JUDGMENT OF THE COURT (First Chamber)

20 January 2021 (*1)

(Reference for a preliminary ruling – Article 49 TFEU – Freedom of establishment – Corporation tax – Taxation of associated companies – National tax legislation prohibiting a company which is established in one Member State from deducting interest paid to a company established in another Member State, belonging to the same group of companies, in the case where a substantial tax benefit is gained)

In Case C-484/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 5 June 2019, received at the Court on 25 June 2019, in the proceedings

Lexel AB

v

Skatteverket,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2020,

after considering the observations submitted on behalf of:

- Lexel AB, by M. Larsén,
- Skatteverket, by M. Andersson Berg and M. Laxmark, acting as Agents,
- the Swedish Government, initially by H. Eklinder, C. Meyer-Seitz, H. Shev, R. Shahsavan Eriksson, J. Lundberg, A.M. Runeskjöld, M. Salborn Hodgson, A. Falk and O. Simonsson, and subsequently by H. Eklinder, C. Meyer-Seitz, H. Shev, R. Shahsavan Eriksson, J. Lundberg, A.M. Runeskjöld, M. Salborn Hodgson and O. Simonsson, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and M.H.S. Gijzen, acting as Agents,
- the European Commission, by K. Simonsson, A. Armenia, E. Ljung Rasmussen and G. Tolstoy, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Lexel AB, a company incorporated under Swedish law, and the Skatteverket (Tax Agency, Sweden) concerning the latter's refusal to allow Lexel AB the deduction of interest paid to a company established in France and belonging to the same group.

Legal context

Provisions related to interest expenses

3 Under the principle set out in Paragraph 1 of Chapter 16 of the inkomstskattelag (1999:1229) (Law 1229 of 1999 on income tax), in the version applicable to the facts in the main proceedings ('the Law on income tax'), interest expenses are deductible in the taxation of a company's business activities.

4 In accordance with Paragraph 10a of Chapter 24 of the Law on income tax, for the application of Paragraphs 10b to 10f of that chapter, the companies concerned are deemed to be associated with each other if one of them, directly or indirectly, through share ownership or otherwise, exercises a significant influence over the other company, or if those companies are mainly under common management. The term 'companies' refers to legal persons.

5 Under Paragraph 10b of Chapter 24 of the Law on income tax, a company linked in a group of associated companies may not deduct interest expenses in relation to a debt owed to an associated company, unless otherwise provided for under Paragraph 10d or Paragraph 10e of that chapter.

6 The first subparagraph of Paragraph 10d of Chapter 24 of the Law on income tax provides that interest expenses relating to the debts referred to in Paragraph 10b of that chapter are deductible if the corresponding income would have been taxed at a nominal rate of at least 10% under the legislation of the State in which the company in the group of associated companies actually entitled to the income is established, if that company were to have only that income ('the 10% rule').

7 The third subparagraph of Paragraph 10d of Chapter 24 of the Law on income tax provides that, if the main reason for incurring the debt is that the group of associated companies would receive a substantial tax benefit, then no deduction for interest expenses may be made ('the exception').

8 The first subparagraph of Paragraph 10e of that chapter provides that, even if the condition of the 10% rule is not met, interest expenses relating to the debts referred to in Paragraph 10b of that chapter are deductible if the underlying debt is justified primarily on commercial grounds. However, that holds true only if the company in the group of associated companies that is actually entitled to the income corresponding to the interest expenses is established in a State within the European Economic Area (EEA) or in a State with which the Kingdom of Sweden has entered into taxation agreements.

