REPORT FOR THE HEARING
in Case E-15/16

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in a case pending before it between

Yara International ASA

and

The Norwegian Government

concerning the interpretation of Article 31 of the Agreement on the European Economic Area in the context of national rules on intra-group contributions.

I Introduction

1. By a letter of 27 September 2016, registered at the Court on 4 October 2016, Borgarting Court of Appeal (*Borgarting lagmannsrett*) made a request for an Advisory Opinion in a case pending before it between Yara International ASA ("the appellant") and the Norwegian Government ("the respondent").

2. The case before the referring court concerns the validity of the Norwegian Tax Appeals Board's decision of 29 November 2013, according to which the appellant was refused a tax deduction for its group contribution paid to a Lithuanian subsidiary. According to Norwegian tax law, no tax deduction may be granted for group contributions paid by a company liable to taxation in Norway to a company that is not liable to taxation in the realm. The central question in the case is whether the requirement for tax liability in the realm under the Norwegian rules on group contributions is compatible with Article 31 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA").

II Legal background

EEA law

3. Article 31(1) EEA reads:

> *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, subject to the provisions of Chapter 4.*

4. 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.*
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> *'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[1]

5. Section 8-5 of the Act of 13 June 1997 No 45 relating to Public Limited Liability Companies[2] and Section 8-5 of the Act of 13 June 1997 No 44 relating to Limited Liability Companies[3] allow a company to distribute contributions to other companies in the same group (i.e. group contributions).

6. Sections 10-2 to 10-4 of the Act of 26 March 1999 No 14 relating to taxation of wealth and income[4] ("the Taxation Act") entitle undertakings under certain conditions to

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[1] Translations of national provisions are unofficial.

[2] *Lov om allmennaksjeselskaper*. LOV-1997-06-13-45.

[3] *Lov om aksjeselskaper*. LOV-1997-06-13-44.

[4] *Lov om skatt av formue og inntekt*. LOV-1999-03-26-14.

claim a deduction, in connection with the tax assessment of their income, for group contributions. The provisions read as follows:

Section 10-2. Deduction for group contributions

(1) Limited liability companies and public limited liability companies may claim a deduction in connection with income tax assessment for a group contribution to the extent such contribution is within the otherwise taxable general income, and insofar as the group contribution is otherwise lawful under the provisions of the Limited Liability Companies Act and the Public Limited Liability Companies Act. Equivalent companies and associations may claim a deduction for a group contribution to the same extent as limited liability companies and public limited liability companies. The provision in Section 10-4 first paragraph second sentence is nevertheless not applicable where a cooperative undertaking pays a group contribution to an undertaking that belongs to the same cooperative federation; see Section 32 of the Act relating to Cooperatives.

(2) A deduction may not be claimed from income that is taxed pursuant to the rules of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses in enterprises as mentioned in Sections 3 and 5 of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses that, pursuant to Section 14-6 fifth paragraph, cannot be carried forward for deduction in subsequent years.

Section 10-3. Tax liability for group contributions received.

(1) A group contribution constitutes taxable income for the recipient in the same income year as it is deductible for the transferor. The part of the group contribution that the transferor may not deduct because of the rules in Section 10-2 second paragraph or because it exceeds the otherwise taxable general income is not taxable for the recipient.

(2) A group contribution does not constitute dividend for the purposes of the provisions of Sections 10-10 to 10-13.

Section 10-4. Conditions for entitlement to pay and receive group contributions

(1) The transferor and recipient must be Norwegian companies or associations. Limited liability companies and public limited liability companies must belong to the same group, cf. Section 1-3 of the Limited Liability Companies Act and Section 1-3 of the Public Limited Liability Companies Act, and the parent company must own more than nine tenths of the shares in the subsidiary and hold a corresponding proportion of the voting rights at the general meeting, cf. Section 4-26 of the Limited Liability Companies Act and Section 4-25 of the Public Limited Liability Companies

Act. These requirements must be fulfilled at the end of the income year. A group contribution may be paid by and between companies domiciled in Norway, even if the parent company is domiciled in another state, provided that the companies otherwise fulfil the requirements.

