Provisional text

JUDGMENT OF THE COURT (First Chamber)

4 October 2024 (*)

(Reference for a preliminary ruling – Freedom of establishment – Article 49 TFEU – Corporation tax – Intra-group cross-border loan for the purposes of financing the acquisition or the extension of an interest in a company not related to the group concerned that becomes, as a result of that transaction, related to that group – Deduction of interest paid on that loan – Loan contracted on an arm's length basis – Concept of 'wholly artificial arrangement' – Principle of proportionality)

In Case C-585/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 2 September 2022, received at the Court on 7 September 2022, in the proceedings

X BV

v

Staatssecretaris van Finaciën,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2023,

after considering the observations submitted on behalf of:

– X BV, by S.C.W. Douma and R. van Scharrenburg, tax advisors,

– the Netherlands Government, by M.K. Bulterman and M.H.S., Gijzen, acting as Agents,

– the Belgian Government, by S. Baeyens and J.-C. Halleux, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the European Commission, by W. Roels, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49, 56 and 63 TFEU.

2 The request has been made in proceedings between X BV, a company incorporated under Netherlands law, and the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) ('the tax authorities') concerning the possibility to deduct for tax purposes interest paid in respect of an intra-group loan, contracted in order to finance the acquisition of a company not related to the group concerned.

Netherlands law

3 Article 10a of the Wet op de vennootschapsbelasting 1969 (Law on Corporation Tax of 1969), in the version in force in 2007 (Stb. 2006, n°631), ('the Law on Corporation Tax'), provides:

'1. When profit is being determined …, interest – including costs and currency exchange results – may not be deducted if it relates to debts which in law or in fact are directly or indirectly payable to a related entity or related natural person, in so far as the debt relates directly or indirectly, in law or in fact, to one of the following legal transactions:

…

(c) the acquisition or extension by the taxpayer, by an entity related to the taxpayer and subject to [corporation] tax, or by a natural person related to the taxpayer and resident in the Netherlands, of an interest in an entity which, following that acquisition or [that] extension, is an entity which is related to that taxpayer.

…

3. Paragraph 1 shall not apply if the taxpayer can demonstrate that:

(a) the loan and the related legal transaction are predominantly based on commercial considerations; or

(b) a profit tax or income tax that is reasonable in accordance with the Netherlands criteria is ultimately levied on the interest in respect of the person to whom, in law or fact, interest is directly or indirectly payable, and that there is no offsetting of losses or charges of another kind for the years preceding that in which the loan is contracted with the result that, ultimately, no tax is payable on the interest according to the criteria of reasonableness referred to, except where it is plausible that the loan was contracted with a view to offsetting losses or charges of another kind which arose during the year itself or will arise in the short term. A tax levied on profit is reasonable in accordance with the Netherlands criteria if it results in a levy at a rate of at least 10% on taxable profit determined in accordance with the Dutch rules …

4. For the purposes of this article …, the following shall be considered to be an entity related to the taxpayer:

(a) an entity in which the taxpayer has an interest of at least one third;

(b) an entity that has an interest of at least one third in the taxpayer;

(c) an entity in which a third party has an interest of at least one third, where that third party also has an interest of at least one third in the taxpayer.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

4 X forms part of a multinational group of companies. X's sole shareholder is A, a company incorporated under Belgian law, whose shares were held by B, another company incorporated under Belgian law, in the amount of 39% of its capital from the year 2000 to 22 December 2002, and in the

amount of 44.47% of that capital since that latter date. The other shares in A were listed on the Brussels Stock Exchange (Belgium) and were therefore held by the public.

5 The group formed by B and A includes C, a company established in Belgium. Between 1999 and 2010, C had, for tax purposes, the status of a 'coordination centre' within the meaning of the Belgian tax legislation. As such, C benefitted from a special tax regime under which, inter alia, its taxable profit was determined at a flat-rate basis and it was not required to withhold any withholding tax from the interest payments. In 2000, A held 53.05% of the shares or holdings in C and B held 46.95% of the shares or holdings in C. On 22 December 2002, A's and B's interest became 64.3% and 27.8%, respectively, of the shares or holdings in C, with the remaining 7.9% being held by third parties.

