# *AN ANALYSIS OF THE A OY* (C-123/11) JUDGMENT

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## Background

A Oy is an undertaking resident in Finland which held all the shares in the company B AB resident in Sweden. Both carried out businesses of retailing furniture, and B AB had incurred trading losses between 2001 and 2007 amounting to SEK 44.8 millions, operating three leased retail stores in Sweden. This subsidiary ceased trading, closing its three sales outlets, one in December 2007 and the other two in March 2008. Even though B AB did not intend to continue trading in Sweden, it still had liabilities arising from two long-term leases of business premises. A Oy planned a merger with its subsidiary B AB, considering it would be justified from an economic point of view: the two leases of B AB would be transferred to A Oy, and the merger would simplify the structure of the group. This operation would lead to the dissolution of B AB, A Oy no longer having a subsidiary or a permanent establishment in Sweden; and the acquisition of all its assets, liabilities and residual obligations by A Oy.

In this view, A Oy applied for an advance ruling from the Central Tax Board (Keskusverolautakunta) in order to clarify with binding effect if, after the merger, it would be able to deduct for Finnish corporation tax purposes the losses of B AB suffered in Sweden, pursuant to article 123(2) of the Finnish Law on income tax. In a ruling of 25/03/2009, the Central Tax Board rejected that possibility and A Oy appealed to the Supreme Administrative Court (Korkein hallinto-oikeus). The Court held that the Finnish Law does not allow a loss by a merged company to be taken over if it has its registered office in another country and its losses cannot be attributed to a Finnish permanent establishment, here according to article 7(1) of the Finland/Sweden double taxation convention. The Court also pointed out that, according to the Finnish case law, the right to take over a transferring company's

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loss is subject to the condition that the merger is not being carried out solely for that purpose.

Nevertheless, the Supreme Administrative Court is uncertain whether that interpretation is compatible with EU Law, and in particular whether it would amount to a restriction of the freedom of establishment as per Articles 49 and 54 TFEU. Therefore, two questions were referred to the CJEU for a preliminary ruling:

1) Are Articles 49 and 54 TFEU to be interpreted as meaning that a receiving company may, in the context of its taxation, deduct the losses of a company which was previously resident in another Member State and which has merged with the receiving company, when those losses arise from the merged company's business activity in that other Member State in the years prior to the merger and when no permanent establishment remains for the receiving company in the State of residence of the merged company and, under national law, the receiving company may deduct losses of the merged company only if the latter is a resident company or the losses arose in the permanent establishment situated in that State ?

2) If the answer to the first question is in the affirmative, do Articles 49 and 54 TFEU have a bearing on whether the loss to be deducted is calculated in accordance with the tax legislation of the receiving company's State of residence, or should the losses found according to the law of the State of residence of the company which is to be merged be considered as deductible losses?

## The judgment of the CJEU

<u>First question: Transfer of the accumulated losses:</u>

The CJEU first points out that the Tax Merger Directive does not address the question of a taking-over in such a situation of any losses that B AB may have suffered[2].

I: Application of the freedom of establishment:

The German, Finnish, Italian and United Kingdom Governments argued that the freedom of establishment is not applicable in the present matter because B AB had already ceased its activities before the merger, and this operation was for the sole purpose of obtaining a tax advantage by offsetting the Swedish trading losses

2 *A Oy*, §22.

against the Finnish profits of A Oy[3]. However, the Court refused to admit that such conduct is a negation of the freedom of establishment, and structured its argument in three steps.

First, it recalled that '*cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They are thus regarded as constituting particular methods of exercise of freedom of establishment, important for the proper functioning of the internal market, and are therefore among those economic activities in respect of which Member States are required to respect the freedom of establishment laid down by Article 49 TFEU*'[4]. Next, the Court acknowledged that the setting up by A Oy of the subsidiary B AB in Sweden amounts to an effective exercise of the freedom of establishment. Finally, the Court explained that the sole reason of the merger being to obtain the deduction of the Swedish losses for Finnish corporation tax purposes, if recognised by the Finnish national Court, is irrelevant here: it is a matter for the Member States to implement legislation designed to tackle such tax abuse[5]. Overall, the freedom of establishment was applicable to the situation in the main proceedings[6].

