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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-3/21

PRA Group Europe AS

v

Norwegian Government, represented by the Tax Administration

in which the Oslo District Court (*Oslo tingrett*) requests the EFTA Court to give an Advisory Opinion under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on certain questions relating to the interpretation and application of Articles 31 and 34 EEA.

1 INTRODUCTION AND FACTUAL BACKGROUND

1.1 Introduction

1. This request for an advisory opinion has been made in proceedings between PRA Group Europe AS ("**PRA Europe**"), a company subject to taxation in Norway, and the Norwegian Government, represented by the Tax Administration (*Staten v/ Skatteetaten*). The request raises questions about tax rules limiting the ability of companies to deduct interest payments made to affiliated parties ("**interest limitation rules**") and the impact of rules on intra-group transfers ("**group contribution rules**") on those interest limitation rules.

2. In essence, the referring court asks whether it is permissible to permit groups of companies which are liable to tax in Norway to neutralise or lessen the impact of the interest limitation rules by making group contributions, in circumstances where this is not possible for a Norwegian company which is in a group with a company or companies liable to taxation in other EEA States.

3. The Authority respectfully submits that the answers to the questions referred may be found in the cases of C-398/16 and C-399/16 *X and X*,[1] C-484/19 *Lexel*,[2] E-15/16 *Yara*,[3] and C-386/14 *Groupe Steria*.[4] These cases involved combinations of rules and facts similar to those in the present case, and show that, while the European Courts have recognised the right of EEA States to exclude non-resident companies from the benefits of group taxation regimes, this right is limited and does not give States – in the words of Advocate General Kokott – *"carte blanche."*[5] It is not the case that any difference in treatment between companies in a domestic tax group and companies not belonging to such a group will be compatible with Article 31 EEA.[6] Where the advantage sought is something other than the ability to simply

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[1] Judgment of 22 February 2018, *X BV and X NV v Staatssecretaris van Financiën*, C-398/16 and C-399/16, EU:C:2018:110 ("***X and X***").
[2] Judgment of 20 January 2021, *Lexel AB v Skatteverket*, C-484/19, EU:C:2021:34 ("***Lexel***").
[3] Judgment of 13 September 2017, Case E-15/16, *Yara International ASA v the Norwegian Government* [2017] EFTA Ct. Rep. 434 ("***Yara***").
[4] Judgment of 2 September 2015, *Groupe Steria SCA v Ministère des Finances et des Comptes Publics*, C-386/14, EU:C 2015:524 ("***Groupe Steria***").
[5] C-386/14 *Groupe Steria*, Opinion of Advocate General Kokott, EU:C:2015:392, paragraph 32.
[6] C-386/14 *Groupe Steria*, paragraph 27; C-484/19 *Lexel* paragraphs 63-70; C-398/16 and C-399/16 *X and X*, paragraph 24.

benefit from the relevant group taxation regime – in other words, where the ability to apply group taxation rules 'unlocks' another tax advantage - a separate assessment of this advantage must be made to determine whether it may justifiably be refused in cross-border situations.[7]

4. Applying this approach, the Authority submits that the combination of the interest limitation rules and the group contribution rules gives groups with Norwegian companies the possibility to lessen or remove the impact of the interest limitation rules, an option which is not open to a Norwegian company in a group with EEA companies. This difference in treatment constitutes a restriction on the freedom of establishment (Section 5.2 below), in circumstances where the EEA cross-border and national situations are comparable (Section 5.3). While it is for the national court to verify, the difference in treatment does not however appear justified as the requirements in national law go beyond what is necessary (Section 5.4).

1.2 Factual background

5. PRA Europe contests the refusal of the Tax Office, upheld by the Tax Appeals Board (*Skatteklagenemnda*), to allow the full deduction of interest payments made in 2014 and 2015 by PRA Group Europe Subholding AS, a company subject to taxation in Norway ("**PRA Subholding**"), to its parent company, PRA Group Europe Holding S.à.r.l. ("**PRA Holding**"), a company subject to taxation in Luxembourg. PRA Subholding was financed by a combination of equity and loan capital from its parent, and the 2014 and 2015 interest payments related to that debt.

6. In its tax returns for 2014 and 2015, PRA Subholding claimed a deduction for debt interest paid to PRA Holding. The deduction claimed was only partial in nature, because PRA Subholding applied the Norwegian rules which limit the deductibility of interest paid to affiliated parties to a certain maximum amount (the interest limitation rules). Under these rules, interest deductions totalling NOK 144 549 153 for 2014 and 2015 were disallowed.

[7] C-386/14 *Groupe Steria*, paragraphs 27-28 (and Opinion of Advocate General Kokott, EU:C:2015:392, paragraph 34), C-484/19 *Lexel* paragraphs 63-70, C-398/16 and C-399/16 *X and X*, paragraph 24.

7. In 2016, PRA Subholding was merged into PRA Europe. PRA Europe requested from the Tax Office a change in the tax assessments for the fiscal years 2014 and 2015, on the basis that the limited interest deduction rules were contrary to the freedom of establishment (Article 31 EEA), and that Norway was obliged to allow a full deduction for the interest payments made.

8. The Tax Office upheld the existing 2014 and 2015 tax assessments (thus limiting the interest deductions). PRA Europe appealed the decision of the Tax Office to the Tax Appeals Board, which dismissed the appeal.

2 THE QUESTIONS REFERRED

9. Against this background, the referring court (*Oslo tingrett*) has asked the following questions:

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 EEA LAW

10. Articles 31 and 34 EEA are relevant when answering the questions referred. Article 31 EEA provides that there shall be no restrictions on the freedom of establishment of EU or EFTA State nationals in the territory of any other of these States, and applies also to the setting up of agencies, branches and subsidiaries by such nationals. Article 34 EEA effectively extends this freedom from restrictions on establishment to companies or firms formed in accordance with the law of an EU or EFTA State.

4 NATIONAL LAW

4.1 Provisions on limitation of interest deductions

11. At the relevant time (in 2014 and 2015), Section 6-40(1) of Act of 26 March 1999 No 14 on taxation of assets and income[8] ("**the Tax Act**"), provided the general rule, by which payments of debt interest were tax-deductible:

> ***"Section 6-40. Interest***
>
> *(1) A deduction is given for interest on the taxpayer's debt."*[9]

12. Section 6-41 of the Tax Act provided an exception, which limited the deductibility of interest paid to related or affiliated parties:

> **"*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;*
> *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*

[8] *Lov 26. mars 1999 nr. 14 om skatt av formue og inntekt (skatteloven).*
[9] Authority translation.

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.

