[2020] UKFTT 0139 (TC)

**TC07620**

**Appeal number: TC/2017/05702, TC/2017/05703, TC/2017/05708, TC/2017/05709, TC/2017/05711, TC/2017/05712 and TC/2017/05713**

***CORPORATION TAX – Cross Border Group Relief for losses – Schedule 18 FA 1988 – Marks & Spencer exception – Holmen and Memira – UK/USA Double Taxation Conventions – OECD commentaries – sister EU companies – Felixstowe and Philips – US ultimate parent – FCE – Boake Allen – no possibilities test – impact of domestic law – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**(1) ESSO EXPLORATION AND PRODUCTION UK LIMITED** **Appellants**
**(2) EXXONMOBIL INTERNATIONAL LIMITED**
**(3) ESSO PROPERTY MANAGEMENT COMPANY LIMITED**
**(4) ESSO PETROLEUM COMPANY LIMITED**
**(5) MOBIL TRADING AND SUPPLY LIMITED**
**(6) EXXONMOBIL MARINE LIMITED**
**(7) EXXONMOBIL CHEMICAL LIMITED**

**and**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE ANNE SCOTT**

**Sitting in public at Court 35, London Taylor House, London on 8 and 9 October 2018**

**Graham Aaronson QC instructed by Joseph Hage Aaronson LLP for the Appellants**

**David Yates QC and Laura Ruxandu of Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

**Submissions 16 and 30 April, 23 July and 1 August 2019**

DECISION

## Introduction

1. The appellants are all ExxonMobil group United Kingdom ("UK") resident companies, established in the UK and subject to UK corporation tax.

2. They are claiming the right to relief for trading losses, Cross Border Group Relief ("CBGR"), incurred and surrendered, by a company called ExxonMobil Denmark Holdings International ApS which was known as ExxonMobil Danmark ApS from 16 October 2006 ("EMDH"). At all relevant times it was an ExxonMobil group company resident in Denmark.

3. In 2005, the Grand Chamber of the CJEU ruled in *Marks & Spencer plc v Halsey*[1] ("Marks & Spencer") that, in principle, the fundamental freedoms enshrined in European law do not allow for CBGR. Losses arising abroad would therefore be forfeited but that the only exception to that rule, on the basis of proportionality, is in the case of "final losses". Paragraph 55 of that judgment is often called "the *Marks & Spencer* exception*"*.

## Procedural Background

4. The claims for CBGR that are the subject matter of these appeals ("the relevant claims") relate to the losses arising in EMDH in each of the accounting period ending ("APE") 31 December 2001, 2002 and 2003. For ease of reference hereafter, with the exception of the Tables I simply refer to the APE and the year.

5. The respondents ("HMRC") opened enquiries into each of the appellants' company tax returns in respect of the relevant claims. That generated extensive correspondence, much of which debated the legal issues canvassed in these appeals.

6. HMRC issued Closure Notices, each with a side letter and appendix, in identical terms, to each of the appellants on 22 February 2017 and denied the relevant claims.

7. On 21 March 2017, the appellants appealed against the refusal of those claims.

8. On 24 March 2017, HMRC issued an amended side letter and appendix, again in identical terms, to each appellant and offered a review. On 18 April 2017, that was accepted by the appellants.

9. In letters dated 13 and 19 June 2017, but received on the same date by all of the appellants, the review conclusions, which were in identical terms in both format and reasoning, upheld the original decisions.

10. On 13 July 2017, the appellants appealed to the Tribunal under paragraph 34(3) of Schedule 18, Finance Act 1998 ("Sch 18") and subsequently, of consent, in terms

[1] Case C-446/03

of Rule 5(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), the appeals were joined to be heard together.

11. I had uncontested witness statements, with exhibits, from three witnesses, Nigel Phillip Halls, the UK Tax Law & Planning Manager of the ExxonMobil group, Kai Ingmar Slettebakk, Treasurer and Downstream Controller Nordic for the ExxonMobil Group and Arne Møllin Ottosen, an expert witness on Danish tax law.

12. There were nine bundles of Documentation, three bundles of Authorities, to which there were additions in the course of the Hearing, and two further clips of Authorities. I had the benefit of a transcript of the proceedings.

13. In HMRC's Skeleton Argument there had been a reference to a draft Amended Statement of Case and an intention to seek leave to amend at the outset of the Hearing which did not materialise. On 16 April 2019, HMRC lodged a Submission seeking leave to amend the Statement of Case by the introduction of a further paragraph directed at all of the years in issue and headed "No possibilities test not satisfied in any event".

14. On 30 April 2019, the appellants confirmed that they offered no objection to the amendment although they took issue with one of the arguments advanced in the Submission by HMRC. That argument was predicated on Advocate General Kokott's opinions in *Skatteverket* v *Memira Holding AB*[2] *(*"Memira") and *Skatteverket* v *Holmen AB*[3] ("Holmen").

15. On 19 June 2019, the CJEU handed down the decisions in both of those cases.

16. On 5 July 2019, HMRC wrote to the Tribunal enclosing a copy of *Holmen* arguing that the appeals should be dismissed. On 23 July 2019, the appellants lodged a response seeking a reference to the CJEU. On 7 August 2019, HMRC lodged submissions in response thereto.

## The factual background

### *Overview of the appellants*

17. The corporate structure of the ExxonMobil group is not in dispute. It is a very complex worldwide group but there are certain key agreed facts relating to these appeals. (It should be noted that sometimes the wording is ExxonMobil and sometimes Exxon Mobil.)

18. At all times relevant to these appeals the appellants and EMDH were members of the same international group of companies and shared a common, ultimate parent company, Exxon Mobil Corporation, which is a United States ("US") resident

[2] C-607/17

[3] C-608/17

company. It owns at least 75% of the group of companies which includes the appellants and EMDH.

19. It is the only link between EMDH and the appellants and given the large number of intermediate subsidiaries and subsidiaries the link is very remote. Some of those intermediate companies are established in other EU Member States and some are established outside the EU.

20. I annex at Appendices 1 and 2 two simplified group structure documents produced by Mr Halls. The parties have agreed that these demonstrate the links between the various appellants and the surrendering company, EMDH, in the APEs 2001 and 2002 in Appendix 1 and APE 2003 in Appendix 2.

21. In summary, Appendix 1 shows how the appellants, who made the relevant claims for the earlier two years, are linked by one or more UK companies to various US holding companies and EMDH via a Luxembourg company. That company is owned by another Luxembourg company, which is in turn owned by various US holding companies. The precise US link company is not identified (and there are a number of intermediary companies which have not been identified) but the ultimate parentage is not disputed.

22. Appendix 2 shows that EMDH's position remained unchanged in 2003 and Esso Petroleum Company Limited had the same links as four of the appellants in the earlier years.

23. At the time of the relevant claims, the appellants were, and are still, all directly or indirectly through other UK companies, owned by either Esso Holding Company UK Inc, a company established in the US and resident in the UK for all APEs covered by the relevant claims, or Mobil Holdings Limited, a company resident in the UK.

24. Esso Holding Company UK Inc migrated residence to the US with effect from 1 July 2004, which is after the end of the APEs for the relevant claims. It is therefore not disputed that the appellants are all entities whose capital is directly or indirectly owned in the US.

25. None of the appellants, nor their intermediate parent companies, have exercised the freedom of establishment to set up a secondary establishment in the EU or EEA.

***Overview of EMDH***

26. EMDH was incorporated on 24 July 1964 as a Danish limited liability company and for many years was known as Esso Chemical A/S. Following the merger in 1999 of Exxon Corporation and Mobil Corporation the shares in EMDH were acquired by ExxonMobil Luxembourg et Cie which, at all times, has been owned ultimately by Exxon Mobil Corporation which is the same US corporation that is the ultimate parent company of the appellants.

27. ExxonMobil Luxembourg et Cie is a company established and resident in Luxembourg. In turn it was owned as to 58% by ExxonMobil Luxembourg SARL,

resident in Luxembourg, and as to 42% by ExxonMobil Spain SL, which is a company resident in Spain. (For completeness 0.003% of EMDH was owned by a US LLC (limited liability company) which was itself owned by the Spanish parent.)

28. The parents of those companies were US resident companies, as were all of the intermediary companies up to the ultimate holding company in the US, Exxon Mobil Corporation.

29. EMDH itself took ownership of a number of companies operating outside Denmark. In 2003/04 it disposed of all of its subsidiaries although it continued to retain its shareholding in Mobil Oil Danmark ApS ("Mobil").

30. Mobil, which had been formed in Denmark in April 1985, was another ExxonMobil group subsidiary resident in Denmark, whose immediate parent company was Mobil Petroleum Company Inc, a US corporation resident in the US.

31. EMDH had held a shareholding in Mobil from 30 September 2002. On 16 October 2006, Mobil merged with EMDH and was formally dissolved and the resulting entity was renamed ExxonMobil Danmark ApS (see paragraph 2).

32. Although Mobil had been loss making in 2001-2004, those losses were carried forward and used against profits of Mobil in 2005 and 2006 reducing profits to nil. There was no election under Danish tax law for joint taxation but EMDH and Mobil did file a joint tax return for the period January 2006 to the date of the merger in October 2006 but there was no transfer of losses from EMDH to Mobil. Neither company was capable of fully utilising its own losses. On the liquidation of Mobil the balance of losses in Mobil were lost. (Mr Ottosen makes it explicit that, in terms of Danish law, those losses would have been forfeited at that stage.) I accept Mr Halls' clear, and uncontested, statement that EMDH did not, at any time, benefit from any pre-merger losses in Mobil.

33. During and immediately after the end of the relevant APEs for which CBGR is claimed, EMDH continued to trade and utilised carried forward losses until 2012.

34. In 2012 a strategic decision was taken to engage in restructuring. ExxonMobil Nordic AS ("Nordic") a group company incorporated and resident in Norway set up a permanent establishment ("PE") in Denmark. It took on the business previously carried on by EMDH and the remaining employees were transferred to Nordic in 2013.

35. On 21 May 2013, an extraordinary general meeting of EDMH passed a resolution to put the company into liquidation. Final accounts were filed on 31 August 2013. On 11 December 2013 a further extraordinary general meeting approved the liquidator's final report and the company was liquidated thereby extinguishing all losses.

36. With the exception of the final accounts, EMDH prepared its accounts to 31 December in each year.

***Agreed facts in relation to the relevant claims and the losses***

*The relevant claims*

37. The appeals before the Tribunal are against decisions to amend certain of the appellants' company tax returns consequent on refusing claims to group relief. The appeals were argued in relation to the relevant claims made by the appellants on 31 October 2016 in respect of the years 2001, 2002 and 2003. The agreed quantum of the relevant claims, as adjusted, is set out in the following table:

**Table 1**

| **Taxpayer** | **CBGR Claim** |
|---|---:|
| **APE 31 Dec 2001** | |
| ExxonMobil Chemical Ltd | £64,037,073 |
| Esso Exploration and Production UK Ltd | £5,823,332 |
| ExxonMobil Marine Ltd | £2,230,906 |
| Mobil Trading and Supply Ltd | £4,556,727 |
| Esso Property Management Co Limited | £3,882,700 |
| ExxonMobil International Ltd | £2,708,193 |
| Total | £83,238,931 |
| | |
| **APE 31 Dec 2002** | |
| ExxonMobil Chemical Ltd | £41,336,349 |
| | |
| | |
| **APE 31 Dec 2003** | |
| ExxonMobil Chemical Ltd | £83,315,115 |
| Esso Petroleum Company Limited | £20,853,885 |
| Total | £104,169,000 |
| | |
| Overall total | £228,744,280 |

38. As can be seen from Table 1, not all of the appellants have made claims in respect of each of these APEs.

39. Other alternative claims for each of these APEs (and also for the APE 2000), had been made previously by the appellants at various times and for various amounts and were referenced in many of the documents relating to the appeals.

40. The APE 2000 is not part of these appeals and nor are the various claims made by other ExxonMobil group companies.

41. The conduct of the enquiries and the appeals are on the basis that there are multiple existing variations of the claims.

42. As a matter of procedure, these alternative claims by the appellants have not been withdrawn and, depending on the decision of the Tribunal on the requirements for and timing of a valid claim, may become relevant in the future.

43. It is, however, common ground that should the relevant claims fail the "no possibilities" or "definitive losses" test then, subject to the Tribunal's reasoning, the earlier alternative claims are anticipated to fail as well.

44. The relevant claims are the last in the series of alternative claims. There is no dispute that, as the Supreme Court made explicit[4], that that is an acceptable approach.

