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To the EFTA Court

Oslo, 15 September 2021

WRITTEN OBSERVATIONS
BY
PRA GROUP EUROPE AS

Represented by Anette Fjeld, advocate at Deloitte Advokatfirma AS, submitted pursuant to Article 20 of the Statute of the EFTA Court, in

Case E-3/21 – PRA Group Europe v Staten v/Skatteetaten

Concerning a request for a preliminary ruling from Oslo Tingrett (Oslo District Court).

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1. INTRODUCTION

1. The EFTA Surveillance Authority concluded in its reasoned opinion dated 25 October 2016 in case 76513 that the Norwegian interest deduction limitation rule from 2014 is in contrary to the freedom of establishment in Article 31 cf. Article 34 of the EEA Agreement.[1]

2. Following the reasoned opinion, the Norwegian government did not agree with ESA and maintained that the interest deduction limitation rule was in line with the freedom of establishment.[2]

3. The next step would normally be an infringement proceeding before the EFTA Court launched by ESA.

4. On July 2019, ESA did however close the case 76513 against Norway. The reason was that Norway had introduced a new interest deduction limitation rule in 2019, including an equity escape clause. Since the past rule was no longer in force, the infringement proceeding was closed. The new interest deduction limitation rule is being assessed by ESA in case no. 82988.

5. ESA has maintained its conclusion that the interest deduction limitation rule from 2014 is in contrary to the freedom of establishment. Despite this, Norway has continued with a practice in breach of the EEA-agreement by continuing to apply an interest deduction limitation rule that treats national situations more favourably than cross-border situations.

6. The Norwegian Tax Appeal Board has in at least three cases concluded that the interest deduction limitation rule from 2014 is in line with the EEA-agreement,[3] and on that basis denied interest deductions.

7. This is the background for why the plaintiff brought the case before the Oslo District Court and argued for obtaining an Advisory Opinion from the EFTA Court.

2. FACTS

8. PRA Group Europe AS agrees with the facts presented in section 2 on page 2 in the Request for Advisory Opinion to the EFTA Court:

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[1] The EFTA Surveillance Authority, Reasoned opinion in case 76513 against Norway dated 25 October 2016, p. 9
[2] Letter from the Ministry of Finance dated 31 January 21 in case 76513
[3] The Norwegian Tax Appeals Board: Skatteklagenemnda, Stor avdeling 01 – Vedtak: SKNS1-2020-26, Skatteklagenemnda, Stor avdeling 01 – Vedtak: SKNS1-2020-100 (the case at hand) and Skatteklagenemnda, Alminnelig avdeling 17, Vedtak: Saksnr: NS 9/2020 (unpublished)

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"PRA Group is a global group engaged in the acquisition of financial assets and service of debt. The group has several companies in Europe, which are owned by the holding company PRA Group Europe Holding S.à.r.l. That company is subject to taxation in Luxembourg.

PRA Group Europe Subholding AS (subject to taxation in Norway) was a wholly-owned subsidiary of the holding company PRA Group Europe Holding S.à.r.l. PRA Group Europe Subholding AS was financed with a combination of equity and loan from the parent company. The interest expenses for the fiscal years 2014 and 2015 are related to that debt.

The company did not receive any other value transfers from the parent company in 2014 and 2015. In its tax returns for 2014 and 2015 the company claimed a deduction for that debt interest, see Section 6-40 of the Tax Act. The company asserted that Section 6-41 of the Tax Act entailed a reduction in the deductible amount. Disallowed interest deductions amounted to NOK 132 969 145 for the fiscal year 2014 and NOK 11 580 008 for the fiscal year 2015, a total of NOK 144 549 153. PRA Group Europe Subholding AS was merged into PRA Group Europe AS in November 2016.

By letter of 7 December 2016, PRA Group Europe AS requested a change in its tax assessment for the fiscal years 2014 and 2015. The company contended that the limited interest deduction rule was contrary to the freedom of establishment provided for in Article 31 EEA and that Norway was under an obligation to allow a full deduction for debt interest accrued.

By the Tax Office's decision of 7 July 2017, the request for a reassessment was admitted for consideration. Following a review on the merits, the tax assessments for 2014 and 2015 were upheld.

PRA Group Europe AS appealed against that decision to the Tax Appeals Board (Skatteklagenemnda) on 31 July 2017.

By decision of 24 June 2020, the Tax Appeals Board, sitting in extended composition,dismissed the appeal.

On 8 September 2020, PRA Group Europe AS lodged proceedings before Oslo District Court, seeking to be allowed a full deduction for accrued debt interest in the fiscal years 2014 and 2015, meaning, without the limited interest deduction rule under Section 6-41 of the Tax Act.

The Norwegian Government, represented by the Tax Administration, responded by Defence of 29 October 2020, claiming that the court should find in its favour.

During the preparatory stages of the proceedings, the District Court has decided to obtain an Advisory Opinion from the EFTA Court concerning the EEA law questions raised by the case."

9. In addition, PRA Group Europe AS would like to emphasize that the Tax Appeals Board was sitting in extended composition due to a dissenting opinion in the decision when in general composition (three members). The dissenting opinion was on the EEA-question. The dissenting member agreed with PRA Group Europe AS and ESA, that the interest deduction limitation rule was in contrary to the freedom of establishment under the EEA-agreement.

3. NATIONAL LAW

10. Relevant national law is the interest deduction limitation rule in the Norwegian Tax Act ("NTA") Section 6-41, limiting the right to deduct interest above NOK 5 million to a 30% EBIDTA ceiling.

11. Further to the group contribution rules in section 10-2 to 10-4 of the NTA granting group companies the possibility to make and receive group contributions with taxable effect, with the aim to even out income differences in the group. Only companies that are liable to tax in Norway can make or receive group contributions.

12. Received group contributions increases the EBIDTA of the company, and thus the 30% EBIDTA ceiling. Norwegian group companies may therefore obtain higher interest deductions than cross-border group companies.

13. The interaction between the interest deduction limitation rule and the group contribution rule was a desired effect from the Norwegian legislator.[4]

14. PRA Group Europe AS agrees with the description of these provisions and their interaction in the Request for Advisory Opinion section 3 on page 3 to 7:

"3. Relevant Norwegian legislation

3.1. The limited interest deduction rule in Section 6-41 of the Norwegian Tax Act

Section 6-40(1) of Act No 14 of 26 March 1999 on taxation of assets and income (Lov om skatt av formue og inntekt av 26. mars 1999 nr.14 (skatteloven)) ("the Tax Act") lays down deduction for debt interest as a general rule. Section 6-41 of the Tax Act is an exception and limits the deductibility of interest paid to affiliated parties to a specified maximum deduction.

Paragraphs (1) to (3) read as follows in 2014 and 2015:

Section 6-41. *Limitation of interest deduction between affiliated parties*

[4] Preparatory works Prop. 1 LS (2013-2014) 4.15.1 page 111 also referred to in the Request for Advisory Opinion

(1) The rules in this Section regarding limitation of deduction of net interest expenses on debt to affiliated individuals, companies or entities shall apply to:

a. companies and entities as referred to in first paragraph of Section 2-2;

b. companies as referred to in Section 10-40 for the purpose of determining profit or loss pursuant to Section 10-41;

c. companies and entities as referred to in Section 10-60 for the purpose of determining profit and loss pursuant to Section 10-65; and

d. companies and entities that are not domiciled in the Kingdom but that are liable for taxation pursuant to Section 2-3 or Section 1 of the Petroleum Taxation Act, read in conjunction with Section 2.