(4) An affiliated party pursuant to this section shall cover
a. any company or entity that, directly or indirectly, is at least 50 per cent owned or controlled by the borrower;
b. any individual, company or entity that, directly or indirectly, has at least 50 per cent ownership of or control over the borrower;
c. any company or entity that, directly or indirectly, is at least 50 per cent owned or controlled by an entity that is deemed to be an affiliated party pursuant to item b; and
d. any parent, sibling, child, grandchild, spouse, cohabitant, parent of a spouse and parent of a cohabitant of any individual who is deemed to be an affiliated party pursuant to item b, as well as any company or entity that, directly or indirectly, is at least 50 per cent owned or controlled by such individuals.
An individual, company or entity is considered to be an affiliated party pursuant to the third subsection if the requirement of ownership or control pursuant to the subsection has been met at some point in time in the course of the fiscal year."[10]

13. As provided by Section 6-41(3) of the Tax Act and noted by the referring court, where the interest limitation rules apply, if the relevant interest payments 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*." This is otherwise known as tax '**EBIDTA**'.[11]

14. When interest expenses paid to an affiliated party exceed 30% of EBITDA, they may not be deducted for tax purposes (unless they are less than NOK 5 million). The rationale for limiting interest deductions to a certain share/percentage of income or loss (EBITDA) is based on the consideration or view that, below this limit or 'cap', the loan is more likely to be based on customary, business-related calculations and not tax avoidance-related considerations.[12]

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[10] Translation of Section 6-41(1)-(3) as provided in the order for reference, pages 3-4; Authority translation of Section 6-41(4).

[11] Earnings before deduction of interest expenses, taxation, depreciation and amortisation.

[12] Order for reference, page 4 and preparatory works: Prop. 1 LS (2013-2014), page 108:

"The proposed model means that the interest deduction is limited to a share of a calculated result. It is an advantage with performance-based deduction limitations that they are based on a company's debt service capacity. Debt service is an indication of whether the loan financing is based on normal, business assessments, and not tax conditions. Debt service, and the relationship between interest burden and income, is therefore already today a key element in arm length assessments. A deduction limitation relative to the result has also the advantage that the group does not avoid the restriction by instead using a higher borrowing rate." (Authority translation).

15. Preparatory works accompanied the introduction of Section 6-41 of the Tax Act. The following excerpts are especially relevant:[13]

> [4.1. Introduction and summary]
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> Page 102:
>
> *"The Government proposes to introduce a rule to limit deductions for interest paid between taxpayers who are affiliated (internal interest). International companies have incentives to invest a lot of debt, and thus interest costs, in companies that belong to countries with relatively high tax rates, such as Norway. Corresponding interest income and receivables can be channelled to group companies domiciled in countries with lower or no taxation. The Government's proposal will contribute to make the Norwegian tax base more robust while simultaneously strengthening the framework conditions for domestic enterprises competing with multinational companies."*
>
> Page 103:
>
> *"It is assumed that the proposed limitation of the interest deduction will to a limited extent weaken the incentives to invest in Norway. The restriction will make it less attractive for multinational groups to place debt in Norway. At the same time, most of our closest trading partners have already introduced similar restrictions. Some companies will nevertheless consider investments in Norway as less attractive if they today, through large deductions for internal interest payments, adapt so that they pay little or no corporation tax. On the other hand, the proposal will strengthen national companies that have faced stricter taxation than competing international companies that have been able to take advantage of current rules."*

4.2 Provisions on group contributions

16. In 2014 and 2015, the rules on group contributions were contained in Sections 10-2 to 10-4 of the Tax Act, which 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).*

[13] Authority translation of Prop. 1 LS (2013-2014).

(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).”[14]

17. Group contributions are value transfers between companies in a group which, subject to certain conditions, allow the transferor to claim a deduction in connection with its income tax assessment. The contribution is then deemed to be taxable income for the recipient. A fundamental condition is that both the transferor and

[14] Translation as provided in the order for reference, pages 5-6.

recipient are liable to taxation in Norway. The group contribution rules aim to support taxation neutrality between undertakings which organise their business operations through departments in a single company and those which do so through several group companies.[15]

18. The relevant preparatory works are referred to and usefully summed up in E-15/16 *Yara* and by the Norwegian Supreme Court in the related case.[16]

4.3 Interaction between the interest limitation rules and group contribution rules

19. As set out in the order for reference, and in the preparatory works to Section 6-41 of the Tax Act, the interest limitation and group contribution rules interact with each other, as follows.

20. Only taxable income is included in tax EBIDTA for the purposes of the Section 6-41 interest limitation rules.[17] The amount of taxable income therefore affects the maximum interest deduction: the more taxable income (and therefore the higher the EBITDA), the more interest may be deducted under Section 6-41 of the Tax Act.

21. Group contributions constitute taxable income. The recipient of a group contribution will therefore be able to deduct more interest under Section 6-41 (because its EBITDA will increase), while the transferor of the group contribution will be able to deduct less (because its EBITDA will correspondingly decrease).[18]

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[15] Order for reference, pages 5 and 6.

[16] See E-15/16 *Yara*, paragraphs 5 and 6 and, similarly, paragraphs 45 and 46 of the judgment of the Norwegian Supreme Court in case HR-2019-140-A Yara:

> *"(45) Of the preparatory work, cf. Ot.prp. nr. 16 (1979–1980) page 6 et seq. and Ot.prp. nr. 1 (1999–2000) page 25 et seq., it appears that the group contribution rules are intended to serve two purposes. One is to facilitate net taxation within the group in that profits can be transferred to companies with a tax loss. In the case of such transfers, in reality a tax loss in one group company will reduce the tax profit in another group company, also referred to as tax equalisation within the group.*
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> *(46) The second purpose is the possibility of being able to transfer funds between group companies, through pure value transfers, with a view to building up reserves in the company or companies in the group where it is appropriate at all times based on a business economic assessment. When a group contribution is given between two group companies that both have a profit, the donor will receive a tax deduction while the recipient will be taxed for the group contribution."* (Authority translation).

[17] Order for reference, page 4.

[18] *Ibid.*

22. This is reflected in the preparatory works to the introduction of Section 6-41 of the Tax Act: [19]

> [4.7 Calculation of the limitation of interest deduction
>
> 4.7.1 The basis for the calculation]
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> Page 110:
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> "***Group contributions are included in the calculation of the interest deduction limit, which makes it possible to transfer the group's profits to companies that have interest costs with effect for the calculation basis.*** *Decisions on group contributions may, however, be influenced by factors other than the interest deduction limitation. There may therefore be cases where companies organised as a group perform somewhat worse than companies organised as one company. The Ministry pointed out in the consultation paper an alternative where the deductible amount in one company can be transferred to another company in the same tax group, and provide a basis for increased interest deduction there. Such an arrangement will, however, be a complicating element in the regulations. The Ministry therefore proposed the simpler solution, where group contributions are included in the basis for calculating the interest deduction."*
>
> *Page 111:*
>
> *"**Any group contribution received or made shall be included in the calculation basis for the interest deduction limitation. Pursuant to sections 10-2 to 10-4 of the Tax Act, limited liability companies and equivalent companies and associations that are part of a so-called tax group may coordinate taxable income in the group companies by making group contributions**."*
>
> *[…]*
>
> *"**Since 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.*** […]*."*

5 THE AUTHORITY'S SUBMISSIONS

5.1 Related action by the Authority

23. While the Authority is presently assessing the current version of the Norwegian interest limitation rules, the case before the Court relates to the rules as in force in 2014 and 2015. The Authority's observations therefore relate solely to the 2014/2015 version of the rules, as referred to by the national court.

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[19] Authority translation of Prop. 1 LS (2013-2014) (emphasis added).

24. In certain places, the referring court refers to a reasoned opinion of the Authority. By way of preliminary background, it may be useful for the Court to have some information on the circumstances surrounding this reasoned opinion, which is attached as **Annex A.1**.

