Case No:76153
Document No: 818742
Decision No: 192/16/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Article 31 of the EEA Agreement by maintaining in force interest deductibility restrictions, such as the one laid down in Section 6-41 NTA, in particular Section 6-41(3-4) NTA

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EFTA SURVEILLANCE AUTHORITY

1 Introduction

On 4 May 2016, the EFTA Surveillance Authority ("the Authority") sent a letter of formal notice (Document No 787208) to Norway. The Authority concluded that the provisions on the limitation of intra-group interest deduction in Section 6-41 of the Norwegian Act on Asset and Income Tax ("the Norwegian Tax Act" or "NTA")[1] were not in line with Article 31 of the EEA Agreement.

The Norwegian Government replied by letter dated 4 July 2016 (Document No 811004, your ref. 14/5797 SL HRu/KR), contesting the grievances contained in the letter of formal notice. In the Government's view, no restriction on the freedom of establishment is at hand. If such a restriction were nevertheless to be considered to be at stake, the Government considers that it would be justified by the balanced allocation of taxing rights coupled with the prevention of tax avoidance and abuse.

The Authority has analysed the arguments submitted by the Norwegian Government and remains of the opinion that the contested rules constitute an infringement of the freedom of establishment protected by Article 31 EEA.

2 Relevant national law

2.1 The Norwegian interest cap rules

Section 6-41 NTA reads as follows:

> *"Section 6-41. Limitation of deduction of interest between affiliated parties*
>
> *(1) The provisions in this section regarding limitation of deduction of net interest expenses on debt to affiliated individuals, companies or entities apply to*
>
> *a. companies and entities as mentioned in section 2-2 first subsection,*
>
> *b. companies as mentioned in section 10-40 for the purpose of determining profit or loss pursuant to section 10-41,*
>
> *c. companies and entities as mentioned in section 10-60 for the purpose of determining profit or loss pursuant to section 10-65, and*
>
> *d. companies and entities that are not resident in the Kingdom but that are liable to tax pursuant to section 2-3 or the Petroleum Taxation Act section 1, see also section 2.*
>
> *(2) Net interest expenses pursuant to this section include interest expenses as mentioned in section 6-40, less interest income. Profit and loss on composite bonds that are not to be decomposed into a bond part and a derivate part for tax purposes are in their entirety considered to be interest income or interest expenses. The same applies to profit and loss on a debt instrument issued at a higher or lower price than its redemption value. Profit and loss as mentioned 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 5 MNOK, they cannot be deducted for the part that exceeds 25 per cent of ordinary income or uncovered loss for the year*

[1] Act of 26 March 1999, Lov om skatt av formue og inntekt (skatteloven).

before the limitation of deductions pursuant to this section, plus interest expenses and tax depreciation, and less interest income. The disallowance of interest deduction pursuant to the preceding sentence is done only for an amount of up to the size of net interest expenses on debt to affiliated individuals, companies or entities. No deduction is granted for any additional losses carried forward, see section 14-6, or group contribution, see section 10-4, after a disallowance of interest deduction has been implemented pursuant to this subsection. If net interest expenses for the year do not exceed 5 MNOK, but the sum of net interest expenses for the year and net interest expenses carried forward from previous fiscal years pursuant to subsection 7 exceeds 5 MNOK, the taxpayer may demand deduction of net interest expenses carried forward and net interest expenses for the year within the limit pursuant to this subsection.

(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.

(5) For any company or entity that is liable to taxation pursuant to section 2-3 of the Tax Act or section 1, see also section 2, of the Petroleum Taxation Act, the total actual interest on debt for the Norwegian business shall be considered interest on debt to affiliated parties and interest on debt to non-affiliated parties in the same ratio as the ratio between the company's or entity's debt to affiliated parties and debt to non-affiliated parties as assessed pursuant to the fourth and the sixth subsections for the company or entity. Debt to affiliated parties pursuant to the preceding sentence is set to the average of such debt as per the 1st of January and the 31st of December of the fiscal year. Correspondingly, debt to non-affiliated parties is set to the average of such debt as per the 1st of January and the 31st of December of the fiscal year.

(6) If the debt that forms the basis of the interest expense was incurred with a party that is non-affiliated, the debt is nonetheless considered to be incurred with an affiliated party insofar as

a. an affiliated party has furnished security for the debt, or

b. the party that is affiliated has a claim against a non-affiliated party, and the claim has a connection with the debt.

(7) Net interest expenses that pursuant to the third subsection are not deductible, may be deducted from ordinary income the following ten years.

Deductions pursuant to the preceding sentence are granted only to the extent that net interest expenses lie within the limit of deductions pursuant to the third subsection. For companies as mentioned in section 10-40 and enterprises and entities as mentioned in section 10-60, net interest expenses pursuant to the first sentence are carried forward the following ten years for the purpose of determining profit or loss pursuant to sections 10-41 or 10-65. For companies etc. as mentioned in the preceding sentence, net interest expenses to be carried forward are to be reduced by 30 per cent of the year's loss in the company or entity, after the limitation of deductions pursuant to this section. Net interest expenses to be carried forward pursuant to this subsection are considered to be deductible before net interest expenses of the year.

(8) This section does not apply to financial institutions pursuant to the Financial Institutions Act, sections 1-3 and 2-1. Furthermore, this section does not apply to financial institutions that are temporarily affiliated to the borrower; see the Commercial Banks Act, section 19 second subsection; the Savings Banks Act, section 24 fourth subsection; the Financial Institutions Act, section 3-16 third subsection; and the Insurance Act, section 6-1 second subsection and section 7-10 first subsection. The preceding sentence applies only to loan agreements entered into before the financial institution and the borrower became affiliated parties.

(9) This section does not apply to companies encompassed by the Petroleum Taxation Act, section 3 d.

