The comparability analysis plays an important role in the Court of Justice of the European Union (CJEU)’s case law on the fundamental freedoms: if the situations examined are not objectively comparable, a violation of the fundamental freedoms is not possible. However, the CJEU does not follow a clear line in its decisions with regard to the comparability analysis, which makes it difficult to understand the decision-making process. Legal uncertainty is the result. In its last decision, Aures, in which the Court had to deal with a loss utilization rule, it exceptionally denied the comparability of the situations. Due to the increasing significance of losses in international tax law, the authors analyse the different methods of comparability analysis in cross-border loss utilization used by the CJEU and highlight the associated problematic areas.

1 INTRODUCTION

The European fundamental freedoms are intended to ensure that in comparable situations residents and non-residents are treated equally (so-called principle of national treatment) and thus guarantee the functioning of the internal market. The fundamental freedoms therefore realize the principle of equality. This means equal situations must be treated equally and unequal situations must be treated unequally. According to the CJEU, unequal treatment of non-residents, which can be caused by national (tax) regulations, is only permissible if it concerns situations that are not objectively comparable or if the unequal treatment can be justified by an overriding reason in the public interest.

The comparability of situations plays a central role in the fundamental freedoms test: if non-residents and residents are in an objectively comparable situation, the unequal treatment needs to be justified. As regards the grounds of justification, the Member States bear the burden of proof. If the Member States do not present a ground of justification or if the justification presented is not accepted by the CJEU, the domestic (tax) rule constitutes undue discrimination and, thus, a violation of the fundamental freedom in question. However, the CJEU does not examine the possible grounds of justification if the situations are not objectively comparable. In this case, a violation of the respective fundamental freedom is excluded a priori. The comparability of situations is therefore of crucial importance.

For this reason, a comprehensible and accurate comparability analysis is essential. Nevertheless, this analysis has become increasingly complex in the CJEU’s case law. Uniformity no longer seems to be recognizable. Against the background of the postulate of predictability and legal certainty, this development must be viewed critically.

In one of its more recent decisions, Aures, the CJEU denied the comparability of the situations, thus qualifying a domestic loss utilization rule prohibiting an entity from the Member State of origin – after relocating its place of effective management to the host state – from claiming a tax loss incurred in the Member State of origin as being in conformity with EU law. This decision gives reason to point out the ‘chaos’ surrounding the comparability analysis in view of cross-border loss utilization rules and to analyse it in more detail.

2 FUNDAMENTAL FREEDOMS AND CROSS-BORDER LOSS UTILIZATION IN THE LIGHT OF EU LAW
2.1 The Prohibition of Discrimination and Restrictions of the Fundamental Freedoms

The fundamental freedoms—*as *lex specialis* to the general prohibition of discrimination on the basis of nationality pursuant to Article 18 of the Treaty on the Functioning of the European Union (TFEU)*—prohibit the unjustified discrimination of non-residents and thus aim to ensure the principle of national treatment. National measures may discriminate either on the basis of nationality (so-called direct discrimination) or on the basis of neutral criteria that, in fact, lead to the same result as a distinction based on nationality (so-called indirect discrimination). Moreover, the fundamental freedoms—in contrast to the general prohibition of discrimination under Article 18 of the TFEU—do not only prohibit (direct and indirect) discrimination, but also any restriction. Accordingly, the fundamental freedoms have a two-tier structure: on the one hand, they refer to the principle of equality (prohibition of discrimination) and, on the other hand, they also contain a freedom-law component (prohibition of restriction).

The prohibition of discrimination prohibits objectively comparable situations from being treated differently unless the differentiation can be justified. According to the CJEU, discrimination can consist of ‘the application of different rules to comparable situations or the application of the same rule to different situations’. In the field of tax law (direct and indirect), discrimination is particularly important, whereas restrictions play a rather insignificant role. In order to determine whether a national measure places nationals of other Member States at a disadvantage, a relative assessment is necessary by establishing a pair of comparisons and identifying the relevant criterion for comparison, the *tertium comparationis* (so-called comparability analysis).

2.2 Domestic Loss Utilization Rules in the Light of the Freedom of Establishment

The compatibility of domestic loss utilization rules with the fundamental freedoms is a recurring topic in the literature and before the CJEU. Although the CJEU has consistently held that exclusive competence in the area of direct taxation remains with the Member States, they must nevertheless comply with the primary and secondary legal requirements of EU law when exercising their competence. Accordingly, when introducing national loss utilization rules, the Member States must in particular observe the freedom of establishment set out in Articles 49 et seq. of the TFEU.

According to Article 49 of the TFEU:

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restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
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The personal scope of the freedom of establishment covers individuals as well as legal entities and includes both the taking up of a new activity in another Member State (so-called primary freedom of establishment) and the establishment of agencies, branches, or subsidiaries (so-called secondary freedom of establishment). According to the CJEU, the host country and the country of origin of the person wishing to establish a business must comply with the requirements of the freedom of establishment. Domestic tax rules that restrict the cross-border utilization of losses may—as is shown in the CJEU cases to be discussed here—affect the freedom of establishment and are therefore frequently put to the test under EU law.

As regards the question whether a national tax regulation is compatible with the fundamental freedoms, the CJEU usually applies the following scheme: first, it examines whether the national measure leads to an
unequal treatment of comparable situations (so-called comparability analysis). In this step, the situation of the concrete cross-border situation is compared with a fictitious, purely domestic situation. If the resident and the non-resident are in a substantially similar situation and the non-resident is put at a disadvantage by the domestic provision, there is unequal treatment and thus a restriction (in a broad sense). In a second step, it is then examined whether the national measure is adequate to achieve the envisaged objective and whether it is proportionate (so-called justification and proportionality analysis). In the decisions of the Court on the cross-border utilization of losses, the objective comparability of situations is frequently affirmed on the basis of a wide range of different criteria. In most of its older rulings, there is no further explanation as to why the situations are comparable; a detailed analysis of the comparability of situations is often missing. In its more recent case line, the CJEU generally puts more emphasis on the comparability analysis. However, this has not significantly increased the clarity and comprehensibility of the decision-making process. A precise examination and determination of the relevant criteria would still be necessary with regard to legal certainty, since Koppensteiner rightly states that depending on the degree of abstraction everything can be compared with everything else.

