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BORGARTING COURT OF APPEAL (*BORGARTING LAGMANNSRETT*)

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Request for an advisory opinion in Case No 16-038684ASD-BORG/01 between Yara International ASA and the Norwegian Government, represented by the Ministry of Finance

1. Introduction

Pursuant to Section 51a of the Courts of Justice Act and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), Borgarting Court of Appeal requests an Advisory Opinion from the EFTA Court in Case No 16-038684ASD-BORG/01 between Yara International ASA (appellant before Borgarting Court of Appeal) and the Norwegian Government, represented by the Central Tax Office for Large Enterprises (respondent before Borgarting Court of Appeal).

The parties in the appeal case before the Court of Appeal are as follows:

Appellant:	Yara International ASA Drammensveien 131 NO-0277 Oslo
Counsel:	Øyvind Hovland, advokat Ernst & Young TAX Advokatfirma AS P.O. Box 20, NO-0051 Oslo
Respondent:	The Norwegian Government, represented by the Central Tax Office for Large Enterprises P.O. Box 1073 Valaskjold, NO-1705 Sarpsborg
Counsel:	The Attorney General of Civil Affairs represented by Pål Wennerås, advokat P.O. Box 8012 Dep, NO-0030 Oslo

The case concerns the validity of the Tax Appeals Board's decision of 29 November 2013. In that decision, Yara International ASA was refused tax deduction for its group contribution paid to its Lithuanian subsidiary UAB Yara Lietuva. According to the provisions of the Norwegian Taxation Act concerning group contributions, no tax deduction may be granted for group contributions paid by a company liable to taxation in Norway to a company that is not liable to taxation in the realm. The central question in the case is whether the requirement for tax liability in the realm under the Norwegian rules on group contributions is compatible with Article 31 EEA, cf. Article 34.

2. More about the factual background to the case

Yara International ASA is a company incorporated and registered in Norway under organisation number 986 228 608. The company is domiciled in Norway for tax purposes.

Yara International ASA is the parent company of a group with several subsidiaries, both in Norway and abroad.

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

On 28 April 2009, UAB Yara Lietuva and AB Lifosa entered into an agreement on the sale/purchase of the entire business of UAB Yara Lietuva for a nominal amount of 1 Lithuanian litas. As of 31 December 2009, UAB Yara Lietuva had a tax loss carryforward of approximately NOK 177,000,000.

On 14 December 2009, Yara International ASA bought all the shares in UAB Yara Lietuva from its wholly-owned subsidiary Yara Suomi Oy. UAB Yara Lietuva thus became a directly owned subsidiary of Yara International ASA.

On 16 December 2009, an agreement was entered into between Yara International ASA and UAB Yara Lietuva, under which Yara International ASA would pay a group contribution of EUR 16,000,000 (corresponding to NOK 132,758,144) to UAB Yara Lietuva with effect for the income year of 2009. The group contribution was paid in cash on 10 January 2010. The appellant has stated that 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 in the Yara group.

On 29 January 2010, a decision was taken to liquidate UAB Yara Lietuva. A person was appointed to act as liquidator for the company. In addition, UAB Yara Lietuva kept on two employees who, for a time, assisted the liquidator in the liquidation process. The appellant has stated that the decision on liquidation was registered in the local companies registry on 17 February 2010. The company was struck off the register on 12 April 2012.

In the tax returns for the income year of 2009, Yara International ASA claimed tax deduction for its group contribution to UAB Yara Lietuva in the amount of NOK 132,758,144, corresponding to EUR 16,000,000.

In the tax assessment for 2009, Yara International ASA was refused deduction of the group contribution paid to UAB Yara Lietuva, with reference to Sections 10-2 to 10-4 of the Taxation Act. According to the rules on group contributions in the Taxation Act, it is not permitted to pay 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, cf. Section 10-4 of the Taxation Act.

By a letter of 9 November 2010, Yara International ASA filed a complaint against the tax assessment to the Central Tax Office for Large Enterprises. The company argued that the Norwegian rules on group contributions are in conflict with the freedom of establishment under the EEA Agreement, and that, pursuant to the EEA Agreement, Norway is therefore obliged to grant the company entitlement to tax deduction for the group contribution paid to UAB Yara Lietuva as a subsidiary domiciled in the EEA.