6 In 2000, X acquired from third parties 72% of the shares in F, a company incorporated under Netherlands law, and A acquired from those third parties the remaining 28% of those shares. X financed the acquisition of those shares by loans contracted with C, which used for that purpose own funds obtained through a capital contribution made by A.

7 In the tax assessment notice addressed to X for 2007 as regards corporation tax, the tax authorities refused to deduct the interest paid by that company to C. X challenged that refusal, first, before the rechtbank Gelderland (District Court, Gelderland, Netherlands) and, subsequently, before the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands). The latter court held, inter alia, in its judgment of 20 October 2020, that Articles 49, 56 and 63 TFEU did not preclude the limitation of the deduction of interest provided for in Article 10a of the Law on Corporation Tax, according to which interest in respect of debts incurred with a related entity is not to be deducted, in so far as those debts relate to the acquisition or extension of an interest in an entity which, following that acquisition or extension, becomes an entity related to the taxpayer, unless the latter proves that one of the two conditions referred to in Article 10a(3) is satisfied.

8 X lodged an appeal on a point of law against that decision before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which is the referring court. That court considers that the national legislation at issue in the main proceedings is capable of placing cross-border situations at a disadvantage. A resident entity, related to the taxpayer, generally satisfies the condition laid down in Article 10a(3)(b) of the Law on Corporation Tax, whereas a non-resident entity related to that taxpayer would, in fact, fulfil that requirement less often and the deduction of interest on debt relating to a loan contracted with that latter entity would be possible only if the condition laid down in Article10a(3)(a) of that law were satisfied.

9 Such a restriction is nevertheless justified, according to the referring court, by the need to combat tax fraud and avoidance, since the legislation at issue in the main proceedings is specifically intended to prevent the conduct of two or more related entities consisting of the creation of wholly artificial arrangements which do not reflect economic reality, with a view to evading the tax normally due on the profits generated by activities carried out on the national territory by means of artificially generated interest on debt, that is to say, due in respect of a loan debt contracted arbitrarily and without business reasons.

10 That court states that loan debts are contracted arbitrarily and without business reasons, inter alia, where, within a group of related entities, the method of financing an operation, which is itself economically founded, is dictated by tax reasons to such an extent that they form part of legal acts which are not necessary for the attainment of the economically justified objectives and which, without those tax reasons, would not have been effected, even if the interest payable on those debts is identical to that which would have been agreed between independent undertakings. The legislation at issue in the main proceedings therefore concerns an erosion of the taxable amount not as a result of excessive interest on debt, but of artificially generated interest on debt.

11 The referring court submits that the total refusal to deduct the interest on debt thus generated artificially would be proportionate to the objective of combating tax fraud and tax avoidance, since, first, it is limited to situations in which the loan within a group of related companies is dictated by tax reasons to such an extent that that loan is not necessary for the attainment of economically justified objectives and that that loan would only be contracted in the presence of a special relationship between the companies concerned, and, second, the conditions which must be satisfied in order to adduce

evidence and to deduct the interest on debt are not all that strict, a fact which renders that deduction ineffective in scope.

12 Nonetheless, that court is uncertain whether its analysis is still well founded in the light, in particular, of the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34, paragraphs 51 and 56). First, it asks whether it can be inferred from that judgment that transactions entered into on an arm's length basis do not, for that reason alone, constitute wholly artificial arrangements. In paragraph 56 of that judgment, the Court held, in essence, that the national legislation at issue in that case could include within its scope transactions which were concluded on an arm's-length basis and which, consequently, do not constitute wholly artificial or fictitious arrangements drawn up with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory. Second, it asks whether importance should be attributed to the fact that, unlike the legislation at issue in the case which gave rise to that judgment, the legislation at issue in the main proceedings in the present case concerns not only an intra-group transfer of interests but also the acquisition of an external entity which becomes, following that acquisition, an entity related to the group.

