

# Opinion Statement ECJ-TF 4/2014 of the CFE on the decision of the European Court of Justice in *SCA Group Holding BV et al.* (Joined Cases C-39/13, C-40/13 and C-41/13), on the requirements to form a “fiscal unity”

This is an Opinion Statement prepared by the CFE ECJ Task Force on *SCA Group Holding BV et al.* (Joined Cases C-39/13, C-40/13 and C-41/13), submitted to the European Court of Justice, the European Commission and the EU Council in December 2014.

## 1. Issues and Preliminary Questions

- (1) This Opinion Statement analyses the Court’s decision in *SCA Group Holding BV et al.* (Joined Cases C-39/13, C-40/13 and C-41/13)<sup>1</sup> of 12 June 2014, concerning the question of whether the Netherlands is violating the provisions on freedom of establishment by refusing to form a “fiscal unity” (*fiscale eenheid*) between domestic companies in situations in which (1) one or more intermediate companies are resident in another Member State (C-39/13 and C-41/13) or (2) the common parent company of two domestic sister companies is resident in another Member State (C-40/13). The Netherlands “fiscal unity” treats separate entities as one taxable unit for corporate income tax purposes and hence enables, for example, full consolidation of profits and losses, regardless of internal transactions, including reorganizations.
- (2) More specifically, *SCA Group Holding BV et al.* addresses the impact of the freedom of establishment on tax consolidation between companies that are all located in the Netherlands where domestic law bars such consolidation because one or more of the “link companies” are located in another Member State.<sup>2</sup> Despite the wider scope of the Netherlands “fiscal unity” regime, *SCA Group Holding BV et al.*

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1. NL: ECJ, 12 June 2014, Joined Cases C-39/13, C-40/13 and C-41/13, *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v. SCA Group Holding BV*, ECJ Case Law IBFD.
2. See art. 15(3)(c) of NL: Corporate Income Tax Act (CITA), National Legislation IBFD, requiring that (at each level of the group) “both taxable persons are established in the Netherlands”, subject to the exception that a PE of a non-resident corporation may also qualify (art. 15(4) CITA).

also falls within the broader group of cases in which the utilization of *domestic* losses is excluded because the resident loss-making company is held via a non-resident company. Such situations have already been at issue in the Court’s decisions in *Papillon* (Case C-418/07),<sup>3</sup> *Philips Electronics* (Case C-18/11)<sup>4</sup> and – more recently – *Felixstowe Docks* (Case C-80/12).<sup>5</sup> Hence, the present case was not concerned with the utilization of *foreign* losses of non-resident subsidiaries, which was discussed by the Court in a second group of cases including, for example, *Marks & Spencer* (Case C-446/03),<sup>6</sup> *Oy AA* (Case C-231/05),<sup>7</sup> *X Holding* (Case C-337/08)<sup>8</sup> and *A Oy* (Case C-123/11).<sup>9</sup> Therefore, even where the same consolidation regime is concerned, for example, the Netherlands fiscal unity regime in *X Holding*, on the one hand, and the present case, on the other, the EU law standards governing the use of foreign losses need to be distinguished from those governing the utilization of domestic losses.<sup>10</sup>

- (3) With its extensive questions, the referring *Gerechthof te Amsterdam* raised two broad issues under the Netherlands fiscal unity regime, i.e. whether the rules on the freedom of establishment, articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU) (2007)<sup>11</sup> (formerly articles 43 and 48 of the EC Treaty)<sup>12</sup> must be interpreted as precluding legislation of a Member State pursuant to which:

3. FR: ECJ, 27 Nov. 2008, Case C-418/07, *Société Papillon v. Ministère du budget, des comptes publics et de la fonction publique*, ECJ Case Law IBFD.
4. UK: ECJ, 6 Sept. 2012, Case C-18/11, *The Commissioners for Her Majesty’s Revenue & Customs v. Philips Electronics UK Ltd*, ECJ Case Law IBFD.
5. UK: ECJ, 1 Apr. 2014, Case C-80/12, *Felixstowe Dock and Railway and Others v. the Commissioners for Her Majesty’s Revenue & Customs*, ECJ Case Law IBFD.
6. UK: ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. Halsey (Her Majesty’s Inspector of Taxes)*, ECJ Case Law IBFD.
7. FI: ECJ, 18 July 2007, Case C-231/05, *Oy AA*, ECJ Case Law IBFD.
8. NL: ECJ, 25 Feb. 2010, Case C-337/08, *X Holding v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.
9. FI: ECJ, 21 Feb. 2013, Case C-123/11, *Veronsaajien oikeudenvalvontayksikkö and Valtiovarainministeriö v. A Oy*, ECJ Case Law IBFD.
10. See also NL: Opinion of Advocate General Kokott, 27 Feb. 2014, Case C-39/13, *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v. SCA Group Holding BV*, para. 28, ECJ Case Law IBFD and the clear distinction made by the Court in *Papillon* (C-418/07), paras. 38-40.
11. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
12. While the referring court framed its questions in light of articles 43 and 48 of the EC Treaty and Advocate General Kokott did not deem it neces-