In a decision of 20 June 2011, the Central Tax Office for Large Enterprises upheld the tax assessment for 2009.

On 5 July 2011, Yara International ASA appealed the decision of the Central Tax Office for Large Enterprises to the Tax Appeals Board.

In a decision of 29 November 2013, the Tax Appeals Board upheld the decision of the Central Tax Office for Large Enterprises of 20 June 2011.

On 27 May 2014, Yara International ASA filed an application to Oslo District Court (*Oslo tingrett*), claiming that the company be granted a deduction for the group contribution it had paid to UAB Yara Lietuva 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 – a total of NOK 37,172,280 with the addition of interest on overdue payment. The Government, represented by the Central Tax Office for Large Enterprises, refuted in its defence of 27 June 2014 the claim and demanded acquittal.

On 17 December 2015, Oslo District Court gave judgment, the operative part of which reads as follows:

1. The Government, represented by the Central Tax Office for Large Enterprises is acquitted.

2. The Government, represented by the Central Tax Office for Large Enterprises is awarded costs, to be paid by Yara International ASA, in the amount of NOK 119,200 – one-hundred-and-nineteen-thousand-two-hundred-kroner – within 14 – fourteen – days from service of this judgment.

Oslo District Court concluded that the provisions of Section 10-2, cf. Section 10-4, of the Taxation Act are compatible with Article 31 EEA, cf. Article 34, and that Yara International ASA was therefore not entitled to a deduction for the group contribution paid to UAB Yara Lietuva. The District Court considered that the lawfulness of the rules on group contributions followed from the reasoning in the judgment of the Court of Justice of the European Union ("ECJ") in Case C-231/05 Oy AA. The Tax Appeals Board's decision of 29 November 2013 was therefore deemed to be valid and the Government, represented by the Central Tax Office for Large Enterprises, was acquitted.

On 28 January 2016, Yara International ASA appealed the District Court's judgment to Borgarting Court of Appeal. The Government, represented by the Central Tax Office for Large Enterprises, refuted the appeal in its reply of 25 February 2016.

During the preparatory stage of the case, the Court of Appeal has decided to request an advisory opinion from the EFTA Court on the question of EEA law that the case raises.

3. Relevant Norwegian legislation

Sections 10-2 to 10-4 of the Act of 26 March 1999 No 14 relating to taxation of wealth and income (the Taxation Act) entitle undertakings, on certain conditions, to claim deduction, in connection

with the tax assessment of their income, for contributions transferred to other undertakings in the same group (group contributions). The provision reads as follows:

Section 10-2. Deduction for group contributions

(1) Limited liability companies and public limited liability companies may claim deduction in connection with income tax assessment for 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 company and association may claim deduction for 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 group contribution to an undertaking that belongs to the same cooperative federation; see Section 32 of the Act relating to Cooperatives.

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

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. The transferor may claim a deduction in connection with the income tax assessment for group contribution as long as the contribution is within the undertaking's taxable general income, cf. Section 10-2 of the Taxation Act. On the other hand, the group contribution becomes taxable income for the recipient, cf. Section 10-3 of the Taxation Act. This means that the system is based on taxation symmetry. A fundamental condition is that both the transferor and the recipient are liable to taxation in the realm, cf. Section 10-4 of the Taxation Act.

The rules on group contributions pursue two objectives, cf. Proposition No 16 to the Odelsting (1979-80) page 6 ff, and Proposition No 1 to the Odelsting (1999-2000) page 25 ff. First, the rules 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 in reality mean that a tax-deductible loss in one group company will reduce the taxable profit in another group company, known as intra-group tax equalisation. A second reason for the rules on group contributions is that there may exist 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 the possibility of building up reserves in one or more companies in a group according to what is expedient at any time based on development plans and funding needs. When a group contribution is paid between two group companies 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.

