EFTA COURT

JUDGMENT OF THE COURT

13 May 2024*

(*Freedom of establishment – Articles 31 and 34 EEA – Balanced allocation of taxation powers – Concept of "final losses" – Deduction of losses of a non-resident subsidiary – Even minimal income*)

In Case E-7/23,

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 by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in a case pending before it between

ExxonMobil Holding Norway AS

and

Staten v/ Skatteetaten (the Norwegian State, represented by the Tax Administration)

concerning the interpretation of Article 31 of the Agreement on the European Economic Area as regards the possibility for ExxonMobil Holding Norway AS to deduct from its taxable income the losses of a subsidiary established in another EEA State,

THE COURT,

composed of: Páll Hreinsson, President (Judge-Rapporteur), Bernd Hammermann and Ola Mestad (ad hoc), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

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* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- ExxonMobil Holding Norway AS ("EMHN"), represented by Hugo P. Matre, advocate;

- the Norwegian Government, represented by Ida Thue, acting as Agent;

- the German Government, represented by Johannes Möller and Ralf Kanitz, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Kyrre Isaksen, Hildur Hjörvar and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Wim Roels and Paulina Carlin, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral arguments of EMHN, represented by Hugo P. Matre; the Norwegian Government, represented by Ida Thue; the German Government, represented by Johannes Möller and Ralf Kanitz; ESA, represented by Claire Simpson, Kyrre Isaksen and Hildur Hjörvar; and the Commission, represented by Wim Roels and Paulina Carlin, at the hearing on 18 January 2024,

gives the following

Judgment

I Legal background

EEA law

1 Article 31(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "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.*
>
> *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.

2 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

3 The Norwegian Act of 26 March 1999 No 14 on taxation of assets and income (*lov om skatt av formue og inntekt av 26. mars 1999 nr. 14* (*skatteloven*)) ("the Tax Act") governs, inter alia, the taxation of companies. As the case concerns the fiscal year 2012, it is the Tax Act as it was worded in 2012 that is relevant.

4 In 2012, Section 10-2 of the Tax Act, entitled "Deduction for group contributions", read:

(1) Private 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 Private Limited Liability Companies Act (aksjeloven) and the Public Limited Liability Companies Act (allmennaksjeloven). Equivalent companies and associations may claim a deduction for a group contribution to the same extent as private 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 (samvirkeloven).

(2) A deduction may not be claimed from income that is taxed pursuant to the rules of the Petroleum Taxation Act (petroleumsskatteloven). 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.

5 In 2012, Section 10-3 of the Tax Act, entitled “Tax liability for group contributions received”, read:

> *(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 in Sections 10-10 to 10-13.*

6 In 2012, Section 10-4 of the Tax Act, entitled “Conditions for entitlement to pay and receive group contributions”, read:

> *(1) The transferor and the recipient must be Norwegian companies or associations. Private limited liability companies and public limited liability companies must belong to the same group, see Section 1-3 of the Private 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, see Section 4-26 of the Private 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 made 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 point b of the first paragraph of Section 2-3 or Section 2 of the Petroleum Tax Act, read in conjunction with Section 1, 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 (ligningsloven).*

7 Section 10-5 of the Tax Act, which took effect from the fiscal year 2021, entitled "Group contributions to foreign subsidiaries", reads:

> *(1) A parent company may claim a deduction for a group contribution to a foreign subsidiary when the parent company documents that the conditions laid down in this section are satisfied, and the group contribution also satisfies the conditions for deduction laid down in Section 10-2.*
>
> *(2) The subsidiary must*
>
> > *a. be equivalent to a company, etc., coming within Section 10-1 first paragraph, and*
> >
> > *b. be resident, actually established and have carried on actual economic activity in another EEA State.*
>
> *(3) The parent company must, at the end of the fiscal year for which the group contribution is made, own more than nine tenths of the shares in the subsidiary and have a corresponding share of the voting rights at the general meeting. A deduction for a group contribution shall not be allowed if the parent company owns the subsidiary through companies that are resident in a foreign State other than where the subsidiary is resident.*
>
> *(4) The group contribution must cover the subsidiary's final losses. Losses shall be deemed to be final when the following conditions are satisfied:*
>
> > *a. It is not, has not been and cannot be possible for the subsidiary or anyone else to claim a deduction for losses in the State where the subsidiary is domiciled.*
> >
> > *b. The reason why the losses may not be deducted by the subsidiary is another than that it is not legally possible to do so, or that the possibility of deducting the losses is limited in time.*
> >
> > *c. The operation of the subsidiary is ceased and a process for liquidating the subsidiary has been initiated immediately after the end of the fiscal year in which the group contribution is made.*
> >
> > *d. The subsidiary is liquidated by the end of the year after the fiscal year for which the group contribution is made.*
>
> *The assessment under letter a and b shall be conducted on the basis of the situation at the end of the fiscal year for which the group contribution is made. The possibility of using the losses shall be assessed from the time the losses were incurred.*