*The Agreed Losses*

45. Of course, the losses were in Danish Kroner and had to be converted into Sterling for the purposes of UK corporation tax.

46. The quantum of losses which arose in EMDH in the years relevant to these appeals are agreed and are as set out in the following table. Table 2 demonstrates the position of the losses in Denmark. It does not demonstrate the amount of losses actually claimed by the appellants.

**Table 2**

| APE Year | Original Losses (GBP) | Losses Utilised in Denmark (GBP) | Losses Remaining in EMDH unutilised in Denmark (GBP) | Reason for impossibility of further utilisation in Denmark |
|---|---|---|---|---|
| 2001 | £193,881,000 | £101,305,742 | £92,575,258 | Time barred after APE 31 December 2006 and on liquidation on 11 December 2013 |
| 2002 | £161,698,000 | £120,361,348 | £41,336,348 | Lost on liquidation on 11 December 2013 |
| 2003 | £104,169,000 | £0 | £104,169,000 | Lost on liquidation on 11 December 2013 |

47. Some of the losses which arose in APE 2001 and APE 2002 were carried forward and utilised against later years' profits of EMDH in Denmark.

[4] Marks & Spencer v HMRC (No 2) [2014] UKSC 11 ("M&S 2014)

48. None of the APE 2003 losses available to be carried forward have been utilised against future profits in Denmark.

49. Table 2 sets out (in Sterling) three things for the purposes of appeals in relation to the relevant claims,

(1) the quantum of losses of EMDH arising for each of APE 2001, APE 2002, and APE 2003,

(2) the quantum of such losses carried forward and utilised against future profits of EMDH in Denmark, and

(3) the quantum of losses for each of the three years remaining in EMDH and not utilised in Denmark.

50. In APE 2001 the appellants had insufficient profit capacity to absorb all of the unutilised losses in EMDH. Consequently whilst £92,575,258 losses were unutilised in Denmark (see Table 2) the claims made on 31 October 2016 only claimed £83,238,931 (see Table 1). The balance of £9,336,327 was not claimed by the appellants or any other ExxonMobil Group company on 31 October 2016 (albeit it had been previously claimed by other ExxonMobil group companies).

51. The Closure Notices disallow losses of £83,238,931, ie the losses in the amounts claimed on 31 October 2016.

52. For APE 2002 and APE 2003, the appellants had sufficient profits to be able to absorb (in the UK) all of the unutilised losses in Denmark. The appellants have claimed all of the available losses for these years.

53. The losses that are the subject matter of these appeals have not been utilised for tax purposes in Denmark or elsewhere and there is no possibility of these losses being utilised in future periods in Denmark.

## The Legislation

### *The relevant provisions of EU law*

54. Section 2(1) of the European Communities Act 1972 (the "ECA") reads as follows:

> " (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable EU right’ and similar expressions shall be read as referring to one to which this subsection applies."

55. The right of establishment was set out in Article 43 of the Treaty establishing the European Community ("TEC") (now Article 49 of the Treaty on the Functioning of the European Union ("TFEU")) which provides:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> 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 the second paragraph of Article 48, 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 the chapter relating to capital."

56. Article 48 TEC (now Article 54 TFEU) confirmed that the right applies to companies.

***Double taxation conventions***

57. For the periods under appeal there were two relevant double taxation conventions ("DTC") namely:-

(a) The UK/USA Income Tax Convention was signed on 31 December 1975 ("1975 DTC") and was given effect in the Double Taxation Relief (Taxes on Income) (The United States of America) Order 1980[5] with effect from 25 April 1980, and

(b) The UK/USA Double Taxation Convention was signed on 24 July 2001 ("2001 DTC") and was given effect in the Double Taxation Relief (Taxes on Income) (The United States of America Order) 2002[6] with effect from 1 April 2003.

58. Under both DTCs the following provision was made in respect of non-discrimination ("the NDA") at Article 24(5) of the 1975 DTC and Article 25(4) of the 2001 DTC:

> "Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith that is more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected."

59. The only difference between the two Articles is that the 1975 DTC states: "which is other or more burdensome" rather than "that is more burdensome" in the 2001 DTC. The parties are agreed that nothing turns on that difference.

[5] SI 1980/568

[6] SI 2002/2848

***UK legislation***

*Section 402 ICTA*

60. There is no dispute about the UK legislation in the years relevant to these appeals which was contained in Chapter IV of Part X of Income and Corporation Taxes Act 1988 ("ICTA"). I annex at Appendix 3 the text of Section 402 ICTA.

61. In summary, between 2000 and 2006 (ie before the legislation for group relief, introduced in Finance Act 2006 ("FA2006")), Section 402 required that a claimant and the surrendering company must be part of the same group of companies. Section 413 ICTA defined a company as "…any body corporate" with no limitation *qua* residence.

62. Section 402 provides that a group structure requirement will be satisfied if the surrendering company is a 75% subsidiary of the claimant company which must be resident in the UK or that both the claimant and the surrendering companies are 75% subsidiaries of a third company which is resident in the UK.

63. There is no provision for loss relief where the third, or indeed any other company is not resident in the UK. The appellants accept that they and EMDH do not satisfy these provisions in regard to residence.

64. It is a matter of agreement that the only exception to the requirement that both the surrendering company and the claimant company claiming group relief are UK resident and subject to corporation tax in the UK is the *Marks & Spencer* exception.

*Section 788 ICTA*

65. Chapter IV of Part X of ICTA is not, however, the end of the story because Part XVIII, headed "Double Taxation Relief", includes another relevant chapter, Chapter 1, "The Principal Reliefs". That provides so far as material (as did its predecessor section 497 of the Income and Corporation Taxes Act 1970):

> "788. **Relief by agreement with other countries**
>
> (1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation in relation to –
>
> > (a) income tax,
> > (b) corporation tax in respect of income or chargeable gains, and
> > (c) any taxes of a similar character to those taxes imposed by the laws of that territory,
> > and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below. …
>
> (3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide –
>
> > (a) for relief from income tax, or from corporation tax in respect of income or chargeable gains; …".

66. The NDAs, Articles 24(5) and 25(4), were respectively scheduled to the two Orders in Council.

***Danish legislation***

67. I set out at Appendix 3 some detail on the Danish law as it applies to losses and in particular to the losses in EMDH.

68. The key points are that the consequences of the legislation are that:

(a) The losses arising in APE 2001 became time barred in Denmark from 31 December 2006.

(b) The losses in APEs 2002 and 2003 were capable of being carried forward indefinitely.

(c) Other than in the event of joint taxation, losses can only be used by the Danish tax resident company, ie when the EMDH business was transferred to the PE established by Nordic those losses could not be carried forward to that PE.

(d) On final liquidation any balance of unutilised losses is forfeited.

**The Issues at the Hearing**

69. At the outset of the hearing, at a high level, Mr Aaronson identified two separate issues to be determined. In their Skeleton Argument, HMRC had identified five questions that fell to be resolved and Mr Aaronson referred to, and agreed, the relevance thereof. Mr Yates very helpfully suggested that those questions be allocated to the two issues. I have adopted that approach.

*The First Issue: Is European Law engaged?*

70. The issue is:

Whether the Exxon Mobil Group structure engages European law, given that the ultimate parent of the Group is in the United States, in a situation where the appellants are all UK resident and the surrendering company is Danish.

That Danish subsidiary's immediate parent is a Luxembourg company and the question is whether the European law rights of that company are infringed relevantly by the refusal to allow CBGR.

In that context, do the DTCs in themselves import the rights and obligations of the United Kingdom under European law?

71. The questions to be resolved are:

(1) Are the appellants entitled to rely on EU law directly?

(2) If not, is there discrimination under the UK/USA Treaties which will entitle the appellants to rely on EU law directly?

*The second Issue: no possibilities or definitive losses*

72. The issue is:

> If European law is engaged, does it require those losses to be available to the appellants on the basis that the "no possibilities" or "definitive losses" test is satisfied?

73. The questions to be resolved are:

> (3) What is the relevant time for testing the "no possibilities" or "definitive losses" test?
>
> (4) Are the losses for 2001 prevented from being considered "definitive" on account of being time-barred in Denmark?
>
> (5) If the answer to (3) is the time of making a claim, were the losses of EMDH "definitive" at this time?

74. Both parties were agreed that if no European law freedom is engaged, in a relevant sense, then that is the end of the matter.

75. However, HMRC argue that even if European law is engaged, which they do not accept, nevertheless the decisions in *Holmen* and *Memira* mean that the appeal should be dismissed.

**Holmen**

76. As soon as the judgments in *Holmen* and *Memira* were issued, HMRC sought dismissal of the appeals on the basis that in these appeals EMDH, which incurred the losses, has an immediate parent in another EU Member State, namely Luxembourg. The issue of an intermediate parent in a different EU Member State from the EU Member State where a loss making subsidiary exists was considered in both cases, and they were both decided on the same basis. However, for ease of reference where the same issue is addressed in each case, I refer only to *Holmen.*

77. The Court held that it is permissible (justifiable and proportionate) to deny CBGR in those circumstances.

78. In that regard HMRC rely on paragraph 29 of *Holmen*:

> "[29] It is not therefore disproportionate for a Member State to make cross-border tax relief conditional on a direct link, even if the other impossibilities referred to in paragraph 55 of the judgment in *Marks & Spencer* have been met, and all the less so since the exception provided for in that paragraph applies, in any event, to the Member State of the subsidiary directly owning the sub-subsidiary which would be the subject of a claim for cross-border relief for the losses of that sub-subsidiary."

79. Further it was also held at paragraph 33 that the concept of “final losses” within the meaning of paragraph 55 of *Marks & Spencer* does not apply where, as in this case, an intermediate parent is in a different EU Member State from the EU Member State where a loss-making subsidiary exists.

80. Paragraph 33 of *Holmen* reads:

> “[33] Consequently, the answer to the first question is that the concept of final losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, does not apply to a sub-subsidiary unless all the intermediate companies between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are [not][7] established in the same Member State.”

81. The first and obvious point to make is that both judgments make extensive reference to *Marks & Spencer* which is unsurprising since in:

(a) *Holmen,* the questions referred to the CJEU were set out at paragraph 17 and the first was:

> “(1) In order for a parent company in one Member State to have the right — which follows from the (judgment in *Marks & Spencer*), — on the basis of Article 49 TFEU to deduct final losses in a subsidiary in another Member State, is it necessary that the subsidiary be directly owned by the parent company?”

(b) *Memira,* the first question sought clarity in regard to “definitive losses” in the context of the judgment of the CJEU in *Re A Oy*[8] (“A Oy”), which itself referred to and relied extensively on *Marks & Spencer.*

82. In both cases the judgments are in line with the Advocate General’s Opinions issued in January 2019. In the introductions to both Opinions, in line with her previously oft expressed reservations about *Marks & Spencer*[9]*,* she points out the problems with “final losses”, the lack of clarity giving rise to the repeated references to the CJEU and states that if the CJEU wishes to adhere to the “final losses” exception then it had the opportunity to “refine this category” ie the *Marks & Spencer* exception.

83. She makes it explicit in her Opinion in *Holmen* that the first question concerns the interpretation of the judgment in *Marks & Spencer* and the judgment also makes that explicit.

84. Similarly, in her Opinion in *Memira* she points out that, although the referring court focuses primarily on *A Oy,* that case applied the findings in *Marks and Spencer.* Beyond reciting the referred question the judgment makes no reference to *A Oy* but refers to *Marks & Spencer.*

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[7] Accepted that the word “not” should not occur.

[8] C-123/11

[9] Eg Paragraphs 2 and 3 of her Opinion in Commission v UK Case C-172/13

85. In both cases the formal Rulings refer explicitly to paragraph 55 of *Marks & Spencer.*

86. It is clear that both cases do indeed further refine and develop CJEU case law on CBGR and final losses.

87. In particular, the CJEU clarified that the losses of sub-subsidiaries may be considered final only if the intermediate parent companies are situated in the same Member States as the sub-subsidiary. The CJEU further concluded that the losses would not be characterised as final before the completion of a subsidiary's liquidation if there was a possibility that they could be transferred to a third party. In that regard, the existence of certain local provisions restricting the transfer of losses in the subsidiaries' Member State is irrelevant.

88. What these two cases establish is that for losses to qualify as final losses in the context of *Marks & Spencer*, specific domestic law restrictions in the subsidiary's state of residence are irrelevant. The parent company must provide concrete evidence that the subsidiary has no possibility of using its existing losses, including following the sale of its shares to a third party.

89. In *Holmen*, the CJEU allows the extension of the principles established in *Marks & Spencer* to losses of sub-subsidiaries, provided specific conditions are fulfilled, namely, that all intermediary companies in the chain are resident in the same Member State.

