JUDGMENT OF THE COURT

13 September 2017[*]

(*Freedom of establishment – Articles 31 and 34 EEA – Necessity – National rules on intra-group contributions – Balanced allocation of taxation powers – Final loss exception – Risk of tax avoidance – Wholly artificial arrangement – Prohibition of abuse of rights*)

In Case E-15/16,

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in a case pending before it between

Yara International ASA

and

The Norwegian Government

concerning the interpretation of Article 31 of the Agreement on the European Economic Area in the context of national rules on intra-group contributions,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Per Christiansen, and Ása Ólafsdóttir (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

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[*] Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- Yara International ASA (“Yara”), represented by Øyvind Hovland, advocate;
- the Norwegian Government, represented by the Ministry of Finance, represented by Pål Wennerås, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Finnish Government, represented by Sami Hartikainen, legal counsellor, Ministry of Foreign Affairs, acting as Agent;
- the United Kingdom Government, represented by David Robertson, member of the Government Legal Department, acting as Agent, and Malcolm Birdling, Barrister;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler and Maria Moustakali, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Richard Lyal and Wim Roels, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Yara, represented by Øyvind Hovland; the Norwegian Government, represented by Pål Wennerås; the Finnish Government, represented by Sami Hartikainen; ESA, represented by Maria Moustakali; and the Commission, represented by Richard Lyal, at the hearing on 6 April 2017,

gives the following

Judgment

I Legal background

EEA law

1 Article 31(1) of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

> *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 Article 34 EEA reads:

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.

National law

3 Section 8-5 of the Act of 13 June 1997 No 45 relating to Public Limited Liability Companies (*lov om allmennaksjeselskaper*) and Section 8-5 of the Act of 13 June 1997 No 44 relating to Limited Liability Companies (*lov om aksjeselskaper*) allow a company to distribute contributions to other companies in the same group (i.e. group contributions).

4 Sections 10-2 to 10-4 of the Act of 26 March 1999 No 14 relating to taxation of wealth and income (*lov om skatt av formue og inntekt*) ("the Taxation Act") entitle undertakings under certain conditions to claim a deduction, in connection with the tax assessment of their income, for group contributions. The provisions read as follows:

Section 10-2. Deduction for group contributions

(1) 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 Limited Liability Companies Act and the Public Limited Liability Companies Act. Equivalent companies and associations may claim a deduction for a group contribution to the same extent as 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.

(2) A deduction may not be claimed from income that is taxed pursuant to the rules of the Petroleum Taxation Act. 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.

Section 10-3. Tax liability for group contributions received.

(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 of Sections 10-10 to 10-13.

Section 10-4. Conditions for entitlement to pay and receive group contributions

(1) The transferor and recipient must be Norwegian companies or associations. Limited liability companies and public limited liability companies must belong to the same group, cf. Section 1-3 of the 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, cf. Section 4-26 of the 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 paid by and 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 Section 2-3 first paragraph (b) above or Section 2, cf. Section 1, of the Petroleum Act; 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.

5 According to the referring court, the provisions on group contributions in Sections 10-2 to 10-4 of the Taxation Act establish a regime that ensures tax neutrality within a taxable group of companies. Under Section 10-2 of the Taxation Act, the transferor may claim a deduction in connection with its income tax assessment for a group contribution as long as the contribution is within the undertaking's taxable general income. On the other hand, according to Section 10-3 of the Taxation Act, the group contribution becomes taxable income for the recipient. This means that the system is based on taxation symmetry. A fundamental condition under Section 10-4 of the Taxation Act is that both the transferor and the recipient are liable to taxation in the realm.

6 The referring court adds that the rules on group contributions pursue two objectives. First, they are intended to facilitate taxation of a group's net income so that profit can be transferred to companies with a tax-deductible loss. Such transfers will entail that a tax-deductible loss in one company will reduce the taxable profit in another company in the same group. This is known as intra-group tax equalisation. Second, there may be a need to make intra-group financial transfers, that is, pure value transfers within a group, for purposes other than tax equalisation. This allows for reserves to be built up in one or more companies in a group according to what is expedient at any point in time based on development plans and funding needs. When a group contribution is paid between two companies in the group that both operate with a profit, the transferor will be granted a deduction for the group contribution while the recipient will be taxed for the group contribution.