(10) The Ministry may issue regulations for purposes of supplementing and implementing this section and may provide more detailed rules as to which items are to be included as interest income and interest expenses, as well as which affiliated parties are to be encompassed by sixth subsection item a."

As of 24 April 2014, certain exceptions to Section 6-41 of the NTA, regarding certain types of loans guaranteed or secured by an affiliated party, were issued by Section 6-41-1 of Regulation No 14 of 26 March 1999, Supplementing and Implementing the Tax Act (*forskrift til utfylling og gjennomføring mv. av skatteloven av 26. mars 1999 nr. 14),* as amended by Regulation No 570 of 24 April 2014 (*forskrift 24 April 2014 nr. 570).* According to the provision, the following securities provided by affiliated parties are exempt:

- Security provided by a company or entity that is at least 50% owned or controlled directly or indirectly by the borrower; and
- Security in the form of a pledge of shares or loan notes issued by the borrower.

The provision reads as follows:

"Section 6-41-1. Furnishing of security by an affiliated party
The provision in section 6-41 sixth subsection item a of the Tax Act does not apply:

a. In cases where the company or entity that has furnished security is at least 50 per cent owned or controlled directly or indirectly by the borrower.

b. In cases where the security furnished by the affiliated party has been *furnished in the form of a pledge over an ownership share in the borrower or a claim against the borrower.*

Re-classification from external loans to internal loans is only to be done to the extent that security for the debt has been furnished. This means that if security has been furnished for parts of a loan, or for only a limited period of a year, the re-classification shall be limited correspondingly. Reference is made to Prop. 1 LS (2013-2014) item 4.12.3 and Prop 1 LS Addendum 1 (2013-2014) item 6.1.2."[2]

2.2 The Norwegian group contribution rules

The Norwegian Tax Act contains provisions on a group relief scheme under which a company may make a "group contribution" to another company that is a member of the same group. The amount of the contribution is deducted from the taxable income of the donor and added to the income of the recipient.

The group contribution regime is generally applicable only to Norwegian companies. Companies from other EEA States may, however, take part in the scheme in so far as they have a branch in Norway that is subject to tax. Group contributions are allowed when the granting company and the receiving company are limited liability companies and belong to the same group.[3] In addition, the parent company must own more than 90% of the subsidiary, and hold an equivalent share of the votes.[4] The Norwegian authorities have explained that these requirements must be met at the end of the relevant financial year in which the group contribution is made.

The granting and the receiving companies must, as part of their annual tax return, disclose the contributions to the tax authorities by submitting complete information on designated

[2] Unofficial translation. Original text reads as follows:
"§ 6-41-1.Sikkerhetsstillelse fra nærstående part
Bestemmelsen i skatteloven § 6-41 sjette ledd bokstav a gjelder ikke:
a. I tilfeller der selskapet eller innretningen som har stilt sikkerhet er eid eller kontrollert direkte eller indirekte med minst 50 prosent av låntakeren.
b. I tilfeller der sikkerheten fra den nærstående parten er stilt i form av pant i eierandel i låntakeren eller fordring på låntakeren.
Omklassifisering fra eksterne lån til interne lån skal bare foretas så langt det er stilt sikkerhet for gjelden. Dette innebærer at dersom det er stilt sikkerhet for deler av et lån, eller kun for en begrenset periode av et år, skal omklassifiseringen begrenses tilsvarende. Det vises til Prop. 1 LS (2013-2014) pkt. 4.12.3 og Prop 1 LS Tillegg 1 (2013-2014) pkt 6.1.2."

[3] Sections 10-2 to 10-4 of the Norwegian Tax Act. Note also that according to Section 10-1 of the Norwegian Tax Act, the rules governing group contributions are applicable for *"aksjeselskap, allmennaksjeselskap samt likestilt selskap og sammenslutning"*.

[4] Section 10-4(1) of the Norwegian Tax Act. The provision states (Unofficial translation by the Authority):
"§10-4. Conditions on the right to make and receive a group contribution
(1) The donor and the recipient must be Norwegian companies or associations. Limited liability companies and public limited companies must belong to the same group, cf. Limited Liability Companies Act section 1-3 and Public Limited Companies Act section 1-3, and the parent company must own more than nine tenths of the shares in the subsidiary and have a corresponding part of the right to vote in general meetings, cf. Limited Liability Companies Act section 4-26 and Public Limited Companies Act section 4-25. These requirements must be fulfilled as at the end of the income year. A group contribution may be made between companies resident in Norway even if the mother company is resident in another State so long as the companies fulfil the
other requirements."

forms. A group contribution may consist of money, working capital or other financial contributions.[5]

A group contribution is deductible for the granting company to the extent that the contribution is covered by its taxable income.[6] When a company grants a group contribution exceeding its taxable income, it cannot deduct the excess amount.[7] The receiving company, on the other hand, is liable for taxes on the group contribution, but the excess, non-deductible amount does not constitute a taxable income on the part of the recipient company. The contribution is considered as income for the receiving company in the same year as the granting company deducts the contribution in its tax assessment.[8] Provided that the recipient suffers a deficit, the contribution may be set off against any losses, also those incurred in previous years. Moreover, the requirements related to a limited liability company's distribution of dividends must be met.[9]

2.3 Effects of the Norwegian interest cap rules

Under Norwegian tax law, the general rule is that interest expenses are fully deductible from business income in the absence of explicit rules that state otherwise. This applies regardless of whether they constitute costs for acquiring or maintaining income.[10]

On 13 December 2013, the Norwegian Government adopted amendments to Section 6-41 NTA in order to limit the right to deduct interest on debt to affiliated parties from taxable income ("the interest cap rules"). The rules entered into force on 1 January 2014.

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[5] The actual payment does not necessarily need to take place in the same year as the income is made, provided that it will be effected by a real transfer of wealth at a later date. Accordingly, it is sufficient that the granting company undertakes an unconditional obligation to make the contribution.

