JUDGMENT OF THE COURT

1 June 2022*

(*Freedom of establishment – Direct taxation – Group contribution rules – Limitation on the deductibility of interest payments to affiliated parties – Comparable situations – Another tax advantage*)

In Case E-3/21,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in the case between

PRA Group Europe AS

and

the Norwegian Government, represented by the Tax Administration,

concerning the interpretation of the rules on freedom of establishment, in particular the interpretation of Article 31 of the Agreement on the European Economic Area, read in conjunction with Article 34,

THE COURT,

composed of: Páll Hreinsson, President, Per Christiansen and Bernd Hammermann (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

– PRA Group Europe AS ("PRA"), represented by Anette Fjeld, advocate;

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

– the Government of Norway, represented by Ida Thue, acting as Agent;

– the EFTA Surveillance Authority ("ESA"), represented by Kyrre Isaksen, Claire Simpson and Melpo-Menie Joséphidès, acting as Agents; and

– the European Commission ("the Commission"), represented by Wim Roels and Vincent Uher, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of PRA, represented by Anette Fjeld; the Government of Norway, represented by Ida Thue; ESA, represented by Kyrre Isaksen and Claire Simpson; and the Commission, represented by Wim Roels; at the remote hearing held on 1 December 2021,

gives the following

Judgment

I Legal background

EEA law

1 Article 31(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "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 reads:

> *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.

National law

3 During the Norwegian fiscal years 2014 and 2015, the Norwegian Act No 14 of 26 March 1999 on taxation of assets and income (*Lov om skatt av formue og inntekt* av 26. mars 1999 nr. 14 (skatteloven)) ("the Tax Act") included the following provisions.

4 Section 6-40(1) of the Tax Act laid down the deduction of debt interest payments as a general rule.

5 Section 6-41 of the Tax Act entitled "Limitation of interest deduction between affiliated parties" read, in extract:

(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.

(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.

...

6 Section 10-2(1) of the Tax Act entitled "Deduction for group contributions" read:

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).

7 Section 10-3 of the Tax Act entitled "Tax liability for group contributions received" read:

(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.

8 Section 10-4 of the Tax Act entitled "Conditions for entitlement to make and receive group contributions" read, in extract:

(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 Facts and procedure

9 PRA Group is a global group engaged in the acquisition of financial assets and debt servicing. The group has several companies in Europe, which are owned by the holding company PRA Group Europe Holding S.à.r.l. ("PRA Holding"), which itself is subject

to taxation in Luxembourg. PRA Group Europe Subholding AS ("PRA Subholding") was a wholly-owned subsidiary of PRA Holding and subject to taxation in Norway.

10 PRA Subholding was financed with a combination of equity and loan capital from PRA Holding. The interest expenses for the Norwegian fiscal years 2014 and 2015 are related to that debt. PRA Subholding did not receive any other value transfers from the parent company in 2014 and 2015.

11 In its tax returns for 2014 and 2015, PRA Subholding claimed a deduction for that debt interest. In the tax assessments interest deductions amounting to a total of NOK 144 549 153 for the fiscal years 2014 and 2015 were disallowed on the basis of Section 6-41 of the Tax Act.

12 According to the request, under Section 6-41(3) of the Tax Act, in relation to the deduction of interest paid on debt owed to affiliated parties, the debtor may not deduct interest in excess of 30 per cent 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" ("EBITDA"). The limited deduction provided for in Section 6-41 is calculated for each individual company separately, irrespective of whether the company is part of a group. Furthermore, in light of the relevant preparatory works, the referring court states that the purpose of Section 6-41 is to counteract tax adaptations whereby international groups place disproportionately large shares of a group's debt, and thus interest expenses, in countries with high tax rates, whilst interest income and financial assets are channelled to group companies domiciled in countries with lower, or no taxation.

13 By letter of 7 December 2016, and after PRA Subholding had been merged into PRA, the latter requested the tax assessments for the fiscal years 2014 and 2015 to be amended.

