ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA Court

OSLO, 29 September 2023

Written Observations
by the Norwegian Government
represented by the Tax Administration

represented by Ida Thue, advocate at the Office of the Attorney General for Civil Affairs, submitted pursuant to Artice 20 of the Statute of the EFTA Court

Case E-7/23 ExxonMobil Holding Norway AS – Staten v/Skatteetaten

concerning a request for a preliminary ruling from Borgarting lagmannsrett (Borgarting Court of Appeal) pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

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1 INTRODUCTION

(1) Borgarting Court of Appeal has, by application dated 20 June 2023, requested the EFTA Court to give an advisory opinion on questions relating to the so-called Marks & Spencer exception, see case C-446/03 and subsequent case law.

(2) The case concerns the validity of the Tax Office's decision of 18 December 2014, where the appellant, ExxonMobil Holding Norway AS (hereinafter "EMHN") was denied deduction for a cross-border group contribution of NOK 900 000 000 to the Danish subsidiary ExxonMobil Danmark ApS (hereinafter "EMD") in the fiscal year 2012.

(3) The main question in the case is whether EMHN has demonstrated that the requirement of "final loss" under the Marks & Spencer exception is met.

(4) The referring court seeks guidance from the EFTA Court on the following questions:

> *"1a: 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?*
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> *1b: If the answer to question 1a 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.*
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> *2: 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?"*

2 THE DISPUTE IN THE MAIN PROCEEDINGS

(1) EMHN is a holding company for the ExxonMobil Group's Norwegian operations. In 2012, the company held 100% of the shares in EMD. EMHN became the parent company of EMD in 2009.

(2) EMD originally sold imported chemicals and lubricants to the Danish market and was also engaged in the operation of petrol stations and oil product refining. Around the year 2000, the company built up a significant holding operation, including financial lending operations to other companies in the ExxonMobil Group around the world.

(3) EMD accrued considerable losses in the period 1999–2004. EMHN claims that most of these losses were related to financing costs. EMD has stated that the company had tax losses

carried forward of DKK 2 071 155 306 at the end of 2011. Although not directly relevant for the questions referred to the EFTA Court, the Government considers that this tax loss has not been substantiated.

(4) Over the years, the ExxonMobil Group implemented significant restructuring measures. After 2004, EMD was no longer a holding company. The contracts owned by EMD and direct marketing and sales activities for lubricants and chemical sales in Europe were brought together in another company outside Denmark in the ExxonMobil Group in 2005. After that time, EMD was no longer involved in direct sales, but mainly took care of marketing and sales support in relation to Danish customers and performed certain support functions relating to market analyses and technical information. After the reorganisation, the group's lubricants business in the Nordic countries was placed under EMHN.

(5) In 2012, EMHN decided that a new Norwegian subsidiary, ExxonMobil Nordic AS (hereinafter "EMN") would take care of the activities previously managed by EMD.

(6) In December 2012, the board of EMHN decided to liquidate EMD. At the same time, EMHN made a group contribution of NOK 900 000 000 to EMD to cover part of the losses in EMD. The annual accounts for 2012 from Danish tax authorities show that the group contribution is part of EMD's taxable income of DKK 915 423 543. The income is applied towards losses from previous periods.

(7) The business activities in EMD (marketing and sales support in relation to Danish customers and support functions relating to market analyses and technical information) continued in 2013, generating income for EMD.

(8) In March 2013, an asset purchase agreement was concluded between EMD and EMN with effect from 1 April 2013. The purchase price is stated as EUR 427 514. EMN continued the business in Denmark through a Danish branch. In May 2013, EMD's bodies formally voted to have the company liquidated. In December 2013, the liquidation was recorded as completed and the company was definitively liquidated. The liquidation accounts for EMD states a profit for the operating business. However, due to a currency loss on the group contribution receivable, the net result was negative.

(9) EMHN filed a tax return for the fiscal year 2012 where the group contribution was deducted. On 18 December 2014, the Tax Office adopted a decision revising EMHN's tax assessment, in which the deduction was disallowed because 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 was in any event no "final loss" within the meaning of the Marks & Spencer judgment (Case C-446/03).