13 Against that background, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 49 TFEU, 56 TFEU and/or 63 TFEU to be interpreted as precluding national legislation under which the interest on a loan debt contracted with an entity related to the taxable person, being a [loan] debt connected with the acquisition or extension of an interest in an entity which, following that acquisition or extension, is a related entity, is not deductible when determining the profits of the taxable person because the debt concerned must be categorised as (part of) a wholly artificial arrangement, regardless of whether the debt concerned, viewed in isolation, was contracted at arm's length?

(2) If the answer to Question 1 is in the negative, must Articles 49 TFEU, 56 TFEU and/or 63 TFEU be interpreted as precluding national legislation under which the deduction of the interest on a loan debt contracted with an entity related to the taxable person and regarded as (part of) a wholly artificial arrangement, being a debt connected with the acquisition or extension of an interest in an entity which, following that acquisition or extension, is a related entity, is disallowed in full when determining the profits of the taxable person, even where that interest in itself does not exceed the amount that would have been agreed upon between companies which are independent of one another?

(3) For the purpose of answering questions 1 and/or 2, does it make any difference whether the relevant acquisition or extension of the interest relates (a) to an entity that was already an entity related to the taxable person prior to that acquisition or extension, or (b) to an entity that becomes an entity related to the taxpayer only after such acquisition or extension?'

Request for the oral part of the procedure to be reopened

14 By document lodged at the Registry of the Court of Justice on 10 April 2024, following the delivery of the Advocate General's Opinion, X requested that the oral part of the procedure be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

15 In support of that request, X submits, in essence, that, by calling on the Court to reconsider the position it adopted in the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), the Advocate General relies, in point 71 of his Opinion, on an argument which has not been debated between the parties. Accordingly, X wishes to put forward arguments relating to compliance with the principle of legal certainty, taking the view that a transitional period would be necessary, if the approach advocated by the Advocate General were endorsed by the Court, and that that approach would have potentially discriminatory effects on it as it has its seat in the Netherlands, and not in Sweden. X would also like to address the question of the effects of that approach on the case-law of the European Free Trade Association (EFTA) Court.

16 In that regard, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 21 December 2023, *Chief Appeals Officer and Others*, C-488/21, EU:C:2023:1013, paragraph 34 and the case-law cited).

17 In addition, the disagreement of an interested party referred to in Article 23 of the Statute of the Court of Justice of the European Union with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 21 December 2023, *Chief Appeals Officer and Others*, C-488/21, EU:C:2023:1013, paragraph 35 and the case-law cited).

18 It is true that the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that there is insufficient information, or where a party has submitted, after the closure of that part of the procedure, a new fact capable of exercising a decisive influence on its decision, or where the case is to be decided on the basis of an argument which has not been discussed between the parties or interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment of 21 December 2023, *Chief Appeals Officer and Others*, C-488/21, EU:C:2023:1013, paragraph 36).

19 However, that is not the situation in the present case. First, it must be noted that the question of the scope of the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34) was discussed during the written and oral parts of the procedure. In addition, the request that the oral part of the procedure be reopened does not contain any new fact capable of exercising a decisive influence on the decision which the Court is called upon to give in this case.

20 In those circumstances, the Court considers, after hearing the Advocate General, that it has sufficient information from the various arguments debated before it and, consequently, that there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

21 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 49, 56 and 63 TFEU must be interpreted as precluding national legislation under which, in the determination of a taxpayer's profits, the deduction of interest paid in respect of a loan debt contracted with a related entity, relating to the acquisition or extension of an interest in another entity, which becomes, as a result of that acquisition or extension, an entity related to that taxpayer, is to be refused in full where that debt is considered to constitute a wholly artificial arrangement or to form part of such an arrangement, even if that debt was incurred on an arm's length basis and if the amount of that interest does not exceed that which would have been agreed between independent undertakings.

