QUESTIONING THE IMPACT OF THE CJEU DECISION IN *MARKS & SPENCER PLC V HALSEY (INSPECTOR OF TAXES)*: A FRENCH PERSPECTIVE

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Introduction

After 11 years of litigation, the *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* case has recently come to an end[2]. Last 19th of February 2014 in its final judgment, the UK Supreme Court has answered the remaining three of the five questions identified by Moses LJ in the Court of Appeal[3].

Originally, the UK Courts referred to the CJEU the question of the compatibility of the UK group relief regime, at the time excluding trading losses suffered by EU subsidiaries to be claimed by their UK resident parent company, with the EU freedom of establishment. The CJEU gave a breakthrough decision[4], which caused a ruckus both for UK Courts involved in the matter and in academic literature. While it is well known that the academic discussions over the decision of the CJEU in *Marks & Spencer* have been heated, the practical issues raised by such decision were at first less obvious.

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2 *Commissioners for Her Majesoy's Revenue and Customs v Marks and Spencer plc* [2014] UKSC 11 & [2013] UKSC 30.

3 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2012] STC 231 [4] (Moses LJ).

4 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.

In the aftermath, the outcomes given by the Supreme Court to these five questions were the following: 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, and as a consequence the question of the availability of the partly used losses does not have to be answered[5]. When the two conditions of the *Marks & Spencer* exception 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[6]. The UK Supreme Court has acknowledged that the principle of effectiveness requires, on the first hand, to allow late self-assessment claims. On the other hand, late pay and file claims are time barred[7]. Finally, the losses transferred cross-border would be converted into UK losses as determined under local rules[8]. This puts emphasis on the complexity the UK Courts have faced in practice when applying the interpretation given by the CJEU in *Marks & Spencer*.

The aim of the present dissertation is first to contemplate the reasoning and solution the CJEU would adopt if faced with the compatibility of the French fiscal unity rules with the EU freedom of establishment regarding losses suffered by EU subsidiaries of a French resident parent company. Second, the goal is also to contemplate the practical issues raised for the French Courts applying the CJEU's findings, and to try to provide solutions based on the existing decisions of French national Courts and national Courts of other EU Member States.

First of all, it is worth comparing the system France has chosen to relieve intra-group losses to the system used in other EU countries, some of which have already been scrutinised by the CJEU in existing cases. There are actually various methods to allow intra-group relief of losses, which we can broadly classify in three categories. The first one is the method adopted by the UK for instance with the group and consortium relief regimes, where companies forming a group are not unified for corporation tax purposes, can claim or surrender losses to one another upward or downward, and simply upon filing these claims for every accounting period[9]. The second one is the top-down approach adopted by Nordic countries such as Finland (*Laki konserniavustuksesta verotuksessa*) for instance, where the parent company can allocate part of its profit to its loss-making subsidiaries for

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

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

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

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

9 UK Corporation Tax Act 2010, Part 5.

Finnish corporation tax purposes[10]. The last one is the bottom-up approach adopted by France (*intégration fiscale*) and the Netherlands (*fiscale eenheid*) for example, where the companies of a group are unified for corporation tax purposes for several accounting periods: losses suffered by the subsidiaries are offset over the profits of the parent company, which is the head of the group having both to declare a consolidated profit and pay the corporation tax for all the companies part of the group[11].

Briefly, it is important to describe the main features of the French fiscal unity rules, as it is a pre-requisite to our further developments. The subsidiaries falling within its scope are these at least 95% directly or indirectly held by one parent company and subject to French corporation tax[12]. In other words, they have to be French resident companies, deriving their profits from activities carried out in France[13]. Following the CJEU's decision in the *Papillon* case[14], the French tax administration allows second tier French resident subsidiaries, indirectly held by the French parent company through a first tier subsidiary resident in another EU Member State, to be part of such group when they meet the aforementioned requirements[15]. The group is formed for a minimum period of five years with a possibility for each company to opt out of the group every year if at least two companies remain in the group. Specific rules exclude the use of pre-entry losses by the head of the group, and by companies having left the group regarding losses incurred at the time they were part of the group[16].

The decision of the CJEU in the *Marks & Spencer* case has been extensively commented in the academic literature. However, it seems that the leading paper from a French author on this topic pre-dates the decision of the CJEU itself. Indeed, Professor Daniel Gutmann proposed his way of reasoning on the issues raised by the *Marks & Spencer* situation in a note published back in 2003 when the preliminary ruling procedure was initiated[17]. Since then, the *Marks & Spencer* case has apparently not been significantly revisited by any other French academic.

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10 CJEU, 18 Jul. 2007, Case C-231/05, *Oy AA*, [2007] ECR I-06373, §6 to 10.

11 *BV*"), [2010] ECR I-01215, §5.

12 Article 223 A CGI.

13 Article 209, I CGI.

14 CJEU, 27 Nov. 2008, Case C-418/07, *Société Papillon v Ministère du Budget, des Comptes publics et de la Fonction publique* ("*Papillon")*, [2008] ECR I-08947.

15 BOI-IS-GPE-10-30-30 n° 60.

16 Article 223 A, I and K CGI.

17 Daniel Gutmann, "*The Marks & Spencer case: Proposals for an Alternative Way of. Reasoning*", EC Tax Review 2003 (Volume 12), Issue 3, Kluwer Law International, p. 154 to 158.

Therefore, we will rely heavily on this article in order to put the CJEU case law on cross-border transfer of EU losses into perspective with the French fiscal unity rules.

We have identified four main issues to deal with in turn in this research paper. The *summa divisio* of our paper will be to consider the substance of the right to transfer EU losses cross-border to a French parent company (Part 1), before paying close attention to the form in which this right must be exercised (Part 2).

First, there are fundamental questions that have been raised by academics regarding the division of the competence in direct taxation matters between the EU institutions and the national institutions of each of the twenty-eight EU Member States (Chapter 1). Indeed, the competence to decide whether losses incurred by companies can be used for corporation tax purposes or not traditionally belongs to each State. Nevertheless, once they have joined the EU, they are part of the EU legal order. So has this competence left the bosom of each EU Member-State to be allocated to the EU institutions or not? We will identify the connecting factors retained by France in order to tax companies and take into account losses they could suffer from. Then, we will highlight the essential distinction made by the CJEU between the allocation and the exercise of powers in the direct taxation field, and its impact on the present matter. Furthermore, we will underline the need for the French fiscal unity rules to comply with the EU principle of non-discrimination and the EU fundamental freedoms. We will also underline the home State obligations of France as a result. Finally, we will verify the relevance of the territoriality argument often used by the French Governments in EU litigations and defended by Professor Daniel Gutmann.

Second, we will then check thoroughly the compliance of the current French fiscal unity rules with the reasoning adopted by the CJEU in its case law regarding cross-border transfer of EU losses (Chapter 2). We will decide both whether the apparent absence within this regime of a rule allowing the transfer of a loss from a subsidiary resident in another EU Member-State to its French parent company constitutes a restriction to the EU freedom of establishment of the latter; and whether such subsidiary is placed in a situation objectively comparable to a French subsidiary. Besides, we will consider the justifications by overriding reasons of public interest potentially available to the French Government. Finally, we will apply the notorious two-prong proportionality test set out by the CJEU in the *Marks & Spencer* case to the French fiscal unity rules. We will then be able to conclude on the potential interpretation the CJEU would make of the compliance of the French fiscal unity rules with EU Law.

Third, the question of the method to be used to compute the loss transferred from a EU subsidiary to its French parent company is a central one (Chapter 1). Indeed, each EU Member State has its own rules to determine the taxable profit of the company, including rules taking into account losses suffered by companies. These rules may be different from one EU Member State to another: the loss computed in the Member-State of residence of the subsidiary may not equate to the same amount once computed under French law if used by its French parent company. We will study the recent developments in the CJEU's case law over the method to be applied by France when a loss has to be transferred. Moreover, we will consider the applicability of an alternative approach to the transfer of the loss itself: the writing-down by the French parent company of the book value of the shares of its EU loss-making subsidiary.

Fourth, the exercise of the right to transfer a loss of a EU subsidiary to its French parent company raises in practice specific considerations related to the burden of proof and the compatibility of the French fiscal unity rules with the relevant general principles of EU Law (Chapter 2). We will decide whether the burden of proof of the final losses rests exclusively on the French tax administration or the French parent company, or on both. Besides, we will consider the impact on the French fiscal unity rules of three general principles of EU Law: namely the need for an equivalent and effective protection of EU Law, and for legal certainty in the Law of the EU Member States.

Part 1: The substance of the right to transfer EU losses cross-border to a French parent company

First of all, we must address the competence issue and determine whether the power to allow or disallow a cross-border transfer of a EU loss belongs to France or the EU institutions (Chapter 1). In a latter phase, we will then address the compliance issue and determine whether the French fiscal unity regime would hypothetically be compliant or not with the EU freedom of establishment in the eye of the CJEU (Chapter 2).

Chapter 1: Does the competence to allow or disallow a cross-border transfer of a EU loss to a French parent company belong to France or the EU institutions?

