ATTORNEY GENERAL – CIVIL AFFAIRS

To the EFTA Court

Oslo, 16 September 2021

WRITTEN OBSERVATIONS

BY

THE KINGDOM OF NORWAY

REPRESENTED BY

THE TAX ADMINISTRATION

represented by Ida Thue, advocate at the Attorney General of Civil Affairs, submitted pursuant to Article 20 of the Statute of the EFTA Court, in

PRA Group Europe AS v. Skatteetaten

concerning a request for a preliminary ruling from Oslo tingrett (Oslo District Court).

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POSTAL ADDRESS:
POSTBOKS 8012 DEP
0030 OSLO

PHONE: +47 22 99 02 00 / +47 22 99 02 61
E-MAIL: ITH@REGJERINGSADVOKATEN.NO

VISIT ADDRESS:
UNIVERSITETSGATA 8
OSLO

1 INTRODUCTION

(1) This request for a preliminary ruling concerns the interpretation of the freedom of establishment in Articles 31 and 34 EEA, in the context of national rules on taxation.

(2) The reference for a preliminary ruling was made in proceedings between PRA Group Europe AS and the Norwegian State in a case concerning the validity of the Tax Appeal Board's decision of 24 July 2020. In that decision, the Tax Appeal Board rejected the plaintiff's claim for full deduction for debt interest on a loan from its parent. This finding follows from the interest limitation rule in Section 6-41 of the Norwegian Tax Act. The provision applies to all interest, regardless of whether the debt is related to a national or foreign creditor.

(3) It is undisputed that Section 6-41 of the Tax Act treats interest on loans from foreign and Norwegian companies in the same way.

(4) The parties disagree as to whether the interest limitation rule applied in conjunction with the Norwegian rules on group contributions in Section 10-2 to 10-4 of the Tax Act must be considered a restriction on the freedom of establishment under Article 31 EEA.

(5) The Government considers that the rules on group contributions are irrelevant in the circumstances of the present case. The interest limitation rule does not exclude group contributions from companies in other EEA States as taxable income. Whether a foreign parent can make a group contribution to a Norwegian subsidiary depends exclusively on company and tax legislation in the parent's home State, and not on Norwegian tax rules. The only relevant question for the Norwegian subsidiary in the present case is whether a group contribution from a foreign EEA Company under that EEA state's law would have been regarded as taxable income under the interest limitation rule in Section 6-41 of the Norwegian Tax Act, and that question must be answered in the affirmative.

(6) In any event, the contested rules are justified on the same grounds as the similar interest limitation provisions in the Anti-Tax Avoidance Directive (2016/1164 EU) Article 4.

2 THE DISPUTE IN THE MAIN PROCEEDINGS AND THE QUESTIONS REFERRED

(7) The dispute in the main proceedings is described in the order for reference, and it is sufficient to recall the main facts here.[1]

(8) PRA Group Europe Subholding AS was a subsidiary of the Luxembourg company PRA Group Europe Holding S.à.r.l. It was financed with a combination of equity and loan from the parent company. The interest expenses for the fiscal years 2014 and 2015, which are the subject-matter of the main proceedings, relate to that loan.

(9) There were no other financial transfers from the parent company in Luxembourg to PRA Group Europe Subholding AS during the same period.

(10) PRA Group Europe Subholding AS was merged into PRA Group Europe AS (the plaintiff in the main proceedings) in November 2016.

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[1] Order for reference, Section 2.

(11) PRA Group Europe AS claimed full deduction for the debt interest and argued that the tax authorities had to disapply the provisions on interest limitation in Section 6-41 of the Norwegian Tax Act as it was in breach of Article 31 EEA.

(12) The company's claim was rejected both by the Tax Office and the Tax Appeals Board.

(13) PRA Group Europe AS then lodged proceedings before Oslo District Court and asked it to request for an advisory opinion from the EFTA Court. In those circumstances, considering that the interpretation of Articles 31 and 34 EEA was relevant for the application of the rules on interest limitation in Section 6-41 of the Tax Act, Oslo District Court decided to stay proceedings and to refer these questions to the EFTA Court for a preliminary ruling:

"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? "

3 QUESTIONS 1 AND 2: THE EXISTENCE OF A RESTRICTION

3.1 Introduction

(14) By its first and second questions, which should be examined together, the referring court essentially asks whether rules on interest limitation and group contribution, such as the national provisions at issue in the main proceedings, must be regarded as a restriction on the freedom of establishment under Article 31 EEA.