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

The distribution of group contributions, which forms part of company law, is regulated by Section 8-5 of the Act of 13 June 1997 No 45 relating to Public Limited Liability Companies (Public Limited Liability Companies Act) and Section 8-5 of the Act of 13 June 1997 No 44 relating to Limited Liability Companies (Limited Liability Companies Act):

Section 8-5. Group contributions

(1) The company may distribute group contributions to other group companies; see Sections 10-2 to 10-4 of the Taxation Act. Undertakings that are part of a group within the meaning of Section 5 of the Act relating to Cooperatives are also treated as group companies.

(2) The provisions of Sections 8-1 to 8-4 apply correspondingly to the distribution of group contributions. The sum total of dividend and group contributions in any one year may not exceed the limit provided for in Section 8-1.

The first paragraph establishes a company law entitlement for a company to distribute group contributions, while the second paragraph specifies the conditions for making such distributions. Group contributions can be paid between all companies within a group, provided that the requirement for ownership interest is met, cf. Section 10-4 first paragraph of the Taxation Act.

A deduction can be claimed in the tax assessment for the year in which the decision applies, even if the decision is not adopted until the following year in connection with the annual accounts.

Decisions on group contributions are usually made with effect for the previous year. The relationship with the company's annual accounts is specifically regulated by Section 8-5 second paragraph of the Limited Liability Companies Act. Pursuant to Section 10-2 first paragraph of the Taxation Act, entitlement to a tax deduction in connection with the income tax assessment is also conditional on the contribution being lawful pursuant to Section 8-5 second paragraph of the Limited Liability Companies Acts. The provision in the second paragraph first sentence entails that both the substantive and formal rules on dividends apply correspondingly to group contributions, cf. Sections 8-1 and 8-4.

The Agreement on the European Economic Area (the EEA Agreement) is made part of Norwegian law by Section 1 of Act No 109 of 27 November 1992 relating to implementation into Norwegian law of the main text of the Agreement on the European Economic Area etc. (the EEA Act). Pursuant to Section 2 of the EEA Act, the EEA Agreement is ranked above general Norwegian law. Therefore, in the event of a conflict between the provisions of the Taxation Act and the EEA Agreement, the EEA Agreement shall take precedence.

4. Grounds for the request for an advisory opinion

The central question in the case is whether the condition in Section 10-4 of the Taxation Act, whereby both the transferor and the recipient of a group contribution must be liable to taxation in Norway for the transferor to be entitled to make a tax deduction, is compatible with the rules on freedom of establishment in Article 31 EEA, cf. Article 34.

The parties agree that the condition in Section 10-4 of the Taxation Act constitutes a restriction in relation to the rules on establishment in Article 31 EEA, cf. Article 34. The parties also agree that the condition concerning liability to taxation in the realm can be justified by an overriding reason in the public interest, namely to ensure a balanced distribution of taxation competence between the EEA States and to prevent tax avoidance, and that the requirement is appropriate to attain these objectives. However, the parties disagree on the extent to which this condition is necessary in order to attain these objectives. The Government, represented by the Central Tax Office for Large Enterprises, is of the opinion that the requirement in Section 10-4 of the Taxation Act is compatible with the EEA Agreement because it is necessary to attain the public interest objectives. On its part, Yara International ASA argues that the Norwegian rules on group contributions go beyond what is necessary, and that an exception must be made for situations in which the recipient of the group contribution is liable to taxation in another EEA State and has suffered a 'final loss'.

As far as the Court of Appeal is aware, there are two ECJ judgments of particular importance in relation to the relevant interpretation of EEA law. These are Case C-446/03 (the 'Marks & Spencer judgment') and Case C-231/05 (the 'Oy AA judgment'). The parties disagree as to what can be derived from these judgments with respect to the central question of interpretation in the present case.