The CJEU, in its case law over direct taxation matters, has consistently stressed the distinction between the allocation (I) and the exercise (II) of a competence.

I: A competence allocated to France:

A- A principle often recalled by the CJEU:

The CJEU has expressed many times in its case law on direct taxation matters that "*although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community Law*"[18]. In other words, the CJEU distinguishes between the allocation and the exercise of a competence. The allocation of powers of direct taxation almost always belong to each EU Member-State, but their exercise must be done in the respect of the requirements set out by EU Law.

However, this statement suffers two limits. First, from the very beginning of the existence of the EU, certain direct taxation powers have been given up by EU Member-States to the EU institutions due to some provisions of the EU Treaties themselves[19]. Second, in order to fulfil the objective of having a common market within the EU, six EU directives constitute minimum harmonization measures[20]. Their goal is to avoid frictions coming from the differences of national Tax Law between EU Member States for certain types of cross-border payments or operations[21].

Professor Daniel Gutmann has drawn from this statement that "(…) *we tend to forget its basic assumption: to exercise its control, the ECJ first has to check that the Member State concerned exercises its competence! Where the Member State does not exercise its competence, the ECJ loses its own.*"[22] This statement seems to hold true: the competence to take into account losses of companies is allocated to France, and had it not exercised it, the CJEU would not have to interpret EU Law here. However, it seems clear that France has exercised such competence, having

18 CJEU, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue*, ("*ACT IV GLO*"), [2006] ECR I-11673, §36. See also *Marks & Spencer*, §29.

19 For instance, the power to tax the salaries of EU officials: CJEU, 16 Dec. 1960, Case 6/60, *Jean-E. Humblet v Belgian State*, [1960] ECR 559 (English special edition), §4, 5.

20 Tom O'Shea, *EU Tax Law and Double Tax Conventions* (Avoir Fiscal Ltd, London 2008), Chapter 2, p. 94-106.

21 EU Directive, 90/434/EEC, 23rd Jul.1990, on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, [2009] OJ L 310; EU Directive, 2003/48/EC, 3 Jun. 2003 on taxation of savings income in the form of interest payments, [2003] OJ L 157; EU Directive, 2003/49/EC, 3 Jun. 2003, on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, [2003] OJ L 157; EU Directive, 2003/123/EC, 22 Dec. 2003, on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, [2004] OJ L 7; EU Directive, 2010/24/EU, 16 Mar. 2010, concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L84; EU Directive, 2011/16/EU, 15 Feb. 2011, on administrative cooperation in the field of taxation, [2011] OJ L 64.

22 Daniel Gutmann, *Op. cit.*, p. 157.

adopted a set of rules for the purpose of taking into account intra-group losses of French companies. Thus, the competence to allow the offset of intra-group losses has both been allocated to and exercised by France.

B- A division of the right to tax chosen by France based on the residence of the subsidiary:

Furthermore, in order for States to decide who has the right to tax, they must choose criteria to base their tax claim on[23]. Traditionally, the division is made between residence or source taxation. In the view of Christina Jonsson, this division of tax jurisdiction lies completely with the States[24].

In the case of France, intra-group losses can only be transferred and relieved thanks to the French fiscal unity regime. On the one hand, French permanent establishments of foreign companies can form or be part of a group unified for French corporation tax purposes.[25] Therefore, arguably France fulfils its source state obligations in that respect. Nevertheless, on the other hand this regime is reserved for resident subsidiaries only, as there is no apparent rule allowing foreign subsidiaries to be part of a group unified for French corporation tax purposes. As a result, the residence of the subsidiary becomes a criteria of differentiation, potentially leading to different tax treatments: losses of French subsidiaries can be relieved in the hands of the French parent company; while losses of other EU subsidiaries cannot apparently be relieved in its hands.

But will this choice of France to only see resident subsidiaries part of a unified group attract the home state obligations set out by the case law of the CJEU? If so, what is the role of the CJEU and the means at his disposition regarding the French fiscal unity regime? And finally what does it have to do of the territoriality argument often put forward by the French Government?

II: A competence which must be exercised consistently with EU Law under the scrutiny of the CJEU:

A- Home State obligations: the French fiscal unity rules must comply with the principle of discrimination and the fundamental freedoms set out by the TFEU:

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23 Christina Jonsson, "*The Impact of AG Geelhoed's Theory on Recent Case Law*", (DPhil thesis, University of Lund 2011), p. 6.

Available here: http://www.lunduniversity.lu.se/o.o.i.s?id=24965&postid=2062177

24 *Ibidem.*

25 BOI-IS-GPE-10-30-40, n°170.

According to the case law of the CJEU, residence taxation will attract home state obligations while only source state obligations will be imposed on source taxation[26]. The home state obligation is the obligation to treat domestic and foreign income consistently according to the division of the tax base[27]. Indeed, the choice by France to disallow foreign subsidiaries to be part of a French unified group of companies is faced with the necessity to respect two essential provisions of the EU Treaties. The first one is the principle of non-discrimination on grounds of nationality[28]. The second ones are the five fundamental freedoms: free movement of goods, persons and capital; freedom to provide services; and freedom of establishment[29].

More specifically, in the case law of the CJEU on cross-border transfer of EU losses, the fundamental freedom at stake has generally been the freedom of establishment pursuant to articles 49 and 54 TFEU. Indeed, the Court usually decides that the freedom of establishment applies over the free movement of capital when the national regime at issue relates to holdings which give the parent company a definite influence over the decisions of its subsidiary and allows it to determine its activities.[30] The 95% threshold of the French fiscal unity rules undoubtedly means that the freedom of establishment would be applicable to the present matter.

Briefly, we must however underline the recognition by the CJEU, in its *Marks & Spencer* decision, that the UK had not extended its tax jurisdiction over a non-resident subsidiary of a resident parent company: it could not tax its profits, so symmetrically did not have to bear its losses[31]. Also, its decision in *X Holding BV* shows that the Netherlands did not fail their home state obligations when excluding foreign EU subsidiaries from the single tax entity regime[32]. Both these arguments of the CJEU could certainly apply in the case of the French fiscal unity regime as well. For now, we can only conclude that such an exclusion from a national regime does not automatically entail the failure of France to fulfil its home state obligations. We will investigate further in Chapter 2, dedicated to the compliance issue.

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26 Christina Jonsson, "*The Impact of AG Geelhoed's Theory...*", *Op. cit.*, p. 7, 8.

27 *Ibidem.*

28 Article 18 TFEU.

29 Articles 28, 29, 45 to 66 TFEU.

30 CJEU, 13 Apr. 2000, Case C-251/98, *C. Baars v Inspector der Belastingen Particulieren/Odernemingen Gorinchem ("Baars")*, [2000] ECR I-002787, §22.

31 *Marks & Spencer*, §43, 46.

32 *X Holding BV*, §44.

B- The competence of the CJEU for negative harmonization and its reject of the territoriality argument put forward by the French Government:

Among other roles, the CJEU shall ensure that in the interpretation and application of the Treaties the law is observed.[33] Therefore, the French fiscal unity regime falls under its scrutiny either through a potential infringement procedure initiated by the EU Commission, or through a hypothetic preliminary ruling procedure initiated by a French Court[34]. More precisely, the CJEU itself recalls that "(…) *the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 234 EC, the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force.* (…) *In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force.*"[35] Overall, it is clear the CJEU possesses the required competence to contend with national regimes such as the French fiscal unity rules, in order to ensure the harmonised application and interpretation of EU Law. If the CJEU was to find this regime not to be compliant with EU Law, it would be deemed not to have existed at all. We will give a look to the potential consequences of such a decision in Part 2 of our research paper.

In his note mentioned earlier, Professor Daniel Gutmann comes to a third conclusion that "*In terms of policy, Governments of Member States therefore face individual choices: either they keep their worldwide systems for corporate income tax, in which case they must reform their group tax rules in order to allow a cross-border flow of losses; or they switch over to the territoriality system, and they do not have to allow such a cross-border flow of losses. The choice between the worldwide principle and the territoriality principle does not belong to the ECJ.*"[36] This is also known as the territoriality argument.

It was first mentioned as far back as in the *Commission v French Republic (Avoir Fiscal)* case as follow: "*a French company or a branch of a foreign company operating in France are taxed only in respect of income produced by their activities in France and the activities of the foreign branch of a French company are not taxed in France.*"[37] Furthermore, in the *Futura* case, the CJEU later on confirmed

33 Article 19 TEU.

34 Articles 251 to 281 TFEU.

35 CJEU, 12 Feb. 2008, Case C-2/06, *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*. ("*Kempter*"), [2008] ECR I-00411, §35.

36 Daniel Gutmann, *Op. cit.*, p. 158.

37 CJEU, 28 Jan. 1986, Case C-270/83, *Commission of the European Communities v French Republic* ("*Avoir Fiscal*"), [1986] ECR I-00273, III, 1, a.

that the Luxembourg rule of the carry forward of trading losses "(…) *which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing discrimination, overt or covert, prohibited by the Treaty*."[38] Therefore, it could appear convincing for France to rely on the territoriality argument and refuse to open up the possibility for foreign subsidiaries to have their losses offset against the profits of their French parent company, merely because France has chosen not to tax the profits of these subsidiaries in the first place.