90. In *Holmen* the CJEU explained that the requirement for direct ownership was needed in order to prevent the double use of losses and to prevent cherry picking in which State to apply losses. However, whilst the CJEU found the direct ownership requirement was justified in principle, nevertheless it was disproportionate for Sweden to preclude the possibility of the parent company taking into account the final losses of a non-resident subsidiary, if the intermediary subsidiaries between the Swedish parent and (in this case) the Spanish sub-subsidiary are all established in the same Member States. In *Holmen* the intermediate subsidiary was in the same Member State.

*Marks and Spencer*

91. In summary, the effect of *Marks & Spencer* is that CBGR is not required in principle by the fundamental freedoms with the consequence that losses arising abroad would be forfeited and therefore not available for use by other members of the group. However, implementing the principle of proportionality, CBGR is available but <u>only</u> in the case of final losses.

92. The detail is that a restriction of freedom of establishment which limited the right of a parent company to deduct the losses of a foreign subsidiary established in another Member State, whereas the losses of a resident subsidiary could be deducted, was justified by the need to:

(a) preserve the balanced allocation of the power to impose taxes between Member States,

(b) prevent the risk of losses being used twice, and

(c) prevent tax avoidance.

93. However, notwithstanding the fact that that is justified in principle, it is disproportionate for the Member State of the parent company to preclude the possibility of the parent company utilising the losses of a non-resident subsidiary that were classified as final.

94. Losses are final where the non-resident subsidiary has:

(a) 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 of the subsidiary in previous periods, and

(b) there was 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 had been sold to the third party.

**The parties' submissions**

**The appellants' arguments**

95. Essentially, the appellants argued that far from requiring the Tribunal to dismiss the appeal the only proper course open to the Tribunal was to refer the EU law issues to the CJEU for a preliminary opinion on the basis that:

(a) In *Marks & Spencer* the structure before the Court was that of a shareholding made through an intermediary holding company in a different Member State.

(b) The proceedings in *Marks & Spencer* were before the Grand Chamber of the CJEU, comprising 13 judges, and there was nothing in that judgment to suggest that loss relief is automatically precluded by the inter-position of an intermediary holding company in a different Member State. Therefore *Marks & Spencer* appears to be in direct conflict with the judgment in *Holmen* (given by the First Chamber comprising 5 judges) as *Holmen* does not seem to have taken into account the fact that the Grand Chamber in *Marks and Spencer* had not viewed the interposition of an intermediate holding company as significant. That should be the subject of an early reference.

(c) The Tribunal is bound by the decisions of the Supreme Court in *M&S 2013*[10] and *M&S 2014* and the Supreme Court was aware that the loss-making subsidiaries were held through a Netherlands intermediate holding company.

(d) The Tribunal's only option, based on *Elchinov*[11], is to either follow the Supreme Court to the effect that the interposition of an intermediary holding company in a different Member State does not automatically preclude the availability of CBGR or make a preliminary reference.

(e) Lastly, it was argued that until August 2019, HMRC had not suggested that the existence of the Luxembourg parent company of EMDH had any relevance to the proceedings. Further HMRC had not addressed whether, under Luxembourg law, loss relief would have been available to the intermediate holding company, were that company to have had loss making Luxembourg subsidiaries. Unless, as a matter of domestic Luxembourg law, there was the availability of loss relief then there could be no possible grounds in EU law for it to claim CBGR. That would render the *Holmen* case completely irrelevant.

**HMRC's arguments**

96. HMRC argue that:

(a) Paragraph 33 of *Holmen* makes it explicit that the concept of "final losses", within the meaning of paragraph 55 of *Marks & Spencer*, does not apply where, as here, an intermediate parent is in a different EU Member State from the loss making subsidiary.

(b) The appellants are not even indirect parents of EMDH. They are at best only sister companies so any claim is weaker than that of an indirect parent.

(c) *Marks & Spencer* did not consider the question of indirect holdings because the CJEU had not been asked about it.

(d) Advocate General Kokott's Opinion, the Commission, the Netherlands and Sweden had all drawn the First Chamber's attention to the factual matrix in *Marks & Spencer* and clearly the First Chamber did not consider that undisputed factual matrix to form part of the *ratio decidendi* in *Marks & Spencer*.

(e) Furthermore, at paragraphs 74-78 in her Opinion, (which are quoted at paragraph 102 below) Advocate General Kokott had expressly addressed the potential apparent inconsistency when pointing out the factual matrix in *Marks & Spencer*. She had argued that nothing could be inferred from the fact that the relevance of the intermediate company had not been debated in *Marks & Spencer*.

(f) There is no conflict between *Holmen* and the two UK Supreme Court decisions. Just as in *Marks and Spencer*, in neither of their two decisions had the Supreme Court considered an intermediate chain of holdings. Therefore

[10] Marks & Spencer plc v HMRC [2013] UKSC 30

[11] Case C-173/09

there is no binding authority requiring the Tribunal to apply the no possibilities test where there are non-resident intermediate holdings.

(g) There is no lack of clarity in the decision in *Holmen;* paragraph 33 makes the position explicit. It is *acte clair*[12] and therefore there is no requirement for a reference[13] and the Tribunal must apply *Holmen.*

(h) HMRC have always argued the relevance of the existence of an intermediate parent established in Luxembourg and in particular that there is no evidence to the effect that the UK rules have infringed the Luxembourg parent's freedom of establishment.

**Discussion**

97. These two cases address the compatibility of Sweden's tax treatment of foreign losses with EU law and provide additional guidance on the application of *Marks & Spencer* and, in particular, the interpretation of "final losses". Effectively, in my view, both cases further refine and develop CJEU case law on CBGR and final losses.

98. I have some difficulty with the appellants' argument that there is a conflict between *Marks & Spencer* and *Holmen* because there was an intermediary holding company established in a different Member State in the former case.

99. I agree with, and am bound by, Judges Richards and Cannan in *HMRC v The Ice Rink Company Ltd and another*[14] where they stated:

> "25. In their submissions on *Levob* and *Deutsche Bank* in particular, both parties invited us to draw conclusions from the underlying facts of those cases….
>
> 26. We regarded such reasoning by analogy as being of limited utility since decisions of the ECJ serve to give guidance on the interpretation of EU law so that their principles, rather than their facts, are relevant."

100. I also observe, in passing, that Moses LJ in the Court of Appeal in *Marks & Spencer v HMRC* ("M&S 2")[15], when analysing what the CJEU decided in *Marks & Spencer* pointed out at paragraph 11 that the Court was looking to the tax regime and "…not to the particular facts of the subsidiary's case".

101. I may say, in that context, that, having checked the German term and found that it meant "a feeling of melancholy and world weariness", I had every sympathy with his observation at paragraph 10 that the fact that *Marks & Spencer*, and that was only in 2012, "…has been subjected to repeated analysis…may induce *Weltschmerz…"* ! It is no different now.

102. I agree with HMRC that the CJEU in *Marks & Spencer* did not examine the question of indirect holdings because it had not been asked about that point. It was

[12] Case C-283/81

[13] Paragraph 31 *Elchinov*

[14] [2019] UKUT 108 (TCC)

[15] [2012] STC

simply not argued. I set out an excerpt from Advocate General Kokott's Opinion in *Holmen* at paragraphs 74 to 81 which covers this point at paragraph 75 and then moves on to another aspect that I also cover below at paragraph 109:

> "74. The *Marks & Spencer* exception for final losses does not differentiate, as regards final losses, between subsidiaries and sub-subsidiaries. At first glance, it would thus permit both the group's parent company and the intermediate subsidiary to set off losses against the final losses in the sub-subsidiary.
>
> 75. The *Marks & Spencer* judgment also related to an indirect chain of holdings, as is rightly pointed out by Holmen and the Commission. The sub-subsidiary, the parent company (a holding company) and the grandparent company (group parent company) in that case were even resident in three different Member States. This is only apparent from the request for a preliminary ruling and the Opinion of the Advocate General, however. (*sic*) (42) It is not mentioned in the facts in the judgment, nor is it examined by the Court.
>
> 76. However, it appears excessive to me, contrary to the view taken by the Commission and in agreement with the Netherlands and Sweden, to infer from this that the Court implicitly ruled that the group's parent company must also be able to use the (final) losses in a sub-subsidiary. The Court did not have to examine this question more closely in that case because it had not been asked about this point.
>
> 77. Above all, however, such an approach would result in a right to choose within a group, which could decide in which Member State a subsidiary or a parent company will use the 'final' losses in the sub-subsidiaries.
>
> 78. In particular, if all three companies were resident in different Member States and there were profits to be set off, this right to choose would be important with a view to optimising the group tax rate. As the Member States participating in the proceedings rightly assert, however, such a right to choose cannot exist. It would also jeopardise the preservation of the balanced allocation of the power to impose taxes between Member States. In addition, there is a risk that the losses could be used in more than one Member State.
>
> 79. As it is still possible in principle to set off losses in another Member State for the direct parent company, there is a fundamental precedence for setting off losses against the direct parent company over setting off losses against the indirect parent company (in this case the group's parent company in Sweden). That precedence also avoids the abovementioned risks of a right of choice for the taxable person and the possibility of double use of losses in three State scenarios.
>
> 80. That precedence applies even where — as here — the sub-subsidiary and the subsidiary are resident in the same Member State. In this case there is no risk of optimisation of the group tax rate by selecting the Member State in which losses are set off, as Holmen rightly argues. Likewise, an increased risk of multiple use of losses is ruled out. Here too, however, the crucial question is not whether the subsidiary and the sub-subsidiary are resident in the same country, but whether final losses exist for the sub-subsidiary in relation to the parent company in the other Member State. As stated above, however, that is not the case.
>
> 81. The answer to the first question is therefore that the losses in an indirectly owned company (a sub-subsidiary) do not in principle constitute final losses in relation to the 'grandparent company' (the parent company of the subsidiary)."

103. I accept HMRC's argument that, as explained by Advocate General Kokott, and impliedly accepted by the CJEU, clearly, nothing can be inferred from the fact that the relevance of an intermediate company was not disputed in *Marks & Spencer*.

104. It is evident from the repeated references to *Marks & Spencer* in both *Holmen* and *Memira* that it was at the centre of both these judgments. The referring Court in *Holmen* specifically asked for a determination based on the reasoning in *Marks &*

*Spencer* in relation to cross-border use of losses within a group with entities in different EU Member States. That was done in the full knowledge of the factual matrix in *Marks & Spencer.*

105. Of course the Supreme Court was aware of the existence of the residence of the intermediate companies. Having carefully read the decisions I can find nothing in the *ratio decidendi* to suggest that that was a factor that was even, in popular parlance, "on the radar" in looking at the "no possibilities" test, just as it had not been in *Marks & Spencer.*

106. Lastly, I find that HMRC have always focussed on the relevance of the Luxembourg parent company. In fact, I observe that it was Mr Aaronson who stated at the outset that:

> "…there is a group structure which, on the face of it, doesn't seem to engage European law although there is a wrinkle in that the Danish subsidiary is owned by a Luxembourg company so maybe the Luxembourg company's European rights are infringed, but that's a very secondary argument."

107. In closing submissions, Mr Aaronson very fairly conceded: "Would we succeed on the group structure from the perspective of the Luxembourg parent of the Danish company? It's not such a strong case…" He went on to say that it was arguable and it is. Being arguable is not a test on the balance of probabilities which is the test here.

108. HMRC argue that the position in Luxembourg law is of no relevance to the decision in *Holmen* since by virtue of that decision there are no relevant EU law rights available. I agree. HMRC rely on paragraph 31 of the judgment in *Holmen* for the proposition that the CJEU was concerned with the risks of optimisation of a group tax rate as a matter of general policy as opposed to whether it was made out on the facts. That paragraph reads:

> " 31. In those circumstances, the risks of optimisation of the group tax rate by choosing in which Member State the losses are set off and of the use of losses multiple times correspond to those noted by the Court in paragraphs 45 to 52 of the judgment in *Marks & Spencer*."

109. Clearly, the CJEU had adopted the arguments of Advocate General Kokott at paragraphs 77 to 80 which I have set out at paragraph 102 above. She makes it explicit that it is a point of principle that is being considered. I therefore agree with HMRC.

**Decision in relation to the application of Holmen**

110. During the course of the Hearing both Mr Aaronson and Mr Yates, very appropriately, referred to the evolution of the jurisprudence of the CJEU. *Holmen* and *Memira* are precisely that. It is clear to me that the Court adopted the Advocate General's invitation to "refine" the category of "final losses" as described in *Marks & Spencer*.