The legislative preparatory works regarding the exception

9 The legislative preparatory works regarding the exception provide the following guidance for interpreting that exception:

- It is for the company requesting the deduction to show that the debt has not been incurred mainly for tax reasons. The term 'mainly' relates to a percentage of around 75% or more. The assessment must be carried out at the level of the group of associated companies and the tax situation of both the lender and the borrower are to be taken into account.
- When the exception is applied, an assessment must be made in each individual case, taking into account all the relevant circumstances, in order to determine whether the main reason for the transactions' having been carried out and the contractual relationship's having arisen is so that the group of associated companies can receive a substantial tax benefit.
- Several factors weigh in favour of applying the exception. In that regard, it has, for example, to be determined whether 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 companies. In that context, high rates of interest may be an important factor. It is also necessary to determine whether the financing could have taken the form of a capital injection instead of a loan. Furthermore, account must also be taken of whether there have been unwarranted channellings of interest payments through other companies in the group of associated companies, and also of situations in which the group of associated companies, in connection with the acquisition of share rights, creates new companies the main purpose of which is to hold a loan claim. Lastly, amongst other considerations, particular attention is also to be paid to the origin of the funds and to the level at which the recipient of the interest is taxed.
- In any event, the exception does not apply to interest payments on internal loans between traditionally taxed limited companies between which there is an entitlement to intra-group financial transfers.

Provisions on intra-group transfers

10 Paragraphs 1 and 3 of Chapter 35 of the Law on income tax provide that an intra-group financial transfer from a parent company to a wholly owned subsidiary or from a wholly owned subsidiary to a parent company is deductible under certain conditions. The intra-group financial transfer is to be entered as income for the recipient.

11 The first subparagraph of Paragraph 2 of that chapter defines 'parent company' as a Swedish limited company owning more than 90% of the shares in another Swedish limited company. The second subparagraph of that

paragraph provides that the term ‘wholly owned subsidiary’ is to be understood as meaning a company owned by the parent company.

12 Paragraph 2a of that chapter provides that, for the purposes of applying the provisions on intra-group financial transfers, a company established in an EEA Member State which is equivalent to a limited company established in Sweden is to be treated in the same way as such a company. However, that applies only if the recipient of the intra-group financial transfer is subject to tax in Sweden for the business activity to which that intra-group financial transfer relates.

13 Paragraphs 4 to 6 of Chapter 35 of the Law on income tax contain provisions which also allow deductions for intra-group financial transfers to a subsidiary that is owned indirectly through another subsidiary and for intra-group financial transfers between two directly or indirectly owned subsidiaries.

The main proceedings and the question referred for a preliminary ruling

14 Lexel is a Swedish company that is part of the Schneider Electric group. The group’s parent company is Schneider Electric SE, which is active in several non-member countries and in several Member States and is established in France.

15 Prior to the transaction at issue in the main proceedings, Schneider Electric Services International SPRL (‘SESI’), a company established in Belgium, was 85% owned by Schneider Electric Industries SAS, a company which is part of the Schneider Electric group established in France, and 15% owned by Schneider Electric España SA (‘SEE’), a group company established in Spain.

16 In December 2011, Lexel acquired the 15% of the shares in SESI owned by SEE, taking out a loan, in advance, from Bossière Finances SNC (‘BF’), an internal bank of the Schneider Electric group. At the time material to the main proceedings, BF was part of a tax entity consisting of approximately 60 companies established in France and belonging to that group.

17 Lexel, BF, SESI and SEE are all, directly or indirectly, subsidiaries of Schneider Electric Industries.

18 Lexel made loan interest payments to BF of 58 million Swedish kronor (SEK) (approximately EUR 5.5 million) in respect of 2013 and of SEK 62 million (approximately EUR 5.9 million) in respect of 2014. BF used the interest amounts which it received to offset deficits that had arisen in the activities of the companies established in France which formed part of the tax entity.

19 Lexel stated that it had bought the SESI shares from SEE because SEE required capital to finance the acquisition of a company outside the Schneider Electric group, that acquisition having been financed mainly by means of loans. Against that background, in order to reduce its financing costs, SEE had decided to sell the shares it owned in SESI and to repay the loans which it had taken out in that context.