(2) Net interest expenses under this section shall include interest expenses as referred to in Section 6-40, less interest income. Profit and loss on composite bonds that are not to be broken down into a bond part and a derivate part for tax purposes, shall in their entirety be considered to be interest income or interest expenses. The same applies to profit and loss on financial assets issued at a higher or lower price than its redemption value. Profit and loss as referred to in the preceding sentence are not considered to be interest income or interest expenses for a holder who has acquired the debt instrument in the secondary market.

(3) If net interest expenses exceed NOK 5 million, they may not be deducted for the part that exceeds 30% of general income or uncovered loss for the year before the limitation of deductions under this section, plus interest expenses and tax depreciation, and less interest income. The disallowance of interest deduction pursuant to the preceding sentence shall be done only for an amount up to the amount of net interest expenses on debt to affiliated individuals, companies or entities. No deduction shall be given for any additional losses carried forward, see Section 14-6, or group contribution, see Section 10-4, after an interest deduction has been disallowed under this paragraph. If net interest expenses for the year do not exceed NOK 5 million, but the sum of net interest expenses for the year and net interest expenses carried forward from previous fiscal years under paragraph seven exceeds NOK 5 million, the taxpayer may require deduction of net interest expenses carried forward and net interest expenses for the year within the limit provided for in this paragraph.

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Under Section 6-41(3) of the Tax Act, the maximum deduction shall correspond to 30% of "general income or uncovered loss for the year before the limitation of deductions under this Section, plus interest expenses and tax depreciation, and less interest income" (known as tax EBITDA).

Only taxable income is included in "general income or uncovered loss for the year" and affects the maximum deduction. In the preparatory works it is stated that "[w]hen the limitation rule is to be based on taxable income and expenses at the time of the tax assessment (general income or loss for the year), it is because tax amounts are more difficult for the taxpayer to influence than accounting amounts", see Prop. 1 LS (2013–2014) part 4.7.1 p. 111.

Group contributions with tax effect, see part 3.2, are one example of value transfers between companies that are taxable, see Prop. 1 LS (2013–2014) part 4.7.1 p. 111. The recipient's maximum deduction will then increase, whilst the transferor's maximum deduction will undergo an equivalent reduction.

The limited deduction provided for in Section 6-41 is calculated for each individual company separately, irrespective of whether the company is part of a group, see Prop. 1 LS (2013– 2014) part 4.7.1 p. 111.

The purpose of Section 6-41 is to counteract tax adaptations whereby international groups place disproportionately large shares of the group's debt, and thus interest expenses, in countries with high tax rates, whilst interest income and financial assets are channeled to group companies domiciled in countries with lower or no taxation, see Prop. 1 LS (2013– 2014) part 4.1 p. 102.

The limited interest deduction rule shall "contribute to make the Norwegian tax base more robust while simultaneously strengthen the framework conditions for domestic enterprises competing with multinational companies", see Prop. 1 LS (2013–2014) part 4.1 p. 102.

It is stated in the preparatory works that "[t]he issue of exploitation of differences in rates may also arise domestically ...", see Prop. 1 LS (2013–2014) part 4.1 p. 102.

The limitation of the deduction to a share of a calculated profit or loss is based on a company's debt service capability. This gives an indication of whether the loan is based on customary, business-related calculations and not tax-related considerations, see Prop. 1 LS (2013–2014) part 4.6 p. 108.

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The rule laid down in Section 6-41 "involves a simple, template-style model for the limited interest deduction, that is independent of the tax rules in other countries, of considerations of business-related reasons, etc.", see Prop. 1 LS (2013–2014) part 4.6 p. 109. The Ministry wrote that "[c]onsiderations of foreseeability and consistent enforcement of the rules weigh against discretionary exceptions, such as those based on whether a transaction is carried out on market terms", and also considered that "those kinds of exceptions will be very resource-intensive", see Prop. 1 LS (2013–2014) part 4.6 p. 109.

The preparatory works also contain statements about the EEA Agreement, see Prop. 1 LS (2013–2014) part 4.6 p. 110:

> *The Ministry takes the view that the proposal is not contrary to the EEA Agreement. The limited deduction applies in respect of both Norwegian-owned and foreign-owned groups. As in other countries, the tax rules on group contributions are, as a main rule, restricted in their application to domestic (Norwegian) companies (although see the second paragraph of Section 10-4(2) of the Tax Act), which cannot be regarded as contrary to the freedom of establishment.*

3.2. The group contribution rules in Sections 10-2 to 10-4 of the Tax Act

PRA Group Europe AS contends that the Norwegian rules on group contributions are relevant for the determination of whether the limited interest deduction rule in Section 6-41 is contrary to the EEA Agreement. The Government disagrees.

Group contributions are value transfers between companies or associations in a group which, subject to certain conditions, allow the transferor to claim a deduction. The contribution is then deemed to be taxable income for the recipient.

In 2014 and 2015, the rules on group contributions read as follows:

> ***Section 10-2.*** *Deduction for group contributions*
>
> *(1) Private limited liability companies and public limited liability companies may claim a deduction in connection with income tax assessment for a group contribution to the extent that these are within the otherwise taxable general income, and to the extent the group contribution is otherwise lawful under the rules of the Private Limited Liability Companies Act (aksjeloven) and the Public Limited Liability Companies Act (allmennaksjeloven). Equivalent companies and associations may claim a deduction for a group contribution to the extent that private limited liability companies and public limited*

liability companies may do so. The second sentence of the first paragraph of Section 10-4 is nevertheless not applicable where a cooperative undertaking pays a group contribution to an undertaking that belongs to the same cooperative federation; see Section 32 of the Act relating to cooperatives (samvirkeloven).

(2) A deduction may not be claimed from income that is taxed pursuant to the rules of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses in operations as referred to in Sections 3 and 5 of the Petroleum Taxation Act. A deduction may not be claimed for group contributions to cover losses which may not be carried forward for deduction in subsequent years pursuant to the fifth paragraph of Section 14-6.

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

(1*) A group contribution constitutes taxable income for the recipient in the same fiscal year as it is deductible for the transferor. That part of the group contribution that the transferor may not deduct due to the rules in the second paragraph of Section 10-2 or because it exceeds the otherwise taxable general income, is not taxable for the recipient.*

(2) A group contribution does not constitute a dividend for the purposes of Sections 10-10 to 10-13.

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

(1) The transferor and the recipient must be Norwegian companies or associations. Private limited liability companies and public limited companies must belong to the same group, see Section 1-3 of the Private Limited Liability Companies Act and Section 1-3 of the Public Limited Liability Companies Act, and the parent company must own more than nine-tenths of the shares in the subsidiary and have a corresponding part of the votes that can be given in general meetings, see Section 4-26 of the Private Limited Liability Companies Act and Section 4-25 of the Public Limited Liability Companies Act. These requirements must be fulfilled at the end of the fiscal year. A group contribution may be made between companies domiciled in Norway even though the parent company is domiciled in another State, provided that the companies otherwise fulfil the requirements.