3 COMPARABILITY IN THE CJEU’S CASE LAW

3.1 General Remarks

The selection of the pair of comparators to examine the conformity of a national tax provision with EU law plays a decisive role in the proceedings before the CJEU. The Court often compares residents with non-residents for the purposes of the fundamental freedoms. In such a case, the term ‘vertical comparability analysis’ is used. The CJEU has ruled in its settled case law that residents and non-residents are generally not in a substantially similar situation. However, there are numerous exceptions to this principle. The vertical comparability analysis is predominantly applied in the examination of national loss realization regulations against the yardstick of the fundamental freedoms before the CJEU. In some of its other decisions, the CJEU has also applied a so-called ‘horizontal comparability analysis’, which, however, will not be discussed in more detail in this article.

In the case law of the CJEU, the criterion of comparability is given varying degrees of importance. In some cases, the Court does not apply the comparability analysis at all; in others, it is only dealt with synoptically without further analysis. However, in some judgments, the regulatory system of a Member State is analysed comprehensively in order to determine the comparability of situations. Moreover, in some decisions comparability is seen as part of the discrimination analysis, while in others it is seen as part of the justification test. There is also criticism of the comparability analysis itself, namely that it is ‘fuzzy’ and increasingly complex. In several of her Opinions, Advocate General (AG) Kokott argues for abandoning the comparability analysis altogether.

3.2 Comparability of Situations with Regard to Cross-Border/Cross-Period Loss Utilization

3.2.1 The Landmark Decision Marks & Spencer, and Comparability Without Explicit Analysis

Marks & Spencer represents the starting point of the CJEU’s line of case law on the cross-border realization of losses and was surprising in several aspects. Until this decision, according to some authors, a national advantage had to be granted also in cross-border situations in order to be in line with the fundamental
freedoms. Consistently, it was assumed that the CJEU would derive an obligation to take foreign losses into account from the fundamental freedoms. The Marks & Spencer decision was made against the background of a British group that had loss-making subsidiaries in several Member States. Over the years, Marks & Spencer withdrew from the individual Member States and subsequently claimed the use of the foreign losses in the UK.

Whereas under UK tax law losses of domestic subsidiaries could be taken into account, a deduction of losses of foreign subsidiaries was prohibited. In the preliminary ruling procedure, the CJEU had to decide whether the UK tax regime, under which foreign losses could not be deducted at the level of the parent company, violated the freedom of establishment. The Court considered this rule to be a restriction of the freedom of establishment but recognized three grounds of justification: (1) the preservation of the allocation of taxing power between the Member States; (2) the avoidance of double utilization of losses in the state of residence; and (3) the risk of tax avoidance.

The compatibility of such a regulation with the freedom of establishment was subsequently restricted again by the CJEU in the context of the proportionality analysis. Accordingly, a general exclusion of foreign losses from being taken into account in the state of residence is impermissible if the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account [ ... ] and there is no possibility for the foreign subsidiary's losses [ ... ] to be taken into account in its State of residence for future periods'. The CJEU thus ruled that only 'final' losses can be taken into account. However, the meaning and scope of the term 'final losses' has not been fully clarified to date.

The scope of application of this line of case law was extended by the CJEU in numerous subsequent rulings on domestic cross-border loss utilization rules. Thus, in the Lidl Belgium case and the KR Wannsee case, the Court recognized that the Marks & Spencer doctrine also applies to losses incurred by foreign permanent establishments (PEs). As far as the comparability analysis is concerned, the CJEU refrained from a more detailed analysis in the aforementioned decisions. The Court identified the relevant pairs (domestic company with foreign PE, and domestic company with domestic PE) and compared them to each other. However, it did not explain why these pairs were comparable at all in the specific case and which criteria were used in the examination. In its more recent case law on the cross-border utilization of losses, however, the CJEU tends to make more statements as regards comparability, but uses various methods to affirm or deny the comparability of the situations.

### 3.2.2 Comparability Based on the Aim of National Legislation

Apart from the decisions in which no comparability analysis was applied at all, the CJEU often examined the objective of the national provision in order to determine the comparability of the situations. In this respect, according to English, the Court handles the fundamental freedoms in the manner of the general principle of equality, in which the tertium comparationis for determining comparability must be determined in a context- and area-specific manner on the basis of the respective purpose of the domestic rule under examination.

For instance, the CJEU referred to the objective of a national provision in the A Oy case following numerous other rulings on direct tax law. In this decision, the CJEU had to deal with a Finnish provision according to which losses could only be deducted in the case of a merger of a domestic parent company with a domestic subsidiary, but not with a foreign subsidiary. According to the CJEU, the aim of the Finnish provision is to grant a tax advantage to the taxpayer. Since both the domestic and the foreign subsidiary wish to take advantage of this benefit, the situations are – according to the CJEU – objectively comparable.

Since taxpayers always seek a tax advantage, according to this principle the comparability of the situations would be given in any case. This result does not seem to be purposeful and lacks any examination of comparability.

In Bevola, the CJEU also established comparability through the purpose of the national regulation. The case concerned the recognition of losses of A/S Bevola, which originated from a Finnish PE. This PE ceased its
activities in 2009, whereupon the losses could consequently no longer be used in Finland. Therefore, the Danish parent company applied for a deduction of the losses from the Danish corporate income tax base. This was rejected by the Danish tax authorities as the company did not opt for the 'international joint tax regime' pursuant to section 31A of the Danish corporation tax act. The regulation provided for foreign losses and – following the principle of symmetry – profits to be taken into account only when the option was exercised. The CJEU subsequently had to rule on the compatibility of the Danish provision with EU law, which allows foreign profits and losses to be offset against domestic income only in those cases in which the company concerned has chosen the international taxation option available under Danish law. The CJEU analysed the purpose of the national provision: according to the Court, the purpose of the international joint taxation regime is to avoid double taxation of profits and, symmetrically, double deduction of losses in the case of Danish companies with foreign PEs. In view of this objective, the situation of a company with a non-resident PE, which cannot take into account its losses for factual reasons, is not different from that of a company with a resident PE. This is because the performance of the parent company is affected by a non-resident PE that has incurred final losses in the same way as losses incurred by a domestic PE.

The reasoning of the Court in _Bevola_ has been criticized in the literature. This is because the Court seems to have recently included the examination of the aspect of 'final losses' – instead of at the level of proportionality – in the comparability analysis. With this approach, the CJEU may have attempted to eliminate a contradiction in its previous case law, especially the _Nordea Bank_ and _Timac Agro_ cases, in which it attached greater importance to the proportionality analysis.

