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EUROPEAN COMMISSION

Brussels, 16 September 2021
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TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted by the **EUROPEAN COMMISSION**, pursuant to Article 20 of the Statute of the EFTA Court, by the European Commission, represented by Wim ROELS, Legal Adviser, and Vincent UHER, Member of its Legal Service, Acting as agents, with a postal address for service in Brussels at the Legal Service, *Greffe contentieux*, BERL 1/169, 200, rue de la Loi, 1049 Brussels, and consenting to service by e-EFTACourt, in

Case E-3/21,

PRA Group Europe AS

Plaintiff

- and -

The Norwegian Government, represented by the Tax Administration

Defendant

concerning the interpretation of Article 31 of the Agreement on the European Economic Area ("EEA Agreement" or "EEA"), read in conjunction with Article 34.

The Commission has the honour to submit the following written observations:

I. THE LEGAL FRAMEWORK

A. EEA Law

1. Article 31(1) EEA reads:

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

2. Article 34 EEA provides:

"*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."

B. National law

3. Section 6-40(1) of Act No 14 of 26 March 1999 on taxation of assets and income ("the Tax Act") lays down the general rules on deduction of debt interest payments.

4. Section 6-41 of the Tax Act limits the deductibility of interest paid to affiliated parties to a specified maximum deduction and reads, in extract, as follows in 2014 and 2015:

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

(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;

(...)

(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."

5. The rules on group contributions are set out by Sections 10-2 to 10-4 of the Tax act, which read, in extract, as follows in 2014 and 2015:

"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).

(...)

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.

(...)".

II. THE FACTS AND THE PROCEDURE

6. PRA Group is a global group engaged in the acquisition of financial assets and service of debt and has several companies in Europe. The plaintiff in the main proceeding, PRA Group Europe Subholding AS (hereinafter "the company"), subject to taxation in Norway, was a wholly-owned subsidiary of the holding company PRA Group Europe Holding S.à.r.l (hereinafter "the holding"), which is subject to taxation in Luxembourg.

7. The company was financed with a combination of equity and loan from the holding. 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 holding in 2014 and 2015.

8. In its tax returns for 2014 and 2015, the company claimed a deduction for that debt interest, which was reduced in application of Section 6-41 of the Tax Act. Disallowed interest deductions amounted to NOK 132 969 145 for the fiscal year 2014 and NOK 11 580 008 for the fiscal year 2015. The company was merged into PRA Group Europe AS in November 2016.

9. By letter of 7 December 2016, PRA Group Europe AS requested a change in the tax assessment of the company for the fiscal years 2014 and 2015. PRA Group Europe AS

contended that the limitation of 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.

10. The Norwegian Tax Office upheld the tax assessments for 2014 and 2015. PRA Group Europe AS appealed against that decision to the Tax Appeals Board on 31 July 2017. By decision of 24 June 2020, the Tax Appeals Board dismissed the appeal.

11. 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.

12. Considering that the resolution of the proceedings required an interpretation of EEA Law, the Oslo District Court (hereinafter "the referring Court") decided to stay the proceedings and submit the following questions to the EFTA Court for an advisory opinion:

> "*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?*"

III. LEGAL ANALYSIS

A. On the mechanics of the Norwegian legislation

13. On the one hand, the Norwegian limitation of interest deduction rule at stake, laid down by section 6-41 of the Tax act, has the following characteristics:

- It introduces an annual cap on deductibility of intra-group interest payments;

- The cap is calculated in function of company's profitability, evidenced as the "tax EBITDA" (i.e. the "*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*"[1]), and its net interest expenses;

- The cap is determined as 30% of tax EBITDA;

- The cap applies to all intra-group interest payments – without any distinction to domestic and cross-border payments;

- It is an objective cap: no motives of the taxpayer nor the arbitrage effect (deductibility by a higher-taxed debtor followed by inclusion in the base of a lower-taxed creditor) is relevant for its application;

- It applies annually with respect of the annual amount of EBITDA and annual amount of net interest expenses, i.e. it does not apply to individual interest payments (except the situation where the taxpayer makes only one intra-group interest payment in a tax year).

