EFTA COURT

REPORT FOR THE HEARING
in Case E-15/11

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice from Oslo tingrett (Oslo District Court) in a case between

Arcade Drilling AS

and

The Norwegian State, represented by Tax Region West,

concerning the interpretation of Articles 31 and 34 of the EEA Agreement.

I Facts and procedure

1. On 22 March 2010, Tax Region West decided to revise the tax assessment of Arcade Drilling AS ('Arcade') for the 2001 and 2002 income years. The main point in the revision decision was that, as from 19 December 2002, Arcade was deemed to have moved its head office out of Norway. Hence, Tax Region West deemed that Arcade was under an obligation pursuant to company law to liquidate, and that this gave rise to liquidation taxation regardless of whether the company was actually liquidated. Tax Region West has given notice of the imposition of 60% additional tax in the case, but a decision concerning additional tax has not been made.

2. On 20 September 2010, Arcade filed legal action against the Norwegian State claiming annulment of the tax assessment for the years in question. Arcade has argued that the assessment is invalid, *inter alia* because the liquidation tax is in contravention of EEA law. Notice of defence was filed on 15 October 2010. The State contests the invalidity objections and maintains that the tax assessment is valid.

3. On 3 February 2011, Oslo tingrett decided to request an Advisory Opinion on the validity of liquidation tax under EEA law. On 14 June 2011, Oslo tingrett decided on the wording of the questions to be put to the Court. On 19 October 2011, the parties submitted an agreed draft letter of questions to Oslo tingrett for referral to the Court. On 28 November 2011, Oslo tingrett referred the case to the Court.

4. In its request to the Court, Oslo tingrett states that the parties to the case disagree about whether a liquidation obligation exists pursuant to Norwegian national law. According to the request, the Norwegian State has conceded that, in this specific case, liquidation tax cannot be imposed on Arcade if it cannot be established pursuant to company law that a liquidation obligation exists when a limited liability company emigrates to another State. The referring court notes that it has not yet concluded as regards this question and that its questions for the Court have therefore been formulated on the assumption that a liquidation obligation exists under Norwegian national law.

5. In its request, Oslo tingrett states that, if Arcade is deemed to have moved its head office to another EEA State, the tax assessment decision will be invalid insofar as the liquidation tax is concerned, provided that such tax is in contravention of EEA law. The court has therefore decided to request an Advisory Opinion on the following questions:

1) **Is it a restriction pursuant to Article 31 EEA, cf. Article 34 EEA, to impose liquidation tax on a company if national company law entails an obligation to liquidate the company because the company has transferred its *de facto* head office from Norway to another EEA State?**

   Is it of any significance that deferral of tax payment is not given until a realisation, if any, is effected?

2) **In the event that the district court holds that a restriction exists: what criteria will be decisive in determining whether the national regulation pursues grounds of overriding public interest and whether it is suitable and necessary for the attainment of such grounds?**

II Legal Background

EEA Law

6. Article 31 EEA reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
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> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected…*

7. Article 34 EEA reads:

Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

National Law

Norwegian limited liability companies legislation

8. Section 2-2 point 2 of the Norwegian Act relating to limited liability companies (the ‘Limited Liability Companies Act’) requires limited liability companies incorporated under Norwegian law to have a ‘registered office’ in Norway. The wording of section 2-2 (1) of the Limited Liability Companies Act is as follows:

(1) The articles of association are to at a minimum represent:

1. *The name of the company;*
2. *The municipality of the kingdom in which the company shall have its registered office;*
3. *The business of the company;*
4. *The size of the share capital, cf. section 3-1;*
5. *The face value of the shares, cf. section 3-1;*
6. *The number, or the minimum and maximum, of directors on the board of directors, cf. Section 6-1;*
7. *If the company shall have more than one general manager or if the board of directors or the corporate assembly has the authority to decide whether the company shall have more than one general manager, and if these are to act collectively as one body;*
8. *What matters are to be resolved at the ordinary general meeting, cf. section 5-5;*
9. *If the shares of the company are to be registered in a securities register.*

9. In an interpretative statement of 6 January 1998, the Ministry of Justice has stated that companies that move their head office out of the realm are in breach of Norwegian company legislation. According to that interpretative statement, whether a ‘head office’ can be deemed to have been moved out of the realm will depend on an ‘overall evaluation, based not only on where the board’s management functions are exercised’. It is further noted in the statement that there is no case-law defining the conditions for when

a head office will be considered to be transferred from the realm, and that, in legal doctrine, opinion varies concerning what is required to establish that a head office has been moved and whether or not a head office or only a registered office in Norway is required under Norwegian limited liability company legislation. From the statement the following passages are presented:

> *In our opinion, it needs to be acknowledged that neither the Limited Liability Companies Act nor any other legal sources establish a rule which clearly states what affiliation a company needs to have to Norway in order to be Norwegian. The assessment must, as a starting point, be based on a common understanding of the term "head office". In most cases this will probably provide sufficient guidance for establishing the nationality of the company. In some cases, however, the different functions may be divided and spread out, to the extent that it is not obvious where the head office should be considered to be. In such cases the question of nationality must be decided based on an assessment taking into account all relevant circumstances, in which it will obviously be of importance where the board holds their meetings and where the administration performs their functions. Besides this we cannot rule out that other factors in general connecting the company to Norway may be of somewhat importance, meaning that a weaker management connection to Norway may be outweighed by the company being connected to Norway in other ways.*
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> *...*
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> *3. Consequences of illegal migration*
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> *In a case where the management and/or administration of a company to a material extent have been transferred abroad so that it must constitute a violation of the rule that the head office should be in Norway, the question is what consequences this should have. One can imagine several possible judicial consequences; penal liability for the management, transfer of the legal domicile abroad, a shareholder may obtain a ruling of remigration, dissolution of the company, etc. A violation of the rule will not necessarily entail all these consequences. In the following we will only comment on the question of dissolution.*
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> *Irrespective of whether one considers the rule of a company having its registered office in Norway as non-statutory law or as an interpretation of the Limited Liability Companies Act section 2-2 first paragraph no. 2, there is no doubt that a transfer of the head office is a violation, which the company is obliged to correct. The correction may either take place by remigration or by dissolving and liquidating the company. A limited company may therefore not "migrate" abroad without dissolution and liquidation in accordance with the Limited Liability Companies Act chapter 13 and incorporation in the new jurisdiction of residency in accordance with the relevant rules in that jurisdiction.*

In accordance with the Limited Liability Companies Act section 13-1 the general meeting has the authority to resolve on a company's dissolution. The bankruptcy court does not have the authority to rule on a forced dissolution in accordance with section 13-2. We refer to section 13-2 first paragraph no. 1, which authorizes the bankruptcy court to rule on a forced dissolution when "the company shall be dissolved as stated by law", is aimed at statutory provisions which state that a violation has the consequence that the company should be dissolved."

10. According to the Ministry's statement, if a limited liability company's head office is moved from the realm, this is an illegality the company is obliged to rectify. This can be done by moving the head office back to the realm or by dissolving and winding up the company. In principle, it is the company's general meeting that has the competence to decide on dissolution or winding up of the company, cf. Section 16-1 of the Limited Liability Companies Act (enclosed). If the general meeting fails to pass such a resolution in connection with moving the head office out of the realm, some commentators assume that the district court can decide to dissolve the company pursuant to Section 16-15(1) point 1 of the Limited Liability Companies Act. This view holds that, in such cases, it follows from the Act that the company must be dissolved. This view is disputed. Enforced dissolution pursuant to the Limited Liability Companies Act can only be effected after the company has been notified and given a deadline to rectify the situation, and after a decision by the district court.

The Limited Liability Companies Act section 16-15 reads:

(1) If the general meeting does not adopt a resolution on dissolution, the district court shall decide by order that the company is to be dissolved in the following cases:

1. if the company is to be dissolved as a result of statutory provisions or provisions in the articles of association;

2. if the company has not notified the Register of Business Enterprises of a board of directors that meets the requirements set out in statutory provisions or pursuant thereto;

3. if the company is required by law to have a general manager and has not notified the Register of Business Enterprises of a general manager who meets the statutory requirements;

4. if the company has not notified the Register of Business Enterprises of an auditor who meets the statutory requirements;

5. if the annual accounts, the directors' report and the auditor's report which the company must submit to the Register of Company Accounts pursuant to section 8-2 of the Accounting Act have not been submitted within six months of the deadline for submission, or if, upon the expiry of the deadline, the Register of Company Accounts cannot approve material submitted as the annual accounts, directors' report and auditor's report.

(2) The court may only order the company to be dissolved pursuant to a provision in the articles of association if a shareholder has so demanded, and the general meeting has not adopted a resolution on dissolution pursuant to section 16-1.