- a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies that do not have a permanent establishment (PE) in that Member State (C-39/13 and C-41/13).
- treatment as a single tax entity is granted to a resident parent company that holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a PE therein (C-40/13).

## 2. The Decision of the Court

- (4) In its decision of 12 June 2014, the Court (Second Chamber) held that the impossibility of forming a fiscal unity under Netherlands law between companies resident in the Netherlands due to the existence of a “link” company in another Member State, i.e. either intermediate non-resident companies linking the Netherlands parent and its Netherlands sub-subsidiary or a non-resident parent company linking two Netherlands sister companies, constitutes an unjustified restriction of the freedom of establishment.<sup>13</sup> Advocate General Kokott had come to the same conclusion in her Opinion of 27 February 2014,<sup>14</sup> albeit based on a somewhat different reasoning. Given the Netherlands requirement for a 95% shareholding for the fiscal unity regime to apply, there was also no doubt that the case had to be considered under the freedom of establishment (and not the free movement of capital).<sup>15</sup>
- (5) First, the Court considered situations in which fiscal unity was denied because the “linking” intermediate subsidiary (and sub-subsidiary) was resident in another Member State (Cases C-39/13 and C-41/13):
- (a) As for the existence of a restriction, the Court referred to *X Holding*<sup>16</sup> and noted that the fiscal unity regime, which allows resident parent companies and their resident subsidiaries to be taxed as if they form one and the same tax entity (“tax integration scheme”), provides a cash-flow

advantage for the companies concerned,<sup>17</sup> and that this scheme allows, in particular, the profits and losses of the companies constituting the tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes.<sup>18</sup> Since the Netherlands regime also applies to sub-subsidiaries<sup>19</sup> and sub-sub-subsidiaries,<sup>20</sup> as long as those intermediate subsidiaries are themselves resident or have a PE in the Netherlands, that legislation creates a difference in treatment since the ability to elect for the tax entity regime is dependent on whether the parent company holds its indirect stakes through a subsidiary established in the Netherlands or in another Member State.<sup>21</sup> The Court also found it “irrelevant that, even in a purely internal situation, no parent company can form a tax entity with sub-subsidiaries without also including the intermediate subsidiary”, since a “Netherlands parent company which holds Netherlands sub-subsidiaries by means of a non-resident subsidiary cannot, in any case, form a tax entity with those sub-subsidiaries”, while, “by contrast, a Netherlands parent company which holds Netherlands sub-subsidiaries through a resident subsidiary still has the ability to elect to do so”.<sup>22</sup>

- (b) Next, the Court considered the justification for the restriction, which (now) is a two-prong analysis: the difference in treatment is only compatible with the freedom of establishment if it either (1) relates to situations that are not objectively comparable or (2) is justified by an overriding reason in the public interest.<sup>23</sup> As for comparability, the Court noted that the objective comparability of situations must be assessed having regard to the aim pursued by the provisions at issue.<sup>24</sup> In light of the aim of the Netherlands fiscal unity regime (i.e. enabling the results of companies to be consolidated for tax purposes), the Court, in turn, found that purely internal situations and situations involving a non-resident “link” company are “objectively comparable to the extent that the benefit of the advantages of

sary to decide whether only those articles or also articles 49 and 54 of the TFEU are applicable *ratione temporis*, since they have identical content (AG Opinion in *SCA Group Holding* (C-39/13), para. 16), the Court relied on articles 49 and 54 of the TFEU (*SCA Group Holding* (C-39/13), paras. 19 et seq. and 44 et seq.).

