



Opinion statement

Dear Sir/Madam,

The CFE ECJ Task Force has issued an [Opinion Statement](#) on the ECJ decision of 22 September 2022 in Case C-538/20, *W AG*, on the deductibility of foreign final losses.

At issue in *W AG* was the ability of a German company to deduct the final losses which it had incurred in its UK permanent establishment (PE) because Germany as the State of residence had waived its power to tax the profits (and losses) of that PE under the Germany/UK tax treaty. The CJEU ruled that when the State of residence refrained from exercising its power to tax the profits (and losses) of the foreign PE under a double tax treaty, the situation of a company with a foreign PE was not objectively comparable to the situation of a company with a domestic PE. As such, there was no different treatment of comparable situations and as a corollary, no breach of the freedom of establishment.

The CFE ECJ Task Force acknowledges the different views on the CJEU's “final loss” doctrine previously established in *Lidl Belgium* for treaty-

exempt permanent establishments, but also notes that the reasoning of that case has been implicitly renounced by the Court in *Timac Agro* and in *W AG*.

The *W AG* decision makes it clear that comparability should be examined differently depending on whether the exemption is granted by domestic or tax treaty law. The CFE ECJ Task Force has reservations regarding this distinction. For the taxpayer, exemption has the same economic effects regardless of whether is adopted through domestic law or tax treaty law. Moreover, *W AG* departs from the Court's reasoning and thinking in *Lidl Belgium*, which also concerned Germany and the same rules. Ideally, the Court would have made this explicit. Finally, it remains to be seen if *Marks and Spencer* is still "good law" or if *W AG* was one of the final nails in the coffin of the "final loss" doctrine.

We invite you to read the [statement](#) and remain available for any queries you may have.

Kind regards,

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