(2) A foreign company domiciled in a country within the EEA is considered equivalent to a Norwegian company provided that:

(a) the foreign company corresponds to a Norwegian company or association as referred to in the first paragraph of Section 10-2;

(b) the company is liable to taxation pursuant to point b of the first paragraph of Section 2-3 or Section 2 of the Petroleum Act, read in conjunction with Section 1; and

(c) the group contribution received constitutes taxable income in Norway for the recipient.

(3) The transferor and recipient must file tax returns pursuant to Section 4-4(5) of the Tax Assessment Act (ligningsloven).

A group contribution is a cost-free transfer of values from one limited liability company to another, see Ot. prp. nr. 16 (1979–1980) part 5 h) p. 9. It may consist of an immediate transfer of funds or other assets, or that the transferor undertakes to pay a specified amount to the recipient at a later time, see Ot.prp. nr. 16 (1979–1980) part 5 j) p. 12.

The provisions on group contributions are intended to support taxation neutrality between undertakings that organise their business operations through departments in a limited liability company, etc., and undertakings that organise their operations through several limited liability companies, etc., in a group.

Whether a group contribution shall be made and what the value of that contribution shall be, is determined by the companies themselves, see Ot. prp. nr. 16 (1979–1980) part 5 c) p. 7. There are nevertheless some limitations in terms of how large a taxable group contribution can be, since it must be within the otherwise taxable general income for the transferor company, see Section 10-2(1) of the Tax Act.

Only companies that are liable to taxation in Norway may make or receive group contributions with tax effects, see Section 10-4(1) and (2), see the Supreme Court judgment in HR-2019-140-A (Yara), paragraph 44.

In the preparatory works for the limited interest deduction rule in Section 6-41 of the Tax Act, the Ministry stated that "[s]ince the group contribution forms part of the basis for the calculation, companies in the tax group will be able to a certain extent to coordinate to achieve interest deductions where there are profits ('tax EBITDA') and interest expenses are distributed unevenly between the companies in the group", see Prop. 1 LS (2013–2014) part 4.7.1 p. 111. The recipient of a taxable group contribution will then have the maximum deduction increased,

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whilst the transferor will have an equivalent reduction. For the group as a whole, the maximum deduction will remain unchanged.

In Prop. 1 LS (2013–2014) part 4.15.1 p. 129, it is stated that there "may be some cases where businesses organised as a group are somewhat worse off than businesses that are organised as a single company. This is due to inter alia that decisions on group contributions may be affected by other factors than the limited interest deduction. If a company in the group has losses that are not related to large interest expenses, it may be appropriate to make a group contribution to that company, even though that will reduce the options for the transferor company to deduct interest due to the limited interest deduction rule."

The Ministry stated that "the rules may have unfortunate results in certain cases", see Prop. 1 LS (2013–2014) part 4.15.3 p. 130, but added that it "is challenging to formulate rules that, formally, give equal treatment to transactions across national borders without at the same time impacting domestic transactions that are clearly not motivated by tax-related considerations", see Prop. 1 LS (2013–2014) part 4.15.3 p. 130.

The Ministry also stated that "an argument can be made that the deduction limitation should be placed at the group level instead of on the individual company. There is no reason to affect interest payments where the corresponding interest income is taxed at the ordinary rate. Consequently, countries that practice group taxation have usually opted to place the limitation at the group level. In Norway, however, we do not have taxation at group level, so that is not possible without making extensive changes to how companies are taxed", see Prop. 1 LS (2013–2014) part 4.15.3 p. 130.

3.3. The Norwegian EEA Act

The EEA Agreement has been implemented into Norwegian law through Section 1 of Act No 109 of 27 November 1992 on the implementation into Norwegian law of the Main Part of the Agreement on the European Economic Area, etc. (lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde mv. av 27. november 1992 nr. 109 (EØS-loven). Under Section 2 of that act, the EEA Agreement takes precedence over general Norwegian law. In the event of conflict between the rules of the Tax Act and the EEA Agreement, the EEA Agreement will prevail."

15. PRA Group Europe AS would in addition like to add that in the consultation round before the law was passed, a Norwegian law firm argued that the interest deduction limitation rule was in contrary to the freedom of establishment due to the possibility for Norwegian group companies to

make and receive group contributions.[5] The potential EEA-issue was therefore raised at an early stage, prior to implementation.

4. EEA LAW

16. Direct taxation is not a part of the EEA agreement, meaning that it falls within the Member States' competence to decide. Member States can however not introduce rules that are in contrary to the four freedoms.[6]

17. Article 31 EEA on the right of establishment provides that:

> *"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.*
>
> *2. Annexes VIII to XI contain specific provisions on the right of establishment."*

18. Article 34 EEA extents the right of establishment to companies and provides that:

> *"Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.*
>
> *'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."*

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[5] Prop. 1 LS (2013-2014) 4.6 page 110
[6] See e.g. C-446/03 Marks & Spencer, para 29

5. QUESTIONS

5.1 The legal questions referred to the EFTA Court

19. The Oslo District Court referred the following questions to the EFTA Court:

1) Is there a restriction within the meaning of Article 31 EEA, read in conjunction with Article 34, when group contributions from Norwegian companies increase the maximum deduction for interest and thus the entitlement to deduction of interests on debt to affiliated parties under the limited interest deduction rule, a possibility which, under Norwegian tax rules, is not available for investments by or in EEA companies?

2) Is an EEA company that is in a group with a Norwegian company in a comparable situation to that of a Norwegian company that is in a group with another Norwegian company, and what significance does it have for the comparability assessment that no actual group contribution has been made from the EEA company to the Norwegian company, but rather a loan?

3) In the event that there is a restriction: Which reasons in the public interest may justify such a restriction?

5.2 Question 1: The existence of a restriction

20. Article 31 EEA requires the abolition of restrictions of the freedom of establishment. It is settled case law that all measures which prohibit, impede, or render less attractive the exercise of the freedom of establishment must be regarded as constituting a restriction on that freedom.[7] This means that the threshold for the existence of a restriction is low.

21. A national law is discriminatory when the effect or purpose of the rule results in discrimination.[8] In the field of taxation a discrimination consists of treating, for national tax purposes, comparable situations differently or different situations in a comparable way.[9]

22. It is sufficient that the measure is capable of restricting the exercise of the freedom of establishment.[10] It is not necessary to establish that the legislation in question has actually had the

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[7] E.g. Case C-96/08 CIBA, para 19 with reference to C-157/07 Krankenheim, para 30 and C-298/5 Columbus Container Services, para 34
[8] E.g. Case C-375/12 Bouanich, para 42-43 and C-565 Société Générale para 26
[9] Case C-279/93 Schumacker, para 30, Case C-311/97 Royal Bank of Scotland para 26 and Case C-386/04 Centro di Musciologia Walter Stauffer, para 32
[10] E.g. Case C-524/04 Thin Cap Group Litigation, para 62 and C-231/05 Oy AA, para 41 in which the question arose in the discussion of a binding ruling prior to an envisaged transaction.

effect of leading some to refrain from an action. This means that the assessment is undertaken on the basis of how the rule is formulated prior to an event (*ex ante*)[11].