(2) A foreign company domiciled in an EEA State is considered equivalent to a Norwegian company provided that:

a) The foreign company corresponds to a Norwegian company or association as mentioned in Section 10-2 first paragraph;

b) the company is liable to taxation pursuant to Section 2-3 first paragraph (b) above or Section 2, cf. Section 1, of the Petroleum Act; and

c) the group contribution received constitutes taxable income in Norway for the recipient.

(3) The transferor and recipient must submit statements pursuant to Section 4-4(5) of the Tax Assessment Act.

7. According to the referring court, the provisions on group contributions in Sections 10-2 to 10-4 of the Taxation Act establish a regime that ensures tax neutrality within a taxable group of companies. Under Section 10-2 of the Taxation Act, the transferor may claim a deduction in connection with its income tax assessment for a group contribution as long as the contribution is within the undertaking's taxable general income. On the other hand, according to Section 10-3 of the Taxation Act, the group contribution becomes taxable income for the recipient. This means that the system is based on taxation symmetry. A fundamental condition under Section 10-4 of the Taxation Act is that both the transferor and the recipient are liable to taxation in the realm.

8. The referring court adds that the rules on group contributions pursue two objectives. First, the rules are intended to facilitate taxation of a group's net income so that profit can be transferred to companies with a tax-deductible loss. Such transfers will in reality mean that a tax-deductible loss in one group company will reduce the taxable profit in another group company, known as intra-group tax equalisation. Second, there may be a need to make intra-group financial transfers, that is pure value transfers within a group, for purposes other than tax equalisation. This allows for reserves to be built up in one or more companies in a group according to what is expedient at any time based on development plans and funding needs. When a group contribution is paid between two group companies that both operate with a profit, the transferor will be granted a deduction for the group contribution while the recipient will be taxed for the group contribution.

9. Furthermore, since the purpose of the rules on group contributions extends to facilitating value transfers within a group, pursuant to Section 10-2 of the Taxation Act,

the deductibility of group contributions applies whether or not the recipient has made a tax-deductible loss.

III Facts and procedure

10. The appellant is a company incorporated and registered in Norway. It is domiciled in Norway for tax purposes. It is the parent company of a group (“the Yara group”) with several subsidiaries, both in Norway and abroad.

11. The Yara group acquired the company UAB Lietuva in 2007. The acquisition was made through Yara Suomi Oy, a Finnish subsidiary of the appellant, which bought Kemira GrowHow Oy, which was the owner of UAB Lietuva. UAB Lietuva was domiciled in Lithuania for tax purposes. After becoming a part of the Yara group, the company changed its name to UAB Yara Lietuva (“UAB”).

12. On 28 April 2009, UAB and AB Lifosa entered into an agreement for the sale and purchase of the entire business of UAB for a nominal amount of LTL 1. As at 31 December 2009, UAB had a tax loss carryforward of approximately NOK 177 million.

13. On 14 December 2009, the appellant bought all the shares in UAB from its wholly-owned subsidiary Yara Suomi Oy. UAB thus became a directly owned subsidiary of the appellant.

14. On 16 December 2009, an agreement was entered into between the appellant and UAB, under which the appellant would pay a group contribution of EUR 16 million (corresponding to NOK 132 758 144) to UAB with effect for the income year of 2009. The group contribution was paid in cash on 10 January 2010. According to the referring court, the appellant claims that part of the group contribution was used to repay debt, while the remaining amount of approximately EUR 6.4 million was deposited in a group account held by the Yara group.

15. On 29 January 2010, a decision was taken to liquidate UAB and it was struck off the local companies register on 12 April 2012.

16. In its tax returns for the income year of 2009, the appellant claimed a tax deduction for its group contribution to UAB in the amount of NOK 132 758 144, corresponding to EUR 16 million. However, in its tax assessment for 2009, the appellant was denied deduction of the group contribution, with reference to Sections 10-2 to 10-4 of the Taxation Act as those provisions do not permit the payment of group contributions with tax effect from a company liable to taxation in Norway to a subsidiary that is not liable to taxation in the realm. That decision was upheld by the Central Tax Office for Large Enterprises in a decision of 20 June 2011, a result that was subsequently confirmed in a decision of 29 November 2013 by the Tax Appeals Board.