[6] Section 10-2(1) of the Tax Act: The provision states (Unofficial translation by the Authority):
"A limited liability company [aksjeselskap] or a public limited company [allmennaksjeselskap] may claim a deduction in its tax assessment in respect of a group contribution in so far as its amount does not exceed the otherwise taxable global income and in so far as the group contribution is otherwise lawful in relation to the rules of the Limited Liability Companies Act [Aksjeloven] or the Public Limited Companies Act [Allmennaksjeloven]. A company or association treated as equivalent to a limited liability company may claim a deduction in respect of a group contribution to the extent to which a limited liability company or a public limited company may do so."

[7] Section 10-3(1) of the Norwegian Tax Act. A parent company may grant a contribution to a subsidiary in the same year as the same subsidiary grants a group contribution to the parent. The two contributions would be viewed as separate transactions, to be treated separately for tax purposes, see Advance Ruling 22/05 by the Norwegian Directorate of Taxes, available online (in Norwegian): http://www.skatteetaten.no/no/Radgiver/Rettskilder/Uttalelser/bfu/Sirkelkonsernbidrag-skatteloven--10-2-til-10-4-/. This entails that under certain circumstances, group contributions could be made and tax consolidation could be achieved without altering the grantors' net equity. This would be the case if a parent company has incurred a tax loss of at least the same proportions as the taxable profits of its subsidiary. The subsidiary could grant a contribution to its parent company and claim a deduction for this. The parent company could set off the contribution received against its own tax loss. Simultaneously, the parent company could grant its own separate group contribution to the subsidiary. The latter group contribution would not be taxable for the receiving subsidiary as the parent company due to its own tax losses would not be in a position to deduct it. In effect, the two group contributions would imply that the subsidiary could eliminate its tax base without eroding its net equity.

[8] Section 10-3(1) of the Norwegian Tax Act.

[9] Section 10-2(1) of the Norwegian Tax Act.

[10] See Section 6-40 NTA. The preparatory works to Section 6-40 NTA (Ot. Prp nr. 86 (1997-1998) Ny skattelov, Chapter 7.6) state that *"... the right to deduct debt interest is not conditional upon the debt being linked to a taxable source of income. Therefore the provision represents an exception to the main rule regarding the deduction of costs for acquiring, maintaining and securing taxable income as laid down in Section 6-1."* (Unofficial translation).

The interest cap rules amount to an exception to the general rule as regards the right to deduct interest on certain debts. They provide that for interest expenses over 5 million NOK,[11] interest paid to an affiliated party that exceeds 25% of the taxable income, after adding back net internal and external interest expenses and tax depreciations/amortizations (“EBITDA”),[12] is not deductible from the taxable income.

According to Section 6-41(4) NTA, an affiliated party is defined as a person, company or entity, which directly or indirectly controls at least 50% of the debtor, or a company or entity controlled at least 50% by the debtor. The interest cap rules thus apply to intra-group loans between affiliated parties. They also apply to any debt from third parties that has been guaranteed by an affiliated party, through formal agreement or any other informal guarantee such as a letter of comfort (so-called “back-to-back loans”).[13]

According to the preparatory works, the legislative rationale for enacting the interest cap rules is the following:

“The Government proposes to introduce a rule of limiting deductions for interest paid between taxpayers that have a community of interest (internal interest). International businesses have incentives to place a lot of debt, and thus also interest expenses, in companies resident in countries with a relatively high tax rate, like Norway. The corresponding interest income and debt claims may be channelled to intra-group companies resident in countries with lower or no taxation. The Government's proposal will contribute to making the Norwegian tax base more robust while simultaneously strengthening the framework conditions for domestic enterprises competing with multinational companies.”[14]

The above rule leads to a general presumption of abuse, and interest deductibility will automatically be denied for interest on debt in excess of this figure. This will be the case, even if a taxpayer can provide economic justification for opting for intra-group financing.

The Norwegian interest cap rules do not distinguish between taxpayers on the basis of the nationality of the affiliated lender. However, the Norwegian interest cap rules are applied in a legal context in which – due to the design of the group contribution rules – only intra-group contributions to domestic companies can be exempted from the interest cap rules.

The Norwegian group contribution system facilitates the use of circular group contributions within the same fiscal tax year, allowing a Norwegian profit making subsidiary to provide upstream group contributions, engendering an impact in taxation

[11] Essentially providing for a *de minimis* rule.
[12] EBITDA stands for earnings before interest, taxes, depreciation and amortization.
[13] See Skatteetaten, “Rettledning til RF-1315 Begrensning av rentefradrag mellom nærstående 2014”, Skattedirektoratet 2014 (available at: http://www.skatteetaten.no/upload/Skjemaer/2014/RF-1317B.pdf). In this reasoned opinion reference is made to intra-group loans, however, those references are equally applicable to back-to-back loans.
[14] Prop. 1 LS (2013-2014) section 4.1 (Unofficial translation). Original text reads as follows: “*Regjeringen foreslår å innføre en regel om å begrense fradrag for renter som betales mellom skattytere som er i interessefellesskap (interne renter). Internasjonale virksomheter har insentiver til å plassere mye gjeld, og dermed rentekostnader, i selskap som hører hjemme i land med relativt sett høy skattesats, slik som Norge. Motsvarende renteinntekter og fordringer kan kanaliseres til konsernselskap hjemmehørende i land med lavere eller ingen skattlegging. Regjeringens forslag vil bidra til å gjøre det norske skattegrunnlaget mer robust samtidig som en styrker rammebetingelsene for nasjonale bedrifter som konkurrerer med flernasjonale selskap.”*

terms upon its Norwegian loss making parent company, followed by a downstream contribution in the same year without any effect in terms of taxation from the same parent company to its subsidiary. Such a mechanism allows for the reduction of the taxable profits of the Norwegian tax group when assessed as a whole.