II: Restriction of the freedom of establishment:

The CJEU highlighted that the possibility granted by Finnish law to a resident company of taking a resident subsidiary's losses into account when it merged with that subsidiary constitutes a tax advantage for the parent company; and that the exclusion from such an advantage of the losses of a non-resident subsidiary is liable to make establishment in other Member States less attractive and hence deter that company from setting up subsidiaries there[7].

III: Objective comparability of the situations:

The Court showed that, regarding the aim of tax legislation in the present case the situation of a Finnish parent company which wished to merge with a resident subsidiary and benefit from the deduction of the losses incurred by the merged subsidiary was objectively comparable to the situation of a Finnish parent company which wished to carry out the same operation with a non-resident subsidiary[8].

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3 *Ibid.* §23.

4 *Ibid.* §24.

5 *Ibid.* §25-27.

6 *Ibid.* §28.

7 *Ibid.* §31-32.

8 *Ibid.* §35.

According to Finnish case law, if the sole motive of a local merger is to deduct the losses of the subsidiary, the Finnish tax administration can refuse such deduction. The CJEU accepted the arguments of Germany and the UK explaining that the comparable local and foreign subsidiaries would therefore receive the same tax treatment[9]. Therefore, there would not be any restriction, but this was a matter for the Finnish national Court to decide[10].

IV: Justification by overriding reasons of public interest:

A- Balanced allocation of the powers of taxation between EU Member States:

First of all, the CJEU accepted that there was a need to safeguard a balanced allocation of the powers of taxation between EU Member States when the legislation at stake '*is designed to prevent conduct liable to jeopardise the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory*'. Thus, the preservation of these powers of taxation might make it necessary to apply to the economic activities of B AB established in Sweden only the tax rules of Sweden in respect of both profits and losses. Finally, the Court points out that to give A Oy the right to elect to have B AB's losses taken into account in Sweden or in another Member State would seriously undermine a balanced allocation of these powers of taxation between EU Member States[11].

B- Double use of losses:

Furthermore, the Court recognised that there might have been a risk that losses would be used twice if, in connection with the merger, A Oy enjoyed the possibility of deducting from its taxable income the losses of B AB. But actually the Finnish rules at issue here prevent such deduction[12].

C- Risk of tax avoidance:

Finally, the Court explained that the possibility of transferring the losses of a non-resident subsidiary (like B AB) to a resident company (like A Oy) on the occasion of a merger entails the risk that such groups of companies carry out restructurings in order to have their losses taken into account in

9 *Ibid.* §36.

10 *Ibid.* §37.

11 *Ibid.* §41-43.

12 *Ibid.* §44.

the Member States which apply the highest rates of tax and in which the tax value of the losses is therefore the highest. In the end, the CJEU accepted that the three overriding reasons of public interest, taken together, can justify the restriction of the Finnish legislation[13].

V: Proportionality test:

Firstly, the CJEU differentiated a priori between the granting to the parent company the possibility of taking into account the losses of its non-resident subsidiary in connection with a cross-border merger and allowing the parent company to choose freely from one year to the next the tax scheme applicable to its subsidiaries' losses[14]. Secondly, the Finnish legislation at issue goes beyond what is necessary to attain the essential part of the objectives pursued in a situation in which the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account. The burden of proof of such disproportionality rests on the parent company[15]. The Court also stresses the fact that even though B AB would be liquidated after the merger operation is carried out and A Oy would no longer have a permanent establishment or subsidiary in Sweden, these specific circumstances are not in themselves capable of showing that there is no possibility of taking into account the losses that exist in the subsidiary's State of residence[16]. For example, the Court recognised that the possibility for the losses of B AB to be used continues to exist when this subsidiary continues to receive income in Sweden. Furthermore, the CJEU highlighted the possibility that the business leases could be assigned, the losses could be carried back to earlier years or used when a capital gain was made on the assets and liabilities of the merged company[17].

Ultimately, the Finnish national Court has to be satisfied that A Oy has proved that it has exhausted all the possibilities of taking into account the Swedish losses. If so, the Finnish rules at issue are a disproportionate obstacle to the freedom of establishment[18].

<u>Second question: Method of computation of the losses:</u>

The CJEU noted, on the first hand, that in the present state of EU law, the freedom of establishment does not as a matter of principle imply the application of

13 *Ibid.* §45, 46.

14 *Ibid.* §48.

