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EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure

by the

EUROPEAN COMMISSION

represented by Wim ROELS, Legal Adviser, and Paulina CARLIN, Member of its Legal Service, Acting as agents, with a postal address for service in Brussels at the Legal Service, *Greffe contentieux*, BERL 1/169, 200, rue de la Loi, 1049 Brussels, and consenting to service by e-EFTACourt,

in Case E-7/23

ExxonMobil Holding Norway AS v Kingdom of Norway

in which the Borgarting lagmannsrett (Borgarting Court of Appeal) ("the Referring Court") has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning the so-called "Marks & Spencer exception" on cross-border loss deductions.

1. FACTS AND QUESTION REFERRED

1. The applicant in this case, ExxonMobil Holding Norway AS ("EMHN") is a holding company resident in Norway and a 100% shareholder of a Danish limited liability company ExxonMobil Danmark ApS ("EMD"). EMD accrued considerable losses over a number of years and, as a result thereof, its operations have been extensively restructured and finally closed down. While deciding the liquidation of EMD on 19 December 2012, EMHN also decided to make a group contribution to cover part of the losses in EMD. EMD was finally liquidated and deregistered on 11 December 2013.

2. EMD included the group contribution received from EMHN as taxable income in its annual accounts for the fiscal year 2012 and used it toward the losses carried forwards from previous periods.

3. EMHN deducted the group contribution from its tax return for the fiscal year 2012, filed on 27 June 2013. The Tax Office however refused the said deduction because it was not possible to allow a deduction for a group contribution when EMD was resident in Denmark. In addition, it was held that there were no "final losses" for the purposes of the "Marks & Spencer exception".

4. The Referring Court requests an advisory opinion of the EFTA Court to 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?

   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?

2. Is it compatible with Article 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. LAW

2.1. EEA law

5. Article 31 EEA reads:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States. 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. Annexes VIII to XI contain specific provisions on the right of establishment."

6. Article 34 EEA provides:

"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."

2.2. National law

7. Chapter 10 of the Norwegian Act of 26 March 1999 No 14 on taxation of assets and income contains rules on deductions for group contributions. In the version applicable in the relevant fiscal year 2012, it reads as follows:

"<u>Section 10-2. Deduction for group contributions</u>

(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.

<u>Section 10-3. Tax liability for group contributions received</u>

(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.

<u>Section 10-4. Conditions for entitlement to pay and receive group contributions</u>

(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)."

8. Norway has adopted new rules which have taken effect as from the fiscal year 2021 on group contributions to foreign subsidiaries, however since they fall outside the scope of the current case, the Commission simply refers to pages 6 to 8 of the Referring Court's referral decision.

3. ANALYSIS

9. It is not in dispute that EMHN did not satisfy the conditions for claiming a deduction under the national legislation applicable in the fiscal year 2012 since the recipient of the group contribution is a foreign company that is not liable to taxation in Norway and since the group contribution is therefore not taxable income for EMD in Norway.

10. In a previous case, also referred to the EFTA-Court by the Referring Court, *Yara*, E-15/16, the question was whether the Norwegian tax rules on group contributions were compatible with the rules on freedom of establishment laid down in Articles 31 and 34 of the EEA Agreement. Your Court answered this question in the negative as follows:

"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, 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, that lay down the condition that both the transferor and the recipient are liable to taxation in the EEA State in question. It is a condition of EEA law that the 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. [1]"

General considerations on the "Marks & Spencer exception"

11. The so-called Marks & Spencer exception finds its origin in Case C-446/03 Marks & Spencer, which concerned a group relief system under which losses suffered by one member of the group in a tax year may be set off against the profits of another member in the same year. Such a system is self-correcting where the loss-making company returns to profit. The Court of Justice accepted that in the context of such a scheme, the refusal to grant the same relief between companies established in different Member States represented an obstacle to free movement. However, the restriction was justified by the risk of so-called loss-trafficking (the manipulation of results in such a way as to book losses in Member States with the highest tax rates), by the risk that the same losses may be used twice and more generally by the balanced allocation of taxing powers.

12. The case law of the Court of Justice in this area seeks to reconcile concern for the principle of ability to pay and the interest of a State in protecting its tax base. The concept of the balanced allocation of taxing powers places some emphasis on the latter aspect and reflects the concept that profits should be taxed in the State where they are earned. Free movement rights should not compromise that balance by allowing companies to choose where to be taxed.

13. The reasoning developed by the Court of Justice in Case C 446/03 Marks & Spencer is just as relevant in a system of group contributions as it is in a simple loss transfer system: the issue of proportionality presents itself in the same manner. This is what your Court decided in the Yara-case [2].

14. In Marks & Spencer, the Court of Justice held that refusal of group relief for losses suffered by non-resident subsidiaries could be justified by three elements: the balanced allocation of taxing powers, the possible double use of losses and the risk of tax avoidance. On the issue of proportionality, the Court resolved the tension between the interest in ensuring equal treatment of domestic and cross-border

(1) Judgment of 13 September 2017, Yara, case E-15/16, paragraph 55.