(5) The deduction may not exceed the lowest amount of losses calculated under Norwegian tax rules and the tax rules in the subsidiary's home State. The calculation shall be made on the basis of the situation at the end of the fiscal year for which the group contribution is made. Losses accrued after that time shall not be included in the calculation. In the calculation, no account shall be taken of losses, including latent losses, accrued before the ownership conditions in the third paragraph were met.

(6) The final losses shall be reduced when in the last five fiscal years, including the fiscal year for which the group contribution is made, the following transfers have taken place between the subsidiary and companies, etc., with which it has a community of interest:

> *a. The subsidiary has transferred assets or liabilities with latent gains, and the latent gains are not taxed in the subsidiary. The final losses shall then be reduced by an amount equal to the latent gains at the time of transfer.*
>
> *b. The subsidiary has received assets or liabilities with latent losses, and the latent losses have been deducted by the subsidiary by the end of the fiscal year for which the group contribution is made. The final losses shall then be reduced by an amount equal to the latent gains at the time of transfer.*
>
> *c. The subsidiary has transferred assets or liabilities and been allowed a deduction in connection with the transfer by the end of the fiscal year for which the group contribution is made. The final losses shall then be reduced by an amount equal to the deducted amount.*

(7) The deduction shall be allowed with effect for the fiscal year for which the group contribution is made.

(8) If the subsidiary is the recipient of net taxable income after the end of the fiscal year for which the group contribution is made, that shall be entered as income in the parent company in the fiscal year in which the income arose. An equivalent income entry shall be made if, after the end of the fiscal year for which the group contribution is made, a transfer takes place as referred to in the sixth paragraph. In the calculation of net taxable income under the first sentence, no account shall be taken of the group contribution received. The income entry under the present paragraph shall not exceed the deduction for a group contribution.

(9) The right to make a deduction shall lapse if the subsidiary is not liquidated by the end of the year after the fiscal year for which the group contribution is made. This shall nevertheless not apply if public law regulations or other overriding reasons justify the liquidation taking longer time and the liquidation is completed

without undue delay. Lapse under the present paragraph shall take place by revision of the tax assessment for the fiscal year the parent company was allowed a deduction for the group contribution.

(10) If a definitive revision is made to the subsidiary's tax assessment in the home State with the result that all or parts of the losses may not be deemed final, the deduction for a group contribution shall be reduced correspondingly.

II Facts and procedure

8 EMHN is a holding company for the ExxonMobil Group's Norwegian operations, which also include the subsidiaries ExxonMobil Nordic AS and Esso Norge AS, and the group companies ExxonMobil Exploration and Production Norway AS and ExxonMobil Production Norway Inc. and others. All of the companies are owned indirectly by the ExxonMobil Corporation in the United States of America (ultimate parent company of the ExxonMobil Group), which is engaged in the oil and energy sector on a worldwide basis. As at 31 December 2012, EMHN held 100% of the shares in ExxonMobil Danmark ApS ("EMD"), the company to which the group contribution in question was made.

9 EMD was established as a Danish limited liability company (*anpartsselskab*) on 24 July 1964. The business activities consisted of sales of imported chemicals and lubricants to the Danish market. The company was originally also engaged in the operation of petrol stations and oil product refining. Around the year 2000, EMD also built up a significant holding operation, including financial lending operations to other companies in the ExxonMobil Group. As part of the extensive holding and financial lending operations, EMD accrued considerable losses. At the end of 2011, EMD had losses carried forward of DKK 2 071 155 306.

10 Over the years, extensive restructuring measures were implemented in the ExxonMobil Group. In addition commercial operations transitioned to a SalesCo model, which resulted in sales of lubricants and centralised support functions being placed under one company, Belgian ExxonMobil Petroleum and Chemical BVBA ("EMPC"). Contracts and other related operations in Denmark were transferred to EMPC by an agreement of 24 February 2005. After that time, EMD mainly took care of marketing and sales support for EMPC in relation to Danish customers, in addition to performing certain support functions relating to market analyses and technical information. EMD was no longer involved in direct sales.