14 Following a review on the merits, the Tax Office upheld the tax assessments for 2014 and 2015 by decision of 7 July 2017. PRA appealed that decision to the Tax Appeals Board. By decision of 24 June 2020, the Tax Appeals Board, sitting in extended composition, dismissed the appeal.

15 On 8 September 2020, PRA lodged proceedings before Oslo District Court, seeking to be allowed a full tax deduction for interest payments on debt owed to affiliated companies. The Norwegian Government, represented by the Tax Administration, contends that the claim should be dismissed.

16 PRA claims that the limited interest deduction rules are contrary to the freedom of establishment provided for in Article 31 EEA, and that Norway is under an obligation to allow a full deduction for debt interest accrued. PRA contends that, for the determination of whether the limited interest deduction rules in Section 6-41 of the Tax Act are contrary to the EEA Agreement, the Norwegian rules on group contributions in Sections 10-2 to 10-4 of the Tax Act are relevant.

17 Group contributions are value transfers between companies or associations in a group which, subject to certain conditions, allow the transferor to claim a tax deduction. The contribution is then deemed to be taxable income for the recipient. It may consist of an immediate transfer of funds or other assets, or that the transferor undertakes to pay a specified amount to the recipient at a later time. According to the request, the provisions on group contributions are intended to support taxation neutrality between undertakings that organise their business operations through departments in a limited liability company and undertakings that organise their operations through several limited liability companies, in a group. Section 10-4(1) and (2) of the Tax Act provides that only companies that are liable for taxation in Norway may make or receive group contributions with tax effects. It follows from the request that, as a group contribution with tax effect forms part of the basis for the calculation of the EBITDA, the recipient of a taxable group contribution will then have increased its maximum tax deduction for debt interest, whilst the transferor will have an equivalent reduction.

18 In the course of the proceedings before Oslo District Court, reference was made to a reasoned opinion (Decision No 192/16/COL) delivered by ESA on 25 October 2016. The background to this reasoned opinion is as follows.

19 In 2014, ESA received a complaint concerning the operation of Section 6-41 of the Tax Act, which entered into force on 1 January 2014. Following a review of the rules and an exchange of views with the Norwegian Government, ESA adopted a reasoned opinion on 25 October 2016. ESA concluded that, by maintaining in force rules on interest deductibility restrictions, such as those laid down in Section 6-41 of the Tax Act, Norway had failed to fulfil its obligations under Article 31 EEA. ESA took account of the fact that groups of companies with Norwegian group members would more readily be able to avoid the operation of the limited interest deduction 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. ESA considered that the measures were not proportionate to any stated overriding reason in the public interest and could not therefore be justified.

20 While the Norwegian Government did not agree with the position adopted by ESA in its reasoned opinion, the Government indicated that it would propose further amendments to the limited interest deduction rules. These amendments, which inter alia introduced certain exceptions to the rules restricting interest deductions, entered into force on 1 January 2019. According to ESA, its assessment of the amended legislation is ongoing.

21 Oslo District Court submitted by letter of 1 July 2021, registered at the Court on the following day, the following questions to the Court:

1) Is there a restriction within the meaning of Article 31 EEA, read in conjunction with Article 34, when group contributions from Norwegian companies increase the maximum deduction for interest and thus the entitlement to deduction of interests on debt to affiliated parties under the limited interest deduction rule, a

possibility which, under Norwegian tax rules, is not available for investments by or in EEA companies?

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

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

22 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as it is necessary for the reasoning of the Court.

III Answer of the Court

Questions 1 and 2

23 By Question 1, the referring court asks whether legislation providing the possibility for a company liable to taxation in Norway, by using group contribution rules, to 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 companies liable to taxation in Norway, whereas such a possibility is not available to a group consisting of companies liable to taxation in other EEA States, is a restriction within the meaning of Article 31 EEA, read in conjunction with Article 34 EEA.