17. On 27 May 2014, Yara International ASA filed an application with Oslo District Court (*Oslo tingrett*), claiming that the company should be granted a deduction for the group contribution it had paid to UAB in the amount of NOK 132 758 144. It also claimed repayment of the corresponding reduction in income tax for the income year of 2009 for a total of NOK 37 172 280 with the addition of interest on overdue payment. On 17 December 2015, Oslo District Court handed down a judgment in favour of the respondent, basing itself, inter alia, on the judgment in *Oy AA*, C-231/05, EU:C:2007:439. The Tax Appeals Board's decision of 29 November 2013 was therefore deemed valid and the respondent was held to have acted lawfully.

18. On 28 January 2016, the appellant brought an appeal against the District Court's judgment before Borgarting Court of Appeal, which has submitted the following question to the Court:

> **Is it compatible with Articles 31 and 34 EEA that national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which the contribution reduces the transferor's taxable income and is included in the recipient's taxable income regardless of whether the recipient makes a loss or a profit for tax purposes, lay down the condition that both the transferor and the recipient are liable to taxation in the EEA State in question, or must the EEA rules be interpreted to mean that, on certain conditions, an exception must be granted from the requirement for tax liability in the realm?**

IV Written observations

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

- the appellant, represented by Øvind Hovland, advocate;
- the respondent, represented by Pål Wennerås, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Finnish Government, represented by Sami Hartikainen, legal counsellor, Ministry of Foreign Affairs, acting as Agent;
- the United Kingdom Government, represented by David Robertson, member of the Government Legal Department, acting as Agent, and Malcolm Birdling, Barrister;
- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler and Maria Moustakali, members of its Department of Legal & Executive Affairs, acting as Agents; and

– the European Commission ("the Commission"), represented by Richard Lyal and Wim Roels, members of its Legal Service, acting as Agents.

V Summary of the arguments submitted

General remarks

20. According to the referring court, the parties agree that the condition in Section 10-4 of the Taxation Act concerning liability to taxation in the realm constitutes a restriction under Article 31 EEA. The parties also agree that this condition can be justified by overriding reasons in the public interest and that the requirement is appropriate to attain that legitimate objective. However, the parties disagree on the extent to which this condition is necessary in order to attain those objectives. This position of the parties has been confirmed in their written observations before the Court.

The appellant

21. The appellant maintains that the sole purpose of its group contribution to UAB was to obtain group relief of the losses sustained by UAB against the taxable income of the appellant. In light of the facts of the case, the appellant submits that the question referred should be reformulated as follows:

> *Is it compatible with Articles 31 and 34 EEA that national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which losses sustained by a subsidiary in one EEA State – through the means of group contributions – is set off against the profits of its parent company in another EEA State, lay down the condition that both the loss-making subsidiary and the parent company are liable to taxation in the same EEA State, or must the EEA rules be interpreted to mean that, on certain conditions, an exception must be granted from the requirement that the loss-making subsidiary be liable to taxation in the same EEA State as the parent company?*

22. With regard to a proportionality analysis of the relevant national rules, the appellant acknowledges that they can be justified by the objectives of protecting a balanced allocation of the power to impose taxes between different EEA States, the avoidance of double use of the same tax losses and the prevention of tax avoidance, taken as a whole. The Norwegian legislation, however, goes beyond what is necessary to attain those three objectives. National law must therefore be interpreted to take account of definite losses sustained by subsidiaries in other EEA States. In this regard, the case law of the Court of Justice of the European Union ("ECJ") confirms that national law is disproportionate if the

possibility of offsetting losses sustained by foreign subsidiaries against the profits of a parent company in another EEA State is wholly precluded.[5]

23. Basing itself on the case law of the ECJ, the appellant submits that there can be no doubt that what is known as the "final loss exception" also covers the situation of the present proceedings.[6] Furthermore, this is supported by the purpose and context of the exception along with the fact that, according to established case law, when interpreting the case law of the ECJ, particularly Grand Chamber judgments, the wording is of utmost importance.[7] The appellant adds that any technical difference between the UK group relief regime and the relevant Norwegian legislation has no merit from the perspective of EEA law.[8]