(10) The dispute in the main proceedings concerns the validity of the Tax Office's decision.

(11) In a judgment of 13 January 2023 Oslo District Court held that the Tax Office's decision to disallow the deduction was valid. The District Court found that EMD's business activities had continued in 2013, generating income for the company, and that, consequently, application of the Marks & Spencer exception was precluded. EMHN has appealed the judgment.

3 RELEVANT NATIONAL LAW

(12) The first paragraph of Section 10-4 of the Norwegian Tax Act provides that the transferor and the recipient of a group contribution must be Norwegian companies.

(13) The exceptions for foreign companies domiciled in an EEA State, see the second paragraph of Section 10-4 of the Tax Act, are not applicable in the present case

(14) It follows from the case law of the Norwegian Supreme Court that the Marks & Spencer exception applies under Norwegian law, see HR-2019-140-A paragraph 59:

> *"From this conclusion [in Case E-15/16], it follows that Article 31 EEA and Article 34 do not preclude the application of national rules on group contributions under which both the transferor and the recipient must be liable to taxation in the relevant EEA State. Nevertheless, the EFTA Court ruled that in cases where the loss sustained by the foreign subsidiary was 'final', 'the requirements of national law go beyond what is necessary'. Hence, when a 'final' loss has been sustained by the subsidiary, it will be contrary to the EEA Agreement to lay down as a condition for a right to deduction that both the parent company and the subsidiary must be liable to taxation in the relevant EEA State."*

(15) Norway has adopted new rules for cross-border group contributions in Section 10-5 of the Tax Act, which took effect as from the fiscal year 2021. While those rules do not apply to the present case (which concerns the fiscal year 2012), the Government nevertheless considers that Section 10-5(4) is based on a correct interpretation of the case law of the EFTA Court and the CJEU on "final losses":

> *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.

4 QUESTION 1: THE REQUIREMENT OF "FINAL LOSSES"

(16) By its first question, the referring court essentially asks whether 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 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.

(17) The Government respectfully submits that this question must be answered in the affirmative.

(18) In *Yara*, the EFTA Court held 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, that lay down the condition that both the transferor and the recipient are liable to taxation in the same State, provided that those provisions do not go beyond what is necessary where the loss sustained by the foreign subsidiary is final.

(19) In reaching that conclusion, the EFTA Court referred to case law on the deduction of losses incurred by foreign subsidiaries (Case C-446/03 *Marks & Spencer I* and Case C-172/13 *Marks & Spencer II*) and case law on the deduction of group contributions to foreign subsidiaries (Case C-231/05 *Oy AA*).

(20) In *Marks & Spencer I*, the Grand Chamber stated that "to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly jeopardise a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred" (para. 46).

(21) The Grand Chamber also found that there was a danger that losses would be used twice (paras. 47–48) and that it entailed a risk of tax avoidance, since losses could be transferred to companies in the States with the highest rates of taxation, and in which the tax value of the losses therefore would be the highest (paras. 49–50).

(22) On that basis, the Grand Chamber accepted that national provisions on group relief could be reserved for subsidiaries established in the same Member State as the parent company. The Grand Chamber considered that such measures would only go beyond what is necessary in the following situation (para. 55):

" – *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, and*

> – *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."*

(23) The requirements in para. 55 are very strict. The foreign subsidiary must have exhausted all possibilities under national law of having the losses taken into account, and there must be no possibility of future income, either by the subsidiary itself, or by a third party.

(24) The Grand Chamber furthermore emphasised that it was for the resident parent company to demonstrate that the requirements set out in para. 55 were fulfilled (para. 56).

(25) Subsequent case law confirms that these requirements are very stringent and that the Marks & Spencer exception consequently has a very limited field of application.

(26) In Case C-123/11 *A*, a Finnish undertaking ("A") with a subsidiary in Sweden ("B"), claimed that B had exhausted the possibilities of having its losses taken into account in Sweden, as B would be liquidated once a merger operation between A and B had been carried out.