In its letter of 10 February 2015, the Norwegian Government confirmed that *"[t]he tax rules on group contributions apply to contributions between two Norwegian companies, contributions between a Norwegian company and a Norwegian branch of a foreign company, and contributions between two Norwegian branches of foreign companies."* In that same letter, the Government further stated that "*"[t]ax relief for group contributions […] is not given for contributions directed to foreign companies. Therefore, foreign companies (including EEA companies) will not be able to offset expenses against income earned in Norwegian companies."*

Thus, the interest cap rules under Section 6-41 NTA are in practice very unlikely to apply to wholly Norwegian groups of companies, and will never apply to groups that are entitled to grant each other group contributions.

This gives rise, in economic terms, to a higher tax charge for groups of companies with a cross border structure than for wholly Norwegian groups of companies. Thus, in cases where the conditions for eligibility for group contributions are fulfilled there is a differential treatment of non-residents inasmuch as cross-border groups fulfilling that condition are liable to be subject to the interest cap rules, contrary to resident groups fulfilling the same conditions, which can make use of the group contribution rules instead.

As a consequence, cross-border intra-group interest contributions will de facto be subject to the interest cap rules to a greater extent (since the exception provided under group contribution rules is not available to them).[15]

To summarise, the interest deduction disallowance under Section 6-41 NTA is in practice very unlikely to apply to Norwegian groups of companies, and will never apply to groups that are entitled to grant each other group contributions.

3 Relevant EEA law

Article 31 of the EEA Agreement on the right of establishment provides that:

> "*1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to […] 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.[...]*"

[15] C-385/12 *Hervis*, EU:C:2014:47.

Article 34 of the EEA Agreement extends the right of establishment to companies and provides that:

> "*Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States. [...]*"

4 The Authority's Assessment

4.1 Applicability of Article 31 EEA

According to established case-law, the question of whether national legislation falls within the ambit of the free movement of capital or the freedom of establishment must be assessed in light of the purpose behind the legislation concerned.[16]

According to further well established case-law, national provisions applicable to holdings of the capital of a company which give the owner "definite influence on the company's decisions" and allow him to "determine its activities" fall within the substantive scope of the freedom of establishment as provided for in Article 31 EEA.[17]

The interest cap rules apply to intra-group loans between "affiliated parties" within the meaning of the Norwegian Tax Act. Section 6-41(4) of that Act refers, for the purpose of defining that concept, to a person, company or entity, which directly or indirectly controls at least 50% of the debtor, or a company or entity controlled at least 50% by the debtor. The rules are thus clearly aimed exclusively at situations where the parent company exerts a definite influence on the company's decision and helps to determine its activities. The Authority will thus proceed to assess the restrictive national measures on the basis of Articles 31 and 34 of the EEA Agreement.

4.2 Comparability

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

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[16] Cases C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* EU:C:2006:544, paragraphs 31-33; C-452/04 *Fidium Finanz* EU:C:2006:631, paragraphs 34 and 43-49; C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* EU:C:2006:773, paragraphs 37 and 38; C-524/04 *Test Claimants in the Thin Cap Group Litigation* EU:C:2007:161, paragraphs 26-34; C-492/04 *Lasertec Gesellschaft für Stanzformen mbH* v. *Finanzamt Emmendingen* EU:C:2007:273, paragraphs 19-26; C-48/11 *A Oy*, EU:C:2012:485, paragraph 17; and C-164/12 *DMC Beteiligungsgesellschaft mbH* EU:C:2014:20, paragraph 29.

[17] See *e.g.* Cases C-231/05 *Oy AA* EU:C:2007:439, paragraph 20; C-112/05 *Commission* v. *Germany* EU:C:2007:623, paragraph 13; C-284/06 *Burda* EU:C:2008:365, paragraph 72; C-212/09 *Commission v Portuguese Republic* EU:C:2011:717, paragraph 42; and C-164/12 *DMC Beteiligungsgesellschaft mbH*, cited above, paragraph 34; Case E-9/11 *ESA v Norway* [2012] EFTA Ct. Rep. 442, paragraph 81; Case E-14/13 *ESA v Iceland* [2013] EFTA Ct. Rep 924, paragraph 27.

[18] C-524/04 *Test Claimants in the Thin Cap Group Litigation*, cited above, paras. 59-60.

4.3 Existence of a restriction

4.3.1 The Authority's assessment

The legislation at issue amounts to a restriction on the freedom of establishment for groups of companies where the loan is provided by an affiliated company residing in another EEA State in cases where the conditions for eligibility for group contributions would have been fulfilled had both companies been Norwegian residents.

In such cases, the interest expense would have been deductible if the company granting the loan were a domestic company, whereas it is liable to be disallowed under the Norwegian interest cap rules if the company granting the loan is a company established in another EEA State.

Groups with affiliated domestic group members will be able to exempt themselves from the Norwegian interest cap rules (benefitting from the group contribution rules), whereas groups with affiliated group members in other Member States will in practice rarely be able to benefit from it.

As indicated above, it is explicitly stated in the preparatory works to the relevant provisions that the objective of the provisions is to prevent the erosion of the Norwegian tax-base[19], thus making it clear that it is primarily targeting cross-border situations. It is further mentioned that the provisions will strengthen the framework conditions for domestic companies in their competition with multinational groups.[20] In the opinion of the Authority, the Norwegian rules amount to a restriction upon the freedom of establishment under two situations:

In the first case, companies from EEA States that conduct cross-border activities are disadvantaged when compared to Norwegian based companies. As a result of the Norwegian interest cap rules, applied in a legal context in which the possibility to rely on group contribution rules is available only for a limited amount of companies, a Norwegian target company will, for example, effectively pay more taxes in Norway if it is acquired and owned by groups based in other EEA States as opposed to Norwegian based groups.[21] Companies can exempt themselves from the ambit of the interest cap rules for non-cross-border contributions, while the same opportunity is not available for cross-border contributions.