A comparability analysis based on the objective of the national regulation is associated with numerous problems and must be viewed critically against the background of the principle of conferral. The question arises whether the CJEU has the competence to analyse and define the objective of a national regulation in detail. According to Article 19(1) of the TEU, the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Accordingly, the CJEU can only interpret EU law, and not national law. In the decisions in which the Court focuses on the objective of the national regulations, it – for reasons of competence – does not use the 'classical' methods of interpretation, but rather determines the objective of the national norm in the comparability analysis. This approach of the CJEU can be questioned, especially since in most cases the knowledge of the respective legal system is lacking and thus the purpose of the norm cannot be identified in detail. As a result, it can then arrive at inaccurate conclusions. This risk has already materialized in individual decisions.

In addition, it is problematic that by focusing on the objective of the national rule, the CJEU regularly brings forward the test of justification to the test of comparability, since the test of justification is also oriented towards the purpose of the regulation. If the result of the comparability analysis were that there is no objective comparability of the situations, there is no longer any room for examining the proportionality of the interference with the fundamental freedom. A balance between the objectives pursued with a national regulation and the fundamental freedoms would thus no longer be possible in individual cases. The proportionality test would therefore no longer apply. If objective comparability is affirmed on the basis of the objective of a regulation, this results in a double consideration of the regulatory interests of the Member States on the one hand as a part of the comparability analysis and on the other hand as a part of the justification test. This would, however, lead to the fundamental freedom test being strongly oriented towards the objective pursued by the national legislator.

By bringing forward the regulatory objective to the comparability analysis, the proportionality test is also undermined to a certain extent: if a regulatory purpose is accepted by the CJEU in the context of the comparability analysis, it must also apply to the proportionality test. An appropriate balancing of conflicting interests is thus made more difficult.

### 3.2.3 Comparability Based on the Subject-to-Tax Approach
A closer analysis of the CJEU decisions *K*, *Nordea Bank*, and *Timac Agro* demonstrates the comparability analysis from the point of view of the subject-to-tax approach. This method is based on the principle of symmetry, which is a part of the principle of territoriality. As the CJEU has repeatedly held, for both inbound and outbound scenarios, the comparability of situations may be lacking in cases where a Member State refrains from the exercise of its tax sovereignty. Thus, the core issue is whether the Member State concerned extends its taxing power to the cross-border case. However, such an approach raises numerous problems. For example, it is not clear to what extent the taxing power must exist. Further, the question arises as to whether tax sovereignty of a Member State can be assumed in cases where taxing power exists (solely) in an abstract way or whether it must be exercised in concrete terms.

In *K*, for example, the CJEU recognized an abstract exercise of tax sovereignty to be sufficient. The decision was based on the following facts: a taxpayer resident in Finland applied for the deduction of losses from the sale of a property located in France from his Finnish tax base. Although Finland did not have a right to tax the property due to the double tax convention (DTC) with France, this did not prevent the CJEU from finding comparability between residents with a domestic property and residents with a property located abroad. As the main argument for the comparability of the situations, the CJEU invoked the agreed progression proviso in the DTC. In this context, it was irrelevant that the real estate was subject to a linear tax rate and therefore the progression proviso could not become effective. In the Court’s view, an agreed progression proviso in the DTC, which, however, did not become effective in the specific case, was therefore sufficient to assume the comparability of the situations of natural taxpayers with domestic and foreign immovable property. However, these findings are not convincing: firstly, since the *K* ruling allows the *e contrario* argumentation of denying comparability in the absence of a progression clause, the Member States could ‘influence’ the result of the comparability analysis by not including such in the respective DTC. Following this line of reasoning, the provision in question would be compatible with EU law without any further justification test. The CJEU did not take into account the explanations of the referring court as well as the Finnish government, according to which, by convention, the progression proviso does not apply to income from immovable assets subject to a flat tax rate. Referring to the text of the treaty, the Court concluded that an explicit exclusion of the progression clause for income from the sale of immovable assets was not provided for and, therefore, it considered the clause to be decisive for the comparability analysis. The approach taken by the CJEU in the present case by referring to the progression proviso seems particularly odd since there had been no other legal consequences for the complainant *K* if such a clause had not been concluded.

Secondly, the reference to the provision of a DTC is to be seen critically because the CJEU in general regards provisions of international (public) law as not decisive for its decisions due to lack of competence. In the decision *Vandeweghe* it is stated:

> The Court has no jurisdiction [ … ] to give a ruling on the interpretation of provisions of international law which bind Member States outside the framework of Community law.

These findings were explicitly confirmed in subsequent decisions. Why the Court deviated from this principle in *K* was not discussed. Based on these considerations, it is not persuasive to rely on a bilaterally agreed progression proviso in a DTC for the purposes of comparability analysis.

On the contrary, in the case *Nordea Bank*, the CJEU focused on the actual exercise of the taxing power. *Nordea Bank* is a bank based in Denmark and had loss-making PEs in Finland, Sweden, and Norway. These losses were deducted from its taxable profit generated in Denmark. Due to the loss situation, the PEs were eventually liquidated. This process was considered as a sale of a business by the Danish tax authorities. Under Danish law, the previously deducted losses of the PEs were subject to subsequent taxation. Thus, the question of the treatment of the foreign losses arose again. In its ruling, the CJEU affirmed the comparability because
Denmark has subjected the profits of the PEs situated in Finland, Sweden, and Norway to Danish tax and, thus, these PEs were treated in the same way as resident PEs with regard to the deduction of losses.\[84\]

In contrast, in the *Timac Agro* case, the CJEU denied the comparability of taxpayers with a domestic and a foreign PE with regard to the second question referred.\[85\] *Timac Agro* concerned a German corporation that had a loss-making PE in Austria. These losses were taken into account by the German tax authorities because they were subject to subsequent taxation. Due to a change in the law, as of 1999 (foreign) losses within the scope of application of the exemption method with progression proviso in the respective DTC were no longer allowed for deduction in Germany. In the event of a sale, previously (before 1999) realized losses therefore led to subsequent taxation. In 2005, the PE of Timac Agro was transferred to an Austrian resident company belonging to the same group of companies. The German tax authorities regarded this event as a sale and included the previously realized losses in the tax base. Timac Agro objected, on the one hand (first question referred), to the addition of the losses previously offset to the tax base and, on the other hand (second question referred), to the non-inclusion of the foreign losses.