15 *Ibid.* §49.

16 *Ibid.* §51, 52.

17 *Ibid.* §53, 54.

18 *Ibid.* §55, 56.

a particular law to the calculation of the subsidiary's losses which are taken over by the parent company, in an operation such as the merger in this case. On the other hand, EU law precludes those methods of calculation being such as to constitute an obstacle to freedom of establishment. Therefore, in principle the 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 Finnish subsidiary. This question cannot be answered in an abstract and hypothetical manner, and must be dealt with on a case-by-case basis[19].

## Analysis

*A Oy* is notable for three main reasons: the CJEU acknowledges that the freedom of establishment encompasses cross-border EU mergers (I); confirms its *Marks & Spencer* (C-446/03) reasoning when facing cross-border transfer of losses issues (II); and finally extends the national treatment principle for the methods used to compute the losses transferred (III).

I: The freedom of establishment in the context of a cross-border EU merger:

A- The irrelevance of the Tax Merger Directive regarding cross-border transfers of losses

First of all, it is worth noting the absence of implication of the EU Tax Merger Directive over a cross-border transfer of losses resulting from a EU merger. Indeed, the Advocate-General Kokott rightly pointed out that the only type of relief it provides is a take-over of the losses from a company resident in a EU Member State by the permanent establishment located in this Member State of a company resident in another Member State[20]. But here the Swedish subsidiary ceased trading before the merger was considered, and its Finnish parent company would not have any permanent establishment left in Sweden. Accordingly, because this directive does not create obligations for EU Member States to take into account trading losses transferred by means of a merger, its anti-abuse provision cannot apply[21]. In other words, the CJEU did not have to look for 'valid commercial reasons' balancing out the tax evasion or tax

19 *Ibid.* §58-60.

20 AGO Kokott, 19 Jul. 2012, Case C-123/11, [2013] ECR I-00000, §27-29; EU Directive 90/434/EEC, 23rd Jul.1990, article 6.

21 EU Directive 90/434/EEC, 23rd Jul.1990, article 11, (1), (a).

avoidance purposes of the merger, as it did for instance in the *Foggia* (C-126/10) case[22].

B- A genuine exercise of the freedom of establishment by way of merger:

Perhaps more importantly, the CJEU undeniably confirmed its broad interpretation of the freedom of establishment, which encompasses EU mergers. Using the same exact wording as in the *SEVIC Systems* (C-411/03) case, it acknowledged the fact that a merger is a particular method of restructuring EU groups of companies, both characterising a genuine exercise of the freedom of establishment and serving useful purposes regarding the EU internal market objectives[23].

C- The possibility left for Member States to adopt legislation designed to tackle tax abuse:

Moreover, with the German, Finnish, Italian and UK Governments argued that the sole motive for the restructuring was to obtain a tax advantage by deducting the losses of the Swedish subsidiary for Finnish corporation tax purposes, the CJEU highlighted the impossibility for this sole motive to defeat the application of the freedom of establishment. More precisely, the Court quoted its *Centros* (C-212/97) decision in order to differentiate between the question of the applicability of the freedom of establishment, and the question whether a Member State may adopt legislation specifically designed to deal with tax abuse in the context of a merger[24]. Arguably, if a Member State does the latter, the compatibility of such a regime with EU law could attract the anti-tax abuse reasoning of the Court. Indeed, we could reason, by analogy, with some of its previous decisions over sets of rules specifically designed to tackle wholly artificial arrangements: for instance a French tax on the commercial value of immovable property owned by legal persons[25], a Belgian tax exemption restricted to interest

22 CJEU, 10 Nov. 2011, Case C-126/10, *Sociedade Gestora de Participações Sociais SA v Secretário de Estado dos Assuntos Fiscais* (*'Foggia'*), [2011] ECR I-10923, §40-52.

23 CJEU, 13 Dec. 2005, Case C-411/03, *SEVIC Systems AG*, [2005] ECR I-10805, §19.

24 CJEU, 9 Mar. 1999, Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (*'Centros'*), [2005] ECR I-01459, §18.

25 CJEU, 11 Oct. 2007, Case C-451/05, *Européenne et Luxembourgeoise d'investissements SA v Directeur général des impôts and Ministère public* (*'Elisa'*), [2007] ECR I-08251, §9180, 81; CJEU, *28 Oct. 2010, Case C-72/09,* Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence *('Rimbaud')*, [2010] ECR I-10659, §34..

payments by resident banks[26], etc. In such cases, the CJEU tends to rely exclusively on the risk of tax avoidance in order to justify the national regime at issue.