However, both the aforementioned cases were concerned with rules applying in a host state situation. The French Government tried to argue the same in an origin state case, namely the *Manninen* case, that the Finnish tax legislation at issue conforms to the principle of territoriality and cannot therefore be regarded as contrary to the Treaty provisions on the free movement of capital.[39] But the CJEU clearly rejected this argument, explaining that "*unlike the legislation at issue in Futura Participations and Singer, the Finnish tax legislation cannot be regarded as an emanation of the principle of territoriality*. (…) *that principle does not preclude the granting of a tax credit to a person fully taxable in Finland in respect of dividends paid by companies established in other Member States.*"[40] The Court added "*In any event, having regard to Article 58(1)(a) EC, the principle of territoriality cannot justify different treatment of dividends distributed by companies established in Finland and those paid by companies established in other Member States, if the categories of dividends concerned by that difference in treatment share the same objective situation.*"[41]

As a result, it is credible that the CJEU, if faced with the same argument put forward by any EU national Government in the proceedings of a case related to the French fiscal unity rules, would dismiss the territoriality argument. Indeed, this set of rules would not be an emanation of the principle of territoriality: it would not preclude the granting of a relief to the French parent company for losses suffered by its EU subsidiaries, and justify a difference of treatment between these subsidiaries and French resident subsidiaries if they are placed in the same objective situation. Thus, we now need to understand what is the right comparator in the mind of the CJEU, and further contemplate the potential reasoning of the Court regarding the compliance of the French fiscal unity regime with EU Law.

38 CJEU, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v Administration des contributions* ("*Futura*"), [1997] ECR I02471, §22.

39 CJEU, 7 Sep. 2004, Case C-319/02, *Petri Manninen* ("*Manninen*"), [2004] ECR I07477, §31.

40 *Ibid.*, §38.

41 *Ibid.*, §39. See also *Marks & Spencer*, §40.

Chapter 2: Are the French fiscal unity rules compliant with the requirements set out by the CJEU?

Having solved the competence issue, we can now determine whether the current French fiscal unity rules would be compliant with the EU freedom of establishment using in turn the concepts of restriction (I), justifications by overriding reasons of public interest (II), and proportionality test (III) developed by the CJEU in its case law.

I: A potential restriction to the EU freedom of establishment:

A- The objective comparability of the situations of a foreign EU subsidiary and of a French subsidiary for the purpose of the French fiscal unity rules:

First of all, in the *Marks & Spencer* decision of the CJEU, the Court highlighted the need for an origin state rule, the UK group relief, to comply with the freedom of establishment of the UK resident Marks & Spencer parent company. Indeed, Professor Tom O'Shea rightly pointed out that the emphasis should be placed on the decision of this UK parent company "(…) *to establish subsidiaries or branches in the first place. It is that decision to established in other Member States which is at issue in this case. It is that decision which is influenced by the UK's Group Relief rules. It is that decision to exercise its right of establishment which faces a restrictive tax regime.*"[42] Again, it would appear correct to assume that the study of the compliance of the French fiscal unity regime places France in an origin state situation as well.

The Marks & Spencer decision also showcased the migrant/non-migrant test, originally found in the *De Groot* decision of the CJEU and stated as follow: "*as far as the exercise of the power of taxation so allocated is concerned, the Member States must comply with Community rules* (…) *and more particularly, respect the principle of national treatment of nationals of other Member States and of their own nationals who exercise the freedoms guaranteed by the Treaty.*" [43] This allowed Professor Tom O'Shea to conclude that "*the Court is making it clear for origin states*", such as France here, "*that they must grant national treatment to their own nationals when they exercise a Community freedom. They must treat those of their nationals that choose to operate cross-border (migrant workers/companies) as favourably as they treat their own nationals who operate in*

42 Tom O'Shea, "*Marks and Spencer v Halsey (HM Inspector of Taxes): restriction, justification and proportionality* ", EC Tax Review 2006 (Volume 15), Issue 2, Kluwer Law International, p. 72.

43 CJEU, 12 Dec. 2002, Case C-385/00, *F.W.L. De Groot v Staatssecretaris van Financien* ("*De Groot*"), [2002] ECR I-11819, §94.

the origin state alone (non-migrant workers/companies). This is not to say that the origin state cannot justify such different treatment; merely that any different treatment may constitute a restriction requiring justification (...)*.*"[44]

Following the reasoning of the CJEU here, we understand that it implies an objective comparison between the tax treatments of the losses in France received by a migrant and a non-migrant entity. More precisely, the position of the CJEU is to look up the aim of the legislation at issue and identify the right entities to compare here. This position may have been misunderstood by some academics.

For instance Professor Daniel Gutmann states that the way of reasoning where "*if the UK allows the EU branch to offset its losses against the profits of the UK company, then it should also allow such a compensation for foreign subsidiaries*" is impossible to accept.[45] Then Professor Daniel Gutmann defends the idea that the UK group relief is not in line with the freedom of establishment "*because the essence of group relief is to create legal comparability between subsidiaries and branches for the purpose of specific tax rules; once the UK accepts that losses suffered by foreign branches may be offset against the profits of a UK company belonging to the same group (by virtue of the combination between the worldwide principle and the group relief rules), it must allow foreign subsidiaries to surrender their own loss in the same conditions.*"[46] This point of view seems to be shared by Professor Michael Lang as well, stating that "*the legal treatment may only be to a certain extent different if the legal situation is only to a certain extent different.*"[47], and thus "*accordingly, the ECJ could have looked at the comparison between a subsidiary and a branch.*"[48]

However, although the Advocate General Maduro contemplated in his Opinion the possibility to compare the tax treatments received by subsidiaries with that of permanent establishments[49], he eventually came to the conclusion that "*plainly, moreover, UK tax legislation does not prohibit a UK company from establishing itself in the other Member States by means of subsidiaries. Accordingly, the question in this case is merely whether the establishment of subsidiaries in another*

44 Tom O'Shea, *Op. cit. Marks and Spencer...*, p. 75.

45 Daniel Gutmann, *Op. cit.*, p. 155.

46 *Ibid.*, p. 158.

47 Michael Lang, "*Wohin geht das Internationale Steuerrecht?*", Internationales Steuerrecht (2005), p. 291.

48 Michael Lang, "*Marks and Spencer – more questions than answers: an analysis of the Opinion delivered by Advocate General Maduro*", EC Tax Review 2005 (Volume 14), Issue 2, Kluwer Law International, p. 96.

49 CJEU, Advocate General's Opinion, 7 Apr. 2005, Case C-466/03, *Marks & Spencer plc v. David Halsey (HM Inspector of Taxes)*, §48.

Member State entails for the group and its parent company resident in the UK a specific disadvantage which they would not incur if the parent opted to establish its subsidiaries in its country of residence."[50]

The CJEU, having looked at the purpose of the UK group relief, confirmed in its *Marks and Spencer* decision[51] the position taken by Advocate General Maduro, and in further cases such as the *A Oy* case recently[52]. Overall, admittedly there could be arguments in favour of comparing the tax treatments of foreign subsidiaries and foreign permanent establishments. Nevertheless, the CJEU has consistently compared the tax treatments of domestic and foreign subsidiaries for the purpose of legislations aimed at relieving losses suffered by companies of a same group. Therefore, there is little doubt that the right comparator is the latter. In other words, the objective comparison to be made for the purpose of the French fiscal unity regime is between the tax treatment received by a non-resident EU subsidiary and the one received by a French resident subsidiary.

B- The French fiscal unity rules restricting the freedom of establishment of the French parent company:

From an origin state perspective, the CJEU relies on the concept of restriction in order to ensure the respect of the EU fundamental freedoms. More specifically, would a French parent company establishing a subsidiary abroad have exercised its freedom of establishment pursuant to articles 49 and 54 TFEU in the eye of the CJEU? Second, if such a freedom has been exercised by the French parent company, are the French fiscal unity rules restricting it?

The CJEU consistently rewards genuine exercises of the freedom of establishment by group of companies in its case law. Indeed, the CJEU often highlights "(…) *the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to pursue their activities in the Member State concerned through a branch or agency.*"[53] The CJEU would certainly recognise a

50 *Ibid.*, §50.

51 *Marks & Spencer*, §34.

52 CJEU, 21 Feb. 2013, Case C-123/11, *A Oy*, not yet published, §35.

53 *Avoir fiscal*, §18; CJEU, 13 Jul. 1993, Case C-330/91, *The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG* ("*Commerzbank*"), [1993] ECR 1-4017, §13; CJEU, 16 Jul. 1998, Case C-264/96, *Imperial Chemical Industries plc v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* ("*ICI*"), [1998] I-04695, §20; CJEU, 21 Sep. 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt)* ("*Saint-Gobain")*, [1999] I-06161, §35; *Marks & Spencer*, §30.

genuine exercise of the EU freedom of establishment if a French parent company was to establish secondary establishments, whether branches or subsidiaries, in other EU Member-States.