23. In tax cases, a restriction would normally entail that a cross-border transaction, etc. is subject to a higher or quicker taxation compared to a domestic transaction.[12]

24. It is also settled case law that a restriction exists even if the restrictive effect is due to the interaction between two sets of rules.[13]

25. In judgements from the European Court of Justice, the Court focuses on the restrictive criterion in relevant national law to determine whether it treats national and cross-border situations differently.[14]

26. In the present case, the deduction for net interest expenses exceeding NOK 5 million is limited to 30% of the company's taxable EBITDA ("earnings before interest, taxes, depreciation and amortization"), i.e., the 30% EBITDA ceiling. In isolation, the 30% EBITDA ceiling does not discriminate. However, when the criterium is combined with the Norwegian group contribution rules, the restrictive effect emerges. A group contribution can only be rendered between companies that are liable to tax in Norway. This means that a Norwegian company's 30% EBITDA ceiling will increase if it receives a group contribution from a company that is liable to tax in Norway with the effect that the interest limitation is reduced. Conversely, an EEA-based group company does not have the opportunity to grant a group contribution and thus not reduce interest limitation for the Norwegian company. It is this interaction between this criterion in the interest deduction limitation rule and the rules on group contributions that creates the difference in treatment.

27. In the case X and X the European Court of Justice concluded that the combination between the Dutch interest deduction limitation rule and the tax consolidation rule, constituted a restriction on the freedom of establishment.[15] Since only Dutch entities covered by the tax consolidation rule could limit the effect of the interest deduction limitation rule, the difference in treatment made it less attractive to create subsidiaries in other Member States.[16]

28. The same difference in treatment occurs in the case at hand. This can be illustrated with the following example:

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[11] See the Advocate General's Opinion in the joined cases C-478/19 and C-479/19, paras 49-69 where this is done in a pedagogic manner
[12] See Case C-311/97 Royal Bank of Scotland, para 34 and Case C-371/10 National Grid Indus, para 37
[13] Joined cases C-398/16 and C-399/16 X and X, paras 30-32 and Case C-484/19 Lexel, paras 40-41
[14] See the Advocate General's Opinion in the joined cases C-478/19 and C-479/19 paras 53-65 and case law cited
[15] Joined cases C-398/16 and C-399/16 X and X, para 33
[16] Ibid

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29. A Norwegian subsidiary ("SubCo") borrows NOK 100,000,000 from its Luxembourg parent company which shall be used to acquire a company. The interest rate on the loan is 10% or NOK 10,000,000. SubCo has a taxable income of NOK 10,000,000. The taxable EBITDA will thus be NOK 10,000,000 plus NOK 10,000,000 in interest costs, i.e., NOK 20,000,000. The 30% EBITDA ceiling would be NOK 6,000,000. The reversal of the interest costs that exceeds the ceiling will then be NOK 4,000,000. This entails an increased tax burden of NOK 1,080,000 (27% of NOK 4,000,000).

30. If SubCo chooses to acquire a Norwegian company ("NorCo") (the national situation), it will however be able to use the taxable income of that company to increase 30% EBITDA ceiling by way of group contributions. As an example, NorCo transfers NOK 10,000,000 to SubCo as a group contribution. Taxable EBITDA is thus increased by NOK 10,000,000, from NOK 20,000,000 to NOK 30,000,000. The 30 % EBITDA ceiling is increased, from NOK 6,000,000 to NOK 9,000,000. Only NOK 1,000,000 is reversed (non-deductible) meaning that the tax burden is reduced from NOK 1,080,000 to NOK 270,000 (27% of NOK 1,000,000).

31. If SubCo instead acquires a Swedish company ("SweCo") (the cross-border situation), it will however not be able to use the taxable income of that entity, because group contributions are limited to situations where the giver and receiver are liable to tax in Norway. This means that the tax burden for SubCo remains the same, i.e., NOK 1,080,000.

32. The above shows that the Norwegian tax rules in combination makes it more beneficial to acquire a Norwegian company compared to an EEA based company.

33. Furthermore, in the case Lexel, the European Court of Justice held that the combination of the Swedish interest deduction limitation rule and group contribution rules, constituted a restriction on the freedom of establishment.[17] This was because, the rules – in combination – treated interest on loans to national and EEA-based companies differently.[18]

34. The Norwegian interest deduction limitation rule in combination with the group contribution rules also treats loans from national and EEA-based companies differently, making it less attractive to exercise the freedom of establishment.

35. This can be illustrated with the following example:

36. In a cross-border situation, a Luxembourg parent company lends NOK 100,000,000 to a Norwegian subsidiary with an interest rate of 10%. The Norwegian company makes a loss of NOK

[17] Case C-484/19 Lexel, para 41
[18] Ibid, para 40

10,000,000 due to the lack of other income. The 30% EBITDA ceiling is nil, which means that all interest expenses are rejected.

37. In a national situation however, a Norwegian parent company lends the same amount to a Norwegian subsidiary. The starting point is that the subsidiary is subject to the same interest deduction limitation as above, i.e., 100% interest limitation. However, the Norwegian parent company (the creditor) provides interest income earned of NOK 10,000,000 as a group contribution to its subsidiary (the debtor). Taxable EBITDA is thus increased by NOK 10,000,000, and the 30% EBITDA ceiling is increased from nil to NOK 3,000,000. The effect is that NOK 3,000,000 of NOK 10,000,000 becomes deductible.

38. This shows that the rules also make it more beneficial to provide debt between two Norwegian entities compared to between an EEA based and a Norwegian entity.

39. That this difference in treatment constitutes a restriction on the freedom of establishment is in line with the European Court of Justice cases Lankhorst-Hohorst and Thin Cap Group Litigation, where the Court has concluded that to treat national situations more favorable with regard to interest deduction, constitutes a restriction.[19]

40. Both illustrations show that the criterium creating the difference in treatment is the 30% EBITDA ceiling.

41. This interaction between the interest deduction limitation rule and group contribution rules was a desired effect from the Norwegian legislature.[20] Despite being aware that the interaction would lead to a difference in treatment between Norwegian and EEA-based groups due to the scope of the group contribution rules, the rule was adopted as outlined above.[21]

42. Based on the above, the difference in treatment constitutes a restriction on the freedom of establishment.

43. In its submissions to the EFTA Court, the Norwegian State alleges that the restriction is not caused by Norwegian law and that it instead can be attributed to Luxembourg group contributions rules, or the lack thereof.

44. The examples depicted above however shows that it is domestic Norwegian rules and not Luxembourg rules that are creating the restriction.

[19] Case C-524/04 Thin Cap Group Litigation, para 63 and Case C-324/00 Lankhorst-Hohorst, para 32
[20] Prop. 1. LS (2013-2014) p. 110-111
[21] See section 3

45. Furthermore, it may seem that the Norwegian State means that it is Luxembourg that should grant the deduction instead of Norway. A similar argument was put forward in the case BJ,[22] where it was argued that a benefit received in another member state should relieve the home state from granting a deduction, i.e., the first benefit neutralizes the discriminatory treatment. This argument was refused by the Court, as the there was no direct link between the discriminatory Belgian rule and the treatment under the foreign rule in question.[23] Since there were no mechanism under Belgian rule to ensure that the taxpayer got the same tax deduction abroad, such foreign rules were not relevant under the restriction assessment.[24]

46. The same must apply to the case at hand. The question is whether there is a differential treatment under Norwegian tax law.