11 As part of the scaling down, properties that had belonged to EMD were sold and vacated. The reorganisation entailed that the Nordic operations for the lubricants business were placed under EMHN. The board of EMHN decided to establish a new subsidiary, ExxonMobil Nordic AS ("EMN"), which was to coordinate ExxonMobil's lubricants activities throughout the Nordic countries, including taking care of the remaining activities

previously managed by EMD. The support functions placed with EMD were also transferred to EMN.

12 The decision to liquidate EMD was taken by the board of EMHN on 19 December 2012 and, on the same day, EMD was informed of the restructuring plan that established EMN, including the transfer of EMD's activities to EMN and the associated liquidation of EMD. On the same date, the board of EMHN moved to make a group contribution of NOK 900 000 000 to cover part of the losses in EMD. The motion was passed at an extraordinary general meeting of EMHN the same day. The board of EMD was informed of the motion passed to approve the group contribution the same day, and decided to accept and include the amount as taxable income for 2012. The annual accounts for 2012 from the Danish tax authorities show that the group contribution is part of EMD's taxable income of DKK 915 423 543. The income was applied towards losses from previous periods and thus brought the company's losses down from DKK 2 071 155 306 at the end of 2011 to DKK 1 155 731 763 at the end of 2012.

13 A limited part of EMD's operations were continued in the first quarter of 2013. On 22 March 2013, an asset purchase agreement was concluded between EMD and EMN. The total sale price was EUR 427 514. By the end of the first quarter of 2013, all service agreements were transferred to EMN in accordance with the asset purchase agreement. On 1 April 2013, EMD sent out information about the liquidation of EMD, and the accompanying transfer of the activities to EMN, to all contract parties, suppliers and the Nordic lubricants business.

14 On 5 April 2013, EMD sent a letter to the Tax Centre, Fredensborg, Denmark, (*Skattecenteret Fredensborg*) to inform them about the transfer of assets. At the same time, a report was sent to the Danish Customs and Tax Administration (*Skatteetaten*) concerning exemption for value added tax. By extraordinary general meeting on 21 May 2013, EMD's bodies formally voted to have the company liquidated, and the company name was changed to ExxonMobil Danmark ApS likvidation. By extraordinary general meeting on 11 December 2013, the liquidation was recorded as completed and the company was definitively liquidated. On that same date, the company was deregistered with the Danish Business Authority (*Erhvervsstyrelsen*).

15 EMHN filed a tax return on 27 June 2013. The group contribution was deducted and the company's general income for the fiscal year 2012 was stated as being NOK 299 706 834. By letter of 25 February 2014, EMHN received a notice from the Norwegian Tax Office stating that consideration was being given to revising EMHN's tax assessment for the fiscal year 2012. EMHN replied to the Tax Office's notice of decision on 31 March 2014. The Tax Office requested further information and documentation by letter of 12 May 2014, to which EMHN replied on 20 June 2014.

16 On 18 December 2014, the Tax Office adopted a decision revising EMHN's tax assessment for the fiscal year 2012, the lawfulness/validity of which is under examination by the Borgarting Court of Appeal. In the decision, the deduction for the group contribution made to EMD was disallowed, with the consequence that the general income for 2012 increased from NOK 299 706 834 to NOK 1 199 706 834. The main reason given for the refusal was that it was not possible to allow a deduction for a group contribution when EMD was resident in Denmark. The alternative ground for refusal was that there were in any event no "final losses", with reference to the exception set out in the *Marks & Spencer* judgment (Case C-446/03).

17 Against this background, Borgarting Court of Appeal decided to make a reference to the Court. The request, dated 20 June 2023, was registered at the Court on 27 June 2023. Borgarting Court of Appeal has referred the following questions to the Court:

1. *Is the application of the "final losses" exception as set out in the EFTA Court's judgment in Case E-15/16 Yara and the case law referred to therein precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed, or must a specific assessment be conducted to determine whether the subsidiary's continued income actually will reduce its losses, or that part of the losses for which a deduction is claimed?*

2. *If the answer to Question 1 is that a specific assessment must be conducted of the subsidiary's continued income, the EFTA Court is requested to indicate how probable it must be that the income actually will reduce the losses, whether the amount of the reduction is of any significance and which factors will be of particular relevance in the assessment.*