D- The importance of the objective comparability requirement:

Advocate-General Kokott refrained from considering the objective comparability of situations when establishing whether there was a restriction of the freedom of establishment by the Member State of origin, because she deemed the significance attached by the CJEU to the condition of objective comparability 'increasingly unclear'[27]. However, in *A Oy*, the CJEU relies undeniably on an objective comparison between the Finnish group relief rules for losses and the exclusion of such relief in the context of a cross-border EU merger. Indeed, the CJEU has first to assess the objective comparability of the situations, which receives different tax treatment. If the situations are objectively comparable, the Court can then look for justifications of this restriction by overriding reasons of public interest.

II: The consistent approach by the CJEU of justification and proportionality requirements in cross-border transfer of losses cases:

A- The confirmation of three overriding reasons of public interest combined as in *Marks & Spencer*:

The Finnish Government successfully argued that allowing the deduction of trading losses transferred cross-border through a EU merger would jeopardise a balanced allocation of the powers of taxation between EU Member States. These Member States would also bear the risk of "double dipping" of those losses. Finally, by giving groups of companies the option to elect where these losses should be deducted, tax planning could be involved to use the losses in the Member State with the highest rate of corporation tax. This option creates a risk of tax avoidance as well. In line with *Marks & Spencer* (C-446/03), the CJEU accepted these three justifications taken all together in order to assess the possibility of disallowing the deduction of losses[28]. Therefore, the Court confirmed its will to combine them in cross-border transfer of losses cases, because they

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26 CJEU, 6 Jun. 2013, Case C-383/10, *Commission v Belgium*, [2013] ECR I-10000, §64.

27 AGO Kokott, 19 Jul. 2012, Case C-123/11, [2013] ECR I-00000, §40, 41.

28 CJEU, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* ('*Marks & Spencer'*), [2013] ECR I-10837, §51.

are linked[29]. Besides, when facing national legislation which organises a transfer of profits restricted to resident companies, the CJEU still combines the justifications with the exclusion of the risk of double use of losses, which cannot exist[30]. Eventually, the Court did not follow the Advocate-General Kokott's opinion that the balanced allocation of taxing powers would be the only ground for justification. Moreover, the Advocate General deemed that there would not be any risk of double dipping, and that this risk cannot be an autonomous ground of justification[31]

B- The confirmation of the 'no possibilities' test of *Marks & Spencer*:

Again, the Advocate-General's opinion clashes with the decision of the CJEU as far as the proportionality of the restriction to the freedom of establishment is concerned. Kokott deems that, by deciding on a merger with its subsidiary, the taxable company would itself forgo the possibility of using the loss in its State of residence. Also, the Advocate General points out that the taxable company still has the option of using the losses in the future by resuming trading and through the resulting profits. Finally, the Advocate General underlines that under certain conditions, the losses of the subsidiary could be transferred to another of its subsidiaries resident in the same Member State[32]. Consequently, the Advocate-General regards the present restriction as 'not particularly serious', and because the exception in *Marks & Spencer* (C-446/03) is to be understood as an *ultima ratio* solution, such restriction is 'reasonably proportionate'[33]. However, the CJEU clearly confirmed the two-prong proportionality test it set out in *Marks & Spencer* (C-446/03). Terminal losses of EU subsidiaries can undoubtedly be transferred cross-border to be offset against the profits of the parent company, even in the context of a merger taking place after the closing down of the business of such subsidiaries. More precisely, the final character of the losses is verified when the subsidiary has, in its State of residence, both exhausted the possibilities for the losses to be offset against the profits of the current accounting period, carried back over previous accounting periods; and has no possibility to carry them forward over succeeding accounting periods or transfer them to a third party[34].

29 CJEU, 18 Jul. 2007, Case C-231/05, *Oy AA*, [2007] ECR I-06373, §62.

30 *Ibid.* §60.

31 AGO Kokott, 19 Jul. 2012, Case C-123/11, [2013] ECR I-00000, §48-53.

32 *Ibid.* §58-60.