The Limited Liability Companies Act section16-16 reads:

> *(1) When the conditions set out in section 16-15 (1) nos. 1 to 4 have been met, the Register of Business Enterprises must notify the company thereof. In cases as mentioned in section 16-15 (1) no. 5, the notice will be given by the Register of Company Accounts. The company must be given a period of one month in which to rectify the matter and must be informed of the consequences of any failure to meet the deadline.*
> *(2) If the company has not rectified the matter upon expiry of the deadline, the Register of Business Enterprises or the Register of Company Accounts must repeat the warning by the insertion of a notice in the Brønnøysund Register Centre's electronic publication and in abbreviated form in a newspaper which is widely read in the area in which the registered office of the company is located. The notice must state that the terms and conditions for dissolution of the company have been met, and that the company has a deadline of four weeks from the notice was inserted in the Brønnøysund Register Centre's electronic publication in which to rectify the matter. The consequences of any failure to meet the deadline must also be stated.*
> *(3) If it is considered expedient, public notice in accordance with the present provision may instead be given by the district court.*

Liquidation taxation of companies

11. If a limited liability company is dissolved, the company is liable to liquidation tax, which entails that all the company's assets are realised with a tax liability on the company's hands in accordance with the universal rules on realisation laid down in the Taxation Act.

12. Before the dissolution of a company is completed, it must submit a tax return and demand an advance assessment, cf. Section 4-7(8) of the Tax Assessment Act. For the current income year, the advance assessment shall cover the period until the company is finally dissolved, cf. Section 8-10 of the Tax Assessment Act. Consequently, on submitting its tax return for advance assessment, the company shall declare all latent tax liabilities for taxation, including gains on the realisation of assets. The withdrawal of operating assets in connection with dissolution, i.e. as liquidation dividend to the shareholders, is deemed to be realisation and must be included for taxation in the advance assessment, cf. Sections 5-1, 5-2 and 5-30 of the Taxation Act.

13. For shareholders liable to taxation in Norway, liquidation will involve realisation tax, i.e. shareholders' gains/losses on the shares will be liable to tax/deductible, cf. Section 10-37 of the Taxation Act.

14. In a statement of 7 May 1998 from the Ministry of Finance, it is assumed that, in emigration cases, a company can be liable to liquidation tax even if it is not actually liquidated or its dissolution is not demanded. In this regard the following is stated by the Ministry of Finance:

> *In the case that a Norwegian incorporated limited company is no longer considered Norwegian in relation to Norwegian company law, as mentioned, the shareholders are obliged to dissolve the company (as a Norwegian limited company) through dissolution and liquidation, cf. the mentioned statement of 6 January 1998 from the Ministry of Justice. Such liquidation entails taxation in accordance with the Corporate Tax Act section 5-8. Even if the shareholders neglect this liquidation obligation, there may be basis for liquidation taxation based on anti avoidance rules. For the tax authorities it will in such cases be close at hand to consider the failure to dissolve to be tax motivated and disloyal toward Norwegian tax rules (in addition to being illegal and punishable in accordance with the corporate legislation).*

Other Norwegian tax legislation in 2001 and subsequently

15. In 2001/2002, Norwegian law did not contain any provisions on tax liability in connection with the emigration of companies. The taxation of Arcade is therefore based on the company being subject to a liquidation obligation pursuant to company law, and on the imposition of exit tax on the basis of universal rules on realisation tax, cf. the above, and is independent of its actual liquidation.

16. In 2001/2002, the Norwegian Taxation Act had (and still has) provisions on the reversal of write-downs when a Norwegian company moves its operating assets out of the Norwegian taxation area, cf. Sections 14-60 ff. However, these rules do not apply if a rig has been subject to general write-downs in Norway for at least eight years. This was the case with Arcade’s rigs, and these provisions were therefore not applicable.

17. Exit tax for companies was regulated by law in 2007 in the case of SE and SCE companies. In 2008, the legal provision was extended to include other types of enterprises based in Norway, see Section 10-71 of the Taxation Act.

18. In 2010, the EFTA Surveillance Authority (ESA) stated that Norwegian exit tax comes into conflict with the EEA Agreement. In a Reasoned Opinion of 2 March 2011, ESA has given notice of further measures if the Norwegian tax rules are not amended.

19. Based on a consultation paper of 18 January 2010, Norwegian tax legislation was amended with effect from 2011, cf. Legislative Proposition No 78 (2010-2011), which was submitted on 25 March 2011. Following the amendment, a company shall no longer be liable to taxation on moving its head office from Norway to another normal tax State in the EEA.

20. In 2008, a provision was adopted relating to realisation settlement upon the withdrawal of assets or liabilities from the Norwegian tax area, cf. Section 9-14 of the Taxation Act. If, at the same time as the company emigrates, individual assets are withdrawn from the Norwegian taxation area, taxation may follow from Section 9-14 of the Taxation Act. In cases like the Arcade case, Section 9-14 of the Taxation Act will in principle result in the taxation of a gain on a rig owned by a company whose seat is moved from Norway to the UK, but deferred payment of such tax is granted. Pursuant to Section 9-14 of the Taxation Act, the assessed tax will lapse if the operating assets are not sold within five years of the income year in which the emigration took place.

21. Exit tax was also introduced for physical persons with effect from 2008, cf. Section 10-70 of the Taxation Act. Pursuant to this provision, taxation can be postponed until the shares are actually realised, and the tax liability lapses if the shares are not sold within five years of relocation.

22. None of these legal provisions are applicable to the assessment of Arcade for 2001/2002, and nor are they invoked as the legal basis for the tax assessment.

III Written Observations

23. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- Arcade Drilling (‘the Plaintiff’), represented by Hanne Skaarberg Holen, Ulf Werner Andersen and Daniel M. H. Herde, Advocates at the law firm PricewaterhouseCoopers AS, Oslo;
- the Norwegian State (‘the Defendant’), represented by Anders F. Wilhelmsen and Amund Noss, Advocates, Office of the Attorney General (Civil Affairs), acting as Agents;
- the Finnish Government, represented by Mervi Pere, Ministry for Foreign Affairs, acting as Agent;
- the French Government, represented by Géraud de Bergues, Head of the European Law and International Economic Law Department, and Natacha Rouam, member of the same department, Ministry of Foreign and European Affairs, acting as Agents;
- the EFTA Surveillance Authority (‘ESA’), represented by Xavier Lewis, Director, and Florence Simonetti, Deputy Director, Department of Legal and Executive Affairs, acting as Agents;
- the European Commission (‘the Commission’), represented by Richard Lyal, Principal Legal Adviser and Walter Mölls, Legal Adviser, members of its Legal Service, acting as Agents.

IV The first question

Arcade Drilling

24. Arcade contends that the factual basis for the disputed exit taxation of Arcade is that the company no longer has management functions or carries out business activities within Norway, but has instead transferred these functions to the United Kingdom. In this regard, it argues that the transfer of functions could either be seen as a strengthening of the existing business of a permanent establishment or as a transfer of the effective management of the company, both of which are in principle protected under EEA law.[1] It is clear from the reassessment that is currently tried by the District Court, that the removal of Norwegian board members by replacing them with UK residents and replacing the Norwegian CEO with a CEO resident in the United Kingdom was decisive to trigger the exit taxation.

25. In light of this and since Arcade has been governed by the Norwegian Limited Liability Company Act since 1990 and is registered in the Norwegian Register of Business Enterprises, in addition to having a business address in Norway and operating a rig and having its central administration in the United Kingdom, Arcade contends that it is entitled to invoke the freedom of establishment under Article 31 EEA and challenge the lawfulness of the imposed exit tax.[2]

26. Arcade submits that, as noted in the request of the national court, a transfer of management functions or operational functions within Norway does not give rise to any form of income taxation as a result of the transfer. However, the tax assessment imposes an immediate tax on all unrealised gains in Arcade upon the transfer of functions to the United Kingdom as if the company were dissolved at this time. It argues that imposing an immediate tax charge levied on exit from one EEA State to another is discrimination under the freedom of establishment in cases where no similar taxation is charged in connection with purely domestic transfers.[3] In this regard, it argues that the cross-border transfer of the place of effective management is objectively comparable to a situation in which a company transfers its place of effective management within an EEA State.[4] The legal rule which regulates this matter is not sufficiently clear for those who are subject to it to be able to determine their legal position.

27. Arcade points out that the Norwegian State has argued that, under Norwegian company law, Arcade has a duty to liquidate the company, and consequently that the taxation of the company is a result of this duty. Although it is for the national courts to

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[1] Reference is made to Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

[2] Reference is made to Case C-371/10 *National Grid Indus*, judgment of 29 November 2011, not yet reported.

