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Opinion

In Case E-7/23

concerning the request referred to the EFTA Court by Borgarting Court of Appeal (*Borgarting lagmannsrett*, Norway) by Decision of 20 June 2023, in the case pending before it between

ExxonMobil Holding Norway AS

and

the Norwegian Government, represented by the Tax Administration,

we submit the following comments on behalf of the Federal Republic of Germany, as evidenced in the authorisation attached:

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A. INTRODUCTION

1 The request referred by the *Borgarting Court of Appeal* (Norway) concerns the interpretation of Article 31, read in conjunction with Article 34, of the Agreement on the European Economic Area ("EEA Agreement") on the freedom of establishment, with respect to the entitlement to claim a deduction for cross-border group contributions in accordance with the case-law of the Court of Justice of the European Union ("the CJEU") in the Marks & Spencer case,[1] for the purposes of deducting final losses sustained by foreign subsidiaries.

2 The request has been made in proceedings between ExxonMobil Holding Norway AS ("the appellant") on the one hand, and the Norwegian Government, represented by the Tax Administration ("the Tax Administration") on the other hand. The appellant, which is domiciled in Norway, is claiming the deduction of a group contribution which it made to its Denmark-based subsidiary during the fiscal year 2012.

3 The legal framework, the facts of the main proceedings and the referred questions are set out in the request referred by the *Borgarting Court of Appeal* (Norway) of 20 June 2023.

4 With its questions, the *Borgarting Court of Appeal* (Norway) is essentially seeking to ascertain whether "final losses" within the meaning of the Marks & Spencer case-law of the CJEU, which the EFTA Court has also endorsed[2], are present in the case under dispute. Its questions should be considered in light of the fact that, whereas the group contribution made to the Danish subsidiary, which is at issue in the present case, was not deductible under the Norwegian tax rules applicable in the relevant year of 2012, the case-law of the Supreme Court (*Høyesterett*) allowed for the possibility of a deduction on the grounds of the Marks & Spencer case-law.

B. LEGAL ASSESSMENT

5 The Federal Government confines its observations to the question of **whether**, in the present case, Article 31, read in conjunction with Article 34, of the EEA Agreement on the freedom of establishment actually provides for the possibility of deducting cross-

[1] Judgment of the CJEU of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763.

[2] Judgment of 13 September 2005, *E-15/16*.

border group contributions made in cases where a subsidiary has sustained final losses. The Federal Government takes the view that this is not the case. Although the non-deductibility of cross-border group contributions constitutes a limitation on freedom of establishment under the circumstances of the case in the main proceedings, this is nevertheless permissible.

6 In the view of the Federal Government, the question regarding the conditions under which losses sustained by a subsidiary are to be regarded as "final losses" is no longer relevant. Consequently, there is no requirement for a decision on those referred questions which relate to the definition of "final losses".

7 The Federal Government takes the view that the CJEU's case-law concerning the freedom of establishment (Article 49, read in conjunction with Article 54, of the Treaty on the Functioning of the European Union (TFEU)) has developed further in relation to the deductibility of losses sustained in other countries and that the Marks & Spencer case-law regarding the exception allowing for the deduction of losses sustained by foreign subsidiaries in cases where those losses are final is no longer to be applied. The same applies accordingly to the interpretation of Article 31, read in conjunction with Article 34, of the EEA Agreement.

8 With its **judgment of 22 September 2022 in the case of *W*,**[3] the **CJEU** has just recently confirmed its decision on the (non-)taking into account of final losses incurred by a foreign permanent establishment in cases where the exemption method has been agreed upon in the applicable double taxation agreement (DTA).[4] According to that judgment, the freedom of establishment (Articles 49 and 54 TFEU) does not require foreign losses to be taken into account if the member state concerned has waived the right to tax foreign permanent establishments under the terms of a DTA.

I. Situations are not objectively comparable

9 The CJEU based its decision on the fact that, in cases where the taxing rights had been waived in the underlying DTA – in the light of the objective of preventing the double

[3] Judgment of the CJEU of 22 September 2022, *W*, C-538/20, EU:C:2022:717.