With regard to the second question, the CJEU denied the comparability of a resident company with a domestic PE and a resident company with a foreign PE. This decision was made against the background of the principle of symmetry: since Germany did not tax the profits of the PE located in Austria – due to the exemption method provided for by the DTC – and the losses could also not be deducted in Germany, objective comparability was not given.\[86\] With regard to *K* – in which a progression clause was also included in the relevant DTC – the abstract possibility of taxation should nevertheless have been sufficient for the affirmation of the objective comparability.\[87\] The reasoning of the CJEU seems inconsistent, especially with regard to the later decision in *Bevola*.\[88\] In the literature, however, it is occasionally stated that the *Bevola* case must be interpreted in the light of the *Nordea Bank* and *Timac Agro* cases, which would resolve any contradiction.\[89\] In this respect, it should be noted that the German Bundesfinanzhof (Federal Fiscal Court) has recently referred several questions to the CJEU for a preliminary ruling on the understanding of the *Timac Agro* case.\[90\] A clarification of the content by the CJEU in the course of this preliminary ruling procedure would be welcome in any case.

Overall, there is a contradiction between the assessment of tax sovereignty in the context of the comparability analysis in the cases *K*, on the one hand, and *Nordea Bank* and *Timac Agro* on the other. While the CJEU clearly follows an abstract approach in *K*, the judgments in the cases *Nordea Bank* and *Timac Agro* allow the conclusion that the exercise of concrete taxing power is decisive. However, this contradiction is not explicitly addressed by the Court. The above-mentioned approach, according to which the actual exercise of taxing power is relevant, can only lead to comparability in situations involving individuals and PEs. In the case of subsidiaries that have their own legal personality, this method of establishing comparability does not seem to be effective.\[91\] Due to the principle of territoriality, profits of foreign subsidiaries are taxed in the country in which the subsidiary is resident.\[92\] There is no abstract possibility of taxation in the country of residence of the parent company. In order to deal with this problem, the CJEU alternatively examines the objective of the national provision – as, for example, in *A Oy*\[93\] – or only marginally addresses the comparability analysis.\[94\]

### 4 The *Aures* Case

#### 4.1 Facts of the Case and Questions Referred to the CJEU

In its decision in *Aures*,\[95\] the CJEU again had to decide on the compatibility of a national regulation on the utilization of losses with the freedom of establishment. *Aures* is a company incorporated under Dutch law, which had its registered office and place of effective management in the Netherlands. In 2007, *Aures* incurred a loss in the Netherlands, which was determined by the Dutch tax authorities in accordance with Dutch law. At the beginning of 2008, *Aures* set up a branch in the Czech Republic, which, under Czech law, constitutes a PE and whose economic activity is subject to tax there.
In 2009, Aures transferred its place of effective management from the Netherlands to the address of the branch in the Czech Republic. From then on, Aures carried out all of its activities through this branch. However, Aures retained its registered seat and its entry in the commercial register in the Netherlands. In view of the transfer of the effective place of management and, thus, also of its tax residency, Aures applied for the right to deduct the loss incurred in the Netherlands in 2007 from the assessment basis for the corporate income tax owed in the Czech Republic. According to the Czech tax authorities, the loss incurred in the Netherlands could not be deducted from the tax base in the Czech Republic. According to section 38n of the Czech income tax act, a loss could only be taken into account if it arose from an economic activity within the territory of the Czech Republic and was determined in accordance with the provisions of the domestic income tax act. However, the Czech income tax act does not provide for any rule regarding the deduction of a tax loss in the event of a change of tax residence and does not permit the transfer of such a loss from another Member State.

According to Aures, the cross-border transfer of the place of effective management was subject to the freedom of establishment and the rejection to deduct the loss suffered in the Netherlands was an unjustified restriction of the aforementioned fundamental freedom. The Czech court subsequently referred two questions to the CJEU for a preliminary ruling: first, the court wanted to know whether the mere transfer of the place of effective management from one Member State to another falls under the freedom of establishment pursuant to Articles 49 et seq. of the TFEU. Should this question be answered in the affirmative, the Czech court asked whether the refusal of cross-border loss utilization is in line with the freedom of establishment within the meaning of Articles 49 et seq. of the TFEU.

### 4.2 Analysis of the Case

#### 4.2.1 Opinion of AG Kokott

For the purpose of examining the objective comparability of the situations within the meaning of the Court’s case law, AG Kokott\[96\] refers to the objective pursued by the national provision at issue. The objective of cross-period loss utilization is to guarantee the ability to pay principle by limiting the principle of periodicity. AG Kokott explicitly states that ‘in relation to a worldwide or Union-wide ability to pay, losses sustained are to be regarded as comparable in the context of cross-period loss deduction. Losses suffered domestically and abroad both reduce a taxpayer’s ability to pay equally’\[97\] A lack of comparability could also arise due to a lack of taxing power for imported losses of companies formerly resident in one Member State that have relocated their place of effective management to another Member State. However, the lack of taxing power of the Czech Republic does not change the outcome of the comparability analysis, because the CJEU explicitly accepted the comparability of taxed domestic and taxed foreign PEs in *Bevola*. Nevertheless, AG Kokott herself rightly doubts the comparability of the situations and argues that they differ, on the one hand, in the absence of a link between the unutilized losses and the taxing power of the Czech Republic, and, on the other hand, a further difference stems from the fact that the ability to pay can always only be determined with regard to a single tax creditor.\[98\]

However, AG Kokott subsequently assumes comparability of the situations with reference to a worldwide or Union-wide ability to pay. The existing differences must be taken into account at the level of justification.\[99\] As a result – according to AG Kokott – the Czech tax rule restricts the freedom of establishment. However, the restriction is justified with regard to the preservation of the balanced allocation of the power to impose taxes between the Member States.