In the second case, the Norwegian rules disadvantage Norwegian based companies that conduct cross-border activities through an EEA based branch, making it less attractive for Norwegian companies to exercise their freedom of establishment by acquiring, creating or maintaining a Norwegian subsidiary with an EEA based branch.

The fact that Norwegian based and EEA based companies are thus treated in a different manner seems to be confirmed by the Norwegian Government's letter of 10 February 2015. Concerning the possibility to circumvent the effects of the interest cap rules via the tax rules on group contributions, the letter stated that such a strategy could be applied only

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[19] Prop. 1 LS (2013-2014) section 4.1.
[20] Ibid.
[21] See, for a similar reasoning. Case C-294/97 *Eurowings* EU:C:1999:524, paragraph 40, and Case C-385/12 *Hervis*, cited above, paragraph 39.

to *"contributions between two Norwegian companies, contributions between a Norwegian company and a Norwegian branch of a foreign company, and contributions between two Norwegian branches of foreign companies."*[22] Thus, Norwegian based groups can obtain full deduction of interest expenses on external debt by choosing an alternative funding structure (not available to EEA based groups) falling under the Norwegian group contribution rules, thus exempting themselves from the ambit of the interest cap rules.

Thus, although the Norwegian interest cap rules *de jure* treat identically cross-border and purely internal situations, they are *de facto* applied in a context in which group contribution rules allow only intragroup loans that take place completely in Norway to be exempted from the interest cap rules.

This amounts to a restriction upon the freedom of establishment, as it is liable to deter companies from EEA States from establishing similar groups with affiliated group members in Norway. It is also liable to deter Norwegian companies from establishing cross-border groups with affiliated group members in other EEA States.[23]

The Authority is therefore of the opinion that this amounts to a restriction on the freedom of establishment.[24]

4.3.2 The view of the Norwegian Government

In its reply to the letter of formal notice, the Norwegian Government states that there is no restriction of the right of establishment. In support of its view, the Government points out that there is no formal difference in treatment between domestic and cross-border situations. The same rules apply for interest paid to foreign and Norwegian recipients.

The Government states that the fact that companies choose not to establish or maintain a debt financing structure, but instead use equity as their form of financing, cannot imply the existence of an indirect discrimination. In the opinion of the Government, a separate indirect discrimination does not exist for EEA law purposes when the alleged discrimination lies within another set of rules that applies to an alternative situation, and where the legality of the latter rules is not called into question as such.

In the Government's opinion, the Authority's references to the *Eurowings* case are not relevant because, contrary to the situation in *Eurowings*, "*the Norwegian interest cap rules do apply to all intra-group interest payments, regardless of the tax treatment of the receiver of the payments*".[25] Furthermore, in the Government's opinion, the Authority's references to the *Hervis* case are not relevant because the challenged turnover tax in *Hervis* did, due to its design, in the majority of cases impose a larger tax burden on companies that were linked to companies which had their registered office in another Member State. The indirect discrimination in the *Hervis* case was a result of the challenged sales tax and the organisational structure of Hungarian and foreign enterprises,

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[22] Page 3 of the Government's letter.

[23] The Authority recalls the CJEU's Case C-386/14 *Groupe Steria SCA v Ministère des finances et des comptes publics* EU:C:2015:524 para. 20, where the Court affirmed that "[t]o exclude from the benefit of such an advantage a parent company which owns a subsidiary established in another Member State is liable to make it less attractive for that parent company to exercise its freedom of establishment, as it would be deterred from setting up subsidiaries in other Member States." See also *Papillon*, C-418/07, EU:C:2008:659

[24] See, for a similar reasoning: Case C-385/12 *Hervis*, cited above, paragraph 39 and Case C-324/00 *Lankhorst-Hohorst* EU:C:2002:749, paragraphs 27-32.

[25] Page 8 of the Government's reply.

and not a result of different set of tax rules that applied to companies choosing not to engage in dispositions that triggered the sales tax.

The Government goes on to assert that the provisions which are subject to the current infringement procedure are neither indirectly discriminatory nor entail a *de facto* discrimination. In this regard, the Government states no difference in treatment or other discriminatory effects inherent to the interest cap rules as such have been identified.

4.3.3 Assessment of the Norwegian Government's arguments

As regards the arguments submitted by the Norwegian Government on the existence of a restriction, the Authority has the following comments:

First, Norway does not deny that the rules at issue place members of a cross-border group of companies which would be able to make a group contribution if both parties had been Norwegian residents at a disadvantage by comparison with members of a wholly domestic group. In the Authority's view, this amounts to a restriction on the freedom of establishment.

Although the rules should formally apply in the same manner to all taxpayers, in practice Norwegian groups that are entitled to benefit from the group contribution rules will be able to exempt themselves from the limit set by the interest cap rules. And it is to this extent that the operation of the rules is discriminatory.

Specifically, the discriminatory effect arises where both a cross border group and a Norwegian-only group rely on intra group loans and merely the Norwegian-only group can benefit from the group contribution rules and be exempted from the interest cap limit.

It follows from the settled case-law of the Court of Justice of the European Union (CJEU) that de facto discrimination is also a restriction, as held by the Court in the cases *Eurowings*, *Lankhorst-Hohorst* and *Hervis*.

Contrary to the Government's statements, there was no formal difference in treatment in the *Hervis* case. The wording of the legislation was neutral, but the majority of tax-payers falling within the less favoured category would be non-residents. This was deemed to be an unjustified restriction on the freedom of establishment by the CJEU. The Court's reasoning in all three cases is similar to the Authority's position in this case.

4.4 The justification for the restriction

4.4.1 The Authority's assessment

Measures restricting the fundamental freedoms may be justified by overriding reasons in the public interest when they are capable of attaining the objective which they pursue and do not go beyond what is necessary in order to attain it.[26]

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[26] See, inter alia, C-383/10 *Commission v Belgium* EU:C:2013:364, paragraph 49.