7 Furthermore, since the purpose of the rules on group contributions extends to facilitating value transfers within a group, pursuant to Section 10-2 of the Taxation Act, the deductibility of group contributions applies whether or not the recipient has made a tax-deductible loss.

II Facts and procedure

Introduction

8 Yara is a company incorporated and registered in Norway. It is domiciled in Norway for tax purposes. It is the parent company of a group ("the Yara group") with several subsidiaries in Norway and other countries.

9 The Yara group acquired the company UAB Lietuva in 2007. The acquisition was made through Yara Suomi Oy, a wholly-owned Finnish subsidiary of Yara, which bought the Finnish company Kemira GrowHow Oy, which was the owner of UAB Lietuva. UAB Lietuva was domiciled in Lithuania for tax purposes. After having become a part of the Yara group, the company changed its name to UAB Yara Lietuva ("UAB").

10 On 28 April 2009, UAB and AB Lifosa entered into an agreement for the sale and purchase of the entire business of UAB for a nominal amount of LTL 1. As at 31 December 2009, UAB had a tax loss carry-forward of approximately NOK 177 million.

11 On 14 December 2009, Yara bought all the shares in UAB from Yara Suomi Oy. UAB thus became a directly owned subsidiary of Yara.

12 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 the 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. According to the referring court, Yara claims that a part of the group contribution was used to repay debt, while the remaining amount of approximately EUR 6.4 million was deposited in a group account held by the Yara group.

13 On 29 January 2010, a decision was taken to liquidate UAB and it was struck off the local companies' register on 12 April 2012.

The dispute at issue

14 In its tax returns for the income year of 2009, Yara claimed a tax deduction for its group contribution to UAB in the amount of NOK 132 758 144, corresponding to EUR 16 million. However, in its tax assessment for 2009, Yara was denied deduction of the group contribution, with reference to Sections 10-2 to 10-4 of the Taxation Act as 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. That decision was upheld by the Norwegian Central Tax Office for Large Enterprises in a decision of 20 June 2011, a result that was subsequently confirmed in a decision of 29 November 2013 by the Tax Appeals Board.

15 On 27 May 2014, Yara filed an application with Oslo District Court (*Oslo tingrett*), claiming that the company should be granted a deduction for the group contribution it had paid to UAB in the amount of NOK 132 758 144. It also claimed repayment of the corresponding reduction in income tax for the income year of 2009 for a total of NOK 37 172 280 with the addition of interest on overdue payment. On 17 December 2015, Oslo District Court handed down a judgment in favour of the Norwegian Government, basing itself, inter alia, on the judgment of the Court of Justice of the European Union ("ECJ") in *Oy AA*, C-231/05, EU:C:2007:439. The Tax Appeals Board's decision of 29 November

2013 was regarded as valid and the Norwegian Government was held to have acted lawfully.

16 On 28 January 2016, Yara brought an appeal against the District Court's judgment before Borgarting Court of Appeal, which on 27 September 2016 submitted the following question to the Court:

> *Is it compatible with Articles 31 and 34 EEA that 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, lay down the condition that both the transferor and the recipient are liable to taxation in the EEA State in question, or must the EEA rules be interpreted to mean that, on certain conditions, an exception must be granted from the requirement for tax liability in the realm?*

17 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

18 The oral hearing was held on 6 April 2017. Since Judge Páll Hreinsson was prevented from sitting after the closure of the oral procedure, the case was reassigned to President Carl Baudenbacher as Judge-Rapporteur. By letter of 8 May 2017, the Court informed the parties and those who had participated in the oral hearing that an ad hoc Judge would be appointed in accordance with Article 30(4) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice to replace Judge Hreinsson and to complete the Court. In the same letter, the parties and participants of the hearing were given the opportunity until 12 May 2017 to request the reopening of the oral procedure. By letters of 12 May 2017, ESA and the Norwegian Government informed the Court that they would not request to be heard again, whereas Yara, the Finnish and United Kingdom Governments and the Commission did not respond within the deadline. Accordingly, on 16 May 2017, the Court informed the parties and the participants of the hearing that it had appointed Ása Ólafsdóttir to act as an ad hoc Judge in the present case and that it had decided to proceed to judgment without reopening the oral procedure.