The comparability analysis undertaken by AG Kokott in her Opinion in the *Aures* case follows the approach taken in *Bevola*. In both cases, comparability is established based on the objective of the national provisions at issue. The objective of the Danish ‘international common tax regime’ in *Bevola*\[100\] was – according to the CJEU – to avoid double loss deduction and to ensure taxation according to the ability to pay principle.\[101\] In the light of these objectives, a company with a domestic PE and a company with a foreign PE that have incurred final losses are comparable. Following up on these findings, AG Kokott concludes that the Czech provision is intended to
ensure an inter-period loss relief and thus the ability to pay of the company. As a result, she found the situations comparable.[102]

4.2.2 Judgment of the CJEU

The CJEU did not follow AG Kokott’s opinion and ended its examination at the level of comparability. Firstly, the Court determined that the transfer of the place of effective management to another Member State is covered by the freedom of establishment but does not necessarily ensure neutrality as regards taxation. Accordingly, a transfer of the place of effective management of a company may lead to a more or less advantageous result from a tax point of view, or may even be disadvantageous for that company. The possibility of a company such as Aures being able to deduct losses incurred within a certain taxable period from a taxable profit made by such a company in a later year constitutes a tax advantage. The CJEU further stated that ‘a Member State is [not] required to draw up its tax rules on the basis of those of another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules’. [103] Provisions that exclude a company resident in one Member State but incorporated in another Member State from the possibility of realizing losses incurred there, as in the case at issue according to section 38n of the Czech income tax act, result in a difference in tax treatment compared to resident companies that can make use of the possibility of realizing losses. As a result, a company incorporated under the law of one Member State could be deterred from transferring its place of effective management to another Member State in order to carry out its economic activities there.

As regards the comparability analysis, the CJEU examined the objective pursued by the national provision. According to the CJEU, the aim of section 38n of the Czech income tax act is to deny the claim of losses incurred in periods of tax residence in another Member State in order to preserve ‘the allocation of the power to impose taxes between the Member States and to prevent the risk of double deduction of losses’. [104] However, contrary to the finding of AG Kokott, the situations are not objectively comparable in casu. A company, which transfers its effective place of management from one Member State to another, is successively subject to the tax jurisdiction of two Member States. Up to the time of the transfer, the company is subject to the tax jurisdiction of the Member State of origin in which the losses were generated and subsequently to that of the host Member State. However, a company (resident in the Czech Republic) that does not transfer its place of effective management or transfers its place of effective management only within the territory of that Member State (the Czech Republic), is subject to the tax jurisdiction of that state alone. Consequently, according to the Court, the case law on ‘final losses’ is also not applicable. The legal concept of the finality of losses refers to losses of a non-resident PE or subsidiary which ceases its activities and whose losses could not be deducted in the state in which it operated and cannot be deducted in the future.[105] As stated in Bevola,[106] the concept of final losses refers to a situation in which the company wishing to utilize the losses and the associated subsidiary/PE are located in two different Member States during the entire taxable period. Aures, on the other hand, did not have a PE or a subsidiary in the Czech Republic during the period in which it incurred the losses in question. Due to the lack of comparability, the Czech provision was not contrary to EU law.

The decision of the CJEU in Aures appears remarkable in the light of A Oy[107] and Memira Holding[108]: in the latter two decisions, the CJEU had to rule on national provisions according to which, in the case of a merger with a domestic parent company, only losses of a domestic – but not those of a foreign – subsidiary, could be deducted.[109] Both the Finnish (A Oy) and the Swedish (Memira Holding) provisions thus provided for restrictions on the utilization of (foreign) losses incurred prior to the merger. The CJEU (implicitly) affirmed the comparability of the situations in the A Oy and Memira Holding cases,[110] while denying it in Aures. This seems to be noteworthy, as the facts of the cases are similar in essence: all of these cases concern inbound situations (on the one hand a ‘merger’, on the other hand a transfer of the place of effective management), whereby the losses were incurred before the respective event (merger/transfer of the administrative seat). Nevertheless, the CJEU comes to different conclusions with regard to the comparability analysis. The decisive factor for this could
have been the equity investment of A Oy and Memira Holding. In Aures, the comparability of situations may have been denied because the company merely transferred its place of effective management and – in contrast to A Oy and Memira Holding – did not have an equity investment in a subsidiary. Admittedly, little evidence for this thesis can be found in the judgments. Nevertheless, as regards the comparability analysis, the CJEU seems to distinguish between cases involving reorganizational measures and cases not involving reorganizational measures. Following this line of reasoning and the CJEU case law referred to above, the comparability of the situations and an obligation to take into account the (foreign) losses at the level of the domestic parent company can be affirmed in cases with restructuring (e.g., EU import mergers). In such cases, however, the obligation to take losses into account is not unlimited: losses are only to be taken into account if they constitute ‘final losses’ within the meaning of the Marks & Spencer I doctrine, i.e., losses which can no longer be utilized in the state of the subsidiary or PE.

In the context of the comparability analysis carried out in Aures, the decision rendered in Bevola may also have played an important role. In Aures, the CJEU initially focused on the objective of the domestic tax rule,[111] but subsequently also explicitly referred to tax power. By doing so, the Court may have intended to prevent any contradiction with the principle established in Bevola, according to which both the objective of the regulation and the tax power must be taken into account. It is striking that the CJEU denied the comparability in Aures mainly due to the lack of taxing power prior to the transfer of the place of effective management of the company.[112] In Bevola, on the other hand, the CJEU primarily focused on the aim of the provision for the purpose of comparability, whereby the criterion of the exercise of tax power receded into the background. It is difficult to discern a clear line according to which, in some cases, the focus of the comparability analysis is based on the objective of the domestic provision (e.g., Bevola) and, in others, on the exercise of taxing power (e.g., Aures).[113]

Nevertheless, the comparability analysis in Aures seems to be correctly reasoned. In Aures, the non-comparability of the situations was rightly argued by analogy with Timac Agro.[114] This is due to the reason that the losses in question were incurred before the transfer of the effective place of management and, thus, at a point in time when Aures was exclusively resident in the Netherlands without any territorial link to the Czech Republic. The Czech Republic, therefore, was not able to exercise any taxing power over the foreign profits and losses of the non-resident company Aures prior to the transfer of the place of effective management. Comparability was not given since the situation in casu objectively differed from the situation a domestic resident company with subject to tax domestic losses would find itself in. As regards Timac Agro, the situations were also not objectively comparable because the residence state of the parent company could not exercise any taxing power over the non-resident PE.[115] Both decisions were therefore mainly rendered on the basis of the subject to tax approach, although the respective reasoning varied in detail due to the different facts of the cases and taxation systems.[116]