22 It must be pointed out at the outset that the dispute in the main proceedings relates to a tax assessment notice for the 2007 financial year, a fact which renders the EC Treaty applicable to it *ratione temporis*. That said, given that the interpretation of the provisions of the FEU Treaty on freedom of establishment, free movement of services and free movement of capital is, in any event, applicable to the corresponding provisions of the EC Treaty, reference will be made to Articles 49, 56 and 63 TFEU, referred to by the referring court.

The applicable fundamental freedom

23 It is clear from settled case-law that, in order to determine whether national legislation comes within the scope of one or other of the fundamental freedoms guaranteed by the FEU Treaty, the purpose of the legislation concerned must be taken into consideration (judgment of 16 February 2023, *Gallaher*, C-707/20, EU:C:2023:101, paragraph 55 and the case-law cited).

24 Accordingly, national legislation intended to apply only to those interests which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU (judgment of 16 February 2023, *Gallaher*, C-707/20, EU:C:2023:101, paragraph 56 and the case-law cited).

25 Furthermore, it is apparent from the Court's case-law that, in so far as any given national rules concern only relationships within a group of companies, they primarily affect the freedom of establishment (judgment of 16 February 2023, *Gallaher*, C-707/20, EU:C:2023:101, paragraph 58 and the case-law cited).

26 In the present case, the national legislation at issue in the main proceedings concerns the tax treatment of interest paid in respect of loan debts contracted by a taxpayer with an entity or a natural person related to that taxpayer, in so far as those debts relate to the acquisition or extension of an interest in another entity which becomes, following that acquisition or extension, an entity likewise related to that taxpayer.

27 Under Article 10a(4) of the Law on Corporation Tax, entities are related where one directly or indirectly holds 33.3% of the interest in the other, or where a third entity directly or indirectly holds 33.3% of the interest in the other two entities.

28 In accordance with the Court's case-law, such a percentage may give the holding company definite influence over the decisions of the company with which it is related (see, to that effect, judgment of 31 May 2018, *Hornbach-Baumarkt*, C-382/16, EU:C:2018:366, paragraph 29).

29 Consequently, since the purpose of the legislation at issue in the main proceedings concerns the tax treatment of interest paid in respect of debts within a group of companies, between entities which may have, directly or indirectly, a definite influence on each other, that legislation falls within the scope of the freedom of establishment.

30 Assuming that the tax regime at issue in the main proceedings has restrictive effects on the freedom to provide services or on the free movement of capital, such effects would be the unavoidable consequence of a possible restriction on freedom of establishment and do not justify a separate examination of the questions referred in the light of Articles 56 and 63 TFEU (see, by analogy, judgment of 17 March 2022, *AllianzGI-Fonds AEVN*, C-545/19, EU:C:2022:193, paragraph 34 and the case-law cited).

31 It is appropriate, therefore, to answer the questions referred in the light of Article 49 TFEU.

32 In that regard, it must be borne in mind that that article 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 (judgment of 20 January 2021, *Lexel*, C-484/19, EU:C:2021:34, paragraph 33 and the case-law cited).

33 A difference in treatment resulting from the legislation of a Member State to the detriment of companies exercising their freedom of establishment is permissible only 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, which means that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (see, to that effect, judgments of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 65 and the case-law cited, and of 22 September 2022, *W (Deductibility of final losses of a non-resident permanent establishment)*, C-538/20, EU:C:2022:717, paragraph 18 and the case-law cited).

Whether there is a difference in treatment

34 It is important to note that, where a parent company established in one Member State pursues its activity in another Member State through a subsidiary, its freedom of establishment may be affected by any restriction imposed on that subsidiary (see, to that effect, judgment of 3 March 2020, *Vodafone Magyarország*, C-75/18, EU:C:2020:139, paragraph 41).

35 Furthermore, in a situation involving a group of companies and concerning the refusal of the tax authorities of a Member State in relation to a company established in that Member State, the parent company of which is established in another Member State, to allow the deduction of certain interest expenses paid to another company in the same group, established in that other Member State, whereas that deduction would have been possible if the company receiving that interest had been established in the first Member State, the Court held that such a difference in treatment had an adverse effect on freedom of establishment (see, to that effect, judgment of 20 January 2021, *Lexel,* C-484/19, EU:C:2021:34, paragraphs 40 and 41).