13. *SCA Group Holding* (C-39/13).

14. NL: Opinion of Advocate General Kokott, 27 Feb. 2014, Case C-39/13, *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v. SCA Group Holding BV*, ECJ Case Law IBFD.

15. See AG Opinion in *SCA Group Holding* (C-39/13), para. 17, referring to UK: ECJ, 13 Nov. 2012, Case C-35/11, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, Commissioners for her Majesty's Revenue & Customs*, ECJ Case Law IBFD.

16. *X Holding* (C-337/08), para. 18. See, on this case, Confédération Fiscale Européenne, *Opinion Statement of the CFE on X Holding* (C-337/08): Submitted to the European Institutions in January 2011, 51 Eur. Taxn. 4, p. 150 et seq. (2011), Journals IBFD.

17. *SCA Group Holding* (C-39/13), para. 21. The Court repeated this notion in paragraph 46 of the decision, stating that “[a] tax entity regime such as that at issue in the main proceedings constitutes a tax advantage for the companies concerned. By speeding up the relief of the losses of loss-making companies by allowing them to be set off immediately against the profits of other group companies, that regime confers a cash advantage on the group”.

18. *SCA Group Holding* (C-39/13), para. 21.

19. *SCA Group Holding* (C-39/13), paras. 22-25.

20. *SCA Group Holding* (C-39/13), para. 26.

21. *SCA Group Holding* (C-39/13), paras. 23-24, referring, by analogy, to *Papillon* (C-418/07), para. 22.

22. *SCA Group Holding* (C-39/13), para. 25.

23. *SCA Group Holding* (C-39/13), para. 28, referring to *Felixstowe Dock and Railway Company and others* (C-80/12), para. 25 and, indirectly, to *Philips Electronics* (C-18/11), para. 17.

24. *SCA Group Holding* (C-39/13), para. 28. See also, for example, *X Holding* (C-337/08), para. 22; *Philips Electronics* (C-18/11), para. 17; and *Felixstowe Dock and Railway Company and others* (C-80/12), para. 25.

the tax entity regime is sought in both situations for the group formed by the parent company and the sub-subsidiaries.<sup>25</sup>

As for the justification of an overriding reason in the public interest, the Court did not address the preservation of a Member State's powers of taxation (with regard to symmetry between the right to tax profits and the right to deduct losses)<sup>26</sup> and quickly rejected a justification on the ground of the risk of tax avoidance,<sup>27</sup> but discussed at some length whether or not the Netherlands tax system is coherent with regard to the prevention of the double use of losses.<sup>28</sup>

The "coherence justification" requires a direct link between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax,<sup>29</sup> and indeed such a direct link was found by the Court in *Papillon*<sup>30</sup> concerning the French tax integration regime. In that case, the Court accepted a direct link between the tax advantage (i.e. possibility of transferring losses) and tax disadvantages (i.e. neutralization of certain transactions between those companies), as the purpose of neutralizing those intra-group transactions was to avoid the double use of losses at the level of resident companies falling under the tax integration regime and thus preserve the coherence of that tax system.<sup>31</sup> This was because of the operation of the French regime: if the legislation at issue in *Papillon* had granted the benefit of tax integration between a French parent and its French sub-subsidiary where the intermediate company was not resident, it would have been possible for a loss suffered by a resident sub-subsidiary to be taken into account in the first instance with regard to the resident parent company (because of the tax integration), and in the second instance with regard to the non-resident intermediate subsidiary (because of a tax

deductible write-off of the participation in the non-resident subsidiary as a result of the reduction in value stemming from the same losses on its shares in the sub-subsidiary or its claims against it).

In *SCA Group Holding BV et al.*, however, the Court distinguished *Papillon* from the Netherlands' system: under the general Netherlands participation exemption (*deelnemingsvrijstelling*)<sup>32</sup> rule, the profits or losses resulting from the possession, acquisition or disposal of a holding are not taken into account in determining the taxable profit of a tax entity,<sup>33</sup> so that a resident parent company can never take into account a loss linked to a holding in one of its subsidiaries, even where that subsidiary has its seat in another Member State.<sup>34</sup> Therefore, the Court continued, it is through this general exemption – and not specific provisions for the neutralization of certain transactions, as in the system at issue in the case giving rise to the decision in *Papillon* – that the Netherlands tax system seeks to prevent the double use of losses within a tax entity. And because the Netherlands participation exemption rule is a general one and not limited to the fiscal unity, the Court found no direct link between the granting of the tax advantage linked to the formation of a tax entity and the offsetting of that advantage by a particular tax, so that, consequently, the restriction on the freedom of establishment cannot be justified by the need to preserve the coherence of the tax system.<sup>35</sup>