111. I do not perceive any conflict between these cases and *Marks & Spencer*. Firstly, the fact that these were decided by the First Chamber is not a relevant factor.

112. In both *Holmen* and *Memira* the CJEU made it clear that a claimant company carries the burden of proof in demonstrating that the losses are indeed final and when. In regard to the Luxembourg parent company I know almost nothing. The appellants argue that unless as a matter of domestic Luxembourg law there was availability of loss relief then *Holmen* is irrelevant. As a group, as they allege, that would be information within the appellants' purview. They have adduced no evidence.

113. Secondly, it is very evident that in every stage of their deliberations, as evidenced by the references in *Memira* to *Marks & Spencer* rather than to *Re A Oy*, (see paragraph 85 above) the CJEU were focussed on elucidating *Marks & Spencer*. In my view, much needed clarity has been shed on the nature and extent of the *Marks & Spencer* exception. I find that it is indeed *acte clair* and there is no need for a further reference.

114. The wording of paragraph 33 of *Holmen* with the deletion of the word "not", which it is agreed was an error in the English translation, is very clear.

115. That being the case, and, at this juncture, ignoring the fact that the ultimate parent company was American, since the intermediate parent companies were not established in the same Member State as EMDH, the appeal falls to be dismissed.

**If I am wrong on the application of Holmen, what of the other issues?**

***The first issue: Is European Law engaged?***

*Question 1: Are the appellants entitled to rely on European law directly?*

116. Section 402 ICTA applies on its own terms (in other words loss relief would not be available since the claimant and surrendering companies are not both resident in the UK) unless relief is given *via* a conforming interpretation to ensure that the legislation is compatible with the TFEU.

117. Such a conforming interpretation can only arise if the appellants can establish that either they or their parent companies can rely on an exercise of freedom of establishment (see paragraph 55 above). The territorial scope of this freedom is limited to companies incorporated under the laws of Member States or the EEA States and obviously that does not include the USA.

118. The appellants correctly argue that there is no blanket requirement that the exercise of a Treaty freedom that is restricted has to be that of the appellants. For that proposition they relied in their Skeleton Argument on the decisions in *HMRC v Philips Electronics UK Ltd*[16] ("Philips") and *Felixstowe Dock and Railway Company Ltd and others v HMRC*[17] ("Felixstowe").

119. At the hearing Mr Aaronson did not expand upon the reference in the Skeleton Argument to *Philips* and *Felixstowe* in relation to that proposition. However, for other

[16] Case C-18/11

[17] Case C-80/12

reasons, Mr Yates very properly referred me to the letters from HMRC dated 5 May 2017.

120. I can see from those letters that the appellants had contended that the CJEU rulings in *Philips* and *Felixstowe* had extended claims for CBGR from the situation of a UK parent company claiming relief for the loss of its EU/EEA subsidiary (linear relief) to permitting a UK subsidiary of a UK parent to rely on the parent's freedom of establishment and claim the loss of its sister EU/EEA company in the place of its parent (sideways relief).

121. I observe that both *Philips* and *Felixstowe* concerned the UK law on consortium relief and the surrender of UK losses to a UK resident company. Neither case concerned CBGR.

122. HMRC agree that it is not in dispute that, in some contexts, EU law allows companies to have the ability to rely on the EU rights of other entities in order to challenge a Member State's laws. They point out that paragraph 23 of *Felixstowe* applied paragraph 39 of *Philips*.

123. None of the appellants or their immediate or intermediate parents have exercised the freedom of establishment to set up a secondary establishment in the EU or EEA.

*Philips* and *Felixstowe*

*Philips*

124. In *Philips* the UK PE of a Dutch company surrendered losses to a UK resident claimant company. They were not members of the same group for UK group relief purposes albeit for EU law purposes, the ultimate "parent" of both companies was another Dutch company on the basis that it indirectly held 50% plus one share in the Dutch company which had the UK branch.

125. The issue before the CJEU was HMRC's contention that UK legislation did not permit the taxpayer to set off the losses *inter alia* on the basis that the Dutch company's losses could be set off against its profits in the Netherlands or that there was a possibility that that was the case.

126. In summary, the CJEU decided that the UK claimant company was able to rely upon the infringed EU law rights of the Dutch company. It held that:

> "39. It is, in the present case, of no relevance in that regard that it is not the taxpayer, a company established in the United Kingdom, whose freedom of establishment has been unjustifiably restricted, but rather the non-resident company with a permanent establishment in the United Kingdom. In order to be effective, freedom of establishment must also entail, in a situation such as that in the main proceedings, the possibility that the taxpayer may have the benefit of the group relief set against its profits."

*Felixstowe*

127. *Felixstowe* concerned a claim for consortium relief by various UK resident companies for losses surrendered by a UK resident company. There was no common EU based parent. The claim was denied on the grounds that the relevant link company was not UK resident, as was the case in *Philips.*

128. Paragraphs 18 and 21 to 24 of the judgment read:-

> "18. Under legislation such as that at issue in the main proceedings, the possibility of transferring, by means of relief, losses sustained by a company that is resident for tax purposes in a Member State and belongs to a consortium to another company that is resident for tax purposes in the same Member State and is a member of a group is subject to the condition that a link company which is a member of both the consortium and the group is resident in that Member State or carries on a trade there through a permanent establishment….
>
> 21. That difference in treatment makes it less attractive in tax terms to establish a link company in another Member State, since the applicable national legislation grants the tax advantage at issue only where the link companies are established in the United Kingdom.
>
> 22. The fact that, in the dispute in the main proceedings, it is not the claimant companies established in the United Kingdom whose freedom of establishment may have been restricted does not affect the finding in the previous paragraph as to the existence of a difference in treatment between resident companies connected by a link company, established in the United Kingdom and resident companies connected by a link company established in another Member State.
>
> 23. The Court has already held that a company may, for tax purposes, rely on a restriction of the freedom of establishment of another company which is linked to it insofar as such a restriction affects its own taxation (see, to this effect, *Revenue and Customs Comrs v Philips Electronics UK Ltd* (Case D-18/11) [2013] STC 41, para 39).
>
> 24. Consequently, in order to be effective, freedom of establishment must also entail, in a situation such as that at issue in the main proceedings, the possibility for the claimant companies to invoke it once they claim to be less well treated for tax purposes than if they had been connected to the loss surrendering company through a link company established in the United Kingdom."

129. As can be seen the *ratio decidendi* in *Philips* was confirmed.

130. At paragraphs 39-42 the CJEU went on to rule on the issue that the only common parent was non-EU in the following terms:

> "39. It is true that the chapter of the Treaty relating to freedom of establishment, unlike the chapter on the free movement of capital, does not contain any provision which extends the scope of its provisions to situations involving a national of a third State established outside the European Union. Its provisions cannot therefore be relied on by a company established in a third state ….
>
> 40. However, it does not follow from any provision of European Union law that the origin of the shareholders, be they natural or legal persons, of companies resident in the European Union affects the right of those companies to rely on freedom of establishment. As the Advocate General has observed in point 60 of his opinion, the status of being a European Union company is based, under art 54 of the TFEU, on the location of the corporate seat and the legal order with the companies incorporated, not on the nationality of its shareholders.

> 41. Furthermore, and in any event, the places of residence of the ultimate parent company and the intermediate companies that control the companies seeking to transfer losses to each other are not of concern to the system of consortium group relief in the United Kingdom as resulting from the legislation at issue in the main proceedings. Apart from the residence condition for the link company, the provisions of the ICTA, in the version in force at the time of the dispute in the main proceedings, are silent as to the location of any other company falling within or standing at the top of the chain of interests between the companies claiming and surrendering losses. Thus, as the United Kingdom government agreed at the hearing, relief such as that claimed in the main proceedings could have been granted, on the basis of the same provisions in a case where the link company was established in the United Kingdom, without this being prevented by the fact that the ultimate parent company and intermediate group companies were established in a third state.
>
> 42. Accordingly, the answer to the questions referred is that Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which it is possible for a resident company that is a member of a group to have transferred to it losses sustained by another resident company which belongs to a consortium where a 'link company' which is a member of both the group and the consortium is also resident in that Member State, irrespective of the residence of the companies which hold, themselves or by means of intermediate companies, the capital of the link company and of the other companies concerned by the transfer of losses, whereas that legislation rules out such a possibility where the link company is established in another Member State."

131. In summary, the CJEU held that the existence of the common non-EU parent did not prevent the UK claimant companies from relying on the infringed EU law rights in respect of the Luxembourg link company.

132. As can be seen, the infringement arose because the UK legislation specified one of the key conditions of relief as being the residence of the link company. There is no such residency requirement for group loss relief, whether cross border or not, for the periods with which we are concerned.

*The appellants' arguments*

133. The appellants' core position is that at all relevant times, since UK legislation did not regard residence as relevant when defining a group for the purposes of Section 402 ICTA, the appellants and EMDH were in a group with an ultimate US common parent (by analogy see paragraph 41 of *Felixstowe*).

134. There has been an exercise of the freedom of establishment within the group in that EMDH was acquired by its Luxembourg parent and remains wholly owned by it. The appellants are therefore entitled to rely on the freedom of establishment of EMDH and/or its Luxembourg parent.

135. At paragraph 11 of their Skeleton Argument ("the paragraph 11 argument"), the appellants argue that the requirement in Section 402 ICTA that the surrendering company must be UK resident is a restriction on the freedom of EMDH and/or its Luxembourg parent. Group relief is a significant fiscal advantage for the entire group and therefore CBGR should be permitted.

136. At paragraph 12 of their Skeleton Argument ("the paragraph 12 argument") the appellants correctly state that had EMDH been or become resident in the UK, group relief would have been available. They then go on to argue that

> "…the choices made by the Luxembourg parent concerning the location of establishment are impacting adversely on the appellants and EMDH. Both the appellants and EMDH are being denied a tax advantage for the group as a whole because the Luxembourg parent company chose to establish EMDH in Denmark."

137. The "no possibilities" test in the *Marks & Spencer* exception is satisfied.

*HMRC's arguments*

138. Essentially, HMRC argue that no relevant EU law rights have been exercised and therefore the *Marks & Spencer* exception does not even come into play.

139. The decision in *Felixstowe* turned on the argument that in imposing a residence condition for the link company which connected with the surrendering company the UK had unlawfully discriminated against EU companies in a way that could not be objectively justified. By contrast the group relief conditions impose no residence condition.

140. Quite apart from the residence issue, it is clear from *Felixstowe* that the UK legislation required the link company to have a connection with the surrendering company ie on the facts of *Felixstowe* the indirect 50.1% shareholding. There is no such connection between EMDH and its Luxembourg parent and the UK. Therefore neither *Felixstowe* nor *Philips* is in point in these appeals.

141. Whilst it is accepted that the Luxembourg parent has exercised its EU law rights in respect of EMDH, UK legislation does not infringe that.

142. The *Marks & Spencer* exception is of no application in these appeals. At paragraph 56 of *Marks and Spencer* the CJEU stated that:

> "56. Where, in one member state, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to article 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that member state the losses incurred by its non-resident subsidiary."

The impact of that is that CBGR is available only to the parent.

143. The focus on the parent runs through all the relevant CJEU jurisprudence such as *A Oy, UK and Bevola*[18]. The jurisprudence of the CJEU on the *Marks & Spencer* exception has never suggested that CBGR applies in any situation other than a parent with a subsidiary (or sub-subsidiary) or a resident company with a foreign PE.[19]

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[18] Case C650/16

[19] *Lidl* Case C-414/06 and *Timac Case C-388/14*

144. If any Member State was required to give relief for the losses in EMDH it is its Luxembourg parent.

*Discussion on direct reliance on European law*

145. HMRC argue that the paragraph 11 argument falls at the first hurdle. They point out that Advocate General Jääskinen stated at paragraphs 66 and 69 of his Opinion in *Felixstowe*[20]

> "66. As the freedom of establishment does not extend to third countries, EU law would not prevent the United Kingdom legislation from requiring that the link company be established in the EU/EEA. In other words, if, in the context of consortium relief, a surrendering company cannot surrender losses where the relevant link company is a third country company, the situation is outside the scope of Article 43 EC. For example, if in the main proceedings the link company, being both a member of the consortium and of the group, were incorporated in the British Virgin Islands instead of in Luxembourg, its freedom of establishment could not be invoked to support a claim for consortium relief. This would be the case even if the parent of the British Virgin Islands company were again an EU/EEA company….
>
> 69. In a system like the United Kingdom consortium relief scheme, national rules regulating the link that is required between the link company and the claimant company may affect the freedom of establishment of their lowest common parent, which enjoys the financial advantage created by the opportunity of setting off the losses of one company against the taxable profit of another company, thereby reducing the joint tax liability of the (sub)group under it. If that lowest common parent is an EU/EEA company, national rules regulating the link may create prohibited restrictions of the freedom of establishment. If that lowest common parent is a third country undertaking, the situation, following the logic in *Test Claimants in the Thin Cap Group Litigation*, falls outside the scope of the freedom of establishment."

