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Editorial

We Need to Know When Previous Case-Law Has Been 'Overruled'! - A Plea for More Legal Certainty in EU Tax Law

Axel Cordewener*

In its recent judgment in W AG *the Court of Justice of the European Union (CJEU) fundamentally departed in substance from earlier case-law concerning the treatment of 'final losses' incurred by foreign permanent establishments. However, like in other tax cases before, the Court did not clarify that previous decisions (in particular*, Lidl Belgium*) are 'overruled' now. This causes unnecessary damage to legal certainty in the area of EU tax law, and the CJEU should reconsider this approach towards 'overruling' in future cases. Furthermore, situations of 'overruling' also deserve special attention within the framework of the current reform of the preliminary ruling system.*

Keywords: overruling, legal certainty, direct taxation, final losses, Marks & Spencer doctrine, preliminary ruling, Court of Justice, General Court, Grand Chamber, CJEU Statute, CJEU Rules of Procedure

1 INTRODUCTION

Under the system established by the European Treaties (Treaty on European Union/TEU and Treaty on the Functioning of the European Union), the Court of Justice of the European Union – consisting of the CJEU and the General Court (GC), together referred to here as the 'European Courts' – is competent, in particular, for the control of the legality of acts of the EU institutions and for the interpretation of EU law. The provision in which these main tasks find their clearest expression is Article 267(1) TFEU, pursuant to which, '*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*'.

The CJEU has pointed out that, 'In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law'.[1] This system is based on the idea of trustful mutual cooperation between the courts at domestic and at EU level. As the CJEU explained, 'In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law'.[2] And the CJEU has added that:

> In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[3]

For the areas of (direct and indirect) taxation and customs duties, the preliminary ruling procedure via the domestic courts is by far the most important procedural instrument to solve issues of EU law in practice as compared to direct proceedings. It is true that actions for annulment (Article 263 TFEU) which are dealt with by the GC in first instance (Article 256(1) TFEU[4]) have caught up in the field of tax-related State aid litigation, but tax-related infringement actions brought before the CJEU by the Commission (Article 258 TFEU) are still scarce and those brought by other Member States (Article 259 TFEU) even extremely seldom.[5] According to the CJEU´s statistics for 2022, more than two-thirds of all 806 new proceedings before the CJEU were references

* Professor of tax law at KU Leuven; lawyer and Of Counsel, Flick Gocke Schaumburg. This Editorial was finalized on 5 Jun. 2023. Email: Axel.Cordewener@kuleuven.be.

1 *See* CJEU (Grand Chamber), 6 Mar. 2018, Case C-284/16, *Achmea BV*, EU:C:2018:158, para. 35.

2 *Ibid.*, para. 36.

3 *Ibid.*, para. 37.

4 With the exception of actions for annulment (and the same goes for actions for failure to act under Art. 265 TFEU) brought by a Member State or an EU institution within the limited areas covered by Art. 51 of the current version of the Statute of the CJEU.

5 For a rare example concerning the infrastructure use charge for the use by passenger vehicles of federal roads, *see* CJEU (Grand Chamber), 18 Jun. 2019, Case C-591/17, *Austria v. Germany*, EU:C:2019:504, with annotation by A. Cordewener & M. Vekeman, *Highlights & Insights on European Taxation* 2019/11.336, 26–35.

by domestic courts for preliminary rulings,[6] and cases related to fiscal issues (taxation and customs duties) form one of the two leading categories.[7]

The large number of fiscal cases can probably be explained by the fact that taxes and customs duties are 'mass phenomena' in the sense that they apply to a multitude of individual situations, and that they generally lead to financial burdens against which the (natural or legal) persons subject to the payment obligation may be inclined to defend themselves. Nevertheless, just like domestic legal systems generally require fiscal provisions to be sufficiently clear and precise in order to create legal certainty for their addressees, one should expect the same from EU law provisions where they have an impact on the position of taxpayers under domestic tax law[8] (this also with a view to the fact that the CJEU even seems to regard the principle of legal certainty as a general principle of primary EU law[9]). Unfortunately, that is not always the case, in particular where broad general clauses contained in primary EU law (above all, non-discrimination rules such as the Treaty freedoms) are concerned. This may trigger repeated requests for preliminary rulings by national courts seeking for clarification, which may even concern one and the same case and then either involve different instances of the national judiciary[10] or the very same court that had already submitted an earlier request to the CJEU.[11]

Ultimately, the above-mentioned aims pursued by the preliminary ruling procedure, that is, to secure 'uniform interpretation of EU law' and 'to ensure its consistency, its full effect and its autonomy', can only be reached if there is a clear and undisturbed communication channel between the courts at domestic and at EU level, and if courts at both levels make active use of this channel. The effective functioning of this system, therefore, requires sincere efforts on the part of domestic and European judges: The former need to respect the possibilities and obligations under Article 267(2), (3) TFEU, together with the *CILFIT* doctrine,[12] to refer clear questions to their European colleagues in Luxembourg, and the latter need to give clear answers. It is against this background that some recent developments at the level of the European Courts deserve a closer look.