(6) Second, the Court addressed the situation in which fiscal unity is denied because the common parent of two resident sister companies is resident in another Member State (C-40/13):

(a) With regard to the existence of a restriction, the Court pointed out that the freedom of establishment aims to guarantee the benefit of national treatment in the host Member State by prohibiting any discrimination based on the place in which companies have their seat.<sup>36</sup> As the "fiscal unity" regime confers a "cash advantage on the group"<sup>37</sup> by allowing, inter alia, for the immediate set-off of losses between profit- and loss-making resident subsidiaries of a resident parent company, the Netherlands rules create a

25. *SCA Group Holding* (C-39/13), paras. 29-31; see also *Papillon* (C-418/07), para. 29.

26. For a rejection of that argument where domestic losses were concerned, see *Philips Electronics* (C-18/11), paras. 25-26 and *Felixstowe Dock and Railway Company and others* (C-80/12), para. 30.

27. See *SCA Group Holding* (C-39/13), para. 42 of the decision, noting that "that ground does not constitute, by itself, an autonomous justification for a tax restriction on freedom of establishment if it is not relied on in conjunction with a specific objective of combating wholly artificial arrangements which do not reflect economic reality and the purpose of which is to escape the tax normally due", which is "[e]vidently, [...] not the objective of the restriction provided for in the tax entity regime". For a similar analysis with regard to the UK regime see *Felixstowe Dock and Railway Company and others* (C-80/12), paras. 31-34. For the Court's case law on such a justification see generally, inter alia, UK: ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer*, para. 26, ECJ Case Law IBFD and UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 55, ECJ Case Law IBFD. It might be noted, however, that the "abuse justification" might be acceptable if it is combined with the need to safeguard a balanced allocation of taxing powers between Member States, even where the domestic legislation is not specifically aimed at purely artificial arrangements; see, for example, *Oy AA* (C-231/05), para. 63.

28. *SCA Group Holding* (C-39/13), paras. 32-41.

29. *SCA Group Holding* (C-39/13), para. 33, referring to DE: ECJ, 17 Oct. 2013, Case C-181/12, *Yvon Welte v. Finanzamt Velbert*, para. 59, ECJ Case Law IBFD.

30. *Papillon* (C-418/07).

31. *Papillon* (C-418/07), paras. 6 and 43-50.

32. The Court refers to it as a "holding exemption" in paragraphs 3, 37, 38 and 39.

33. That rule, which is established in article 13 CITA applies to holdings greater than 5% of the capital, and hence covers all tax entities in the fiscal unity regime, since they require a holding of at least 95% of the capital; see para. 37.

34. See *SCA Group Holding* (C-39/13), para. 39.

35. *SCA Group Holding* (C-39/13), paras. 37-41.

36. See *SCA Group Holding* (C-39/13), para. 45, referring to UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*, para. 43, ECJ Case Law IBFD; FR: ECJ, 14 Dec. 2006, Case C-170/05, *Denkavit Internationaal BV, Denkavit France SARL v. Ministre de l'Économie, des Finances et de l'Industrie*, para. 22, ECJ Case Law IBFD; and DE: ECJ, 26 June 2008, Case C-284/06, *Burda Verlagsbeteiligungen GmbH v. Finanzamt Hamburg-Am Tierpark*, para. 77, ECJ Case Law IBFD; see also, for example, UK: ECJ, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, para. 37, ECJ Case Law IBFD.