III Answer of the Court

Preliminary remarks

19 According to the referring court, the parties agree that the condition in Section 10-4 of the Taxation Act concerning liability to taxation in the realm constitutes a restriction under Article 31 EEA. The parties also agree that this condition may be justified by overriding

reasons in the public interest and that the requirement is appropriate to attain that legitimate objective. However, the parties disagree on the extent to which this condition is necessary in order to attain that objective. This position of the parties was confirmed in their written observations submitted to the Court, and at the oral hearing.

Observations submitted to the Court

20 *Yara* submits that the sole purpose of its group contribution to UAB was to obtain group relief of the losses sustained by UAB against Yara's taxable income. Yara acknowledges that the relevant national rules can be justified by the objectives of protecting a balanced allocation of the power to impose taxes between different EEA States, the avoidance of double use of the same tax losses and the prevention of tax avoidance, taken as a whole. Norwegian legislation, however, goes beyond what is necessary to attain those three objectives. National law must therefore be interpreted to take account of definite losses sustained by subsidiaries in other EEA States (reference is made to the judgment in *Commission* v *United Kingdom*, C-172/13, EU:C:2015:50, paragraphs 26 and 27).

21 Yara contends further that the case law of the ECJ on "the final loss exception" covers the situation of the present proceedings (reference is made to the judgment in *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraphs 27, 32, 55 and 56). This is supported by the purpose and context of the exception along with the fact that, according to established case law, when interpreting the case law of the ECJ, particularly Grand Chamber judgments, the wording is of utmost importance. Yara maintains that its actions and those of its subsidiary reflect genuine business decisions and were therefore not apt to undermine a balanced allocation of the power to impose taxes between the EEA States. The ECJ's *Oy AA* judgment is not relevant to the present proceedings as there was no scope in that case for testing the final loss exception, since the case concerned financial transfers and not tax consolidation of profits and losses within a group (reference is made to the judgment in *Oy AA*, cited above, paragraphs 12, 13, 16 and 17). Yara concludes that a complete refusal of loss-relief for a non-resident subsidiary in a situation such as the present does not satisfy the principle of proportionality.

22 At the oral hearing, Yara maintained that no further profits were generated, and that the case merely concerned the tax consolidation of losses. Upon a question from the bench, however, Yara acknowledged that UAB obtained income, in the form of interest, from the EUR 6.4 million, which was deposited in a group account held by the Yara group. Yara's lawyer confirmed that this "cash pool" allowed the investment "to earn passive loan interest income".

23 The *Norwegian Government* contends that, in determining the necessity of the restriction at issue in the present case, the result should depend on the relevant model of taxation. The ECJ has held that, in a system of intra-group financial transfers, to require the transferor and transferee to be resident in the same Member State is proportionate to the objectives

of safeguarding a balanced allocation of taxation and preventing tax avoidance. The Norwegian Government does not dispute that an intra-group financial transfer system may be used to the same effect as a group relief system. Nonetheless, certain features of intra-group financial transfer systems have led the ECJ to view the proportionality of such schemes differently from those limited to the deduction of losses. The Norwegian Government argues that the final loss exception is delimited by cumulative and strict conditions. In addition, the ECJ has refrained from the analogous use of this exception for final loss in relation to tax systems that do not concern deduction of losses.

24 According to the Norwegian Government, there is a consistent and distinct ECJ line of case law concerning the cross-border transfer of profits generated through an activity undertaken on the territory of the Member State in question, which demonstrates that companies do not enjoy a right to choose freely where their profits are taxed. Such a right would undermine the system of allocation of the power to tax between Member States. Furthermore, the judgment in *Oy AA* shows that a system of intra-group financial transfers raises issues parallel to the distribution of profits to shareholders. The Norwegian Government objects to Yara's attempts to distinguish the present proceedings from the judgment in *Oy AA* on factual grounds.

25 At the oral hearing, the Norwegian Government contended that UAB's entire business was sold to a third party in 2009, except for the losses, preventing any possibility for a third party to use them, and hence precluding the application of the final loss exception. In addition, the Norwegian Government observed that the Yara group subsequently bought the shares in UAB from its subsidiary in Finland, Yara Suomi Oy, and proceeded to make a group contribution to UAB. According to the Norwegian Government, this constituted a wholly artificial arrangement, made in order to gain a tax advantage.