24. Elaborating on the refinement of the "final loss exception" in the case law of the ECJ, the appellant maintains that the situation where a loss-making subsidiary ceases its business and sells or disposes of all its income producing assets is not *a priori* such as to allow the parent company to choose freely from one year to the next the tax scheme applicable to the losses of its subsidiary.[9] Furthermore, the actions of the appellant and its subsidiary reflect genuine business decisions and were therefore not apt to undermine a balanced allocation of the power to impose taxes between the EEA States. The appellant concludes that a complete refusal of loss-relief for a non-resident subsidiary in a situation such as the present does not satisfy the principle of proportionality. It contends that Swedish case law supports this result.

25. With regard to the respondent's reliance on the judgment in *Oy AA*, the appellant submits that it is not relevant to the present proceedings as there was no scope in that case for testing the "final loss exception". This reflects the fact that the case concerned financial transfers and not the tax consolidation of profits and losses within a group.[10] In this regard, the appellant argues that in *Oy AA* the ECJ could only rule on questions of relevance to the resolution of the case before the national court.[11]

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5 Reference is made to the judgment in *Commission* v *United Kingdom*, C-172/13, EU:C:2015:50, paragraphs 26 and 27.

6 Reference is made to the judgment in *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraphs 27, 32, 55 and 56. Reference is also made to the Opinion of Advocate General Poiares Maduro in the same case, EU:C:2005:201, point 16.

7 Reference is made to the judgment in *Makro Zelfbedieningsgroothandel and Others*, C-324/08, EU:C:2009:633, paragraph 27.

8 Reference is made to the Commission's Communication of 19 December 2006, *Tax Treatment of Losses in Cross-Border Situations*, COM(2006) 824.

9 Reference is made to the judgments in *A Oy*, C-123/11, EU:C:2013:84, paragraphs 41 to 45, 48 and 49, and *Commission* v *United Kingdom*, cited above, paragraph 37.

10 Reference is made to the judgment in *Oy AA*, C-231/05, EU:C:2007:439, paragraphs 12, 13, 16 and 17.

11 Reference is made to the judgment in *Corsica Ferries Italia*, C-18/93, EU:C:1994:195, paragraph 14.

26. Furthermore, the appellant contends that there is a decisive difference between, on the one hand, the surrender of losses sustained by a subsidiary, which has ceased its business, sold all its income producing assets and been put into liquidation, against the profits of its non-resident parent company by means of a group contribution, and, on the other hand, a financial transfer from a profitable subsidiary to its parent company by means of a group contribution. A parent company will necessarily continue to exist in a group that prevails, whereas a loss-making subsidiary under liquidation will be wound up with final effect so that there will be no possibility of it actually utilising its losses in the future. The appellant concludes that in the judgment in *Oy AA* the ECJ did not intend to renounce its settled case law set out in *Marks & Spencer*.

27. The appellant proposes that the Court should answer the question referred, as reformulated by the appellant, as follows:

> *Articles 31 and 34 EEA do not preclude intra-group contribution provisions of an EEA State which generally prevent a resident parent company from deducting from its taxable profits – by means of group contributions – losses incurred in another EEA State by a subsidiary established in that EEA State although they allow the parent company to deduct losses incurred by a resident subsidiary. However, it is contrary to Articles 31 and 34 EEA to prevent the resident parent company from doing so where the non-resident subsidiary has exhausted the possibilities available in its EEA State of residence of having the losses taken into account in the situations contemplated in paragraphs 55 and 56 of the judgment of Marks & Spencer (C-446/03).*

The respondent

28. The respondent contends that, in determining the necessity of the restriction at issue in the present case, having regard to the existing case law of the ECJ, the result should depend on the relevant model of taxation. With regard to intra-group financial transfers, the ECJ has concluded that it is proportionate to the objectives of safeguarding a balanced allocation of taxation and preventing tax avoidance to require the transferor and transferee to be resident in the same Member State.[12]