5 Conclusion

Domestic (tax) rules governing the realization of losses, which treat residents and non-residents differently, must be examined on the basis of the fundamental freedoms and in particular the freedom of establishment pursuant to Articles 49 et seq. of the TFEU. In order to answer the question of whether such a provision complies with EU law, the CJEU firstly examines the objective comparability of the situations. As this article shows, the case law of the CJEU with regard to the comparability analysis appears to be inconsistent and (sometimes) result-oriented. The result is legal uncertainty for taxpayers and the tax authorities of the Member States. In view of the practical consequences of the comparability analysis, clearer criteria are needed to determine whether situations are objectively comparable. Furthermore, the Court hardly indicates why it takes certain factors into account already at the level of the comparability analysis and others only at the level of justification.[117] In numerous Opinions, AG Kokott therefore argues to abandon the comparability analysis due to a lack of transparency and the fact that, depending on the level of abstraction, all situations are comparable in some way.[118] Accordingly,
the comparability analysis should be limited to eliminating cases in which there is no discrimination from the outset.\[119\]

In the academic discussion, numerous proposals as to what an alternative comparability analysis might look like have already been elaborated [120] The following comparability analysis could serve as a solution: at the first level, it should be examined whether the non-resident PE/subsidiary is subject to tax in the residence state of the parent company, i.e., the residence state of the parent company exercises its taxing power.\[121\] In this context, a concrete and not an abstract taxing power should be decisive. If certain foreign income components are subject to tax in the residence state of the parent company, but are not taxed due to a DTC, the situations should not be comparable. In cases where the national regulation provides for a different tax treatment (hence the situations seem to be not comparable at first glance), at the second level, comparability can still be established on the basis of the objective of the national rule.\[122\] In Aures, according to the authors, it would have been appropriate to deny comparability already due to the lack of tax power (first level). A more detailed analysis of the purpose of the Czech regulation would therefore not have been necessary.

In any case, the relevance of national loss utilization rules will increase in the future. In recent years, proposals and regulations have been developed, both at a national and international level, which are intended to prevent profit shifting by multinational companies. As a result, the use of cross-border loss utilization for tax minimization purposes has increased tremendously,\[123\] which, in turn, might lead to a rise in tax disputes in the future. Consequently, the number of preliminary rulings before the CJEU regarding the compatibility of national loss utilization rules with EU law might increase in the future. Against this background, a uniform and consistent case law is needed.

Footnotes

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1 CJEU 14 July 1977, C-8-77, Sagulo, m.no. 11; see also Daniel-Erasmus Khan & Sophia Henrich, Art. 18 TFEU, European Union Treaties m.no. 2 (Rudolf Geiger, Daniel-Erasmus Khan & Markus Kotzur eds 2015); Georg Kofler, Wer hat das Sagen im Steuerrecht – EuGH (Teil 1), 69(6) Österreichische Steuerzeitschrift (ÖStZ) 106, 108 et seq. (2015).


5 CJEU 27. Feb. 2020, C-405/18, Aures Holdings.

6 David Edward & Robert Lane, Edward and Lane on European Union Law 422 et seq. (2013); Khan & Henrich, supra n. 1, m.no. 1 et seq.; Gabriele Kucsko-Stadlmayer, Art. 18 AEUV m.no. 15 et seq. with further references (Heinz Mayer & Karl Stöger EUV/AEUV 2013); Michael Holoubek, AEUV Art. 18 m.no. 5 et seq. (4th ed., Jürgen Schwarze et al. eds, EU-Kommentar 2019).

In this regard, Reimer states that the term ‘comparable situation’ is linguistically unfortunate, because one can compare everything; what is meant is a special similarity of the situation as a basis for the comparison. See Reimer, supra n. 1, at m.no. 7.129.


Cf. CJEU 6 Mar. 2007, C-292/04, Melilcicke and Others, m.no. 19; 24 May 2007, C-157/05, Holböck, m.no. 21; 11 Oct. 2007, C-451/05, ELISA, m.no. 68; Mathieu Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation 189 et seq. (2010).


Wattel, *supra* n. 4, at 542 et seq.

Koppensteiner, *Über Äpfel, Birnen und die ‘Vergleichbarkeitsprüfung’ im Europäischen Steuerrecht*, 71(10) ÖSIZ 305 (2018); see also AG Kokott, 13 Mar. 2014, C-48/13, Nordea Bank, m.no. 21 et seq.; 10 Jan. 2019, C-607/17, Memira Holding, m.no. 46; 10 Jan. 2019, C-608/17, Holmen AB, m.no. 38; 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 30.


The CJEU also frequently contrasts residents with income abroad and residents with income at domestic level. See Lang, 2016 *supra* n. 13, at 118.

Lang, 2011 *supra* n. 13, at 154 et seq.; Lang, 2016 *supra* n. 13, at 118.

CJEU 14 Feb. 1995, C-279/93, Schumacker, m.no. 30; 11 Aug. 1995, C-80/94, Wielockx, m.no. 17 et seq.; 27 June 1996, C-107/94, Asscher, m.no. 41; 12 May 1998, C-336/96, Gilly, m.no. 49; 14 Sept. 1999, C-391/97, Gschwind, m.no. 22; 12 June 2003, C-234/01, Gerrits, m.no. 43; 1 July 2004, C-169/03, Wallentini, m.no. 15; 9 Nov. 2006, C-520/04, Turpeinen, m.no. 26; 12 Dec. 2006, C-374/04, Test Claimants in Class IV of the ACT Group Litigation, m.no. 63; 22 Dec. 2008, C-282/07, Truck Center, m.no. 41; 11 Sept. 2014, C-47/12, Kronos International, m.no. 81.

Cf. in this respect Kokott, *supra* n. 4, at § 3 m.no. 126; see also ECHR 23 Oct. 1990, 11581/85, Darby, m.no. 32, which assumes the comparability of residents and non-residents in a comparable manner without justification.

See also Daniela Hohenwarter, *Verlustverwertung im Konzern* 80 et seq. (2010).

The horizontal comparability analysis can be divided into two subgroups: first, the comparison of different residents earning foreign income and second, the comparison of different non-residents earning domestic income. See further Michael Lang, *Recent Case Law of the ECJ in Direct Taxation: Trend, Tensions and Contradictions*, 18(3) EC Tax Rev. 104 et seq. (2009); Jose Calderón & Andrés Baez, *The Columbus Container Services ECJ Case and Its Consequences: A Lost Opportunity to Shed Light on the Scope of the Non-discrimination Principle*, 37(4) Intertax 231 et seq. (2009); Lang, 2011 *supra* n. 13, at 154 et seq.; Lang, 2016 *supra* n. 13, at 118; see also CJEU 24 Feb. 2015, C-512/13, Sopora.