[3] Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409 and Case C-470/04 *N* [2006] ECR I-7409.

[4] Reference is made to *National Grid Indus*, cited above, paragraph 38.

assess whether or not such a duty exits under Norwegian law, Arcade submits that this question is not at all clear and that most Norwegian legal scholars contest it. Moreover, Norwegian companies are not taxed on the basis of an obligation to liquidate, but on the actual disposal of assets as part of the liquidation process.

28. Arcade contends that the taxation does not result from the alleged duty under company law to liquidate, but instead from application of the general anti-tax avoidance rule, which is only applied to cross-border relocations. Furthermore, Arcade is a fully operational company and has never been requested or forced to enter into liquidation by the Norwegian authorities. In company law terms, Arcade has not migrated from Norway. The company has been subject to Norwegian legislation throughout this period, and it still is. The company has met all the requirements of the Limited Companies Act relating to Norwegian limited liability companies, including having a registered office in Norway. Furthermore, the company has also complied with the Norwegian Limited Liability Companies Act's organizational rules and the provisions on undistributable equity, etc. The company's accounts have been prepared and audited in accordance with Norwegian law. It maintains its status as a legal person in Norway and has done so ever since its incorporation. Consequently, the company has the capacity to sue and be sued before Norwegian courts.

29. Arcade argues that the notion that it is within the ambit of the EEA States' power to adopt legislation that could force companies into liquidation, and that the lesser hindrance of exit taxation should therefore be accepted, has been rejected by the Court of Justice of the European Union ("the ECJ").[5] This can also be seen as a question of whether the scope of Article 34 may be limited in cases where States can liquidate the company but have not done so yet. Furthermore, it is submitted that the ECJ has clearly distinguished between company law rules defining connecting factors and tax rules assigning tax consequences to a transfer of the place of management of a company.[6]

30. Accordingly, the imposition of tax on a company constitutes a restriction pursuant to Article 31 EEA, cf. Article 34 EEA, irrespective of whether national company law entails an obligation to liquidate the company because the company has transferred its *de facto* head office from Norway to another EEA State. Therefore, the first paragraph of the first question of the national court must be answered in the affirmative. Arcade also notes that EEA law may affect the rules governing the winding up of companies.[7] In Arcade's opinion, the principle of legal certainty should require that the liquidation taxation should be dependent on an actual liquidation. Otherwise, it is possible to end up with a situation where domestic liquidation taxation only takes place where companies are actually liquidated but a different and discriminatory rule will apply for cross-border situations. In

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5 Reference is made to *National Grid Indus*, cited above, paragraph 29.

6 Reference is made to *National Grid Indus*, cited above, paragraph 31.

7 Reference is made to *National Grid Indus*, cited above, paragraph 30.

Arcade's opinion all the normal liquidation rules under the Limited Liability Company Act should also apply in a cross-border situation.

31. As regards the second paragraph of the first question, Arcade argues that the reassessment of Arcade entails immediate taxation of the company, with no option of deferring the tax payment. In Arcade's view, the significance of a lack of choice between immediate or deferred taxation of unrealised gains has been addressed by the ECJ. The latter has concluded that Article 49 of the Treaty on the Functioning of the European Union ('TFEU') must be interpreted as precluding legislation of a Member State prescribing the immediate recovery, at the time of the transfer, of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State.[8] In light of this, exit taxation without the possibility of deferral of the tax payment until the time of realisation, as in the present case, must be regarded as disproportionate.

32. Arcade suggests that the first question be answered as follows:

> *It is a restriction pursuant to Article 31, cf. Article 34 EEA, to impose immediate taxation on a company irrespective of whether national law entails an obligation to liquidate the company, in case the company is not in liquidation, because the company has transferred its effective management from Norway to another EEA Member State.*

The Norwegian State

33. The Norwegian State submits that a company, which, pursuant to national legislation, has an obligation to liquidate, cannot rely on freedom of establishment to avoid the tax consequences of this obligation. A company that does not fulfil the requirements under national legislation cannot rely on freedom of establishment under Article 34 EEA, as it is no longer considered to be 'formed in accordance with the law of an EC Member State or an EFTA State'.

34. It is argued that companies exist solely by virtue of the company law under which they are incorporated, and that no provision is made for companies to exist outside of the foundation for their existence, i.e. the company law of each EEA State. As a result, the ECJ has held in a number of cases that the Member States have power to decide the requirements a company must meet to retain its status as a legally incorporated entity under the Member State's legislation, and thus be capable of enjoying freedom of establishment under Article 31 EEA, cf. Article 34 EEA.[9]

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8 Reference is made to *National Grid Indus*, cited above, paragraph 2 of the operative part.

9 Reference is made to Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 19; Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraphs 109 to 110, and 111 to 112; and *National Grid Indus*, cited above, paragraphs 26 to 28.

35. On the basis of the case-law cited, the Norwegian State argues that a distinction must be drawn between, on one hand, a company that, regardless of its transfer of its real seat to another EEA State, retains its status as a legally incorporated company under the law of the State and, on the other hand, a company that transfers its real seat to another EEA State, but cannot legally do so under the national law of the State of origin while retaining its status as a legally incorporated company. In the view of the Norwegian State, the former may rely on the freedom of establishment to enable the relocation of its real seat, while the latter may not.

36. A possible exception from the second category might apply when a company wishes to convert itself into a company governed by the company law of the recipient State and the company law of the recipient State allows it to do so. In that case, the company may rely on the freedom of establishment.[10] However, the Norwegian State does not find this exception to be applicable in the present case, since Arcade does not wish to convert itself into a company governed by the law of another EEA State, but to remain a Norwegian company. In this situation, Norway has the power to decide whether or not the company can transfer its real seat to another State while retaining its status as a legally incorporated company under Norwegian law.

37. The Norwegian State argues that the tax-related consequences of the obligation to liquidate the company cannot lead to any other outcome. As it is within the power of each EEA State to decide that a company that moves its real seat to another EEA State shall be liquidated, it must also be within the power of the EEA States to levy liquidation tax on the company when it liquidates.

38. The fact that Arcade, or, more precisely, the general meeting of Arcade's shareholders, has not fulfilled the obligation to liquidate cannot in any circumstance mean that Arcade can rely on the freedom of establishment, while another hypothetical company, having duly observed its obligations under Norwegian legislation on limited liability companies, cannot. The Norwegian State argues that the liquidation taxation is a direct and necessary consequence of the obligation to liquidate the company.

39. Moreover, it cannot be of any significance that the Norwegian company law authorities have not taken any specific steps to uncover the company's breach of the obligation to liquidate, or have not actively required Arcade to liquidate. If this were to be deemed significant, there would be no consequences for the company if the, in this case hypothetical, administrative body failed to uncover the company's breach of company law. National legislation cannot be expected or required to place the burden to follow up a company's compliance with this kind of obligation on an administrative body. It must be the responsibility of the companies themselves to observe their obligations under national law.

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[10] Reference is made to *Cartesio*, cited above, paragraphs 111 to 112.

40. With regard to the sub-question under the first question, the Norwegian State's position is that it is not of any significance that payment of the liquidation tax is not deferred until actual realisation takes place. As soon as it relocated its real seat to another State, the company was no longer a legally incorporated company in Norway and should therefore have been liquidated. The relocation of the company's real seat is, for tax purposes, considered to be an actual realisation of the company's assets. To defer payment until the no longer legally incorporated company actually realises its assets would mean disregarding and rendering worthless the Norwegian legal rule that a company cannot relocate its real seat to another State and continue to be a legally incorporated company.

41. The Norwegian State recognises that it follows from case-law that an EEA State may not deny a legal person status as such if the legal person exists pursuant to the company law of another EEA State.[11] However, it is argued that this case-law has no bearing on the present case, since it does not concern the company law of the recipient State, but the company law of the State in which the company originates (Norway).

42. As regards Arcade's arguments that liquidation taxation treats the transfer of a real seat from Norway to the United Kingdom less favourably than a corresponding move within Norway, the Norwegian State contends that this is not a relevant comparison. If the situation is to be compared with a corresponding internal event, the internal event must be the taxation of a company that does not comply with its obligation to liquidate. Such a company would be subject to liquidation taxation to the same extent as Arcade, regardless of whether or not actual liquidation had taken place. It is the obligation to liquidate that gives rise to the liquidation taxation, not the relocation of the real seat as such.

43. The Norwegian State also disagrees with Arcade's submission that the taxation in the present case is purely a tax law issue, and that company law cannot justify the liquidation taxation. It states that the liquidation taxation is a direct and necessary consequence of the obligation to liquidate the company, not of the relocation of the company's real seat as such. The liquidation taxation cannot be assessed without also taking into account the underlying rule of company law, which is the basis for the establishment of the obligation to liquidate and thus the obligation to pay liquidation tax.