The Marks & Spencer judgment concerned the question of group relief (coverage of loss) from a British parent company to subsidiaries domiciled, for tax purposes, in Belgium, Germany and France. The British rules on group relief made intra-group transfers to cover losses conditional upon both undertakings being liable to taxation in the United Kingdom. The ECJ concluded that this was a restriction on the freedom of establishment that was justified by three overriding reasons in the public interest: (a) the objective of safeguarding a balanced allocation of the power to impose taxes, (b) the objective of preventing losses from being used (deducted) twice and (c) the objective of preventing tax avoidance. The restriction was found appropriate and necessary to attain these objectives, but went beyond what was necessary in cases where the recipient's loss was 'final' and the only possibility of tax utilisation was to transfer it to another undertaking in the group. This

has subsequently been referred to as the 'Marks & Spencer exception' or the 'final loss exception'.

The Oy AA judgment concerned a group contribution from a Finnish subsidiary to a British parent company, and addressed the Finnish rules on intra-group financial transfers. Like the Norwegian rules on group contributions, the Finnish rules on intra-group financial transfers required both the transferor and the recipient of the transfer to be liable to taxation in the State. The ECJ concluded that this requirement entailed a restriction on the freedom of establishment, but that it was justified by overriding reasons in the public interest. The ECJ emphasised in particular the objective of safeguarding a balanced allocation of the power to impose taxes and the objective of preventing tax avoidance. The restriction was found appropriate and necessary to attain these objectives.

The parties agree that the Finnish and Norwegian rules on intra-group contributions are, generally speaking, identical.

The Government, represented by the Central Tax Office for Large Enterprises, is of the opinion that it follows from paragraphs 63 to 65 in the Oy AA judgment that, in order to safeguard a balanced allocation of the power to impose taxes and prevent tax avoidance, deduction for group contribution must be conditional on the companies being liable to taxation in the State. Moreover, the ECJ rejected the claim that the Member States would have to allow for exceptions from such a condition. The provision in Section 10-4 of the Norwegian Taxation Act is therefore compatible with Article 31 EEA, cf. Article 34. It is pointed out that the Marks & Spencer judgment concerned a tax regime based on transfer of loss (group relief), and not a regime based on group contributions that entitle the transferor to deduction, regardless of the loss incurred by the recipient. It is argued that the subsequent Oy AA judgment shows that the Marks & Spencer exception is neither relevant nor applicable to such a group contribution system.

Yara International ASA argues that in the case of the Oy AA judgment, there were neither factual nor legal grounds for considering the Marks & Spencer exception, as it was clear that no 'final loss' situation existed in the case. Hence, it is argued that, in the OY AA judgment, the ECJ did not express an opinion on whether, in the case of rules on group intra-contributions like the Finnish and Norwegian ones, exceptions must be made for situations in which the recipient of the group contribution is liable to taxation in another EEA State and has suffered a 'final loss'. Relying on the Marks & Spencer judgment, it is argued that exceptions for 'final loss' situations must also apply in relation to rules on group contributions like the Norwegian ones.

The Court of Appeal has not found an obvious answer to the question of interpretation and has therefore decided to request an advisory opinion from the EFTA Court.

5. The parties' pleadings concerning EEA law

5.1 Yara International ASA has primarily argued as follows:

It is argued that the restrictive rules on group contributions are disproportionate because Yara International ASA is not granted a deduction in income for the group contribution it has paid to its wholly-owned subsidiary UAB Yara Lietuva, which has incurred a final loss for tax purposes. In order for the question referred to the EFTA Court to be relevant, UAB Yara Lietuva's loss for tax purposes must qualify as a 'final loss' in accordance with paragraphs 55 and 56 in the Marks & Spencer judgment (the 'Marks & Spencer exception').

It is settled EEA law that the rules on freedom of establishment do not give a general right to cross-border tax equalisation within a group. However, it is also settled EEA law that the freedom of establishment entitles to such tax equalisation in exceptional cases where the conditions for the Marks & Spencer exception are met. The Marks & Spencer exception entitles to cross-border tax

equalisation in situations where the recipient subsidiary that incurred the loss has discontinued its business and initiated liquidation, and thus no longer has any practical possibility of utilising the loss, with the consequence that the nature of the loss changes to a 'final loss'.