For example, CJEU 6 June 2000, C-35/98, Verkooijen, m.no. 35 et seq.; 7 Sept. 2006, C-470/04, N; concerning the cross-border utilization of losses, see CJEU 13 Dec. 2005, C-446/03, Marks & Spencer.

CJEU 7 Nov. 2013, C-322/11, K, m.no. 37 et seq.

Critical of this inconsistent approach of the CJEU, Wattel, *supra* n. 4, at 542 et seq.

Wattel, *supra* n. 3, at 626.

See e.g., Hein Vermeulen & Vassilis Dafnomilis, *ECJ Decision in Bevola (Case C-650/16): A Missing Piece in the Marks & Spencer (Case C-446/03) Puzzle*, 59(2/3) ET 89 et seq. (2019).

AG Kokott 13 Mar. 2014, C-48/13, Nordea Bank, m.no. 21 et seq.; 10 Jan. 2019, C-608/17, Holmen AB, m.no. 38; 10 Jan. 2019, C-607/17, Memira Holding, m.no. 46; 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 30. For a different view, see AG Hogan in his Opinion of 19 Nov. 2020, C-388/19, MK and C-480/19, E, in which he assumes that the comparability analysis is necessary and bases this, among other things, on the wording of Article 65 TFEU.

CJEU 13 Dec. 2005, C-446/03, Marks & Spencer. After the CJEU ruled in the *Marks & Spencer* case that the UK group taxation regime violated the freedom of establishment, the legislator attempted to amend the regulations to conform to EU law. However, the Commission continued to consider the recast regulations to be contrary to EU law and initiated infringement proceedings in 2007. The CJEU took the *Marks & Spencer II* case

40 Lang, supra n. 14, at 530; O’Shea, supra n. 9, at 72.


42 Lang, supra n. 14, at 530.

43 Regarding the grounds of justification in the field of tax law, see Ivan Lazarov, The Relevance of the Fundamental Freedoms for Direct Taxation, Introduction to European Tax Law on Direct Taxation 89 et seq. (6th ed., Michael Lang et al. eds, 2020).

44 CJEU 13 Dec. 2004, C-446/03, Marks & Spencer, m.no. 45 et seq.; unwritten grounds of justification were accepted by the CJEU in Avoir Fiscal; see CJEU 28 Jan. 1986, C-270/83, Commission v. French Republic (‘avoir fiscal’).

45 CJEU 13 Dec. 2004, C-446/03, Marks & Spencer, m.no. 55.

46 Critical Koppensteiner, who states that the (implicit) principle of ensuring a one-time loss deduction established by the CJEU in the Marks & Spencer case and subsequent case law, while being commendable against the background of the realization of a common internal market, is misguided on the basis of existing law. As long as there are neither harmonized regulations for the determination of a tax-relevant income nor a Europe-wide uniform allocation of taxing power, the tax system of a Member State can only be considered in isolation to determine the violation of a fundamental freedom. The willingness of the CJEU to include the tax systems of several affected Member States in a ‘fundamental freedom test’ thus inevitably leads to arbitrary results in the absence of a clear division of responsibilities between the Member States; see Koppensteiner, supra n. 24, at 304.


52 Engisch, supra n. 13, at 286 et seq.

53 CJEU 21 Feb. 2013, C-123/11, A Oy.

54 Cf. CJEU 12 June 2014, C-39/13, SCA Group Holding BV; 22 June 2017, C-20/16, Bechtel; 4 July 2018, C-28/17, NN.

55 CJEU 21 Feb. 2013, C-123/11, A Oy, m.no. 35; see also CJEU 25 Feb. 2010, C-337/08, X Holding, m.no. 24.

56 Of the same opinion, Wattel, supra n. 3, at 627.
In more detail, Vermeulen & Dafnomilis, supra n. 37, at 89 et seq. This approach was also advocated in the NN case, CJEU 4 July 2018, C-28/17, NN, m.no. 35.

CJEU 17 July 2014, C-48/13, Nordea Bank.

CJEU 17 Dec. 2015, C-388/14, Timac Agro, it has to be noted that proportionality was only examined in detail for the first question referred, but not for the second.


In the K case, however, the CJEU dealt with the objective of the national regulation and in this respect makes a teleological interpretation. See CJEU 7 Nov. 2013, C-322/11, K, m.no. 37 et seq.

CJEU 6 Mar. 2007, C-292/04, Meilicke and Others, m.no. 36 et seq.; 17 July 2008, C-426/07, Krawczynski, m.no. 43 et seq.

It is true that the CJEU’s statements could be interpreted as a teleological-systematic interpretation of the respective national provision. However, an interpretation of national law is ruled out in any case due to jurisdictional limits.

This line of reasoning also applies to the Court’s examination of the grounds of justification brought forward by the Member States, since these grounds are usually deduced from the objectives of the national provision in question.

Englisch, supra n. 13, at 287 et seq. With reference to CJEU 6 Oct. 2015, C-66/14, IFN, m.no. 37 et seq. and 16 Apr. 2015, C-591/13, Commission v. Germany, m.no. 75 et seq.


AG Kokott 13 Mar. 2014, C-48/13, Nordea Bank, m.no. 27.

Cf. Englisch, supra n. 13, at 288 et seq.

Ibid., at 290 et seq.

CJEU, 7 Nov. 2013, C-322/11, K.

CJEU 17 July 2014, C-48/13, Nordea Bank.

CJEU, 17 Dec. 2015, C-388/14, Timac Agro.

Englisch, supra n. 13, at 291.

Ibid., at 291 with further reference.


Karoline Spies & Stephanie Zolles, Nachversteuerung gem. § 2a Abs. 4 Nr. 2 EStG 1977/StBereinG; Abzug sog. Finaler (Betriebstätten-)Verluste nach Unionsrecht, ISR 279 (2017).

CJEU 7 Nov. 2013, C-322/11, K, m.no. 42–46.

See CJEU 27 Nov. 1973, C-130/73, Vandeweghe, m.no. 2.