25. In 2014, the Authority received a complaint about the operation of Section 6-41 of the Tax Act (the interest limitation rules), which entered into force on 1 January 2014.[20] Following a review of the rules and exchange of views with the Norwegian Government, the Authority adopted a reasoned opinion on 25 October 2016, concluding that, by maintaining in force rules on interest deductibility restrictions, such as the ones laid down in Section 6-41 of the Tax Act, Norway had failed to fulfil its obligations under Article 31 EEA. The Authority took account of the fact that groups of companies with Norwegian group members would more readily be able to avoid the operation of the interest limitation rules due to their ability to apply and benefit from the Norwegian group contribution rules. This could deter Norwegian companies from establishing cross-border groups with affiliated group members in other EEA States (or conversely, deter companies from such States from establishing similar groups with affiliated group members in Norway). The Authority considered that the measures were not proportionate to any stated overriding reason in the public interest and could not therefore be justified.

26. While the Norwegian Government did not agree with the position adopted by the Authority in its reasoned opinion, it indicated that it would propose further amendments to the interest limitation rules. These amendments, which e.g. introduced certain exceptions to the rules restricting interest deductions, entered into force on 1 January 2019.[21] The Authority is presently assessing the compatibility of the rules, as amended, with Article 31 EEA.[22]

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[20] Introduced by Act of 13 December 2013 No 117. Section 6-41 was subsequently amended by Acts of 18 December 2015 No 115, 19 December 2017 No 121, 20 December 2018 No 102 and 20 December 2019 No 94.
[21] Act of 20 December 2018 No 102 (*Lov 20. desember 2018 nr. 102 om endringer i skatteloven*).
[22] Case No 82998.

5.2 First Question – the Existence of a Restriction

27. By its first question, the referring court essentially asks whether Articles 31 and 34 EEA must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which a company liable to taxation in Norway may, by using group contribution rules, lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies, provided it is in a group with other companies liable to taxation in Norway, whereas this is not possible if it is in a group consisting of companies liable to taxation in other EEA States.

28. The legislation at issue in the main proceedings applies to companies with ownership links of over 50% (interest limitation rules)[23] or 90% (group contribution rules)[24] with each other. The freedom of establishment is therefore primarily engaged and, as requested by the referring court, the national legislation must be examined in the light of Article 31 EEA.[25]

29. Under the national legislation, the Section 6-41 interest limitation rules apply to all companies, wherever they are tax resident. According however to the referring court, and as noted in the preparatory works to Section 6-41, in practice, a company liable to tax in Norway may use the group contribution rules to lessen or remove the impact of the interest limitation rules, provided it is in a group which includes other companies liable to taxation in Norway. Within such a group, one Norwegian company may make a group contribution to another. This transfer will have the effect of increasing the recipient's EBITDA, which increases its ability to incur debt to other group companies without being subject to the interest limitation rules (or at least lessens the impact of those rules). A Norwegian tax-resident company which is in a group consisting of companies liable to taxation in other EEA States does not, however, have this possibility to remove or lessen the impact of the interest limitation rules. This is because only Norwegian tax-resident companies may apply the group contribution rules. It is clear from the preparatory works to the introduction

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[23] Section 6-41(4) of the Tax Act.
[24] Section 10-4 of the Tax Act.
[25] Judgment of 18 July 2007, *Oy AA*, C-231/05, EU:C:2007:439 ("***Oy AA***"), paragraph 23, E-15/16 *Yara*, paragraph 33.

of Section 6-41 of Tax Act that this link between the two sets of rules, which leads to the difference in treatment, was not accidental. As can be seen from paragraphs 15 and 20-22 above, the impact of the group contribution rules on the EBITDA, and in turn on the interest limitation rules, was a known and desired effect.[26]

30. In line with the settled case-law of the European Courts,[27] the Authority submits that such a difference in treatment is liable to restrict the exercise by companies of the freedom of establishment: a Norwegian company may neutralise or reduce the impact of the interest limitation rules where it is part of a group which includes other Norwegian companies, but not if it is in a group which consists of companies which are established and tax-resident in other EEA States. Norwegian companies which wish to take out an intra-group loan are therefore placed at a disadvantage if they form part of a group with companies in other EEA States, compared with a group which includes other Norwegian companies.

31. The Authority refers to the recent cases of *Lexel*[28] and *X and X*,[29] both of which involved rules and facts similar to the present case.

32. *Lexel* concerned an intra-group loan made by a French company (BF) to another group company, in Sweden (Lexel). Under Swedish rules limiting the deductibility of interest payments to associated companies, Lexel was denied a tax deduction for the interest payments it made to BF, on the basis that the purpose of the loan was to gain a tax benefit (‘**the avoidance exception**’).[30] The legislative preparatory works to the avoidance exception showed that the exception would not, however, apply to interest paid on intra-group loans where the companies involved were entitled to make intra-group financial transfers. Companies were entitled to make

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[26] The Authority observes that, after the introduction of Section 6-41, the Tax Directorate proposed that group contributions should not be taken into account when calculating ordinary income for the purposes of the interest limitation rules. This proposal was not accepted and the link to group contributions was maintained: see Prop. 1 LS (2018-2019) page 160:

> *“The Tax Directorate has proposed that the deduction limit be calculated on the basis of ordinary income before group contributions. The Ministry believes that it is relevant to assess the debt burden overall for Norwegian companies in the same group, as profit transfer takes place at group level, cf. also section 9.8.3. It is not a goal to limit interest deductions in an individual company with high debt that is part of a group with other Norwegians companies with low debt, and where the Norwegian part of the group as a whole is not thinly capitalised.”*

[27] See the cases referred to in paragraphs 31-35 below and E-15/16 *Yara*, paragraphs 32-36.

[28] C-484/19 *Lexel*, cited at footnote 2 above.

[29] C-398/16 and C-399/16 *X and X*, cited at footnote 1 above.

[30] C-484/19 *Lexel*, paragraph 22, and paragraphs 3-9 where the rules are set out in more detail.

intra-group transfers only if they were subject to tax in Sweden.[31] In such cases, the transferor would receive an income deduction and the recipient of the financial transfer would enter it as taxable income. Because of the *ability* of Swedish domestic group companies to carry out intra-group financial transfers, in practice it was never inferred that the purpose of any intra-group loan was to secure a tax benefit.[32] Swedish-resident companies in a group were therefore 'immunised' from the operation of the avoidance exception, because they had the possibility to make intra-group transfers. This possibility was not however open to a Swedish company such as Lexel, which was making a payment to a group company in France. The CJEU considered this as a restriction on the freedom of establishment.[33]

33. *X and X* concerned a Netherlands rule under which interest in respect of loans taken out with a related entity was not deductible if the loan related to a capital contribution, particularly in relation to the purchase of shares in a related entity. The rule could be disapplied if the company could demonstrate that there were predominantly business reasons for the loan. The same law also contained rules permitting a group of resident companies to form a single tax entity, where companies were taxed jointly at the level of the parent. Within the single tax entity, mutual equity links, such as a capital contribution from a parent to a subsidiary, became non-existent for the purposes of taxation, as a result of consolidation.[34] The company X BV (in the Netherlands, part of a Swedish group) set up an Italian subsidiary in order to purchase shares in an Italian company belonging to the same group, financed through a loan granted by a Swedish company in the same group. The Netherlands tax authorities disallowed the deduction of the loan interest on the basis that X BV was unable to demonstrate sound business reasons for its conduct. X BV argued that it would have been treated more favourably if its Italian subsidiary had been a Netherlands resident company, since it could have formed a single tax entity with it and accordingly deducted its loan interest to the Swedish company without restriction.[35] In other words, domestic groups of companies had a possibility to avoid the operation of the interest restriction rules, a possibility which was not

[31] C-484/19 *Lexel*, paragraphs 9-12 and 38.
[32] *ibid*, paragraphs 24, 31, 40.
[33] *ibid*, paragraphs 31, 40-41.
[34] C-398/16 and C-399/16 *X and X*, paragraphs 27-28.
[35] *ibid*, paragraph 31.

open to a Netherlands company in a group with companies from other EU Member States. The CJEU held that this difference in treatment was liable to restrict the freedom of establishment.[36]

34. In short:
    - *Lexel* concerned interest limitation rules which applied to Swedish and EU companies, but in practice did not apply[37] to Swedish groups of companies, which could make intra-group transfers (while Swedish-EU groups could not);
    - *X and X* concerned interest limitation rules which applied to Netherlands and EU companies, but Netherlands companies could avoid these rules by forming single tax entities (while Netherlands-EU groups could not).