146. HMRC state that that makes it clear "beyond doubt" that a group company can rely on the freedom of establishment of another group company only if they are connected through an EU incorporated parent company, but not in cases where the only common parent is situated in a third State.

147. The CJEU accepted that Opinion and at paragraph 42 referred only to the possibility of a link company being situated in a different Member State, not a third country.

148. Of course in this appeal the only, and very remote, connection between EMDH and the appellants is the US parent.

149. I agree with HMRC and find that freedom of establishment is not engaged on that basis alone.

150. The appellants correctly state that group relief is a tax advantage for the group as a whole. They build on that by stating that, given that UK domestic legislation between 2000 and 2006 regarded residence as being irrelevant for the purposes of defining a group, then EMDH and its parent company are each to be regarded as members of the same group or groups with the appellants for the purposes of CBGR.

[20] Case C-80/12

151. HMRC's argument is that the UK cannot, through a domestic definition of group companies, unilaterally extend the personal scope of the chapter of the Treaty relating to freedom of establishment to cover third countries. They rely on paragraph 50 of *Kronos International Inc. v Finanzamt Leverkusen*[21] ("Kronos") which reads:

> "50. However, a member state cannot unilaterally extend the personal scope of the chapter of the Treaty relating to freedom of establishment, the objective of which is to secure freedom of establishment solely for nationals of member states (see, to this effect, order in Lasertec (Case C-492/04) [2007] ECR I-3775, para 27)."

152. Mr Yates expanded on that by outlining a hypothetical situation where all the other Member States had the same group relief provisions as the UK (which they certainly do not) and Exxon Mobil had sub-subsidiaries in each of those Member States. He argued that if Mr Aaronson's argument were to be correct, then every one of those Member States would be discriminating against the Luxembourg parent. The consequence would be that, because the only connection is the US parent, each and every State would have to allow CBGR. I agree with him that that cannot be right.

153. I accept that from the point of view of the UK, EMDH and its parent are in a group or groups with the appellants but I do not accept that that *per se* extends to freedom of establishment.

154. HMRC argue, and I have heard no contrary argument, that in *Felixstowe,* regardless of residence, the legislation requires that a link company (the clue is in the use of the word "link") must have a connection to the surrendering company. On the facts of *Felixstowe*, that was an indirect 50.1% shareholding. I agree with HMRC that, in these appeals there is no such link between EMDH and its Luxembourg parent on the one hand and the appellants on the other.

155. Furthermore, I certainly agree with HMRC that in all of the cases to which I have been referred and which deal with the *Marks & Spencer* exception the emphasis is on the parent and the subsidiary and or sub-subsidiary.

156. I also observe that at paragraphs 14 and 27 in *UK* the CJEU made it clear that although paragraph 55 of *Marks & Spencer* is the primary parameter of the *Marks & Spencer* exception, nevertheless paragraph 56 is an integral part.

157. The recent decisions in *Holmen* and *Memira* serve to reinforce the view that CBGR is available only to the direct or indirect parent. In the context of direct engagement with EU law, there is no such connection in these appeals.

158. Whilst I agree with the appellants' bland assertion in the paragraph 12 argument that the position of the surrendering company is crucial for the purposes of group relief because it must consent to the surrender, I do not see how that impacts on these appeals. The losses were surrendered.

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[21] Case C-47/12

159. It is for the appellants to establish that the UK legislation has infringed treaty freedoms. HMRC cited *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam*[22] which states at paragraph 35:

> "35. Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Even though, according to their wording, the Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation."

160. HMRC's argument in that regard is that all iterations of freedom of establishment in the CJEU jurisprudence involve either a prohibition on a Member State from:

(a) hindering the establishment in another State of one of its nationals, or a company incorporated under its laws, or

(b) hindering the establishment in that State of a company incorporated in another Member State.

They are right.

161. I also agree with HMRC that the UK has no obligation in terms of the TFEU to protect the establishment by the Luxembourg parent of its subsidiary EMDH. There is no requirement on the UK to ensure the freedom of establishment of a Luxembourg company with a Danish subsidiary where there is no TFEU freedom connection to the UK.

162. The appellants have not established any basis on which, in a situation where the UK has no powers of taxation or otherwise over either EMDH or its parent, UK legislation has infringed their freedom of establishment.

163. Lastly, as far as the paragraph 12 argument is concerned, the simple fact that EMDH is established in Denmark may or may not mean that that has an adverse impact on it from a taxation perspective. However that has nothing to do with the UK legislation.

164. I find that European Law is not engaged directly.

*Question 2: If not, is there discrimination under the UK/USA Treaties which will entitle the appellants to rely on EU law directly?*

165. The appellants argue that, on the assumption that they meet the no possibilities test, they are subjected to taxation that is more burdensome than that suffered by a comparable hypothetical UK resident company with a UK parent. That is a direct consequence of the fact that their capital is controlled by a US parent. The appellants contend that by being unable to claim the EMDH losses, that is in breach of the NDA

[22] Case C-371/10

in the relevant DTC. In essence they say that the only reason that the appellants cannot claim the losses is because the ultimate parent is incorporated in the US rather than the UK.

166. Accordingly they rely on the DTC that applied at the relevant time. The 2001 DTC applies to the APE 31 December 2003 from 1 April 2003. The 1975 DTC applies to the preceding periods.

167. As I have indicated at paragraph 60 there is no material difference between the two NDAs.

168. The parties agree that Section 788 ICTA means that the DTCs have " …effect in relation to corporation tax".

169. HMRC's case, as set out in the amended Statement of Case, was that there was no discrimination under the DTCs, on the basis that:

(a) The non-availability of CBGR is not because the only link between EMDH and the appellants is the US resident common parent, but because rather it is the result of requirement under UK law that the surrendering company and the claimant company had to be within the scope of UK corporation tax. The only exception to that requirement was where the UK law was required to give effect to EU law where freedom of establishment might otherwise be said to be disproportionately infringed. It is the lack of any EU law rights as opposed to the fact that the common parent is US resident that is the reason for the non-availability of CBGR. They rely on paragraphs 46-47 of *Kronos* which read:

> "46 Therefore, a company or firm which is not formed in accordance with the law of a Member State cannot enjoy freedom of establishment.
>
> 47 This finding is not called into question by Kronos's argument that a company of a third State cannot be discriminated against for tax purposes as against a company incorporated under German law and must, therefore, be able to rely on the freedom enshrined in Article 49 TFEU."

(b) In any event, as later OECD (Organisation for Economic Co-operation and Development) commentaries make clear, the concept of discrimination in the OECD model (which the 1975 and 2001 DTCs follow) does not extend to indirectly allowing nationals or residents of one country (eg the US) accessing the benefits of a bilateral or multi-lateral treaty concluded by the other country which is party to a DTC (ie in these appeals the UK in respect of its membership of the EU).

170. They therefore argue that it follows from the fact that the exercise of EU law rights is a fundamental condition for the application of the *Marks & Spencer* exception that it is also a relevant characteristic in the comparison required by the NDA. Therefore a US controlled UK company which has not exercised EU law rights is not comparable with a UK controlled UK company which has exercised EU law rights.

171. Accordingly HMRC argue that the correct comparator for the appellants and EMDH is a UK controlled UK resident company with a foreign subsidiary which has not exercised its freedom of establishment in setting up that subsidiary. For example, a UK controlled UK resident company with a subsidiary in, say, South Africa. In that case neither the appellants nor the comparator company would be able to claim CBGR.

172. To choose any other comparator would necessarily imply extending EU freedom of establishment to third states, which is outside the scope of the NDA.

173. The appellants argue that the relevant hypothetical comparator would be if they and EMDH had an ultimate UK resident parent rather than a US parent. They rely on *FCE Bank plc v HMRC*[23] ("FCE AC"). One of the predecessor decisions on which both parties rely is that of the First-tier Tribunal in its decision[24] ("FCE").

174. By contrast, HMRC argue that, if the DTC is applicable, which they deny, then that is the wrong comparator and they rely on *Boake Allen Ltd v HMRC; NEC Semi-Conductors Ltd v CIR* (and related appeals)[25] ("Boake"). In response the appellants rely on Henderson J at paragraph 361 of *Test Claimants in the Thin Cap Group Litigation v HMRC*[26] ("Thin Cap").

175. Before looking at the case law, which refers to the commentaries, it is appropriate to look at the relevant OECD commentary. The parties are in agreement that, in principle, the commentaries should be considered. There is also agreement that one can look at a later refinement of the commentaries as an indication or assistance in understanding the text. HMRC correctly argue that they provide clarification, albeit they are not binding and that neither the UK nor the US, as OECD members, made any observation on the passages in the commentary with which we are concerned.

176. I accept that the inference, where no observation has been made, is that the State concerned is content with the commentary, both currently and historically.

177. I was referred to the 2008 version of the OECD commentaries, which contains an expanded commentary on the NDAs with which these appeals are concerned. This is relevant as it represents the then current views of the Member States of the OECD. However, as the Tribunal in *FCE* pointed out, in expressing reservations about paragraph 30, some caution must be exercised in relying on commentaries added later than the treaty because it cannot be said that the parties made the treaty in reliance on them.

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[23] [2012] EWCA 1290

[24] [2010] UKFTT 136

[25] [2007] UKHL 25

[26] [2009] EWHC 2908 (Ch)

178. In particular my attention was drawn to paragraphs 2, 76 and 77 of the 2008 version.

179. The commentary relating to Article 24(5) of the 1975 DTC read:

> "76. This paragraph forbids a Contracting State to give less favourable treatment to an enterprise, the capital of which is owned or controlled, wholly or partly, directly or indirectly, by one or more residents of the other Contracting State. This provision, and the discrimination which it puts an end to, relates to the taxation only of enterprises and not of the persons owning or controlling their capital. Its object therefore is to ensure equal treatment for taxpayers residing in the same State, and not to subject foreign capital, in the hands of the partners or shareholders, to identical treatment to that applied to domestic capital."

180. Paragraph 77 of the OECD commentary, which was introduced in 2008, and therefore applies to both NDAs reads:

> "77. Since the paragraph relates only to the taxation of resident enterprises and not to that of the persons owning or controlling their capital, it follows that it cannot be interpreted to extend the benefits of rules that take account of the relationship between a resident enterprise and other resident enterprises (eg rules that allow consolidation, **transfer of losses or tax-free transfer of property** between companies under common ownership). For example, if the domestic tax law of one State allows a resident company to consolidate its income with that of a resident parent company, paragraph 5 cannot have the effect to force the State to allow such consolidation between a resident company and a non-resident parent company. This would require comparing the combined treatment of a resident enterprise and the non-resident that owns its capital with that of a resident enterprise of the same State and the resident that owns its capital, something that clearly goes beyond the taxation of the resident enterprise alone."

181. I have highlighted in bold the words that are contentious.

182. To put the Tribunal in *FCE* in context, *FCE* was a pure DTC case with no EU law implications because UK losses were being surrendered to a UK company. Both of the subsidiaries were owned by a US company. Notwithstanding the Judges' concerns about paragraph 77 they distinguished their position on the facts when they pointed out that:

> "30. The wholly different situation in this appeal of the grouping of profits and losses between domestic subsidiaries of a non-resident parent company in the same state is not expressly addressed in the commentary, which suggests that this was not a concern and might be why countries with court decisions to the effect that the treaty provision allows grouping in this situation did not object to the commentary. There is nothing in the commentary that causes us to change the view we have reached on the wording of the provision in the light of *Boake Allen* and supported by decisions in three other countries."

183. Mr Yates drew my attention to the fact that the decisions in the three other countries all involved domestic losses or domestic inter-group transfers to another company within the same group and within the same jurisdiction.

184. That is quite different to the factual matrix in these appeals.

185. Mr Yates' recollection was that the Judges in the First-tier Tribunal in *Felixstowe*[27] had said that they agreed with the Tribunal in *FCE* and Mr Aaronson adopted that argument. Mr Aaronson argued that *FCE* is authority for the proposition that paragraph 77 is wrong or it should not be taken into account.