29. Furthermore, the respondent does not dispute that an intra-group financial transfer system may be used to the same effect as a group relief system. Nonetheless, certain features of intra-group financial transfer systems, for example the fact that they are not necessarily linked to losses and thereby promote objectives beyond the deduction of losses,

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12 Reference is made to the judgment in *Oy AA*, cited above, paragraphs 63 to 65.

have led the ECJ to view the proportionality of such schemes differently to those limited to the deduction of losses.[13]

30. The respondent argues that the "final loss exception", as laid down in the ECJ's case law, is a quite narrow exception, delimited by cumulative and strict conditions.[14] In addition, the ECJ has refrained from the analogous use of this exception for final loss in relation to tax systems that do not concern deduction of losses. For example, in *Oy AA* the Finnish system of intra-group financial transfer was distinguished from systems concerning the deduction of losses.[15] The application of the "final loss exception" has thus been limited to cases concerning the UK group relief rules and other tax schemes governing deductibility of losses.[16]

31. According to the respondent, there is a consistent and distinct ECJ case law concerning the cross-border transfer of profits generated through an activity undertaken on the territory of the Member State in question, which demonstrates that companies do not enjoy a right to choose freely where their profits are taxed, as such a right would undermine the system of allocation of the power to tax between Member States. Furthermore, the judgment in *Oy AA* shows that a system of intra-group financial transfers raises issues parallel to the distribution of profits to shareholders.[17]

32. Considering the issue of necessity, the respondent submits that in *Oy AA* the ECJ found that it is proportionate for the legislation of a Member State to make deduction of an intra-group financial transfer contingent on the companies being liable to taxation in the same Member State.[18] In reaching that conclusion, the ECJ distinguished the contested system from the system at stake in the judgment in *Marks & Spencer*.[19]

33. Finally, the respondent objects to the appellant's attempts to distinguish on factual grounds the present proceedings from the judgment in *Oy AA*.

34. The respondent proposes that the Court should answer the question referred as follows:

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[13] Reference is made to the Commission's Communication of 19 December 2006, cited above, p. 7.

[14] Reference is made to the judgment in *Marks & Spencer*, cited above, paragraph 55.

[15] Reference is made to the judgment in *Oy AA*, cited above, paragraph 57.

[16] Reference is made to the judgments in *Commission* v *United Kingdom*, cited above; *K*, C-322/11, EU:C:2013:716; *A Oy*, cited above; and *Timac Agro Deutschland*, C-388/14, EU:C:2015:829.

[17] Reference is made to the judgments in *Oy AA*, cited above, paragraphs 56 and 64; *Test Claimants in Class IV of the ACT Group Litigation*, C-374/04, EU:C:2006:773, paragraph 59; and *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 46.

[18] Reference is made to the judgment in *Oy AA*, cited above, paragraphs 58 and 62 to 65.

[19] Reference is made to the judgment in *Oy AA*, cited above, paragraphs 57 and 58.

> *Article 31 EEA does not preclude legislation in an EEA State, such as that at issue in the main proceedings, according to which a transferor established in that EEA State is only entitled to deduct an intra-group financial transfer from its taxable income if the transferee is subject to taxation in the same EEA State.*

The Finnish Government

35. According to the Finnish Government, the relevant Norwegian legislation in the present proceedings is similar to the Finnish legislation that was addressed in the judgment in *Oy AA*. From a legal and practical point of view, such tax systems differ from the tax system that was addressed in the judgment in *Marks & Spencer*. Since the relevant facts of the present proceedings are the same as in *Oy AA*, the question referred should be answered in a similar manner.

36. The Finnish Government proposes that the Court should answer the question referred as follows:

> *Articles 31 and 34 of the EEA Agreement do not preclude national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which the contribution reduces the transferor's taxable income and is included in the recipient's taxable income only on the condition that both the transferor and the recipient are liable to taxation in the EEA State in question irrespective of whether the losses of the recipient are considered to be final.*

The United Kingdom Government

37. The United Kingdom Government argues that a restriction on the freedom of establishment is permissible in the present proceedings because the respondent does not exercise any taxing rights over UAB.[20] The appellant's contributions to UAB are not, for this reason, objectively comparable to contributions made to a domestic permanent establishment. Therefore, the restriction on the freedom of establishment is permissible.