37. *SCA Group Holding* (C-39/13), para. 46.

difference in treatment by excluding from such an advantage “parent companies which also own subsidiaries in the Netherlands but have their seat in another Member State and are without a permanent establishment in the Netherlands”.<sup>38</sup> That disadvantage compared with purely domestic situations constitutes a restriction,<sup>39</sup> which “is not called into question by the fact that the common parent company of the subsidiaries to be consolidated is situated at a higher level in the group’s chain of interests”.<sup>40</sup>

- (b) The Court then turned to the justification for the restriction and first addressed the objection that the Netherlands “fiscal unity” regime “seeks to consolidate all of a group’s results with respect to the ultimate parent company, so that the position of a group the parent company of which has its seat in the Netherlands would not be comparable to that of a group the parent company of which has its seat in another Member State”, and rejected that analysis based on the objective of the “fiscal unity” regime, which allows for the consolidation of the subsidiaries in respect of a group the parent of which is resident.<sup>41</sup> The difference in treatment, as regards the possibility of fiscally integrating sister companies is, therefore, not justified by an objective difference of situation. Nor is it justified by an overriding reason in the public interest.<sup>42</sup> The Court not only rejected a justification based on the risk of tax avoidance,<sup>43</sup> but also one based on the coherence of the tax system with regard to the prevention of the double use of losses,<sup>44</sup> as it was not apparent “that the granting of the benefit of the tax entity to sister companies would break any direct link between that advantage and a particular tax”.

(7) Hence, the ECJ ruled as follows:

1. In Cases C-39/13 and C-41/13, Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies which do not have a permanent establishment in that Member State.
2. In Case C-40/13, Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which treatment as a single tax entity is granted to a resident parent company which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a permanent establishment there.

38. *SCA Group Holding* (C-39/13), para. 47.  
 39. *SCA Group Holding* (C-39/13), para. 48, referring to *Papillon* (C-418/07), para. 32; see also, for example, *Thin Cap* (C-524/04), para. 61.  
 40. *SCA Group Holding* (C-39/13), para. 49.  
 41. *SCA Group Holding* (C-39/13), paras. 50-52.  
 42. *SCA Group Holding* (C-39/13), paras. 53-54.  
 43. *SCA Group Holding* (C-39/13), para. 55, referring to para. 42 of the decision.  
 44. *SCA Group Holding* (C-39/13), paras. 53-54.

### 3. Comments

- (8) *Consistent Case Law.* The Court’s result in *SCA Group Holding BV et al.* is in line with previous case law on the use of domestic losses under group taxation regimes: in *Papillon*, the Court objected to the exclusion of a domestic sub-subsidiary from the French “tax integration” regime where the intermediate subsidiary was established in another Member State.<sup>45</sup> In *Philips Electronics*, the Court held that UK national legislation excluding the transfer of domestic losses incurred by a branch of a non-resident company to a resident company of the same group violates the freedom of establishment.<sup>46</sup> And in *Felixstowe Dock*, the Court found it to be an infringement of the freedom of establishment for UK legislation to require the “link company” to be a resident in order to facilitate a loss transfer between a company belonging to a consortium and a company that is a member of a group.<sup>47</sup>

It can be derived from these decisions that the different (technical) characteristics of the various group taxation regimes (for example, consolidation by disregard of group entities or by transfer of profits or losses) may not lead to different outcomes of the cases.<sup>48</sup> Also, it does not make a difference how many tiers of intermediate non-resident EU-companies are interposed between a resident parent and a resident sub-subsidiary,<sup>49</sup> as each of the intermediate companies exercises its freedom of establishment and each lower-tier company can also derive rights from that freedom.<sup>50</sup>

- (9) *Comparability.* As in some of the more recent cases, C-18/11<sup>51</sup> the Court first identifies the “restriction”, which, in the field of tax law, exists if establishment is hindered by a disadvantageous difference in treatment of an establishment in another Member State in comparison with a purely domestic establishment.<sup>52</sup> Second, under the heading “justification for the restriction” it asks if such difference in treatment either relates to situations that are not objectively comparable or can be justified by an overriding reason in the public interest.<sup>53</sup> Finally, of course, the national measure must be proportionate, i.e. it must not go beyond what is necessary to attain that objec-

45. *Papillon* (C-418/07).  
 46. *Philips Electronics* (C-18/11).  
 47. *Felixstowe Dock and Railway Company and others* (C-80/12).  
 48. See also AG opinion in *SCA Group Holding* (C-39/13), para. 65, comparing the French tax integration at issue in *Papillon* (C-418/07) and the Netherlands “fiscal unity” regime at issue in the present case.  
 49. *SCA Group Holding* (C-39/13), para. 26.  
 50. The Court has explicitly held that a company may, for tax purposes, rely on a restriction of the freedom of establishment of another company that is linked to it in so far as such a restriction affects its own taxation; see, for example, *Philips Electronics* (C-18/11), para. 39; *Felixstowe Dock and Railway Company and others* (C-80/12), para. 23.  
 51. See, for example, *Felixstowe Dock and Railway Company and others* (C-80/12), para. 25 and *Philips Electronics* (C-18/11), para. 17.  
 52. See *Papillon* (C-418/07), paras. 16-23.  
 53. *SCA Group Holding* (C-39/13), para. 28, referring to *Felixstowe Dock and Railway Company and others* (C-80/12), para. 25 and, indirectly, to *Philips Electronics* (C-18/11), para. 17.