36 It is therefore necessary to examine whether the legislation at issue in the main proceedings leads to a difference in treatment which has an adverse effect on freedom of establishment.

37 It is important to note that not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are, in that regard, prohibited (judgment of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 62 and the case-law cited).

38 In particular, a tax regime which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (see, to that effect, judgment of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 42 and the case-law cited).

39 In the present case, it should be noted that Article 10a(1)(c) of the Law on Corporation Tax, which provides for the refusal to deduct interest paid in respect of loan debts contracted with a related entity, in the circumstances referred to in that provision, does not draw any distinction according to whether or not a group is cross-border (see, by analogy, judgment of 22 February 2018, *X and X*, C-398/16 and C-399/16, EU:C:2018:110, paragraph 35).

40 Article 10a(3)(a) and (b) of that law, which lays down the conditions under which such a deduction is nevertheless possible, is also applicable without distinction to national and cross-border situations.

41 However, the referring court is of the view, as set out in paragraph 8 of the present judgment, that Article 10a(3)(b) of the Law on Corporation Tax, which requires it to be established, first, that a tax is ultimately levied on the interest in question and, second, that that tax is reasonable according to the criteria of Netherlands law, that is to say, results in taxation of at least 10% of the taxable profit determined in accordance with those criteria, nevertheless has the effect of placing cross-border situations at a disadvantage.

42 It will be for the referring court, which alone has jurisdiction to assess the facts of the dispute in the main proceedings and to interpret the national legislation concerned, to determine whether taxation at a rate lower than 10% on the taxable profit determined in accordance with those criteria may apply to related entities receiving interest which have their seat in the Netherlands.

43 If that were not the case or if, although possible in theory, such taxation was not applied in practice, Article10a(3)(b) of the Law on Corporation Tax, while laying down an apparently objective condition, would have to be regarded as introducing a condition which will, in fact, be satisfied in the case of a company established in the Netherlands which pays interest to a related entity established in that Member State. It would also follow that only companies established in the Netherlands which pay interest to a related entity established in another Member State may find themselves in a situation where that condition is not satisfied, where the latter Member State, like the Kingdom of Belgium in the present case, subjects that entity to a lower tax.

44 Consequently, if taxation at a rate of less than 10% was not practised under the Netherlands tax regime, the unavoidable and not uncertain consequence (see, *a contrario*, judgment of 3 March 2020, *Tesco-Global Áruházak*, C-323/18, EU:C:2020:140, paragraph 72) of a condition such as that laid down in Article 10a(3)(b) of the Law on Corporation Tax is that it affects only cross-border situations.

45 This way, the unfavourable treatment of a company, being a subsidiary of a parent company established in another Member State, based on the place in which the related entity receiving the interest paid by that subsidiary has its seat, is liable to deter that parent company from carrying on an activity in the Netherlands through that subsidiary, while maintaining that related entity in that other Member State, in which it is subject to a favourable tax regime. As the Advocate General observed, in essence, in point 44 of his Opinion, such unfavourable treatment is also liable to deter a parent company, established in the Netherlands, from exercising its freedom of establishment by establishing a related entity in another Member State in which it would be subject to a favourable tax regime.

46 In the light of all the foregoing considerations, it must be held that, although applicable without distinction, the legislation at issue in the main proceedings involves a difference in treatment which is liable to affect the exercise of freedom of establishment.

47 It is therefore necessary to ascertain, in accordance with the case-law cited in paragraph 33 of the present judgment, whether that difference in treatment concerns situations which are not objectively comparable.

Whether the situations are comparable

48 It follows from the Court's case-law, first, that the comparability or otherwise of a cross-border situation with a domestic situation must be examined having regard to the objective pursued by the national provisions at issue and to the purpose and content of those provisions, and, secondly, that only the relevant distinguishing criteria established by the legislation at issue must be taken into account for the purpose of assessing whether the difference in treatment resulting from such legislation reflects a difference in objective situation (judgment of 27 April 2023, *L Fund*, C-537/20, EU:C:2023:339, paragraph 54 and the case-law cited).