2 THE NEED FOR A CLEAR SIGNAL FROM THE CJEU WHEN PREVIOUS CASE-LAW IS 'OVERRULED'

There are several areas in the broader context of measuring domestic direct tax rules against the fundamental Treaty freedoms where the CJEU´s case-law has taken some twists and turns over the years. This concerns, inter alia, the development of the 'coherence' (or 'cohesion') principle as a potential defence for Member State under the 'rule of reason',[13] and the evaluation of domestic exit tax provisions.[14] The CJEU rather stoically sailes through these muddy waters by making ample use of 'distinguishing',[15] and this may be justifiable by the fact that, in the cases referred to it, generally different national rules under different individual circumstances where concerned.

But the situation is of a different quality as far as the so-called 'final losses' doctrine is concerned, at least with respect to the symmetrical tax treaty exemption of positive and negative income derived through economic activities abroad (in particular, via foreign permanent establishments). In a nutshell, the development was as follow: After the CJEU had invented in *Marks & Spencer* the possibility for UK parent companies to import, within the framework of the UK group relief rules and with a view to grant equal treatment to cross-border groups of companies with domestic group in the light of freedom of establishment (Articles 49, 54 TFEU), 'final' losses of subsidiaries set up in other EU Member States,[16] the CJEU accepted only a few years later in *Lidl Belgium*,[17] as a matter pf principle, the same possibility

[6] *See* https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf (accessed 5 Jun. 2023), at 2.

[7] While the category 'Area of freedom, security and justice' comprises ninety-five cases (ca. 11.8%), ten cases are recorded under 'Customs duties' (ca. 1.2%) and sixty-two cases (ca. 7.7%) under 'Taxation'; *see supra* n. 6, at 3. However, cases related to national direct tax measures and their compatibility with EU primary law are generally listed under other headings (fundamental freedoms, prohibition of State aid), so that the actual number of tax cases will be larger.

[8] Where payment obligations arise under secondary EU law, this has been explicitly recognized. *See* e.g., CJEU, 9 Jul. 1981, Case 169/80, *SA Gondrand Frères*, EU:C:1981:171, para. 17; CJEU, 13 Feb. 1996, Case C-143/93, *Gebroeders Van Es Douane Agenten BV*, EU:C:1996:45, para. 27.

[9] *See* e.g., CJEU, 14 Mar. 2000, Case C-54/99, *Association Église de Scientologie de Paris* et al., EU:C:2000:124, para. 22.

[10] *See* on a VAT issue dealt with under Art. 95 EEC (now Art. 110 TFEU) CJEU, 5 May 1982, Case 15/81, *Gaston Schul I*, EU:C:1981:135, and subsequently CJEU, 21 May 1985, Case 47/84, *Gaston Schul II*, EU:C:1985:216.

[11] *See* on the impact of free movement of capital under Art. 56(1) EC (now Art. 63(1) TFEU) on domestic systems of dividend taxation: CJEU (Grand Chamber), 6 Mar. 2007, Case C-292/04, *Meilicke I*, EU:C:2007:132, and CJEU, 30 Jun. 2011, Case C-262/09, *Meilicke II*, EU:C:2011:438; CJEU (Grand Chamber), 12 Dec. 2006, Case C-4446/04, *Test Claimants FII Group Litigation I*, EU:C:2006:774, and CJEU (Grand Chamber), 13 Nov. 2012, Case C-35/11, *Test Claimants FII Group Litigation II*, EU:C:2012:707, followed by CJEU, 12 Dec. 2013, Case C-362/12, *Test Claimants FII Group Litigation III*, EU:C:2013:834 concerning a preliminary ruling by a different UK court on procedural issues.

[12] *See* CJEU, 6 Oct. 1982, Case 283/81, *Srl CILFIT* et al., EU:C:1982:335, as recently summed up and clarified by CJEU (Grand Chamber), 6 Oct. 2021, Case C-561/19, *Consorzio Italian Management* et al. *(II)*, EU:C:2021:799, paras 32 et seq.

[13] *See* e.g., F. Vanistendael, *Cohesion: the phoenix rises from its ashes*, 14 EC Tax Rev. 208–222 (2005).

[14] *See* e.g., A. Linn, Vermeintliche oder tatsaechliche Rechtskontinuitaet in der Rechtsprechung des EuGH, Internationales Steuerrecht (IStR) 103, at 105–107 (2016).

[15] On this technique, *see* generally M. Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice – Unfinished Business* 127–154 (Cambridge 2014).

[16] CJEU (Grand Chamber), 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc I*, EU:C:2005:763, para. 55.

[17] CJEU, 15 May 2008, Case C-414/06, *Lidl Belgium GmbH & Co. KG*, EU:C:2008:278, para. 47.

for German head offices of tax treaty exempt permanent establishments in other Member States.[18] It was only because the German head office could not demonstrate that the foreign losses were already 'final' that the deduction of these losses from the domestic tax base in the relevant year at stake was refused by the CJEU.[19]

And almost as fast as the card house was built, it fell apart again. First of all, basically no taxpayer in the various follow-up cases concerning both foreign subsidiaries and foreign permanent establishments (or other tax treaty exempt sources of foreign income) managed to convince the CJEU that the respective losses incurred were already 'final'; in some cases the ball was played back to the referring domestic court for further scrutiny, but based on the CJEU´s analysis it was generally obvious that chances of success were rather low.[20] Secondly, the CJEU accepted the amendments made to the UK group relief system after *Marks & Spencer* even though they severely limited the possibilities for UK parent companies to claim the 'finality' of their foreign subsidiaries´ losses.[21] A third element which did not directly concern the finality issue but actually made that criterion partly redundant (and therefore unnecessarily blurred the picture even further) was the qualification of losses of individuals as part of their 'personal and family circumstances' under the (likewise unfortunate) *Schumacker* doctrine.[22] And a fourth development that was at odds with *Marks & Spencer* was the obligation imposed on the Source State to take foreign losses into account when taxing dividend payments to non-resident corporate shareholders.[23]

