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# EU Direct Tax Newsalert

## CJEU judgments on Swedish “final losses” cases

On 19 June 2019, the Court of Justice of the European Union (CJEU) issued its judgments in *Memira Holding* (C-607/17) and *Holmen* (C-608/17).

### Background

In the 2005 *Marks & Spencer* (C-446/03) case, the CJEU ruled that, under certain circumstances, a parent company is allowed to deduct tax losses (“final losses”) arising in a foreign subsidiary. The CJEU has dealt with similar cases several times over the past 15 years.

In 2017, the Swedish Supreme Administrative Court referred two new “final losses” cases to the CJEU for clarification.

The *Memira Holding* case was about a cross-border merger between a loss-making German subsidiary and a Swedish parent company. The CJEU was asked to clarify whether the German losses would be deductible in Sweden after the merger had been finalized.

The *Holmen* case dealt mainly with questions regarding whether tax losses arising in indirectly held Spanish subsidiaries would be deductible for the Swedish parent company upon liquidations of the Spanish companies.

### CJEU's Judgments

#### *Memira Holding*

In the CJEU's view, *Memira Holding* may deduct the foreign losses in Sweden, but *only* if the Swedish parent company can demonstrate that it is impossible to use the losses in Germany in future periods.

The fact that Germany does not allow losses to be taken over through a merger is thus not decisive in itself. Further possibilities to take over the losses must be assessed.

The CJEU states that losses in subsidiaries can't be characterized as “final” if there is a possibility of deducting those losses economically in the subsidiary's state of residence, for example by transferring them to a third party.

If, on the other hand, the parent company can adduce evidence to the contrary, then the losses of the German subsidiary would be

deemed as final and it would then be disproportionate not to allow *Memira Holding* to take them into account in Sweden.

#### *Holmen*

The CJEU clarified that final losses arising in an indirectly held subsidiary, should not be deductible for the parent company, *unless* all the intermediate companies between the parent company and the loss-making subsidiary are resident in the same member state as the loss-making subsidiary. In the *Holmen* case the facts suggest that a loss could be deductible in Sweden, as all intermediate companies were from Spain.

Along the same lines as in the *Memira Holding* case, the CJEU clarified that the mere fact that the legislation of the subsidiary's state of establishment does not allow the transfer of losses in the year of liquidation can't, in itself, be sufficient to deem the losses as “final”. Further, the CJEU reiterated that losses in foreign subsidiaries can't be characterized as “final” if there is a possibility of deducting those losses economically in the subsidiary's state of residence, for example by transferring them to a third party.

### Takeaway

It seems as if the CJEU took a slightly different path compared to the view suggested by the Advocate General (AG) earlier this year. Unlike the views put forward by the AG, the judgments from CJEU are, at least at first glance, more in line with CJEU's previous case law.

The CJEU clearly stresses that it is up to the foreign parent company to demonstrate that there are no possibilities at all to use the tax losses abroad, for example by selling the shares to a third party. If the parent company can demonstrate this, however, then the losses are deemed as final and should be possible to be deducted by the foreign parent company.

The outcome in the *Holmen* case also shows that losses in indirectly held subsidiaries, in certain (but not all) scenarios, can be utilized by the foreign parent company.