186. I do not agree. The First-tier Tribunal Judges Roger Berner and Sir Stephen Oliver QC stated their view very clearly at paragraph 23 and I have highlighted in bold the reference to *FCE*:

> "We do not find this further commentary in para 77 to be of any assistance in determining the issue before us. The most it tells us is that questions of treaty non-discrimination can fall to be considered in the context of domestic legislation concerning transactions within, or tax treatment of, groups of companies with an element of foreign ownership. Mr Goy did not seek to argue that para 77 had the effect of precluding non-discrimination from applying in the case of group relief generally. **In any event, we would share the view expressed by the First-tier Tribunal in *FCE Bank* that para 77 does no more than say that grouping of losses etc might not be claimed where one group company is resident and the other non-resident**, which is a very different case from that with which we are concerned, where both the Surrendering Company and the claimant companies are UK resident, and so the focus is clearly on the taxation of resident enterprises and not on that of the non-resident parent company."

187. I agree with that analysis.

188. Mr Aaronson argued that, crucially, paragraph 77 had no relevance because the surrender of the losses from EMDH did not involve the US parent in any way. The only relevance of the US parent was that it was a US parent.

189. I disagree. Paragraph 77 is a guide to the interpretation of the NDAs. It should be taken into account.

190. The wording of paragraph 77 is clear and the NDA does not extend to the transfer of losses between a non-resident and a resident enterprise.

191. In their Skeleton Argument, and in oral argument, HMRC relied on paragraph 2 of the commentary on Article 24. It too was introduced in 2008. It reads:

> "Likewise, the provisions of the Article cannot be interpreted as to require most-favoured-nation treatment. Where a State has concluded a bilateral or multilateral agreement which affords tax benefits to nationals or residents of the other Contracting State(s) party to that agreement, nationals or residents of a third State that is not a Contracting State of the treaty may not claim these benefits by reason of a similar non-discrimination provision in the double taxation convention between the third State and the first-mentioned State. As tax conventions are based on the principle of reciprocity, a tax treatment that is granted by one Contracting State under a bilateral or multilateral agreement to a resident or national of another Contracting State party to that agreement by reason of the specific economic relationship between those Contracting States may not be extended to a resident or national of a third State under the non-discrimination provision of the tax convention between the first State and the third State."

192. Whilst Mr Yates argues that this paragraph is clear guidance on the approach to be taken to DTCs to the effect that one cannot indirectly access EU rights *via* the

[27] [2011] UKFTT 838 (TC)

NDAs, Mr Aaronson unequivocally states that it is of no relevance, not least because EU law is not a mere bilateral or multilateral treaty.

193. It is not disputed that the Supreme Court, in considering the status and character of The European Communities Act 1972 in *R (Miller) v Secretary of State (SC(E &NI)*[28] ("Miller"), found that: "…so long as that Act remains in force, the EU treaties, EU legislation and the interpretations placed on those instruments by the Court of Justice are direct sources of European law."

194. Mr Aaronson takes from that that EU law is not a mere bilateral or multilateral treaty and therefore paragraph 2 is irrelevant. By contrast, Mr Yates argues that *Miller* does not alter the fact that the European treaty is multilateral and it is incorporated into UK law in the same way as any other international treaty, namely by domestic legislation.

195. It seems to me that, regardless of domestic legislation such as the 1972 Act, as HMRC argue, there is a multilateral treaty that underpins that legislation. The 1972 Act and the EU treaty antedate the 2008 OECD commentary by many years. Neither the UK nor the US (which enjoys DTCs with a number of EU countries) sought to exclude multilateral treaties that were incorporated into domestic law.

196. Accordingly, analogous to the position described by the Tribunal in *FCE* at paragraph 30, I find that the facts that:

(a) the incorporation of rights in a bilateral or multilateral treaty into domestic law was not expressly addressed in the commentary,

(b) there was reference to treaty rights alone, and

(c) there were no objections to the commentary

mean that the words of the commentary in paragraph 2 should stand without caveat as a guide to interpretation of the NDAs.

197. Whilst I understand Mr Aaronson's argument, nevertheless, I agree with HMRC that the concept of discrimination in the DTCs does not extend to indirectly allowing the benefits of a bilateral or multilateral treaty to be accessed by virtue of a DTC which is based on reciprocity.

198. As paragraph 2 of the commentary makes explicit, reciprocity is not only a major factor but a key issue. The whole thinking underpinning the *Marks & Spencer* exception is that the domestic law is justifiable unless it is disproportionate and that that is not considered in isolation but by reference to reciprocal rights. At the heart of that exception is that if freedom of establishment is engaged there is a reciprocal freedom of establishment.

199. The US has no concept of freedom of establishment.

[28] [2017] UKSC 5

200. The UK and other EU Member States have agreed the parameters of the rights extended to their respective residents. If residents of a third state could access those by invoking an NDA of a DTC, that would be disruptive as between the Member States where some might have such an NDA and others might not.

201. Given that neither the UK nor the USA made any observations on paragraphs 2 and 77, I am following the approaches advocated in those paragraphs in the commentary in interpreting the NDAs.

202. However, as I indicate, the appellants rely on Mr Justice Henderson (as he then was) at paragraph 361 in *Thin Cap* which reads:

> "361. The true answer to the question posed by the House of Lords in Boake Allen, in my judgment, is that the UK thin cap rules discriminate between groups where the ultimate ownership and control is to be found in a member state and groups where it is to be found in a third country, because the former can invoke Article 43 and the latter cannot. Since the UK is a member state, and the USA is not, it seems to me that the necessary discrimination for the purpose of Article 24(5) of the US Treaty is made out. However, as I have already said, I consider that IBM's claim must fail, because the hypothesis required by Article 24(5) does not relevantly engage Article 43 EC."

203. Both parties agree that that paragraph is *obiter dicta*. Having read the case, which was heard in 2009 and therefore postdates the 2008 commentary I accept the argument that there is no reference at any point to the OECD commentaries. I do not accept the argument that that was because they had nothing to do with that case and by implication nothing to with these appeals. That is because, the detail of that very long case has no relevance to these appeals and I do accept Mr Yates' argument that paragraph 361 must be read in context.

204. That context is a reference to the question posed in *Boake* at the last sentence in paragraph 16 (namely whether the UK ACT provisions were discriminatory), the quotation from Lord Hoffman at paragraph 17 of *Boake*, a finding that on the facts of that case, EU law did not advance matters and a finding that:

> "360. The point in Boake Allen was that, if a UK parent were interposed, it would then be possible to make a group income election, even though control of the UK subsidiary would remain in the USA. This showed that the inability to make an election was not caused by the US control of the UK subsidiary. In the present case, by contrast, I cannot see what difference … would be made by the interposition of an intermediate UK parent."

205. He had therefore rejected the argument advanced to him on the basis of *Boake* and hence paragraph 361 is indeed *obiter*. Having rejected the argument he may well have decided that he had no cause to resort to the commentaries. I do not know. I distinguish these appeals.

206. Accordingly, I find that there is not discrimination under the DTCS which will entitle the appellants to rely on EU law directly.

207. If I am wrong on that, then my starting point is that the FTT in *FCE* quoted Lord Hoffman at paragraph 16 in *Boake*, the relevant portion of which reads:

> "…In relation to article 24(1) of the OECD model convention, which prohibits discrimination between residents on grounds of nationality, the commentary says that the 'underlying question' is whether two residents are being treated differently **'solely** by reason of having a different nationality.' It does not repeat this observation in relation to article 24(5), but the principle must be the same….".

I have highlighted in bold the word "solely". I therefore agree with Mr Aaronson when he stated that what the NDA means is quite simply that "…if you have an American parent company, direct or indirect parent company, owning a UK company, a UK resident company shan't suffer any adverse tax consequences by virtue solely that it is owned by a US company."

208. Is that what happened here?

209. That takes me to the question of comparators. That matters because if the appellants are correct then a hypothetical parent in the UK would be infused with EU rights, could invoke Article 43 (freedom of establishment) and thereby, courtesy of the *Marks & Spencer* exception, achieve CBGR (if the "no possibilities test" were to be satisfied).

*The cases relied upon*

210. HMRC accept that in *FCE AC* the Court decided that the purpose and effect of article 24(5) are to outlaw the admittedly discriminatory tax treatment, to which (but for the DTC) FCE would be subject. That is because if it were the directly held subsidiary of a UK-resident company as compared with the directly held subsidiary of a US-resident company it would be entitled to more favourable tax treatment. There is discrimination. Patently, the only reason for the difference in treatment in that case was the fact of FMC's US residence.

211. It is not in dispute between the parties that the NDA is applicable where, as Mr Aaronson stated "…the relevance of the parent company is confined to its state of residence alone" and that that is what the Court held in *FCE AC* saying that is what the House of Lords established in *Boake*.

212. HMRC accept that the correct comparator in that instance was a UK parent company but also point out that the consideration of EU law rights did not feature in that case.

213. HMRC rely instead on paragraphs 16, 17 and 22 of *Boake*. I have quoted from paragraph 16 above in reference to the word "solely" and I stand by that.

214. The remainder of the quotation upon which HMRC rely reads:

> "16. … Does section 247 discriminate on the grounds that the capital of the subsidiary is controlled by a non-resident company?
>
> 17. In my opinion it plainly does not. For example, if a US parent were to interpose a UK resident holding company between itself and its UK-resident subsidiary, the control would remain in the US but there would be no objection to an election by the UK subsidiary and its immediate, UK-resident parent. On the other hand, an individual US shareholder and the company he controls in the UK could not elect, but the reason is not because the company is

> subject to US control. An individual UK shareholder and his company could not elect either, for the same reason that a non-resident company cannot elect. It is because an individual is not liable to corporation tax. An election is a joint decision by two entities paying and receiving dividends that one rather than the other will be liable for ACT. This is not a concept which can meaningfully be applied when one of the entities is not liable for ACT at all.…
>
> 22. A DTC, on the other hand, does not give a company or individual resident in one country a right of establishment in the other. As the commentary on the OECD model says, the equality it ensures is only that any enterprise it owns in the other country will not be subject to taxation which discriminates on the ground of its foreign control. In my opinion, the denial of the right of election was not on the ground of the company's foreign control but on the ground that section 247 cannot be applied to a case in which the parent company is not liable to ACT."

215. HMRC argue on that basis that the fact that group was ultimately controlled in the US is irrelevant. That is because, to adopt Lord Hoffman's approach, subject to meeting the "no possibilities" test if the group had an intermediate UK parent holding company of the appellants and EMDH, relief would be available and there would be no perceived difference in treatment and control would remain in the US.

216. In *FCE AC* Lord Justice Rimer rejected HMRC's argument that discrimination was not solely due to foreign ownership of FCE as it would have been open to the group to interpose an intermediate UK holding company. Not only am I bound by that but I agree entirely. How does that sit with the argument in *Boake* where it is clear that Lord Hoffman did consider the interposition of a UK company?

217. Fortunately, although I was only taken to the headnote, I can see that Lord Justice Rimer considered paragraphs 16, 17, 19 and 22 of *Boake* in some detail at paragraphs 32 *et seq*. He very clearly distinguished the cases, and the references to the interposition of a UK company on the facts. It is equally clear that the references in paragraphs 17 and 22 of *Boake* turned on those facts.

218. Lord Justice Rimer went on to say:

> "36….I agree with the way that the Upper Tribunal dealt with this point at paragraph 19 of its judgment:
>
> > 'We observe at this point that this crucial part of Lord Hoffmann's reasoning has no relevance to the present case, because the claim for group relief was a claim that only affected the UK tax position of the two UK subsidiaries. The claim had no effect at all on the tax position of the US parent, and the only relevance of the parent company was to establish (or not, as the case may be) the necessary group relationship between the two UK companies which surrendered and accepted the trading losses. It is conceptually quite irrelevant whether the US common parent is within the charge to UK corporation tax or not, in relation to the question of whether two UK tax resident companies are sufficiently connected to each other so as to form a group which permits the surrender of losses from one to another.'"

219. In these appeals, as the parties acknowledge, the claims had no effect on the tax position of the US parent whose only relevance was to establish the group relationship.

220. Of course, in these appeals it is not purely domestic relief of losses. However, should the "no possibilities" test be satisfied then I find that the relevant comparator would be a UK parent imbued with EU rights, as the appellants argue.

221. However, for the reasons given, I do not find that the NDAs are engaged.

***The second issue: no possibilities or definitive losses***

*Question 3: What is the relevant time for testing no possibilities, ie when are there final losses?*

222. HMRC have consistently accepted that the test set out in the first part of the *Marks & Spencer* exception were met in respect of the EMDH losses but did not accept that the "no possibility" aspect had been met.