49 As stated in paragraph 29 of the present judgment, the purpose of the national legislation at issue in the main proceedings is to ensure the tax treatment of interest paid in respect of debts within a group of companies between entities capable of having, directly or indirectly, definite influence over each other. That legislation is intended to confer the possibility of deducting, in the context of the determination of profit, interest on debts due to a related entity only where that interest is not artificially generated.

50 It should be noted that, with regard to a tax advantage, such as the possibility of deducting, in the context of the determination of profit, interest on debts owed to a related entity, a taxpayer is not placed in a different situation depending on whether the entity receiving that interest is established in the same Member State or whether that entity is subject, in another Member State, to more or less advantageous tax treatment (see, by analogy, judgment of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 31). In all those cases, the loan in respect of which that interest is paid and the related legal transaction may be based on economic considerations.

51 In those circumstances, and without prejudice to the examination of the potentially justified nature of the legislation at issue in the main proceedings on the basis of an overriding reason in the public interest, it must be held that a company is not in a different situation merely because the related entity, the recipient of the interest concerned, is established in another Member State, in which that interest is subject to a rate not exceeding 10% on a taxable profit determined according to the criteria of Netherlands law.

52 Furthermore, the Court has held that a situation in which a company established in one Member State makes interest payments on a loan contracted with 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 (judgment of 20 January 2021, *Lexel*, C-484/19, EU:C:2021:34, paragraph 44).

Justification

53 It is necessary to examine, in the light of the case-law cited in paragraph 32 of the present judgment, whether the difference in treatment at issue in the main proceedings may be justified by an overriding reason in the public interest and whether it is proportionate to that objective.

The existence of an overriding reason in the public interest

54 The referring court, the governments which submitted observations and the European Commission submit that the restriction created by the legislation at issue in the main proceedings is justified by the need to prevent tax fraud and avoidance. In particular, the referring court states, as set out in paragraph 9 of the present judgment, that that legislation seeks to prevent the erosion of the taxable amount in the Netherlands by means of artificially generated interest on debt, that is to say payable in respect of a loan debt contracted arbitrarily and without business reasons, in particular where, within a group of linked entities, the method of financing an economically justified transaction is dictated by tax reasons to such an extent that they form part of the legal acts which are unnecessary for the attainment of economically justified objectives and which, without those tax reasons, would not have been carried out.

55 In that regard, the Court has held that the prevention of tax fraud and is an overriding reason relating to the public interest, capable of justifying a restriction on the exercise of freedom of movement guaranteed by the FEU Treaty (see, to that effect, judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 36, and of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 63).

56 A national measure restricting freedom of establishment may also be justified where it is designed to combat wholly artificial arrangements, aimed at circumventing the legislation of the Member State concerned (judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 31).

57 In accordance with settled case-law, in order for a restriction on the freedom of establishment provided for under Article 49 TFEU to be justified on the grounds referred to in paragraphs 55 and 56 above, 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, inter alia, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraphs 51 and 55; of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraphs 72 and 74; of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 73; and of 20 January 2021, *Lexel*, C-484/19, EU:C:2021:34, paragraph 49).

58 The Court has also stated that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage constitutes the essential aim of the transactions at issue (judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 107 and the case-law cited).

59 Whilst the pursuit by a taxpayer of the tax regime most favourable for him or her cannot, as such, set up a general presumption of fraud or abuse, the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned (judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 109 and the case-law cited).

60 It should be noted, in that regard, that the Court found in the cases 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 46 and 48), which concerned Article 10a(2)(b) of the Law on Corporation Tax, as in force in 2004, which corresponds, in essence, to Article 10a(3)(b) of the Law on Corporation Tax, as confirmed by the referring court in the main proceedings, that that provision undeniably pursues the objective of combating tax fraud and avoidance and seeks to prevent a group's own funds from being presented, in a contrived manner, as

funds borrowed by a Netherlands entity of that group and the interest on that loan from being deducted from the taxable profit in the Netherlands.

