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WRITTEN OBSERVATIONS

BY

EXXONMOBIL HOLDING NORWAY AS

Represented by Hugo P. Matre, lawyer at Advokatfirmaet Schjødt AS, submitted pursuant to Article 20 of the Statute of the EFTA Court, in

Case E-7/23-3 - ExxonMobil Holding Norway AS v. Staten v/Skatteetaten

Concerning a request for preliminary ruling from Borgarting lagmannsrett (Borgarting Court of Appeal).

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1. INTRODUCTION

(1) The request for preliminary ruling concerns interpretation of freedom of establishment in Articles 31 and 34 EEA, in the context of national rules on taxation. The referral for a preliminary ruling originates from proceedings between ExxonMobil Holding Norway AS ("EMHN") and the Norwegian State in a case concerning the validity of the Tax Appeal Board's decision of 18. December 2014. In that decision, the Tax Appeal Board rejected the plaintiff's claim for full deduction for the cross-border group contribution of NOK 900 000 000 made to the subsidiary ExxonMobil Danmark ApS ("EMD") in the fiscal year 2012.

(2) It is undisputed that EMD does not satisfy the conditions for deductions in the Norwegian Tax Act Section 10-4, as EMD is not a Norwegian company/resident in Norway and only companies that are liable to tax in Norway can give and receive group contributions with tax effect. The parties disagree as to whether the conditions in "the Marks & Spencer exception" are met, cf. Case - 446/03 and subsequent case law, that is to say, whether EMD has sustained "final losses" (Norwegian: "endelig tap", or in the newly adapted Norwegian Tax Law Section 10-5 "endelig underskudd").

(3) With reference to the appeal and the written observations submitted to Borgarting Court of Appeal ahead of the court's request for a preliminary ruling, EMHN submits that on the basis of case law of the ECJ and the EFTA Court, occurrence of "minimal income" will preclude the right to deduct "final losses" only if the income is suitable for creating uncertainty as to whether the company at any time may utilize the losses which is deducted, cf. Case C-172/13 *Marks & Spencer II* paragraph 36. The Norwegian State has taken a categorical position and claims that the "final losses" exception is always precluded where a subsidiary is in receipt of even a minimal income in the fiscal year following the year for which a deduction is claimed. EMHN upholds that such an interpretation will entail that the Marks & Spencer exception will no longer serve its purpose and the objective pursued by the exception will be unattainable, since it will not be possible for a Norwegian undertaking to satisfy the condition. As the Norwegian rules for tax-related profit equalization through group contributions require a transfer of value, there will in practice always be a positive income in the hands of the recipient, at least in the form of interest on funds received. The decisive factor must be that it may still - as in this case - be certain that the part of the recipient's loss suffered for which the deduction is claimed has been finally lost. The Norwegian State's claim that a deduction should be refused even when it is certain that the part of the loss for which a deduction is claimed is a final loss suffered. This will effectively discriminate undertakings with subsidiaries domiciled in other EEA-countries and undermine the legitimate interests and purpose behind the group contribution rules and the Marks & Spencer exception.

(4) The legitimate interests which exist in connection with the group contribution rules and their protection under the prohibition against discrimination deriving from the freedom of establishment was emphasized by the EFTA Court in their recent preliminary ruling in Case E-3/21, which was applied by the Borgarting Appeals court in case LB-2023-34315. EMHN will in the following provide reasoning on why the decision supports the view that it would be contrary to freedom of establishment in Articles 31 and 34 EEA to apply Norwegian State's categorical interpretation of "final loss"/the Marks & Spencer exception.

2. CASE E-3/21 - PRA GROUP EUROPE AS V. THE NORWEGIAN STATE

(5) The Case E-3/21 concerned the Tax Appeal Board's decision of 24 July 2020 to reject PRA Group Europe AS' claim for full deduction for debt interest on a loan from its parents with reference to the interest limitation rule in Section 6-41 of the Norwegian Tax Act. The question was whether the interest limitation rule, combined with the group contribution rules in the

Norwegian Tax Act Section 10-2 to 10-4, constituted an illegal restriction on the right to establishment, cf. EEA Agreement Article 31.

(6) The EFTA Court concluded that the two rules together constituted a restriction on the freedom of establishment EEA Article 31, cf. paragraph 37. The EFTA Court also found that the restriction could not be justified in the need for a balanced allocation of the power to impose taxes between the Member States and/or the need to prevent tax avoidance, cf. paragraph 49.