Moreover, the concept of restriction from an origin state perspective may be broken down in three steps by analogy to the *Marks & Spencer* case. The first one would be for the CJEU to acknowledge the possibility granted by French law, for a French parent company head of a unified group for French corporation tax purposes, to deduct losses of a French subsidiary being part of such group.[54] The second stage is for the Court to establish that it constitutes a tax advantage.[55] Finally, the last step is for the CJEU to highlight that the exclusion of such an advantage for losses of non-resident EU subsidiaries is liable to make establishment in other Member States less attractive and deter or hinder a French company from setting up subsidiaries there.[56] Again, if faced with the French fiscal unity regime, the CJEU would be very likely to adopt such reasoning. We can thus assume that the French fiscal unity regime constitutes, for any French parent company head of a unified group and willing to integrate EU loss-making subsidiaries in the group, a restriction to its EU freedom of establishment.

II: The justifications by overriding reasons of public interest available to the French Government:

A- The need for a balanced allocation of the powers of taxation between EU Member States:

Even though the French fiscal unity regime may be restrictive, the four steps formula detailed by the CJEU in the *Gebhard* case ensures the possibility for the French Government to save it[57]. More specifically, for the first three steps of this formula, the CJEU is looking for restrictive national rules applied in a non-discriminatory manner, justified by imperative requirements in the general interest, and suitable for securing the attainment of the objective which they pursue[58]. Logically, the French fiscal unity regime can hardly be discriminatory on grounds of nationality considering it is an origin state rule: the objective comparability requirement would be made between two French resident parent companies, one establishing subsidiaries in France, the other establishing subsidiaries in other EU

54 By analogy to *Marks & Spencer*, §27.

55 *Ibid.*, §32.

56 *Ibid.*, §33.

57 CJEU, 30 Nov. 1995, Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ("*Gebhard"*), [1995] I-04165.

58 *Ibid.*, §37.

Member States. Thus, these rules are certainly applied in a non-discriminatory manner.

As a preliminary remark, it is worth pointing out the constant refusal of the CJEU to admit a reduction in tax revenue as a justification here.[59] The first justification by overriding reasons of public interest the French Government could try to rely on is the balanced allocation of the powers of taxation between EU Member States. This breakthrough justification was accepted for the first time in the *Marks & Spencer* decision of the CJEU.[60] Profits and losses should be treated symmetrically in the tax systems of each EU Member State, otherwise it might jeopardise a balanced allocation of the powers of direct taxation between these Member States. Put simply, if the EU Member State A can tax the profits of a company it should also bear its losses, and vice-versa. Also, if the CJEU allows a cross-border transfer of a loss from a subsidiary resident in the EU Member State A to its parent company resident in the EU Member State B; A can tax the profit of the subsidiary but will not have to bear its loss, while B will bear the loss of the subsidiary without being able to tax its profits. This is the kind of situation the CJEU wants to avoid with the present justification.

The balanced allocation of the powers of taxation between EU Member States has been heavily criticised in the academic literature. Professor Michael Lang has found it to be a "*position difficult to understand*", and that "*the ECJ is wrong. Allowing the deduction of the loss in the parent's residence state does not necessarily exclude the possibility to utilize the loss in another member State. Specifically, the introduction of deductibility of a foreign loss in the state of residence of the parent does not prevent the state of residence of the subsidiary from applying its own domestic rules. There is neither an option to utilize the loss in one or the other Member State nor are the losses "transferred" in a way that they can no longer be utilized in the other state.*"[61] However, this statement may not be right because the intra-group losses would be transferred in a EU environment only. Thus, the EU Member-States could count on the EU Directive 2011/16/EU on administrative cooperation in the field of taxation in order to exchange information about which Member State has allowed the use of the loss, so that the other Member States can disallow it.

Professor Michael Lang adds that "*using the phrase "allocation of the power to impose taxes between Member States" is also misleading. The power to impose taxes between the Member States is not allocated amongst the Member States. They*

59 *Manninen*, §49 ; *Marks & Spencer*, §44.

60 *Marks & Spencer*, §45,46.

61 Michael Lang, "*The Marks and Spencer case – the open issues following the ECJ's final word* ", European Taxation 2006 (Volume 46), IBFD, No 2, p. 57.

can impose taxes whenever there is the necessary genuine link required by international customary law."[62] This statement seems to hold true, but it may be due to the fact that Professor Michael Lang fails to grab the importance of the word "balance" used by the CJEU: it is not the allocation of direct taxing rights by each EU Member State that is questioned here, but the fact that the resulting balance in the EU environment might be compromised by a cross-border transfer of a loss or profit.

Also, academics have rightfully focused on the fact that this justification was "*taken together*" by the Court with the two other justifications we will study later on.[63] Domenico Pezzella broke down the situation very well in an article, in which he defended the idea that the justifications had to be taken together, but with supremacy of the balanced allocation of powers of taxation between EU Member States.[64] This position is compelling.

Indeed, the CJEU underlined in the *Lidl Belgium* case that, bearing in the mind the wide variety of situations in which a Member State may rely on such reasons, it might not be necessary for all three justifications referred to in *Marks & Spencer* to be present at the same time in order to justify a national regime amounting to a restriction of the EU freedom of establishment[65]. Furthermore, the CJEU accepted the combination of the balanced allocation justification along with only the justification of need to fight tax avoidance in the *Oy AA* case[66], and with only the justification of the need to prevent the risk of double dipping of the losses in the *Lidl Belgium* case[67]. Moreover, the *X Holding BV* case may have been seen as a reversal of the position of the Court using the sole argument of need for a balanced allocation of the powers of taxation between EU Member-States to justify the Dutch single tax entity regime.[68] However, some academics have pointed out that this case could not be taken into account as a precedent, because the dispute only involved temporary losses suffered by the non-resident subsidiaries, not final

62 Michael Lang, "*Einführung in das Recht der Doppelbesteuerungsabkommen*", 2nd edition (Vienna: Linde, 2002), p. 21.

63 *Marks & Spencer*, §51.

64 Domenico Pezzella, "*Final Losses under EU Tax Law: Proposal for a Better Approach*", European Taxation 2014 (Volume 54), IBFD, No 2-3, p.72, 73.

65 CJEU, 15 May 2008, Case C-414/06, *Lidl Belgium Gmbh & Co. KG v.Finanzamt Heilbronn* ("*Lidl Belgium*"), [2008] I-03601, §40.

66 CJEU, 18 Jul. 2007, Case C-231/05, *Oy AA*, [2007] ECR I-06373, §60.

67 *Lidl Belgium*, §42.

68 *X Holding BV*, §41.

losses.[69] Indeed, the three justifications have been used together once again recently by the CJEU in its *A Oy* judgment, using the exact same wording as in its *Marks & Spencer* decision.[70]

So eventually would a cross-border transfer of a loss suffered by a EU resident subsidiary to its French parent company jeopardise the balanced allocation of the direct taxing rights between France and this other EU Member State? Arguably it would indeed, as "*taxpayers who have sought to "import" foreign losses have hit a brick wall in a number of cases*".[71] Also, it may have to be the lead argument of the French Government in order to defend the French fiscal unity rules in the proceedings before a hypothetical decision of the CJEU. But what other justifications could the French Government try to combine it with?

B- The risk of double use of the losses of the foreign EU subsidiary:

The CJEU recognises an actual risk of double use of the losses transferred in the tax systems of the EU Member States concerned. Even though, in reality, the French rules here prevent such deduction by the French parent company of the loss suffered by its EU subsidiary. The case law of the CJEU proves that the risk of double dipping has never been accepted as a stand-alone justification: in the *Marks & Spencer* and *A Oy* cases it was taken together with the need to prevent the risk of tax avoidance and the balanced allocation of taxing rights between EU Member States[72], while in *Lidl Belgium* it was joined only with latter.[73] Furthermore, more recently in the *Philips Electronics* case the CJEU added that "(...) *the host Member State, in whose territory the permanent establishment is situated, therefore cannot, in order to justify its legislation in a situation such as that in the main proceedings and in any event, plead as an independent justification the risk of the double use of losses.*"[74] Some academics have then drawn from this statement the confirmation by the CJEU that the risk of double use of losses can never be a stand-alone

69 Servaas van Thiel, *X Holding: A Denial of Justice, in From Marks & Spencer to X Holding: The Future of Cross-Border Group Taxation* (D.Webber & B. da Silva Editions, Kluwer Law International 2011), p. 51-58.

70 *A Oy*, §46.

71 Frederik Boulogne & Nana Sumrada Slavnic, "*Cross-Border Restructuring and "Final Losses"*", European Taxation 2012 (Volume 52), IBFD, No 10, p. 487.

72 *Marks & Spencer*, §51; *A Oy*, §46.

73 *Lidl Belgium*, §40.