44. In the view of the Norwegian State, Arcade's argument in this regard seems to concern whether or not Arcade is in breach of the Norwegian law on limited liability companies. Again, it must be stressed that this is a question for Oslo tingrett to decide in the main proceedings. Furthermore, the Norwegian State does not agree that the liquidation tax imposes a heavier burden on Arcade than an actual liquidation would have done. It is the view of the Norwegian State that the liquidation taxation of Arcade in the

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[11] Reference is made to Cases C-212/97 *Centros* [1999] ECR I-1459; C-208/00 *Überseering* [2002] ECR I-9919; and C-167/01 *Inspire Art* [2003] ECR I-10155.

present case is fully consistent with the liquidation taxation that would have been imposed if Arcade had been liquidated upon emigration from Norway. For tax purposes, Arcade is considered to have been liquidated before the tax liability to Norway ceased.

45. The Norwegian State further argues that a difference in the tax outcome is not in itself relevant. The EEA Agreement does not guarantee that the transfer of the company's real seat to another Member State will be neutral as regards taxation.[12] If a difference in the tax outcome is deemed relevant by the Court, it must be for the national court to decide whether such a difference is present in this case.

46. Based on the foregoing, the Government concludes that the State of Norway has the power to decide the connecting factors a company must have to Norway to retain its status as a legally incorporated company under Norwegian law. A company in breach of the required connecting factors is no longer a company 'formed in accordance with the law of an EC Member State or an EFTA State', cf. Article 34 EEA and Article 54 TFEU, and thus cannot rely on the freedom of establishment to avoid the obligation to liquidate and the pertaining liquidation tax.

47. The Norwegian State proposes that the first question be answered as follows:

> *A company that under national law has an obligation to liquidate pursuant to a relocation of its real seat to another EEA state, may not rely on Article 31 EEA, cf. Article 34 EEA, to avoid the tax related consequences of its obligation to liquidate.*
>
> *As the company is under an obligation to liquidate, it is of no significance that deferral of tax is not given.*

The Finnish Government

48. The Finnish Government considers that it follows from the settled case-law of the ECJ that Arcade cannot plead freedom of establishment, when it follows from the national company law that a company transferring its effective management to the United Kingdom cannot retain its status as a Norwegian company and thus must be liquidated.[13]

49. To this effect, the Finnish Government argues that it follows from case-law that an EEA State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and, as such, capable of enjoying the right of establishment, and what is required if the company is to subsequently be able to maintain that status.[14] In the case of a company incorporated under its law, an EEA State is therefore able to make the company's right to retain its legal personality under the

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[12] Reference is made to *National Grid Indus*, cited above, and case-law cited.

[13] Reference is made to *National Grid Indus*, cited above, paragraph 26.

[14] Reference is made to *Cartesio*, cited above, paragraph 110.

law of that State subject to restrictions on the transfer abroad of the company‘s place of effective management.[15]

50. The Finnish Government contends that it is apparent from the request for an Advisory Opinion that the situation in the present case is essentially the same as in the case of *Cartesio*.[16] However, as Arcade’s purpose was not to change the applicable company law but the company itself, it was in breach of the connecting factor required by the company law of the State of incorporation. Therefore, it follows from the case-law mentioned that Articles 31 and 34 EEA do not preclude national legislation under which a *de facto* transfer of a company’s head office results in the winding up of the company and in the consequences inherently associated with liquidation, including taxation of unrealised capital gains. A company that has an obligation under such legislation to liquidate may not rely on Articles 31 and 34 EEA to avoid the tax-related consequences of such liquidation.

51. The Finnish Government submits that the Court should give the following answer to the first question submitted to it:

> *Articles 31 and 34 of the EEA Agreement do not preclude national tax authorities from imposing a liquidation tax without any possibility of deferral of payment on a company which transfers its de facto head office from Norway to another EEA State if national company law entails an obligation to liquidate the company because of the transfer.*

The French Government

52. The French Government agrees with the Finnish Government that it follows from case-law that the freedom of establishment confers no right on a company incorporated under the national law of an EEA State to retain this status if it breaks the connecting factor required in order to maintain such a status pursuant to this State’s national law. Thus, the EEA State of origin may require the company in question to wind up or liquidate.[17]

53. However, it is also submitted that an EEA State of incorporation cannot, by requiring the winding-up or liquidation of the company, prevent that company from moving to another EEA State and converting into a company governed by the law of this latter EEA State, to the extent that it is permitted under that law to do so. Indeed, in such a situation, the company retains its legal personality and is converted into a company

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15 Reference is made to *Überseering*, cited above, paragraph 70.

16 Reference is made to *Cartesio*, cited above.

17 Reference is made to *Daily Mail*, cited above, paragraphs 23 to 24; *Cartesio*, cited above, paragraphs 110 to 113; and *National Grid Indus*, cited above, paragraphs 27 to 33.

governed by the law of the host EEA State as soon as it ceases to fulfil the conditions set out in the law of the EEA State of origin for being considered as a legal person.[18]

54. In these circumstances, the company can rely on the freedom of establishment under Article 31 EEA from the perspective of the host State in order to challenge the lawfulness of the requirement to wind up in the State of origin. However this instantaneous transfer of the company's legal personality from the State of origin to the host State must be provided for by the law of this latter State in a way that allows the company to retain its original legal personality without having to be newly formed.

55. The French Government argues that such a scenario is not involved in the present case, since it appears from the request that Arcade Drilling does not intend to convert into a company governed by British law. In that case, the EEA State of incorporation can require the company to wind up or liquidate without the company being able to invoke the freedom of establishment to challenge the lawfulness of its obligation to wind up or liquidate. Indeed, if, on emigrating, the company neither retains its status as a company of the EEA State of incorporation nor converts itself into a company governed by the legislation of the host EEA State, it will no longer exist as a company. Thus, it will no longer be formed in accordance with the law of an EEA State and be able to invoke the freedom of establishment against the State of incorporation.

56. Moreover, if the host EEA State does not allow a company incorporated under the law of another EEA State to convert into a company governed by its law when this company transfers its head office to its territory, the company's shareholders will have no choice but to create a new company in the host EEA State. This new company will not be able to rely on the freedom of establishment in order to contest the obligation imposed by the EEA State of origin on the former company to wind up or liquidate; the obligation to wind up or liquidate does not apply to the newly created company, but to the former one. In other words, the discontinuity of the company's legal personality prevents the new company from invoking the freedom of establishment to challenge the lawfulness of the obligation of the former company to wind up or liquidate in the EEA State of origin.

57. The French Government submits that the Court should answer the first question in the following manner:

> *A company incorporated under the law of an EEA Member State which transfers its real head office to another Member State, without being allowed to retain its*

[18] Reference is made to *Cartesio*, cited above, paragraph 112.

> *status as a company governed by the law of the Member State of origin cannot rely on Article 31 EEA against this Member State to challenge the lawfulness of the obligation to liquidate and to pay a liquidation tax on the unrealised capital gains relating to its assets, even though no tax payment deferral is granted.*

The EFTA Surveillance Authority

58. ESA argues that it now follows from case-law that, once a State has asserted its jurisdiction on a company, the exercise of such jurisdiction should be in conformity with the right of establishment. In other words, EEA States shall, at least, be required to apply their connecting factors in a way that respects the fundamental freedoms.

59. As regards the present case, ESA contends that the liquidation tax is alien to the connecting factor. In ESA's view, Norwegian company law relies *a priori* on the incorporation system, for which it is typical that a company does not cease to exist if its real seat is transferred abroad.

60. In the case at hand, ESA submits that the company was never actually liquidated. In this regard, ESA points out that the request of the referring court states that enforced dissolution pursuant to the Limited Liability Companies Act can only be effected after the company has been notified and given a deadline to rectify the situation and after a decision by a district court. However, in the present case, it seems that the Norwegian company law authorities have never found, or filed a complaint concerning, breaches of Norwegian company law or required that Arcade be liquidated. The only reaction of the Norwegian authorities to the company's transfer of real seat appears to be the imposition of a tax. Meanwhile, the company is still registered under the Norwegian Central Coordinating Register for Legal Entities and appears to comply with company law requirements regarding capital and the auditing of accounts. Accordingly, the company continued to exist both in law and in fact.