tive.<sup>54</sup> In line with its settled case law,<sup>55</sup> the Court confirms that the objective comparability of situations must be assessed having regard to the aim pursued by the provisions at issue,<sup>56</sup> i.e. in respect of the Netherlands “fiscal unity” regime, the (advantageous) consolidation of profits and losses of the various group members.<sup>57</sup> Hence, and in line with *Papillon*,<sup>58</sup> the Court rejected arguments against the comparability of domestic and cross-border situations in the present case: as the Netherlands regime does not offer any possibility at all to form a fiscal unity if the “link” company is non-resident (and has no PE in the Netherlands), it is not decisive that also in a purely domestic setting a group (1) between a parent and a sub-subsidiary could not be formed without including the intermediate subsidiary and (2) between two sister companies without including the common parent company.

- (10) *Justification*. Unlike in *Papillon*, the Court in *SCA Group Holding BV et al.* rejected the coherence of the Netherlands “fiscal unity” regime for lack of a direct link between a tax advantage (loss utilization) and a disadvantage (neutralization of decreases in value of shareholdings in group companies). This was because, under Netherlands legislation, a general (and not a group-specific) rule denied the tax-effective depreciation of shareholdings in group companies and hence prevented the double use of losses that may occur by taking into account (1) the losses of the sub-subsidiary directly and (2) the loss-related decrease in value of the parent’s holding in the non-resident intermediate company.<sup>59</sup> Contrary to the information apparently provided to the Court by the Netherlands government,<sup>60</sup> the participation exemption is not applicable in situations involving a switch over or liquidation; moreover, the Court did not consider a potential double loss utilization via debt claims that a parent company may have against its foreign intermediate subsidiary. In any event, *Papillon* has established quite a high hurdle for proportionality with regard to less intrusive measures that would allow companies “to establish that there is no risk of losses being used twice.”<sup>61</sup> It should also be noted that the Court in *SCA Group Holding BV et al.* did not address a Member State’s preservation of powers of taxation with regard to symmetry between the right to tax profits and the

right to deduct losses.<sup>62</sup> While such an argument has been accepted as legitimate to safeguard symmetry between the right to tax profits and the right to deduct losses,<sup>63</sup> it does not hold in cases in which the consolidation of resident companies is concerned, i.e. the use of domestic losses, because – as the Court had noted in *Papillon* – “the question which is put relates to the taking into account of losses recorded in one and the same Member State, which also excludes, *prima facie*, a risk of tax avoidance.”<sup>64</sup> Indeed, the power of the Member State “to impose taxes is not at all affected by the possibility of transferring, by relief and to a resident company, the losses sustained by another company, since the latter is also resident for tax purposes in that Member State.”<sup>65</sup>

- (11) *EEA States*. As the freedom of establishment also applies in the European Economic Area (article 31 of the EEA Agreement),<sup>66</sup> intermediate companies and parent companies resident in EEA Member States must likewise be covered by the holding of the Court in *SCA Group Holding BV et al.*
- (12) *Third-State Issues*. “Tax integration” regimes are generally, by virtue of their holding requirements (for example, a 95% shareholding in the Netherlands fiscal unity regime), intended to apply only to those shareholdings that enable the holder to exert a definite influence over a company’s decisions and to determine its activities. This means that only the freedom of establishment but not the freedom of capital movement with its *erga omnes*-effect may apply to those situations.<sup>67</sup> It must, moreover, be kept in mind that the provisions on the freedom of establishment cannot be relied on by a company established in a third state.<sup>68</sup> That said, in *SCA Group Holding BV et al.*, the Court did not have to address the question of whether it would arrive at different results if (1) the Netherlands parent company was owned by a resident of a third-state, (2) the common parent of two resident sister companies was a resident of a third-state or (3) the intermediate company was a resident of a third-state. As for the first issue, however, it becomes clear from the Court’s case law that the status of being an EU company “is based, under Article 54 TFEU, on the location of the corporate seat and the legal order where the company is incorporated, not on the nation-

54. See, for example, *Papillon* (C-418/07), paras. 52-62.

55. *SCA Group Holding* (C-39/13), para. 28. See also, for example, *Papillon* (C-418/07), para. 27; *X Holding* (C-337/08), para. 22; *Philips Electronics* (C-18/11), para. 17; and *Felixstowe Dock and Railway Company and others* (C-80/12), para. 25.