74 CJEU, 6 Sep. 2012, Case C-18/11, *The Commissioners for Her Majesty's Revenue & Customs v Philips Electronics UK Ltd.* ("*Philips Electronics")*, not yet published, §33.

justification to a restriction of the EU freedom of establishment.[75] It is also worth mentioning that the risk of double use of losses is excluded concerning national legislation which organises a transfer of profits restricted to resident companies, the CJEU assuming that such a risk simply cannot exist[76]. But because the French fiscal unity rules organise a transfer of intra-group losses, not the allocation of intra-group profits, the French Government could join the justification of the risk of double dipping in its argument as well.

C- The risk of tax avoidance by the French parent company:

The last justification the French Government may rely on is the prevention of the risk of tax avoidance. Arguably, although this is highly debated in the tax literature[77], there is a distinction to be made in the case law of the CJEU, where the need to fight against tax avoidance has been accepted as a stand-alone justification, or in combination with the need for a balanced allocation of the powers of taxation between EU Member-States.

On the one hand, the need to combat tax avoidance was consistently accepted on its own as a justification to a restriction of a EU fundamental freedom by the CJEU when "(…) *the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.*"[78] For example, an early application of this concept can be seen in a cross-border transfer of losses case: *ICI*. Indeed, the UK Government failed to justify the restrictive effects of the UK consortium relief rules with the need to prevent tax avoidance alone because these rules did not "(…) *have the specific purpose of preventing wholly artificial arrangements, set up to circumvent UK tax legislation, from attracting tax*

75 Roel Monteiro & Martje Kiers, "*The Court' s Position on Cross-Border Losses: A Quest for the Well-Being of EU Citizens?*", EC Tax Review 2013 (Volume 22), Issue 2, Kluwer Law International, p. 92-94.

76 *Oy AA*, §60.

77 See further Tom O'Shea, "*Tax avoidance and abuse of EU Law*", EC Tax Journal 2010-11 (Volume 11), Key Haven Publications Ltd., p. 100-114 ; Dennis Weber, "*Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ - Part 1 & 2*", European Taxation 2013 (Volume 53), IBFD, No 6-7, p. 251-328.

78 For instance CJEU, 12 Sep. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd. v Commissioners of Inland Revenue* ("*Cadbury Schweppes")*, [2006] I-07995, §55 ; CJEU, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* ("*Thin Cap GLO")*, [2007] I-02107, §74.

benefits."[79] Eventually, the CJEU often recalls the possibility left for each Member-State to adopt or maintain in force such anti tax avoidance national legislation.[80]

On the other hand, however, the need to fight the risk of tax avoidance remains relevant here when combined with the justification of balanced allocation. Indeed, in some situations the risk of tax avoidance could add to the jeopardy of the balanced allocation of the powers of taxation between EU Member-States.[81] Thus, in *Marks & Spencer*, the CJEU seems to accept the risk of tax avoidance as a justification to a restriction to the EU freedom of establishment because the possibility to transfer losses cross-border in the EU would give the possibility to the taxpayer to choose to establish the parent company where the value of the losses is the highest.[82] This reasoning was confirmed in the *SGI* case.[83]

Overall, even though the French fiscal unity regime does not seem specifically designed to tackle tax avoidance through the concept of wholly artificial arrangements, it is arguable that the need to prevent tax avoidance is a justification available to the French Government, because it adds to the jeopardy of the balanced allocation of the direct taxing rights between EU Member States. This statement holds true only in presence of final losses. But when are losses suffered by a EU subsidiary considered as "final" or "terminal"?

III: The potential disproportionality of the current French fiscal unity rules:

A- The non-compliance of the French fiscal unity rules with the two-prong test set out by the CJEU in the *Marks & Spencer* (C-446/03) case:

Once a restrictive national measure is justified and appropriate, the last step of the *Gebhard* formula mentioned earlier is for the CJEU to make sure that such measure does not go beyond what is necessary in order to attain the objective.[84] This is also known as the proportionality test.

In its *Marks & Spencer* decision, the Court developed for the first time a two-prong test ensuring only certain losses suffered by non-resident EU subsidiaries of

79 *ICI*, §26.

80 *Marks & Spencer*, §57.

81 Tom O'Shea, "*Tax avoidance...*", *Op. cit.*, p.104-106.

82 Marks & Spencer, §49.

83 CJEU, 21 Jan. 2010, Case C-311/08, *Société de Gestion Industrielle v Belgian State* ("*SGI*"), [2010] I-00487, §68, 69.

84 *Gebhard*, §37.

a EU resident parent company could be transferred cross-border. This test *ultima ratio* is also known as the *Marks & Spencer* exception, or the "no possibilities" test. More precisely, the UK group relief was disproportionate where "*the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods*[85]*, if necessary by transferring the losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods*" and "*there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods*[86] *either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.*"[87] This test has been confirmed recently by the CJEU in its *A Oy*'s decision.[88]

From a French perspective, first of all it is worth mentioning the absence of any rule in the French fiscal unity regime allowing, directly or indirectly and in any form, the transfer of any loss incurred by a non-resident EU subsidiary to its French resident parent company. Moreover, French Courts have come across taxpayers benefiting from the fiscal unity rules and claiming for the relief of losses suffered by their non-resident EU subsidiary.

Indeed, the Administrative Tribunal of Montreuil-sous-Bois dealt with this claim brought by Agapes S.A., and did so developing three interesting conclusions.[89] First, the Administrative Tribunal stated that Agapes S.A. could not offset such loss against its own profits because the EU subsidiary was not subject to corporate income tax in France. Second, the Administrative Tribunal explained that articles 49 and 54 TFEU do not preclude EU Member-States from adopting national legislation allowing the constitution of unified groups for corporation tax purposes with resident companies, while excluding non-resident entities when they are not subject to corporate income tax in this Member-State. Third, the Administrative Tribunal admitted that the French fiscal unity regime amounted to a restriction of the EU freedom of establishment, but justified by the balanced allocation of the powers of taxation between EU Member States, and proportionate to attain its objective.

85 For the purpose of this research paper, this will be referred to as a carry-back of the loss.

86 For the purpose of this research paper, this will be referred to as a carry-forward of the loss.

87 *Marks & Spencer*, §55.

88 *A Oy*, §49.

89 French Tribunal Administratif de Montreuil, 1re chambre, 14 oct. 2010, n°0809608 et n°0902754, Société Agapes.

The Administrative Court of Appeal upheld this decision, and interestingly added that the French fiscal unity rules would only be disproportionate if the losses of the non-resident EU subsidiary were not exhausted due to the legislation of its Member State of residence, but for instance if the subsidiary was liquidated.[90] This case is now pending in front of the Highest Administrative Court in France, the Council of State.

This decision calls for three remarks. First, both these French Administrative Courts relied on the territoriality argument in order to justify the exclusion of non-resident EU subsidiaries from the French fiscal unity regime. We dealt with this argument in Chapter 1 of our research paper, and concluded that this argument is not convincing. Second, the Administrative Court of Appeal made a distinction between losses exhausted for legal or factual reasons, and only admitted the latter to the *Marks & Spencer* exception. Is such an interpretation in line with the reasoning of the CJEU? Third, perhaps more importantly, the current French fiscal unity regime would arguably not be recognised as a proportionate restriction to the EU freedom of establishment of French parent companies in the eye of the CJEU. In other words, final losses of 95% directly or indirectly held non-resident EU subsidiaries of the French parent company should be transferrable to the latter and offset against the profits of the whole group for French corporation tax purposes.

B- The distinction between the losses exhausted due to factual or legal reasons and the impact of the *K* (C-322/11) case:

Several EU national Courts have interpreted the 'no possibilities' test in an interesting manner: 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 French[91], German[92], and Swedish[93] national Courts, which have considered that only the losses being 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 the *Krankenheim* case: the losses that cannot be utilised for legal reasons, unlike those impossible to use for factual

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90 French Cour Administrative d'Appel de Versailles, 2eme chambre, 26 feb. 2013, n°10VE04169, Société Agapes.

91 *Ibidem.*

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

93 Swedish Högsta Förvaltningsrätten, 11 Mar. 2009, 7322-06 and 11 Mar. 2009, RÅ 2009 reference 14.

reasons, merely amounting to a disparity, also called quasi-restriction[94]. 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.*"[95]

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* 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 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*".[96] Thus, again, amounting to a disparity due to parallel exercise of powers of taxation between EU Member States.

Arguably, we could try to rationalise the reasoning of the CJEU here and establish three distinct situations. First, when there was no legal possibility to use the losses in the Member State of residence of the subsidiary in the first place, France does not act in a restrictive manner when it prevents the cross-border transfer of such losses because this is a disparity situation. Second, France can also exclude from its French fiscal unity regime losses that became impossible to use for legal reasons in the Member State of residence of the subsidiary, because it is a disparity situation as well. Third, losses impossible to use for factual reasons may have to be transferred cross-border. Indeed, the French fiscal unity rules restricted to resident companies might, in this extreme situation, affect the EU freedom of establishment in a disproportionate manner creating an unbalanced allocation of the

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94 Domenico Pezzella, *Op. cit.*, p.75, 76.

95 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.