61. ESA submits that, regardless of how the national court might ultimately interpret Section 2.2 of the Norwegian Limited Liability Companies Act, it is obvious that Arcade never ceased to exist under Norwegian law. The company should thus be considered to be a legal person fulfilling the criteria laid down in Article 34 EEA and, as such, to benefit in principle from the freedom of establishment.[19]

62. ESA assumes that the objective of the extensive interpretation of Section 2-2 point 2 of the Limited Liability Companies Act by the Norwegian authorities is not necessarily to introduce an additional connecting factor, but rather to impose a tax on the capital gains of companies that transfer their real seat and thereby leave the Norwegian tax jurisdiction. It argues that the two interpretative statements issued by the Ministries of

[19] Reference is made to the Opinion of Advocate General Jääskinen in Case C-378/10 *VALE* of 15 December 2011, not yet reported, points 44 to 46, 50 and 68.

Justice and Finance, respectively, entail that exit tax shall be paid if a company that is established in an incorporation system jurisdiction transfers its place of effective management abroad.

63. ESA contends that the liquidation taxation imposed upon the transfer of tax residence is an alien or extraneous element in the legal rules governing the migration of companies. In this regard, ESA argues that extraneous rules that are added to the actual connecting factors (namely, the place of incorporation in an incorporation system) should not fall outside the scope of the freedom of establishment.

64. If it were otherwise, an exit tax could be imposed without it being considered to be a restriction on the freedom of establishment when the applicable company law rule allows for a change of place of establishment, even if the company never ceases to exist. When, however, a State imposes a tax separately from the company law rule system, such a tax would be considered to be a restriction on the freedom of establishment. Similar situations would thus be treated differently with regard to EEA law depending on whether a State chooses to link the exit tax in an artificial manner to its company law or to adopt it as a clear exit tax.

65. If the Court were to decide that, even though States are free to determine under which circumstances a company continues to exist, any alien element, such as an exit tax that has no link to the actual existence of a company, shall fall under the scope of the freedom of establishment, ESA argues that the exit tax in the case at hand was imposed on a company that had transferred its head office and, as a result, had changed its residency for tax purposes. A similar transfer of head offices within Norwegian territory would not trigger any taxation on unrealised capital gains.

66. Furthermore, had the company's residence remained in Norway, any profit would not have been deemed to be earned or become subject to taxation until, and if, the company had actually realised the relevant assets. Moreover, the liquidation tax on Arcade entails immediate taxation of potential capital gains on a construed disposal of the two rigs owned by the company. The tax assessment has given rise to a claim for the immediate payment of exit tax, without deferral.

67. ESA contends that the Norwegian practice also treats the cross-border movement of a company's residence through the transfer of its real seat as a taxable event, whereas comparable domestic movements are not taxed. The cross-border movement therefore leads to earlier taxation than would a purely domestic transfer of seat.

68. The fact that this taxation is linked to the market value of the assets at the time of exit might potentially lead to tax being levied on an amount higher than any actual gains that might be achieved if the assets were realised at a later stage. Moreover, it is not taken

into account that the value of the assets may actually decrease in the period between the time of exit and the time when the assets are actually realised.[20]

69. The assets might also never be realised, such as when capital goods are fully used and depreciated over their useful life and then subsequently totally written off. In such cases, their end value could even potentially be negative when costs are involved in their disposal.

70. Despite this, the calculation and taxation in the case at hand are final under national law according to the request of the referring court. This has the effect that the exiting company is taxed on hypothetical unrealised gains despite the fact that actual gains upon subsequent realisation are uncertain, or may be far lower or not arise at all (if the realisation of the asset results in a loss). Conversely, if the company remains in Norway instead, such developments will be taken into account in calculating any profit. Thus, the provisions on exit taxation could entail that a company exercising its freedom of establishment is taxed higher than a company that remains in Norway and/or is taxed on profits that it might never actually earn.

71. It is submitted that this unequal treatment works to the disadvantage of cross-border transfers, a disadvantage that, from a financial perspective, may even assume existential dimensions. Because of its deterrent effect, final settlement tax such as that in the present case is likely to prevent the exercise of the freedom of establishment guaranteed by EEA law, and it therefore represents a restriction of that freedom.

72. ESA submits that the first question be answered as follows:

> *A company incorporated under the law of an EEA State which transfers its place of effective management to another EEA State, may rely on Article 31 EEA for the purpose of challenging the lawfulness of a liquidation tax imposed on it by the State of origin on the occasion of the transfer of the place of effective management where:*
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> *• The applicable company law provision of the State of origin only states that companies incorporated under this State's law shall have their registered office in this State;*
>
> *• The actual liquidation of the company in question was neither required nor enforced by the competent authorities of the State of origin with the result that the company continued to exist under that State's register of companies and to carry out its activities.*

The European Commission

[20] Reference is made to Case C-470/04 *N*, cited above, paragraph 54.

73. According to the Commission, the ECJ has consistently held that the question of whether Article 49 TFEU applies to a company that seeks to rely on the freedom of establishment is a preliminary matter that can only be resolved by reference to the applicable national law. That is to say, before that provision can be applied, it must first be determined, in the light of the conditions laid down in Article 54 TFEU, that the company actually has a right to that freedom.[21]

74. The Commission submits that an EEA State has the power to define the connecting factor that is required of a company incorporated under its national law, and only a company, which thus has legal personality, enjoys the right of establishment. An EEA State may thus make the right of a company incorporated under its law to retain its legal personality under the law of that State subject to the maintenance in that State of the company's place of effective management.

75. In the Commission's view, that does not mean that an EEA State may simply forbid the 'emigration' of a company incorporated under its law or attach obligations to such emigration without regard to any obligations under EU or EEA law. An EEA State may refuse to permit a company governed by its law to retain that status if the company moves its seat to another EEA State, thus breaking the necessary connecting factor. It may not, however, by requiring the winding-up or liquidation of the company, prevent a company from converting itself into a company governed by the law of the other EEA State, to the extent that it is permitted under that law to do so. [22]

76. Accordingly, even when an EEA State makes the enjoyment of legal personality under its company legislation conditional on the maintenance in its territory of the company's head office, a company incorporated under that legislation may move its head office while at the same time converting itself into a company recognised by the legislation of the destination EEA State, and in those circumstances, it is entitled to rely on the freedom of establishment in order to oppose measures that seek to prevent or present an obstacle to such a move.

77. If Arcade is converted into a UK company, it is therefore entitled to rely on the freedom of establishment in order to challenge the requirement to pay liquidation tax. If it is not, and if it does not move its central management and control back to Norway, then — always assuming that the Norwegian tax authorities are correct in their assertion that Norwegian company law requires the head office of a company to be located in national territory — the dissolution of the company would appear to be inevitable. Such a measure is not in itself a restriction contrary to the EEA Agreement for the reasons set out above. Any normal tax consequences of such dissolution would not constitute a restriction either.

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[21] Reference is made to *National Grid Indus*, cited above, paragraphs 26 to 27; *Daily Mail*, cited above, paragraphs 19 to 23; *Überseering*, cited above, paragraphs 67 to 70; and *Cartesio*, cited above, paragraph 109.

[22] Reference is made to *Cartesio*, cited above, paragraphs 111 to 112.

The question of the deferred payment of tax does not arise in this hypothesis, for there is no longer any taxpayer in respect of whom payment can be deferred.

78. It is relevant in the present case that the Norwegian authorities responsible for the administration of company law have taken no steps to require Arcade to dissolve itself or change its status during the period since its central management was moved to the United Kingdom. The revision decision was taken by the tax authorities some eight years after that move. In these circumstances, it may be thought questionable whether, in reality, there is any company law obstacle to the move, and hence any justification for the tax decision. That is a matter to be examined by the national court. Moreover, it follows that any dissolution and any consequent tax liability can only arise now; there would not appear to be any basis for a tax claim based on an event – dissolution – that did not take place ten years ago.

79. Insofar as Arcade is entitled to rely on the freedom of establishment on the grounds that it has been converted into a UK company, the further question arises of whether and to what extent Norway is entitled to impose tax on the basis of the removal of the company's head office from Norway (an 'exit tax'). The request of Oslo tingrett raises no such hypothesis for the good reason that it is not the basis of the proceedings now pending before it. For the sake of completeness, the Commission will nevertheless make brief observations on this point.

80. The movement of a company's seat or assets may trigger an exit tax charge that is not borne by companies that do not move their seat, their operations or their assets (or that move them only within national territory). The latter only pay tax when the value of assets is realised, for example through their disposal. That tax charge takes place later, sometimes much later. Such a difference in treatment is undeniably an obstacle to free movement. It places companies that move at a clear disadvantage compared with companies that do not exercise their right to free movement.