47. Consequently, the combination of the 30% EBITDA ceiling and the group contribution creates a *prime facie* restriction on the freedom of establishment.

5.3 Question 2: Comparable situations

48. In order for the difference in treatment to be compatible with the freedom of establishment it must relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest and is proportionate to that objective.[25]

49. Regarding comparable situations, it follows from established case law, amongst others, in the case Lexel paragraph 43:

> *"43 Whether the cross-border and national situations are comparable is a matter which must be examined having regard to the purpose and content of the national provisions in question (judgment of 22 February 2018, X and X, C-398/16 and C-399/16, EU:C:2018:110, paragraph 33 and the case-law cited)."*

50. As mentioned above, there are two ways of assessing the restriction in this case, either as a discrimination that makes it less beneficial for Norwegian companies to invest in EEA-based companies compared to Norwegian companies such as in the case X and X, or as a discrimination of loans from foreign lenders such as in the case Lexel.

51. If the EFTA-court wants to regard the restriction as a discrimination that makes it less beneficial for Norwegian companies to invest in EEA-based companies compared to Norwegian companies

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[22] Case C-241/20 BJ
[23] Ibid, para 49
[24] Ibid, para 51
[25] E.g. Case C-484/19 Lexel, para 42 and joined cases C-398/16 and C-399/16 X and X, para 32

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as illustrated in paragraphs 28-32, above, the case resembles the facts in the X and X case.[26] In that case, a Dutch group company borrowed money from a Swedish group company. That money was used to capitalize an Italian subsidiary ("Italy 1") of the Dutch company, which in turn used that money to acquire an unrelated Italian company ("Italy 2").[27]

52. Even though interest expenses were as a starting point deductible, this did not apply if the loan was used *inter alia* for the paying up of shares, which was the case in X and X.[28] The Dutch interest limitation rule did apply generally similarly as the Norwegian 30% EBITDA ceiling rule in the present case.

53. However, if Italy 1 instead was a Dutch subsidiary, part of the same tax group, the capitalization would be disregarded for tax purposes due to the Dutch tax consolidation rule. In effect the interest limitation rule was put out of effect, as a consequence of the Dutch tax consolidation rule. In other words, the Dutch tax consolidation rule limited the effect of the interest limitation rule. The same applies to the Norwegian tax consolidation rules (the group contribution rules). In the X and X case, the important was not who the lender was, but the fact that the tax consolidation rules together with the interest limitation rule made it more beneficial to invest in Dutch subsidiaries than EU-based subsidiaries. The illustration above shows that the same applies for the Norwegian rules.

54. Relevant for this part of the analysis is to determine whether the cross-border situation depicted in the illustration above is in a comparable situation with the domestic situation. In the X and X case, the Court looked at both rules that interacted, the interest limitation rule and the tax consolidation rule. As the interest limitation rule did apply generally, the tax consolidation rule was decisive when assessing comparability. As the Court already has decided that Dutch and foreign subsidiaries are comparable with regard to tax consolidation,[29] the same conclusion was reached with respect to the Dutch interest limitation rule. The important paras are 33 to 37 in X BV which reads:

> *"33 Whether the cross-border and national situations are comparable must be examined having regard to the purpose and content of the national provisions in question (see, to that effect, judgment of 18 December 2014, X, C-87/13, EU:C:2014:2459, paragraph 27).*

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[26] Joined cases C-398/16 and C-399/16 X and X, paras 7-13
[27] See ibid para 7
[28] See ibid para 3
[29] Case C-337/08 X Holding, para 24

34 In the present case, the difference in treatment at issue stems from the combination of Article 10a(2)(b) and Article 15 of the Law on corporation tax. However, the purpose of those provisions is different. Whereas Article 10a(2)(b) of that law seeks to prevent the Netherlands tax base being eroded by contrived intra-group financial arrangements, Article 15 of the law allows the profits and losses of the companies constituting the single tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes. According to the referring court, one of the consequences of the single tax entity scheme is that the association between the loan and the capital contribution which determines whether Article 10a(2)(b) of the Law on corporation tax applies disappears because of consolidation.

35 However, Article 10a(2)(b) of the Law on corporation tax does not itself draw any distinction according to whether or not a group is cross-border. Consequently, whether the situations are comparable must be examined only in the light of the purpose of Article 15 of that law, having regard to the consequence of consolidation set out by the referring court.

36 The Court has already held, in paragraph 24 of the judgment of 25 February 2010, X Holding (C-337/08, EU:C:2010:89), with regard to the Netherlands tax scheme of the single tax entity, that the situation of a resident parent company wishing to form a single tax entity with a resident subsidiary and the situation of a resident parent company wishing to form a single tax entity with a non-resident subsidiary are objectively comparable with regard to the objective of that tax scheme.

37 It follows from this that the cross-border and national situations are comparable in the light of the combination of the national provisions at issue in the main proceedings and that there is, therefore, a difference in treatment. That difference may, however, be justified by overriding reasons in the public interest."

55. By using the same line of arguments in this case, it is clear that the 30% EBITDA ceiling rule applies generally so the key for assessing comparability is the group contribution rules. Finland does, as Norway, use group contributions to achieve tax consolidation in a Finnish group. The Court of Justice has already ruled in the *Oy AA* case that foreign parent companies are in a comparable situation with Finnish parent companies when it comes restrictions deriving from the Finnish group contribution rules (the group contribution went upwards in the ownership chain in that case). [30] A group contribution can also go downwards in an ownership chain. The EFTA Court

[30] Case C-231/05 Oy AA, para 38

has assessed such a group contribution in case E-15/16 *Yara*. Every party to that case, save for the UK, did not question the fact that a foreign subsidiary was in a comparable situation to a Norwegian subsidiary when it came to the Norwegian group contribution rules. The EFTA Court did not see any reason to address the UK's divergent view, as the Court concluded that there was a restriction.[31] In the later Supreme Court judgment, neither the parties nor the court saw any reason to question the comparability.[32]

56. This is also in line with the Marks & Spencer case[33] where the UK wanted to limit the transfer of a tax position (i.e., tax consolidation in form of transfer of losses) from foreign subsidiaries to UK parent companies. The European Court of Justice concluded that foreign subsidiaries were in a comparable situation as UK subsidiaries under the UK tax consolidation rules.[34]. For completeness only, it was not decisive for the comparability test that the EU-based subsidiaries were not taxable in the UK.[35] The same was also confirmed in the Rewe Zentralfinanz case.[36]

57. If this case is regarded as a discrimination, whereby loans from EEA based lenders are treated less beneficial than from Norwegian lenders,[37] it resembles the Lexel case.[38] In that case, Lexel financed the acquisition of shares in a company, by means of loans from an EEA-based group company.[39] Interest deduction was however denied under Swedish rules, due to that the loan was regarded mainly tax motivated. Lexel could have secured a deduction of the interest connected with that loan if the creditor had been established in Sweden due to the Swedish group contribution rules. This constituted a difference in treatment based on the nationality of the lender.