(15) It is recalled that the tax system of the EFTA States is not covered by the EEA Agreement, but that the EFTA States must exercise their competences in this field consistently with EEA law.[2]

(16) Freedom of establishment under Articles 31 and 34 EEA entails the right for a company formed in accordance with the law of an EEA State to exercise its activity in another EEA State through for example a subsidiary.[3] All discrimination based on the place where the registered office, central administration or principal place of business of a company is situated, is prohibited.[4]

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[2] See Case E-15/16 *Yara*, para. 32.
[3] See Case C-231/05 *Oy AA*, para. 29.
[4] See Case C-231/05 *Oy AA*, para. 30.

3.2 The Norwegian provisions on group contributions are not relevant to the present case

(17) In the present case, it is undisputed that the rules on interest limitation in the Norwegian Tax Act treat interest on foreign and domestic loans in the same way. These rules do not discriminate against foreign companies.

(18) However, the plaintiff argues that the interest rules become discriminatory when applied in conjunction with the Norwegian rules on group contributions. The plaintiff claims that group contributions increase the maximum deduction limit under Section 6-41(3) of the Tax Act for Norwegian groups, "[a] possibility not available to EEA based groups".[5]

(19) The Government agrees that group contributions increase the maximum deduction limit if they constitute taxable income within the meaning of Section 10-3(3) of the Tax Act.

(20) All taxable income is treated equally under the interest limitation rule. The fact that some group contributions may qualify as taxable income, and thereby increase the deduction limit, does not amount to a difference in treatment. Basing the maximum allowed interest deduction on taxable income is mandatory under the interest limitation rule in Article 4(2) of the Anti-Tax Avoidance Directive (Directive 2016/1164 EU) (ATAD) ("the income subject to corporate tax").[6]

(21) The plaintiff seems to assert that 1) it is impossible for foreign companies to make group contributions to Norwegian subsidiaries; and 2) Norwegian law makes it impossible; and 3) this entails discrimination under Article 31 EEA. This also seems to be the reasoning of the EFTA Surveillance Authority, cited by the referring court in Section 4 of the Order for reference. It is undisputed that the wording[7] of Question 1 refers to these submissions.

(22) The Government does not agree that Norwegian tax law makes group contributions from other companies in other EEA States to subsidiaries in Norway impossible.

(23) There are no provisions in Norwegian law that prohibit foreign companies from making group contributions to Norwegian subsidiaries under their national law. Such payments can be considered taxable income under Section 6-41(3) of the Tax Act and thus increase the maximum deductible amount.

(24) The plaintiff's parent company is not subject to tax in Norway. The parent's income is not taxable in Norway, nor can the company claim any deductions under Norwegian law. Norwegian tax law is consequently irrelevant for the parent, including the rules on group contributions.

(25) Thus, the alleged problem of group contributions does not stem from Norwegian law.

(26) Whether the parent company in the present case could have made group contributions, depends entirely on Luxembourg law. If group contribution to foreign subsidiaries had been allowed under Luxembourg law, the parent could have made such contributions.

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[5] Order for reference, Section 5.
[6] See also the Preamble para. 6.
[7] "…a possibility which, under Norwegian tax rules, is not available for investments by or in EEA companies."

(27) This shows that the purported difficulties are connected to Luxembourg law.

(28) On this point, the present case differs from the previous case-law on group contributions (*Yara* and *Oy AA*[8]). In these two cases, the company making the group contribution was subject to tax and claimed deduction for the group contributions. It was evident that the rules on group contributions were relevant. In the present case, the parent is not subject to tax in Norway and Norwegian rules on group contributions are immaterial to the case.

(29) The only relevant question for the Norwegian subsidiary in the present case is whether a group contribution from a foreign EEA Company under that EEA state's law would have been regarded as taxable income under the interest limitation rule in Section 6-41 of the Norwegian Tax Act, and that question must be answered in the affirmative.

(30) Based on the above, it must be concluded that Section 6-41(3) of the Tax Act treats interest on loans from foreign and domestic creditors in the same way, and that the Norwegian rules on group contributions are irrelevant to the present case. The national provisions at issue in the main proceedings do not discriminate against companies based in other EEA States and there is no restriction on the freedom of establishment.