20 According to Lexel, the acquisition of the shares in SESI was not intended to confer a tax benefit on the Schneider Electric group and no tax benefit arose from the fact that BF was able to use the interest income to offset the deficits linked to the activities of that group in France. Eventually, the income corresponding to those interest payments will be taxed and, furthermore, at a higher rate than that applicable in Sweden.

21 In that regard, the French corporate tax rate for 2013 and 2014 was 34.43%. However, no tax was levied on the interest income received during those years because the tax entity in question showed a deficit for that period. During those same years the Swedish corporate tax rate was 22%.

22 The Tax Agency, after confirming that the 10% rule was applicable, nevertheless refused, in reliance on the exception, to allow the deduction of the interest charges on the loan granted by BF. According to the Tax Agency, the transactions at issue were carried out so that the deduction of the interest costs related to the acquisition of the shares in SESI could be made in Sweden rather than in Spain with a view to gaining a substantial tax benefit. The Tax Agency also found that the exception was compatible with Article 49 TFEU on the freedom of establishment.

23 Lexel appealed against the Tax Agency’s decision to the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden).

24 The Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) upheld the Tax Agency’s assessment that the deductions in question had to be refused on the basis of the exception. However, that court found that, if BF had been established in Sweden, that exception could not have been applied. In that situation, Lexel and BF would then have been in a position to carry out intra-group financial transfers, in accordance with the provisions of Chapter 35 of the Law on income tax, without it being inferred that the purpose of such a transaction was to secure a substantial tax benefit. In that context, that court found that application of the exception gave rise to a restriction on the freedom of establishment which could, nevertheless, be justified in the circumstances of the case.

25 Lexel appealed to the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden). That court found that the exception applied to the transactions at issue, at the same time holding, as had the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm), that the application of that exception gave rise to a restriction on the freedom of establishment, but that that restriction could nonetheless be justified by the prevention of tax avoidance and with a view to maintaining a balanced allocation of the power to impose taxes between the Member States.

26 Lexel appealed to the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), which has granted leave to appeal in respect of the freedom of establishment, and more specifically, as to whether application of the exception infringes EU law. Within the part of the appeal for which leave to appeal was granted, the question of determining whether the criteria for applying the exception have been met in the present case is not intended to be examined, as that question was stayed pending the answer to the preliminary reference. In that context, the referring court asks whether the application of that exception amounts to a restriction on the freedom of establishment in the light of Article 49 TFEU and, if so, whether there are possible justifications for such a restriction.

27 Relying on the legislative preparatory works regarding the exception, the referring court notes that the overall objective of that provision is to prevent aggressive tax planning by means of deductions of interest. That objective, in tandem with the fight against tax evasion, constitutes a justification which, under certain conditions, is accepted by the Court's case-law.

28 Furthermore, the referring court observes that the Court has in several judgments held that it is compatible with the freedom of establishment to exclude affiliates of a group established outside the Member State in question from the scope of provisions on intra-group profit-spreading. However, in the case which gave rise to the judgment of 22 February 2018, X and X (C-398/16 and C-399/16, EU:C:2018:110, paragraphs 39 to 42), concerning the Netherlands rules on the deduction of interest, the Court held that the affiliates of a group established outside the Member State concerned could not be excluded from tax benefits which are not specifically linked to such profit-spreading systems and found that the difference in treatment caused by those rules amounted to an unjustifiable restriction on the freedom of establishment.

29 Despite a theoretical similarity, the Swedish rules on intra-group financial transfers and the Netherlands rules on tax entities have significant differences as to their practical consequences. The referring court thus takes the view that this affects the application of the approach set out in that judgment.

30 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'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 companies 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 companies 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 financial transfers?'

The question referred

31 By its question, the referring court essentially asks whether Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a company established in one Member State is not allowed to deduct interest payments made to a company belonging to the same group, established in another Member State, on the ground that the principal reason for the debt having arisen appears to be the obtaining of a substantial tax benefit, whereas such a tax benefit would not have been deemed to exist if both companies had been established in the first Member State, as in that situation they would have been covered by the provisions on intra-group financial transfers.

