Case C-484/19

Request for a preliminary ruling

Date lodged:

25 June 2019

Referring court:

Högsta förvaltningsdomstolen (Sweden)

Date of the decision to refer:

5 June 2019

Claimant:

Lexel AB

Defendant:

Skatteverket

[...]

JUDGMENT UNDER APPEAL

Judgment of the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden) of 29 June 2018 in Cases Nos 5437-17 and 5438-17

MATTER

Income tax, etc.: referral of a question for a preliminary ruling from the Court of Justice of the European Union

The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) takes the following

DECISION

A preliminary ruling pursuant to Article 267 TFEU is to be sought from the Court of Justice of the European Union, in accordance with the attached request to that effect (Annexed Minutes). **(Or 1)**

[...]

Annexed Minutes

Request for a preliminary ruling pursuant to Article 267 TFEU concerning the interpretation of Article 49 TFEU

Introduction

1. The present request for a preliminary ruling concerns the question of whether it is compatible with the freedom of establishment provided for in Article 49 TFEU to refuse deduction for certain interest expenses at the time of taxation. The question has arisen in a case in which a Swedish company has not been allowed a deduction for interest paid to a French company that is part of the same group. The French company has been able to offset the interest received against losses that have arisen in the group's business in France. The deduction was refused on the basis of a provision providing that interest expenses relating to a debt owed to a company in the same group of associated enterprises may not be deducted if the main reason for the debt arising is to give the group a substantial tax benefit.

2. In the preparatory working documents for the provision in question, it is stated that the intention is not to catch interest payments between companies that can offset profits and losses amongst themselves through so-called intra-group transfers. The rules on intra-group transfers are applicable only as between companies that are taxable in Sweden. For that reason, among others, questions have arisen in the case as to whether it is compatible with the freedom of establishment to refuse the company the deduction in respect of interest.

Applicable provisions of EU law

3. Articles 49 and 54 TFEU prohibit restrictions on the freedom of a company from another Member State to establish itself on Swedish territory, for example by establishing a subsidiary in Sweden. **(Or 2)**

Applicable provisions of national law

Provisions laying down restrictions on entitlement to deductions of interest on certain debts

4. Under the main rule in Chapter 16, Paragraph 1, of the inkomstskattelag (1999:1229) (Law (1999:1229) on income tax; the 'Law on income tax'), interest expenses are deductible in the taxation of a company's business activity.

5. As regards interest expenses relating to debts between companies in the same group, however, there are certain limitations on the entitlement to deduction. At the time material to the present case, the following was provided for in Chapter 24, Paragraph 10 a to 10 f, of the Law on income tax.

6. Under Paragraph 10 a, for the application of Paragraph 10 b to 10 f, companies are deemed to be associated with each other if one of the companies, directly or indirectly, through ownership or otherwise exercises a significant influence over the other company or the companies are mainly under common management. The term ‘company’ refers to legal persons.

7. Under Paragraph 10 b, a company in a group of associated enterprises may not – unless otherwise provided for under Paragraph 10 d or 10 e – deduct interest expenses in relation to a debt owed to a company in the group of associated enterprises.

8. The first subparagraph of Paragraph 10 d provides that interest expenses relating to those debts referred to in Paragraph 10 b are deductible if the income corresponding to the interest expense should have been taxed at a rate of at least 10% under the legislation of the State where the company in the group of associated enterprises actually entitled to the income is resident, if that company only were to have that income (the 10% rule).

9. The third subparagraph of Paragraph 10 d provides that no deduction may be made, however, if the main reason for the debt’s having arisen is that the group of associated enterprises is to receive a substantial tax benefit (the exception).

10. The first subparagraph of Paragraph 10 e provides that, even if the condition in the 10% rule is not met, interest expenses relating to the debts referred to **(Or 3)** in Paragraph 10 b may be deducted if the debt forming the basis of the interest expense was incurred mainly for business reasons. However, that holds true only if the company in the group of associated enterprises that is actually entitled to the income corresponding to the interest expense is resident in a State within the European Economic Area (EEA) or in a State with which Sweden has entered into a taxation agreement.