58. When assessing comparability in such a situation it is sufficient to point to the fact that Norway treats loans from a foreign lender the same way as loans from a Norwegian lender, i.e., regarded as comparable pursuant to the national rule in question.

59. Reference is made to paragraph 44 in Lexel which outlines this ratio decidendi:

> *44 It must be held, as the European Commission has submitted in its written observations, that a situation in which a company established in one Member State makes interest payments on a loan taken out from a company established in another Member State and belonging to the*

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[31] See Case E-15/16 *Yara*, para 36
[32] See the Norwegian Supreme Court Judgement HR-2019-140-A *Yara*
[33] Case C-446/03 Marks & Spencer
[34] Ibid, para 40
[35] Case C-446/03 Marks & Spencer, para 40
[36] Case C-347/04 Rewe Zentralfinanz, para 34
[37] See paras 33-39 above
[38] Case C-484/19 Lexel, paras 14-30
[39] Ibid, paras 39-40

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same group is no different, so far as the payment of interest is concerned, from a situation in which the recipient of the interest payments is a company belonging to the group and established in the same Member State, namely Sweden in the present case."

60. Consequently, the national and cross-border situations are objectively comparable.

61. In its submissions to the EFTA Court, the Norwegian State has argued that the situations are not comparable because no actual contribution has been made from the EEA-based company to the Norwegian company. In their view, one wrongfully compares two transactions: a loan and a group contribution in a domestic situation with one transaction in a cross-border situation: a loan.[40]

62. Whether an actual group contribution or other type of contribution has been made is however irrelevant when assessing comparability, or whether a restriction exists.

63. Firstly, as outlined above, it is sufficient that the measure is capable of restricting the exercise of the freedom of establishment, i.e., the assessment is carried out *ex ante*, prior to an event.[41]

64. Secondly, it is established case law that the taxpayer is not obliged to do the impossible.[42] In this situation, rendering a group contribution that will have no taxable effect in Norway.

65. The State has argued before the District Court that groups with foreign companies have ways of achieving the same result as Norwegian based companies using group contributions and thus the rules are not discriminating.

66. This is not true, which is evident by the preparatory works to interest limitation rules, where only group contribution is regarded as a measure to limit the adverse effects of the 30% EBITDA ceiling.

67. This is further supported by the changes made to interest limitation rules in 2018 with effect for 2019. To avoid that groups may benefit from both the group contribution rules and the equity escape clause, group contributions from companies claiming relief under the equity escape clause are disregarded for interest limitation purposes (i.e., the group contribution does not affect the 25% EBITDA ceiling of the recipient), see Section 6-41 3rd paragraph 2nd sentence of the NTA.

68. The legislator did not find any other rule comparable to the group contribution rules, otherwise one would have expected that such a rule was mentioned in Section 6-41 3rd paragraph 2nd sentence.

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[40] Request for an Advisory Opinion (to the EFTA court) p. 10, paragraph 3

[41] See above, para 22

[42] Joined Cases C-622/16 P and C-624/16 P State Aid, para 79, Case C-156/17 Köln-Aktiefonds Deka, paras 48, 62-64 and Case C-480/16 Fidelity Funds, in which foreign investment funds were held to be objectively comparable to Danish investments funds, even though they had not actually applied for a withholding tax exemption, see paras 14 and 63

69. The only way to achieve the same result is to artificial increase the taxable income by creating an increased tax liability. A taxpayer cannot be obliged under EEA law to act in a manner which is not abiding by normal business practice. A taxpayer may for example choose not to claim a deduction of NOK 1,000,000. The effect is that the 30 % EBITDA is increased with NOK 300,000. The company's interest deduction (benefit) is NOK 81,000 (using 27% Corporate Income Tax rate). The increased income of NOK 1,000,000 results in NOK 270,000 in increased tax payable, which means that it would cost the company NOK 270,000 to get a NOK 81,000 benefit (a net loss of NOK 189 000). A group contribution does not have this detrimental effect, as the group's overall tax liability is not increased, it is only moved around. This means that a group consisting of Norwegian companies would get the benefit of NOK 81,000 with the additional cost on an aggregated level. This also supports the fact that there are no alternatives to group contributions.

70. That the situations are comparable are also supported by ESA's reasoned opinion concerning the same Norwegian interest deduction limitation rule as in the present case:

> *"The Authority observes that the situation of a cross-border structure involving a resident company paying interest on a loan to a company in another EEA State is, in respect of interest payment, not different from that of a purely domestic situation where the interest recipient is an affiliated resident company.[18] Thus, the two situations are comparable."[43]*

71. The national and cross-border situations are comparable.

5.4 Question 3: Justification

72. A restriction of the freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary that its application is appropriate for ensuring the attainment of the objectives and not go beyond what is necessary to attain those objectives.[44]

73. In cases where the restriction is caused by the interaction of two sets of rules, it is established case law that the starting point of the assessment must be the tax rule from which the advantage is being refused.[45] In this case, it is the interest limitation rule. The other rule, in this case, the group contribution rules is not relevant when assessing the relevant overriding reasons in the public interest.

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[43] The EFTA Surveillance Authority, Reasoned opinion dated 25 October 2016 in case 76513, p. 9
[44] Case C-484/19 Lexel, para 46 and cited case law
[45] Ibid, paras 62-64 and cited case law

74. In the national proceedings, the state has argued that the restriction can be justified by the fight against tax evasion and tax avoidance, and, secondly, of the need to maintain a balanced allocation of the power to impose taxes between the Member States.

75. In the *Lexel* case, the Swedish and Dutch government argued that the same reasons should justify the restriction deriving from the Swedish interest limitation rules.[46] The Swedish case has a lot of similarities with the Dutch *X and X* case.[47] Under the Swedish interest deduction rules, there was as mentioned an exception (interest limitation) for mainly tax motivated loans. This exception was not applicable, if the borrower and lender fulfilled the criteria for group contributions in Sweden. Even though the Dutch and Swedish rules differed, the outcome was the same; domestic loans or investments were treated better than comparable cross-border transaction. The difference between the rules did not affect assessment of balanced allocation of taxing rights, see para. 65 and 66 in *Lexel* which reads:

"65 As the referring court observed, the difference between the rules examined in the judgment of 22 February 2018, X and X (C-398/16 and C-399/16, EU:C:2018:110), and those in question in the main proceedings lies in the fact that, under the rules at issue which gave rise to that judgment, the conditions for a deduction differed according to whether or not the company being acquired was part of the same tax entity as the acquiring company. By contrast, in the main proceedings in the present case, the difference in treatment is, in practice, based on a requirement of residence for the creditor company, a requirement which results in the exception not being applicable. Nevertheless, the advantage which Lexel is claiming in the present case cannot be confused with the advantage provided by consolidation within a single tax entity. The dispute in the main proceedings concerns therefore the possibility of deducting interest charges, not the general offsetting of costs and gains specific to the single tax entity.