32 In other words, the question is whether such legislation constitutes a restriction on freedom of establishment, contrary to Article 49 TFEU.

33 As a preliminary remark, it should be borne in mind that Article 49 TFEU requires the elimination of restrictions on freedom of establishment of nationals of a Member State on the territory of another Member State. That freedom includes, for companies established in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency (see, to that effect, judgments of 21 May 2015, Verder LabTec, C-657/13, EU:C:2015:331, paragraph 32; of 2 September 2015, Groupe Steria, C-386/14, EU:C:2015:524, paragraph 14; and of 22 February 2018, X and X, C-398/16 and C-399/16, EU:C:2018:110, paragraph 18).

34 However, a difference in treatment stemming from a Member State's legislation to the detriment of companies exercising their freedom of establishment does not constitute an obstacle to that freedom if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest and proportionate to that objective (judgments of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04, EU:C:2006:774, paragraph 167; of 25 February 2010; X Holding, C-337/08, EU:C:2010:89, paragraph 20; and of 22 February 2018, X and X, C-398/16 and C-399/16, EU:C:2018:110, paragraph 20).

The difference in treatment

35 Under Paragraph 10b of Chapter 24 of the Law on income tax, a company linked in a group of associated companies may not, unless otherwise provided for under Paragraph 10d or 10e of that chapter, deduct interest expenses in relation to a debt owed to an associated company.

36 Under the 10% rule, interest expenses relating to the debts referred to in Paragraph 10b of Chapter 24 of the Law on income tax are deductible if the corresponding income would have been taxed at a rate of at least 10% under the legislation of the State in which the associated company actually entitled to the income is established, if that company were to have only that income. Nevertheless, the first subparagraph of Paragraph 10e of that chapter provides that those interest expenses may be deductible, even if the 10% rule is not met, if the underlying debt was incurred mainly for business reasons and if the associated company which is actually entitled to the income corresponding to the interest expenses is established in an EEA State.

37 The exception provides as well that interest expenses are not deductible if the main reason for the debt having arisen is that the group of associated companies is to receive a substantial tax benefit. According to the legislative preparatory works regarding the exception, it is for the company seeking the deduction to show that the debt was not incurred mainly for tax reasons, that is to say amounting to 75% or more.

38 At the same time, the provisions of Chapter 35 of the Law on income tax state that, subject to certain conditions, a deduction can be made for an intra-group financial transfer from a parent company to a wholly owned subsidiary or from a wholly owned subsidiary to a parent company, or for an intra-group financial transfer to a subsidiary that is owned indirectly through another subsidiary, and for one made between two directly or indirectly owned subsidiaries. However, that rule applies only if the recipient of the intra-group financial transfer is subject to tax in Sweden in respect of the business activity to which that financial transfer relates.

39 In the present case, Lexel financed the acquisition of shares in SESI, which is part of the same group, by means of a loan taken out from another company in that group, BF. Although the interest expenses paid by Lexel to BF met the 10% rule, the Tax Agency refused to allow Lexel to deduct the interest expenses connected with that loan, on the basis of the exception, finding that the main reason for that loan was to obtain a substantial tax benefit.

40 According to the documents before the Court, Lexel could have secured a deduction of the interest expenses connected with that loan if BF had been established in Sweden. According to the explanation provided by the referring court, a company may deduct intra-group financial transfers made to another company in the same group from its taxable income in the case where that other company is subject to tax in Sweden. In that situation, there is therefore no point in taking a loan from another company in the group with the sole purpose of being able to deduct the corresponding interest expenses. That is why the exception is never raised against the deduction of interest charges related to a loan from another group company established in Sweden. By contrast, the exception is applicable in the case where the beneficiaries of the interest charges are established in another Member State.