3.3 The present case must be distinguished from the judgments in *X and X* and *Lexel*

(31) The national provisions in the present case are not comparable to *X and X*[9] and *Lexel*[10].

(32) The judgment in *X and X* concerned rules on deductibility of interest and currency losses in two cases of investments in foreign subsidiaries. In case C-398/16, a Netherlands parent was denied the deduction on interest expenses on an intra-group loan. The loan was obtained to finance a capital contribution in an Italian subsidiary. Under Netherlands law, interest on a loan to a related entity could not be deducted if it was connected to a capital contribution in a related entity.[11]

(33) The Netherlands company argued that it could have deducted the loan interest from its profits if it had been able to form a single tax entity with its Italian subsidiary. Since Netherlands law reserved that right to resident companies, it claimed that its freedom of establishment had been limited contrary to Articles 49 and 54 TFEU.[12]

(34) The CJEU agreed that cross-border groups were subject to a difference in treatment.[13]

(35) The Netherlands system of fiscal unity (whereby national companies in the same group can form a single tax entity) differs from the Norwegian system of group contributions.

(36) Since capital contributions are not apparent within a single tax entity, companies in a Netherlands group could in practice deduct the interest that was denied to companies in cross-border groups. It was therefore clear that the national rules treated interest paid to companies in national and cross-border groups differently.

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[8] Case E-15/16 *Yara* and Case C-231/05 *Oy AA*.
[9] Joined Cases C-398/16 and C-399/16 *X and X*.
[10] Case C-484/19 *Lexel*.
[11] Joined Cases C-398/16 and C-399/16 *X and X* para. 3.
[12] Joined Cases C-398/16 and C-399/16 *X and X* paras. 7–8.
[13] Joined Cases C-398/16 and C-399/16 *X and X* para. 18–37.

(37) That is not the situation in the present case.

(38) The fact that companies in Norwegian groups can make group contributions does not mean that the interest limitation rule in Section 6-41(3) of the Tax Act applies only to cross-border groups. It is undisputed that the interest limitation provision also applies to domestic transactions. The stated objective of the Norwegian legislator was to ensure equal treatment of the national and cross-border situations.[14]

(39) In a group contribution system, each company in a national group is taxed separately, based on its own income and expenses. Transactions between companies in the group therefore cannot become “invisible”, as in the Netherlands fiscal unity system.

(40) Group contributions under Norwegian law constitute genuine financial transactions. This is the reason why the Limited Liability Companies Acts contains requirements that must be met to make a group contribution.[15] The criteria are basically the same as for dividend payments. The group contribution system is limited to the taxable general income of the transferor company and pursues objectives beyond the deduction of losses.[16]

(41) In a situation where a company pays interest on a loan from its parent, from whom it also receives a group contribution, there are two elements: 1) the interest and 2) the group contribution.

(42) By contrast, in the present case there is only one element: the interest on the loan.

(43) A situation where a company has paid interest on a loan from a parent company, but not received any other taxable income, is not comparable to a situation where a company has also received one or more group contribution.

(44) In the context of value added tax, the CJEU has held that a taxable person who is denied the right to deduct input VAT because of the absence of taxable transactions is not in a comparable situation to a taxable person who has been granted the right to deduct input VAT because of the existence of an actual taxable transaction.[17]

(45) This principle is equally applicable to the circumstances of the present case. A company that has only paid interest on a loan from a parent company, such as the plaintiff, is not in a comparable situation to a company that also received taxable income such as group contributions. Consequently, that company cannot claim deduction on the same basis as the company that has also received taxable group contributions.

(46) The objective of the interest limitation rule is to fix a ratio for maximum deductibility of interest which refers to taxpayer’s taxable income, as to make sure a reasonable relation exists between taxable income and interest deductions. The maximum deduction limit in Norwegian law and the ATAD is therefore based on taxable income. Two cases based on different taxable income are not comparable and cannot be subject to equal treatment under the interest limitation rules.

(47) It must therefore be concluded that the present case cannot be likened to *X and X*.

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[14] See Prop. 1 LS (2013–2014) Section 4.15.3, cited in the Order for reference, Section 3.2.
[15] Section 8-5 of the Private Limited Liability Companies Act and the Public Limited Liability Companies Act.
[16] See Prop. 1 LS (2013–2014) Section 4.15.1, cited in the Order for reference, Section 3.2.
[17] See Case C-459/17, Société de Gestion Industrielle (SGI) para. 44.