96 CJEU, 7 Nov. 2013, C-322/11, *K*, not yet published, §79-81.

powers of taxation between EU Member States. Nevertheless, Frederik Boulogne and Nana Sumrada Slavnic 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[97]. But Professor Gerard Meussen highlighted the fact that the closing down of foreign establishments remains a drastic business decision[98].

In the end, it remains highly arguable that such a distinction departs from a literal interpretation by national Courts, including French ones, of the "no possibilities" test set out by the CJEU. It is not sure whether the CJEU ever explicitly intended to make this distinction or not. It would be interesting for practitioners to litigate a preliminary ruling question to the CJEU on this distinction between losses exhausted due to factual or legal reasons, and lift the uncertainty.

Part 2: The form of the right to transfer EU losses cross-border to a French parent company

We can now analyse, in a more practical manner, the exercise of the right to transfer intra-group final losses cross-border. We will consider the method used to compute the losses transferred (Chapter 1), then develop practical considerations regarding the burden of proof and the need to ensure legal certainty and effective protection of EU Law (Chapter 2).

Chapter 1: Which method should be used to compute the losses transferred from a EU subsidiary to its French parent company?

Each EU Member State has its own rules to determine how losses suffered by resident companies can be taken into account for corporation tax purposes. However, when losses are transferred cross-border, which rule or method to compute them should apply? According to the CJEU, any method respecting the principle of national treatment (I), although it would be relevant to contemplate from a French perspective the reasoning of the CJEU in the *Rewe Zentralfinanz* case (II).

I: Any method respecting the principle of national treatment in consideration of the loss transferred cross-border:

97 Frederik Boulogne & Nana Sumrada Slavnic, *Op. cit.*, p. 486-490.

98 Gerard Meussen, "*The ECJ' s Judgment in Krankenheim – The Last Piece in the Cross-Border Loss Relief Puzzle?*", European Taxation 2009 (Volume 49), IBFD, No 7, p. 361-363.

A- The absence of an abstract and hypothetical method and the requirement to grant national treatment to the losses transferred

As a preliminary, the CJEU has interestingly pointed out in its *Futura*'s decision that "*As yet, no provision has been made for harmonizing domestic rules relating to determination of the basis of assessment to direct taxes. Consequently, each Member State draws up its own rules governing the determination of profits, income, expenditure, deductions and exemptions as well as the amounts in respect of each of them which may be included in the calculation of taxable income or of losses which may be carried forward.*"[99] Thus, France possesses the exclusive competence to determine the method used to take into account losses suffered by resident companies, in other words in a French environment.

Nevertheless, recently in its *A Oy* judgment the Court faced for the first time a direct question related to the method to be used when an intra-group final loss had to be transferred cross-border in a EU context. The Court seems to deliver two relevant developments here. On the one hand, it acknowledges the impossibility of setting-up an abstract and hypothetical method for calculation of the losses transferred.[100] But, on the other hand, the CJEU clearly requires the national treatment principle to be extended to the method of computation itself.[101] In other words, here the accounting methods used in the State of residence of the EU subsidiary to compute its losses cannot result in a lower amount of losses than the amount given if the French accounting methods were to be used, as it would be for a unified group with a French subsidiary. Arguably, on the contrary if the calculation with the accounting standards of the State of residence of the EU subsidiary leads to a greater amount of losses, this situation might not be problematic in the eye of the CJEU. Indeed, it has shown in the past to be to accept reverse discrimination in cross-border transfers of dividends situations[102].

B- French 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 CJEU does not give insights on the best method, the Advocate-General Kokott interestingly explained in her opinion over the *A Oy* situation that, in 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

99 *Futura*, §33.

100 *A Oy*, §60.

101 *Ibid.*, §59.

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

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.[103]

This is a matter for national Courts to decide upon. It seems appropriate to reason by analogy with the solution adopted by the UK Supreme Court in its two *Marks & Spencer* judgment. It had to choose between six potential methods identified through several hearings before the FTT.[104] 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.[105]

It is unknown whether the French tax administration would be keen to adopt the equivalent of Method E here: in other words, using the losses as computed under the rules of the State of residence of the EU subsidiary, then convert them into French losses for the purpose of the French fiscal unity regime. This choice would appear consistent with the national treatment principle set out by the CJEU. Ultimately, however, the choice of the method to compute the losses transferred cross-border will remain a tricky one, done on a case-by-case basis and potentially with different outcomes in each EU Member State.

II: An alternative approach: a write-down of the book value of the shares of a EU subsidiary by its French parent company

A- The importance of the CJEU reasoning in the *Rewe Zentralfinanz* (C-120/78) case

103 CJEU, Advocate General Kokott's Opinion, 19 Jul. 2012, Case C-123/11, not yet published. §73,75.

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

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

Alternatively to the cross-border EU transfer of an intra-group final loss, the German regime at stake in the *Rewe Zentralifanz* case allowed for a German parent company to partially write-down the book value of shares or debts issued to a German resident loss-making subsidiary.[106] The other EU resident loss-making subsidiaries being excluded from this tax advantage, the CJEU logically recognised that it amounted to a restriction to the EU freedom of establishment.[107]

But from then on, the reasoning of the CJEU is unique in the light of the purpose of the German legislation at issue: it does not seem to be found in any cross-border transfer of losses case. The German Government structured its argument to justify such restrictive national regime based on the need for a balanced allocation of the powers of taxation between EU Member States, the risk of double dipping of the losses, the need to prevent tax avoidance, the effectiveness of fiscal supervision, and finally the need to ensure the cohesion of the German tax system. The CJEU rejected all these arguments in turn, expressing very interesting developments.

As far as the first justification is concerned, the CJEU considered that the impossibility to partially write-down the book value of shares or debts of non-resident EU subsidiaries was outside its scope.[108] More specifically, such operation does not jeopardise the taxing rights of EU Member States in relation to activities carried on in their territory, and thus undermining a balanced allocation of the power to impose taxes between EU Member States.[109] Moreover, the German regime at issue cannot be justified merely by the fact that the German parent company has decided to carry on economic activities in another Member State, in which Germany cannot exercise its taxing powers. Accordingly, Germany cannot rely on the balanced allocation of powers of taxation justification to systematically refuse to grant a tax advantage to a resident company, on the ground that it developed a cross-border economic activity which does not have the immediate result of generating tax revenues for that State.[110]

The CJEU has adopted the same line of reasoning with courses of action not jeopardising the taxing rights of EU Member States, such as the transfer of a loss suffered by a UK permanent establishment of a Dutch resident company to its sister UK company under the UK consortium relief regime in *Philips*

106 CJEU, 29 Mar. 2007, Case C-347/04, *Rewe Zentralfinanz eG v Finanzamt Köln-Mitte ("Rewe Zentralfinanz")*, [2007] ECR I-02647.

107 *Ibid.*, §36.

108 *Ibid.*, §41.

109 *Ibid.*, §42.

110 *Ibid.*, §43.

Electronics[111], or even the transfer of a loss from a UK resident consortium company to a UK resident group company through a Luxembourg resident link company under the same regime in *Felixstowe Dock*.[112] Besides, it is worth mentioning that Germany has chosen to tax resident companies on their worldwide profits, while France only tax profits derived from activities carried out in France: but the territoriality argument would again most likely be set aside by the Court because it would not be capable of justifying such national legislation.[113]

The CJEU also tackled the risk of double dipping of the loss, explaining that the loss is incurred by the parent company because of the reduction in the book value of its shareholdings in foreign subsidiaries. It is a separate treatment from the losses suffered by the subsidiaries themselves, so that such a risk cannot exist.[114] It seems difficult to understand this conclusion. Arguably, these two losses could eventually be comparable, even if they are incurred by two separate entities. Thus, if the losses are not terminal in the EU Member State of residence of the subsidiary which can then offset them against its own profits, while the parent company resident in another EU Member State writes-down the book value of the shares of its subsidiary which is then deductible from its taxable profits; it is doubtful that the risk of double use of the losses is inexistent…

Furthermore, the Court refused to admit that the German regime at stake was specifically targeted at purely artificial arrangements designed to circumvent German tax law, but is targeted, generally, at any situation in which subsidiaries are established, for any reason, outside Germany.[115] As a consequence, the risk of tax avoidance cannot justify it. Moreover, the effectiveness of fiscal supervision cannot justify that Germany imposes different conditions on the deduction, according to whether the shares relate to subsidiaries established in Germany or in other EU Member States.[116] Finally, the need to maintain the coherence of the tax system is rejected because there is no direct link between the immediate deductibility of the losses stemming from partial write-downs of the book value of the shareholdings and the alleged tax exemptions for dividends received from these subsidiaries.[117]

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111 *Philips Electronics*, §25.

112 CJEU, 1 Apr. 2014, Case C-80/12, *Felixstowe Dock and Railway Company Ltd & others v The Commissioners for Her Majesty's Revenue & Customs ("Felixstowe Dock")*, not yet published, §30.

113 *Rewe Zentralfinanz*, §68.

114 *Ibid.*, §48.

115 *Ibid.*, §52.

116 *Ibid.*, §55.