In each case, the CJEU in its judgment (and the Advocate General in his opinion in *X and X*[38]) considered the rules in question to represent restrictions upon the freedom of establishment. The Authority notes the clear parallels between the facts of these two cases and those at issue in the main proceedings. It respectfully submits that the legislation at issue similarly restricts the freedom of establishment by providing Norwegian debtor companies grouped with Norwegian companies the option of removing or minimising the impact of the interest limitation rules by making group contributions, when this option is not open to Norwegian debtor companies grouped with companies tax-resident in other EEA States.[39]

35. Finally on this point, the Authority observes that, under the case-law of the CJEU, the fact that the restriction results from the interaction between two sets of rules (the second set providing a type of exception or 'softening' of the first), rather than one single provision, does not change the analysis. It is clear from *inter alia X and X* that a difference in treatment may stem from a combination of different rules or

[36] C-398/16 and C-399/16 *X and X*, paragraph 32.
[37] C-484/19 *Lexel*, paragraphs 31, 40.
[38] Advocate General Bobek did not issue an opinion in C-484/19 *Lexel*.
[39] See similarly C-386/14 *Groupe Steria*, where the CJEU held that the 'neutralisation' of tax which would otherwise apply in respect of dividends from French resident subsidiaries was prohibited by Article 49 TFEU. This was because such neutralisation was refused in respect of dividends from subsidiaries located in other Member States which, had they been resident, would have been eligible for neutralisation in practice, had they so elected.

circumstances.[40] To ignore differences in treatment arising from such interaction or combination of rules would weaken the *effet utile* of Article 31 EEA.

36. The Authority therefore submits that the first question should be answered as follows:

> *Articles 31 and 34 EEA must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, will restrict the freedom of establishment where a company liable to taxation in Norway may, by using group contribution rules, lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies, provided it is in a group with other companies liable to taxation in Norway, whereas this is not possible if it is in a group with companies liable to taxation in other EEA States.*

5.3 Second Question – Comparability

37. It is settled case-law that a restriction or difference in treatment may be compatible with Article 31 EEA if it relates to situations which are not objectively comparable (or if it is justified by an overriding reason in the public interest and is proportionate to that objective).[41] By its second question, the referring court therefore asks whether the EEA cross-border and national situations are comparable. It asks, first, whether an EEA company[42] that is in a group with a Norwegian company is in a comparable situation to a Norwegian company that is in a group with another Norwegian company. It also asks, second, whether it is relevant for the comparability assessment that no actual group contribution is made by an EEA company to a Norwegian company, but rather that there is only a loan.

38. In respect of the ***first part of the second question***, it is settled case-law that whether 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.[43]

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[40] C-398/16 and C-399/16 *X and X*, paragraphs 34 and 49; see also C-484/19 *Lexel*, paragraphs 3-13 and 40.
[41] C-484/19 *Lexel*, paragraph 42, C-398/16 and C-399/16 *X and X*, paragraph 20, E-15/16 *Yara*, paragraph 37.
[42] The Authority understands this as referring to a company established and tax-resident in an EEA State other than Norway.
[43] C-398/16 and C-399/16 *X and X*, paragraph 33; C-484/19 *Lexel*, paragraph 43.

39. As set out above, the difference in treatment in the present case results from a combination of two sets of rules: the interest limitation rules, and the group contribution rules. The Authority therefore considers it appropriate to consider the question of comparability in relation to this combination. For completeness, it then also considers comparability in relation to the interest limitation rules and the group contribution rules, taken separately.

40. First, the Authority considers that, taking into consideration the **interest limitation rules and the group contribution rules in combination**, the national and cross-border situations described by the national court are comparable. In both situations a Norwegian company is subject to the interest limitation rules, and wishes to avoid or minimise the impact of those rules through the operation of the group contribution rules (in other words, to obtain a sort of exception to the interest limitation rules).

41. A 'combination' scenario was specifically considered by the CJEU in *X and X*. As outlined at paragraph 33 above, in *X and X*, domestic groups of companies had the possibility of avoiding the operation of the interest limitation rules by forming a single tax entity, a possibility which was not open to a Netherlands company in a group with companies from other EU Member States. The CJEU held that the restriction stemmed from the *combination* of the interest limitation provisions and the single tax entity provisions.[44] When assessing comparability, the CJEU considered the matter from the perspective of the single tax entity provisions (which effectively supplied the exception or exemption from the interest limitation rules, and applied differently to domestic and domestic-EU groups).

42. In *X and X* the CJEU considered 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 tax entity with a non-resident company were objectively comparable. and that therefore "*the cross-border and national situations* [*were*] *comparable <u>in the light of the combination of the national provisions</u> at issue in the main proceedings and that there is, therefore, a difference in treatment*. [emphasis added]"[45]

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[44] C-398/16 and C-399/16 *X and X*, paragraphs 34, 49.
[45] C-398/16 and C-399/16 *X and X*, paragraphs 34-37.

43. The Authority submits that a similar approach can be applied in the present case.

44. Second, if, for completeness (or in the alternative), the comparability assessment is made from the point of view of the Norwegian **interest limitation rules**, taken separately, the Authority considers that the situations remain comparable. It is clear from the legislative preparatory works that the aim of the interest limitation rules is to restrict the deduction of interest payments to affiliated parties to a certain percentage of EBITDA, in which circumstances it is effectively presumed that no tax avoidance is taking place.[46] In *Lexel*, the CJEU held that a situation where 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 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 that case.[47] Similarly, the Authority considers that the situation of a Norwegian debtor company, wishing to deduct interest payments made to another Norwegian company, is comparable with that of a Norwegian debtor company seeking to deduct interest payments made to a non-resident EEA company. In both cases, the debtor company is in receipt of a loan and wishes to deduct the interest for tax purposes. The Authority further observes that the Norwegian interest limitation rules insofar as they are contained in Section 6-41 of the Tax Act make no distinction on the basis of the tax residence of the creditor, which itself suggests that the basic interest payment situations are comparable.[48]

45. Third, if the comparability assessment is made from the point of view of the Norwegian **group contribution rules**, again, the Authority submits that the situations are comparable. In *Yara*, the Court assessed whether restricting the ability to make group contributions to Norwegian tax liable companies was justified by overriding reasons in the public interest. By proceeding to this step of the analysis, it therefore acknowledged that the situations of Norwegian tax-resident groups (who could benefit from the group contribution rules) and those of mixed

[46] See paragraphs 14-15 above.
[47] C-484/19 *Lexel*, paragraph 44.
[48] Compare C-398/16 and C-399/16 *X and X*, paragraph 35.