(48) The judgment in *Lexel* concerned Swedish provisions on deduction of interest on debt to related companies. A special rule put companies that were entitled to make intra-group financial transfers (same as group contributions) at an advantage.[18]

(49) The CJEU considered that this special rule treated interest on loans from Swedish and cross-border group companies differently.[19]

(50) The Government is of the opinion that the present case cannot be likened to *Lexel*.

(51) The special rule at issue in *Lexel* applied to companies that were in the position to make intra-group financial transfers. It was not necessary to make an actual transfer. Under the Norwegian rules, only actual taxable group contributions will increase the maximum deduction limit. As already noted, a situation with two elements (an interest payment and a taxable group contribution) is not comparable to a situation with only one element (an interest payment) and it would be wrong to tax the two situations on the same basis.

(52) A parallel to Lexel could have been drawn if the Norwegian interest limitation rules had exempted from limitation interest paid between Norwegian companies that were in the position to make group contributions. However, Norwegian law contains no such rule.

(53) Based on the above, it must be concluded that *Lexel* is not relevant to the present case.

4 QUESTION 3: JUSTIFICATIONS

(54) The third question from the referring court is based on the premise that the national provisions in the main proceedings constitute a restriction. The referring court asks which reasons in the public interest may justify such a restriction.

(55) If the Court finds that the contested provisions restrict the freedom of establishment, the Government submits that the rules on interest limitation and group contribution are justified by the need to safeguard the balanced allocation of the power to impose taxes between the EEA States and the need to protect national corporate tax systems against tax avoidance practices across the EEA.

(56) The Court and the CJEU have found different aspects of group contribution systems to be justified on account of the need to safeguard the balanced allocation of the power to tax between the EEA States and the need to prevent tax avoidance.[20] The Government holds that the same reasoning is applicable in the circumstances of the present case.

(57) Article 6 EEA provides that the fundamental freedoms must be interpreted and applied uniformly in the EU and the EEA. If a national provision is compatible with the freedom of establishment in the EU, it is necessarily compatible also with the EEA Agreement.

(58) The same goes for provisions of secondary legislation. If such provisions are compatible with the freedom of establishment in the EU, similar provisions in the national law of an EEA State are also compatible with the EEA Agreement.

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[18] Case C-484/19 *Lexel* para.9.
[19] Case C-484/19 *Lexel* paras. 40-41.
[20] Case C-231/05 *Oy AA* paras. 60–65 and Case E-15/16 *Yara* paras. 38–39 and 45.

(59) It is therefore noteworthy that the interest limitation rule in Section 6-41(3) of the Tax Act pursues the same objectives as the similar interest limitation provision in Article 4 of the Anti-Tax Avoidance Directive (Directive 2016/1164 EU) (ATAD).

(60) The Directive is based on the need for ensuring that tax is paid where profits and value are generated and to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty.[21]

(61) The EU legislator found that that the interest limitation rule in Article 4 was necessary to discourage practices of base erosion and profit shifting (BEPS) through excessive interest payments.[22] It was stated in the preamble that only taxable income should be taken in account in determining the deductible amount of interest[23].

(62) The plaintiff claims that the national courts must disapply the interest limitation rule as regards the interest on a loan from its cross-border parent company.

(63) Such an interpretation of the freedom of establishment under Article 31 EEA would lead to a situation where only companies belonging to a national group would be subject to the interest limitation rule. However, this would render the provisions entirely devoid of purpose since BEPS practices such as excessive interest payments are connected to the transactions of cross-border groups.

(64) The EEA States would therefore be left with the absurd choice between repealing the interest limitation rule (opening the door for BEPS practices, and breaching EU Member States' obligations under the ATAD) or limiting their own systems for group taxation (a fundamental part of most EEA States' national tax systems).

(65) Such an interpretation of the freedom of establishment cannot be accepted.

(66) It must be emphasised that the different systems for group taxation in the national law of the EEA States do not consist of a set of "tax advantages" for national companies but are based on the fundamental principle of tax neutrality (that tax provisions should not influence the choices made by companies). Group taxation systems therefore contain provisions that aim for a neutral tax result for the group. Under the Norwegian rules on group contribution, for example, a taxable group contribution is a deductible expense for the transferor and a taxable income for the transferee. The result is neutral for all group companies taxable under Norwegian law.

(67) The ATAD therefore allows the EU Member States to combine their different systems of group taxation with the interest limitation rule in Article 4.