38. Even if the facts set out in the request for Advisory Opinion did disclose an objectively comparable situation, any restriction on the freedom of establishment would, according to the United Kingdom Government, be justified for the reasons set out in the ECJ's case law.[21] In addition, it argues that the ECJ was competent to reformulate the question referred in the judgment in *Oy AA*, cited above, and to provide an answer to the question in its reformulated form.[22]

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[20] Reference is made to the judgment in *Timac Agro Deutschland*, cited above, paragraphs 63 and 64.

[21] Reference is made to the judgment in *Oy AA*, cited above, paragraphs 17, 19 and 63.

[22] Reference is made to the judgment in *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 36.

39. Finally, the United Kingdom Government submits that if, contrary to its primary submissions, the Court were to find that there was an objectively comparable situation which would be unjustified absent the possibility of relief for definitive losses, the national court would be required to determine whether UAB has a definitive loss which is to be taken into account in the tax base of the appellant. This would require it to consider whether UAB had a definitive loss at the time immediately after the end of the final accounting period of trading. It would be unable to reach such a conclusion if, at that time, UAB continued to be in receipt of any income, no matter how minimal.[23] In this regard, the United Kingdom Government notes that, according to the referring court, the group contribution to UAB was not all used to discharge debt.

40. The United Kingdom Government proposes that the Court should answer the question referred as follows:

> *Articles 31 and 34 EEA do not preclude legislation in an EEA State, such as that at issue in the main proceedings, according to which a group company domiciled in that EEA State is only entitled to deduct a group contribution from its taxable income if the recipient group company is liable to taxation in the same EEA State. Nor do Articles 31 and 34 EEA require that such rules admit of an exception where the recipient of the contribution is liable to taxation in another member state and has suffered a definitive loss.*

ESA

41. ESA submits that national rules, such as the relevant provisions of the Norwegian Taxation Act, constitute a restriction under Articles 31 and 34 EEA, which may be justified by the balanced allocation of taxing powers between the EEA States. Furthermore, the application of those rules in the main proceedings appears proportionate as the losses in question do not meet the criteria to be considered final for the purposes of the relevant case law.

42. According to ESA, the starting point for the Court's analysis should be the well-established principle that an EEA State is required to take into account a loss from foreign activity only if it also taxes that activity.[24] This is a matter that goes to the heart of the exercise by EEA States of their territorial taxation competence.[25] The "final loss exception" thereby sits uneasily with the fundamental cornerstones of direct taxation in EEA law.

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[23] Reference is made to the judgment in *Commission* v *United Kingdom*, cited above, paragraphs 31 to 37.

[24] Reference is made to the judgments in *K*, cited above, paragraphs 55 and 64 to 71; *Marks & Spencer*, cited above, paragraph 45; *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraph 31; *X Holding*, C-337/08, EU:C:2010:89, paragraph 28; *A Oy*, cited above, paragraph 42; *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 32 and case law cited; and *National Grid Indus*, cited above, paragraph 58.

[25] Reference is made to the judgment in *Schulz-Delzers and Schulz*, C-240/10, EU:C:2011:591, paragraph 42 and case law cited.

Furthermore, ESA maintains that, given the very limited practical scope of the exception in EU law, the absence of such an exception in EEA law need not undermine the principle of homogeneity.

43. ESA argues that while the Norwegian provisions at issue in the present case are in principle identical to the Finnish provisions that were assessed in *Oy AA*, the facts of the two cases remain different since the latter case did not raise the question of the treatment of final loss. Thus the question that the Court is confronted with is whether the Norwegian legislation is proportionate to the objective pursued in a situation where the non-resident subsidiary has incurred losses with the characteristics of those invoked in the present case.