33 *Ibid.* §63-68.

34 CJEU, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)* ('*Marks & Spencer'),* [2013] ECR I-10837, §55.

It is worth mentioning the interpretation given by some EU national Courts of the 'no possibilities' test: a distinction is made between the final character of the losses due to legal reasons (e.g. limitation of loss carry forward) or factual circumstances (e.g. closing down of a permanent establishment or subsidiary). This particular development comes from the German[35] and French[36] national Courts, which have considered that only the losses which are terminal because of factual circumstances could be claimed cross-border under the 'no possibilities' test. This distinction is the latest focus of the literature, and some academics explained that it stems from the wording of the CJEU in *Krankenheim* (C-147/07), the losses that cannot be utilised for legal reasons, unlike those impossible to use for factual reasons, merely amounting to a disparity, also called quasi-restriction[37]. More precisely, the CJEU recalled that it '*held that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a company as to the establishment of commercial structures abroad may be to the company's advantage or not, according to circumstances. Even supposing that the combined effect of taxation in the State where the principal company of the PE is situated and tax due in the State where that establishment is situated might lead to a restriction of the freedom of establishment, such a restriction would be imputable only to the latter of those States. In such a situation, that restriction would arise not from the tax system at issue in the main proceedings, but from the allocation of tax competences under the agreement issued between the States involved.*'[38]

The impact of the reason for the 'finality' of the losses is even more clouded by the recent refusal of the CJEU to apply the 'no possibilities' test in the *K* (C-322/11) case. Indeed, because the facts brought before the CJEU showed that in the State source of the income (France) there had never been any legal possibility to use the capital losses in any way, the CJEU reminded us that '*a Member State cannot be required to take into account, for the purposes of applying its tax law, of the possible adverse*

35 German Bundesfinanzhof, 9 Jun. 2010, I R 100/09, IStR, p. 670; I R 107/09, FR, p. 896.

36 French Administrative Court of Appeal of Versailles, 26/02/2013, *Société Agapes*, n° 10VE04169.

37 D. Pezzella, '*Final Losses under EU Tax Law: Proposal for a Better Approach*', IBFD European Taxation 2014 (Volume 54), No 2-3, 30/01/2014, p.75, 76.

38 CJEU, 23 Oct. 2008, Case C-157/07, *Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH* ('*Krankenheim*'), [2008] ECR I-08061, §50-52.

*consequences arising from particularities of legislation of another Member State applicable to a property situated in the territory of that State which belongs to a resident in the first State*', thus again amounting to a disparity due to parallel exercise of powers of taxation between EU Member States.[39]

Arguably, we could try to rationalise the reasoning of the CJEU here and establish three distinct situations. Firstly, when there was no legal possibility to use the losses in the source State in the first place, the residence State does not act in a restrictive manner when it prevents the cross-border transfer of such losses because this is a disparity situation. Secondly, the same goes for the losses that became impossible to use for legal reasons in the source State. Thirdly, losses impossible to use for factual reasons may have to be transferred cross-border. Indeed, a national regime of group relief for losses restricted to resident companies might, in this extreme situation, affect the freedom of establishment in a disproportionate manner creating an unbalanced allocation of the powers of taxation between the EU Member States. Although academics have rightly noted that excluding legally exhausted losses from the *Marks & Spencer* exception would encourage the ceasing of foreign activities when the expiry of losses is approaching, not when the business is no longer profitable[40]. But other academics highlighted the fact that the closing down of foreign establishments remains a drastic business decision[41].

Although in the end, it is highly arguable that such a distinction might depart from a literal interpretation by national Courts of the 'no possibilities' test as set out by the CJEU, which it never explicitly intended to make. It would be interesting for practitioners to litigate a preliminary ruling question to the CJEU on this distinction and lift the uncertainty.

The latest judgments of the UK Supreme Court in the Marks & Spencer case provide three useful developments over these questions. First of all, the 'no possibilities test' must be verified at the date of the claim rather than at the end of the accounting period in which the losses crystallised[42].

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39 CJEU, 7 Nov. 2013, C-322/11, *K*, [2013] ECR I-00000, §79-81.

40 G.F. Boulogne & N. Sumrada Slavnic, '*Cross-Border Restructuring and "Final Losses"*', 52 Eur. Taxn., Journals IBFD, 10, p. 486-490 (2012).