CJEU 14 Dec. 2000, C-141/99, AMID, m.no. 29; 6 Dec. 2007, C-298/05, Columbus Container, m.no. 47.
83 CJEU 17 July 2014, C-48/13, Nordea Bank; m.no. 24; for a discussion of this judgment, cf. Raul-Angelo Papotti & Carlomaria Setti, The ECJ Decision in Timac Agro (Case C-388/14): Another Properly Shaped Piece in the ECJ’s Tax Loss Puzzle, 56(6) ET 246 et seq. (2016).
84 CJEU 17 July 2014, C-48/13, Nordea Bank, m.no. 24.
85 For a more detailed analysis concerning Timac Agro, see Franziska Leich & Adrian Cloer, Referral to the ECJ on (Final) Cross-Border Losses – Timac Agro Deutschland (Case C-388/14), 55(9) ET 445 et seq. (2015).
86 CJEU 17 Dec. 2015, C-388/14, Timac Agro, m.no. 65.
87 Spies & Zolles, supra n. 79, at 279.
89 See in principle also Vermeulen & Dafnomilis, supra n. 37, at 94.
90 German Bundesfinanzhof 6 Nov. 2019, I R 32/18, pending before the CJEU under C-538/20.
91 Kokott, supra n. 4, at § 3 m.no. 128.
92 See also Gutmann, supra n. 50, at 155; Wattel, supra n. 3, at 627 et seq.; different view Monsenego, who is of the opinion that the choice of not taxing foreign subsidiaries results from the decision of the Member State and not from an obligation imposed by international law. See Monsenego, supra n. 47, at 110 et seq.
93 CJEU 21 Feb. 2013, C-123/11, A Oy.
94 CJEU 13 Dec. 2005, C-446/03, Marks & Spencer, m.no. 38 et seq.
95 CJEU 27 Feb. 2020, C-405/18, Aures Holdings.
97 AG Kokott 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 27.
98 AG Kokott 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 31.
99 However, a certain contradiction can be seen in AG Kokott’s comments on objective comparability based on the taxpayer’s ability to pay: on the one hand, it is argued that the taxable capacity can only ever be determined in relation to a single tax creditor. ‘The principle of taxation according to ability to pay should thus always be construed as territorial’, AG Kokott 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 31. On the other hand, the losses suffered are to be considered comparable in terms of a worldwide or Union-wide ability to pay, since ‘losses suffered domestically and abroad both reduce a taxpayer's ability to pay equally’. AG Kokott 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 27; cf. Kokott, supra n. 4, at § 3 m.no. 48 et seq.
100 See s. 3.2.2.
101 CJEU 12 June 2018, C-650/16, Bevola, m.no. 38 and 39.
102 AG Kokott 17 Oct. 2019, C-405/18, Aures Holdings, m.no. 25 et seq.
103 CJEU 27 Feb. 2020, C-405/18, Aures Holdings, m.no. 32.
104 CJEU 27 Feb. 2020, C-405/18, Aures Holdings, m.no. 38.
105 See CJEU 12 June 2018, C-650/16, Bevola, m.no. 38; as regards final losses.
106 CJEU 12 June 2018, C-650/16, Bevola, m.no. 30 et seq.
107 CJEU 21 Feb. 2013, C-123/11, A Oy.
108 CJEU 19 June 2019, C-607/17, Memira Holding.
109 See s. 3.2.2.
110 Although the judgment in Memira Holding lacks a more detailed analysis of the comparability criterion, it can be assumed that the CJEU implicitly assumed comparability of the facts of the case. This is supported by the fact that the Court of Justice, in answering the reference for a preliminary ruling, relied on the conditions
for taking into account ‘final’ losses set out in *Marks & Spencer I*. The Court of Justice also referred to the fact that the losses were not taken into account in the case at hand. As shown in s. 3.2.1, these conditions are examined at the level of the proportionality test, which is subsequent to the comparability analysis. Accordingly, if the CJEU had assumed non-comparable situations in *Memira Holding*, the requirements for ‘final’ losses within the meaning of the *Marks & Spencer I* doctrine would not have had to be examined, because the fundamental freedom test would already have had to be terminated at the level of comparability.

111 CJEU 27 Feb. 2020, C-405/18, *Aures Holdings*, m.no. 37 et seq.
112 CJEU 27 Feb. 2020, C-405/18, *Aures Holdings*, m.no. 39 et seq.
114 Eva M. Goetz, *AURES Holdings a.s. (C-405/18) at the Intersection of Cross-Border Loss Relief, Corporate Exit Taxation and Dual Residency Mismatches*, 49(2) Intertax 178 (2021); CJEU 27 Feb. 2020, C-405/18, *Aures Holdings*, m.no. 41; in this respect also Vermeulen & Dafnomilis, *supra* n. 37, at 94 et seq.
115 In this context, it is nevertheless noteworthy that the lack of the taxing powers resulted from different taxation systems, cf. Goetz, *supra* n. 114, at 178 et seq.
116 In detail, *ibid.*, at 177 et seq.
117 Kokott, *supra* n. 4, at § 3 m.no. 128 et seq.
119 Kokott, *supra* n. 4, at § 3 m.no. 129 et seq.
120 Bammens, *supra* n. 9, at 16; Wattel, *supra* n. 4, at 553; Englisch, *supra* n. 13, at 296 et seq.
121 In this sense also Wattel, who stipulates: ‘[O]nly one comparability standard makes sense: to be (subject to tax) or not be (subject to tax), that is the (relevant) question’, Wattel, *supra* n. 4, at 553.
122 The view taken here is also in line with the CJEU’s decision in *Bevola*, in which the Grand Chamber takes precisely this approach, stating: ‘Where the legislature of a Member State treats those two categories of establishments in the same way for the purpose of taxing their profits, it recognises that, with regard to the detailed rules and conditions of that taxation, there is no objective difference between their situations which could justify a difference in treatment [m.no. 34; comparability based on the subject-to-tax-approach]. The judgments of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087), and of 17 Dec. 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829), cannot be understood, however, as meaning that, where national tax legislation treats two situations differently, they cannot be regarded as comparable. The Court held that the application of different tax rules to a resident company depending on whether it has a resident permanent establishment or a non-resident permanent establishment cannot be a valid criterion for assessing the objective comparability of the situations. [ … ] Consequently, the comparability of the situations must be assessed with regard to the purpose of the national provisions [ … ]’ (m.no. 35; comparability based on the aim of national legislation), CJEU 12 June 2018, C-650/16, *Bevola*.
123 Not without reason, this topic will be addressed at the 2023 IFA Congress in Cancun. See [https://www.ifa.nl/congresses/ifa-2023-cancun](https://www.ifa.nl/congresses/ifa-2023-cancun) (accessed 8 May 2021).