3. *Is it compatible with Articles 31 and 34 of the EEA Agreement to require as a prerequisite for the application of the "final losses" exception that the liquidation process be formally decided on immediately after the end of the fiscal year for which a deduction is claimed?*

18 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answer of the Court

Question 1

19 By Question 1, the referring court asks, in essence, whether the "final losses" exception, as set out in the Court's judgment in Case E-15/16 *Yara*, judgment of 13 September 2017, is

precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed, or whether a specific assessment must be conducted to determine whether the subsidiary’s continued income will actually reduce its losses, or that part of the losses for which a deduction is claimed. That is, whether “minimal income” is only decisive if it may indicate to what extent it is possible to obtain an income in the company, or whether the existence of a minimal income itself is decisive and precludes the application of the exception.

20 As a preliminary point, the Court recalls that it held in Case E-15/16 *Yara*, cited above, paragraphs 45 to 49, that a restriction of the freedom of establishment which limits the right of a company to deduct the losses of a foreign subsidiary, whereas the losses of a resident subsidiary may be deducted, is justified by the need to preserve the balanced allocation of the power to impose taxes between the EEA States and to prevent the risk of losses being used twice and of tax avoidance (compare also the judgments of 19 June 2019 in *Memira Holding*, C-607/17, EU:C:2019:510, paragraph 20 and case law cited, and of 19 June 2019 in *Holmen*, C-608/17, EU:C:2019:511, paragraph 18 and case law cited).

21 However, in *Yara*, cited above, paragraphs 40 to 42, the Court relied on paragraph 55 of the judgment of the European Court of Justice of 13 December 2005 in *Marks & Spencer*, C-446/03, EU:C:2005:763, in which it was established that, even though that restriction is justified in principle, it is disproportionate for the parent company’s State of establishment to preclude the possibility for the parent company to take into account at its level for tax purposes the losses of a non-resident subsidiary that are classified as final. Further, the Court held that in order to assess whether a loss, in this respect, is to be considered final, the existence of two conditions must be verified. First, the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary, by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods. Second, that there is no possibility for the foreign subsidiary’s losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

22 Regarding the condition that the losses must be final, it follows from case law that the losses attributable to a non-resident subsidiary become definitive when, first, the non-resident subsidiary has exhausted all the possibilities of deducting those losses available under the law of the EEA State of residence and, second, it has ceased to receive any income in the EEA State of residence, so that there is no longer any possibility of the losses being taken into account in that EEA State (compare the judgment in *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 64).

23 As argued by ESA, as long as the subsidiary continues to receive income, however minimal, the possibility remains open that losses may, in some way, be taken into account

in the subsidiary's State of residence in future fiscal years. In such circumstances, the losses will not be final, and EEA States are not obliged to grant relief.

24 In this regard, the Court observes that even ceasing trading or being put into liquidation is not sufficient in itself to satisfy the final losses exception if some income is still being generated, e.g. the receipt of minimal income or when the company's assets are liquidated (compare the judgment of 21 February 2013 in *A*, C-123/11, EU:C:2013:84, paragraphs 51 to 54, and the Opinion of Advocate General Kokott of 23 October 2014 in *Commission* v *United Kingdom*, C-172/13, EU:C:2014:2321, point 40).

25 The losses incurred by a non-resident subsidiary may be characterised as definitive only if that subsidiary no longer has any income in its EEA State of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the EEA State in which it is resident (compare the judgments of 3 February 2015, *Commission* v *United Kingdom*, C-172/13, EU:C:2015:50, paragraph 36, and case law cited, and 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, cited above, paragraph 63 and case law cited). Thus, as the Court noted in *Yara*, the existence of even minimal income itself precludes the application of the final loss exception (see the judgment in Case E-15/16 *Yara*, cited above, paragraphs 40 to 42 and case law cited).

26 Consequently, the application of the final loss exception within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, as confirmed in *Yara*, is precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

27 Lastly, for the sake of completeness, the Court observes that even if it is established that the subsidiary no longer has any income in its EEA State of residence, the losses would not be characterised as final if there is a possibility of deducting those losses economically by transferring them to a third party. A third party may, for tax purposes, take into account the subsidiary's losses in the State where the latter is established, for example following a sale of that subsidiary for a price that takes into account the tax advantage represented by the deductibility of those losses. The parent company must be in a position to show that such a possibility is precluded (compare the judgments in *Memira Holding*, C-607/17, cited above, paragraphs 22 to 28 and case law cited, and *Holmen*, C-608/17, cited above, paragraphs 34 to 40 and case law cited).