26 According to the *Finnish Government*, the relevant Norwegian legislation which is at stake in the present proceedings is similar to the Finnish legislation that was addressed in *Oy AA*. From a legal and practical point of view, such tax systems differ from the tax system that was addressed in *Marks & Spencer*. Since the relevant facts of the present proceedings are the same as in *Oy AA*, the question referred should be answered in a similar manner. At the hearing, the Agent for the Finnish Government expressed serious doubts as to the possibility of applying the final loss exception to the facts of the present proceedings, particularly since UAB appeared to have been in a position in which it could have had at least some amount of income.

27 The *United Kingdom Government* argues that a restriction on the freedom of establishment is permissible in the present case because the Norwegian Government does not exercise any taxing rights over UAB (reference is made to the judgment in *Timac Agro Deutschland*, C-388/14, EU:C:2015:829, paragraphs 63 and 64). Yara's contributions to UAB are, for this reason, not objectively comparable to contributions made to a domestic permanent establishment. Therefore, the restriction on the freedom of establishment is permissible.

With regard to the final loss exception, the United Kingdom Government maintains that the national court should consider whether UAB had a definitive loss at the time immediately after the end of the final accounting period of trading. The national court would be unable to reach such a conclusion if, at that time, UAB continued to be in receipt of any income, no matter how minimal. In this regard, the United Kingdom Government notes that, according to the referring court, the group contribution to UAB was not all used to discharge debt.

28 *ESA* submits that national rules such as the relevant provisions of the Norwegian Taxation Act constitute a restriction under Articles 31 and 34 EEA, which may be justified by the balanced allocation of taxation powers between the EEA States. The application of those rules in the main proceedings appears proportionate, as the losses in question do not meet the criteria to be considered final for the purposes of the relevant case law. The starting point for the Court's analysis should be the well-established principle that an EEA State is required to take into account a loss from foreign activity only if it also taxes that activity. Moreover, EEA States are free to adopt or maintain in force rules having the specific purpose of precluding from a tax benefit wholly artificial arrangements, whose purpose is to circumvent or escape national tax law.

29 At the oral hearing, while sustaining that the Norwegian provisions at issue in the present case are in principle identical to the Finnish provisions that were assessed in *Oy AA*, ESA argued that the facts of the two cases remain different since the latter case did not raise the question of the treatment of final loss. In ESA's view, it is, in any event, unnecessary in the present case to draw a structural distinction between the systems of loss relief and intra-group contributions. This follows since a distinction of that kind is not needed for the analysis of the proportionality of the measures. In the present proceedings, there appear to be some hints of a wholly artificial arrangement, although that is a matter for the referring court to assess.

30 The *Commission* concurs with ESA in its assessment that, although the relevant Norwegian rules are essentially identical to the provisions of Finnish law dealt with in the judgment in *Oy AA*, the ECJ did not have to consider the issue of final loss. However, the analysis of proportionality in the present case must focus specifically on the question whether, in a case of final loss, the measure at issue is indeed indispensable to achieve the objective of safeguarding the balanced allocation of taxing rights. In this regard, the reasoning from the judgment in *Marks & Spencer* is just as relevant in a system of group contributions as it is in a simple loss transfer system.

31 The Commission further argues that relief should not be given for a final loss in all cases. Rather, it is necessary to examine generally the circumstances surrounding the acquisition of the subsidiary and the manner in which its losses were incurred. It is also necessary to exercise very close scrutiny of potential tax avoidance and manipulation, for example in cases where a company acquires a foreign loss-making company and liquidates it. In this

regard, the Commission contrasts the situation where a company creates an establishment in another EEA State in order to carry on business there with the situation where a company acquires a foreign loss-making company and liquidates it. In its view, only the former situation should enjoy the protection of Article 31 EEA. The Commission also submits that a company which acquires a foreign subsidiary should not normally be entitled to relief for losses incurred by that subsidiary before its acquisition, since the purchase price paid for the subsidiary will have reflected the existence of the losses. At the hearing, the Agent for the Finnish Government and the Agent for ESA supported this argument.