41 G.T.K. Meussen, '*The ECJ' s Judgment in Krankenheim – The Last Piece in the Cross-Border Loss Relief Puzzle?*', 49 Eur. Taxn. 7, Journals IBFD, p. 361-363 (2009).

42 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2013] UKSC 30 [33] (Lord Hope).

Besides, when the two conditions of such test are met, sequential/cumulative claims by the same company for the same losses of the same surrendering company in respect of the same accounting period can be made[43]. Finally, the UK Supreme Court has acknowledged that the principle of effectiveness requires, on the first hand, to allow late self-assessment claims And on the other hand, late pay and file claims are time barred[44].

III: The extension of the national treatment principle to the calculation of losses:

A- A method of computation ensuring no less favourable treatment than for a parent company merging with a resident subsidiary:

For the first time, thanks to the Finnish Court referring to the CJEU the question of the method to be used to compute the losses transferred cross-border, the Court had the opportunity to give both theoretical and practical insights, and the Court delivers two relevant developments in the present case. On the one hand, it acknowledged the impossibility of setting-up an abstract and hypothetical method for calculation of the transferred losses. But, on the other hand, the CJEU clearly required the national treatment principle to be extended to the method of computation itself. In other words, here the Swedish accounting methods used to compute the losses of B AB before the merger cannot result in a lower amount of losses than the amount given if the Finnish accounting methods were to be used as it would for a merger with a Finnish subsidiary. Arguably, on the contrary if the calculation with the Swedish accounting standards leads to a greater amount of losses, this situation might not be problematic in the eye of the Court because it has shown to be inclined to accept reverse discrimination in cross-border transfers of dividends[45].

B- Local method of computation or hybrid method?

The practical application of the national treatment principle to the method of calculation of the losses begs the question of the appropriate method to be retained. Although the Court does not give insights on the best method, the Advocate-General Kokott interestingly explained in her opinion that, in

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43 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2014] UKSC 11 & [2013] UKSC 30 [41] (Lord Clarke).

44 *Ibid.*, [48] (Lord Clarke).

45 CJEU, 14 Nov. 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres v Belgische Staat* (‘*Kerckhaert Morres’)*, [2006] ECR I-10967, §18.

principle, the losses to be taken into account should be calculated according to the tax law of the receiving company's State of residence. But she then notes that such principle could have to be limited in certain circumstances, because the cause of a loss calculation could differ from the operating result. For example, fiscal promotion measures of the receiving company's State of residence such as higher depreciation would result in a bigger loss. Therefore, the method used to compute the losses transferred cross-border should exclude the application of tax incentive measures in order to give a truly equal treatment of the losses[46].

This is a matter for national Courts to decide upon. For reference, the UK Supreme Court had to choose between six potential methods identified through several hearings before the FTT[47]. Two methods, namely method B and method D, were considered overly complicated and were set aside. With the next two methods, the losses would be calculated under the rules of a single country: the State of residence of the subsidiary (Method A), or the UK (Method C). With the last two methods, the unutilised losses would be converted into UK losses as determined under local rules (Method E) or determined by taking the lower each year of the amounts calculated and utilised either under local rules or after conversion to UK rules (Method F). The FTT held that Method E was the correct one and its decision was upheld by the Upper Tribunal, then by the Court of Appeal and ultimately by the Supreme Court[48]. In the end, this choice seems consistent with the national treatment principle set out by the CJEU, but the choice of the method to compute the losses transferred cross-border will remain a tricky one, done on a case-by-case basis.

## Conclusion

Overall, *A Oy* is a significant case for the Court's jurisprudence not only because it is in line with the *Marks & Spencer* (C-446/03) reasoning of the CJEU, but also because it extends the scope of the freedom of establishment to cross-border EU mergers. The national treatment principle is also clearly extended to the method of computation of the losses itself. However, *A Oy* may seem difficult to reconcile with the recent decision of the CJEU in the *K* (C-322/11), and does not provide an answer over the distinction made between losses exhausted for legal or factual reasons.

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46 AGO Kokott, 19 Jul. 2012, Case C-123/11, [2013] ECR I-00000, §73, 75.

47 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2014] UKSC 11 & [2013] UKSC 30 [49] (Lord Clarke).

48 *Ibid.*, [53] (Lord Clarke).