24 By the first part of Question 2, the referring court asks whether a company based in another EEA State which is part of a group with a company based in Norway is in a comparable situation to that of a Norwegian-based company which is part of a group with another Norwegian-based company. The second part of Question 2 relates to the comparability assessment, and whether it is of significance, in the context of that assessment, that no group contribution has actually been made from the foreign EEA based company to the Norwegian-based company, but rather a loan. The Court finds it appropriate to address Questions 1 and 2 together.

25 Section 6-41 of the Tax Act is an exception from the general rule on deduction for debt interest, and it limits the deductibility of interest paid to affiliated parties to a specified maximum deduction. The maximum deduction corresponds to 30 per cent of the company's tax EBITDA. This rule applies to all companies, irrespective of their tax residence. According to the request, the purpose of Section 6-41 is to counteract tax adaptations enabling international groups to place disproportionately large shares of the group's debt, and thus interest expenses, in countries with high tax rates, whilst interest income and financial assets are channelled to group companies domiciled in countries with lower or no taxation.

26 It appears from the documents before the Court that the preparatory works of the Tax Act clarify that the group contribution rules in Sections 10-2, 10-3 and 10-4 of the Tax Act may be used to lessen or remove the impact of the limited interest deduction rules. The group contribution rules are intended to support taxation neutrality between undertakings that organise their business operations through departments in a company, and undertakings that organise their operations through several companies in a group. To apply the group contribution rules, the transferor and the recipient must both be Norwegian companies and must belong to the same group. Such a transfer will increase the recipient company's EBITDA and thus increase its maximum deduction under the limited interest deduction rules, whilst the transferor's maximum deduction will undergo an equivalent reduction. This, in turn, will increase the recipient company's ability to incur debt and pay interest to other group companies without being subject to the limited interest deduction rules. Conversely, a Norwegian tax-resident company in a group of companies liable to taxation in other EEA States, will not be able to similarly escape (or lessen the impact of) the limited interest deduction rules by providing a group contribution to a group company liable to taxation in another EEA State.

27 The Court also notes that in a situation where a company may deduct intra-group financial transfers made to another company in the same group from its taxable income where the other company is subject to tax in the same EEA State, there is no point in taking a loan from another company in the group with the sole purpose of being able to deduct the corresponding interest expenses (compare the judgment in *Lexel*, C-484/19, EU:C:2021:34, paragraph 40).

28 The freedom of establishment entails a right for companies, formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA, to pursue their activities in another EEA State through a branch established there. Article 31 EEA is intended in particular to secure the benefit of national treatment in a host State. A difference in treatment between the resident subsidiaries based on the seat of their parent companies constitutes an obstacle to the freedom of establishment if it makes it less attractive for EEA companies to establish subsidiaries in that EEA State (see Case E-15/16 *Yara International ASA* [2017] EFTA Ct. Rep. 434, paragraphs 34 and 35).

29 A scheme such as that at issue in the main proceedings, resulting from the combination of the limited interest deduction rules and the group contribution rules, is liable to restrict companies' exercise of the freedom of establishment. In particular, Norwegian companies which form part of a group with companies in other EEA States, and which wish to take out an intra-group loan, are precluded from neutralising or reducing the impact of the limited interest deduction rules. Such companies are therefore placed at a disadvantage vis-à-vis companies in groups where all companies are established in Norway.

30 It follows from case law that the fact that a potential restriction of the freedom of establishment results from the interaction between two sets of rules, particularly in circumstances in which one set provides either an exception to, or an amendment of, the other, does not change the analysis as to whether a restriction is present. A difference

in treatment may stem from a combination of different rules or circumstances (compare the judgments in *X and X*, C-398/16 and C-399/16, EU:C:2018:110, paragraphs 34 and 49, and *Lexel*, cited above, paragraphs 40, 41 and 78). As noted by ESA, to ignore differences in treatment arising from such interaction or combination of rules would weaken the effectiveness of Article 31 EEA.