Although the Authority does not dispute that the relevant Norwegian legislation can be justified by the objective of the prevention of tax avoidance and abuse coupled with the balanced allocation of taxing rights, it considers the Norwegian rules go beyond what is necessary to achieve their goal.

In order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices coupled with the balanced allocation of taxing rights, the legislation that supports the restriction must be constructed to prevent only wholly artificial arrangements created with a tax avoidance purpose.[27] According to the case-law of the CJEU it cannot be presupposed that a transaction is not genuine and proper.[28] Furthermore, as observed by the Advocate General in *Steria*, *"[u]nder case-law, a justification based on preserving the coherence of the tax system of a Member State requires that there be a link between advantage and levy as regards the aim pursued by the tax provision. (..) However, such a link is not possible without identifying a specific tax levy and its individual purpose."*[29]

The Norwegian provisions at issue do not seem to comply with the above criteria. To be caught by the Norwegian legislation, the arrangements do not have to be artificial (in total or in part). This might result in two identical arrangements – one artificially created for the purpose of tax avoidance and one created in the ordinary and legitimate business of a group – to be both equally and indistinctly affected by the Norwegian rules.

Furthermore, not only do the Norwegian rules not distinguish between wholly artificial arrangements and regular arrangements, but they also prevent any distinction between partially artificial and wholly artificial arrangements. The interest deductions are denied as a whole and not limited to that part of the interest which exceeds what would have been agreed had the relationship been at arm's length.[30]

In this regard, the Authority would like to refer to the Communication of 10 December 2007 to the Council, the European Parliament and the European Economic and Social Committee entitled "The application of anti-abuse measures in the area of direct taxation - within the EU and in relation to third countries" (COM(2007) 785 final), where the following is pointed out: *"In order for anti-abuse rules to be justified, they must be confined to situations in which there is a further element of abuse. […] The detection of a wholly artificial arrangement thus amounts in effect to a substance-over-form analysis."*

The case law of the CJEU clarifies that, to respect the proportionality requirement, the resident company must be given an opportunity to produce evidence that its activities in the other EEA State are genuine;[31] without being subjected to undue administrative constraints; that the taxpayer should be given the opportunity to provide evidence of any commercial justification there may have been for that arrangement.[32]

Instead, the Norwegian interest cap rules do not include any form of an escape clause.

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[27] Case C-105/07, *Lammers & Van Cleeff*, EU:C:2008:24, paragraph 26 and *Thin Cap*, para. 74.
[28] Case C-318/10 *SIAT*, EU:C:2012:415, paragraph 51.
[29] C-386/14 *Groupe Steria* EU:C:2015:392, paragraph 51.
[30] See Case C-524/04 *Thin Cap*, cited above, paragraph 83.
[31] Ibid., with reference to C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* EU:C:2006:544, paragraph 70.
[32] C-524/04 *Thin Cap*, cited above, paragraph 82.

In its letter of 10 February 2015, the Norwegian Government stated that *"[t]he interest limitation applies to all eligible taxpayers that pay interest expenses that exceed the cap to an affiliated party."* There is *"no method by which Norwegian based groups or EEA-based groups may exempt themselves from the interest cap rules. Groups are not given the opportunity to provide evidence of any commercial justification on the basis of which they may be exempted."*[33]

The Authority notes that the rules do not offer any opportunity to taxpayers that conduct cross border activities to produce evidence that their activities in the other Member State are genuine. Under the Norwegian interest cap rules, interests will not be deductible, if they exceed *for any reason* the limit set in the rules. Therefore the rules are not proportionate.

The Authority wishes also to point out that the fact that an escape clause is equally not available to groups that conduct cross-border activities and groups that conduct their activities only in Norway, does not suffice to prove that a disproportionate restriction does not exist. In fact, while it is clear that an escape clause is available neither for the cross-border groups, nor for the Norwegian-only groups, the latter may still benefit of the group contribution rules while the former have no possibility to avail themselves of any exception.

Therefore, it is the Authority's opinion that the Norwegian interest cap rules do not meet the requirement of proportionality.

4.4.2 The view of the Norwegian Government

The Norwegian Government submits that the contested legislation is not disproportionate because it serves the broader aim of ensuring the balanced allocation of taxing rights and the interest of preventing tax avoidance and abuse.

In support of its view, the Government states the following:

i) The Government maintains that as the discriminatory effects solely arise in the event a resident group makes use of group contributions as an alternative to loan financing, the grounds for justification of the discriminatory effects must also relate to the reasons why the option of making group contributions for tax purposes is limited for cross-border groups.
The Government states that the limitations on group relief for losses sustained by non-resident companies are justified by overriding reasons of public interest, such as the need to safeguard the balanced allocation of the power to tax between the EEA States and the need to prevent tax avoidance. Thus, justification on grounds of the need to safeguard the balanced allocation of the power to tax between the EEA States and the need to prevent tax avoidance can be claimed for the alleged indirect discrimination based on the interest cap rules in combination with the group consolidation rules.

According to the Government, an EEA state should be able to impose the same restrictions that are applied to cross border group contributions. That is, the limitations on interest deductions must also be justified by reasons such as the need to safeguard the balanced allocation of the power to tax between the EEA States and the need to prevent tax avoidance.

[33] Page 2 of the Government's letter.