117 *Ibid.*, §62-64.

Overall, if France was to allow such write-downs by French parent companies for French resident subsidiaries, all the downsides and practical issues raised by the EU cross-border transfer of a final loss could be avoided. Indeed, instead of having to transfer the loss of the subsidiary itself, the French parent company could simply write-down the value of its shares or debt in its own accounting books. However, France could arguably have to open this possibility to the shares and debts issued to non-resident EU subsidiaries as well, when the losses suffered by these subsidiaries meet the requirements of the *Marks & Spencer* exception. Indeed, its powers of taxation would not seem to be jeopardised, and the French Government would probably not be able to rely on other justifications successfully.

B- The possibility of writing-down limited to groups of companies listed on a stock market:

As a preliminary remark, it is worth remembering that the French fiscal unity regime sets a 95% threshold for direct or indirect holdings of the French parent company in its French subsidiaries. Consequently, under French law such holdings in French or non-resident EU subsidiaries, if held for at least two years, will be classified as direct investments for accounting purposes.[118] Besides, some groups of companies unified for French corporation tax purposes can be listed on a stock market (such as Euronext for instance), while most of the others remain unlisted. In the event of a loss suffered by the subsidiary of a French parent company, and which can be considered as terminal, the tax treatment applicable will then differ.

Indeed, on the one hand, listed EU groups of companies have the obligation to fair value, through the consolidated profit and loss account, most of their financial instruments pursuant to the applicable IFRS norms.[119] In other words, the definitive loss of value of the shares of the subsidiary can be taken into account for both accounting and then tax purposes by the French parent company head of the unified group. On the other hand, unlisted groups of companies can only count on allowances, in the consolidated accounts again, for temporary depreciations of direct investments. In other words, here the French parent company can only deduct the allowance in one accounting year, but has to add it back to the taxable basis in the following accounting year, because the loss in value of the holdings in the subsidiary is only deemed to be temporary.[120]

It is therefore currently impossible in France, within an unlisted group of companies, to partially write-down the book value of shareholdings in a permanent

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118 Article 39,1, 5°, 18th alinea CGI.

119 See also IAS 32 and 39. Regulation EC, n°1606/2002, 19 Jul. 2002, on the application of international accounting standards, [2002] OJ L 243, article 4.

120 Article sexies of annexe III CGI.

manner. Arguably, it may be interesting for France to consider opening up this possibility for final losses of non-resident EU subsidiaries regarding the *Marks & Spencer* and *Rewe Zentralfinanz* decisions of the CJEU combined.

Chapter 2: Are the French fiscal unity rules compatible with the requirements of the CJEU regarding the burden of proof and the relevant general principles of EU Law?

Finally, who bears the burden of proof of a final loss (I)? Also, would the French fiscal unity rules organise the transfer of such loss both in an equivalent and effective way, while ensuring legal certainty for the taxpayer in the eye of the CJEU (II)?

I: The requirements of the CJEU in relation to the burden of proof

A- A burden of proof exclusively borne by the taxpayer

First, the CJEU, both in its *Marks & Spencer* and *Lidl Belgium*[121] decisions, seems to accept that the burden of proof here lies exclusively with the taxpayer. Indeed, in the former case the Court states that "*where, in one Member State, the resident parent company demonstrates to the tax authorities that* [the two conditions of the "no possibilities" test] *are fulfilled, it is contrary to Articles 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that Member State the losses incurred by its non-resident subsidiary*".[122] This led Professor Michael Lang, for instance, to conclude that the CJEU could have tried to emphasise an active role of the taxpayer here.[123]

Second, the UK Courts have reflected on the meaning of having "no possibilities" to offset the loss suffered by the non-resident EU subsidiary in the *Marks & Spencer* litigation, i.e. the scope of the proof of a final loss here. More specifically, in the decision of the High Court, Park J assumed that it meant "*recognised possibilities legally available given the objectives facts of the company's situation at the relevant time*".[124] Furthermore, Chadwick LJ added in the Court of Appeal that the two-prong test of the CJEU, especially the second condition, would not be satisfied "(…) *if the claimant did no more than demonstrate that it was improbable or unlikely, or that there was little or no real*

121 *Lidl Belgium*, §51.

122 *Marks & Spencer*, §56.

123 Michael Lang, "*The Marks and Spencer case – the open issues…*", *Op. cit.*, p. 65.

124 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2006] EWHC 811 (Ch) [33] (Park J).

likelihood, or that the claimant (or the surrendering company) had no intention, that losses could or would be set against future profits. (…) *Given the context, the phrase "no possibility" in the second condition is to be read as "no real possibility"; in the sense that a real possibility is one which cannot be dismissed as fanciful.*"[125] Although the UK Courts have raised here an interesting question, the French Courts do not seem to have directly addressed this question. Arguably, common sense should prevail and only foreseeable legal possibilities need to be considered when assessing the lack of possibilities to use the loss.

Third, the CJEU seems prone to adopt a wide approach of the means to prove a loss. Indeed for instance in *Futura*, although in an host state situation, the limitation by a EU Member State of the means at disposition of the taxpayer to the setting up of additional accounts was deemed not essential by the Court.[126]

Consequently, we can conclude that the burden of proof of a final loss of the non-resident EU subsidiary would probably rest here exclusively on its French parent company. The French parent company could rely on any mean of proof obtained in a loyal manner according to the French civil procedure[127]. It would have to bring proof of the absence of foreseeable legal possibility to use the loss in the previous, current or next accounting periods of its non-resident EU subsidiary.

B- The need for the French tax administration to exhaust the means at its disposition?

However, the Advocate-General Maduro, in his Opinion on the *Marks & Spencer* case, adopted a slightly different approach. Indeed, in order to ascertain the existence and exact amount of a EU final loss under the UK group relief, the HMRC could rely at the time on "(…) *instruments of enhanced cooperation under Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation. Under those provisions the competent authorities of one Member State have the power to request the competent authorities of another Member State to provide them with all information enabling them to establish the correct amount of corporation tax. In fact that instrument of administrative cooperation "provides for ways of obtaining information comparable to those existing between tax authorities*

125 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2007] EWCA Civ 117 [49] (Chadwick LJ).

126 *Futura*, §40.

127 French Cour de Cassation, 2eme Chambre Civile, 7 oct. 2004, pourvoi n° 03-12.653, *Bull.* 2004, II, n° 447 ; Chambre Commerciale, 25 feb. 2003, pourvoi n° 01-02.913 ; Chambre Sociale, 20 nov. 1991, pourvoi n° 88-43.120, *Bull.* 1991, V, n° 519.

at national level". Nor does it seem to me to be ruled out that the Member State concerned may impose on a company claiming group relief a duty of information as to the tax situation of the group to which it belongs and in particular the possibility of dealing with the losses of the subsidiaries in the State in which they are established. In such a case it will none the less be necessary to ensure that those requirements do not exceed what is necessary in order to attain the objective of securing the information sought."[128]

Indeed, the CJEU has shown in an origin state situation, for instance in the *Vestergaard* case, that the burden may first rest on the tax administration of the EU Member State.[129] Then, "*in addition*" the Court admits that a transfer of the burden of proof to the taxpayer is clearly possible.[130] Although this two-steps approach does not seem to have ever been used by the CJEU in a cross-border transfer of losses case. Therefore, we have to confirm our conclusion that the onus of proof of a final loss would probably weigh entirely on the French parent company, for the purpose of the French fiscal unity rules, in the eye of the CJEU.

II: The compatibility of the French fiscal unity rules with the relevant general principles of EU Law

A- Principles of equivalence and effective protection of EU Law

Finally, when a cross-border transfer of a final loss is at stake, the procedural rules of the French fiscal unity regime would still have to comply with at least three general principles of EU law. Arguably, all three are findings of the CJEU stemming from the principle of loyal cooperation between EU Member States as per article 4(3) TFEU[131]. They also constitute a restriction to the general EU Law principle of national procedural autonomy, identified by the CJEU as the need for "(…) *the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law* (…)."[132]

128 Advocate General's Opinion, *Marks & Spencer*, *Op. cit.*, §81.

129 CJEU, 28 Oct. 1999, Case C-55/98, *Skatteministeriet v Bent Vestergaard ("Vestergaard")*, [1999] ECR I-07641, §26.

130 *Ibidem.*

131 CJEU, Advocate General Geelhoed, 3 Jun. 2003, Case C-129/00, *Commission of the European Communities v Italian Republic*, [2003] ECR I-14637, §55.

132 CJEU, 17 Jun. 2004, Case C-30/02, *Recheio - Cash & Carry SA v Fazenda Publica / Registo Nacional de Pessoas Colectivas, and Ministerio Publico*, [2004] ECR I-06051, § 17.