31 A difference in treatment arising from an EEA State's legislation to the detriment of companies exercising their freedom of establishment does not constitute an obstacle to that freedom if it relates to situations which are not objectively comparable (compare the judgment in *X and X*, cited above, paragraph 20 and case law cited).

32 It is further settled case law that the question as to 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 legislative provisions in question (compare the judgment in *X and X*, cited above, paragraph 33, and *Lexel*, cited above, paragraph 43 and case law cited).

33 As noted, the difference in treatment in the present case between companies based in another EEA State, on the one hand, and Norwegian-based companies, on the other, results from a combination of the limited interest deduction rules and the group contribution rules. The Court considers it appropriate to consider the question of comparability in relation to this combination. It must be held that a situation where a company established in one EEA State makes interest payments on a loan taken out from a company established in another EEA State and these two companies belong to the same group is no different from a situation where the recipient of the interest payments is a company belonging to the group and is established in the same EEA State, namely Norway in the present case (compare the judgment in *Lexel*, cited above, paragraph 44). When assessing the limited interest deduction rule and the group contribution rules in combination, the national and cross-border situations described by the referring court are comparable. The fact that companies established in the same EEA State are able to lessen or remove the impact of limited interest deduction rules through the application of group contribution rules, whilst companies established in different EEA States are not, does not impact that comparability assessment.

34 Further, the referring court asks what significance it has for the comparability assessment that no actual group contribution has been made from the foreign EEA-based company to the Norwegian-based company, but rather a loan. Such situations must be distinguished. A group contribution is a one-sided transfer of value, whilst a loan is not. However, the fact that a company established in one EEA State did not actually make a group contribution to a company in the same group established in another EEA State is of no relevance for the assessment whether that company is in a comparable situation to that where the recipient is established in the same EEA State.

35 As the referring court sets out, a company based in another EEA State could not make a group contribution with tax effect in Norway, because that company is not tax resident in Norway, as required by Section 10-4 of the Tax Act. However, in line with established case law, the mere fact that a company is a non-resident taxpayer does not

automatically entail that situations are not comparable and that different treatment may be justified, since such a conclusion would serve to deprive Article 31 EEA of its substance (compare the judgments in *X Holding*, C-337/08, EU:C:2010:89, paragraph 23; *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 37; and *Oy AA*, C-231/05, EU:C:2007:439, paragraph 30 and case law cited).

36 The Court adds, in this regard, that it is sufficient for legislation to be regarded as a restriction on the freedom of establishment if it is capable of restricting the exercise of that freedom without there being any need to establish that the legislation in question has actually had the effect of leading some of the companies established in another EEA State to refrain from acquiring, creating or maintaining a subsidiary in the EEA State in question (compare the judgment in *Oy AA*, cited above, paragraph 42 and case law cited).

37 Consequently, the answer to Questions 1 and 2 must be that, in the context of the national legislation at issue in the main proceedings, a foreign EEA-based company in a group with a Norwegian-based company is in a comparable situation to that of a Norwegian-based company in a group with another Norwegian-based company. It is immaterial for the comparability assessment that no actual group contribution has been made from the company based in another EEA State to the Norwegian-based company. Article 31 EEA, read in conjunction with Article 34 EEA, must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, constitutes a restriction on 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.

Question 3

38 By Question 3, the referring court asks what reasons in the public interest may justify a restriction arising out of national legislation, such as that at issue in the main proceedings.

39 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 (see Case E-8/16 *Netfonds Holding and Others* [2017] EFTA Ct. Rep. 163, paragraph 112 and case law cited, and compare the judgment in *Lexel*, cited above, paragraph 46 and case law cited).

40 In the main proceedings, a number of justifications appear to have been raised for the measures in question. This includes 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 Court observes that the objectives of ensuring the effectiveness of fiscal supervision, the need to safeguard the cohesion of the national tax scheme, 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 (see *Yara*, cited above, paragraph 38, and Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraph 48 and case law cited). The objective of combating tax evasion may also justify a measure restricting the exercise of the fundamental freedoms guaranteed by the EEA Agreement (see *Yara*, cited above, paragraph 38).

