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Judgment in Case E-15/16 *Yara International ASA* v *The Norwegian Government*

NATIONAL RULES ON INTRA-GROUP CONTRIBUTIONS MAY REQUIRE THAT TRANSFEROR AND RECIPIENT ARE LIABLE TO TAXATION IN THE SAME EEA STATE

In a judgment delivered today, the Court answered a question referred to it by Borgarting Court of Appeal (*Borgarting lagmannsrett*) concerning the interpretation of Articles 31 and 34 of the EEA Agreement.

Yara International ASA ("Yara") is a company incorporated, registered and domiciled for tax purposes in Norway. It is the parent company of a group with subsidiaries in Norway and other countries. In 2007, the Yara group acquired the company UAB Lietuva ("UAB") through Yara Suomi Oy, a wholly-owned Finnish subsidiary of Yara. UAB was domiciled for tax purposes in Lithuania.

On 31 December 2009, UAB had a tax loss carry-forward of approximately NOK 177 million. On 14 December 2009, Yara bought all the shares in UAB from Yara Suomi Oy. UAB thus became a directly owned subsidiary of Yara. On 16 December 2009, an agreement was entered into between Yara and UAB, under which Yara would pay a group contribution of NOK 132 758 144 (at that time corresponding to EUR 16 million) to UAB with effect for the income year of 2009. The group contribution was paid in cash on 10 January 2010. On 29 January 2010, a decision was taken to liquidate UAB and it was struck off the local companies' register on 12 April 2012.

Yara claimed a tax deduction for its group contribution to UAB. The Norwegian authorities denied the claim with reference to Sections 10-2 to 10-4 of the Norwegian Taxation Act. 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.

The Court was asked whether the provisions requiring both transferor and recipient of intra-group contributions to be liable to taxation in Norway, are compatible with Articles 31 and 34 EEA, or whether EEA law must be interpreted to mean that, on certain conditions, an exception must be granted from that requirement.

The Court found that, while the provisions at issue constituted a restriction to the freedom of establishment under Article 31 EEA, they may be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective pursued and do not go beyond what is necessary in order to attain it.

In the case at issue the parties disagree as to the necessity of the national legislation. The Court found that it is for the national court to assess whether the loss at issue was final. This depends on two conditions: the exhaustion, by the non-resident subsidiary, of all the possibilities in its State of residence of having the losses taken into account for the relevant accounting periods; and the impossibility, for that subsidiary, to have its losses taken into account for future periods.

The Court moreover pointed to the need to ensure that this analysis must be guided by the principle of prohibition of abuse of rights, so as to ensure that wholly artificial arrangements are precluded.

The Court found that Articles 31 and 34 EEA do not preclude the application of national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act. Those national rules must serve a legitimate objective such as the need to safeguard the balanced allocation of taxation powers between EEA States or to prevent wholly artificial arrangements leading to tax avoidance. However, the requirements of national law go beyond what is necessary to pursue those objectives in cases where the loss sustained by the foreign subsidiary is final.

The full text of the judgment may be found on the internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.