The end drew nearer, however, when the CJEU started to doubt the objective comparability of foreign and domestic branches from the perspective of the avoidance of double taxation as the underlying aim of a double tax treaty.[24] While a small flame still remained flickering after *Bevola* where the loss of a foreign permanent establishment was carved out from the head office´s tax base under strictly territorial domestic legislation, rather than the tax treaty exemption method,[25] the judgment in *W AG* clearly hammered the last nail into the coffin for losses from foreign sources (in particular, permanent establishments) covered by a tax treaty exemption: Following the advice of Advocate General Collins,[26] the CJEU declared them categorically uncomparable with losses from otherwise equivalent domestic activities so that the question of whether or not such losses were 'final' was irrelevant.[27] And following the CJEU, the German Federal Tax Court has now buried the 'final losses' doctrine for permanent establishments that are exempt under German double tax treaties.[28]

Taxpayers may not like this outcome, but they will have to accept it. Still, what is less acceptable from the perspective of tax practitioners and academics (not only in Germany) is the way this outcome has been reached and presented. To begin with, and despite the considerable efforts made by the CJEU in *W AG* to distinguish the case from *Bevola*,[29] it is difficult to see why the symmetrical exclusion of foreign profits and losses from the domestic tax base under a (bi- or multilateral) tax should lead to a different evaluation than a Member State´s unilateral decision to limit the exercise of its own tax jurisdiction to purely domestic activities and exclude the (positive and negative) income derived through foreign

[18] The particular relevance of this case-law for Germany can only be understood against the background that it has been vested administrative and court practice (dating back to the early 1930s) that the exemption of foreign 'income' under a tax treaty (double tax convention) from the domestic tax base applies symmetrically to profits and losses. Originally, this view had also been followed by tax practice in Austria and Luxembourg. However, it was first abandoned by the Austrian Supreme Administrative Court (Verwaltungsgerichtshof, 25 Sep. 2001, 99/14/0217) and then also by the Supreme Administrative Court of Luxembourg (Cour administrative, 10 Aug. 2005, 19407C).

[19] *See* CJEU, 15 May 2008, Case C-414/06, *supra* n. 17, paras 49–51.

[20] *See* CJEU, 21 Feb. 2013, Case C-123/11, *A Oy*, EU:C:2013:84, paras 49 et seq.; CJEU, 7 Nov. 2013, Case C-322/11, *K*, EU:C:2013:716, paras 73 et seq.; CJEU, 17 Dec. 2015, Case C-388/14, *Timac Agro Deutschland GmbH*, EU:C:2015:829, paras 52 et seq.; CJEU (Grand Chamber), 12 Jun. 2018, C-650/16, *A/S Bevola* et al., EU:C:2018:424, paras 61 et seq.; CJEU, 19 Jun. 2019, Case C-607/17, *Memira Holding AB*, EU:C:2019:510, paras 22 et seq.; CJEU, 19 Jun. 2019, Case C-608/17, *Holmen AB*, EU:C:2019:511, paras 34 et seq. Compare also EFTA-Court, 13 Sep. 2017, Case E-15/16, *Yara International ASA*, [2017] EFTA-Court Reports 436, paras 40 et seq. The question was not discussed by CJEU (Grand Chamber), 18 Jul. 2007, Case C-231/05, *Oy AA*, EU:C:2007:439, and CJEU, 25 Feb. 2010, Case C-337/08, *X-Holding BV*, EU:C:2010:89.

[21] *See* CJEU (Grand Chamber), 3 Feb. 2015, Case C-172/13, *Commission v. UK*, EU:C:2015:50, paras 25 et seq.

[22] For an application at the level of the tax rate, *see* already CJEU, 18 Jul. 2007, Case C-182/06, *Lakebrink*, EU:C:2007:452, paras 30 et seq. For applications at the level of the tax base, *see* CJEU, 16 Oct. 2018, Case C-527/06, *Renneberg*, EU:C:2008:566, paras 61 et seq.; CJEU, 18 Jun. 2015, Case C-9/14, *Kieback*, EU:C:2015:406, paras 25 et seq.; CJEU, 9 Feb. 2017, Case C-283/15, *X*, EU:C:2017:102, paras 30 et seq.

[23] *See* CJEU, 22 Nov. 2018, Case C-575/17, *Sofina SA et al.*, EU:C:2018:943, and the analysis by G. Kofler, *Cross-border losses and* W AG*: The beginning of the end of the `final loss exception´?*, Cahiers de fiscalité luxembourgeoise et européenne 73-97, at 96 et seq. (2023), referring also to the territoriality principle emphasized by CJEU, 15 May 1997, Case C-250/95, *Futura Participations and Singer*, EU:C:1997:239, paras 20 et seq.

[24] *See* CJEU (Grand Chamber), 14 Jul. 2014, Case C-48/13, *Nordea Bank Danmark A/S*, EU:C:2014:2087, para. 24 (concerning the multilateral Nordic Convention); CJEU, 17 Dec. 2015, Case C-388/14, *supra* n. 20, para. 27 (concerning a bilateral double tax treaty).