Findings of the Court

The freedom of establishment and the existence of a restriction

32 As a general rule, the tax system of an EFTA State is not covered by the EEA Agreement. However, EFTA States must exercise their competences in the area of taxation consistently with EEA law (see Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 20 and case law cited).

33 The Yara group has its central administration in Norway and has acquired subsidiaries in Finland and Lithuania. According to Article 34 EEA, legal entities, such as Yara, may rely on Article 31 EEA. It is thus clear that the present case involves the exercise of the freedom of establishment.

34 The freedom of establishment entails a right for companies, formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a branch established there. Even though, according to its wording, Article 31 EEA is intended in particular to secure the benefit of national treatment in a host State, it also prohibits the home State from hindering the establishment in other EEA States of its own nationals or companies incorporated under its legislation (see Case E-8/16 *Netfonds Holding and Others*, judgment of 16 May 2017, not yet reported, paragraph 107 and case law cited).

35 A difference in treatment between resident parent companies according to the seat of their subsidiary companies constitutes an obstacle to the freedom of establishment if it makes it less attractive for resident companies to establish subsidiaries in other EEA States (compare the judgment in *Oy AA*, cited above, paragraph 39 and case law cited).

36 Based on the above, the Court finds that legislation, such as that described in the question referred, constitutes a restriction of Article 31 EEA.

Legitimacy of the aims pursued

37 A national measure which hinders the freedom of establishment laid down in Article 31 EEA can be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, for example, *Netfonds Holding and Others*, cited above, paragraph 112 and case law cited).

38 The objectives of ensuring the effectiveness of fiscal supervision, the need to safeguard the cohesion of the national tax system, preserving the allocation of powers of taxation and symmetry between the EEA States, and preventing tax avoidance constitute overriding requirements in the general interest, capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the EEA Agreement (see Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 48 and case law cited). In addition, the objective of combating tax evasion may justify a measure restricting the exercise of the fundamental freedoms guaranteed by the EEA Agreement (compare the judgment in *Cadbury Schweppes*, C-196/04, EU:C:2006:544, paragraphs 51 and 55). It is for the referring court to identify the objectives which are in fact pursued by the national measures, as well as to determine whether the legitimate aims are pursued in a suitable and consistent manner (see *Netfonds Holding and Others*, cited above, paragraph 116).

39 It is clear from the reference that the main issue at stake is the necessity of the national legislation. The Court must thus analyse the layer of the proportionality test which concerns the necessity of measures, such as those at issue in the present case, to safeguard a legitimate aim.

The issue of necessity and the final loss exception

40 Yara has maintained that the final loss exception is at stake in the present case. This exception entails that, when addressing group relief between a parent company and a subsidiary with fiscal residence in another EEA State, the compensation of final losses can be a reasonable exception to the State's requirement that both parent company and subsidiary are subject to taxation in the realm. In such situations, a refusal to grant group relief goes beyond what is necessary to attain the essential part of the objectives pursued (compare the judgment in *Marks & Spencer*, cited above, paragraph 56).

41 To assess whether a loss is to be considered final, the existence of two conditions must be verified. First, the non-resident subsidiary must have 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. Second, there must be 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 (compare the judgment in *Commission* v *United Kingdom*, cited above, paragraph 26 and case law cited).

42 If these conditions are fulfilled, it is contrary to the freedom of establishment to preclude the possibility for the parent company to deduct from its taxable profits in that EEA State the losses incurred by its non-resident subsidiary (compare the judgment in *Marks & Spencer*, cited above, paragraph 56).

43 Yara argues that this is the case with the group contribution at issue, maintaining that its directly owned subsidiary in Lithuania, UAB, had ceased its business, sold all its income producing assets and been put into liquidation. Furthermore, Yara maintained at the oral hearing that the case merely concerned tax consolidation.

44 Yara's group contribution was not all used to discharge debt, with part of it being deposited into a group account. It was confirmed at the oral hearing, however, that UAB continued to receive income in the form of interest. Yara's advocate stated that this "cash pool" allowed the investment "to earn passive loan interest income". The Court notes that the existence of even minimal income precludes the application of the final loss exception (compare, *inter alia*, the judgment in *Commission* v *United Kingdom*, cited above, paragraph 36).