Norwegian-EEA tax resident groups (who could not) were comparable. A similar approach was taken by the CJEU in:

- *Oy AA*, where the position of Finnish subsidiaries with Finnish parents was considered comparable with the position of Finnish subsidiaries whose parents were established in another Member State, from the point of view of the Finnish rules on intra-group transfers,[49] and in
- *X Holding*, where 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 tax entity with a non-resident company were objectively comparable. The reasoning of the CJEU was that the situations were "*objectively comparable with regard to the objective of* [the single tax entity scheme] *… in so far as each seeks to benefit from the advantages of that scheme, which, in particular, allows the profits and the 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*."[50] Such reasoning may be applied by analogy to the facts of the present case: the non-resident company seeks to be able to make contributions to its Norwegian subsidiary or group company with tax effect.

The Authority therefore submits that, even if this case is approached by considering only the group contribution rules, and not those rules in combination with the interest limitation rules, the cross-border and national situations are comparable, and that a difference in treatment therefore exists.

46. Therefore, whether the focus of the comparability assessment is on the ability to deduct interest (where the group contribution rules provide a type of exception) or on the ability to benefit from the group contribution rules (because applying these rules 'unlocks' a way to minimise or avoid the operation of the interest limitation rules), or on the combination of these rules, the Authority submits that the relevant situations are comparable. In each case, intra-group loans are made, in each case

[49] C-231/05 *Oy AA*, paragraph 38.
[50] Judgment of 25 February 2010, *X Holding BV* v *Staatssecretaris van Financiën*, C-337/08, EU:C:2010:89 ("***X Holding***"), paragraphs 22-24.

the Norwegian resident debtor seeks a deduction for tax purposes, in each case this deduction may be restricted under the interest limitation rules, and in each cases the Norwegian resident debtor would like the ability to benefit from an 'EBITDA boost' under the group contribution rules, to lessen the impact of such interest limitation rules.

47. In respect of the ***second part of the second question***, the Authority understands that the referring court is considering circumstances where:
    - an EEA company has not made a group contribution to a Norwegian debtor company, but only a loan,
    - a Norwegian company has made a group contribution, and also a loan, to a Norwegian debtor company,

    and is asking whether this difference – in relation to the actual making of a group contribution or not - means that the two situations are not comparable.

48. First, the Authority observes that the EEA company *cannot* make a group contribution with tax effect in Norway: Section 10-4 of the Tax Act. This is because it is not tax resident in Norway. In line with settled case-law, the simple fact that a company is a non-resident taxpayer does not automatically mean that situations are not comparable and that different treatment may be justified: to do so would deprive Article 31 EEA of its substance.[51] Further, the Authority recalls that it is sufficient for legislation to be *capable* of restricting the exercise of the freedom: it is not necessary to establish that the legislation has actually had an effect (in other words, whether or not the EEA company has actually acted in a certain way or not is not relevant; it is sufficient that the rules are capable of being a restriction).[52]

49. Second, the Authority observes that it is precisely the inability to make group contributions, which can neutralise or lessen the impact of the interest limitation rules, which places EEA companies in a different situation compared to Norwegian groups of companies. To say that this inability to make group contributions *of itself*

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[51] C-337/08 *X Holding*, paragraph 23, Judgment of 13 December 2005, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes),* C-446/03, EU:C:2005:763 ("***Marks & Spencer***"), paragraph 37, Judgment of 28 January 1986, *Commission v French Republic ('avoir fiscal')*, Case C-270/83, EU:C:1986:37, paragraph 18, C-231/05 *Oy AA*, paragraph 30.

[52] See e.g. C-231/05 *Oy AA*, paragraph 42.

also has the effect of making the situations incomparable would be circular and would deprive Article 31 EEA of useful effect.

50. Related to this, the Authority observes, third, that it is commonplace in the tax jurisprudence of the European Courts that a non-resident EEA company is not able to benefit from a fiscal advantage available to a domestic company or group (and is not therefore able to take the related act or enter into the related transaction). This has not however prevented the situations being comparable. The Authority refers in particular to *Yara* and *Oy AA* (where non-resident companies could not benefit from group contribution rules and could not therefore make or receive group contributions),[53] *X and X*, and *X Holding*, (where non-resident companies could not benefit from the single tax entity rule),[54] *Lexel* (where non-resident companies did not fall within the group transfer rules),[55] and *Groupe Steria* (where non-resident companies could not benefit from tax integration).[56] In all these cases, the fact that non-resident entities were unable to benefit from or apply the favourable domestic tax rule in question (and were unable to take the related transactional steps) did not prevent the Courts from finding that the situations were otherwise comparable. The issue was therefore whether the rule preventing the favourable treatment could be justified. The Authority respectfully submits that the same approach is appropriate here.

51. The Authority therefore submits that the second question should be answered as follows:

> *In the context of such national legislation, an EEA company which is in a group with a Norwegian company is in a comparable situation to that of a Norwegian company which is in a group with another Norwegian company. It is not significant for the comparability assessment that, under the national legislation, the EEA company is unable to make a group contribution to the Norwegian company.*

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[53] E-15/16 *Yara*, paragraph 14, C-231/05 *Oy AA*, paragraph 32.
[54] C-398/16 and C-399/16 *X and X*, paragraph 28, C-337/08 *X Holding*, paragraphs 18 and 19.
[55] C-484/19 *Lexel*, paragraph 12.
[56] C-386/14 *Groupe Steria*, paragraph 19.

5.4 Third Question – Justification

52. By its third question, the referring court asks whether any restrictive effect of the national legislation, arising from the difference in treatment, may be justified by overriding reasons in the public interest.

53. It is settled case-law that a national measure which hinders the freedom of establishment laid down in Article 31 EEA may be justified by overriding reasons in the public interest, provided that it is appropriate to securing the attainment of the objective which it pursues and does not go beyond what is necessary to attain it.[57]

54. The objectives of ensuring the effectiveness of fiscal supervision, the need to safeguard the cohesion of the national tax system, preserving the allocation of powers of taxation and symmetry between the EEA States, and preventing tax avoidance constitute overriding requirements in the general interest, capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the EEA Agreement.[58] The objective of combating tax evasion may also justify a measure restricting the exercise of the fundamental freedoms guaranteed by the EEA Agreement.[59] It is for the referring court to identify the objectives which are in fact pursued by the national measures, as well as to determine whether the legitimate aims are pursued in a suitable and consistent manner.[60]

55. In the case before the national court, a number of justifications appear to have been raised: the need to maintain a balanced allocation of the power to tax, and the fight against tax avoidance and evasion, or a combination of the two. The Authority considers these in turn.

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[57] E-15/16 *Yara*, paragraph 37, Judgment of 16 May 2017, Case E-8/16, *Netfonds Holding ASA m.fl. v Staten v/Finansdepartementet*, [2017] EFTA Ct. Rep 163 ("***Netfonds Holding***") paragraph 112 and case-law cited, C-484/19 *Lexel*, paragraph 46 and case-law cited.