11. In the preparatory work of the exception in the third subparagraph of Paragraph 10 d the following guidance is given for the interpretation of the provision (prop. 2012/13:1 pp. 250–254).

12. It is the company requesting the deduction that must show that the debt has not arisen mainly for tax reasons. By ‘mainly’ is meant around 75% or more. The assessment must be carried out at the level of the group of associated enterprises and both the lender’s and borrower’s situations are to be taken into account. As a rule, short-term debts and so-called cash-pool activities are not covered by the exception.

13. In the application of the exception, an assessment must be made in each individual case, taking into account all relevant circumstances, to determine whether the main reason for the transactions’ having been carried out and the contractual relationship’s having arisen is so that that the group of associated enterprises can receive a substantial tax benefit. Circumstances weighing in favour of applicability of the exception include, for example, the fact that the loan has been

taken out in order to finance an associated company's acquisition of share rights from another company in the group of associated enterprises or that interest rates are high. Another important factor is whether the financing could have taken the form of a capital injection instead of a loan.

14. Account should also be taken of whether there have been unwarranted channellings of interest payments through other companies in the group of associated enterprises. An example of that is where a company with substantial deficits and lacking funds to lend still acts a lender through transfers of funds from other companies in the group of associated enterprises in order to obtain tax advantages. If the debt was created in order to enable the group of associated enterprises to take advantage of a deficit in a company in a given country by a loan or capital for lending being channelled **(Or 4)** there, the deduction should not be allowed. Such an operation must be deemed to have been carried out so that the group of associated enterprises can receive a substantial tax benefit, for example by circumventing the rules for intra-group transfers.

15. Another situation that could be questioned is when the group of associated enterprises, in connection with the acquisition of share rights, creates a new company, the main purpose of which is to hold a loan claim. A further factor that should form part of the assessment is the origin of the funds. The fact that they are self-generated funds being lent out can, from the perspective of the creditor, point to there being sound business reasons behind the transaction. The level at which the recipient of the interest is taxed should also be taken into account. Interest payments on internal loans between traditionally-taxed limited companies between which there is entitlement to intra-group transfers are not caught by the exception.

16. Chapter 24, Paragraphs 10 a to 10 f, of the Law on income tax have now been repealed. Since 1 January 2019, Chapter 24, Paragraph 18, instead provides that interest expenses in relation to a debt owed to a company in the same group of associated enterprises may, as a rule, always be deducted if the company in the group of associated enterprises that is actually entitled to the income corresponding to the interest expense is resident in a State in the EEA or in a State with which Sweden has entered into a taxation agreement. That therefore applies irrespective of how the recipient of the interest is taxed. Under the rules currently in force, the deduction will be refused only if the debt has arisen exclusively or almost exclusively in order for the group of associated enterprises to receive a substantial tax benefit. In accordance with the preparatory working documents, by 'exclusively or almost exclusively' is meant around 90–95% and up to 100% (prop. 2017/18:245 p. 184).

17. The reason for the tightening of the scope of application of the rules on limiting entitlement to deduct interest paid on loans from associated enterprises is that, at the same time, other amendments relating to entitlement to deduct interest expenses in the corporate sector have been introduced. They are based, inter alia, on Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against

tax avoidance practices that directly affect the functioning of the internal **(Or 5)** market and on the OECD recommendations on tax base erosion and profit shifting.

18. As stated above, however, it is the previously applicable provisions in Chapter 24, Paragraph 10 a to 10 f, of the Law on income tax that are applicable to the present case.

Provisions on intra-group transfers

19. Provisions on intra-group transfers are founded on Chapter 35 of the Law on income tax. The purpose of those provisions is to make it possible to spread profits within a group of companies through profit transfer.

20. Paragraphs 1 and 3 provide that an intra-group transfer from a parent company to a wholly-owned subsidiary or from a wholly-owned subsidiary to a parent company is deductible, subject to certain conditions. The intra-group transfer is to be entered as income for the recipient.

21. The first subparagraph of Paragraph 2 provides that the term 'parent company' is to be understood as meaning, inter alia, a Swedish limited company owning more than 90% of the shares in another Swedish limited company. The second subparagraph provides that the term 'wholly-owned subsidiary' is to be understood as meaning a company owned by the parent company.