The Marks & Spencer case concerned the British rules on group relief and the question of tax equalisation between a profitable British parent company and loss-making subsidiaries in France, Germany and Belgium. In the plaintiff's view, the ECJ's reasoning in its assessment of proportionality in Marks & Spencer, which led to the Marks & Spencer exception, must apply correspondingly where the technical implementation of tax equalisation between a profitable parent company and a loss-making subsidiary takes place through the use of a group contribution. The ECJ's reasoning in Marks & Spencer is of a principle nature and thus applicable regardless of the technical method used to achieve tax equalisation within a group of companies.

The Norwegian rules on group contributions are based on the principle of transferring a group contribution between group companies corresponding to the value of the recipient company's loss. On this point, the British rules are more flexible, and British groups may choose whether the profitable group company should pay compensation for the right to utilise the losses of other group companies and, if so, how much. For a presentation of the British rules on group relief, reference is made to the Advocate General's opinion in Case C-80/12 (Felix Stowe).

The objective behind the Norwegian rules on group contributions and the British rules on group relief is to open up for tax equalisation within a group. There are differences in calculation methods and implementation conditions, but both regimes entail discrimination in that they distinguish between residents and non-residents. The similarities between the regimes can, *inter alia*, be illustrated by reference to the European Commission's Communication of 19 December 2006 'Tax Treatment of Losses in Cross-Border Situations' (COM(2006) 824), where it is stressed that, in real terms, there is no difference between the British rules on group relief and the rules on intra-group contributions:

> *'The term "intra-group loss transfer" covers both "group relief" and the "intra-group contribution". Both these types of system allow a definitive transfer of income between companies in order to relieve losses against profits within a group. Under a "group relief" system a loss from one group member can be transferred (or "surrendered") to a profitable group member. Under an "intra-group contribution" system the profits from one group member can be transferred to a loss-making group member. To the extent that the "intra-group contribution" system is used to eliminate losses, it therefore has the same economic effect as a system of "intra-group loss transfer".'*

ECJ case law also indicates that technical differences between the States' national rules are not given decisive weight when assessing the lawfulness of such rules in relation to the freedom of establishment; see paragraphs 50 and 51 in Case C-303/07 (Aberdeen).

Yara International ASA contests that the Oy AA judgment must be interpreted to mean that the freedom of establishment does not warrant application of the Marks & Spencer exception in situations where tax equalisation between a profitable parent company and a loss-making subsidiary is technically implemented through the use of a group contribution. When interpreting the Oy AA case it is important to keep in mind that the ECJ assesses the question that is relevant in the case. The question referred by the Finnish national court was general, regardless of the direction and purpose of the intra-group financial transfer (see paragraph 16 in Oy AA), but the ECJ reformulated and limited the precedence of the judgment by confining the problem to a specific situation that only concerned upstream financial transfers from a subsidiary to a parent company; see paragraphs 16 and 17 in Oy AA. Furthermore, it is stated in paragraphs 12 and 13 in

Oy AA, cf. paragraph 65, that the purpose of the intra-group financial transfer was to secure the financial position of the British parent company, since the business of the British parent company was also important for the Finnish subsidiary. The British parent company had run at a loss in the year that it expected to receive the intra-group transfer and was expected to continue to do so for the next two years. Hence, the intra-group contribution was not made for the purpose of coordinating the profit in the Finnish subsidiary with the loss in the British parent company.

As a point of departure, the ECJ may only rule on questions of relevance to the resolution of the case before the national court; see Case C-18/93 paragraph 14. On that basis, it could be argued that the ECJ in Oy AA was not in any case competent to answer whether the refusal of a deduction for a downstream group contribution from a profitable parent company to a loss-making subsidiary for tax equalisation purposes was compatible with EU law (other than as an *obiter dictum*, which it did not make)

By comparing paragraph 16 in Oy AA and paragraph 26 in Marks & Spencer I, it appears to be clear that the Oy AA case concerned a cross-border value transfer in the form of an intra-group contribution, while the Marks & Spencer case concerned cross-border tax equalisation. This is also indicated in paragraph 57 in Oy AA and paragraphs 70 and 71 in the Advocate General's opinion in Oy AA.