[58] E-15/16 *Yara*, paragraph 38 and see Case E-19/15 *ESA v Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 48 and case-law cited. See also C-484/19 *Lexel* paragraphs 48-51.

[59] E-15/16 *Yara*, paragraph 38 and *Cadbury Schweppes*, C-196/04, EU:C:2006:544 ("***Cadbury Schweppes***"), paragraphs 51 and 55, C-398/16 and C-399/16 *X and X* paragraph 46, see also C-484/19 *Lexel*, paragraphs 48-51.

[60] E-15/16 *Yara*, paragraph 38 (and see E-8/16 *Netfonds Holding*, paragraph 116).

5.4.1 The balanced allocation of the power to tax

56. As set out above, the restriction in the present case derives from the combination of the interest limitation and the group contribution rules.

57. The European Courts have held that domestic group-based tax rules, like the Norwegian group contribution rules, have been justified by the need to preserve the balanced allocation of taxing powers between EEA States. In such cases, the Courts have considered it legitimate to limit certain tax advantages to domestic groups of companies, to the exclusion of non-resident EEA companies. Such a justification was accepted in *Yara* (in respect of the Norwegian group contribution rules, save to the extent that they did not foresee a final loss exception),[61] *Oy AA* (in respect of the Finnish intra-group transfer rules),[62] and *X Holding* and *X and X* (in respect of the Netherlands single tax entity rule).[63]

58. The Authority therefore considers that, insofar as the tax advantage sought is simply the ability to apply the group contribution regime in line with the purpose and logic of that regime (see paragraphs 17-18 above), any difference in treatment between domestic groups and Norway-EEA groups would appear to be justified by the need to safeguard the balanced allocation of taxing powers. In other words, within the logic of the Norwegian group contribution system, Norwegian companies may between themselves make and receive group contributions with tax effect, while non-resident companies are excluded.[64]

59. What is at issue in the present case is not, however, the group contribution rules *per se*, but the difference in treatment which flows from the ability of a Norwegian company or companies within a group to use such rules to minimise or remove the impact of *another* set of rules, the interest limitation rules. The question is therefore whether *this difference*, the difference in treatment in relation to the interest limitation rules, can be justified by the need to safeguard the allocation of the power to impose taxes between EEA States.

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[61] E-15/16 *Yara*, paragraph 55.
[62] C-231/05 *Oy AA*, paragraph 67.
[63] C-337/08 *X Holding*, paragraphs 42 and 43; C-398/16 and C-399/16 *X and X*, paragraph 23
[64] E-15/16 *Yara*, paragraph 55.

60. The CJEU has recently had the opportunity to rule on similar situations in *X and X* and *Lexel*. As set out above at paragraphs 32-33, in each of these cases a benefit deriving from, or the simple existence of, a group taxation rule (respectively a single tax entity rule and a group transfer rule) had an impact on an interest limitation rule, with the consequence that cross-border situations were treated less favourably than domestic situations. The CJEU in each case observed that, while the relevant *group* taxation rule could itself be justified by the balanced allocation of taxing powers, this alone was not enough to 'immunise' the overall fiscal situation (thus including the impact on the interest limitation rules) from scrutiny.

61. Thus, in *Lexel*, the CJEU observed that:

    (i) the reservation of the group transfer rules in *Oy AA* to domestic companies was justified by the need to maintain a balanced allocation of taxing power, in order to avoid the taxable subject having the free choice of deciding in which State a profit or loss is taken into account and the possibility of freely moving the taxable base between Member States;[65]

    (ii) for these reasons, it had held in *X Holding* that the consolidation at the level of the parent company of the profits and losses of companies forming a single tax entity constituted an advantage which could justifiably be reserved to resident companies in view of the need to preserve the allocation of the power to impose taxes between the Member States;[66]

    however, turning to the interest deduction component of the case, the CJEU held:

    > *"63.* ***However, as regards tax advantages other than the transfer of profits or losses within a tax-integrated group, a separate assessment must be made as to whether a Member State may reserve those advantages to companies belonging to such a group and consequently exclude them in cross-border situations*** *(see, to that effect, judgment of 2 September 2015, Groupe Steria, C-386/14, EU:C:2015:524, paragraphs 27 and 28).*

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[65] C-484/19 *Lexel*, paragraph 61, referring to C-231/05 *Oy AA* at paragraph 56 and C-337/08 *X Holding* at paragraphs 29-33.

[66] C-484/19 *Lexel*, paragraph 62, referring to C-337/08 *X Holding* at paragraphs 29-33.

> *64.* ***Pursuant to that case-law, the Court held, in its judgment of 22 February 2018, X and X*** *(C-398/16 and C-399/16, EU:C:2018:110, paragraphs 40 and 41), to which, indeed, the national court refers,* ***that the Netherlands rules on the deduction of interest could not be justified by the need to preserve a balanced allocation of the power to impose taxes****. That was the case in particular because, unlike the situation of the general offsetting of costs and gains specific to a single tax entity, the case which gave rise to that judgment involved an advantage without any specific link to the tax scheme applicable to such entities."* [emphasis added][67]

62. In *Lexel*, the CJEU went on to recall that the dispute in the main proceedings concerned an advantage related to the possibility of deducting interest charges, not to the general offsetting of costs and gains within a single tax entity (thus not in relation to a domestic group taxation regime).[68] In respect of the rules limiting interest deductibility, the CJEU observed that, according to the legislative preparatory works, the provision sought 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. It held that such an objective could not, however, be confused with the need to preserve the balanced allocation of power to impose taxes between the Member States.[69]

63. The CJEU observed further that 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 both correspond to those on an arm's-length basis, the CJEU observed that there is no difference between those transactions in terms of the balanced allocation of the power to impose taxes between the Member States. Accordingly, it found that the justification based on the preservation of a balanced allocation of the power to impose taxes between the Member States could not be accepted.[70] The CJEU applied similar reasoning in *X*

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[67] C-484/19 *Lexel*, paragraphs 63 and 64.
[68] C-484/19 *Lexel*, paragraph 65.
[69] C-484/19 *Lexel*, paragraph 67.
[70] C-484/19 *Lexel*, paragraphs 69-70.

and X, where it also concluded that the difference in treatment could not be justified by the need to safeguard the allocation of the power to tax.[71]

64. Thus, in both *Lexel* and *X and X,* the CJEU made clear that, when assessing the justification for any 'advantage' provided to domestic companies, it must be considered what that advantage 'is' (in other words, what is the 'nature' of the advantage). If it is an advantage which falls outside the scope of the group transfer regime or single tax entity scheme (both of which may otherwise be justified), this advantage must be assessed and justified separately.[72] Such an approach was also followed in *Groupe Steria*, where the CJEU held:[73]

> *"27. It cannot, however, be inferred from the judgment in X Holding (C-337/08, EU:C:2010:89) that any difference in treatment between companies belonging to a tax-integrated group, on the one hand, and companies not belonging to such a group, on the other, is compatible with Article 49 TFEU. In that judgment, the Court merely examined the residence condition as a condition of access to a tax integration scheme, and held that that condition was justified, taking into account the fact that such a scheme allows losses to be transferred within the tax-integrated group.*
>
> *28. As regards tax advantages other than the transfer of losses within the tax-integrated group, a separate assessment must therefore be made, as the Advocate General noted in point 34 of her Opinion, 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."*

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[71] C-398/16 and C-399/16 *X and X*, paragraphs 39-42.