66 In any event, the differences linked to the implementation of the rules at issue in the respective national taxation schemes cannot have any bearing on the assessment of whether the difference in treatment at issue in the main proceedings may be justified on the basis of the need to preserve the balanced allocation of the power to impose taxes between the Member States."

76. This is also relevant for the present case. Similarly, as in *Lexel,* the restriction is caused by the combination of interest limitation rules and group consolidation rules. This entails that the analysis of possible justifications in that case is transferable to this case.

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[46] Case C-484/19 Lexel, para 47
[47] Joined Cases C-398/16 and C-399/16 X and X, paras 39, 43 and 46

77. Firstly, it needs to be examined whether the difference in treatment can be justified by grounds relating to the fight against tax evasion and tax avoidance.

78. In *Lexel* there is a general part addressing these justifications in interest limitation cases. Firstly, the rules in question needs to target wholly artificial arrangements established to escape the tax normally due on profits generated by activities carried out on national territory and secondly, any refusal of interest deductions should be limited to the interest expense exceeding an arm's length interest, see para. 49-51 which reads:

> *"49 In order for a restriction on the freedom of establishment provided for under Article 49 TFEU to be justified by those grounds, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory (see, to that effect, judgments of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas, C-196/04, EU:C:2006:544, paragraph 55, and of 22 February 2018, X and X, C-398/16 and C-399/16, EU:C:2018:110, paragraph 46)*
>
> *50 Furthermore, first, in order to determine whether a transaction represents a purely artificial arrangement entered into for tax reasons alone, the taxpayer must be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement (judgment of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, EU:C:2007:161, paragraph 82).*
>
> *51 Secondly, where the consideration of those elements leads to the conclusion that the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the principle of proportionality requires that the refusal of the right to a deduction should be limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties been one at arm's length (judgment of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, EU:C:2007:161, paragraph 83)."*

79. Similarly, as in Lexel, the Norwegian interest deduction limitation rule does not solely impact artificial loans. The 30% EBDITA ceiling is fixed and not impacted by the objective of the loan.[48] This means that any interest cost above the ceiling is non-deductible irrespective of the motive for loan or the interest rate agreed upon. Thus, interest on loans made on arm's length terms, with no

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[48] See above, section 3

tax motive, could be captured by the interest limitation rule. This shows that the rule is more far-reaching than permitted under this justification.

80. This is supported by ESA in its reasoned opinion: [49]

> *"The Norwegian provisions at issue do not seem to comply with the above criteria. To be caught by the Norwegian legislation, the arrangements do not have to be artificial (in total or in part). This might result in two identical arrangements – one artificially created for the purpose of tax avoidance and one created in the ordinary and legitimate business of a group – to be both equally and indistinctly affected by the Norwegian rules.*
>
> *Furthermore, not only do the Norwegian rules not distinguish between wholly artificial arrangements and regular arrangements, but they also prevent any distinction between partially artificial and wholly artificial arrangements. The interest deductions are denied as a whole and not limited to that part of the interest which exceeds what would have been agreed had the relationship been at arm's length.[30]"*

81. Furthermore, to determine whether a transaction represents a purely artificial arrangement entered into for tax reasons only, the taxpayer must – under the national legislation in question – be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement.[50] This has also a side towards the proportionality test.

82. The Norwegian interest deduction limitation rule do not include any form of an escape clause giving the taxpayer an opportunity to provide evidence of any commercial justification. This was also put forward by ESA.[51]

83. An equity escape clause was first introduced in 2019, granting cross-border groups of companies the possibility for full deductions based on the equity ratio in the group. This supports that the interest deduction limitation rule from 2014 was disproportionate.

84. Consequently, the restriction cannot be justified by the fight against tax evasion and tax avoidance.

85. Secondly, it needs to be examined whether the difference in treatment may be justified by the need to safeguard a balancing allocation of taxing rights between the Member States.

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[49] The EFTA Surveillance Authority, Reasoned opinion dated 25 October 2016, p. 13
[50] Case C-484/19 Lexel, para 50 and Case C-524/04 Thin Cap Group Litigation, para 82, see ESA's Reasoned opinion p. 13
[51] ESA's Reasoned opinion, p. 13-14

86. The point of departure should, when assessing this justification, be that if the state grants a benefit in a domestic situation (renounces part of its taxing rights), the state cannot argue the same taxing right is important in the cross-border situation in an attempt to limit equal treatment.[52] In the Santander Asset Management case it is stated:

> *" 48 However, where a Member State has chosen not to tax resident UCITS in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident UCITS in receipt of such income (see Amurta, paragraph 59; Aberdeen Property Fininvest Alpha, paragraph 67; and Commission v Germany, paragraph 78)."* [53]

87. This justification is also addressed in *Lexel*. The Court does first outline the general characteristics of the justification,[54] before it clarifies that tax consolidation rules and certain other rules have been given more leeway when it comes to limiting beneficial domestic treatment to mere national situations.[55] The Court further holds that not all benefits granted to group companies may be limited to domestic companies,[56] before it in paragraph 65 reiterates its reasoning from *X and X* that interest limitation rules in combination with tax consolidation rules should be assessed as an interest deduction case which reads:

> *"65 As the referring court observed, the difference between the rules examined in the judgment of 22 February 2018, X and X (C-398/16 and C-399/16, EU:C:2018:110), and those in question in the main proceedings lies in the fact that, under the rules at issue which gave rise to that judgment, the conditions for a deduction differed according to whether or not the company being acquired was part of the same tax entity as the acquiring company. By contrast, in the main proceedings in the present case, the difference in treatment is, in practice, based on a requirement of residence for the creditor company, a requirement which results in the exception not being applicable. Nevertheless, the advantage which Lexel is claiming in the present case cannot be confused with the advantage provided by consolidation within a single tax entity. The dispute in the main proceedings concerns therefore the possibility of deducting interest charges, not the general offsetting of costs and gains specific to the single tax entity."*

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[52] See among others Case C-347/04 Rewe Zentralfinaz, para 43 (depreciation on shares), Case C-386/14 Groupe Steria (5% taxation on dividends).
[53] Joined Cases C-338/11 to C-347/11 Santander Asset Management
[54] Case C-484/19 Lexel, paras 59-60
[55] Ibid, paras 61-62
[56] Ibid, para. 63

88. This point, that is not general offsetting of costs and gains, is further supported by the fact that the rule in question is not affected by how the interest income is treated, see para. 41 in *X and X*, which was the final part of the argument to rule out the justification.

89. The Court in *Lexel*, did also compare the justification used in the preparatory works with the alleged justification and points out that the justification in the preparatory works is not an accepted justification under EU law, see para. 67-68 which reads:

> *"67 Within that context, it must be made clear that, according to the legislative preparatory works regarding the exception, that provision seeks expressly to prevent the erosion of the Swedish tax base which could result from tax planning linked to the deduction of interest expenses in a cross-border situation. However, such an objective cannot be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States.*
>
> *68 It must be borne in mind that the reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (see, inter alia, judgment of 13 December 2005, Marks & Spencer, C-446/03, EU:C:2005:763, paragraph 44 and the case-law cited). A finding to the contrary would amount to allowing the Member States to restrict, on the basis of that ground, the freedom of establishment."*

90. In this case, it is also possible to argue that the main reason for not granting equal treatment to the taxpayer is the effect it will have on the tax revenue in Norway.