22. Paragraphs 4–6 contain provisions allowing deductions to be made also for intra-group transfers made to a subsidiary that is owned indirectly through another subsidiary and for intra-group transfers made between two directly or indirectly owned subsidiaries.

23. Paragraph 2 a provides that, in the application of the provisions on intra-group transfers, a non-Swedish company resident in an EEA State which equates to a Swedish limited company is to be treated as such a company. However, that applies only if the recipient of the intra-group transfer is taxable in Sweden for that business activity to which the intra-group transfer relates. **(Or 6)**

Facts

24. The case concerns the Swedish limited company Lexel, which is part of the Schneider Electric Group. The Group is active in a large number of countries. The parent company of the Group is the French company Schneider Electric SE.

25. The group also includes the Belgian company Schneider Electric Services International (SESI). Prior to the transaction at issue in the present case, that company was 85% owned by the French company Schneider Electric Industries SAS (SEISAS) and 15% by the Spanish affiliate Schneider Electric España SA (SEE).

26. In December 2011, Lexel acquired the 15% of the shares in SESI owned by SEE. In order to finance that acquisition, Lexel took out a loan from the French affiliate Bossière Finances SNC (BF). Lexel, BF, SESI and SEE are all directly or indirectly subsidiaries of SEISAS. In 2013 and 2014 Lexel paid interest on the loan to BF, amounting to around SEK 58 million (2013) and around SEK 62 million (2014) respectively and claimed deductions for the interest in its tax returns.

27. BF is the Group's internal bank. It handles, inter alia, the Group's cash-pool and has granted loans to around 100 different affiliates. BF is subject to French corporate tax and is part of a tax entity in France which had around 60 French affiliates during the years relevant to the present case. Companies in these types of tax entities may offset their surpluses against deficits that have arisen in other companies in the unit.

28. The French corporate tax rate for the years 2013 and 2014 was 34.43%. No tax was levied on interest income during those years, however, since the tax entity showed a deficit. The Swedish corporate tax rate for the same years was 22%.

29. The Skatteverket refused deductions for the interest expenses on the loan from BF. The Skatteverket found that Lexel and BF were both in a group of associated enterprises, which means that, under Chapter 24, Paragraph 10 b, of the Law on income tax **(Or 7)**, the interest expenses were not, as a rule, deductible. The Skatteverket then examined whether the 10% rule in the first subparagraph of Paragraph 10 d was applicable. Under that rule, a hypothetical examination is to be made of how the interest would have been taxed in the hands of the recipient if that income alone had been taken into account. Thus, in order for the interest to be deductible on the basis of that rule, it is sufficient that the interest income be taxable and that the tax rate be at least 10%. Referring to the taxation level in France, the Skatteverket found that the 10% rule was applicable.

30. That raised the question of whether the deduction should still be refused on the basis of the third subparagraph of Paragraph 10 d. Lexel had stated that the reason for its acquiring the shares in SESI from SEE was that the latter company needed capital in connection with its acquisition of another company, Spanish Telvent Group, from external sellers. SEE financed that acquisition mainly with loans and SEE also had internal and external loans from before from the acquisition of the shares in SESI. In order to reduce its financing costs, SEE sold its shares in SESI and repaid those loans.

31. According to Lexel, the purpose of Lexel's acquisition of the shares in SESI was thus not to confer a tax benefit on the Group. Lexel further stated that no tax benefit arose because BF could offset the interest income against deficits in the French business activities. According to Lexel, account had in fact to be taken of the fact that those deficits were thereby eliminated and could not be utilised as against future profits. An income corresponding to interest income would thus eventually be taxed and, furthermore, at a higher tax rate than that applicable in

Sweden. Lastly, Lexel stated that an application of the exception was not compatible with EU law provisions on freedom of establishment.