81. The Commission submits that the first question of the referring court should be answered as follows:

> *a) Article 31 EEA must be interpreted as not precluding the imposition by an EEA State of liquidation tax where, owing to the transfer of a company's head office from that State to another EEA State, the company has lost its legal personality as a company of that State and has therefore been dissolved.*
>
> *b) Article 31 EEA must be interpreted as precluding the imposition of a liquidation obligation and the consequent imposition of liquidation tax by an EEA State on account of the transfer of a company's head office from that State to another EEA State where the company has, without being dissolved, become a company under the legislation of the latter State.*

V The second question

Arcade Drilling

82. If this case is regarded as a tax case, Arcade asserts that neither the balanced allocation of powers of taxation nor the prevention of tax avoidance is an overriding reason that can justify exit taxation in this matter. Further, the restriction is not suitable for attaining the objective of securing a balanced allocation of taxing rights, as foreign companies tax resident in Norway were not subject to this taxation, an unequal treatment which is also a breach of the principle of equal treatment in EU law. On the other hand, if this is a company law case, the tax justifications are not relevant. In any event, Arcade submits that the taxation is disproportionate, as it does not allow the taxpayer to choose between immediate or deferred taxation.[23]

83. Arcade further argues that the taxation is based on a fiction that the company has been liquidated. It is contended that, if the company had actually been liquidated, this would have entailed a taxable event in both the United Kingdom and Norway. The Norwegian tax authorities would have had to grant foreign tax credit relief under the Double Tax Convention between Norway and the United Kingdom. In effect, the Norwegian State would only be allowed to collect the amount of tax assessed in Norway that exceeds the tax assessed in the United Kingdom. Instead, the tax assessment in the present case taxes the full amount of unrealised capital gains without regard to the taxing rights of the United Kingdom.

84. In Arcade’s view, this clearly demonstrates that the Norwegian exit taxation is not based on a coherent territorial principle but rather on fiscal grounds. In this regard, Arcade submits that the ECJ has never accepted preservation of fiscal revenue as an imperative reason in the public interest in any tax case. Therefore, simple loss of receipts suffered by an EEA State because a taxpayer has moved his tax residence to another EEA State, where the tax system is different and may be more advantageous for him, cannot in itself justify a restriction on the right of establishment. Moreover, with regard to the tax evasion argument put forward by the Norwegian State, Arcade submits that this has already been rejected in *National Grid Indus.*[24]

85. Arcade submits that it should be noted that the Norwegian parliament, with effect from 2011, has adopted new exit tax rules on the transfer of tax residency for Norwegian limited liability companies. Under the new rules, companies are entitled to defer taxation of unrealised gains until actual realisation takes place. Even in the event that a duty to liquidate a Norwegian company actually exists as a result of a transfer of the place of its effective management, no immediate taxation will be imposed under the newly adopted

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[23] Reference is made to *National Grid Indus*, cited above.

[24] Reference is made to *National Grid Indus*, cited above, paragraph 84.

legislation. In Arcade's view, this clearly demonstrates that the allocation of powers of taxation, or even the prevention of tax avoidance, does not in any way necessitate immediate taxation as imposed by the Norwegian tax authorities in this case.

86. Arcade accordingly submits that the answer to the referring court's second question should be as follows:

> *Article 31 EEA must be interpreted as precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains related to assets if a company transferring its place of effective management to another Member State at the very time of that transfer.*

The Norwegian State

87. Should the Court find that the liquidation taxation of Arcade constitutes a restriction, the Norwegian Government submits that the liquidation taxation is justified on the basis of overriding public interests, namely the objective of preserving the allocation of powers of taxation between the EEA States and the objective of preventing avoidance of national legislation. It is argued that both these objectives are legitimate.[25]

88. In the view of the Government, the company law rule setting out the connecting factors required for a company to retain its status as a legally incorporated company can clearly be justified by the objective of protecting the company's creditors, the company's employees and other stakeholders in the company, and must be seen as appropriate and necessary to attain this objective. Among other things, this is shown by the procedures that must be followed when an SE company moves between EEA States.[26]

89. The Norwegian Government further submits that the potential restriction must be the tax consequence of the obligation to liquidate, namely the liquidation tax. It is argued that the liquidation taxation of a company in breach of its obligation to liquidate can be justified on grounds of preventing avoidance of national legislation. The relevant Norwegian tax rule will be applicable in cases where *de facto* liquidation is not effected, and the rule is designed to prevent avoidance of the related liquidation taxation that would otherwise arise. It will also be relevant to apply this tax rule in situations other than cross-border situations, where a failure to effect *de facto* liquidation prevents the settlement of tax positions. In both cases, application of the rule will rely on a specific assessment, based on the same standards. It is argued that the national tax rule that applies to avoidance arrangements of the type in question is clearly appropriate in relation to preventing avoidance of liquidation tax.

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[25] Reference is made to *National Grid Indus*, cited above, paragraphs 45 and 84, and case-law cited.

[26] Reference is made to Article 8 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for European company (SE), OJ 2001 L 294, 10.11.2001, p. 1-21.

90. With regard to the objective of preserving the allocation of powers of taxation between the EEA States, the Government argues that the liquidation taxation is a direct and necessary consequence of the company in question's breach of Norwegian company law. As such, it cannot be regarded as an 'exit tax', but as a liquidation tax. The Government argues that to find that the tax-related consequence of the obligation to liquidate constitutes a restriction that cannot be justified would mean that the Norwegian company law rule setting out the connecting factors a company must have to Norway to retain its status as a legally incorporated company would have to be disregarded. This would be contrary to established case-law stating that the EEA States have the power to define the connecting factors required to retain status as a legally incorporated company under national legislation.

91. Nevertheless, it is the Government's view that the liquidation taxation can be justified by the objective of preserving the allocation of powers of taxation between the EEA States in situations where the obligation to liquidate has arisen due to the relocation of a company's real seat to another EEA State.

92. Furthermore, the objective achieved by imposing tax on companies that can no longer exist pursuant to Norwegian legislation because they have moved their real seat to another State is that values generated by the company while it was a legally incorporated Norwegian entity are taxed in Norway. In this regard, the objective of preserving the allocation of powers of taxation between the EEA States is a legitimate objective.[27] As Arcade was no longer liable to pay tax in Norway subsequent to its emigration, the liquidation taxation at the time of emigration was therefore appropriate to attain the objective in question.[28] The Government also believes that this measure is necessary to preserve the allocation of powers of taxation between the EEA states, i.e. that the same level of protection cannot be achieved by less restrictive means.

93. The Government argues that applying the reasoning of *National Grid Indus* to the present case would entail that immediate establishment of the amount of tax is necessary, but that Arcade should be able to choose between immediate payment of the tax and deferred payment of the tax until the time of subsequent realisation by disposal etc.[29]

94. However, as Arcade is no longer a legally incorporated company under Norwegian law following its relocation, the case manifestly differs from *National Grid Indus*. Therefore, it is not relevant to draw a distinction between the establishment of the amount of tax and the recovery of the tax. The immediate recovery of the tax must therefore also

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[27] Reference is made to *National Grid Indus*, cited above, paragraphs 45 to 46, and case-law cited.

[28] Reference is made to *National Grid Indus*, cited above, paragraphs 47 to 48.

[29] Reference is made to *National Grid Indus*, cited above, paragraphs 52 to 64, and paragraphs 65 to 75.

be deemed necessary in order to pursue the objective of preserving the allocation of powers of taxation between the EEA States.

95. If the Court should for some reason find that the distinction between the establishment of the amount of tax and the recovery of the tax is relevant in the present case, the Government points out that in 2002 Norway and the United Kingdom had no mutual agreement on the recovery of tax. The Norwegian authorities thus did not have the means necessary to obtain useful information in connection with the recovery of the claim, or to obtain the assistance required to actually recover the tax claim.[30] Also for this reason, it is not relevant to distinguish between the establishment of the amount of tax and the recovery of the tax in the present case.

96. Should the Court disagree with this, it is the Government's view that the possible restriction constituted by the tax will be justifiable if the tax authorities in Norway gave Arcade a choice between settling the tax as of 2002, or at the time of subsequent realisation by disposal etc., according to the principles laid down in *National Grid Indus*.

97. With regard to the objective of preventing avoidance of liquidation tax, it is argued that the national tax rule that applies to avoidance arrangements of the type in question is clearly necessary to achieve this objective. In the present case, the objective pursued is not to prevent the possible future avoidance of tax, but an avoidance that has already occurred. The Norwegian Government submits that this differs manifestly from the situation in ECJ case-law, where it has been held that the objective of preventing possible future tax avoidance does not necessitate immediate taxation of a company's transfer of its real seat to another Member State.[31] As the avoidance in the present case has already taken place, immediate liquidation taxation is necessary.