The Government further states that the Authority's reasoning would, in effect, also entail that the limitations on the group contribution rules may only apply to "wholly artificial" arrangements. Such an outcome is, however, contrary to the case law established by the CJEU, according to which the need to safeguard the balanced allocation of the power to tax between the Member States and the need to prevent tax avoidance is recognized as a justification for limitations on cross-border group taxation.

ii) The Government reiterates that an opportunity to provide evidence of commercial justification for the loan arrangement would imply a substantial weakening of the effect of the limitation rules. According to the experience of the Norwegian assessment authorities, the arm's length principle is difficult to apply to loan arrangements in multi-national enterprises. An opportunity to provide evidence of commercial justification would leave the assessment authorities with similar considerations and difficulties. One of the reasons for the introduction of the interest cap rules was the inadequacy of section 13-1 in the Norwegian Tax Act (the arm's length principle) as a measure to safeguard the balanced allocation of the power to tax between the EEA States and prevent tax avoidance through intra-group interest expenses. Thus, an escape clause as mentioned would not leave the tax authorities only with "disadvantages of a purely administrative nature", but would rather make the set of rules concerned inadequate as a measure to safeguard the balanced allocation of the power to tax between the EEA States and prevent tax avoidance.[34]

iii) The Government states on page 9 of its letter of 4 July 2016, that "*the draft Anti Tax Avoidance Directive establishes a minimum level of protection for domestic corporate tax bases. According to the directive, net borrowing costs shall be deductible only up to 30 percent of the taxpayer's earnings before interest, tax, depreciation and amortisation (EBITDA) or up to 3 million euro. As an option for the Member States, the limitation may not apply when the tax payer is a standalone entity or can demonstrate that the debt to equity ratio is in line with or higher than the ratio of the group. The Ministry of Finance assumes that the minimum level of protection imposed by the draft EU Anti Avoidance Directive is in accordance with the EU law.*

Neither the Commission draft nor the European Council draft include, however, an escape clause based on an opportunity for the taxpayer to produce evidence that the loan arrangement is genuine and has commercial justification. This means that in countries that have in place group tax consolidation rules the "indirect discrimination" effect introduced by the Authority in the letter of formal notice will in effect prevent an implementation of the directive. This supports the view that the Norwegian interest cap rules and the group contribution rules are in line with EEA law."[35]

4.4.3 Assessment of the Norwegian Government's arguments

[34] In Case C-512/13, *Sopora*, para. 33, the Court of Justice states: *"While it is true that considerations of an administrative nature cannot justify a derogation by a Member State from the rules of EU law (judgment in Terhoeve, C 18/95, EU:C:1999:22, paragraph 45), it is also clear from the Court's case-law that Member States cannot be denied the possibility of attaining legitimate objectives through the introduction of rules which are easily managed and supervised by the competent authorities (see judgments in Commission v Italy, C 110/05, EU:C:2009:66, paragraph 67; in Josemans, C 137/09, EU:C:2010:774, paragraph 82; and in Commission v Spain, C 400/08, EU:C:2011:172, paragraph 124)."*

[35] Page 9 of the Government's reply.

i) The Authority is of the opinion that the Norwegian Government's argument as regards justification is misconceived. The Government is correct that there are indeed cases in which it is insufficient or even irrelevant to consider whether the restriction is targeted solely at artificial arrangements. That was the case in *Oy AA* case, referred to by the Government, where the group contribution rules prevented companies from making cross-border group contributions. Group contributions are not commercial transactions in the normal sense but allow domestic groups to transfer profits from one company to another, without any consideration. The complete territorial restriction on such contributions was justified by the particular nature of the regime. Any extension of that regime cross-border would indeed have allowed taxpayers freely to move their profits to another Member State, thereby undermining the balanced allocation of taxing rights. There was no scope for testing the commerciality of the contributions or imposing an arm's length rule. Transferring capital to another group member without any consideration whatsoever is by definition never done for commercial reasons.

By contrast, intra-group lending is a commercial transaction. Tax avoidance can be prevented, and hence the balanced allocation of taxing rights 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 what would have been agreed with an arm's length lender. Where those standards are met, the rate of tax borne by the lender should be of no concern to the Member State of the borrower. Accordingly, in the case of rules on interest deductibility, the Court has not permitted a complete territorial limitation but merely allowed Member States to deny a deduction for artificial arrangements and other arrangements to the extent that they do not meet the arm's length standard.

In other words, in the context of rules restricting interest deductions, artificiality serves as the test for both the interest in preventing tax avoidance and that of preserving the balanced allocation of taxing rights. This is clear from paragraphs 71 and 72 of Case C-311/08 *SGI*:

"71 National legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents an artificial arrangement, entered into for tax reasons, is to be regarded as not going beyond what is necessary to attain the objectives relating to <u>the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance</u> where, first, on each occasion on which there is a <u>suspicion that a transaction goes beyond what the companies concerned would have agreed under fully competitive conditions</u>, <u>the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction</u> (see, to that effect, Test Claimants in the Thin Cap Group Litigation, *paragraph 82, and order in Case C‑201/05* Test Claimants in the CFC and Dividend Group Litigation *[2008] ECR I‑2875, paragraph 84).*
72 Second, where the consideration of such elements leads to the conclusion that the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence."[36]

Essentially, therefore, *SGI* confirms the CJEU's findings in *Thin Cap* as regards the arm's length principle. It is logical that the national tax measures, in order to be proportionate to

[36] Emphasis added.

their objective, must only affect the part of the transaction which deviates from what would have been agreed by independent parties. If (i) an independent party would have granted the same loan on the same conditions and (ii) the loan is not a wholly artificial arrangement, there is no *undue* transfer of tax base from Norway. It could also be pointed out that if the loan is used in the borrowing company's running business, its use can, rather, be expected to generate taxable income corresponding to or exceeding the company's interest expenses. In such cases, the loan has not eroded the Norwegian tax base, but increased it.

In any event, the Authority wishes to reiterate that the mere fact that, in order to avoid being subject to the limitations imposed by the interest cap rules, cross-border groups could opt for external forms of financing instead of non-artificial intra group arrangements, cannot amount to a justification for the Norwegian provisions. Solely because the aforementioned options are available to a group with no substantial differences in terms of costs, the group should not *have to* opt for the external form of financing and change its legitimate preferences to avoid being discriminated against.