[25] *See* CJEU (Grand Chamber), 12 Jun. 2018, C-650/16, *supra* n. 20, paras 33 et seq. On this case, cf. A. Cordewener, *Cross-Border Loss Compensation and EU Fundamental Freedoms: The `Final Losses´ Doctrine Is Still Alive!*, 27 EC Tax Rev. 230–236 (2018).

[26] A.G. Collins, 10 Mar. 2022, Case C-538/20, *W AG*, EU:C:2022:184, paras 31 et seq. *See* on this opinion G. Kofler, *Should We Cout `Final´ Losses?*, 31 EC Tax Rev. 108–114 (2022).

[27] *See* CJEU, 22 Sep. 2022, Case C-538/20, *W AG*, EU:C:2022:717, paras 19 et seq.

[28] Bundesfinanzhof, 22 Feb. 2023, I R 35/22 (ex I R 32/18), *IStR* 2023, 363. There are currently still some cases pending before the Federal Tax Court (I R 44/22 = ex I R 49/19 and ex I R 17/16, heard on 12 Apr. 2023; I R42/22 = ex I R 48/17), but a different outcome is not to be expected.

[29] *See* CJEU, 22 Sep. 2022, Case C-538/20, *supra* n. 27, paras 23 et seq.

permanent establishments from the outset.[30] Should the evaluation from an EU law perspective not be determined by the effect, rather than the legislative technique used by the Member States?[31] Moreover, if the decisive factor for determining comparability is indeed 'the aim pursued by the national provisions at issue',[32] it should be remembered that in *Bevola* the CJEU had characterized the relevant domestic legislation in Denmark as being 'intended to prevent double taxation of profits and, symmetrically, double deduction of losses of Danish companies possessing … permanent establishments' in other Member States.[33] In *W AG* the (German legal practice of interpreting the) exemption method under a double tax treaty is characterized as a measure 'in order to prevent or mitigate the double taxation of profits and, symmetrically, the double deduction of resident companies' losses' where such companies have permanent establishments abroad. So why is there a need to distinguish *W AG* from *Bevola* and create the impression that the latter is still 'good law'?

But what is worse is that in *W AG* the CJEU simply switched off the light for the 'final losses' doctrine (at least) with respect to tax treaty exempt foreign activities (in particular, through permanent establishments[34]) without mentioning, not even with a single word, its own *Lidl Belgium* judgment which, concerning exactly the same legal issue and the very same Member State, had switched on that light. Throughout the history of the CJEU´s case-law on the impact of the Treaty freedoms on national tax systems which started almost four decades ago,[35] this is the clearest case of an 'overruling' (in substance, but not with respect to visibility) that can be identified.[36] And the fact that the Court does not indicate this in any way is both particularly remarkable and disappointing against the background of the considerable extent of discussion and litigation the 'final losses' doctrine has triggered since *Marks & Spencer*.

Next to cases concerning domestic withholding taxes, cases on loss utilization have become the most important topic before the CJEU in the area of direct taxation. The vast majority of loss cases are preliminary rulings, which shows that there is substantial litigation going on before the domestic courts.[37] And this is only the tip of the iceberg, since a very large number of disputed cases (i.e., taxpayers requesting and tax authorities rejecting cross-border 'final' loss relief) will usually remain frozen at the administrative level until 'test cases' at court level have clarified the issue. Moreover, regarding discussions in legal doctrine, loss issues are at the 'top of the pops' as far as the mere quantity of publications is concerned. In her opinion in *Commission v. UK*, the only infringement case on the topic, Advocate General Kokott hat pointed out that the CJEU´s case-law data base had registered '142 academic publications' which dealt directly with *Marks & Spencer* and subsequent judgments concerning 'final losses'.[38] That was in 2014, and it is submitted here that not only already at that time the total number of publications on the topic was actually much higher, but that since then it has developed into a sort of tsunami.

The importance of the topic was further emphasized by the fact that several Advocates General took very critical views on the *Marks & Spencer* doctrine[39] and that Advocate General Kokott, in her aforementioned opinion,[40] had even asked the CJEU to abandon it altogether. And the existing legal uncertainties have led the German Federal Tax Court to seek clarification from the CJEU on the relevance of the doctrine for tax treaty exempt permanent establishments not only once (*Timac Agro*), but even twice (*W AG*), with very detailed explanations[41] regarding the problems of

[30] *See* for a parallel issue regarding the treatment of foreign exchange losses the discussion of CJEU, 28 Feb. 2008, Case C-293/06, *Deutsche Shell GmbH*, EU:C:2008:129, and CJEU, 10 Jun. 2015, Case C-686/13, *X AB*, EU:C:2015:375, by G. Kofler, *Cross-Border Loss Relief*, in *Terra/Wattel, European Tax Law – Vol. I: General Topics and Direct Taxation* 325–370, at 369 et seq. (S. Douma et al. eds, 8th ed. 2022).

[31] *See* by analogy, the case-law regarding the application of the state aids prohibition under Art. 107(1) TFEU, e.g., CJEU (Grand Chamber), 21 Dec. 2016, Joined Cases C-20/15 and C-21/15 P, *Commission v. World Duty Free Group SA* et al., EU:C:2016:981, para. 79.

[32] CJEU, 22 Sep. 2022, Case C-538/20, *supra* n. 27, paras 23 et seq.

[33] CJEU (Grand Chamber), 12 Jun. 2018, Case C-650/16, *supra* n. 20, para. 36.

