⁹ See the references to UK Supreme Court, 22 May 2013, *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc*, [2013] UKSC 30, in paras. 7 and 42 in Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50.

⁶⁰ See Opinion of A.G. *Kokott*, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, para. 15, and Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 15.

⁶¹ See Section 119(1) and (4) CTA, and also the example in CTM8535.

⁶² As the UK has contended, “final losses” can also exist “where, immediately after the end of the accounting period in which the losses have been sustained, that subsidiary ceased trading and sold or disposed of all its income producing assets” (see the UK's position as restated in Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 37). This implies that loss relief is possible not only in “respect of a single accounting period” (as the Commission had claimed) but rather for losses from two accounting periods, i.e., (1) for the losses incurred in the accounting period *before* the subsidiary ceased trading and sold or disposed of all its income producing assets, and (2) for the losses incurred *in* the accounting period in which the subsidiary ceased trading and sold or disposed of all its income producing assets. One might then pose the question if the losses of even more accounting periods may be eligible for relief, e.g., because disposing of assets takes more than one accounting period.

effectively relieved in the subsidiary's State or not.⁶³ If, for the sake of argument, we assume that the Court has fully accepted this conclusion, the "*Marks & Spencer* exception" clearly loses much of its practical importance (because "final losses" are only losses of one taxable period and do not include unused carry-forwards from previous periods) and may put more focus on tax planning by creating strange incentives (e.g., to completely wind-down or take-over the trading activities and all assets of the subsidiary to enable loss utilisation). Such a narrow understanding, however, would certainly be a surprise for those domestic courts that have applied the "*Marks & Spencer* exception" to accumulated foreign "final" losses of several years (and not only to the losses of the last taxable year).⁶⁴

12. It is not entirely clear if all of the above conclusions and their potentially far-reaching effects on the utilisation of "final" losses can indeed be inferred from the Court's decision, given that the outcome of an infringement proceeding does not necessarily mean that Member State's law is in full compliance with EU law. It could also merely indicate that the Commission has failed to prove a violation of EU law. Hence, *European Commission v. United Kingdom* may have limited effect, or it may mean that the "*Marks & Spencer* exception" is reduced to a very limited number of situations. If there still is a hope for future profits, the possibility of using the losses against those profits by carry-forward seems to prevent those losses from being final: Even minimal income of a subsidiary creates "a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident".⁶⁵ Also, in the framework of a liquidation (and if carry-forward is admissible), it seems that losses of the subsidiary will not be "final" if, e.g.,

- there are judicial or administrative claims in progress (regardless of whether those claims are brought by or against the subsidiary);
- there are situations where an impairment was deemed to be needed but the loss is not realised (e.g., if the subsidiary has a claim against a doubtful debtor for which the impairment was recorded but there is at least a theoretical possibility of recovering such amount);
- assets with unrealized gains are kept at the end of the accounting period; or
- mere theoretical possibilities of income exist. Also, it remains unclear whether procedural rules may have an impact on the concept of "final" losses, e.g., with regard to the statute of limitations.⁶⁶

That said, this rather narrow understanding of the "*Marks & Spencer* exception" contrasts with the whole rationale of group as pictured by the court, i.e., granting the group a cash-flow advantage "by

⁶³ Imagine the following example: Company X, an EU subsidiary of a UK parent, was active in three years, having only losses (that cannot be carried backwards or otherwise compensated in the State where they are located). In year 1 there were losses of 20.000 (calculated under both tax systems), in year 2 30.000 and in year 3 60.000 (and in this year, the company is liquidated in November). Under UK rules it seems that only the losses of year 3, i.e., 60.000, could potentially be relieved in the UK as "final losses", whereas 50.000 of loss carry-forwards from years 1 and 2 would remain unrelieved.

⁶⁴ See concerning "final" permanent establishment losses, e.g., German Bundesfinanzhof, 9 June 2010, I R 107/09 (taxable years 2000-2001); German Bundesfinanzhof, 5 February 2014, I R 48/11 (taxable years 1997-1998); Fiscal Court Hamburg (Germany), 6 August 2014, 2 K 355/12 (taxable years 2004-2008).

⁶⁵ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 36, referring to Case C-123/11, *A Oy*, EU:C:2013:84, paras. 53 and 54.

⁶⁶ It may be questioned, e.g., if one is obliged to wait (1) for end of the period defined by the (tax) statute of limitation for the loss to be considered final (as the company may be attributed new profits, e.g., in the framework of a transfer pricing adjustment), or (2) even for the end of all periods for administrative and judicial appeals (and if so, only the ordinary or also the extraordinary ones).

speeding up the relief of the losses of loss-making companies by allowing them to be set off immediately against the profits of other group companies”.⁶⁷