223. Whilst HMRC accept that the Supreme Court in *M&S 2013* decided that the "no possibilities" test should be applied as at the date of the claim, they look to the new legislation enacted in *FA2006* following *Marks & Spencer*. That applied from 1 April 2006 and has no impact on these claims. However, that provided that the "no possibilities" test should be applied immediately after the APE in which the loss arose.

224. The European Commission brought infraction proceedings ("UK")[29] on the basis that imposing conditions on CBGR by applying the test immediately after the end of the APE was too restrictive.

225. The judgment in *UK* is short but covers a number of issues. The CJEU set out the United Kingdom legal context, namely:

> (a) ICTA did not permit losses sustained by non-resident companies to be taken into account,
>
> (b) Following the decision in *Marks & Spencer*, FA2006 amended ICTA allowing CBGR in certain circumstances and that was then reproduced in Corporation Tax Act 2010 ("CTA"),
>
> (c) Section 119(4) CTA final losses must be determined "as at the time immediately after the end" of the APE in which the losses were sustained,
>
> (d) The Supreme Court in *M&S 2013* had determined that, in regard to the pre 2006 legislation, "…interpreted in the light of European Union ("EU") law…" the relevant date is to look at the circumstances obtaining at the date of the claim.

226. The CJEU was determining two complaints by the Commission that the legislation in FA2006 and CTA breached EU law principles because it

> (a) made it virtually impossible in practice to obtain CBGR, and
>
> (b) precluded CBGR for losses sustained before 1 April 2006 (ie the legislation was not retrospective).

On the basis that the Commission had failed to prove its case neither complaint was upheld.

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[29] Commission v UK Case C-172/13

227. The outcome of that case was that the CJEU held that after 2006 it was lawful for the UK to apply the "no possibilities" test to losses immediately after the accounting period in which the losses arose. It also provided further guidance at paragraphs 33 and 36 as to the type of loss that would not meet the *Marks & Spencer* exception.

228. HMRC argue that, of course, that guidance was not before the Supreme Court in *M&S 2013* and, had it been, then that case would have been decided differently. Whilst HMRC acknowledge that *UK* related to *FA2006* they argue that it represents the CJEU's interpretation of the freedom of establishment set out at Articles 49 and 54 of TFEU and as such has declaratory effect which means that it also applies to prior legislation such as Section 402 ICTA.

229. I do not agree.

230. At paragraph 42 in its penultimate substantive paragraph the CJEU stated:

> "In response to the Commission's argument, the United Kingdom contends that cross-border group relief is also available for periods before 1 April 2006, but that it is governed by the legislation applicable to those earlier periods, construed in accordance with EU law following the judgment in *Marks & Spencer* … as was the intention of the Supreme Court of the United Kingdom in its judgment of 22 May 2013, referred to in paragraph 7 above."

231. The final substantive paragraph before the complaint is rejected states that, irrespective of any argument on legal certainty (which was not explored), the Commission had failed to prove its case.

232. Clearly the CJEU recognised the detail of *M&S 2013* and its impact on pre 2006 losses, since it made it explicit at paragraph 7 that the Supreme Court had found that relevant date was the date of the claim for cases before FA2006 came into effect.

233. There is nothing in *UK* that even starts to suggest that the Supreme Court decision was in conflict with EU law.

234. Therefore I reject HMRC's, admittedly ingenious, argument that the effect of *UK* is to retrospectively permit re-interpretation of Section 402 ICTA and thereby render the decision in *M&S 2013* irrelevant.

235. Accordingly, I find that the relevant time for testing "no possibilities", namely when there are final losses, is at the date of the claim.

*Question 4: Are the losses for 2001 prevented from being considered definitive on account of being time-barred in Denmark?*

236. As I indicate at paragraph 229 above, in *UK* the CJEU provided guidance on the type of loss that would not meet the *Marks & Spencer* exception and found at paragraph 33 that:

> "It should be noted, however, that the first of those situations referred to by the Commission is irrelevant for the purposes of assessing the proportionality of Section 119(4) of the CTA 2010.

> It is settled law that losses sustained by a non-resident subsidiary cannot be characterised as definitive, as described in paragraph 55 of the judgment in *Marks & Spencer* by dint of the fact that the Member State in which the subsidiary is resident precludes all possibility of losses being carried forward (see judgment in *K*, paragraphs 75 to 79 and the case-law cited). In such a situation, the Member State in which the parent company is resident may not allow cross-border group relief without thereby infringing Article 49 TFEU."

237. HMRC argue that the liquidation of EMDH in 2013 is irrelevant as the 2001 losses were time barred by 2006 in terms of Danish law and therefore on the basis of paragraph 33 of *UK* the losses cannot fall within the *Marks & Spencer* exception.

238. The appellants correctly argue that in the APE 2001, in respect of which the claims arise, until 2006 the losses were capable of being carried forward. They distinguish that position with the facts in *K* where there was never any possibility of losses as the "particularity" of the domestic law had no concept of losses for the type of asset involved.

239. I observe that in *K* at paragraph 75 the CJEU referred to the *Marks & Spencer* exception and went on to say that "…irrespective of the considerations of fact…" the taxpayer could not be regarded as having "exhausted the possibilities" (the wording in paragraph 55 of *Marks & Spencer*) since the possibility of losses did not exist and never had existed.

240. The CJEU went on to find that:

> "79. According to the Court's case-law, a Member State cannot be required to take account, for the purposes of applying its tax law, of the possible adverse consequences arising from particularities of legislation of another Member State applicable to a property situated in the territory of that State which belongs to a resident in the first State (see, by analogy, Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 51; Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 42; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 49).
>
> 80. The free movement of capital cannot be understood as meaning that a Member State is required to adjust its tax rules on the basis of those of another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a taxpayer as to investment abroad may be to the taxpayer's advantage or not, according to circumstances (see, by analogy, *Deutsche Shell*, paragraph 43; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 50)."

241. Mr Aaronson argues that there is doubt as to what constitutes a "particularity", relying on Advocate General Kokott's Opinion at paragraph 40 for *UK*. Firstly, that Opinion was rejected although that does not make that paragraph invalid.

242. Secondly, it can be seen that the CJEU has relied on paragraphs 49 and 50 of *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*[30]. Paragraph 49 reads in very similar terms to paragraph 79 of *K* but specifically with the substitution of the words "permanent establishment" for the word "property" in the third line.

[30] Case C-157/07

243. However, paragraph 50, which is again expressed in similar terms to paragraph 80 of *K* is very relevant here since we are dealing with freedom of establishment. It reads:

> "The Court has held that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a company as to the establishment of commercial structures abroad may be to the company's advantage or not, according to circumstances (*Deutsche Shell*, paragraph 43)."

244. It seems clear to me that in respect of the 2001 losses, for all intents and purposes, the possibility of losses did not exist from 2006. Therefore, as in *K*, the possibility could not be exhausted. Therefore, neither at APE 2001 could they be definitive nor as at the date of the claim.

245. The answer to the fourth question therefore is that the losses for 2001 are prevented from being considered definitive because they were time-barred in Denmark.

*Question 5*: *If the answer to (3) is the time of making a claim, were the losses of EMDH definitive at this time?*

246. In both *Holmen* and *Memira* the CJEU made it clear that a claimant company carries the burden of proof in demonstrating that the losses are indeed final and when. Essentially, as the Court makes clear at paragraphs 38 to 40 of *Holmen* the appellants would need to establish the point at which there was no possibility of losses being used by a third party. The Court also confirmed that domestic law restrictions on the use of losses in the jurisdiction of the subsidiary (or sub-subsidiary) are not decisive in determining whether the jurisdiction of the claimant company must grant loss relief.

247. HMRC's argument is that the relevant losses have only become purportedly "definitive" following the intragroup transfer of EMDH's business to Nordic which thereafter operated a PE in Denmark. The underlying business continued to be profitable (as highlighted by the fact that prior year losses continued to be partially utilised up to and including 2012). It is HMRC's case that EU law would not require the UK (assuming that there were EU rights in play) to provide loss relief for such losses since:

> (i) they have only become purportedly "definitive" as a result of an internal reorganisation, and/or
>
> (ii) the fact that Danish tax law does not allow such losses to be carried forward into the successor PE does not make them "definitive" for the purposes of EU law.

248. Undoubtedly not all of the CJEU decisions referencing the *Marks & Spencer* exception are totally aligned. However, notwithstanding the many years of

controversy and Advocate General Kokott's dislike of it, quite apart from *Philips, Felixstowe,* and *A Oy,* since 2018 *Bevola, NN*[31]*, Holmen and Memira.* have all not only endorsed but also clarified it. For example *NN*, which deals with the use of Danish losses in Denmark (although the parents are Swedish) extends the *Philips* line of authority on domestic losses and I have discussed *Holmen* and *Memira* at length.

249. The appellants rely on paragraph 64 of *Bevola* to define what Mr Aaronson describes as the "essence" of the *Marks & Spencer* exception.

250. However, I think that that paragraph needs to be read in context. The CJEU started with asking whether the losses were definitive and stated at paragraph 58:

> "Where there is no longer any possibility of deducting the losses of the non-resident permanent establishment in the member state in which it is situated, the risk of double deduction of losses no longer exists".

251. The Court went on to discuss whether the legislation went beyond what was necessary to pursue the objectives and stated that the deduction of losses can be allowed only on condition that the resident company demonstrates that the losses it wishes to set off against its results are definitive and I quote the following paragraphs:

> "60. However, in order not to compromise the coherence of the Danish tax system, the maintenance of which was one of the reasons for the adoption of the legislation in question, deduction of such losses can be allowed only on condition that the resident company demonstrates that the losses it wishes to set off against its results are definitive (see, to that effect, judgments of 13 December 2005, *Marks & Spencer*, C-446/03, paragraph 56, and of 3 February 2015, *Commission* v *United Kingdom*, C-172/13, paragraph 27).
>
> 61. In this respect, it must show that the losses in question satisfy the requirements set out by the Court in para 55 of the judgement of 13 December 2005, *Marks & Spencer*, to which the referring court rightly refers in its question.
>
> 62. Thus, in para 55 of that judgement, the Court held that a restriction of freedom of establishment imposed by the legislation of a member state is disproportionate in the situation in which, first, the non-resident subsidiary has exhausted the possibilities available in its state of residence of having the losses taken into account for the accounting period concerned by the claim of release and also for previous accounting periods and, second, there is no possibility of the losses being 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.
>
> 63. The criterion of the definitive nature of the losses, within the meaning of para 55 of the judgement of 13 December 2005, *Marks & Spencer*, was explained in para 36 of the judgement of 3 February 2015, *Commission v UK*. It follows that the losses incurred by a non-resident subsidiary may be characterised as definitive only if that subsidiary no longer has any income in its member state of residence. So long as that subsidiary continues to be in receipt of even minimal income, there is a possibility that the losses sustained may yet be offset by future profits made in the member state in which it is resident.
>
> 64. It follows … that the losses attributable to a non-resident permanent establishment become definitive when, first, the company possessing the establishment has exhausted all the possibilities of deducting those losses available under the law of the member state in which the

[31] Case C-28/17

> establishment is situated and, second, it has ceased to receive any income from that establishment, so that there is no longer any possibility of the losses being taken into account in that member state."

252. Firstly, there is a very clear reference to, and endorsement of, paragraph 56 of *Marks & Spencer* (and paragraph 27 of *UK* which refers to it). Therefore the arguments articulated at paragraphs 142 and 143 above apply since there is no "parent" or indeed "grand-parent" relationship in these appeals. On that basis alone the *Marks & Spencer* exception does not apply to these losses.

253. If I am wrong on that, at paragraph 163 it does indeed make it clear that, as Mr Aaronson said, *UK* "amplified" *Marks and Spencer*.

254. Furthermore, as Advocate General Kokott pointed out at paragraph 71 of her Opinion in *Memira, Bevola* did not make any specific comments on when final losses exist.

255. At paragraph 27 of his Skeleton Argument Mr Aaronson argues that even if the date for the "no possibilities" test was the end of the relevant accounting period then the "no possibilities" test would still be met given the quantum of the losses as they could never have been used in Denmark.

256. I cannot accept that argument since, as can be seen, paragraph 63 of *Bevola* endorsed paragraph 36 of *UK,* which in turn endorsed paragraphs 54 and 54 of *A Oy,* and that excludes claims based on the scale of losses.

257. Whilst I do understand the appellants' argument that EMDH had exhausted all possibilities of using its losses that are the subject matter of these claims, the reason that that is so is as a result of domestic legislation. Undoubtedly it was a commercial decision to transfer EMDH's business to Nordic and indeed the business carried on thereafter.

258. The issue is whether it is for the UK to bear the adverse consequences arising from the tax legislation in Denmark that applied to that transfer.