14. On the other hand, the group contribution system applicable in Norway, whose rules are set out by Sections 10-2 to 10-4 of the Tax act, has the following characteristics:

- It allows affiliated companies (meeting the criterion of 90% of shares or vote control) to transfer between themselves their tax bases;

- It may be used to offset tax losses, i.e. a profitable group member may transfer a part of its taxable profits to a loss-making group member;

- The contribution constitutes a deductible expense of the contributor, while it increases the tax base of the beneficiary;

- The regime applies solely to companies resident and taxable in Norway.

[1] Section 6-41(3) of the Tax Act.

15. Both rules concern the tax base: the former may have the effect of increasing the debtor's tax base, the second allows members of a domestic group to increase or reduce the tax base of each member so as to optimise the tax burden of the group as a whole.

16. It appears that a combined application of the limitation of interest deduction rule and the group contribution regime may result in an advantage for companies that have domestic affiliated companies eligible for that regime over companies without such domestic group members. The advantage consists herein that domestic affiliated companies can receive a group contribution payment, which could increase the company's tax EBITDA and thus increase the group contribution recipient's amount of annually deductible interest (30% of tax EBITDA).

17. However, the interest limitation rule is strictly neutral as to whether it applies in a purely domestic or an EEA-cross border situation. The interest charges paid to companies established in another Member State are deductible within the same limits as those paid to domestic companies.

B. On the questions asked by the referring court

18. By its first question, the referring court is asking whether the Norwegian rule allowing group contributions from Norwegian companies to 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 – whereas such possibility is not available for investments by or in EEA companies, constitutes a restriction within the meaning of Article 31 EEA, read in conjunction with Article 34.

19. Furthermore, by its second question, the referring court is asking whether the situation of an EEA company, that is in a group with a Norwegian company, is comparable to the one 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.

20. Since both questions concern the existence of a restriction on the freedom of establishment, which arises in cases of different treatment of comparable situations, both these questions will be answered together.

21. By its third question, in the event there is a restriction, the referring court seeks to ascertain whether it could be justified.

22. To answer these questions, it is necessary to examine the limitation of interest deduction rules, the group contribution rules and then the combination of both sets of rules.

1) On the limitation of interest deduction rules

23. Firstly, it must be observed that the Norwegian limitation of interest deduction rule is identical in purely domestic situations and in EEA-cross border situations. Moreover, this rule does not pretend to assess taxpayers' motives for intra-group loan arrangements, but operates mechanically by imposing a cap that is annually a fraction of tax EBITDA. Therefore, this rule does not create by itself any discrimination.

2) On the group contribution rules

24. Secondly, as ruled by the EFTA Court in the case Yara, E-15/16, the Norwegian group contribution rules constitute a restriction of the freedom of establishment, as a Norwegian company will not be granted a deduction for a cross-border group contribution, so that it makes it less attractive for resident companies to establish subsidiaries in other EEA States[2].

25. In the Yara judgement, the Court referred to the case-law of the Court of Justice of the European Union (hereinafter "the Court of Justice") on the Finnish group contribution regime, which is essentially identical to the Norwegian one. In the Oy AA case[3], the Court of Justice ascertained the comparability of the situations and the existence of a possible restriction on the right of establishment stemming from the limitation of the personal and territorial scope of the Finnish group contribution system:

"31 In this case, it should be noted that, in relation to the possibility of deducting as expenses a transfer made in favour of the parent company, the legislation at issue in the main proceedings introduces a difference in treatment between subsidiaries established in Finland according to whether or not their parent company has its corporate seat in that same Member State.

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[2] EFTA Court, judgement of 13 September 2017, Yara International ASA, E-15/16, paragraphs 35 and 36.

[3] Court of Justice, judgement of 18 July 2007, Oy AA, C-231/05, EU:C:2007:439.

32 A transfer made by a subsidiary in favour of a parent company with its corporate seat in Finland and which fulfils the other conditions laid down by the KonsAvL is regarded as an intra-group financial transfer within the meaning of that law, deductible from the taxable income of the subsidiary. By contrast, a transfer by a subsidiary in favour of a parent company not established in Finland will not be regarded as such and will therefore not be deductible from the taxable income of the subsidiary. The subsidiaries of foreign parent companies thus receive less favourable tax treatment than that enjoyed by the subsidiaries of Finnish parent companies.

[…]

38 Therefore, in relation to the aim pursued by the Finnish system of intra-group financial transfers, the mere fact that parent companies which have their corporate establishment in another Member State are not subject to tax in Finland does not differentiate the subsidiaries of those parent companies from the subsidiaries of parent companies which have their establishment in Finland, and does not render the positions of those two categories of subsidiary incomparable.