45 The parties have discussed the relevance of the ECJ's judgment in *Oy AA*, cited above, for resolving the case at issue. The Court finds, however, that for an analysis of the proportionality threshold, such as that in question in the present case, it is not necessary to draw a distinction between the system of loss relief, such as the one at issue in *Marks & Spencer*, and the system of intra-group financial contribution, at issue in *Oy AA*. What is essential is that any restriction of the fundamental freedoms must be appropriate to ensure the attainment of a legitimate objective, such as safeguarding the balanced allocation of taxation powers between EEA States, and that it does not go beyond what is necessary to attain that objective (see *Netfonds Holding and Others*, cited above, paragraph 112 and case law cited).

46 It is hence for the national court to assess, on the basis of the criteria mentioned above in paragraphs 41 and 44, and the facts of the case pending before it, whether the resident parent company has effectively demonstrated that its non-resident subsidiary sustained a loss of a definitive nature.

The prohibition of abuse of rights

47 At the oral hearing, both the Norwegian Government and ESA submitted that the purchase of UAB and its subsequent liquidation were made with the sole purpose of gaining a tax advantage, adding that, were such a tax advantage allowed in a cross-border situation, it would lead to the choice of tax jurisdiction and the proliferation of wholly artificial arrangements.

48 The Norwegian Government contended that the order for reference acknowledged that UAB's entire business was sold to a third party in 2009, except for the losses, which would have prevented any possibility for a third party to use them – thus failing to satisfy the conditions for application of the final loss exception. In addition, Yara subsequently bought UAB's shares from its subsidiary in Finland, Yara Suomi Oy, and proceeded to make a group contribution to UAB. The Norwegian Government thus suggested that Yara purchased such losses merely in order to gain a tax advantage.

49 The Court recalls that EEA States remain free to enact rules which have the objective of precluding wholly artificial arrangements leading to tax avoidance (see Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 166). This is a corollary of the prohibition of abuse of rights, an essential feature of EEA law, which aims, inter alia, at preventing companies established in an EEA State from attempting, under cover of the rights created by the EEA Agreement, to circumvent their national legislation, or improperly or fraudulently take advantage of provisions of EEA law (see Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 87).

50 In assessing the fulfilment of the conditions for the application of the final loss exception, the national court must equally take account of this principle, in order to preclude arrangements designed merely to secure a tax advantage and to avoid taxation in an EEA State.

51 It is settled case law that, in order to examine wholly artificial arrangements, national courts must carry out a case-specific examination, taking into account the particular features of each case, in order to assess the abusive or fraudulent conduct of the persons concerned (see *Olsen and Others*, cited above, paragraph 173 and case law cited).

52 Two elements must be considered in this analysis. In addition to a subjective element consisting in the intention of obtaining a tax advantage, the objective circumstances must also attest to the artificial character of the situation. What is decisive is the fact that the activity, from an objective perspective, has no other reasonable explanation but to secure a tax advantage (see *Olsen and Others*, cited above, paragraphs 174 and 175 and case law cited; compare, in particular, the Opinion of Advocate General Poiares Maduro in *Halifax and Others*, C-255/02, EU:C:2005:200, points 70 and 71).

53 At the oral hearing, upon a question from the bench, Yara's advocate confirmed that UAB used the group contribution to pay internal debt to another company within the Yara group, and that the remaining funds were subsequently channelled back to Yara as liquidation proceeds. The Norwegian Government submitted that this explanation made clear that the whole arrangement was tax motivated.

54 Yara's contention that it first bought the Lithuanian subsidiary and then, post acquisition, looked into what it had acquired in more detail and subsequently decided that it no longer wished to operate in Lithuania is not convincing. However, it is for the national court to

determine, in light of the specific circumstances of the case, whether the loss at issue was indeed final, or whether the situation could constitute a wholly artificial arrangement, designed to avoid taxation.

55 In light of the above, the answer to the question referred must be 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, 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.

IV Costs

56 The costs incurred by the Finnish Government, the United Kingdom Government, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by Borgarting Court of Appeal (*Borgarting lagmannsrett*) hereby gives the following Advisory Opinion:

> **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.**

Carl Baudenbacher | Per Christiansen | Ása Ólafsdóttir

Delivered in open court in Luxembourg on 13 September 2017.

Gunnar Selvik
Registrar

Per Christiansen
Acting President