32. The Skatteverket, by contrast, took the view that the exception was applicable. The Skatteverket found that SEE began to show deficits in 2011 and found that the transactions had been carried out so that the deduction for the interest costs relating to the acquisition of SESI could be made in Sweden instead of in Spain. As **(Or 8)** the corresponding interest income was not taxed in France because it could be offset against the deficits there it would, according to the Skatteverket, give rise to a substantial tax benefit for the group of associated enterprises if a deduction for the interest were to be allowed in Sweden. The Skatteverket further found that that tax benefit had to be deemed to be the main reason for the debt being incurred. Lastly, the Skatteverket found that an application of the exception could not be regarded as being contrary to the freedom of establishment.

33. Lexel appealed against the Skatteverket's decision to the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden), which upheld the Skatteverket's finding that the deduction should be refused on the basis of the exception and that that could not be considered to be contrary to EU law. As regards the question of the exception's compatibility with the freedom of establishment, the Förvaltningsrätten found that, on its wording, the rule was applicable, irrespective of where the interest recipient was located. If BF had been a Swedish company, however, the exception would not have applied, since in that case Lexel and BF could have made and received intra-group transfers between themselves. In that case, according to the preparatory working documents, the interest deduction would not have given rise to a substantial tax benefit. On that basis, the Förvaltningsrätten held that an application of the exception gave rise to a restriction on the freedom of establishment. The Förvaltningsrätten found, however, that that restriction could be justified.

34. Lexel appealed against that decision to the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm), which dismissed the appeal. The Kammarrätten held that the circumstances of the case suggested that the debt had been created so that the group of associated enterprises could take advantage of deficits in France while at the same time deductions were allowed in Sweden. In the view of the Kammarrätten, the company had not shown that the reason for the debt having arisen was not mainly to enable the group of associated enterprises to obtain a substantial tax benefit. The exception was therefore applicable.

35. The Kammarrätten (Administrative Court of Appeal, Stockholm) further concurred in the finding of the Förvaltningsrätten (Administrative Court, Stockholm) that the application of the exception gave rise to a restriction on the freedom of establishment. The Kammarrätten further found, as regards entitlement to the interest deduction, that the situation in which commercially-active affiliates paid interest to affiliates in other Member States was objectively comparable to **(Or 9)** the situation where interest was paid to Swedish companies in the Group. Like the Förvaltningsrätten, however, the Kammarrätten considered that the

restriction on the freedom of establishment could be justified. In that regard, the Kammarrätten stated that the exception worked to counter tax avoidance and that it was effective in safeguarding a balanced allocation of the power to impose taxes between the Member States. According to the Kammarrätten, the exception did not go beyond what was necessary to achieve the aims pursued and, with the guidance given in the preparatory working documents as to how the rule was to be applied, was sufficiently predictable for the companies concerned by it.

36. Lexel appealed against the judgment of the Kammarrätten (Administrative Court of Appeal, Stockholm) to the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), which has granted leave to appeal in respect of the question of whether it is compatible with the freedom of establishment to refuse, on the basis of the exception, a deduction for interest payments made on a loan granted by a company in the same group of associated enterprises as the borrowing company. The question of leave to appeal in respect of the remainder of the case has been stayed.

37. Within the framework of the question in respect of which leave to appeal has been granted, the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) will therefore not review the finding of the Kammarrätten (Administrative Court of Appeal, Stockholm) that the criteria for the exception to apply are met in the present case. The review conducted by the Högsta förvaltningsdomstolen will instead be restricted to the question of whether an application of the exception is contrary to EU law. There is, however, nothing preventing the Högsta förvaltningsdomstolen from examining other questions in the case at a subsequent time, should it find grounds to do so.

Submissions of the parties

Lexel

38. The exception leads to a restriction on the freedom of establishment on two grounds. Firstly, there is deemed to be a substantial tax benefit if the interest recipient is resident in a Member State that applies a lower rate of tax than the **(Or 10)** Swedish rate. Secondly, the exception, together with the intra-group transfer rules, in practice always gives rise to a deduction for interest when the criteria for intra-group transfers are met, which is not the case when the interest recipient is a non-Swedish company that is not taxable in Sweden. The exception therefore entails negative differential treatment of cross-border situations.