39 A difference in treatment between resident subsidiary companies according to the seat of their parent company constitutes an obstacle to the freedom of establishment if it makes it less attractive for companies established in other Member States to exercise that freedom and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure (Case C 324/00 Lankhorst-Hohorst [2002] ECR I 11779, paragraph 32, and Test Claimants in the Thin Cap Group Litigation, paragraph 61).

[…]

42 However, for legislation to be regarded as a restriction on the freedom of establishment, it is sufficient that it be capable of restricting the exercise of that freedom in a Member State by companies established in another Member State, without there being any need to establish that the legislation in question has actually had the effect of leading some of those companies to refrain from acquiring, creating or maintaining a subsidiary in the first Member State (Test Claimants in the Thin Cap Group Litigation, paragraph 62).

43 It follows that the difference in treatment to which resident subsidiaries are subjected, under a system such as that at issue in the main proceedings, by reason of the place of the corporate seat of their parent company constitutes a restriction on the freedom of establishment."

26. In answer to the second question asked by the referring court, it follows from this case-law that 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, regardless if it is established that the legislation in question has actually had the effect of leading some of those companies to refrain from acquiring, creating or maintaining a subsidiary in another Member State[4] . The circumstance that the Norwegian company did not receive any group contribution from its Luxembourgian parent company has therefore no significance for the question of the existence of a difference of treatment.

27. However, this difference of treatment established by the group contribution rules is justified. In the Yara judgement, the EFTA Court ruled that, beside the specific case of final loss that was at stake, "*Articles 31 and 34 EEA do not preclude the application of national rules on intra-group contributions, such as the rules in the Norwegian Taxation Act, under which the contribution reduces the transferor's taxable income and is included in the recipient's taxable income regardless of whether the recipient makes a loss or a profit for tax purposes, that lay down the condition that both the transferor and the recipient are liable to taxation in the EEA State in question. It is a condition of EEA law that the national rules must serve a legitimate objective such as the need to safeguard the balanced allocation of taxation powers between EEA States or to prevent wholly artificial arrangements leading to tax avoidance.*"[5]

28. In the Oy AA case, the Court of Justice ruled also that the restriction originated by the group contribution rules could be justified by reasons in the public interest such as the need to safeguard the balanced allocation of the power to tax between Member States and the need to prevent tax avoidance and that it was proportionate to those objectives:

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[4] Oy AA, paragraph 42.

[5] EFTA Court, judgement of 13 September 2017, Yara International ASA, E-15/16, paragraph 55.

"60 Having regard to the combination of those two factors, concerning the need to safeguard the balanced allocation of the power to tax between the Member States and the need to prevent tax avoidance, this Court therefore finds that a system, such as that at issue in the main proceedings, which grants a subsidiary the right to deduct a financial transfer in favour of its parent from its taxable income only where the parent and the subsidiary both have their principal establishment in the same Member State, pursues legitimate objectives compatible with the Treaty and justified by overriding reasons in the public interest, and is appropriate to ensuring the attainment of those objectives.

[...]

63 Even if the legislation at issue in the main proceedings is not specifically designed to exclude from the tax advantage it confers purely artificial arrangements, devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory, such legislation may nevertheless be regarded as proportionate to the objectives pursued, taken as a whole."

29. As a consequence, taken in isolation, the group contribution rules are compatible with Article 31 EEA read in combination with Article 34.

3) On the combination of limitation of interest deduction and group contribution rules

30. Thirdly, the referring court is essentially wondering whether the combination of the limitation of interest deduction rule and the group contribution rule could lead to a separate, unjustified, restriction, or if the difference of treatment the plaintiff complains of is simply the consequence of the justified restriction as accepted by the Yara and Oy AA judgments.

31. Indeed, the fact that the group contribution rules are compatible with the freedom of establishment does not automatically imply that any other tax advantage linked to the group regime does comply with EEA law. As the Court of Justice stated in the Groupe Steria case about the neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received from subsidiaries, "*a separate assessment must therefore be made [...] as to whether a Member State may*

reserve those advantages to companies belonging to a tax-integrated group and consequently exclude them in cross-border situations”[6].