Namely, the first one is the principle of equivalence or non-discrimination: here the French procedural rules for a legal claim of a cross-border transfer of a EU terminal loss based on the *Marks & Spencer* exception must not be less favourable than the procedural rules applicable for the comparable domestic legal claim of a transfer of a French final loss.[133] The second one is the principle of effective protection of EU Law: the French procedural rules may not make it impossible or very difficult in practice to exercise the rights derived from the *Marks & Spencer* exception.[134] More specifically, the CJEU would analyse by reference to the role of the procedural rule of the French fiscal unity regime, its progress and its special features, viewed as a whole, before the various national instances.[135] Moreover, the purpose and intent of the procedural rule of the French fiscal unity regime would have to be balanced against the consequences of the application of such provision for the application of EU Law.[136]

Actually, under the current French fiscal unity regime, the legal claim being restricted to domestic losses fails to meet both the equivalence requirement and the need to apply effectively the "no possibilities" set out by the Court in *Marks & Spencer*. In other words, not only France may have to open in substance the possibility of relieving final losses of non-resident EU subsidiaries of a French parent company when they are comparable to an unified French subsidiary, but such possibility must also be effectively opened in practice with procedural rules working in the same way as for domestic claims.

Also, lessons could be learned from the experience of the UK Supreme Court in the *Marks & Spencer* litigation. Indeed, the aforementioned general principles of EU Law seem respected by the UK Supreme Court since sequential/cumulative claims by the same company for the same losses of the same surrendering company in respect of the same accounting period could be made.[137] However, the Court later seems to limit the extent of principle of effectiveness of EU Law: self-assessment claims were allowed while late pay and file claims were time barred[138]. But such a distinction may not be relevant because the method to claim losses

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133 Arjo van Eijsden & Janco van Dam, "*The Impact of European Law on Domestic Procedural Tax Law: Wrongfully Underestimated?*", EC Tax Review 2010 (Volume 19), Issue 5, Kluwer Law International, p. 200.

134 *Ibidem*; *Kempter*, §57.

135 CJEU, 14 Dec. 1995, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State ("Peterbroeck")*, [1995] ECR I-04599, §14.

136 CJEU, 21 Nov. 2002, Case C-473/00, *Cofidis SA v Jean-Louis Fredout ("Cofidis")*, [2002] ECR I-10875, §36.

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

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

under the French fiscal unity rules has never changed. Therefore, arguably the principles of equivalence and effectiveness of EU Law applied from a French perspective would be absolute. Put simply, there may not be a time frame for past valid claims of a French parent company to be satisfied: could any of them be satisfied as long as the EU losses are proven to be final?

B- Principle of legal certainty:

The EU general principle of legal certainty is also known as the protection of legitimate expectations. Two recent cases in the field of direct taxation demonstrate the use of the principle of legal certainty by the CJEU. Namely, in *FII GLO 3* the Court highlights the fact that such principle "(…) *requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them.*" and that "(…) *limitation periods must be fixed in advance if they are to serve their purpose of ensuring legal certainty.*"[139] Furthermore, in *Itelcar* the Court adds that "(…) *the rules in question do not make it possible, at the outset, to determine their scope with sufficient precision. Accordingly, the do not meet the requirement of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, especially where they may have unfavourable consequences for individuals and companies. As it is, rules which do not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.*"[140]

So are the procedural rules of the French fiscal unity regime clear, precise and predictable enough to ensure the protection of the legitimate expectations of the French parent company being the taxpayer? Comparatively, the UK Court of Appeal explained that the need for legal certainty could trump the principle of effectiveness of EU Law.[141] Indeed, the Upper Tribunal (Tax and Chancery Chamber) earlier acknowledged that the CJEU "(…) *had consistently upheld the right of a Member State to impose time limits within which a claimant had to make his claim, provided that the time limit was reasonable, and provided that, if a time limit was reduced, accrued rights were protected by reasonable transitional arrangements*."[142] Here the French rules allow for corrective tax returns, initiated

139 CJEU, 12 Dec. 2013, Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Commissioners for Her Majesty's Revenue and Customs ("FII GLO 3")*, not yet published, §44.

140 CJEU, 3 Oct. 2013, Case C-282/12, *Itelcar - Automóveis de Aluguer Lda v Fazenda Pública ("Itelcar")*, not yet published, §44.

141 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2012] STC 231 [63] (Moses LJ).

142 *Commissioners for Her Majesty's Revenue and Customs v Marks and Spencer plc* [2010] UKUT 213 (TCC) [4].

by the taxpayer (being the French parent company) in an accounting year, for domestic losses incurred in one of the three previous accounting periods.[143] This time limit appears reasonable, in line with the principle of legal certainty set out by the CJEU.

But it is worth noting that in *FII GLO 3*, the CJEU quotes the *Marks & Spencer* case to underline the fact that "(...) *the principle of the protection of legitimate expectations precludes a national legislative amendment which retroactively deprives a taxpayer of the right enjoyed prior to that amendment to obtain repayment of taxes collected in breach of EU Law.*"[144] Accordingly, if France decides in the future to open up its fiscal unity regime to foreign EU losses, the amended procedural rules will have to ensure legal certainty from the point of view of the taxpayer, i.e. the French parent company. In other words, the latter should then be able to claim for relief of losses unrelieved before, in breach of the *Marks & Spencer* exception, and which occurred in any of the three previous accounting periods.

Some academics have called for guidance of the CJEU in the tax literature because taxpayers are supposedly in an urgent need for legal certainty, since their main concern "(...) *is quite often not or at least not only the recovery of overpaid taxes from the past, but arrangement of their investments and business activities for the present and the future.*"[145] The finger appears to be directed at the case law of the CJEU here, not the national regimes of the EU Member States. However, arguably the case law of the CJEU in the field of the cross-border transfer of EU losses, as it stands today, seems clear, consistent and predictable for the most part. Indeed, excluding the question of the distinction between legally and factually exhausted losses, all the other concepts playing in the reasoning of the CJEU seem to meet these standards. Thus, EU Member States can safely adopt national regimes allowing the use of intra-group losses while respecting EU Law and ensuring legal certainty for their taxpayers, both from a substantial and practical standpoint.

Conclusion

We can draw four main conclusions in consideration of the aim of our research paper: would the French fiscal unity regime be hypothetically compatible with EU Law in the eye of the CJEU following its landmark decision in *Marks & Spencer*?

143 Article L.169 LPF; BOI-BIC-DECLA-30-10-10-20, II-B-2 à 3, n° 150-160.

144 *FII GLO 3*, §45.

145 Axel Cordewener, "*Cross-Border Loss Relief and the 'Effet Utile' of EU Law: Are We Losing It?*", EC Tax Review 2011 (Volume 20), Issue 2, Kluwer Law International, p. 58.

First, the competence to allow or disallow the transfer of intra-group losses belongs exclusively to France, but it must be exercised in respect of the EU principle of non-discrimination, the EU fundamental freedoms and under the scrutiny of the CJEU. Eventually, the territoriality argument seems to carry little weight, and France must respect its home State obligations.

Second, the French fiscal unity rules may constitute a restriction of the EU freedom of establishment as per articles 49 and 54 TFEU. The situation of the non-resident EU subsidiary of the French parent company may objectively be compared to the situation of a hypothetical French subsidiary. The French Government may be able to justify appropriately such restriction based on the arguments taken together of the need for a balanced allocation of the powers of taxation between EU Member States, the need to prevent the risk of double use of the losses, and the need to prevent the risk of tax avoidance. However, the French fiscal unity regime may go beyond what is necessary to attain the objective it pursues, i.e. may be disproportionate, because final losses suffered by the comparable non-resident EU subsidiary cannot be transferred and relieved in the hands of its French parent company. In other words, ultimately the French fiscal regime may not be compliant with the requirements of the CJEU set out in *Marks & Spencer* and further confirmed in its case law.

Third, the best method to compute the loss transferred is any one ensuring national treatment: by analogy with the decision of the UK Supreme Court in *Marks & Spencer*, for instance, using the losses as computed under the rules of the State of residence of the EU subsidiary, then convert them into French losses. Alternatively, France could open the possibility as a general rule of a partial write-down by the French parent company of the book value of the shareholdings of its non-resident EU subsidiary.

Fourth, the burden of proof of a terminal loss seems to rest exclusively on the taxpayer, i.e. the French parent company. The general EU principle of equivalence requires that the procedure applicable to the transfer of a foreign EU loss is comparable to the one applicable to the transfer of a French loss. The general EU principle of effectiveness requires France to satisfy past claims by a French parent company for relief of foreign EU final losses in breach of EU Law. The general EU principle of legal certainty involves the possibility for France to set up a time frame for the use of intra-group losses, as long as the procedural rules are clear, precise and that their application is predictable.

Main Abbreviations

BOI: Doctrine of the French Tax Administration (Bulletin Officiel des Impôts)

CGI: French Tax Code (Code Général des Impôts)

CJEU: Court of Justice of the European Union

EU: European Union

IAS: International Accounting Standards

Ibid.: indicated in the previous quotation

Ibidem: same as previous quotation

IFRS: International Financial Reporting Standards

IRS: Internal Revenue Service

Loc. cit.: *Loco Citato*, quoted reference

LPF: French Procedural Tax Code (Livre des Procédures Fiscales)

Ltd: Limited Liability Company

Op. cit.: *Opere Citato*, quoted literature

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UK: United Kingdom