[72] C-484/19 *Lexel*, paragraphs 63-66, and C-398/16 and C-399/16 *X and X*, paragraphs 39-42. See also the Opinion of Advocate General Kokott in C-386/14 *Groupe Steria* EU:C:2015:392, at paragraphs 29-34 (in particular paragraph 32), where the Advocate General undertakes a useful review of the case-law, including *X Holding*, in which she also delivered an Opinion.

[73] C-386/14 *Groupe Steria*, paragraphs 27-28. *Groupe Steria* concerned the unequal treatment of dividends received by a French parent company, depending on whether the dividends came from companies which were themselves members of a tax-integrated group with the parent, (meaning they were established in France), or from subsidiaries established in other Member States. In the first situation only, the dividends were fully exempt from corporation tax on account of the 'neutralisation', under French law, of a portion of the dividends which would otherwise be taxed as a consequence of Article 145(1) of the French General Tax Code. This neutralisation occurred as a result of the separate French rules on tax-integrated groups (see paragraph 10 of the judgment). The CJEU held that this neutralisation of the tax which would otherwise apply was prohibited by Article 49 TFEU, as it was refused in respect of dividends from subsidiaries located in other Member States which, had they been resident, would have been eligible for neutralisation in practice, had they so elected.

65. In the present case, the advantage sought is, like in *Lexel* (or in *X and X*), not the application of the group contribution rules for their own sake, but the ability to deduct interest payments to affiliated parties. On this, the Authority respectfully submits that, like in *Lexel*, the Norwegian interest limitation rules appear to be concerned not with safeguarding the balanced allocation of taxes *between* States, but with fighting tax avoidance. In short, Norway is deciding whether or not to grant a deduction for tax purposes; what is concerned is the fiscal sovereignty of one and the same State.[74] Consequently, the difference in treatment does not appear justified by the need to safeguard the allocation of the power to impose taxes between the EEA States.

5.4.2 The fight against tax avoidance and evasion

66. The need to prevent a loss of tax revenue is not a matter of overriding general interest that would justify a restriction on a freedom guaranteed by the EEA Agreement.[75] For the purposes of preventing tax avoidance, a national measure restricting the right of establishment may however be justified, provided:
    a. it specifically targets wholly artificial arrangements which do not reflect economic reality and the (sole) purpose of which is to avoid the tax normally payable on the profits generated by activities carried out on the national territory;[76]
    b. it is appropriate to secure the attainment of this objective and does not go beyond what is necessary to attain it.[77]

    These matters are considered below. The Authority recalls here that the restriction follows not from the interest limitation rules as such, but from the fact that, due to the impact of the group contribution rules, a Norwegian company in a group solely with a company or companies liable to taxation in other EEA States ("**a Norway-EEA group**") is fully subject to the interest limitation rules, while a Norwegian company which is in a group with other companies liable to taxation in Norway is

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[74] Compare C-386/14 *Groupe Steria*, paragraph 29.

[75] Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400 ("***Olsen and Others***"), paragraph 166, Case C-196/04 *Cadbury Schweppes*, paragraph 49. See also C-484/19 *Lexel*, paragraph 68 and the case-law cited.

[76] E-3/13 and E-20/13 *Olsen and Others*, paragraph 166, Judgment of 3 October 2013, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 34, and case law cited, E-15/16 *Yara*, paragraph 49, C-484/19 *Lexel*, paragraphs 48-51, C-398/16 and C-399/16 *X and X*, paragraph 46.

[77] E-15/16 *Yara*, paragraph 37.

not. It is this full application of the interest limitation rules solely to the Norway-EEA group which must be justified and is considered below.

67. It is clear, from the preparatory works to the introduction of Section 6-41 of the Tax Act, that the interest limitation rules seek to prevent tax avoidance or evasion. The Authority refers to the extracts cited at paragraph 15 above and to the following extracts:[78]

> [4.2 The need to limit the deduction for interest costs
>
> 4.2.1 General]
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> Page 103:
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> *"The wide possibilities for interest deductions can make Norway an attractive country for making deductions. The combination of high capital mobility and an increasingly widespread globalisation of large companies means that the transfer of financial capital between tax jurisdictions has increased in recent years. A multinational group has an incentive to invest much of the group's debt in the group companies that are domiciled in countries where the tax rate is relatively high. Corresponding interest income and receivables can be channelled to group companies domiciled in countries with lower tax levels. By exploiting these tax differences between countries, the group achieves a reduction in the total tax burden. Such a tax-motivated, strategic allocation of debt is often referred to as "thin capitalisation"."*
>
> *[…]*
>
> *"Cases that the Tax Administration has worked on indicate that some companies take advantage of the relatively wide possibility of interest deductions in Norway. Empirical studies show that multinational companies report lower tax profits in Norway than companies that only operate domestically. Opportunities to reduce profits through interest payments to countries with lower tax rates may be one of the reasons for this."*
>
> *[…]*
>
> *"Tax planning with interest deductions can lead to a significant loss of revenue. At the same time, competition is distorted because international companies can afford to pay significantly less tax than competitors who do not have the same adaptability. This is not very economically efficient and can threaten the corporate tax base. It is also inefficient for society that companies spend large resources on exploiting rate differences between countries."*

68. Against this background, the Authority considers whether the criteria for justifying a difference in treatment on tax avoidance/evasion grounds are met.

69. First, under the settled case-law of the European Courts, 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

[78] Authority translation of Prop. 1 LS (2013-2014).

undue administrative constraints, to provide evidence of any commercial justification that there may be for that arrangement.[79] Further, in order to examine wholly artificial arrangements, national courts must carry out a case-specific examination, taking into account the particular features of each case.[80]

70. Second, it is settled case-law that 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.[81]

71. The Authority considers these requirements in turn.

72. The interest limitation rules in Section 6-41 of the Tax Act, read together with the group contribution rules in Sections 10-2 to 10-4 of the Tax Act, do not appear to provide for the opportunity for taxpayers to show that the transaction is commercially justified. The interest limitation rules in Section 6-41 are 'mechanical': if the interest expenses claimed exceed a certain amount and a certain percentage of EBITDA, the interest deduction is denied. There is no possibility for the taxpayers involved to demonstrate that the loan is genuine and on arm's length or standard commercial terms.

73. Second, the corollary of this mechanical application of the rules is that the deduction which is refused may not necessarily be limited to the proportion of interest which exceeds what would have been agreed had the relationship between the parties been one at arm's length. Once the EBITDA percentage threshold is exceeded, and provided the interest expenses are above the 5 million NOK *de minimis*, all interest expenses are subject to the interest limitation deduction (including those below 5 million NOK).[82]

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[79] C-484/19 *Lexel* paragraph 50; Judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161 (**'Thin Cap'**), paragraph 82.
[80] E-15/16 *Yara*, paragraph 51, E-3/13 and E-20/13 *Olsen and Others*, paragraph 173.
[81] C-484/19 *Lexel*, paragraph 51, C-524/04 *Thin Cap*, paragraph 83.
[82] Prop. 1 LS 2013-2014, pages 102 and 127.