44. With regard to the ECJ's case law on final loss in the context of direct taxation, ESA maintains that the rationale behind the "final loss exception" is that in such circumstances the transfer of losses is no longer at the discretion of the taxpayer. However, in recent ECJ case law, the "final loss exception" has been deprived of much of its practical scope of application.[26] Nonetheless, the case law entails that, in order to comply with the principle of proportionality, an EEA State that provides in its legislation for the possibility to offset losses via intra-group contributions between two resident entities within the same group must also grant the opportunity to a taxable company to demonstrate that its non-resident subsidiary's losses are final.[27]

45. However, in the present case and subject to verification by the national court, ESA contends that the losses in question do not meet the criteria to be considered final for the purposes of the relevant case law.[28]

46. Finally, ESA maintains that, according to established case law, EEA States are free to adopt or maintain in force rules having the specific purpose of precluding from a tax benefit wholly artificial arrangements whose purpose is to circumvent or escape national tax law.[29]

47. ESA proposes that the Court should answer the question referred as follows:

> *National rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which the contribution reduces the transferor's taxable income and is included in the recipient's taxable income, and which require that both the transferor and the recipient are liable to taxation in the EEA State in question,*

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[26] Reference is made to the judgments in *Commission* v *United Kingdom*, cited above, paragraphs 36 to 37, and *Timac Agro Deutschland*, cited above, paragraph 55.

[27] Reference is made to the Commission's Communication of 19 December 2006, cited above, p. 7.

[28] Reference is made to the judgments in *Commission* v *United Kingdom*, cited above, paragraphs 33, 36 and 37, and *K*, cited above, paragraph 77. Reference is also made to the Opinion of Advocate General Kokott in *Commission* v *United Kingdom*, C-172/13, EU:C:2014:2321, point 39.

[29] Reference is made to the judgment in *Marks & Spencer*, cited above, paragraph 57 and case law cited.

constitute a restriction on the freedom of establishment as laid down in Articles 31 and 34 EEA which may be justified by the balanced allocation of taxing powers between the EEA States. In circumstances such as those of the case pending in front of the national court, the application of those rules appears, subject to verification by that court, proportionate, as the losses in question do not meet the criteria to be considered "final" for the purposes of the relevant case-law.

The Commission

48. The Commission concurs with ESA in its assessment that although the relevant Norwegian rules are essentially identical to the provisions of Finnish law dealt with in the judgment in *Oy AA*, the ECJ did not have to consider the issue of final loss.[30]

49. In the Commission's view, the analysis of proportionality in the present case must focus specifically on the question whether, in a case of final loss, the measure at issue is indeed indispensable to achieve the objective of safeguarding the balanced allocation of taxing rights. In this regard, the reasoning from the judgment in *Marks & Spencer* is just as relevant in a system of group contributions as it is in a simple loss transfer system.[31] That does not mean that relief should be given for a final loss in all cases. Rather, it is necessary to examine generally the circumstances surrounding the acquisition of the subsidiary and the manner in which its losses were incurred. It is also necessary to exercise very close scrutiny of potential tax avoidance and manipulation.

50. The Commission concludes that Article 31 EEA should not be interpreted in a way that opens the door to "loss-trafficking", whereby the purchase of loss-making companies is for the sole purpose of using their accumulated losses in order to offset the profits of the acquirer.[32] In this regard, the Commission contrasts the situation where a company creates an establishment in another EEA State in order to carry on business there with the situation where a company acquires a foreign loss-making company and liquidates it. It is only the former situation which should enjoy the protection of Article 31 EEA. The Commission also submits that a company which acquires a foreign subsidiary should not normally be entitled to relief for losses incurred by that subsidiary before its acquisition, since the purchase price paid for the subsidiary will have reflected the existence of the losses.

51. The Commission proposes that the Court should answer the question referred as follows:

Articles 31 and 34 EEA do not in general preclude national rules on intra-group contributions (under which the contribution reduces the transferor's taxable income

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30 Reference is made to the judgment in *Oy AA*, cited above, paragraphs 56 and 64.

31 Reference is made to the judgment in *Marks & Spencer*, cited above, paragraph 55.

32 Reference is made to the judgment in *A Oy*, cited above, paragraphs 45 and 48.

and is included in the recipient's taxable income regardless of whether the recipient makes a loss or a profit for tax purposes) which require that both the transferor and the recipient must be liable to taxation in the EEA State in question. However, that condition may not be applied where it is not indispensable in order to protect the balanced allocation of taxing power or to prevent tax avoidance.

Páll Hreinsson
Judge-Rapporteur