41 In the light of those factors, it must be held that in the present case there is a difference in treatment which has an adverse impact on the exercise by companies of the freedom of establishment.

42 Such a difference in treatment may, however, be compatible with Article 49 TFEU if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest and is proportionate to that objective.

Whether the situations are comparable

43 Whether the cross-border and national situations are comparable is a matter which must be examined having regard to the purpose and content of the national provisions in question (judgment of 22 February 2018, X and X, C-398/16 and C-399/16, EU:C:2018:110, paragraph 33 and the case-law cited).

44 It must be held, as the European Commission has submitted in its written observations, that a situation in which a company established in one Member State makes interest payments on a loan taken out from a company established in another Member State and belonging to the same group is no different, so far as the payment of interest is concerned, from a situation in which the recipient of the interest payments is a company belonging to the group and established in the same Member State, namely Sweden in the present case.

45 Consequently, it is necessary to examine whether the difference in treatment at issue in the main proceedings may be justified by overriding reasons in the public interest.

The justifications

46 It is settled case-law that a restriction on the freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objectives in question and not go beyond what is necessary to attain those objectives (see, inter alia, judgments of 13 December 2005, Marks & Spencer, C-446/03, EU:C:2005:763, paragraph 35; of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas, C-196/04, EU:C:2006:544, paragraph 47; and of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, EU:C:2007:161, paragraph 64).

47 By way of justification, the Tax Agency, supported on this point by the Swedish and Netherlands Governments, states that the exception forms part, first, of the fight against tax evasion and tax avoidance, and, secondly, of the need to maintain a balanced allocation of the power to impose taxes between the Member States.

48 In the first place, it is necessary to assess whether the difference in treatment at issue in the main proceedings may be justified by grounds relating to the fight against tax evasion and tax avoidance.

49 In order for a restriction on the freedom of establishment provided for under Article 49 TFEU to be justified by those grounds, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory (see, to that effect, judgments of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas, C-196/04, EU:C:2006:544, paragraph 55, and of 22 February 2018, X and X, C-398/16 and C-399/16, EU:C:2018:110, paragraph 46).

50 Furthermore, first, in order to determine whether a transaction represents a purely artificial arrangement entered into for tax reasons alone, the taxpayer must be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement (judgment of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, EU:C:2007:161, paragraph 82).

51 Secondly, where the consideration of those elements leads to the conclusion that the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the principle of proportionality requires that the refusal of the right to a deduction should be limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties been one at arm's length (judgment of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, EU:C:2007:161, paragraph 83).

52 In the present case, it is apparent from the documents before the Court that the exception is aimed at counteracting aggressive tax planning in the form of the deduction of interest expenses and is expressly aimed at any 'substantial tax benefit'. In that situation, it is for the company requesting such a deduction to show that the debt has not arisen mainly for tax reasons, that is to say amounting to 75% or more.

53 The specific objective of the exception is not to counter purely artificial arrangements and the application of that exception is not limited to such arrangements. As the Tax Agency acknowledged in essence at the hearing, the exception in question relates to debts resulting from civil-law transactions, not relating solely to fictitious arrangements. Consequently, according to the Tax Agency's assessment of the objectives of the transaction at issue, the exception may also cover transactions carried out on an arm's-length basis, that is to say, in conditions analogous to those which would apply between companies which are independent of one another.

54 In other words, the fictitious nature of the transaction at issue is not decisive for refusing the right to a deduction because the intention of the company concerned to take on a debt, mainly for tax reasons, is sufficient to justify refusal of the right to a deduction. A transaction is classified as being mainly for tax purposes when that purpose exceeds a certain percentage, namely 75%, in the purpose of that transaction.

55 However, the fact alone that a company wishes to make a deduction of interest payments in a cross-border situation, in the absence of any artificial transfer, cannot justify a measure which undermines the freedom of establishment provided under Article 49 TFEU.