91. In this paragraph the Court points at the inconsistency since the deduction would have been accepted had the loan been borrowed from an external borrower. If that would be an acceptable reduction in the tax base, the same should apply when the loan came from the related party. Para 69 reads:

> *"69 Furthermore, as was noted during the hearing, the interest charges in respect of which Lexel sought the deduction would have been deductible if BF had not been an associated company. However, where the conditions of a cross-border intra-group transaction and an external cross-border transaction correspond to those on an arm's-length basis, there is no difference between those transactions in terms of the balanced allocation of the power to impose taxes between the Member States."*

92. Under the Norwegian interest limitation rules a similar loan from an external party would not be subject to interest limitation. It is thus difficult to see how a related party loan on similar terms could be justified as the effect on the tax base is the same. Even though it is not stated directly, it is

clear that loans on arm's length terms cannot be regarded to offset the balanced allocation of taxing rights between the member states.[57] The same is true in the present case.

93. The same logic can be applied to the 30% EBITDA ceiling. If it is acceptable in a Norwegian domestic context to increase the parent company's 30% EBITDA ceiling with the taxable income of a Norwegian subsidiary, then it is difficult to see any reason for not applying the same logic where a Norwegian parent company can increase its 30% EBITDA ceiling with the taxable income of a subsidiary in another EEA country. The Norwegian tax base is reduced with the same number and the rule in question is not dependent on how or where the interest income is taxed.

94. It is possible to allege that the Court in Lexel in reality uses the point of departure as quoted from the Santander Asset Management case above. Consequently, a balancing allocation of taxing rights cannot justify the restriction.

95. This does also mean the two above-mentioned justifications in combination cannot justify the restriction, as evident in paragraph 76 of the case Lexel which reads:

> *"76 However, where, as in the main proceedings, the Member State in question cannot validly assert the justification based on the need to preserve a balanced allocation of the power to impose taxes between the Member States, a measure, such as that at issue in the main proceedings, cannot be justified on the basis of taking account together of the need to preserve a balanced allocation of the power to impose taxes between the Member States and of that of the fight against tax avoidance."*

96. Furthermore, the Norwegian interest deduction limitation rule is in any event disproportionate. Amongst others, because (i) the legislation does not give the taxpayer an opportunity to provide evidence of any commercial justification and (ii) because the interest deductions are denied as a whole and not limited to that part of the interest which exceeds arm's length interest rates.[58]

97. The Norwegian interest deduction limitation rule could have been more proportionate in various ways. As illustrated through the inclusion of the equity escape clause in 2019, the legislator could have introduced an equity escape clause in the 2014 legislation. As an alternative to an escape clause the legislation could open for the inclusion of the EBIDTA in the interest receiving entity.

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[57] On the contrary, arm's length pricing enforces a balanced allocation of taxing rights between member states and also improved conditions for the Internal Market, see European Commission, "Transfer Pricing and the Arbitration Convention" (https://ec.europa.eu/taxation_customs/transfer-pricing-and-arbitration-convention_en)

[58] See paras 91-93 above

That would lead to a more proportionate rule and the same treatment of national and cross-border situations.

98. In its submissions to the EFTA Court the State argues that the Norwegian interest deduction limitation rule is in line with the European Anti-Tax Avoidance Directive ("ATAD")[59] article 4 and thus can be justified by overriding reasons in the public interest.

99. The view of the state can however not be upheld.

100. Firstly, ATAD came into force in 2016, two years after the Norwegian interest deduction limitation rule that is being examined in the present case.

101. Secondly, ATAD is not directly applicable to Norwegian domestic law, as direct taxation does not form part of the EEA-agreement.[60]

102. Lastly, and importantly, a premise for the implementation of any directive into domestic law is that the directive is implemented in line with the four freedoms under the EEA-agreement. This means that directives cannot be interpreted as giving rise to the introduction or maintenance of conditions contrary to the four freedoms.[61]

103. In Commission v Spain, the Court of Justice upheld:

> *"The Court has consistently held that a rule of secondary legislation, such as Article 8 of Directive 2000/36, cannot be interpreted as authorising the Member States to impose or to maintain conditions contrary to the Treaty rules on the free movement of goods (Case C-47/90 Delhaize et Le Lion [1992] ECR I-3669, paragraph 26; Case C-315/92 Verband Sozialer Wettbewerb [1994] ECR I-317, Clinique , paragraph 12; and Joined Cases C-427/93, C-429/93 and C-436/93 Bristol-Myers Squibb and Others [1996] ECR I-3457, paragraph 27)."*[62]

105. It must also be emphasized that ATAD is a minimum harmonization directive, meaning that the EU Member States may introduce rules beyond the minimum requirements in the directive. A premise for local additions is however that the implementation is in line with the four freedoms.[63]

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[59] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market

[60] See section 4 above

[61] Case C-12/00 Commission v Spain, para 97, Case C-14/00 Comission v Italy, para 66 and Joined Cases C-427/93, C-429/93 and C-436/93 Bristol Myers, paras 25-27

[62] Case C-12/00 Commission v Spain, para 97

[63] Case C-168/01 Bosal Holding, para 27 and the General Attorney's opinion in that case para 58. In essence the wording of the directive cannot be interpreted as opening for discriminatory rules.

106. The difference between ATAD Article 4 and the Norwegian interest deduction limitation rule in the NTA section 6-41 is, amongst others, the inclusion of made and received group contribution when determining the 30% EBITDA ceiling, which is the restrictive criterion in the case at hand.

107. It is true that Recital 7 in ATAD, which the state refers to, opens for the possibility to implement interest deduction limitation rules on group level. This does however not grant the state the right to implement rules that treats cross-border groups less favorably than national rules. Recital 7 cannot serve as basis for an implementation and practice in contrary to the freedom of establishment.

108. As shown above, Norway could for example have introduced interest deduction limitation rules where the EBIDTA in EEA-based group entities could have been considered for Norwegian tax purposes. This would lead to an equal treatment of national and cross-border situations in line with ATAD.

109. On the basis of the above, the Norwegian legislation in question is disproportionate.

110. Consequently, the restriction cannot be justified by overriding reasons in the public interest.

6. ANSWERS TO THE QUESTIONS

111. In the light of the above, PRA Group Europe AS submits that the EFTA Court answers the questions referred by Oslo District Court as follows:

1. There is a restriction within the meaning of Article 31 EEA, read in conjunction with Article 34, when group contributions from Norwegian companies increase the maximum deduction for interest and thus the entitlement to deduction of interests on debt to affiliated parties under the limited interest deduction rule, a possibility which, under Norwegian tax rules, is not available for investments by or in EEA companies.

2. An EEA company that is in a group with a Norwegian company is in a comparable situation to that of a Norwegian company that is in a group with another Norwegian company.

   It is without significance for the comparability assessment that no actual group contribution has been made from the EEA company to the Norwegian company.

3. In the event that there is a restriction, the restriction cannot be justified by overriding reasons in the public interest.

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Oslo, 15 September 2021

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