[34] It should also be mentioned that CJEU, 7 Nov. 2013, Case C-322/11, *K*, EU:C:2013:716, paras 42 et seq., concerned tax treaty exempt (negative) income from the sale of immovable property, and that there is also a tension between the recent W AG judgment and the former decision where the CJEU had based the assumption of objective comparability on the fact that the relevant double tax treaty provided for exemption with progression (progressivity saving clause, Art. 23A(3)OECD MC). For further discussion of this issue, *see* Kofler, *supra* n. 23, at 91 et seq.

[35] *See* CJEU, 7 May 1985, Case 18/84, *Commission v. France*, EU:C:1985:175 on free movement of goods (then still Art. 30 EEC Treaty), and CJEU, 28 Jan. 1986, Case 270/83, *Commission v. France*, EU:C:1986:37 on freedom of establishment (then still Arts 52, 58 EEC Treaty).

[36] Another area of direct taxation where the CJEU never explicitly stated that an 'overruling' has taken place concerns secondary EU legislation, more particularly the relationship between CJEU, 4 Oct. 2001, Case C-294/99, *Athinaïki Zythopoiia AE*, EU:C:2001:505, and CJEU, 26 Jun. 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, paras 52 et seq., regarding the question of whether Art. 5 of the Parent-Subsidiary Directive also forbids taxes levied on the distributing subsidiary. This issue was raised by the French Conseil d´État in the reference that led to CJEU, 17 May 2017, Case C-365/16, *AFEP* et al., EU:C:2017:378, but it was not addressed by the CJEU.

[37] *See* in this respect already A. Cordewener, *Cross-Border Loss Relief and the `Effet Utile´ of EU Law: Are We Losing It?*, 20 EC Tax Rev. 58–61, at 59 et seq. (2011).

[38] A.G. Kokott, 23 Oct. 2014, Case C-172/13, *Commission v. UK*, EU:C:2014:2321, para. 2 with footnote 6.

[39] *See* A.G. Geelhoed, 23 Feb. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:139, para. 65; A.G. Kokott, 19 Jul. 2012, Case C-123/11, *A OY*, EU:C:2012:2321, paras 47 et seq.; A.G. Mengozzi, 21 Mar. 2013, Case C-322/11, *K*, EU:C:2013:183, paras 63 et seq. and 87 et seq.

[40] A.G. Kokott, 23 Oct. 2014, Case C-172/13, *supra* n. 38, paras 42 et seq.

[41] *See* in particular, Bundesfinanzhof, 6 Nov. 2019, I R 32/18, *Bundessteuerblatt (BStBl.)* II 2021, 68, at B.II (= order for reference in Case C-538/20, *W AG*).

understanding and applying the CJEU´s case-law from the perspective of national judges which have to keep the system of domestic legal protection of taxpayers running and functioning.

Taking all the above elements into consideration, it does not seem that it would have been asked too much from the CJEU to openly admit and indicate that *Lidl Belgium* is 'overruled' now and the *Marks & Spencer* 'final losses' doctrine no longer relevant for tax treaty exempt cross-border activities (in particular, permanent establishments).[42] This also with a view to the fact that this new approach towards (non-)comparability between foreign and domestic permanent establishments may well cause collateral damage, in the sense that it would only be logical to apply the same approach to non-resident subsidiaries and declare them uncomparable with domestic subsidiaries[43] – with the effect that the *Marks & Spencer* doctrine would be rendered useless even for its original field of application. A clear recognition of *Lidl Belgium* as 'overruled' would at least have made it easier for the CJEU to change its course in the future for cases involving subsidiaries, too.

Unfortunately, it is incomprehensible why there is such a reluctance on the part of the CJEU to openly 'overrule' previous judgments in the area of taxation, which particularly requires legal certainty. There is no apparent legal obstacle to overcome in this respect. As Advocate General Kokott in her already quoted opinion in *Commission v. UK* had pointed out, it is true that, 'On the basis of the common-law principle of *stare decisis et non quieta movere*, the past case-law ought, in principle, to be followed. The judgment in *Marks & Spencer* has not, however, brought about *quieta*, as it has consistently remained unclear with regard to its effects'.[44] Hence, even if *stare decisis* were a principle of EU law,[45] it would not form an obstacle to an explicit departure from previous case-law. While the CJEU categorically shied away from 'overruling' like from a hot iron during the first decades of its jurisprudence, the situation started to change in the early 1990s[46] with cases on free movement of goods like *HAG II*[47] and the famous *Keck and Mithouard* judgment.[48] And while initially the cases in which the CJEU expressly departed from previous decisions were 'as few as they are celebrated',[49] the number of examples has been steadily increasing since then: The relevant cases concern, inter alia, social security coordination,[50] equal treatment of men and women,[51] free movement rights of third country national married to EU citizens,[52] and marketing authorizations for medicinal products.[53] So why not tax law?