41 The Court notes, as observed by the Norwegian Government, that it follows from established case law that group contribution rules have been justified by the need to preserve the balanced allocation of taxing powers between EEA States. Case law has in such circumstances considered it legitimate to limit certain tax advantages to domestic groups of companies, to the exclusion of non-resident EEA companies (see *Yara*, cited above, paragraph 55, and compare the judgments in *Oy AA*, cited above, paragraph 67; *X Holding*, cited above, paragraphs 42 and 43, and *X and X*, cited above, paragraph 23). The Norwegian Government argues in its written observations that the same reasoning should be applicable in the circumstances of the present case.

42 The Court observes that group contributions allow intra-group transfers of profits, from one company to another within the same domestic group, without the payment of consideration in return. The absence of consideration entails that such transfers should not be understood as transactions of a commercial nature, in the ordinary sense. It would undermine the balanced allocation of powers to impose taxes according to the principle of territoriality if taxpayers had a free choice to decide in which State a profit is taxed or a loss is taken into account and the possibility of freely moving the taxable base between EEA States (compare the judgment in *Lexel*, cited above, paragraph 61 and case law cited). In such cases, there is no scope to test the commercial nature of the contributions by, for example, an assessment at arm's length. The arm's length principle states that transactions between associated enterprises should not be distorted by the special relationship that exists between the parties.

43 However, the Court recalls that the restriction in the present case derives from the combination of the limited interest deduction and the group contribution rules, rather than the group contribution rules assessed alone. The issue in the present case does not pertain to the group contribution rules themselves, but the difference in treatment arising from the ability of a Norwegian company or companies within a group to use such rules to lessen or remove the impact of another set of rules, namely the limited interest deduction rules.

44 When assessing the justification for any advantage afforded to Norwegian companies, the nature of this advantage must be considered. More particularly, if this advantage falls outside the scope of the group transfer scheme, this advantage must be assessed and justified separately.

45 The Court observes that the justification as regards the transfer of profits or losses within a tax-integrated group does necessarily not apply to the limited interest deduction

rules. With respect to those rules, the balanced allocation of taxing rights may be preserved by refusing an interest deduction where the arrangement is wholly artificial, or to the extent that the debt/equity ratio or interest rate are not in line with what would have been agreed with an arm's length lender. This may also serve to prevent tax avoidance.

46 The question is therefore whether this difference in treatment in relation to the limited interest deduction rules can be justified by the need to safeguard the allocation of the power to impose taxes between EEA States. It is established case law that, in cases similar to those in the main proceedings, in which combinations of tax rules function such that cross-border situations are treated less favourably than domestic situations, although one rule alone (in this instance, the group taxation rule) could itself be justified by the balanced allocation of taxing powers, this, in itself is insufficient to justify the overall fiscal situation, including the effect on the limited interest deduction rules (compare the judgment in *Lexel*, cited above, paragraph 78).

47 In this respect, the Court notes that the consideration of ensuring balanced allocation of the taxing rights between EEA States has been accepted by the European Court of Justice ("ECJ") when an equal treatment can lead to EEA States losing their taxing rights or activities carried out on their territory, typically if the taxpayer can decide where income and expenses are to be taxed (compare the judgment in *K*, C-322/11, EU:C:2013:716, paragraphs 49 and 50, 55 and 71).

48 However, such considerations are not capable of justifying a restriction such as that arising in circumstances in which a tax deduction has been granted in a national but not a cross-border situation. Rather, and in particular, if an EEA State grants such a benefit in a domestic situation (and renounces part of its taxation rights), that EEA State cannot argue the same taxing right is important in the cross-border situation in an attempt to limit equal treatment (compare the judgment in *Rewe Zentralfinanz*, C-347/04, EU:C:2007:194, paragraph 43). Consequently, the difference in treatment does not appear justified by the need to safeguard the balanced allocation of the power to impose taxes between EEA States.