Finally, as repeatedly held by the Court of Justice, tax reasons do not warrant, in themselves, the conclusion that the transactions in question are not genuine and proper.[37]

ii) As explained in the letter of formal notice, it is apparent from the case-law of the CJEU that administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EEA law.[38] Furthermore, it was affirmed in *Thin Cap* that "*national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement*".[39] Consequently, in the Authority's opinion, the risk of posing an administrative constraint on the assessment authorities cannot be considered as an overriding reason to deprive taxpayers of the opportunity to produce evidence that, first, their activities in the other Member State are genuine, and second, there are business reasons behind an arrangement that otherwise would be subject to the interest cap rules limit.

With regard to the Government's statement that the arm's length principle is difficult to apply to loan arrangements in multi-national enterprises, it could be noted that if the taxpayer is a member of a consolidated group for financial accounting purposes, the draft anti-tax avoidance directive ("ATA-Directive")[40] provides for two alternative worldwide group ratio escape rules, namely (1) an equity escape rule or (2) an earnings-based worldwide group ratio rule. The Member States may choose to implement one of these two escape rules, but they are not obliged to do so. Under the equity escape rule a taxpayer

[37] See, *inter alia*, *SIAT*, paragraph 51 and *Cadbury Schweppes*, paragraph 69.

[38] Case C-386/04 *Centro di Musicologia Walter Stauffer* EU:C:2006:568, paragraph 48; Case C-318/07 *Persche* EU:C:2009:33, paragraph 55 and Case C-418/07 *Papillon* EU:C:2008:659, paragraph 54.

[39] C-524/04 *Thin Cap*, cited above, para. 82.

[40] On 28 January 2016, the EU Commission published the proposal for a council directive laying down minimum rules against tax avoidance practices that directly affect the functioning of the internal market (COM (2016) 26 final). On 21 June, the Ministers of Finance of the Member States to the European Union reached an agreement on the ATA Directive. The agreement is a political agreement in the Economic and Financial Affairs Council (ECOFIN).

is allowed to fully deduct its exceeding borrowing costs if it can demonstrate that the ratio of its equity over its total assets is not more than 2 percentage points lower than the equivalent ratio of the worldwide group. Under the earnings-based worldwide group ratio rule a taxpayer is allowed to deduct its exceeding borrowing costs up to the level of the net interest/EBITDA ratio of the worldwide group to which it belongs.

iii) It appears from the preamble of the draft ATA Directive that the main purpose of the rule limiting interest deductibility is to discourage cross-border tax avoidance practices and protect against aggressive tax planning in the internal market.[41]

As noted in the preamble to the proposal published by the EU Commission for a council directive laying down the ATA-Directive, "*[t]he envisaged measures do not go beyond ensuring the minimum necessary level of protection for the internal market. The Directive does not therefore prescribe full harmonisation but only a minimum protection for Member States' corporate tax systems. Thus, the Directive ensures the essential degree of coordination within the Union for the purpose of materialising its aims. In this light, the proposal does not go beyond what is necessary to achieve its objectives and is therefore compliant with the principle of proportionality."*

The draft ATA Directive only sets out minimum standards which all EU Member States must implement. The preamble explicitly states that the implementation of the Directive should not affect the taxpayer's obligation to comply with the arm's length principle or the Member State's right to adjust a tax liability upwards in accordance with the arm's length principle.

The fact that the draft proposal merely provides for minimum protection implies that any national measure would still have to be in line with the fundamental freedoms. This is evident by the *travaux préparatoires* of the draft proposal, which state: *"Given that this Directive fixes a minimum level of protection for the internal market, it is envisaged setting the rate for deductibility at the top of the scale (10 to 30%) recommended by the OECD. Member States may then introduce stricter rules."*[42] Without question, such stricter rules could only exist in harmony with the fundamental freedoms.

Furthermore, the purpose of the draft proposal is not to overrule decades of case-law on thin capitalisation developed by the CJEU. The *travaux préparatoires* address this point, albeit in the context of exit taxation, when it states: "*As the application of exit taxation within the Union shall be in line with the fundamental freedoms and in line with the case law of the Court of Justice of the European Union (CJEU)* [...]." [43]

[41] It can be noted that the position of the EU is that interest limitation regulations are introduced in a context in which *"[i]nterest payments are generally tax deductible in the EU. Some companies arrange their inter-company loans so that their debt is based in one of the group's companies in a high-tax country where interest payments can be deducted. Meanwhile, the interest on the debt is paid to the group's "lender" company which is based in a low tax country where interest is taxed at a low rate (or not at all)."* (European Commission - Fact Sheet, The Anti Tax Avoidance Package – Questions and Answers (Updated), Brussels, 21 June 2016). See http://europa.eu/rapid/press-release_MEMO-16-2265_en.htm. In the Authority's opinion this confirms that interest cap rules should be introduced only to prevent the behaviour described in this text extract, and should not simultaneously affect legitimate and non-abusive transactions.

[42] *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market.* COM(2016) 26 final. Brussels, 28.1.2016. p. 7.

[43] *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market.* COM(2016) 26 final. Brussels, 28.1.2016. p. 8.

As the application of the Directive shall be in line with the fundamental freedoms and in line with the case law of CJEU the Authority wishes to refer once again to Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* concerning the application of freedom of establishment to cross-border thin capitalization rules: in its decision, the CJEU ruled that in order for such limitation rules to be proportionate, taxpayers must have the opportunity to provide commercial justification for excess interest expense.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force interest deductibility restrictions, such as the one laid down in Section 6-41 NTA, in particular Section 6-41(3-4) NTA, thereby deterring Norwegian companies from establishing cross-border groups with affiliated group members in other EEA States (or conversely, deterring companies from such States from establishing similar groups with affiliated group members in Norway), Norway has failed to fulfil its obligation arising from Article 31 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels, 25 October 2016

For the EFTA Surveillance Authority

Frank J. Büchel
College Member

Carsten Zatschler
Director

This document has been electronically signed by Frank J. Buechel, Carsten Zatschler on 25/10/2016