61 The fact that the legislation at issue in the main proceedings concerns not only situations in which a taxpayer contracts a loan debt with a related entity in order to finance the acquisition or extension of an interest in an entity which was already related to that taxpayer, as was the situation in the cases giving rise to the judgment of 22 February 2018, *X and X* (C-398/16 and C-399/16, EU:C:2018:110), but also those in which an entity becomes an entity related to the same taxpayer only following that acquisition or that extension, as in the present case, does not call that assessment into question. In all those situations, as the Advocate General observed in point 58 of his Opinion, that legislation is intended to prevent the artificial nature of the transactions concerned, arising from the redirection of own funds and the conversion of them in loan capital.

Proportionality

62 As is apparent from paragraph 33 of the present judgment, it is still necessary to assess whether the legislation at issue in the main proceedings is appropriate for ensuring, in a consistent and systematic manner, the attainment of the objective pursued.

63 In that regard, it should be recalled that, under the legislation at issue in the main proceedings, a taxpayer may deduct from his or her taxable profits interest paid in respect of loan debts contracted with related entities which relate to the acquisition or extension of an interest in an entity that becomes related after that acquisition or extension, only if he or she demonstrates that the conditions laid down in Article 10a(3)(a) or (b) of the Law on Corporation Tax are satisfied.

64 That legislation is therefore suitable for securing the attainment of the objective pursued, in a consistent and systematic manner, since it makes it possible to neutralise the effects of the conduct of two or more related entities consisting of 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, by excluding from the deduction the interest artificially generated or, at the very least, by ensuring that that interest is taxed at a reasonable rate in the Member State of the beneficiary and that the tax on profits is not avoided altogether.

65 Therefore, it must be ascertained whether the restriction at issue in the main proceedings goes beyond what is necessary to attain that objective.

66 In that regard, a finding that there is a wholly artificial arrangement requires, in addition to a subjective element comprising the intention to obtain a tax advantage, a number of objective factors demonstrating that, despite formal observance of the conditions laid down by EU law, the objective pursued by the freedom of establishment has not been achieved (see, to that effect, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 64 and the case-law cited, and, by analogy, judgment of 26 February 2019, *N Luxembourg 1 and Others*, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 124 and the case-law cited).

67 The Court has held that national legislation which relies on an examination of objective and ascertainable factors in order to determine whether a transaction represents a wholly artificial arrangement solely for tax purposes and which, on each occasion on which the existence of such an arrangement cannot be ruled out, gives the taxpayer concerned an opportunity, without subjecting him or her to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction, may be regarded as not going beyond what is necessary to prevent abusive practices (see, to that effect, judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 87 and the case-law cited).

68 In order to determine whether a transaction pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole transaction at issue. The imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even *prima facie* evidence of fraud and abuse, would go further

than is necessary for preventing fraud and abuse (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 32 and the case-law cited).

69 In the present case, the legislation at issue in the main proceedings establishes a presumption that interest paid in respect of loan debts contracted in accordance with the criteria set out in Article 10a(1)(c) of the Law on Corporation Tax constitute or form part of wholly artificial arrangements.

70 Those criteria, in particular, the fact that those loan debts are owed to a related entity and relate to the acquisition or extension of an interest in an entity which, following that acquisition or extension, is a related entity, constitute indications, within the meaning of the case-law referred to in paragraph 68 above, of the existence of a wholly artificial arrangement.

71 The possibility for the taxpayer to rebut that presumption by demonstrating that the conditions laid down in Article 10a(3)(a) and (b) of the Law on Corporation Tax are satisfied makes it possible to limit the refusal to deduct loan interest solely to situations in which the loan within a group of connected companies is dictated by tax reasons to such an extent that that loan is not necessary for the attainment of economically justified objectives and where it would not have been contracted at all between entities which have no special relationship.