3 A PROCEDURAL FRAMEWORK TO GUARANTEE THE VISIBILITY OF 'OVERRULING' DECISIONS?

After the publication of Advocate General Collins´ opinion in *W AG* which paved the way for the change in the CJEU´s case-law, it has been suggested that 'a special procedure should be introduced and regulated in the Statu(t)e of the Court of Justice and/or the Rules of Procedure of the Court' with respect to decisions of the CJEU that 'overrule' previous case-law: 'Such an overruling decision could only be brought by a specialized chamber or by the Court in a special composition (an increased number of sitting judges, such as the Grand Chamber) under circumstances when the inconsistency of the case law requires a unifying decision'[54]

There are indeed examples in domestic procedural regulations that provide for similar rules. E.g., in Germany the rules of procedure for all five branches of the judiciary require that if one Senate of a Federal Supreme Court would like to deviate from a previous decision of another Senate, it first has to ask the latter whether it sticks to that decision, and if that is the case, the former Senate is entitled to ask the Grand Senate of

[42] On the importance of an explicit 'overruling' in this area, *see also* R. Szudoczky, *Foreign Permanent Establishment Losses Under the Fundamental Freedoms: Does* W AG *Bring an End to a Rollercoaster Ride?*, 51 Intertax 432–443, at 441 et seq. (2023).

[43] *See* in this vein already A.G. Kokott, 23 Oct. 2014, Case C-172/13, *supra* n. 38, para. 26 (referring to CJEU (Grand Chamber), 14 Jul. 2014, Case C-48/13, *supra* n. 24): 'In the light of these statements relating to permanent establishments, it seems reasonable to assume, by way of an *argumentum a fortiori*, that resident and non-resident *subsidiaries* are not at all in a comparable situation having regard to the allocation of the power to impose taxes between Member States'.

[44] A.G. Kokott, 23 Oct. 2014, Case C-172/13, *supra* n. 38, para. 42. Under US law, the doctrine of *stare decisis* is likewise 'not an inexorable command', but rather 'a principle of policy'; *see* T. Tridimas, *Precedent and the Court of Justice – A Jurisprudence of Doubt*, in *Philosophical Foundations of European Union Law* 307–330, at 311 (J. Dixon & P. Eleftheriadis eds, Oxford 2012) with references to the case-law of the US Supreme Court.

[45] As pointed out by A.G. La Pergola, 12 Feb. 1998, Case C-262/96, *Sürül*, EU:C:1998:55, para. 36, 'the rule *stare decisis* has not been incorporated in the Community judicial system. The Court does not of course fail to ensure that its case-law displays continuity and that its judgments are logically compatible and not contradictory with each other. However, the Court is not technically bound by its earlier judgments'.

[46] On 'express overruling', *see* Tridimas, *supra* n. 44, at 316–320.

[47] CJEU, 17 Oct. 1990, Case C-10/89, *SA CNL-SUCAL NV v. HAG GF AG (HAG II)*, EU:C:1990:359, para. 10, referring to CJEU, 3 Jul. 1974, Case 192/73, *Van Zuylen Frères v. Hag AG (HAG I)*, EU:C:1974:72, and stating that 'the Court believes it necessary to reconsider the interpretation given in that judgment'.

[48] CJEU, 24 Nov. 1993, Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, EU:C:1993:905, para. 16 ('contrary to what has previously been decided').

[49] *See* A.G. La Pergola, 12 Feb. 1998, Case C-262/96, *supra* n. 45, para. 36 with n. 35.

[50] *See* already CJEU, 30 Apr. 1996, Case C-308/93, *Cabanis-Issarte*, EU:C:1996:169, para. 34.

[51] CJEU, 30 Jun. 1998, Case C-394/96, *Brown v. Rentokill Limited*, EU:C:1998:331, para. 27.

[52] CJEU (Grand Chamber), 25 Jul. 2008, Case C-127/08, *Metock* et al., EU:C:2008:449, para. 58.

[53] CJEU (Grand Chamber), 9 Jul. 2020, Case C-673/18, *Santen SAS*, EU:C:2020:531, paras 60 and 34 (declaring that 'the premises' established by CJEU, 19 Jul. 2012, Case C-130/11, *Neurim Pharmaceuticals (1991) Ltd*, EU:C:2012:489, 'must be disregarded').

[54] *See* Szudoczky, *supra* n. 42, at 432–443, at 443.

the respective Federal Supreme Court for a ruling; if an individual Senate wants to deviate from a previous decision of the Grand Senate, it has to refer the issue directly to the latter.[55] There even exists a Common Senate of the Federal Supreme Courts for situations where a Federal Supreme Court would like to deviate from a decision of another Federal Supreme Court (or of the Common Senate).[56]

However, it appears questionable whether it is really necessary to install such formal solutions at the level of the CJEU. An alternative could be to intensify the use of the already existing rules. The 'Common Procedual Provisions' in Title II of the CJEU´s Rules of Procedure[57] stipulate in Article 60(1) that, '*The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute*'.[58] So there is already a basic guideline in the Rules of Procedure that cases standing out as regards '*difficulty or importance … or particular circumstances … should be assigned to the Grand Chamber*' (of fifteen judges, Article 16(2) Statute and Article 27(1) CJEU Rules of Procedure), and the question of whether or not the CJEU shall 'overrule' one of its previous decisions should easily be covered by this guideline.[59]

It may, of course, not always be possible to already anticipate at the moment of the initial assignment of a case whether it qualifies as a Grand Chamber case in the aforementioned sense. After all, only few references by domestic courts for preliminary rulings will explicitly ask the CJEU to overturn its previous case-law, so that usually a potential 'overruling' issue will not immediately be on the radar when a case arrives in Luxembourg. But situations where such issues pop up in the course of preliminary ruling proceedings can be dealt with: Pursuant to Article 60(2) CJEU Rules of Procedure, '*The formation to which a case has been assigned may, at any stage of the proceedings, request the Court to assign the case to a formation composed of a greater number of Judges*'. In other words, if the members of a Chamber of three or five judges (Article 16(1) CJEU Statute and Article 28 CJEU Rules of Procedure) are of the opinion that a previous CJEU decision should be 'overruled', they have it in their own hands to request the assignment of the case to the Grand Chamber (and in cases of '*exceptional importance*', even to the full Court).