(7) Even though the decision does not provide direct precedence for our case as it concerns the right of interest deduction combined with the Norwegian group contribution rules, it provides some guidance on the group contribution rules' legitimate basis and protection under the freedom of establishment. The EFTA Court acknowledges the legitimate business interests underlying the group contribution rules and states in paragraph 26 that they are:

> *intended to support taxation neutrality between undertakings that organise their business operations through departments in a company, and undertakings that organise their operations through several companies in a group. To apply the group contribution rules, the transferor and the recipient must both be Norwegian companies and must belong to the same group. Such a transfer will increase the recipient company's EBITDA and thus increase its maximum deduction under the limited interest deduction rules, whilst the transferor's maximum deduction will undergo an equivalent reduction. This, in turn, will increase the recipient company's ability to incur debt and pay interest to other group companies without being subject to the limited interest deduction rules. Conversely, a Norwegian tax-resident company in a group of companies liable to taxation in other EEA States, will not be able to similarly escape (or lessen the impact of) the limited interest deduction rules by providing a group contribution to a group company liable to taxation in another EEA State.*

(8) The EFTA Court then goes on in paragraph 29 to point out the benefits stemming from the group contribution rules are relevant in relation to the freedom of establishment in EEA Article 31:

> *A scheme such as that at issue in the main proceedings, resulting from the combination of the limited interest deduction rules and the group contribution rules, is liable to restrict companies' exercise of the freedom of establishment. In particular, Norwegian companies which form part of a group with companies in other EEA States, and which wish to take out an intra-group loan, are precluded from neutralising or reducing the impact of the limited interest deduction rules. Such companies are therefore placed at a disadvantage vis-à-vis companies in groups where all companies are established in Norway.*

(9) The EFTA Court then concludes in paragraph 37 that:

> *Article 31 EEA, read in conjunction with Article 34 EEA, must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, constitutes a restriction on the freedom of establishment where a company liable to taxation in Norway may, by using group contribution rules, lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies, provided it is in a group with other companies liable to taxation in Norway, whereas this is not possible if it is in a group with companies liable to taxation in other EEA States.*

(10) Restrictions can generally not go beyond what is necessary to attain the legitimate purpose. The EFTA Court comments on this limitation when considering measures to counter tax avoidance and evasion in paragraph 49:

> *With respect to the fight against tax avoidance and evasion, the Court recalls that the need to prevent a loss of tax revenue is not a matter of overriding general interest that would justify a restriction on a freedom guaranteed by the EEA Agreement. However, a national measure restricting the right of establishment for the purposes of preventing tax avoidance may be justified, provided it specifically targets wholly artificial arrangements which do not reflect economic reality, and it is appropriate to secure the attainment of this objective and does not go beyond what is necessary to attain it (see Joined Cases E-3/13 and E-20/13 Fred. Olsen and Others [2014] EFTA Ct. Rep. 400, paragraph 166, and Yara, cited above, paragraph 37).*

(11) To refuse deductions for group contributions, when it is clear that the share of the deficit for which deductions are claimed is a final loss suffered, is disproportionate and goes beyond the right to introduce restrictions.

(12) It is important to note that neither the EFTA Court in Case E-3/21 or the Borgarting Court of Appeal in LB-2023-34315 assess the existence or scope of the Marks & Spencer exception. However, the quoted statements show that the Norwegian group contribution rules, and the leeway they give a business group, according to the circumstances constitutes a legitimate interest which is protected by the freedom of establishment and the corresponding protection against national discrimination. If the Norwegian State's categorical interpretation is applied, where "the door is closed" for granting deductions for group contributions in cross-border situations even if it is clear that the loss for which a deduction is claimed has been finally suffered, while such deductions are allowed for entirely domestic situations, this will remove the protection cross-border group contributions has under Article 31 according to the Marks & Spencer exception and undermine the purpose and effectiveness of the provision as it would make it less attractive for Norwegian companies to establish subsidiaries in other EEA-states.

(13) After considering the EFTA Court's judgment in Case E-3/21, the Borgarting Court of Appeal concluded that the cooperation between the Norwegian group contribution rules and the limitations in the right to deduct interest was an illegal restriction on the freedom of establishment and that the Tax Appeal Board's decision in that case was invalid for that reason, cf. LB-2023-34315.

(14) Based on the above EMHN submits that the Marks & Spencer exception must be interpreted in the context of its purpose, which is to provide right to use final losses suffered through cross-border group contributions with tax effect. The occurrence of any "minimal income" will only prevent there being a final loss if the income creates uncertainty as to whether the company that has suffered the loss can or could utilize the part of the loss which is covered by the cross-border group contribution in any other way.

(15) The Norwegian state's interpretation entails that cross-border group contributions are refused even if it is proven that the part of the subsidiary's loss that are utilized through a group contribution has been finally lost. This will undermine the legitimate interest that stems from the recognized possibility to provide cross-border contributions to utilize final losses through the Marks & Spencer exception.

ADVOKATFIRMAET SCHJØDT AS

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