[4] See, in particular, judgment of the CJEU of 17 December 2015, *Timac Agro Deutschland*, C-388/14, EU:C:2015:829.

taxation of profits and, symmetrically, the double taking into account of losses – the necessary comparability of the factual circumstances (in that case, companies with foreign permanent establishments and companies with domestic permanent establishments) that is required for a violation of the fundamental freedoms to exist was already lacking.[5]

10 According to that decision, there is therefore no obligation for the state in which a company is based to import the losses of a foreign permanent establishment in cases where an exemption is provided for under a DTA. The above applies irrespectively of whether those losses are current losses or the "final losses" of the permanent establishment.

11 In the present case of a foreign subsidiary, in comparison with the losses of a domestic subsidiary, no other rule can apply in the context of provisions governing the deduction of group contributions. This is because the conditions laid down in the Norwegian tax provisions (applicable in the relevant year of 2012), which provide that, in cases where a recipient of a group contribution is domiciled in another EEA state, the group contribution for that recipient must constitute taxable income in Norway,[6] are clearly intended to preserve the allocation of taxing rights and prevent double deduction of the losses in two states.

12 Subsidiaries are (unlike permanent establishments) independent legal entities and taxpayers which (unlike permanent establishments) are to be excluded in principle from the worldwide income of the parent company. States do not generally exercise any taxing rights over the foreign subsidiaries of domestic parent companies. That is confirmed by the first sentence of Article 7 (1) of the OECD Model Convention, which provides that the profits of an enterprise of a contracting state are to be taxable only in that state (with the exception of profits that are attributable to a foreign permanent establishment).

13 The Federal Government therefore assumes that, in the main proceedings, Norway does not exercise any taxing rights over the appellant's Danish subsidiary EMD.

[5] See Judgment of the CJEU of 22 September 2022, *W*, C-538/20, EU:C:2022:717, paragraph 22.

[6] See Chapter 10 Section 10-4 paragraph 2 of the Norwegian Tax Act.

14 In accordance with the CJEU´s judgment of 22 September 2022, domestic parent companies with foreign subsidiaries are likewise not in an objectively comparable situation to domestic parent companies with domestic subsidiaries. A violation of the freedom of establishment is therefore ruled out.

15 As with the application of the exemption method under a DTA for foreign permanent establishments, the freedom of establishment therefore **does not make it necessary – even more so with regard to rules governing the deductibility of group contributions – to import foreign losses sustained within the tax jurisdiction of another state**.

16 That finding was also affirmed by the judgment recently handed down by the CJEU in *VP Capital.*[7] In that judgment, the CJEU held that the taxation of recoveries of write-downs on shares in companies by the state of destination (host member state) – without taking into account the losses previously sustained in the exit state (member state of origin) – does not constitute a violation of the freedom of establishment. In the Court's opinion, there was a difference in treatment vis-à-vis domestic companies, in respect of which write-downs are generally not deductible and the subsequent recovery of those write-downs is exempt from taxation.[8] However, in that case, as in its prior judgment in *AURES Holdings,*[9] the CJEU also held that the situations of companies that have moved their registered office and (at the time of recording the write-downs) resident companies were not objectively comparable from the perspective of tax jurisdiction / allocation of taxing rights.[10]

17 In this recent judgment too, the CJEU maintains its case-law, which provides that the tax jurisdiction of a member state is of pivotal importance for the purposes of ascertaining the objective comparability of the situations and that a member state is not required to take account of the losses sustained in the tax jurisdiction of another member state. This can now be regarded as established CJEU case-law.

[7] Judgment of the CJEU of 10 November 2022, *VP Capital*, C-414/21, EU:C:2022:871.

[8] See judgment of the CJEU of 10 November 2022, *VP Capital*, C-414/21, EU:C:2022:871, paragraphs 20 to 22.

[9] Judgment of the CJEU of 27 February 2020, *AURES Holdings*, C-405/18, EU:C:2020: 127.