It should be added that Member States and EU institutions have the right to request (without further motivation) the assignment of a case to the Grand Chamber. Article 16(3) CJEU Statute grants that right to '*a Member State or an institution of the Union that is party to the proceedings*', while Article 27(1) CJEU Rules of Procedure refers to '*a Member State or an institution of the European Union participating in the proceedings*'. Despite the fact that a preliminary ruling procedure under Article 267 TFEU is a dialogue between the domestic and the European judges (*see supra* at 1) without any real 'parties', Article 27(1) CJEU Rules of Procedure nevertheless seems to include situations where Member States or EU institutions make use of their right to 'Participation in preliminary rulings procedures' under Article 96(1)(b), (c) CJEU Rules of Procedure and '*submit observations to the Court*'.[60] So if there is a *lacuna* to be identified in the procedural framework of the CJEU as regards access to a Grand Chamber, it would be the lack of an entitlement of the '*parties to the main proceedings*' (before the referring domestic court), beyond their right to '*submit observations to the Court*' under Article 96(1)(a) CJEU Rules of Procedure, to have the case assigned to a Grand Chamber. It does not require much fantasy, though, that with the introduction of such an explicit entitlement the number of Grand Chamber proceedings would increase exponentially (and far beyond situations of potential 'overrulings'). Ultimately, this would reduce the value of Grand Chamber decisions, which is not desirable, either.

A midway could be a self-obligation on the part of the judges at the CJEU to take the possibility under Article 60(2) CJEU Rules of Procedure more seriously and, in ordinary Chamber proceedings, '*request the Court to assign the case to a formation composed of a greater number of Judges*' (i.e., a Grand Chamber) where the conditions

[55] *See* for the Bundesgerichtshof (ordinary judiciary in civil and criminal matters): § 132 Gerichtsverfassungsgesetz; for the Bundesarbeitsgericht (labour law matters): § 45 Arbeitsgerichtsgesetz; for the Bundesfinanzhof: § 11 Finanzgerichtsordnung; for the Bundessozialgericht (social law matters): § 41 Sozialgerichtsgesetz; for the Bundesverwaltungsgericht (administrative law matters): § 11 Verwaltungsgerichtsordnung.

[56] Legal basis is the Law on ensuring the uniformity of the jurisprudence of the Federal Supreme Courts (Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes).

[57] Rules of Procedure of the Court of Justice of 25 Sep. 2012, OJ 2012 L 265/1, with subsequent amendments.

[58] *See* Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the TEU and the TFEU, OJ 2012 C 326/210, with subsequent amendments. In practice, ca. every tenth decision of the CJEU is rendered by a Grand Chamber (10.63% of all CJEU rulings in 2022; *see supra* n. 6, at 9).

[59] For the sake of completeness, it should be mentioned that, under Art. 60(2) Rules of Procedure, the CJEU may also '*assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance*'. In practice, such '*full Court*' decisions are very rare (only 0.27% of all CJEU rulings in 2022; *see supra* n. 6, at 9).

[60] Article 44(3) of the previous Rules of Procedure, as amended following the entry into force of the Treaty of Nice, OJ 2003 L 147/17, had even explicitly recognized that, '*For the purposes of this provision, "party to the proceedings" means any Member State or any institution which is a party to or an intervener in the proceedings or which has submitted written observations in any reference of a kind mentioned in Article 103*' (i.e., the preliminary ruling procedure).

of Article 60(1) are met and a case is characterized by a certain '*difficulty or importance … or particular circumstances*'. For cases where a Chamber of three or five judges contemplates an 'overruling' one could argue that, taking into account the high significance of the principle of legal certainty (*see supra* at 1), the discretion ('*may*') to make that request for an assignment is reduced to only one valid option (i.e., 'must'). Moreover, nothing prevents the '*parties to the main proceedings*' from submitting, together with their written '*observations*', the expression of their wish to have the case dealt with by the Grand Chamber, in particular because they believe that previous CJEU case-law must be 'overruled'. This could even help the competent Chamber to form a better view on the question of whether an assignment to the Grand Chamber is required.

In defence of the CJEU´s practice it should be pointed out that, though, that in general the Court has been paying heed to the importance of explicit 'overrulings' and decided the relevant cases either in full Court or, after the Nice reform, by way of Grand Chamber judgments (*see* the examples *supra* at 2 *in fine*). However, in the area of tax law the CJEU refuses to follow that path, despite the fact that this field of law particularly requires legal certainty (*see supra* at 1), and this approach should urgently been changed.