28 At the hearing, EMHN stated that EMD had exhausted the possibilities of taking the loss into account and that there are no possibilities of the loss being taken into account in the subsidiary's EEA State of residence. However, the Norwegian Government observed that, in 2012, EMHN decided that EMN would take care of the activities previously managed by EMD. In this regard, the Norwegian Government argues that, after that transfer, EMN

continued, and continues, to run the business in Denmark through a Danish branch, which still generates income for that company.

29 The Court observes that it is settled law that losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in paragraph 55 of *Marks & Spencer*, by dint of the fact that the legislation in the EEA State in which the subsidiary is resident precludes a transfer of losses to a third party. In such a situation, the EEA State in which the parent company is resident may deny cross-border group relief without thereby infringing Article 31 EEA (compare the judgment in *Commission* v *United Kingdom*, C-172/13, cited above, paragraphs 33 and 39 and case law cited, and the Opinion of Advocate General Kokott of 10 January 2019 in *Memira Holding*, C-607/17, EU:C:2019:8, points 55 and 56 and case law cited).

30 In this regard the Court observes that losses which are not usable because of legal restrictions, for example because they cannot be transferred to a third party, are not intended to constitute final losses in accordance with settled case law. Only losses which would be usable in law but cannot be used in fact in future could be regarded as final losses (compare the judgment in *Memira Holding*, C-607/17, cited above, paragraphs 26 to 27 and case law cited).

31 The missing opportunity to exploit such a loss must in such a situation be attributed to the specific domestic law restrictions in the subsidiary's state of residence. The EEA State of the parent company's residence cannot be obliged to bear the adverse consequences arising from such legislation (compare the judgment of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraphs 78 to 79 and case law cited, and the Opinion of Advocate General Collins in *W (Deductibility of final losses of a non-resident permanent establishment)*, C-538/20, EU:C:2022:184, point 75).

32 Accordingly, losses which are precluded from being carried forward because of legal restrictions in the EEA State in which the subsidiary resides do not constitute final losses within the meaning of the exception set out in paragraph 55 of *Marks & Spencer*.

33 It is for the national court to assess, on the basis of the criteria mentioned above, and the facts of the case pending before it, whether the parent company has effectively demonstrated that the subsidiary had no possibility of using its existing losses.

34 In the light of the foregoing, the answer to the first question must be that it is compatible with Articles 31 and 34 EEA to require that the application of the "final losses" exception within the meaning of the Court's judgment in Case E-15/16 *Yara* is precluded where a non-resident subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

35 In the light of the answer given to the first question, it is not necessary to answer the second question.

Question 3

36 By Question 3, the referring court asks whether the right of establishment precludes a requirement, as a prerequisite for the application of the final losses exception, that the liquidation process of the foreign loss-making group member should be formally decided upon immediately after the end of the fiscal year for which a deduction is claimed.

37 As held above, it is settled case law that the losses incurred by a non-resident subsidiary may be characterised as definitive only if that subsidiary no longer has any income in its EEA State of residence. Furthermore, losses would not be characterised as final before the completion of the subsidiary's liquidation if there is a possibility of deducting those losses economically by transferring them to a third party.

38 The Court observes that it is possible to show that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer*, where, immediately after the end of the accounting period in which the losses have been sustained, that subsidiary ceased trading and sold or disposed of all its income producing assets (compare the judgment in *Commission* v *United Kingdom*, C-172/13, cited above, paragraph 37).

39 In the light of the above, it is compatible with Articles 31 and 34 EEA for an EEA State to require, in order to demonstrate that a loss is final, that a liquidation process be formally decided upon immediately after the end of the fiscal year for which a deduction is claimed.

IV Costs

40 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal hereby gives the following Advisory Opinion**:**

1. **It is compatible with Articles 31 and 34 EEA to require that the application of the “final losses” exception within the meaning of the Court’s judgment in Case E-15/16 *Yara* is precluded where a non-resident subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.**

2. **It is compatible with Articles 31 and 34 EEA for an EEA State to require, in order to demonstrate that a loss is final, that a liquidation process be formally decided upon immediately after the end of the fiscal year for which a deduction is claimed.**

Páll Hreinsson Bernd Hammermann Ola Mestad

Delivered in open court in Luxembourg on 13 May 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President