56. *SCA Group Holding* (C-39/13), para. 28. See also, for example, *Papillon* (C-418/07), para. 27; *X Holding* (C-337/08), para. 22; *Philips Electronics* (C-18/11), para. 17; and *Felixstowe Dock and Railway Company and others* (C-80/12), para. 25.

57. *SCA Group Holding* (C-39/13), para. 29.

58. *Papillon* (C-418/07), paras. 21, 23-26.

59. For a discussion on whether those are the “same” losses see AG opinion in *SCA Group Holding* (C-39/13), para. 53.

60. See *SCA Group Holding* (C-39/13), para. 39.

61. See, for example, *Papillon* (C-418/07), paras. 52-62.

62. For a rejection of that argument where domestic losses are concerned, see *Papillon* (C-418/07), paras. 38-40; *Philips Electronics* (C-18/11), paras. 25-26; and *Felixstowe Dock and Railway Company and others* (C-80/12), para. 30.

63. See, for example, DE: ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*, para. 33, ECJ Case Law IBFD.

64. *Papillon* (C-418/07), para. 39.

65. *Felixstowe Dock and Railway Company and others* (C-80/12), para. 30; see also *Philips Electronics* (C-18/11), paras. 25-26.

66. Agreement on the European Economic Area of 17 March 1993, OJ L1 (1993), EU Law IBFD.

67. See AG opinion in *SCA Group Holding* (C-39/13), para. 17, referring to *FII Group Litigation II* (C-35/11).

68. See, for example, DE: ECJ, 3 Oct. 2006, Case C-452/04, *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, para. 25, ECJ Case Law IBFD; and *Felixstowe Dock and Railway Company and others* (C-80/12), para. 39.

ality of its shareholders”.<sup>69</sup> As for the second issue, the Court in *Test Claimants in the Thin Cap Group Litigation* (Case C-524/04), has already made it forcefully clear that the freedom of establishment would not apply, as the common third-state parent company is not an “EU company” within the meaning of article 54 of the TFEU and hence not protected by article 49 of the TFEU.<sup>70</sup> And as for the third issue, one must likewise conclude that the creation of a Netherlands subsidiary by a third-state intermediate company is not protected under the freedom of establishment.

(13) *Practical Implications.* Neither Advocate General Kokott nor the Court had to be concerned with technical issues, especially the question of how consolidation (which, under the Netherlands “fiscal unity” regime, is effected at the level of the parent company) should take place if the common parent of two resident sister companies is resident in another Member State and has no PE in the Netherlands. These technical issues are a matter for domestic tax law and tax treaties. Advocate General Kokott explicitly pointed out that “the question of in which company the tax

entity consolidation takes place is purely technical and irrelevant as far as the attainment of the objective of the regime is concerned. If the effects of a tax entity formed between the subsidiaries can be made possible in principle, the question of the taxable person to which the operating result is ultimately attributed is of secondary importance”.<sup>71</sup> The Court confirmed this finding.<sup>72</sup>

#### 4. The Statement

(14) The Confédération Fiscale Européenne welcomes this decision, as it confirms that non-discriminatory consolidation between resident companies must be granted even if “linking companies” are resident in another EU or EEA Member State.

(15) The Confédération Fiscale Européenne expects Member States, where necessary, to establish substantive and procedural rules to facilitate practical implementation of this decision of the Court, in particular with regard to the consolidation of resident sister companies of a common EU or EEA parent company.

69. *Felixstowe Dock and Railway Company and others* (C-80/12), para. 40.

70. *Thin Cap* (C-524/04), paras. 96-99.

71. AG opinion in *SCA Group Holding* (C-39/13), para. 77.

72. *SCA Group Holding* (C-39/13), para. 51.

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