[10] See judgment of the CJEU of 10 November 2022, *VP Capital*, C-414/21, EU:C:2022:871, paragraphs 23 et seq.

II. In the alternative: Justification based on overriding reasons relating to the public interest

18 Furthermore, any limitation on the freedom of establishment would also be justified on the basis of overriding reasons relating to the public interest – particularly to preserve the allocation of taxing rights between member states, as well as to ensure coherence and to prevent losses from being taken into account twice.

19 It should be pointed out, also with regard to this ground of justification, that the CJEU has further developed its case-law since the judgment in *Marks & Spencer*[11] and has **independently** examined this **grounds of justification**.[12]

20 The CJEU recognises that the **preservation of the allocation of taxing rights** between member states may make it necessary to apply to the economic activities of companies established in one of those states only the tax rules of that state in respect of both profits and losses.[13] The Norwegian rules applicable in the relevant year of 2012 also follow that approach.

21 The non-deductibility of group contributions made to subsidiaries that are subject to the tax jurisdiction of another state also serves to ensure the **coherence of the tax system**.

22 The ground of justification based on coherence of the tax system requires that there must be proof of a direct link between the tax advantage and its offsetting by means of a specific tax burden.[14] The correlation which, according to the case-law of the Court, is necessary for that direct link to be established[15] is present in the case at issue, since the non-taking into account of cross-border group contributions reflects a logical symmetry, complementing the non-taxation of the foreign subsidiary and the group

[11] Judgment of the CJEU of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763.

[12] See judgment of the CJEU of 4 July 2018, *NN*, C-28/17, EU:C:2018:526, paragraphs 41 et seq.

[13] See judgment of the CJEU of 21 December 2016, *Masco Denmark and Damixa*, C-593/14, EU:C:2016:984, paragraph 36; judgment of the CJEU of 21 February 2013, *A Oy*, C-123/11, EU:C:2013:84, paragraph 42; judgment of the CJEU of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 45.

[14] See, for example, the judgment of the CJEU of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt Wannsee*, C-157/07, EU:C:2008:588, paragraph 42 et seq.

[15] In this respect, see judgment of the CJEU of 22 January 2009, *STEKO Industriemontage*, C-377/07, EU:C:2009:29, paragraph 53.

contribution received from that subsidiary. The rules governing the deductibility or non-deductibility of group contributions under Norwegian law (as applicable in the relevant year) are thus fully symmetrical.

23 In that regard, the CJEU has itself stated that the fundamental freedoms do not require a member state to exercise its taxation powers asymmetrically, so as to permit the deduction of losses from operations whose results, if they were positive, would not in any event be taxed.[16] Accordingly, the non-taxation of foreign subsidiaries and the corresponding non-deductibility of group contributions made to those subsidiaries is also justified by the objective of preserving the coherence of the tax system.

24 Furthermore, the non-deductibility of group contributions paid to foreign subsidiaries clearly also serves the objective of preventing a double deduction of losses.

25 With regard to the – independent – justification grounds of preserving the allocation of taxing rights and the coherence of the tax system, the Federal Government takes the view that the non-deductibility of group contributions made in order to compensate losses sustained by foreign subsidiaries does not – even in the case of "final" losses – go beyond what is necessary, as otherwise the pursued objectives would be completely unattainable in that respect.

26 Hence, the non-deductibility of the losses at issue in the present case would in any case – even if they are "final losses" – be justified in order to preserve the allocation of taxing rights and to ensure the coherence of the Norwegian tax system.

[16] See judgment of the CJEU of 22 February 2018, *X*, C-398/16 and C-398/16, EU:C:2018:110, paragraph 58.

C. CONCLUSION

27 The Federal Government is therefore of the opinion that the referred questions are to be answered as follows:

> Article 31, read in conjunction with Article 34, of the EEA Agreement on the freedom of establishment does not preclude a national rule, such as the rule at issue in the present case, according to which cross-border group contributions made to subsidiaries residing in another EEA state are non-deductible even if they are final losses.