56 It must be held that the exception may include within its scope transactions which are carried out at arm's length and which, consequently, are not purely artificial or fictitious arrangements created with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.

57 Consequently, the justification based on the fight against tax evasion and tax avoidance cannot be accepted.

58 In the second place, it is necessary to examine whether the difference in treatment at issue in the main proceedings may be justified by the need to safeguard the allocation of the power to impose taxes between the Member States.

59 As the Court has repeatedly held, the justification based on the need to maintain the balanced allocation of the power to impose taxes between the Member States can be accepted where the system in question is designed to prevent conduct which is liable to jeopardise the right of a Member State to exercise its power to tax in relation to activities carried out in its territory (see, inter alia, judgments of 13 December 2005, Marks & Spencer, C-446/03, EU:C:2005:763, paragraph 46, and of 31 May 2018, Hornbach-Baumarkt, C-382/16, EU:C:2018:366, paragraph 43 and the case-law cited).

60 The preservation of the balanced allocation of the power to impose taxes between Member States may make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses (judgments of 15 May 2008, Lidl Belgium, C-414/06, EU:C:2008:278, paragraph 31, and of 21 January 2010, SGI, C-311/08, EU:C:2010:26, paragraph 61).

61 The justification based on the preservation of the balanced allocation of the power to impose taxes between Member States has inter alia been allowed by the Court where a condition of residence is required in order to benefit from a particular tax scheme in order to avoid the taxable subject having the free choice of deciding in which State a profit is taxed or a loss is taken into account and the possibility of freely moving the taxable base between Member States (see, to that effect, judgments of 18 July 2007, Oy AA, C-231/05, EU:C:2007:439, paragraph 56; of 21 January 2010, SGI, C-311/08, EU:C:2010:26, paragraph 62 and the case-law cited; and of 25 February 2010, X Holding, C-337/08, EU:C:2010:89, paragraphs 29 to 33).

62 For those reasons, the Court has held that the consolidation at the level of the parent company of the profits and losses of the companies forming a single tax entity constitutes an advantage which may justifiably be reserved to resident companies in view of the need to preserve the allocation of the power to impose taxes between the Member States (see, to that effect, judgment of 25 February 2010, X Holding, C-337/08, EU:C:2010:89, paragraphs 29 to 33).

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

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

65 As the referring court observed, the difference between the rules examined in the judgment of 22 February 2018, X and X (C-398/16 and C-399/16, EU:C:2018:110), and those in question in the main proceedings lies in the fact that, under the rules at issue which gave rise to that judgment, 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. By contrast, in the main proceedings in the present case, the difference in treatment is, in practice, based on a requirement of residence for the creditor company, a requirement which results in the exception not being applicable. Nevertheless, the advantage which Lexel is claiming in the present case cannot be confused with the advantage provided by consolidation within a single tax entity. The dispute in the main proceedings concerns therefore the possibility of deducting interest charges, not the general offsetting of costs and gains specific to the single tax entity.

66 In any event, the differences linked to the implementation of the rules at issue in the respective national taxation schemes cannot have any bearing on the assessment of whether the difference in treatment at issue in the main proceedings may be justified on the basis of the need to preserve the balanced allocation of the power to impose taxes between the Member States.

67 Within that context, it must be made clear that, according to the legislative preparatory works regarding the exception, that provision seeks expressly to prevent the erosion of the Swedish tax base which could result from tax planning linked to the deduction of interest expenses in a cross-border situation. However, such an objective cannot be confused with the need to preserve the balanced allocation of the power to impose taxes between the Member States.

68 It must be borne in mind that the reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (see, inter alia, judgment of 13 December 2005, Marks & Spencer, C-446/03, EU:C:2005:763, paragraph 44 and the case-law cited). A finding to the contrary would amount to allowing the Member States to restrict, on the basis of that ground, the freedom of establishment.