74. The rules at issue in the main proceedings may therefore include within their scope transactions which are carried out at arm's length and which, consequently, are not purely artificial or fictitious arrangements created with a view to escaping the tax normally due on the profits generated by activities carried out on national territory. The legislative preparatory works appear to have recognised that this was the case when Article 6-41 of the Tax Act was adopted.[83]

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[83] Prop. 1 LS 2013-2014, Authority translation (emphasis added):

[4.6 Choice of main model to limit the interest deduction]

Page 108:

"Many of the replies to the consultation propose various exceptions and safety valves, for example based on whether an internal transaction can be shown to have been carried out on market terms.[…]".

"The Ministry maintains the consultation paper's proposal for the main model. It is demanding to design rules that prevent unwanted tax planning, and which at the same time are administratively simple and do not have undesirable effects for commercially sound business. Other countries' rules on limiting interest deductions vary, and there is no consensus on which model is most appropriate. This may also depend on other tax rules and other conditions in the individual countries."

Page 109:

"**The Ministry's proposal 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. Considerations 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. The Ministry further considers that those kinds of exceptions will be very resource intensive**."

[…]

"With the proposed changes compared with the consultation proposal (percentage, threshold value and performance access), in the Ministry's opinion there is no reason to propose further exceptions (safety valve, etc.)."

[4.19 Financial and administrative consequences]

Page 137:

"It is the overall tax terms and other framework conditions that determine the location of business activities. It is assumed that the proposed limitation in the interest deduction will to a small extent weaken the incentives to invest in Norway. The restriction will make it less attractive for multinational groups to place debt in Norway. At the same time, most of our closest trading partners have already introduced similar restrictions. Some companies will nevertheless be able to consider investments in Norway as less attractive if they today, through large interest deductions, adapt so that they pay little or no corporation tax to Norway.

On the other hand, the proposal will be able to strengthen national companies that have faced stricter taxation than competing international companies that have been able to take advantage of current rules. The rules will thus contribute to greater neutrality between national and international companies and to protect the Norwegian tax base. However, the new rules do not differentiate between national and international owners. Norwegian state-owned groups and companies owned by municipalities will also be covered by the regulations."

[…] "**Nevertheless, it cannot be ruled out that the rule in some cases will go somewhat further than an arm's length assessment would indicate.** If a company that is not thinly capitalised should be affected by the rule, it must be possible to take out loans from independent parties and thus ensure the correct deduction."

Page 138:

"It is complicated to design rules that are both simple and accurate. A good interest rate limitation rule must also be adapted to the other regulations in Norway. The Ministry will closely monitor the effects of

75. Consequently, under the settled case-law of the European Courts, it appears that any justification which the Norwegian Government might raise, based on the fight against tax evasion and tax avoidance, cannot be accepted. The rules in question do not give the taxpayer the possibility to show that the arrangement is for genuine commercial reasons, and the interest deduction denied may exceed what would have been agreed had the relationship between the parties been one at arm's length.

76. The Authority notes that the Norwegian Government has, in the above context, raised the matter of 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 (otherwise known as the "Anti-Tax Avoidance Directive" or "**ATAD**").[84]

77. The Authority observes first, that ATAD entered into force on 8 August 2016[85] with a transposition date in the EU of 31 December 2018.[86] It was not considered EEA relevant and will not be incorporated into the EEA Agreement. It therefore does not form part of Norwegian or EEA law for the purposes of this request for an advisory opinion.

78. Second, on the substance of the matter, while the Norwegian interest limitation rules in Section 6-41 of the Tax Act are formulated in a materially similar way to the interest limitation rule in Article 4(1) and (2) of ATAD, it is not the Norwegian interest limitation rules alone which are the subject of the main proceedings. The restriction derives from the *combination* of the interest limitation and group contribution rules.[87] While Article 4(1) of ATAD gives EU Member States a certain leeway where "*EBITDA may be calculated at the level of the group and comprise the results of all its members*", the Directive is not prescriptive about how this may be done. To the extent that a directive gives discretion to the EEA States, which may be exercised

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the rule. Based on experience with the rules, it will be assessed whether there is a need for changes in the regulations, both with regard to circumvention opportunities and any negative consequences for the business community."

[84] OJ L 193, 19.7.2016, p.1.

[85] Article 12 ATAD.

[86] Article 11 ATAD (note that for certain provisions of ATAD, the transposition date was 31 December 2019).

[87] See pararaphs 29-30 and 35 above.

when implementing the directive's provisions, it is settled case-law that such discretion may be exercised only in compliance with the fundamental provisions of the TFEU, or, where relevant, the EEA Agreement.[88] As set out at paragraphs 72-75 of these observations, the rules at issue in the present case go beyond what is necessary to prevent wholly artificial arrangements leading to tax avoidance. Even therefore if Norway had been subject to the provisions of ATAD, this alone would have been insufficient to justify the rules at issue in the present case.

5.4.3 The balanced allocation of the power to tax together with the fight against tax avoidance

79. The CJEU has, in certain cases, ruled that where national legislation is not specifically designed to exclude from the tax advantage which it confers purely artificial arrangements, devoid of economic reality, such legislation may nevertheless be justified by the objective of preventing tax avoidance, taken in conjunction with the objective of preserving the balanced allocation of the power to impose taxes between the EU Member States.[89]

80. Where however the State in question cannot validly assert a justification based on the need to preserve a balanced allocation of the power to impose taxes, the CJEU has held that the same national legislation cannot be justified on the basis of taking account *together* the need to preserve a balanced allocation of the power to impose taxes between the Member States and the need to fight tax avoidance.[90]

81. In light of the observations made at paragraphs 56-65 above, the Authority considers that because the difference in treatment cannot be justified by the need to maintain a balanced allocation of taxing powers, it cannot be justified by such a need taken in combination with the need to fight tax avoidance.

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[88] C-386/14 *Groupe Steria*, paragraph 39, Judgment of 23 January 2012, E-2/11 *STX Norway Offshore AS and Others* [2012] EFTA Ct. Rep. 4, paragraph 74.

[89] See judgment of 21 January 2010, *Société de Gestion Industrielle (SGI) v Belgian State*, C-311/08, EU:C:2010:26, paragraph 66 and the case-law cited; considered further in C-484/19 *Lexel*, paragraphs 72-76.

[90] C-484/19 *Lexel*, paragraph 76.

5.4.4 Conclusion on justification

82. In light of the above, the Authority therefore submits that the third question should be answered as follows:

> *Such national legislation may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, the requirements of national law go beyond what is necessary to pursue such an objective.*

6 CONCLUSION

Accordingly, the Authority respectfully submits that the Court should answer the questions of the referring court as follows:

(1) *Articles 31 and 34 EEA must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, will restrict the freedom of establishment where a company liable to taxation in Norway may, by using group contribution rules, lessen or remove the impact of rules limiting interest deductions in respect of loans taken out with affiliated companies, provided it is in a group with other companies liable to taxation in Norway, whereas this is not possible if it is in a group with companies liable to taxation in other EEA States.*

(2) *In the context of such national legislation, an EEA company which is in a group with a Norwegian company is in a comparable situation to that of a Norwegian company which is in a group with another Norwegian company. It is not significant for the comparability assessment that, under the national legislation, the EEA company is unable to make a group contribution to the Norwegian company.*

(3) *Such national legislation may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, the requirements of national law go beyond what is necessary to pursue such an objective.*

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Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority

SCHEDULE OF ANNEXES

No	Description	Referred to in these written observations at paragraph(s)	Number of pages
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