259. The answer as to whether the losses of EMDH were definitive at the date of claim is that they were not. The reason that they could not be utilised by Nordic was purely a question of domestic law. The *Marks & Spencer* exception, as refined by the line of case law such as *UK, A Oy, Bevola, Holmen* and *Memira* and others, does not allow that.

**Decision**

260. For all the reasons set out above, the appeals are dismissed.

261. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

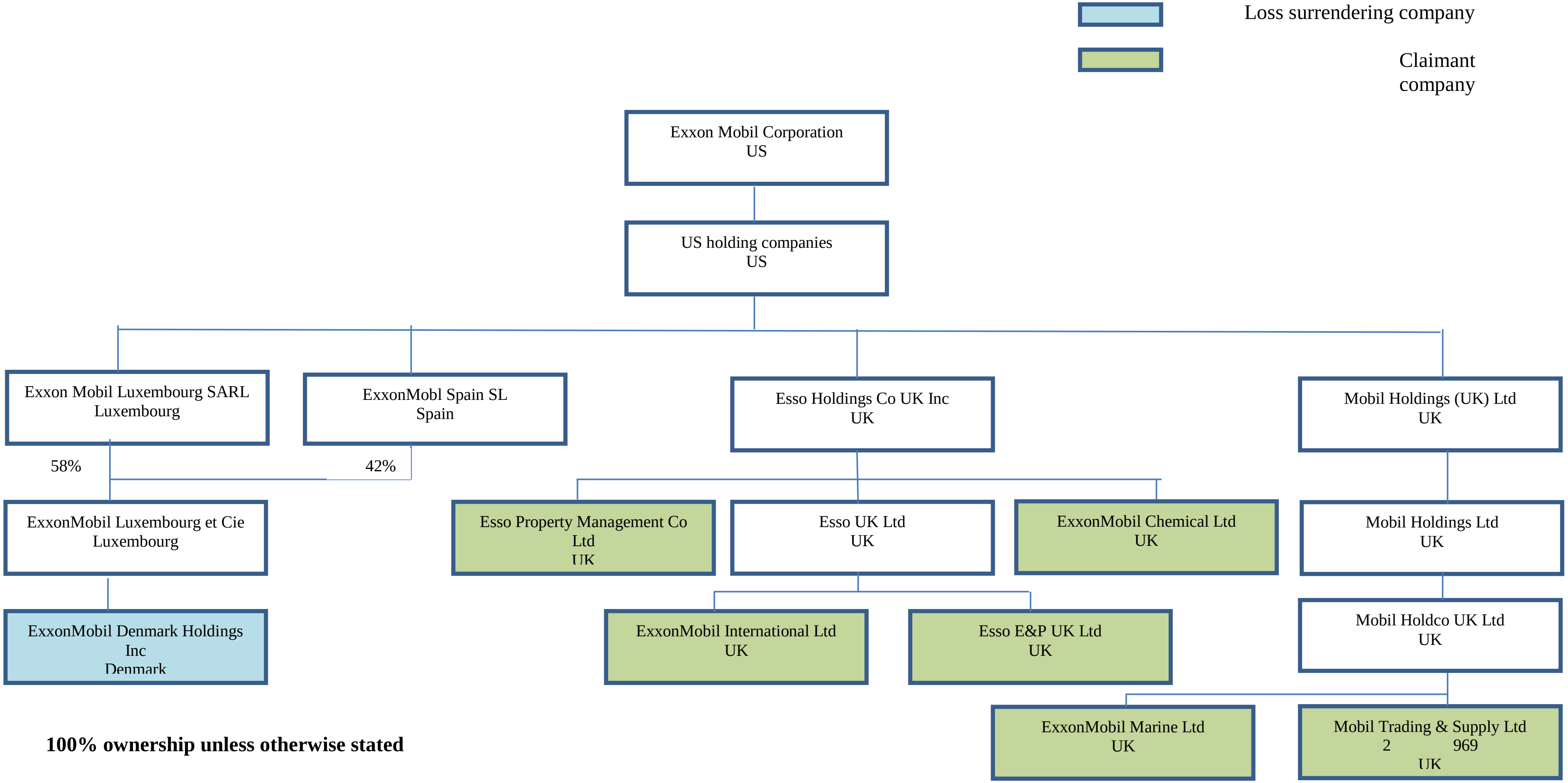
**ANNE SCOTT**

**TRIBUNAL JUDGE**

**RELEASE DATE: 4 MARCH 2020**

**Appendix 1**

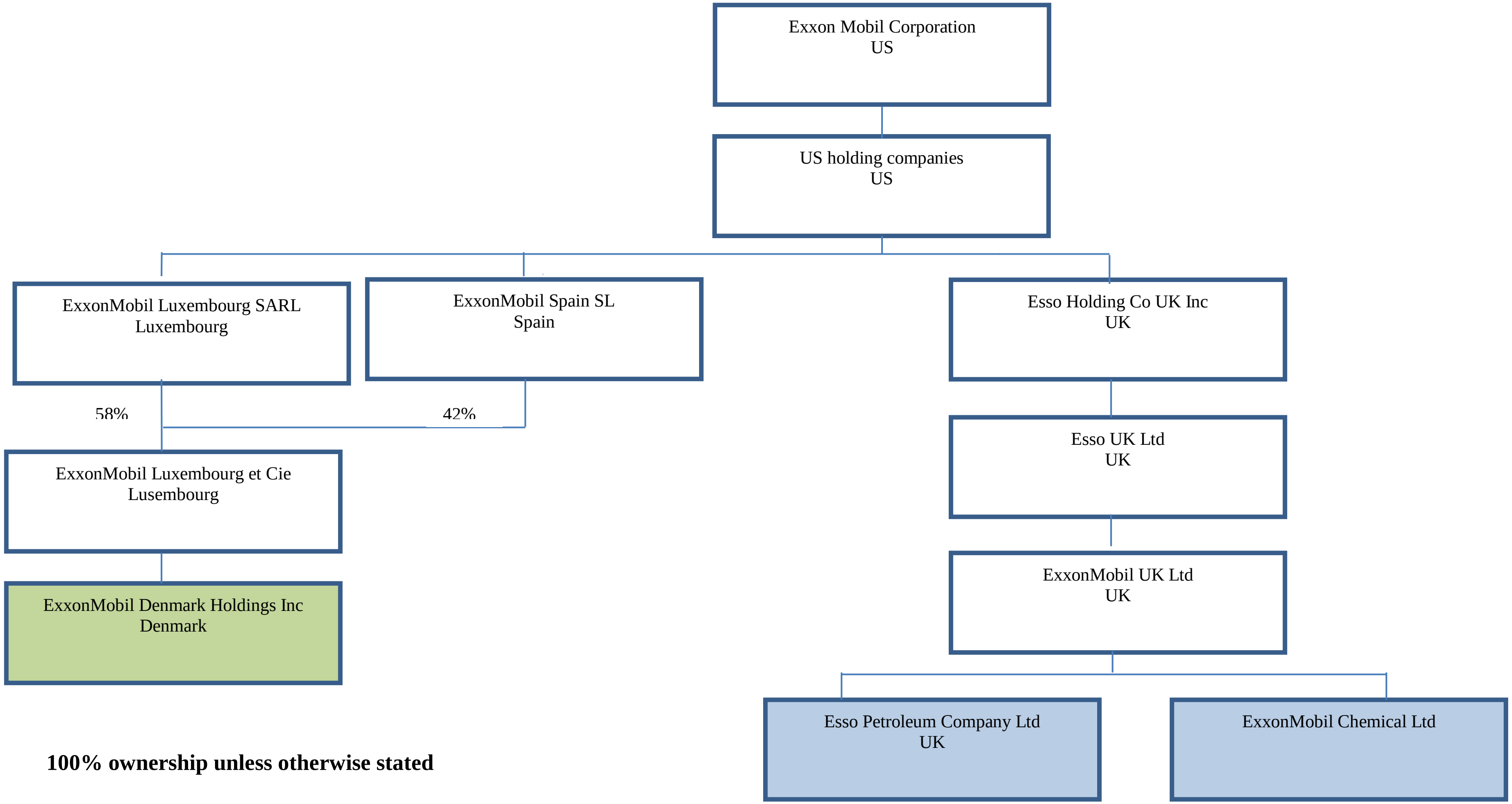
## Corporate Structure – Years ended 31 Dec 2001 & 2002




**100% ownership unless otherwise stated**

Appendix 2

# Corporate Structure – Year ended 31 Dec 2003




**100% ownership unless otherwise stated**

**Appendix 3**

**Danish Law on losses**

1. Section 15 of the Ligningsloven (the Danish Tax Assessment Act no. 339) provided that losses could only be carried forward for use in subsequent APEs for a maximum of five years. That meant that the unused balance of the losses incurred in the APE 2001 became time-barred on 31 December 2006.

2. Section 15 was amended by the Act no. 313 of 21 May 2002 with the effect that losses arising from and after 1 January 2002 could be carried forward indefinitely.

3. Act no. 591 of 18 June 2012 simultaneously abolished the carry forward rule in section 15 as amended and introduced an indefinite carry forward rule in section 12 of the Corporation Tax Act no. 591 with effect for income years from 1 July 2012.

4. Section 12 introduced a general restriction to carry forward whereby on an annual basis a company is permitted only to carry forward and offset losses up to a certain threshold (fixed annually) of the taxable income of the year. Any balance of unutilised losses exceeding the applicable threshold can offset no more than 60% of any part of the year’s taxable income exceeding the applicable threshold. That means that if the taxable income of the year exceeds the applicable threshold corporation tax will be payable regardless of the amount of carried forward losses.

5. Although Danish law provides for group consolidation in its joint taxation rules, and EMDH was taxed under those rules in the period January to October 2006 (see paragraph 29 above) and in 2013 when it entered into joint taxation with a permanent establishment of a non-resident group member prior to its liquidation, I accept the uncontested expert evidence of Mr Ottosen that those rules are not relevant to the EMDH losses. He points out that since the losses predate the periods of joint taxation EMDH would not have been eligible to offset those losses against profits of Mobil or the permanent establishment.

6. Losses carried forward must be utilised as soon as possible, meaning that they can only be carried forward to the extent that they cannot be offset against profit in earlier years.

7. Carry back of losses is not permitted.

8. Other than in the event of joint taxation, losses incurred by a Danish tax resident company can only be utilised by that company.

9. On final liquidation, the balance of unutilised losses remaining is forfeited.

**402 Surrender of relief between members of groups and consortia**

(1) Subject to and in accordance with this Chapter and section 492(8), relief for trading losses and other amounts eligible for relief from corporation tax may, in the cases set out in subsections (2) and (3) below, be surrendered by a company ("the surrendering company") and, on the making of a claim by another company ("the claimant company") may be allowed to the claimant company by way of a relief from corporation tax called "group relief".

(2) Group relief shall be available in a case where the surrendering company and the claimant company are both members of the same group.

A claim made by virtue of this subsection is referred to as a "group claim".

(3) Group relief shall also be available in the case of a surrendering company and a claimant company either where one of them is a member of a consortium and the other is—

(a) a trading company which is owned by the consortium and which is not a 75 per cent subsidiary of any company; or
(b) a trading company—

    (i) which is a 90 per cent subsidiary of a holding company which is owned by the consortium; and
    (ii) which is not a 75 per cent subsidiary of a company other than the holding company; or

(c) a holding company which is owned by the consortium and which is not a 75 per cent subsidiary of any company;

or, in accordance with section 406, where one of them is a member of a group of companies and the other is owned by a consortium and another company is a member of both the group and the consortium.

A claim made by virtue of this subsection is referred to as "a consortium claim".

[(3A) Group relief is not available unless the following condition is satisfied in the case of both the surrendering company and the claimant company.

(3B) The condition is that the company is resident in the United Kingdom or is a non-resident company carrying on a trade in the United Kingdom through a branch or agency (*from 2003 a permanent establishment*).]

(4) A consortium claim shall not be made … if a profit on a sale of the share capital of the other company or its holding company which the member owns would be treated as a trading receipt of that member.

(5) Subject to the provisions of this Chapter, two or more claimant companies may make claims relating to the same surrendering company, and to the same accounting period of that surrendering company.

(6) A payment for group relief—

(a) shall not be taken into account in computing profits or losses of either company for corporation tax purposes, and
(b) shall not for any of the purposes of the Corporation Tax Acts be regarded as a distribution or a charge on income;

and in this subsection “a payment for group relief” means a payment made by the claimant company to the surrendering company in pursuance of an agreement between them as respects an amount surrendered by way of group relief, being a payment not exceeding that amount.