49 With respect to the fight against tax avoidance and evasion, the Court recalls that 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. However, a national measure restricting the right of establishment for the purposes of preventing tax avoidance may be justified, provided it specifically targets wholly artificial arrangements which do not reflect economic reality, and it is appropriate to secure the attainment of this objective and does not go beyond what is necessary to attain it (see Joined Cases E-3/13 and E-20/13 *Fred. Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 166, and *Yara*, cited above, paragraph 37).

50 In the present case, the restriction arises from the fact that only group companies liable to taxation in Norway may use the group contribution rules to lessen or remove the effect of the limited interest deduction rules, while a Norwegian company in a group with companies liable to taxation in other EEA States may not make or receive group

contributions to or from those companies. This entails that the full tax effect of the limited interest deduction rules falls solely on the Norway-EEA group.

51 It is against this background that it falls to be considered whether the criteria for justifying a difference in treatment on tax avoidance/evasion grounds are met.

52 In cases involving interest limitation or deductibility, the ECJ has not permitted Member States to restrict such rules to entirely domestic situations. Rather, such rules may only be applied to deny deductions for arrangements to the extent that they do not have any underlying commercial justification based on an assessment at arm's length. Thus, where 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 (compare the judgments in *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 83, and *Lexel*, cited above, paragraphs 50 and 51).

53 It is settled case law that, 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. Further, in order to determine whether a transaction represents a purely artificial arrangement entered into for tax reasons alone, the taxpayer must be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may be for that arrangement (compare the judgment in *Lexel*, cited above, paragraph 50, and see *Yara*, cited above, paragraph 51 and case law cited).

54 It is apparent from the documents before the Court that the national rules at issue in the main proceedings do not provide for the opportunity for taxpayers to show that the transaction is commercially justified. There is no possibility to demonstrate that a transaction is genuine and on arm's length terms. This further entails that the deduction 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.

55 National rules such as those at issue in the main proceedings may therefore include transactions that 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.

56 The Norwegian Government submitted that, in the light of Article 4(5) of the 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, it would not be necessary to combine the interest limitation rule with the opportunity for taxpayers to show that the transaction is commercially justified. However, Norway's submission is not undisputed. ESA maintains that the limitation rules must comply with fundamental freedoms and an assessment on proportionality, allowing the taxpayer the opportunity

to provide commercial justification for excess interest expenses. The Court notes that this directive has neither been incorporated into the EEA Agreement nor was it in force in the EU at the material time.

57 Accordingly, the answer to the third question must be that a restriction arising from national legislation such as that at issue in the main proceedings may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, if national law, which is for the referring court to determine, does not provide the taxpayer with the opportunity to demonstrate that the transaction took place on terms corresponding to what would have been agreed had the relationship between the parties been one at arm's length, it goes beyond what is necessary to pursue that objective.

IV Costs

58 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo District Court hereby gives the following Advisory Opinion:

1. **In the context of national legislation such as that at issue in the main proceedings, a foreign EEA-based company which is in a group with a Norwegian-based company is in a comparable situation to that of a Norwegian-based company which is in a group with another Norwegian-based company. It is immaterial for the comparability assessment that no actual group contribution has been made from the company based in another EEA State to the Norwegian-based company.**

   Article 31 EEA, read in conjunction with Article 34 EEA, must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, constitutes a restriction on 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. **A restriction arising from national legislation such as that at issue in the main proceedings may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, if national law, which is for the referring court to determine, does not provide the taxpayer with the opportunity to demonstrate that the transaction took place on terms corresponding to what would have been agreed had the relationship between the parties been one at arm's length, it goes beyond what is necessary to pursue that objective.**

Páll Hreinsson Per Christiansen Bernd Hammermann

Delivered in open court in Luxembourg on 1 June 2022.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President