32. The Groupe Steria judgment is to be read together with the Court of Justice’s judgment in X-Holding[7], where the Dutch tax integration regime was held justified by reason of the risk that opening it up to non-national companies would give companies the option of having their losses taken into account in the Member State in which they are established or in another Member State. The X-Holding judgment builds itself on a previous case, Oy AA, already mentioned. Also in Oy AA the Court of Justice has based its justification on the risk presented by giving companies the right to elect to have their losses taken into account in the Member State in which they are established or in another Member State[8]. Therefore, in Groupe Steria, the Court held that the difference of treatment caused by the neutralisation of dividends received from subsidiaries was “a tax advantage other than the transfer of losses”. This separate restriction could not be justified by itself[9].

33. The Commission would like to refer to two other cases that involved tax advantages “*other than the transfer of losses within the tax-integrated group*”, which needed therefore a separate assessment. In both cases the Treaty compatibility of the national interest deduction rules was at stake.

34. In the X and X case[10], Dutch law refused in principle the deductibility of interest payment to a related entity. However, as an exception, the deductibility was allowed in the case where the related entities formed a single tax entity, which was only possible for resident companies[11]. Therefore, by limiting this exception, by the way of an explicit reference to the provisions on tax-integrated groups, to payments to resident companies, the legislation on the deductibility of interests introduced a restriction by itself. This restriction could not be justified, especially as the advantage at stake “*may not be confused with the advantage provided by consolidation within a single tax entity*”[12].

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[6] Court of Justice, judgement of 2 September 2015, Groupe Steria SCA, C-386/14, EU:C:2015:524, see paragraphs 27 and 28.
[7] Court of Justice, judgement of 25 February 2010, X Holding BV, C-337/08, EU:C:2010:89.
[8] Oy AA, paragraph 55.
[9] Groupe Steria, paragraph 36.
[10] Court of Justice, judgement of 22 February 2018, X BV (C-398/16) and X NV (C-399/16), EU:C:2018:110.
[11] Idem, see paragraph 28.
[12] Idem, paragraph 40.

Indeed the limitation of interest was considered an "other" tax advantage than the consolidation or transfer of losses. Again, this separate restriction could not be justified by itself[13].

35. The Lexel case[14] is quite similar. The deduction of the interest charges related to a loan from another group company was granted by the Swedish legislation only when a number of conditions were fulfilled[15]. These conditions were in themselves equally applicable to domestic and cross border situations. However, the rules on intra-group financial transfers applied only if the recipient of the intra-group financial transfer was subject to tax in Sweden[16]. As the Court of Justice observed, "*the advantage which Lexel is claiming in the present case cannot be confused with the advantage provided by consolidation within a single tax entity*" and "[*t]he 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*"[17].

36. Therefore in these three cases, the difference of treatment between the domestic and the cross border situation was situated outside of the tax advantage judged justified by the judgments in the cases Oy AA, X-Holding and Yara, i.e. the consolidation of group companies or – to put it differently – the transfer of losses between group companies.

37. In the present case however the difference of treatment does not seem to find its roots in an "other tax advantage" but in the tax advantage for which the group contribution rules were justified in the judgments Yara and Oy AA. It should therefore not be considered as a restriction caused by the combined application of the two sets of rules but simply the logical consequence of the justified restriction.

38. The fact that companies which have domestic affiliated companies can increasing the amount of deductible interest by means of a group contribution, which is not possible for companies not having domestic affiliated companies eligible for the group contribution system is a consequence of the limited personal and territorial scope of the Norwegian group taxation regime. The difference is illustrated by the diagram below.