39. The restriction on the freedom of establishment cannot be justified on the basis of the need to counter tax avoidance or by the need to safeguard a balanced allocation of the power to impose taxes between the Member States, irrespective of whether the justifications are taken into account individually or together. The purpose of the exception is to combat tax avoidance, but it is not limited to wholly artificial operations. The present case involves real establishments and companies

engaged in real economic activity. The debt in question has also run at market-level interest rates.

40. The exception is not aimed directly at safeguarding a balanced allocation of the power to impose taxes. The allocation of the power to impose taxes cannot by itself be influenced by taxation levels or possible deficits in the hands of the recipient. An interest deduction always reduces the tax liability in the borrowing company's domicile and increases the tax liability in the domicile of the lending company. That can be a threat to the Member State's tax base but not to the allocation of the power to impose taxes on which the Member States have agreed.

41. The proportionality assessment cannot be carried out for the purpose of protecting the Swedish corporate tax base, as that is not an accepted justification. The exception contains a presumption that there is tax avoidance in all situations where a cross-border debt is deemed to entail a substantial tax benefit, which is not proportionate.

42. An application of the exception goes well beyond what is necessary to achieve the objective of eliminating the undue tax benefit, since the interest deduction is refused definitively and in its entirety. In the present case refusal of the **(Or 11)** deduction may give rise to double taxation, since the tax break in France is only temporary. A more proportionate approach would therefore be to defer the entitlement to a deduction until operations in France began to show a surplus.

43. It is, moreover, not possible to foresee with the required degree of precision a possible application of the exception. The circumstances referred to in the preparatory working documents are not the kind of objective and verifiable circumstances that can provide guidance for whether an operation is a wholly artificial arrangement.

The Skatteverket

44. The exception is applicable to interest expenses relating to debts owed to companies in the same group of associated enterprises, irrespective of where the companies are domiciled and irrespective of whether they can exchange intra-group transfers with tax law effect. In cases where there is entitlement to intra-group transfers between two Swedish companies as well, entitlement to deduct interest expenses must thus be examined in the light of the exception. If there are no limitations on entitlement to intra-group transfers between the companies, that examination will lead to the conclusion that the debt between them has not arisen mainly for tax reasons, since in that case the companies would have been able to achieve corresponding deductions by making an intra-group transfer. The fact that an examination relating to the exception sometimes leads to its being applicable and sometimes to its not being applicable does not mean that the rule gives rise to such negative differential treatment as to amount to a restriction on the freedom of establishment.

45. Should it be held that there is a restriction, however, it can be justified by the need to safeguard a balanced allocation of the power to impose taxes between the Member States and to counter tax avoidance and tax evasion. When those justifications are considered together, it is not necessary that the national rule be directed solely at wholly artificial arrangements. **(Or 12)**

46. The overall purpose of the rules limiting entitlement to a deduction of interest is to prevent the tax base from being eroded, in both purely domestic situations and cross-border situations. In cross-border situations, the rules seek to hinder untaxed profits from being transferred from Sweden to another Member State, which contributes to safeguarding a balanced allocation of the power to impose taxes between the Member States.

47. The rules on intra-group transfers seek to make it possible to spread profits between businesses that are taxed in Sweden. The rules do not, therefore, apply in relation to domestic group companies that are tax-exempt or taxed under special rules; nor do they apply in relation to non-Swedish group companies that are not liable to pay taxes in Sweden. Intra-group debt can be arranged in such a way as to circumvent the rules on intra-group transfers, which is what the interest deduction rules seek to prevent.

48. In the examination of entitlement to interest deductions under the exception, there is always an assessment in each individual case of whether the debt has arisen mainly so that the group of associated enterprises can obtain a substantial tax benefit. For the deduction to be refused, the debt in question must be predominantly for tax reasons. Thus, deductions for interest expenses are not refused automatically solely because the loan was granted by a company in another Member State. The applicable evidentiary requirements are the same as for all other deduction claims made.

49. The exception is directed at the debt itself, not at the amount of the interest per se. It is not, therefore, disproportionate to refuse the deduction for the entire interest amount. Sufficient guidance is given in the preparatory working documents as to when the exception is to be applied.