98. The Norwegian Government submits that the second question be answered as follows:

> *In the event that the national court should find that Article 31 EEA, cf. Article 34 EEA, is applicable, the liquidation taxation may be found to be appropriate and necessary to pursue the objectives of preserving the allocation of powers of taxation between the EEA States and to prevent avoidance of national legislation, the specific application of which is for the national court to finally assess in the main proceedings.*

The Finnish Government

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[30] As to the opposite effect, reference is made to *National Grid Indus*, cited above, paragraph 78.

[31] Reference is made to *National Grid Indus*, cited above, paragraphs 83 to 84.

99. In the event that the Court should hold that Articles 31 and 34 EEA do apply and a restriction exists, the Finnish Government submits that it is justified by the objective of ensuring the balanced allocation of powers of taxation between the EEA States.

100. In support of this argument, the Government firstly submits that preserving the allocation of powers of taxation between the EEA States is a legitimate objective that can justify restrictions on the freedom of establishment.[32] Secondly, it is clear that legislation pursuant to which the transfer of the seat results in the taxation of unrealised capital gains is appropriate to ensure the preservation of the allocation of powers of taxation between the EEA States concerned.[33] Thirdly, it has to be examined whether legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objective it pursues. In the last resort it is for the national court to make this assessment taking into account all the facts of the case.

101. The Finnish Government further argues that a distinction was drawn in *National Grid Indus* between the establishment of the amount of tax and the recovery of the tax.[34] It argues that it clearly follows from the judgment that establishing the amount of tax at the time of the transfer of a company's place of effective management complies with the principle of proportionality.[35]

102. As regards the recovery of the tax, the ECJ stated in that case that, compared with the immediate payment obligation, national legislation offering an emigrating company a choice between immediate payment and deferred payment of the amount of tax would constitute a measure that, while being appropriate to ensure the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment.[36] It was further stated that an appropriate solution could be recovery of the tax debt at the time of the actual realisation in the host Member State. A company could thus avoid the cash flow problems that could result from the immediate recovery of the tax.[37]

103. In the view of the Finnish Government, however, the circumstances in the present case differ from those in *National Grid Indus* in that Arcade, since the *de facto* transfer of its head office, is no longer a legally incorporated company under Norwegian law. Pursuant to Norwegian company law, a company transferring its head office must be

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32 Reference is made to *National Grid Indus*, cited above, paragraph 45; Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 45; and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 51.

33 Reference is made to *National Grid Indus*, cited above, paragraph 48.

34 Reference is made to *National Grid Indus*, cited above, paragraph 51.

35 Reference is made to *National Grid Indus*, cited above, paragraph 52.

36 Reference is made to *National Grid Indus*, cited above¸ paragraph 73.

37 Reference is made to *National Grid Indus*, cited above, paragraph 68.

placed into liquidation. As liquidation is the process by which a company is brought to an end and the assets and property of the company redistributed, the Finnish Government submits that the liquidation of the company could be considered to be a realisation of the company's assets within the meaning of the judgment in *National Grid Indus*. Hence, in cases where the emigrating company is placed in liquidation (whether voluntarily or because it does not satisfy the criteria set forth in national company law), it is not necessary to draw a distinction between the establishment of the amount of tax and the recovery of the tax.

104. Furthermore, it should be noted that the framework of cooperation between the competent authorities of the EU Member States established by Directives 77/799/EEC[38] and 2008/55/EC[39] does not exist between Norway and the United Kingdom. It is submitted that the ECJ has on a number of occasions taken account of this fact when assessing the proportionality of potential restrictions on fundamental freedoms as guaranteed in the EEA Agreement. The Finnish Government argues that this fact should also be taken into consideration in determining whether the proportionality principle precludes immediate recovery of the tax at issue. The national court should consider whether, in the absence of the framework of cooperation established by the above-mentioned directives, such obligations of cooperation exist between the competent authorities in the EEA states in question that afford the national tax authorities actual opportunities to ensure effective debt collection in the case of deferred payment of the amount of tax.

105. In conclusion, the Finnish Government submits that the Court should answer the second question referred to it as follows:

> *In the event the EFTA Court holds that a restriction exists, it is justified by the objective of ensuring the balanced allocation of powers of taxation between the Member States. The national legislation at issue is appropriate for ensuring the attainment of the said objective. It is for the national court to make certain, taking into account the facts of the case, that the immediate payment of the liquidation tax does not go beyond what is necessary to attain the objective.*

The French Government

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[38] Reference is made to Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member State in the field of direct and indirect taxation, OJ 1977 L 336, p. 15, as amended by Council Directive 92/12/EEC of 25 February 1992, OJ 1992 L 76, p. 1.

[39] Reference is made to Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, OJ 2008 L 150, p. 28, which in turn has been replaced by Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ 2010 L 84, p. 1.

106. If an answer to the second question is required, the French Government submits that the obligation to pay the tax in question is justified by the overriding public interest of ensuring the balanced allocation of powers of taxation between EEA States, provided that the national legislation is appropriate in relation to attaining the objective pursued and does not exceed what is necessary in order to achieve it.[40]

107. In this respect, it is argued that ensuring the balanced allocation of powers of taxation between EEA States is a legitimate objective.[41] The French Government further argues that it follows from *National Grid Indus* that Norway is allowed to tax the unrealised capital gains relating to the assets of a company incorporated under its law at the time when its power of taxation in respect of this company ceases to exist, e.g. when this company transfers its real head office to another EEA State.[42]

108. It is submitted that, even though the Norwegian tax legislation was amended in 2010 to the effect that a company is in principle no longer liable to taxation when moving its head office from Norway to another State within the EEA, it does not follow from this amendment that the Norwegian tax provisions in force in 2001-2002 go beyond what is necessary to ensure the balanced allocation of powers of taxation between EEA States. In this respect, it should be stressed that national legislation cannot be considered to be disproportionate on the sole grounds that it was amended in a more liberal direction.[43]

109. Furthermore, the French Government argues that it is irrelevant that, as a result of the liquidation tax imposed on Arcade, part of the increase in value of its assets from 1995 to 2002 could have been taxed both in Norway and in the United Kingdom. In this regard, the French Government contends that EEA law does not prohibit international juridical double taxation.

110. Secondly, it is submitted that the amount of tax on unrealised capital gains imposed on a company by the EEA State of origin can be assessed definitively at the time of transfer of the company's head office to another EEA State, without that EEA State having to take account of decreases or increases in value that may subsequently occur.

111. Thirdly, the EEA State of origin may have to offer the company concerned the choice between immediate payment and deferred payment of the amount of tax. However, if a deferral of tax payment is granted, the EEA State of origin may, on the one

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[40] Reference is made to Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraph 23, and case-law cited; and, for comparison, *National Grid Indus*, paragraph 42, and case-law cited.

[41] Reference is made to Case C-470/04 *N*, cited above, paragraph 42; and *National Grid Indus*, cited above, paragraph 45.

[42] Reference is made to *National Grid Indus*, cited above, paragraphs 42 to 86.

[43] Reference is made to the Opinion of Advocate General Kokott in Case C-498/10 *X*, delivered on 21 December 2011, not yet reported, point 45.

hand, require the payment of interest as well as, on the other hand, taking the necessary measures to prevent the risk of non-recovery of the tax.

112. Concerning this latter point, the EEA State of origin can require a bank guarantee to be furnished.[44] The French government considers that the EEA State of departure could also require the company newly established in another EEA State to appoint a representative who is held jointly and severally liable for the payment of the tax due from the company.

113. In accordance with the above, the French Government suggests that the following answer be given to the questions raised by Oslo tingrett:

> *Article 31 EEA does not preclude the legislation of an EEA Member State that imposes an exit tax on companies incorporated under national law at the time of transfer of its real head office to another Member State, without taking into account the subsequent decreases or increases in value, provided that a deferral of tax payment is granted. However, if a deferral of tax payment is granted, the Member State of origin can require the payment of interest as well as the provision of a bank guarantee or the appointment of a representative jointly and severally liable for the payment of the tax due by the company.*

The EFTA Surveillance Authority

114. ESA argues that, in order for a restriction on the freedom of establishment to be justified by an overriding general interest, the measure in question must be appropriate to ensure the attainment of that objective and must not go beyond what is necessary to attain it. ESA further submits that it follows from the judgment in *National Grid Indus* that preserving the allocation of powers of taxation between the States is a legitimate objective.

115. In the absence of any unifying or harmonising measures, ESA contends that the EEA States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation.[45] In that context, the transfer of the place of effective management of a company of one EEA State to another by which the company ceases to be tax resident in the first State cannot mean that the State of origin has to abandon its right to tax a capital gain that arose within the ambit of its powers of taxation before the transfer.

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[44] Reference is made to *National Grid Indus*, cited above, paragraph 74.