(68) Under Article 4(2) Member States may treat as a taxpayer 1) an entity which is permitted or required to apply the rules on behalf of a group, as defined according to national law; or 2) an entity in a group, as defined according to national tax law, which does not consolidate the results of its members for tax purposes.

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[21] Preamble para. 1
[22] Preamble para. 6
[23] Ibid.

(69) In these cases, the deduction limit (EBITDA) may be calculated at the level of the group and comprise the results of all its members.

(70) It is explicitly stated in the preamble to the ATAD that where a group includes more than one entity in a Member State, the Member State may consider the overall position of all group entities in the same State, including a separate entity taxation system to allow the transfer of profits or interest capacity between entities within a group, when applying rules that limit the deductibility of interest.[24] This reasoning applies *a fortiori* to group contribution systems, which are based on actual transactions between group companies.

(71) Sweden, Finland and Belgium have implemented the interest limitation rule of the ATAD in the context of group taxation systems that are similar to the Norwegian provisions.

(72) The EU legislature must necessarily have taken the view that the interest limitation rules, applied in conjunction with the national systems for group taxation, were compatible with the freedom of establishment. If not, the Directive would have been invalid.

(73) This conclusion is not altered by the judgment in *X and X*.[25]

(74) In this case, the CJEU held that the risk of a transaction not being genuine was no less if the parent company and the subsidiary were resident in the same state, than if the subsidiary was established in another Member State and not permitted to form a single tax entity.[26] It must be assumed that this finding also affected the related assessments of balanced allocation of taxation powers and tax avoidance. These questions all concern the risk of erosion of the tax base. If the risk is identical in the national and cross-border situations, it is hard to understand why the two situations should be treated differently.

(75) By contrast, BEPS practices such as excessive interest payments are specifically linked to the cross-border situation. The interest limitation rules in the ATAD and the Tax Act are thus not comparable to the interest rules in *X and X*.

(76) The plaintiff and the EFTA Surveillance Authority have submitted that the interest limitation rule is contrary to Article 31 EEA because of the lack of exceptions.[27]

(77) It is correct that in 2014 and 2015, the Norwegian interest limitation rule did not contain exceptions. In the preparatory works, it is stated that the provision "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".[28] The Ministry referred to considerations of foreseeability and consistent enforcement of the rules and added that an exception based on whether the transaction was on market terms would be very resource-intensive[29].

(78) The ATAD confirms that it was not necessary to combine the interest limitation rule with any exceptions. The equity escape rule in Article 4(5) of the ATAD is optional ("may").

[24] Preamble para. 7.
[25] Joined Cases C-398/16 and C-399/16 *X and X* (judgment of 22 February 2018).
[26] Joined Cases C-398/16 and C-399/16 *X and X* para. 50 with reference to the Opinion of the Advocate General.
[27] See Order for reference, Sections 4 and 5.1.
[28] See Prop. 1 LS (2013–2014) Section 4.6, cited in the Order for reference, Section 3.1.
[29] Ibid.

The Member States were free to choose simple, cost-effective rules if they wanted to. Several EU States have indeed chosen not to implement Article 4(5) in domestic law.[30]

(79) Based on the above, the Government submits that the contested national provisions are justified on the same grounds as the limited interest provision in the ATAD. The treaty provisions on the freedom of establishment have not been changed. It is thus irrelevant that the ATAD was adopted after the Norwegian interest limitation rules.

5 ANSWER TO THE QUESTIONS

(80) Based on the above, the Government respectfully submits that the questions 1 and 2 should be answered as follows:

"National provisions on interest limitation and group contribution, such as those at issue in the main proceedings, do not constitute a restriction under Article 31 EEA."

(81) If the Court finds that national rules such as the provisions at issue in the present case constitute a restriction, the Government respectfully submits that question 3 should be answered as follows:

"Article 31 EEA does not preclude national provisions on interest limitation and group contribution, such as those at issue in the main proceedings".

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Oslo, 16 September 2021

THE ATTORNEY GENERAL (CIVIL AFFAIRS)

Ida Thue

Agent

[30] See Daniel Gutman: "The Interest Limitation (Article 4 ATAD)", Section 4.37, in: Haslehner et al. (eds.): *A Guide to the Anti-Tax Avoidance Directive* (Edward Elgar Publishing, 2020) with reference to Belgium, Greece, Italy, the Netherlands and Sweden.