The need for a preliminary ruling

Introduction

50. In the present case, it is undisputed that Lexel and BF are both in a group of associated enterprises and that the criterion in the 10% rule is met. Moreover, the Kammarrätten (Administrative Court of Appeal, Stockholm) has **(Or 13)** found that the criteria for the exception are met. As stated in paragraphs 36 and 37, the Högsta förvaltningsdomstolen (Supreme Administrative Court) will not, within the framework of the question in respect of which leave to appeal has been granted, as stated above, examine the position taken by the Kammarrätten (in that

regard. What remains to be examined is thus whether it is compatible with the freedom of establishment to refuse Lexel a deduction for interest payments made to BF on the basis of the exception.

The Commission's letter of formal notice

51. The Commission has initiated infringement proceedings against Sweden and, in a letter of formal notice sent in 2014, argued that the Swedish limitations on entitlement to deductions for intra-group interest payments on loans under Chapter 24, Paragraph 10 b to 10 e, of the Law on income tax is incompatible with Article 49 TFEU when those limitations are applied to groups in which interest is paid to business companies situated in another Member State (Commission's ref. SG-Greffe (2014) D/17633, case number 2013/4206).

52. The Swedish Government has replied to the Commission, stating that, in its view, the limitations on entitlement to interest deductions do not give rise to any direct or indirect restriction on the freedom of establishment. Should an indirect restriction be found to exist, it can, in the Government's submission, be justified (Fi2014/4205).

Restriction on the freedom of establishment?

53. The wording of the exception does not suggest that it draws any distinction between interest paid to Swedish recipients and interest paid to non-Swedish recipients. Lexel submits, however, that in practice the rule leads to negative tax treatment of interest paid to non-Swedish recipients and thereby a restriction on the freedom of establishment. In the assessment of whether that is the case, the following circumstances, inter alia, may be of interest.

54. For Swedish recipients, the rules limiting entitlement to deduction for interest expenses catch primarily the interest paid to investment companies, **(Or 14)** which are taxed under a special scheme, and to tax-exempt recipients such as municipalities and certain non-profit organisations and foundations.

55. Interest payments made to Swedish limited companies that are taxed in the usual manner can, however, also be caught by the rules. Such interest payments are always caught by the 10% rule, but deductions may be refused if the exception is applicable. Where the company can make and receive intra-group payments amongst themselves with tax law effect and without limitations, it follows from the preparatory working documents that the exception is not applicable. Interest payments between Swedish limited companies that are part of the same group of associated enterprises but do not meet the criteria for being able to make and receive intra-group payments – such as the requirement of ownership of at least 90% – may, however, be caught by the exception.

56. In the present case, it is undisputed that Lexel and BF would have been able to effect intra-group payments amongst themselves if BF had been a Swedish

company and that, in that case, the exception would not have been applicable. On that basis, the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) and the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) have found that there is a restriction on the freedom of establishment. The Skatteverket, however, has taken the opposite view, and the Swedish Government also takes the view that the rules on interest deductions do not give rise to a restriction on the freedom of establishment.

Can a possible restriction be justified?

57. Should it be held that the refusal to allow an interest deduction gives rise to a restriction on the freedom of establishment, the determination must then be made as to whether that restriction can be justified. The justifications that have been brought to the fore in the present case include the wish to counter tax avoidance and safeguard a balanced allocation of the power to impose taxes between the Member States.

58. In accordance with the preparatory working documents, the overall objective of the exception is to prevent aggressive tax planning with interest deductions (prop. 2012/13:1 s. 251) **(Or 15)**. In accordance with the case-law of the Court of Justice of the European Union, the objective of combating tax avoidance is an acceptable justification. Lexel submits, however, that the exception cannot be accepted on that ground, because it does not catch only wholly artificial arrangements (see, for example, *Cadbury Schweppes*, C-196/04, EU:C:2006:544, paragraph 51). The Skatteverket, for its part, states that, when the objective of preventing tax avoidance is combined with other justifications, then rules which are not directed solely at wholly artificial arrangements can also be accepted (see, for example, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraphs 42–51).