(27) The CJEU found that the merger and the liquidation of B were not in themselves capable of showing that there was no possibility of taking into account B's losses in Sweden (para. 52). It was for the national court to determine whether A had proved that B had exhausted all the possibilities of taking into account the losses in Sweden (para. 54). In this regard, the CJEU nevertheless referred to the submissions made by several intervening Member States that the possibility of taking B's losses into account in Sweden still existed (para. 53):

> *"The German Government submits that those losses can be deducted from the income, admittedly very small, which B continues to receive in Sweden. It adds that B is still involved in leases which could be assigned. The French Government also submits that Swedish law allows companies to take losses into account in previous tax years or on the occasion of the taxation of capital gains made on the assets and liabilities of the merged company. The Italian Government submits that Sweden is entitled to evaluate the assets transferred and to tax the merged company on the profit thus realised."*

(28) The German Government's argument that B's losses could be deducted from the income, admittedly very small, which B continued to receive in Sweden, is of particular relevance to the present case, since it is based on the premise that a very small income in itself would be <u>sufficient</u> in order to conclude that B had not exhausted all the possibilities of taking into account the losses in Sweden. The fact that the CJEU simply referred to the submission of the German Government without any comments, indicates that it shared that opinion.

(29) This was confirmed in Case C-172/13 *Marks & Spencer II* (GC).

(30) In that case, the Commission claimed that the UK rules on group relief did not comply with the conditions in para. 55 of *Marks & Spencer I*. The Commission argued that it was virtually impossible to obtain group relief for losses sustained by non-resident companies under UK law (para. 14).

(31) According to the Commission, the possibility of obtaining tax relief in the State of residence had to be assessed on the basis of the actual facts of the case, and not some theoretical possibility (of subsequently taking into account losses sustained by the non-resident subsidiary) which exists only because the foreign subsidiary has not yet been placed in liquidation (para. 16).

(32) The Grand Chamber did not agree with the Commission. The Grand Chamber found that a subsidiary's losses may be characterised as definitive *"<u>only</u> if that subsidiary no longer has <u>any</u> income in its Member State of residence. So long as that subsidiary continues to be in receipt of <u>even minimal</u> income, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident"* (para. 36) (emphasis added).

(33) The Grand Chamber furthermore considered that the UK rules did not make it impossible to obtain group relief for losses sustained by non-resident companies, since it was possible to show that the losses were final in cases where, immediately after the end of the accounting period in which the losses had been sustained, the subsidiary ceased trading and sold or disposed of all its income producing assets (para. 37).

(34) It is apparent from the wording in para. 36 that the mere existence of even minimal income in the Member State of the non-resident subsidiary is sufficient to conclude that the losses sustained by a subsidiary established in another Member State may yet be offset by future profits. The mere existence of income in itself precludes application of the Marks & Spencer exception.

(35) The wording in *Marks & Spencer II* para. 36 is clear and leaves no room for doubt. Since the mere existence of income is decisive, it is not necessary to conduct any further assessment of the subsidiary's situation. Had the Grand Chamber meant that a separate assessment was necessary, as submitted by Commission in para. 16, it would have said so.

(36) Since the mere existence of income is sufficient to conclude that the losses sustained may yet be offset by future profits, factors such as the size of the income, or whether it is large enough to cover the losses, are irrelevant for the assessment of whether there is a final loss.

(37) The Grand Chamber does not explain why the existence of income precludes application of the Marks & Spencer exception. There are, however, three good reasons for why application of the "final loss" exception should be precluded in cases where the subsidiary has income.

(38) The first and most obvious reason is that the existence of income in the subsidiary company is a clear indication that it is too early to conclude that there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods, cf. *Marks & Spencer I* para. 55

(39) Second, the criterion of income contributes to the effectiveness of the main rule, i.e. that the EEA States are allowed to reserve tax measures such as group relief and group contribution for resident companies in order to secure the balanced allocation of the power to impose taxes, and to reduce the risk of losses being used twice and the risk of tax avoidance (by

losses being transferred to States in which the tax value of the losses would be the highest). A requirement based on the mere existence of income also makes it more difficult to circumvent the main rule, as compared to a general assessment of the company's future.