The issue is all the more pressing in the area of taxation which is precisely at the centre of the current effort on the part of the CJEU to reform the preliminary ruling system and, in order to reduce its own workload, (inter alia) shift a part of its competences to the GC. In the 'Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union', dated 30 November 2022,[61] the CJEU has identified 'specific areas in which the General Court is to have jurisdiction, pursuant to Article 256(3) of the Treaty on the Functioning of the European Union, to hear and determine questions referred for a preliminary ruling by the courts of Member States under Article 267 of that Treaty'.[62]

According to the proposal of a new Article 50b(1) to be included in the CJEU Statute, the GC '*shall have jurisdiction to hear and determine requests for a preliminary ruling … that come exclusively within one or several of the following specific areas: the common system of value added tax; excise duties; the Customs Code and the tariff classification of goods under the Combined Nomenclature; compensation and assistance to passengers; the scheme for greenhouse gas emission allowance trading*'.[63] In the view of the CJEU, these five areas (three of them concerning indirect taxation and customs duties) 'are clearly defined and sufficiently separable from other areas covered by Union law, are governed by a limited number of acts of secondary legislation and … rarely give rise to judgments of principle'; furthermore, they have 'given rise to abundant case-law on the part of the Court of Justice, … , since such requests represent, on average, roughly 20% of all requests for a preliminary ruling brought before the Court of Justice each year'.[64]

Interestingly, the CJEU itself discusses some procedural safeguards accompanying this partial transfer of competence for preliminary rulings to the GC, but its own proposals to change its Statute are limited to formal aspects: Firstly, the proposed Article 50 is intended to align the organizational structure of the GC to a large extent with that of the CJEU by introducing '*chambers of three or five Judges*' and '*a Grand Chamber*' (and in addition, even '*a chamber of an intermediate size between the chambers of five Judges and the Grand Chamber, or be constituted by a single Judge*'),[65] while the proposed Article 50b(3) provides that '*an Advocate General shall be designated*' for the preliminary rulings handled by the GC.[66] And secondly, the proposed Article 50b(2) requires that, '*Every request for a preliminary ruling*' under Article 267 TFEU '*shall be submitted to the Court of Justice*', and that only '*After verifying … that the request for a preliminary ruling comes exclusively within one or within several of the areas*' covered by Article 50b(1), '*the Court of Justice shall transmit that request to the General Court*'.[67] In this respect, however, the CJEU explicitly admits that 'the verification carried out by the Court of Justice in that context does not consist of an assessment of whether it is appropriate to refer the case before the General Court or to leave it with the Court of Justice, in the light of the interest of the questions referred for a preliminary ruling'.[68]

Hence, the aforementioned verification does not take into consideration whether the CJEU would be better placed to answer the question(s) referred. In principle, this evaluation is left to the GC: According to the CJEU, '*the transfer of a request for a preliminary ruling to the General Court is without prejudice to the option that that court has of referring the case to the Court of Justice*' if the GC '*considers that the case requires a decision of principle likely to affect the unity or consistency of Union law*' (Article 256(3), second subparagraph TFEU).[69] For such situations it 'should not be necessary to convene the Grand Chamber of the General Court in order to rule on

[61] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf (accessed 5 Jun. 2023).

[62] *Ibid.*, at 1. According to the first subpara. of Art. 256(3) TFEU, '*The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute*'.

[63] *Ibid.*, at 13.

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*, at 14.

[67] *Ibid.*

[68] *Ibid.*, at 5 et seq.

[69] *Ibid.*, at 6.

questions transmitted to the General Court for a preliminary ruling since … cases requiring a decision of principle such as those that usually come within the jurisdiction of the Grand Chamber should be referred to the Court of Justice' under the aforementioned provision.[70] It is submitted here that a situation where the GC comes to the conclusion that a previous decision of the CJEU in any of the five areas listed in the proposed Article 50b(1) should be 'overruled' must be regarded as requiring '*a decision of principle likely to affect the unity or consistency of Union law*' on which the CJEU, and not the GC, should have the final say. And the same goes for future situations in which the GC may consider 'overruling' one of its own decisions in those five areas. For the sake of legal certainty and of visibility, in both cases the Grand Chamber of the CJEU should be the ultimate European court to decide.

Last but not least, it must be pointed out that there is indeed an emergency break regarding this partial transfer of jurisdiction to the GC for cases under Article 267 TFEU. As the CJEU emphasizes, this transfer is likewise 'without prejudice … to the possibility, for the Court of Justice itself, to review the decision of the General Court' under the circumstances mentioned in Article 256(3), third subparagraph TFEU,[71] i.e., '*where there is a serious risk of the unity or consistency of Union law being affected*'. As can be derived from the wording of the latter provision, this type of '*review*' by the CJEU should be an exception.[72] Nevertheless, one could imagine situations where it indeed becomes necessary – for example, where the GC 'overrules' a case-law previously established by the CJEU without making use of the aforementioned possibility under Article 256(3), second subparagraph TFEU to refer the case (back) to the CJEU.

It has been reported that the CJEU´s request to have its Statute amended was discussed by representatives of the Member States on 31 May 2023, and that the European Parliament will vote on a potential approval in September 2023.[73] It is unknown whether issues related to 'overruling' have played or will play any role in these debates, and it can hardly be expected that the text of the new provisions proposed by the CJEU will be amended to take to such issues into account. However, one of the main aims of this reform of the preliminary ruling system is to promote 'the uniform interpretation and application of Union law'.[74] Both from a practical and an academic standpoint it would, therefore, be highly welcome if CJEU and GC, once the procedural reform has been passed and the new rules have been enacted, would pay more attention to the need for a clear case-law, in particular in the area of taxation, and would ensure better visibility of situations where a decision departs from previous case-law.

[70] *Ibid.*, at 7.

[71] *Ibid.*, at 6.
[72] *Ibid.*
[73] *Ibid.*, at 7.
[74] J. Compte, *Tax Notes Today International* (31 May 2023).