(2) Judgment of 13 September 2017, Yara, case E-15/16, paragraph 45.

situations on the one hand and the linked objectives of balanced allocation of taxing powers and the need to prevent tax avoidance on the other by holding that the refusal of group relief went :

> "[...] *beyond what is necessary to attain the essential part of the objectives pursued where:*
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> – *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*
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> – *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." (3)*

15. Following the *Marks & Spencer* judgment, the United Kingdom adapted its legislation on group relief to take account of the opinion of the Court of Justice and the litigation which opposed Marks & Spencer to HMRC continued its course through the English Courts till the UK Supreme Court.

16. In parallel, the European Commission started infringement proceedings against the United Kingdom arguing in essence that its new group relief rules was too restrictive to give a proper implementation of the judgment, in particular of paragraph 55 containing what was referred to as the "no possibilities test". The Commission concluded that the new rules were so restrictive that they make it virtually impossible in practice to benefit from group relief.

17. Independently from the Commission, the United Kingdom Supreme Court also found that the new English legislation was too restrictive to Marks & Spencer's rights under paragraph 55 of the ECJ's judgment. It found in paragraphs 30 and 32 of its judgment of 22 May 2013 in case UKSC 2011/0241 (4) as follows:

> *"30. [...] The approach contended for by HMRC would mean that there would be no realistic chance of satisfying the para 55 conditions at all. It would hardly*

(3) Judgment of 13 December 2005, Marks & Spencer, case C-446/03, EU:C:2005:763, paragraph 55.

(4) UKSC, 22 May 2022, Commissioners for HMRC (Respondent) v. Marks & Spencer plc (Appellant), case 2011/0241, [2013] UKSC 30.

ever be possible, if regard is had only to how matters stood at the end of the relevant accounting period, to exclude entirely the possibility that the losses in question might be utilised in the Member State of the surrendering company [...]".

"32. What M&S was doing can be attributed to the fact that the companies had ceased trading six years earlier, and not to the exercise of an option to choose where to seek relief for the losses that had been incurred. There is no reason to think that what it did must be seen as a threat to the balanced allocation of taxing powers."

18. The Court of Justice however in its judgment in Case C-172/13, Commission vs United Kingdom ([5]), also known as "*Marks & Spencer II*" disagreed with both the Commission and the United Kingdom Supreme Court in their assessment of the new English legislation.

19. The Commission will therefore answer the questions of the Referring Court having regard to the case law of both the Court of Justice and the EFTA-Court as it currently stands.

On questions 1 a) and b), timing of the finality of losses

20. In essence Question 1a) of the referring court concerns the temporal aspects of the assessment whether the losses to be covered by the group contribution are final. The Norwegian court inquires whether the losses cannot be regarded final "*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.*"

21. In other words, the referring court would like to know if the finality of losses has to occur or be ascertained at the end of accounting period in which they were incurred, or whether the losses may become final at a later date, so that a receipt of low amounts of income (i.e. insufficient income to cover the whole amount of losses incurred previously) would not preclude the claim of group contribution for the

(5) Judgment of 3 February 2015, European Commission v United Kingdom, case C-172/13, EU:C:2015:50.

remaining amounts of losses that were not set off against the low income received after the end of accounting period, in which the losses were incurred.

22. The original no possibilities' test in paragraph 55 of Marks & Spencer, i.e. "*where there are no possibilities for those 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*", does not give any indication in that regard.

23. However, the very same issue was the subject of Case C-172/13 Commission v the UK. The UK enacted its legislation implementing the Marks & Spencer ruling by adding "the finality of losses condition" to other conditions for loss surrender. Meeting all the conditions for the relief had to be demonstrated or ascertained immediately after the end of accounting period for which relief was requested (although the relief could have been requested up to 24 months after the end of accounting period).

24. The Commission contended that such timing arrangements make claiming the relief virtually impossible. Nevertheless, this grievance was rejected by the Court of Justice, which took a very narrow interpretation of the factual impossibility of the use of losses:

    "[...], it should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in Marks & Spencer (EU:C:2005:763), 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 (see judgment in A, EU:C:2013:84, paragraphs 53 and 54)" (6).

25. For these reasons, the Commission submits that 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 can be precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

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(6) Judgment of 3 February 2015, European Commission v United Kingdom, case C-172/13, EU:C:2015:50, paragraph 36. Further confirmed notably in Judgments of 12 June 2018, Bevola, case C-650/16, EU:C:2018:424; and of 13 September 2017, Yara, case E-15/16.

On question 2: formal liquidation of the subsidiary

26. Question 2) of the referring court inquires whether the EEA 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 on immediately after the end of the fiscal year for which a deduction is claimed.

27. Again, Marks & Spencer no possibilities' test does not literally specify whether a formal decision to liquidate the loss-making group member could be required as a prerequisite of "finality of losses". However, the matter was partly analysed in case C-172/13 Commission v the UK, where the CJEU found that:

> *"Referring to a specific example of a resident parent company which obtained cross-border group relief, the United Kingdom confirmed 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 (EU:C:2005:763), 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 ([7])."*

28. For these reasons, the Commission submits that 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.

([7]) Judgment of 3 February 2015, European Commission v United Kingdom, case C-172/13, EU:C:2015:50, paragraph 37.

4. CONCLUSION

29. In the light of the foregoing, the Commission considers that the questions referred to the EFTA-Court for an advisory opinion by the Borgarting lagmannsrett (Borgarting Court of Appeal) should be answered as follows:

> It is compatible with Articles 31 and 34 of the EEA Agreement to require that 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.
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> 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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