(40) Third, a criterion of income is easy to apply and contributes to legal certainty. As noted by Advocate General Kokott in *Marks & Spencer II*, a distinction between 'real' and 'theoretical' possibilities of future income (cf. the submissions of the Commission) would only lead to considerations of probability which, by their nature, do not provide legal certainty (para 45). Legal certainty was probably high up on the CJEU's list of priorities. The Marks & Spencer exception was known for being anything but clear, see Advocate General Kokott in *A* para. 1 ("synonymous with chaos and despair") and *Marks & Spencer II* para. 2.

(41) In *Yara*, the EFTA Court correctly notes that the existence of even minimal income precludes application of the final loss exception, with reference to *Marks & Spencer II* (para. 44). In that case, the contested loss amounted to NOK 177 million, but the EFTA Court still held that the occurrence of even minimal interest income precluded there being a final loss.

(42) The CJEU has also referred to the interpretation of the "final loss" from *Marks & Spencer II* in its later case law, see Case C-388/14 *Timac Agro* para. 55, and Case C-650/16 *Bevola*, where the Grand Chamber stated (para. 63):

> *"The criterion of the definitive nature of the losses, within the meaning of paragraph 55 of the judgment of 13 December 2005, Marks & Spencer (C-446/03, EU:C:2005:763), was explained in paragraph 36 of the judgment of 3 February 2015, Commission v United Kingdom (C-172/13, EU:C:2015:50). It follows 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 Member 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 Member State in which it is resident."*

(43) Based on the above, the Norwegian Government respectfully submits that the existence of income in the subsidiary company precludes application of the Marks & Spencer exception.

(44) Consequently, is not necessary to answer question 1b. The case law on "final losses" does not provide any basis for establishing criteria as described in question 1b.

(45) In present case, EMD continued its business activities after the fiscal year of 2012, consisting in marketing and sales support to Danish customers and support functions (market analyses and technical information). This activity generated income for EMD in 2013. Consequently, application of the "final loss" exception is precluded.

5 QUESTION 2:

(46) By its second question, the referring court asks whether it is 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.

(47) The Government respectfully submits that this question must be answered in the affirmative.

(48) In *Marks & Spencer II*, the Commission argued that it was a requirement under the UK rules on group relief that the non-resident subsidiary must enter liquidation before the end of the tax year in which the losses are sustained, see para. 15.

(49) The UK asserted that the relevant provisions did not make cross-border relief conditional upon the non-resident subsidiary having been put into liquidation before the end of the accounting period in which the losses were sustained. Evidence of an intention to wind up a loss-making subsidiary and initiation of the liquidation process soon after the end of the accounting period would be factors to be taken into account. The intention to wind up the subsidiary was taken into account, along with all other relevant facts as at the end of the accounting period in which the losses were sustained, in determining whether there was no possibility of the losses being taken into account, see para. 18.

(50) The Grand Chamber found the UK rules on group relief compatible with the freedom of establishment. The Grand Chamber held that the final loss requirement would be fulfilled *"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"*, see para. 37. This necessarily implies that the liquidation process must be formally initiated at the same time, that is, immediately after the end of accounting period or the end of the fiscal year for which a deduction is claimed. Otherwise, the subsidiary would still have the option of resuming trade at a later point in time, and the possibility that the subsidiary's losses could be taken into account in the future, within the meaning of *Marks & Spencer I* para 55, cannot be excluded.

(51) Only a formally initiated liquidation process that is decided on immediately after the end of the fiscal year for which a deduction is claimed, and completed accordingly, can thus provide conclusive evidence that the subsidiary's loss had become final in that fiscal year.

(52) Based on the above, the Government respectfully submits that it is 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.

(53) In the present case, the Government considers that EMD's commercial activities continued after the fiscal year 2012, until 1 April 2013, and that this business generated income for the company. The liquidation process was not formally decided on immediately after the end of the fiscal year 2012, but on 21 May 2023. It must also be noted that EMN continued, and still continues, to run the business in Denmark through a Danish branch, still generating income for that company.

6 ANSWER TO THE QUESTIONS

(54) Based on the foregoing, the Government respectfully submits that the questions posed by the referring court should be answered as follows:

> *1. The application of the "final losses" exception in the EFTA Court's judgment in Case E-15/16 Yara and the case law referred to therein 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.*
>
> *2. It is 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.*

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Oslo, 29/09/2023

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