69 Furthermore, as was noted during the hearing, the interest charges in respect of which Lexel sought the deduction would have been deductible if BF had not been an associated company. However, where the conditions of a cross-border intra-group transaction and an external cross-border transaction correspond to those on an arm's-length basis, there is no difference between those transactions in terms of the balanced allocation of the power to impose taxes between the Member States.

70 Accordingly, the justification based on the preservation of a balanced allocation of the power to impose taxes between the Member States cannot be accepted.

71 In the third place, an assessment must be made as to whether, as in essence the Tax Agency and the Swedish and Netherlands Governments argue, the rules at issue in the main proceedings may be justified by taking account together of the justifications related to the fight against tax evasion and tax avoidance and the preservation of a balanced allocation of the power to impose taxes between the Member States.

72 It is true that the Court has already ruled that national legislation which is not specifically designed to exclude from the tax advantage which it confers purely artificial arrangements, devoid of economic reality and created with the purpose of escaping the tax normally due on the profits generated by activities carried out on national territory, may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken in conjunction with the objective of preserving the balanced allocation of the power to impose taxes between the Member States (see, to that effect, judgment of 21 January 2010, SGI, C-311/08, EU:C:2010:26, paragraph 66 and the case-law cited).

73 However, it must be pointed out that the taking into consideration of those grounds of justification together has been accepted by the Court in very specific situations, namely where the fight against tax avoidance constitutes a particular aspect of the public interest linked to the need to preserve a balanced allocation of the power to impose taxes between the Member States (see, to that effect, judgments of 18 July 2007, Oy AA, C-231/05, EU:C:2007:439, paragraphs 58 and 59, and of 21 January 2010, SGI, C-311/08, EU:C:2010:26, paragraph 67).

74 As the Court has noted, the objectives of safeguarding the balanced allocation of the power to impose taxes between Member States and the prevention of tax avoidance are linked. Conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory, is such as to undermine the right of the Member States to exercise their tax jurisdiction in relation to those activities and to jeopardise a balanced allocation between Member States of the power to impose taxes (judgment of 18 July 2007, Oy AA, C-231/05, EU:C:2007:439, paragraph 62).

75 On that basis, the Court has been able to hold that, given in particular the need to preserve the balanced allocation of the power to impose taxes between Member States, despite the fact that the measures at issue do not specifically target purely artificial arrangements, devoid of economic reality and created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory, such measures may nevertheless be justified (judgments of 18 July 2007, Oy AA, C-231/05, EU:C:2007:439, paragraph 63, and of 21 January 2010, SGI, C-311/08, EU:C:2010:26, paragraph 66).

76 However, where, as in the main proceedings, the Member State in question cannot validly assert the justification based on the need to preserve a balanced allocation of the power to impose taxes between the Member States, a measure, such as that at issue in the main proceedings, cannot be justified on the basis of taking account together of the need to preserve a balanced allocation of the power to impose taxes between the Member States and of that of the fight against tax avoidance.

77 Consequently, the justification based on the need to preserve the balanced allocation of the power to impose taxes between the Member States and the fight against tax avoidance cannot be accepted.

78 Having regard to the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a company established in one Member State is not permitted to deduct interest payments made

to a company belonging to the same group, established in another Member State, on the ground that the principal reason for the debt linking them appears to be the obtaining of a substantial tax benefit, whereas such a tax benefit would not have been deemed to exist if both companies had been established in the first Member State, as in that situation they would have been covered by the provisions on intra-group financial transfers.

Costs

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

On those grounds, the Court (First Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a company established in one Member State is not permitted to deduct interest payments made to a company belonging to the same group, established in another Member State, on the ground that the principal reason for the debt linking them appears to be the obtaining of a substantial tax benefit, whereas such a tax benefit would not have been deemed to exist if both companies had been established in the first Member State, as in that situation they would have been covered by the provisions on intra-group financial transfers.

[Signatures]

(*1) Language of the case: Swedish.