13. Another open issue is the quantification of “final” losses, i.e., which State’s tax rules are used to determine the amount of losses. This question was briefly addressed by the Court in *A Oy*, where it stressed that such “calculation must not lead to unequal treatment compared with the calculation which would have been made in a similar case for the taking over of the losses of a resident subsidiary”.⁶⁸ Notwithstanding, in that case, the Court also noted that such “question cannot, however, be addressed in an abstract and hypothetical manner, but must be analysed where necessary on a case-by-case basis”.⁶⁹ Unfortunately the Court in the present case of *European Commission v. United Kingdom* did not have to address the UK requirement that “final” losses need to be recomputed in accordance with UK rules and only the lower of the two amounts (foreign computed loss v. domestic computed loss) is to be taken into account at the UK level.⁷⁰ While, under the logic of the UK Supreme Court’s decision this requirement would appear to breach the fundamental freedoms,⁷¹ we wonder whether the distinction made under UK law is in line with *Marks & Spencer*. Additional case law is necessary to clarify this issue.
14. Finally, one may recall *Biehl II*, where the Court has stated that “incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended”,⁷² i.e., that legislative actions and not mere administrative practices are required for the proper fulfilment of a Member State’s obligations under the Treaty. In the present case of *European Commission v. United Kingdom*, the Court did not elaborate on whether the domestic law amendments were to have retroactive effects, but rather dismissed the Commission’s second plea: It focused on the burden of proof and pointed out that the Commission “has not established the existence of situations in which cross-border group relief for losses sustained before 1 April 2006 was not granted” and even left it open if a UK Supreme Court decision “according to which losses sustained before that date are not excluded from cross-border group relief, satisfies the need for legal certainty as regards the possibility of obtaining cross-border group relief for losses sustained before that date”.⁷³ From this it might (wrongly) be concluded that absence of legislative amendments taking effects *ex tunc* (or a delay in taking legislative action at all) is, therefore, not necessarily perceived as a breach of EU law. The problem of lack of legislative action (or delay) by Member States is, however, sometimes closely related to the

⁶⁷ See Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 22, and Opinion of A.G. Kokott, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, para. 20. The Court has, however, not considered the “second and more significant” advantage of group relief as pointed out by Advocate General Kokott: “Where, on balance across all the accounting periods for its activity, the subsidiary makes only a loss (‘total loss’), group relief goes beyond being a mere cash flow advantage. In this case, on the basis of the loss relief, the parent company does not pay any tax on its income to the amount of the total loss incurred by its subsidiary, and this is definitive. The same situation exists where the subsidiary does not collapse economically, but its loss carry-forward is limited by law and, for that reason, losses incurred by it are not subject to tax relief.” See Opinion of A.G. Kokott, 23 October 2014, Case C-172/13, *European Commission v. United Kingdom*, EU:C:2014:2321, para. 21.

⁶⁸ Case C-123/11, *A Oy*, EU:C:2013:84, para. 59.

⁶⁹ Case C-123/11, *A Oy*, EU:C:2013:84, para. 60.

⁷⁰ See Section 128 CTA 2010 and CTM81590, which explains that “[t]he amount of loss to be relieved is the foreign loss recomputed in accordance with UK principles. However, where the amount recomputed under UK rules exceeds the eligible foreign loss the amount available for surrender by way of group relief cannot exceed the quantum of eligible foreign loss. Such differences will arise, for example, because of timing differences in the recognition of income or expenditure so will either be amounts that have already been relieved or could be relieved in future.” See also HMRC’s guidance in CTM81625 “Groups: group relief: surrendering company not UK resident: examples: comparison of UK and EEA loss”.

⁷¹ See paras. 49-53 of UK Supreme Court, 19 February 2014, *Commissioners for Her Majesty’s Revenue and Customs v Marks and Spencer plc*, [2014] UKSC 11 (conversion to UK rules the unutilised losses as determined under domestic rules).

⁷² Case C-151/94, *Commission v. Luxembourg (“Biehl II”)*, EU:C:1995:357, para. 18.

⁷³ Case C-172/13, *European Commission v. United Kingdom*, EU:C:2015:50, para. 43.

uncertainty surrounding the Court's case law: The *Marks & Spencer* legacy shows the problem surrounding the "final loss exception" (not to speak of legislative implementation), and in some areas it even seems that the Court later relaxes its case law (and hence rewards those Member States who had not taken legislative action at all). Moreover, in some instances the Court hands down broad and open-ended decisions and leaves it to the domestic court to decide the issue (recently, e.g., in *A Oy*⁷⁴ or *Sopora*⁷⁵). While it is certainly true that the Court may only interpret EU Law (and not provide normative solutions or rule on domestic law), one may wonder if instead of broad decisions more precise guidance could be provided by the Court, thus preventing doctrinal debates and continuous litigation.

IV. The Statement

15. The *Confédération Fiscale Européenne* welcomes the additional explanation on the concept of "definitive losses" established in *Marks & Spencer*. Furthermore, it notes that in certain factual and legal patterns it remains doubtful whether and when the exception applies.
16. The *Confédération Fiscale Européenne* notes that in practice, on one view this exception will be applicable in only very limited circumstances. The "new" understanding of definitive losses and the need to assess useability "immediately after the end of the accounting period" would necessarily lead to offset of losses being only allowed in a limited number of cases. This restriction may lead companies to liquidate their subsidiaries for tax purposes. This hampers economic efficiency and therefore the development of the internal market. The latter would require immediate off-setting of foreign losses in the State of the parent company, coupled with an efficient recapture rule.
17. Hence, the *Confédération Fiscale Européenne* welcomes that the Commission will re-launch the project on a CCCTB and plans to propose that, "until full CCCTB consolidation is introduced, group entities should be able to offset profits and losses they make in different Member States".⁷⁶ Such cross-border loss relief would be temporary (with recapture once the group entity is profit-making again) and would remove a major tax obstacle in the internal market for businesses.

⁷⁴ Case C-123/11, *A Oy*, EU:C:2013:84.

⁷⁵ Case C-512/13, *Sopora*, EU:C:2015:108.

⁷⁶ See Chapter 3.1 of the Commission's Communication "A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action", COM(2015) 302 final (17 June 2015).