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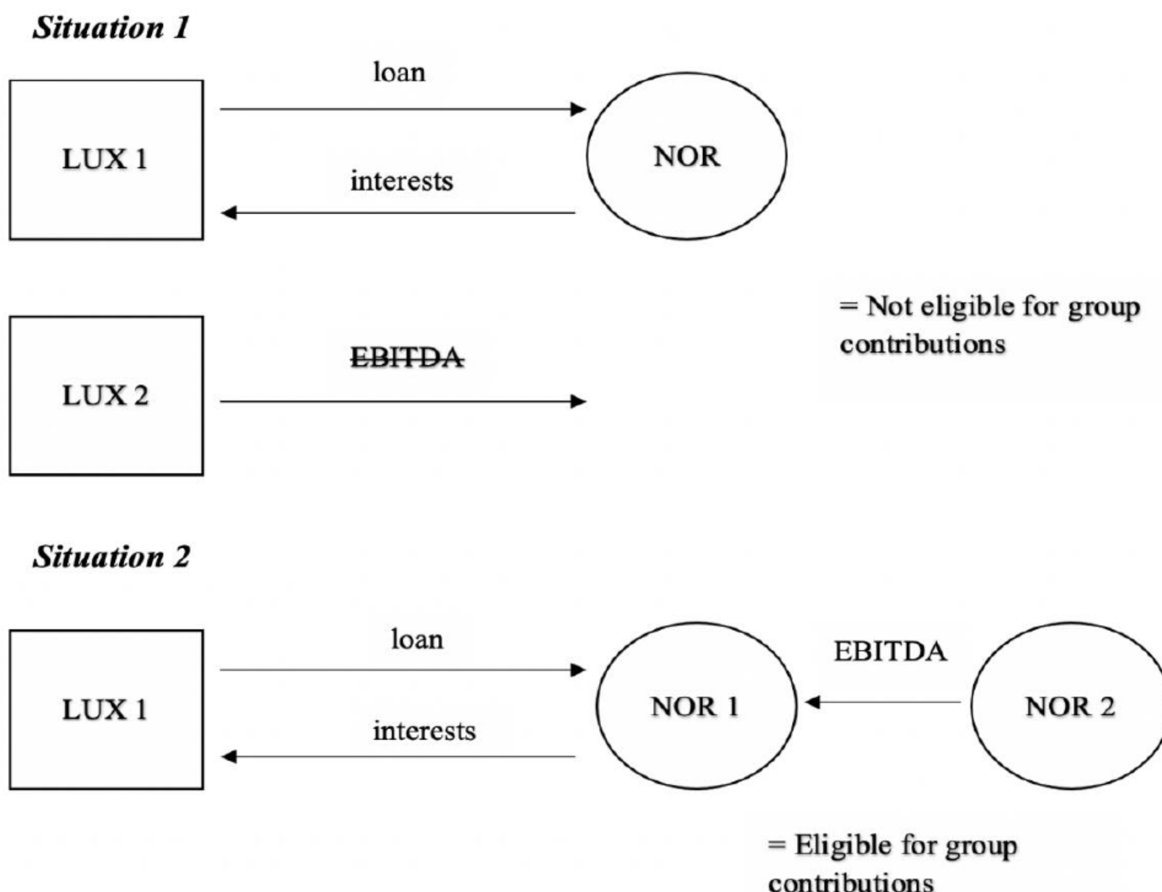
[13] Idem, paragraph 51.
[14] Court of Justice, judgement of 20 January 2021, Lexel AB, C-484/19, EU:C:2021:34.
[15] Idem, see paragraphs 3 to 8 and 36 and 37
[16] Idem, see paragraph 38.
[17] Idem, see paragraph 65.



39. It follows from the diagram that a Norwegian company will effectively pay more taxes in Norway if it is member of a group whose other members are based in other EEA States ("situation 1"), as opposed to a group whose members are based in Norway ("situation 2"), since no EEA based group member may grant it a group contribution that would increase its interest deductibility.

40. Nonetheless, since the benefit of the group contribution rule depends on whether or not there is a transferor within the group (i.e. domestic affiliated members), there are situations where cross-border financing structures could benefit from group contributions and, thus, be able to increase the interest cap. This is the case where within a cross-border structure involving a resident company, paying interest on a loan to an EEA based company (for instance in Luxembourg), could receive a group contribution from another national affiliated member and be entitled to a deduction of interests on debt (see the diagram, situation 2).

41. For these reasons, the Commission considers that the alleged discrimination is a simple consequence of the Norwegian group contribution rules, which are compatible with the freedom of establishment.

IV. CONCLUSION

42. For the reasons set out above, the Commission considers that the questions referred to the EFTA Court for an Advisory Opinion by the District Court of Oslo should be answered as follows:

Article 31 EEA, read in conjunction with Article 34, must be interpreted as not precluding national legislation, such as that at issue in the main proceeding, pursuant to which group contributions from domestic companies increase the interest deduction cap set at 30% of tax EBITDA and thus the entitlement to deduction of interests on debt to affiliated parties, a possibility which, under national tax rules, is not available for investments by or in EEA companies.

Wim ROELS Vincent UHER

Agents for the Commission