There is a decisive difference in principle between a downstream intra-group contribution made for tax equalisation purposes and an upstream intra-group contribution made for value transfer purposes. Furthermore, a loss-making parent company will necessarily continue to exist in a group that prevails, while a loss-making subsidiary may be wound up with final effect so that there will be no possibility of actually utilising the loss in the future. In the Oy AA case there was in fact no question of winding up the business of the parent company or the parent company as such. The continuing of the parent company entailed that the conditions for deduction based on the Marks & Spencer exception were in any event not applicable. The present case concerns a diametrically opposite situation, where the purpose of the group contribution is tax equalisation between a profit-making parent company and a loss-making subsidiary under liquidation.

Furthermore, in a judgment by the Supreme Administrative Court in Sweden of 11 March 2009 (RÅ, 2009 ref. 13), it was concluded that the freedom of establishment permits cross-border intra-group financial transfers from a profitable Swedish parent company in favour of an EU-domiciled subsidiary with a final loss. The Supreme Administrative Court concluded that Marks & Spencer was applicable to situations in which tax equalisation is implemented by means of downstream intra-group contributions and that Oy AA concerned a different situation and therefore could not be interpreted to mean that the ECJ had deviated from Marks & Spencer in Oy AA.

The Norwegian rules on group contributions can also be applied to value transfers between group companies. This is regulated by Section 8-5 of the Limited Liability Companies Acts. Such group contributions can be made with or without tax effect. These aspects of the Norwegian rules on group contributions are not relevant in the present case, since the purpose of the group contribution is tax equalisation between Yara International ASA and UAB Yara Lietuva.

The plaintiff requests that the EFTA Court reformulate the question from the national court to include only the situation in the present case, where a profitable Norwegian parent company makes a group contribution for tax equalisation purposes to an EEA-domiciled subsidiary with a final loss.

5.2 The Government, represented by the Central Tax Office for Large Enterprises, has primarily argued as follows:

By its question, the referring court requests clarification of whether Articles 31 and 34 EEA (Articles 49 and 54 TFEU) constitute an obstacle to a group contribution regime, where the tax deductibility of a group contribution is dependent on the transferor and recipient being liable to taxation in the realm. This question has approximately the same wording as the question that was submitted in Case C-231/05 Oy AA. The Grand Chamber of the ECJ decided that the corresponding Finnish rules on intra-group financial transfers were proportional when considered as a whole; see paragraphs 62 and 63:

> '(62) It should be noted at the outset that the objectives of safeguarding the balanced allocation of the power to impose taxes between Member States and the prevention of tax avoidance are linked. Conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory is such as to undermine the right of the Member States to exercise their tax jurisdiction in relation to those activities and jeopardise a balanced allocation between Member States of the power to impose taxes.
>
> *(63) Even if the legislation at issue in the main proceedings is not specifically designed to exclude from the tax advantage it confers purely artificial arrangements, devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory, **such legislation** may nevertheless be regarded as **proportionate to the objectives pursued, taken as a whole**.*' (Highlighted in bold by the Government)

The ECJ also expressly rejected the claim that such rules on intra-group transfers must open up for exceptions in certain cross-border situations, including when the recipient makes a loss; see paragraphs 64 and 65:

> *'(64) **In a situation in which the advantage in question consists in the possibility of making a transfer of income,** thereby excluding such income from the taxable income of the transferor and including it in the taxable income of the transferee, **any extension of that advantage to cross-border situations** would, as indicated in paragraph 56 of this judgment, have the effect of allowing groups of companies to choose freely the Member State in which their profits will be taxed, to the detriment of the right of the Member State of the subsidiary to tax profits generated by activities carried out on its territory.*
>
> *(65) **That detriment cannot be prevented by imposing conditions** concerning the treatment of the income arising from the intra-group financial transfer in the Member State of the transferee, or **concerning the existence of losses made by the transferee**.*
> *To allow deduction of the intra-group financial transfer where it constitutes taxable income of the transferee company, **or where the opportunities for the transferee company to transfer its losses to another company are limited**, or to allow deduction of an intra-group financial transfer in favour of a company whose establishment is in a Member State applying a lower rate of tax than that applied by the Member State of the transferor only where that intra-group financial transfer is specifically justified by the economic situation of the transferee, as Oy AA has proposed, would nevertheless mean that, in the final analysis, the choice of the Member State of taxation would be a matter for the group of companies, which would have a wide discretion in that regard.'*
> (Highlighted in bold by the State)