[45] *National Grid Indus*, cited above, paragraph 45. ESA further notes that EEA States will usually draw guidance from international practice and the model conventions drawn up by the Organisation for Economic Development and Cooperation (OECD).

116. ESA contends that this is the reason why certain EEA States decided to adopt legislation on exit taxation. Exit taxation applied upon the emigration of a company is based on the internationally recognised principle of territoriality in conjunction with a temporal component, and it essentially serves to allocate the power to tax. It aims to ensure that the whole profit earned by a company in the period when it was liable to tax in a State is also taxed there. For that purpose, any unrealised capital gains that have accrued up to that point are deemed to have been realised upon the date of exit.[46]

117. In the case at hand, ESA submits that both Norwegian and UK law contain provisions under which Arcade might conceivably have an obligation to pay tax on all its worldwide income and gains. However, pursuant to the double taxation treaty, the decisive factor is the place of management of the company. This means that, as long as the place of management was in Norway, Arcade was tax-resident there and paid tax on income and capital gains in Norway even though its actual assets were located in the United Kingdom.

118. Therefore, when Arcade moved its place of management to the United Kingdom and became tax resident there, Norway was in principle entitled to tax any unrealised capital gains that arose within the ambit of its power of taxation before the transfer.

119. In order to assess the proportionality of such legislation, ESA asserts that a distinction must be drawn between the establishment of the amount of tax and the recovery of the tax.

120. As to the definitive establishment of the amount of tax at the time when the company transfers its place of management to another EEA State, ESA argues that it follows from *National Grid Indus* that the State of origin complies with the principle of proportionality if, for the purpose of safeguarding the exercise of its powers of taxation, it determines definitively – without taking account of decreases or increases in value that may subsequently occur – the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist.

121. With regard to further losses, ESA submits that the host State normally assesses the company's assets and liabilities at market value when the company first becomes taxable in that State. As a result, double taxation would be avoided and subsequent losses in the host State would be taken into account. Moreover, such taxation is permissible pursuant to tax conventions based on the OECD model convention.

122. ESA argues that the judgment of the ECJ in *National Grid Indus* means that the profits of a company that transfers its place of effective management and thereby

[46] Reference is made to the Opinion of Advocate General Kokott in *National Grid Indus*, cited above, point 47.

becomes tax resident in another State are, after the transfer, taxed exclusively in the host State, in accordance with the principle of fiscal territoriality linked to a temporal component. In light of the connection between a company's assets and its taxable profits, and for reasons relating to the symmetry between the right to tax profits and the possibility of deducting losses, it is for the host State, in its tax system, to take account of fluctuations in the value of the assets of that company that occur after the date on which the State of origin loses all fiscal connection with the company.[47]

123. Accordingly, ESA submits that the final settlement tax is intended to maintain the balanced allocation of powers of taxation between EEA States and is appropriate to attain that objective and does not go beyond what is necessary for that purpose.

124. In relation to the immediate recovery of the tax at the time when the company transfers its place of management to another EEA State, ESA submits that immediate payment of the tax, even though the assets of the company have not yet been realised and potentially might never be, is likely to entail cash flow problems.[48] However, the ECJ noted that the asset situation of a company may appear so complex that it is almost impossible to accurately carry out cross-border tracing of the destiny of all the items making up the company's fixed and current assets until the unrealised capital gains incorporated into those assets are realised. Moreover, such tracing will entail efforts that constitute a considerable or even excessive burden on the company in question.

125. In other situations, the nature and extent of the company's assets would make it easy to carry out a cross-border tracing of the individual assets for which a capital gain was ascertained at the time when the company transferred its place of management to another State. In those circumstances, national legislation offering a company transferring its place of management to another State a choice between immediate payment of the amount of tax, which is a cash flow disadvantage for the company but frees it from subsequent administrative burdens, and deferred payment of the amount of tax, possibly together with interest, would constitute a measure that would be less harmful to the freedom of establishment than an automatic and immediate obligation to pay the exit tax. If a company were to consider the administrative burden in connection with deferred recovery to be excessive, it could opt for immediate payment of the tax.

126. ESA argues that the Norwegian law applicable in the case at hand, as interpreted by the Norwegian authorities, requires the immediate recovery of the liquidation tax on unrealised capital gains relating to assets of companies transferring their place of effective management to another EEA State at the very time of that transfer. ESA submits that this obligation of immediate recovery is disproportionate, with reference to *National*

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[47] Reference is made to the Opinion of Advocate General Kokott in *National Grid Indus*, cited above, points 76 to 78, and paragraph 58 of the judgment.

[48] Reference is made to *National Grid Indus*, cited above, paragraphs 65 to 86.

Grid Indus. In ESA's view, companies moving their place of effective management to another EEA State should be given a choice between at least two options: either immediate payment of the tax or deferred payment, possibly with interest. Allowing for deferred payment presupposes that the State of origin will be informed of the realisation of the assets and will be able to effectively recover the tax.

127. In this respect, ESA notes that Norway has concluded multilateral or double taxation treaties with all the other EEA States except Liechtenstein, that contain provisions on the exchange of information. Thirteen of these treaties also contain provisions on mutual assistance in connection with the collection of tax debts. Moreover, Norway is a party to the 1988 OECD Council Convention on Mutual Assistance in Tax Matters to which eleven other EU Member States are currently parties. This convention provides for all possible forms of cooperation between States in the assessment and collection of taxes. The cooperation ranges from the exchange of information to the recovery of foreign tax claims.

128. ESA acknowledges that, where a company relocates to an EEA State from which Norwegian tax authorities are not able to request assistance in the collection of the taxes due to the absence of relevant agreements, it may prove difficult to recover the tax if the company no longer maintains a branch, subsidiary or any assets in the Norwegian jurisdiction. Even where the company relocates to a State that has concluded a double taxation treaty with Norway that contains provisions on mutual assistance, the cross-border tracing of the assets might prove difficult because of the nature and extent of a these assets. In such cases, ESA admits that, if companies choose to defer payment of the tax, Norway should be entitled to take into account the risk of non-recovery of the tax through measures such as the provision of a bank guarantee.[49]

[49] *National Grid Indus*, cited above, paragraphs 73 and 74.

129. In conclusion, ESA submits that the second question should be answered as follows:

> *Article 31 EEA must be interpreted as:*
>
> *- not precluding legislation of an EEA State under which the amount of tax on unrealized capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another EEA State, ceases to obtain profits taxable in the former State;*
>
> *- precluding legislation of an EEA State which prescribes the immediate recovery of tax on unrealized capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.*

The European Commission

130. As to the extent to which the interest of EEA States in ensuring their ability to tax gains made in their territory can justify an obstacle to free movement, the Commission submits that, insofar as it is possible for the State of departure to ensure recovery of the tax debt by other means, there is no justification for the immediate payment of tax on the departure of the company or of the assets concerned. It is sufficient that the tax charge be calculated and collected at some later time, i.e. the moment at which the gain would have become taxable in the ordinary course of events.

131. The Commission notes that this issue is addressed at length in *National Grid Indus*, where it was held that a Member State is entitled to charge tax on capital gains (including recovery of depreciation allowances) accrued in its territory, and in order to do so it may calculate the amount of tax due at the time of departure. It would be disproportionate, however, to require immediate payment so long as it is possible to verify the continued existence and state of the assets. The actual payment of tax should be deferred until such time as a comparable company that did not move would pay tax in respect of the same assets.[50]

132. The Commission recognises that the judgment in *National Grid Indus* is based in part on the existence within the Union of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures,[51] and that the absence of such an instrument in relations between EU Member States and EFTA States could militate in favour of immediate payment, on the grounds that there can be no comparable guarantee of recovery of the tax debt. However,

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[50] Reference is made to *National Grid Indus*, cited above, paragraphs 42 and onwards.
[51] OJ 2008 L 150, p. 28.

in the circumstances of the present case, where the main assets of the company were located outside Norway at all relevant times, it is not clear what real difference there can be between the situation before and after the move in relation to the recoverability of the tax. More importantly, both the United Kingdom and Norway have ratified the amended OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, which provides for the recovery of tax claims (see Article 11). The conclusions of the ECJ in *National Grid Indus* are therefore entirely transferable to the circumstances of the present case.

133. The Commission submits that the second question should be answered as follows:

> *Where a company has transferred its head office from an EEA State to another EEA State and has been converted into a company of the latter State, Article 31 EEA must be interpreted as precluding the immediate recovery of tax on unrealised capital gains relating to the assets of the company. The first State may, however, at the moment of transfer of the head office, definitively fix the amount of tax on unrealised capital gains, without taking into account decreases or increases in value which may occur subsequently.*

Páll Hreinsson
Judge-Rapporteur