59. The Skatteverket has further argued that the exception seeks to prevent the rules on intra-group payments from being circumvented by intra-group debts being arranged so that profits arising in Sweden can be offset against deficits in other countries (see also prop. 2012/13:1 paragraph 254). In a number of decisions, the Court of Justice of the European Union has held that – apart from certain cases of so-called final losses – it is compatible with the freedom of establishment to exclude non-domestic affiliates from the scope of application of provisions on intra-group profit-spreading. However, it has also been held in the case-law of the Court of Justice of the European Union that that means that non-domestic affiliates are excluded from tax benefits which are not specifically linked to such profit-spreading systems (see, for example, *X BV and X NV*, C-398/16 and C-399/16, EU:C:2018:110, paragraphs 39–42).

60. *X BV* concerned the Netherlands interest deduction rules. The rules caught interest on loans from related companies where the loan was connected to acquisitions of shares in a related company. Under those rules, a deduction was always allowed for interest if the company being acquired was part of a tax entity with the acquiring company. If the company was not part of such an entity, however, the

entitlement to deduction was conditional on it being demonstrated as plausible that there were predominantly sound business reasons for the loan and the acquisition or that taxing the interest in the hands of the recipient was reasonable. The Court of Justice of the European Union found that that distinction in treatment amounted to an unjustifiable impediment to the freedom of establishment.

61. The Netherlands rules on tax entities have their corollary in the Swedish tax system in the rules on intra-group transfers. In *X BV* the Court of Justice of the European Union **(Or 16)** thus found that the links between the rules on interest deductions and the rules on tax entities did not mean that the Netherlands rules could be justified. One difference between the rules examined in *X BV* and the Swedish rules, however, is that under the Netherlands rules the conditions for a deduction differed according to whether or not the company being acquired was part of the same tax entity as the acquiring company. Under the Swedish rules, the difference in the entitlement to deduction is instead related to whether the payer and the recipient of the interest can offset profits and losses between themselves by making intra-company transfers. In *X BV*, the Court of Justice of the European Union appears to have attached weight to the fact that the Netherlands rules did not link the entitlement to deduction with the taxation of the interest in the hands of the recipient (see paragraph 41 of the judgment). In the view of the Högsta förvaltningsdomstolen (Supreme Administrative Court), the findings of the Court of Justice of the European Union in *X BV* cannot simply be transferred to the Swedish rules.

62. A further question on which the parties have differing views is whether the application of the exception is sufficiently foreseeable, thereby bringing the rule within the requirement of legal certainty (see, for example, *SIAT*, C-318/10, EU:C:2012:415, paragraphs 56 to 59). In order to determine whether that is the case, a determination must be made of whether the statements in the preparatory working documents, referred to in paragraphs 11 to 15 above, provide sufficient guidance for the application of the rule.

Summary conclusion

63. In summary, the Högsta förvaltningsdomstolen (Supreme Administrative Court) finds that there are differing viewpoints as to the compatibility of the exception with EU law. Lexel's view that it is contrary to EU law to refuse the company the interest deduction on the basis of the exception finds support in the Commission's letter of formal notice. The Skatteverket, the Swedish Government, the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) and the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) are of the opposite view and consider that EU law does not preclude refusal of the deduction.

64. The Högsta förvaltningsdomstolen (Supreme Administrative Court) further considers that it is not possible to conclude with certainty on the basis of the

existing case-law of the Court of Justice of the European Union which of those **(Or 17)** viewpoints is correct. It is therefore necessary to refer a request for a preliminary ruling to the Court of Justice of the European Union.

Question

65. In the light of the foregoing, the Högsta förvaltningsdomstolen (Supreme Administrative Court) requests an answer to the following question.

66. Is it compatible with Article 49 TFEU to refuse a Swedish company a deduction for interest paid to a company which is in the same group of associated enterprises and is resident in a different Member State on the ground that the principal reason for the debt having arisen is deemed to be that the group of associated enterprises is to receive a substantial tax benefit, when such a tax benefit would not have been deemed to exist if both companies had been Swedish, since they would then have been covered by the provisions on intra-group transfers?