The consideration of the necessity of the Finnish rules on intra-group financial transfers in the Oy

AA case differed from the consideration of the British rules on group relief in Case C-446/03 Marks & Spencer. In this connection, the ECJ emphasised that the rules on intra-group financial transfers concern *'the possibility of making a transfer of income, thereby excluding such income from the taxable income of the transferor and including it in the taxable income of the transferee'* (Oy AA paragraph 64). In other words, the rules on intra-group financial transfers concern transfer of income, and it was therefore underlined by the ECJ earlier in the judgment that such a system *'does not concern deductibility of losses'* (Oy AA paragraph 57). The ECJ went on to stress that the risk of tax avoidance *'is reinforced by the fact that the Finnish system on intra-group financial transfers does not require the transferee to have suffered losses'* (paragraph 58). The ECJ thus based its consideration of necessity on the characteristic features of rules on intra-group contributions, that neither concern the deductibility of losses nor are conditional on losses being incurred, and therefore are materially different from more limited tax regimes that concern the *'deductibility of losses.'* That was why the ECJ's assessment of the necessity of the Finnish rules on intra-group financial transfers in Oy AA differed from its assessment of the rules on group relief in Marks & Spencer.

Nonetheless, Yara International ASA seeks a strict interpretation of Oy AA and argues that the ECJ's findings are limited to the factual context of the case and are not generally applicable. With reference to the Advocate General's opinion, the company argues that the ECJ did not have any cause to discuss exceptions, including the conditions for exception in Marks & Spencer.

The Government notes that, when interpreting case law, and particularly a judgment by the Grand Chamber of the ECJ, the wording is of the utmost importance. The appellant's arguments must therefore be rejected, since, as pointed out by the ECJ in connection with similar attempts at strict interpretation, '*there is nothing, however, in the wording of the judgment ...which gives grounds for concluding that the statements made by the Court... are applicable only in a factual context such as that and cannot have general application*" (see for example Case C-324/08 Makro Zelfbedieningsgroothandel, paragraph 27).

It is evident from the findings in Oy AA that the ECJ ruled on the necessity of the conditions in the rules on intra-group financial transfers on a general basis and expressly concluded that (i) '*such legislation... [is] proportionate... taken as a whole'* (paragraph 63). The scope of this conclusion is made even clearer when the ECJ, unlike the Advocate General, in the next paragraph also rejected (ii) *'any extension of that advantage to cross-border situations...'* (paragraph 64). The ECJ further stated (iii) that the risk of undermining a balanced allocation of taxation competence '*cannot be prevented by imposing conditions...',* including *'the existence of losses made by the transferee'* (paragraph 65). In other words, Oy AA provides a clear answer to the question referred and it is even given three times in paragraphs 63 to 65. The ruling in Oy AA states both positively (i) that liability to taxation in the State as a condition for tax deduction of intra-group financial transfers is necessary, and expressly rejects (ii) that an intra-group financial transfer system must allow for deduction in cross-border situations, not even (iii) on certain conditions for exception. The Finnish Supreme [Administrative] Court has therefore in Oy AA and subsequent rulings upheld the Finnish rules on intra-group financial transfers. Accordingly, the Government upholds its view that the referred question must be answered in accordance with paragraphs 63 to 65 in Oy AA and proposes the following answer:

> *Article 31 EEA does not constitute an obstacle to legislation in an EEA State, such as that at issue in the main proceedings, according to which a group company domiciled in that EEA State is only entitled to deduct a group contribution from its taxable income if the recipient group company is liable to taxation in the same EEA State.*

6. Question

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?

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For further information, please contact the Court of Appeal.

Borgarting Court of Appeal

(Signature)
Petter Ringnes
Court of Appeal Judge

CC: Copies have been sent to the counsel in the case.