72 It follows, in that regard, from the explanations given by the referring court, that the condition laid down in Article 10a(3)(a) of the Law on Corporation Tax concerns both the reason for the loan and the related legal transaction and the objective factors characterising that loan and that legal transaction, the taxpayer having to show that they are justified by economic considerations and that they could have been agreed between entities in the absence of those special relationships. It follows, according to that court and as mentioned in paragraph 10 of the present judgment, that, in accordance with its case-law, loan debts contracted arbitrarily and without business reasons constitute wholly artificial arrangements, even if, in themselves, the interest on those debts is identical to that which would have been agreed between independent undertakings.

73 As is apparent from paragraph 12 of the present judgment, the referring court asks whether it is possible to infer from the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), and, in particular, from paragraph 56 of that judgment, that transactions consisting in contracting debts with an entity related to the taxpayer do not, by definition, constitute wholly artificial arrangements where they have been established on an arm's length basis.

74 It should be recalled, first, that the Court has held that the fact that a company has been granted a loan by another company on terms which do not correspond to those which would have been agreed on an arm's length basis constitutes, for the Member State in which the borrower company is resident, an objective element which can be independently verified by third parties in order to determine whether the transaction at issue represents, in whole or in part, a solely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State. In that regard, the question is whether, in the absence of a special relationship between the companies concerned, the loan at issue would not have been granted or would have been granted for a different amount or at a different rate of interest (see, to that effect, judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 81).

75 It follows from that case-law that the examination of compliance with arm's length conditions relates not only to the terms of the loan contract relating, in particular, to the amount or the interest rate, but also to the economic sense of the loan at issue and the related legal transactions. The latter examination involves verifying the economic validity of that loan and the related legal transactions, by ensuring that such transactions could have been concluded between the companies party to the contract in the absence of a special relationship.

76 An examination aimed at ensuring that not only the terms of the loan at issue, but also the very fact of contracting it and the related legal transactions, correspond to what the companies would have agreed in arm's length circumstances amounts to ascertaining the economic reality of the transactions whose absence, as is apparent from the case-law referred to in paragraphs 57, 59 and 67 of the present judgment, constitutes one of the decisive factors in classifying a purely artificial arrangement transaction.

77 Secondly, as the Court recalled in the judgment of 21 December 2023, *BMW Bank and Others* (C-38/21, C-47/21 and C-232/21, EU:C:2023:1014, paragraphs 281 and 283), which postdates the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), it follows from the general principle of law that EU law cannot be relied on for abusive or fraudulent ends that a Member State must refuse, even in the absence of provisions of national law providing for such a refusal, the benefit of provisions of EU law where they are relied on by a person not for the purpose of achieving the objectives of those provisions, but for the purpose of benefiting from an advantage granted to that person by EU law, where the objective conditions required for obtaining the advantage sought, laid down by EU law, are only formally satisfied.

78 It follows that an examination of the formal conditions of the transactions alone is not sufficient to assess the economic reality of a given transaction.

79 Thirdly, the Court stated, in paragraph 29 of the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), that, despite a theoretical similarity, the Swedish legislation at issue in the case which gave rise to that judgment and the Netherlands rules on tax entities differ appreciably in their practical consequences.

80 The Court held that the specific objective of the legislation at issue in that case was not to combat wholly artificial arrangements, that it formed part of the fight against aggressive tax planning in the form of the deduction of interest expenses and that the application of that legislation was not limited to such arrangements, since transactions concluded on an arm's length basis could also be caught by the prohibition on deductions, that is to say, under conditions analogous to those which would apply between independent companies. The intention of the company concerned to contract a debt, mainly for tax reasons, was sufficient to justify the refusal of the right of deduction in a cross-border situation (judgment of 20 January 2021, *Lexel,* C-484/19, EU:C:2021:34, paragraphs 52 to 54).

81 The Court also noted that the legislation at issue in the case that gave rise to the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34, paragraph 53), was capable of applying to debts arising from transactions governed by civil law, namely those concluded on an arm's length basis, but did not concern fictitious arrangements.

82 It follows that the Court did not adopt a position, in that judgment, on the situation envisaged by the legislation at issue in the main proceedings with the specific aim of combating wholly artificial arrangements, as is apparent from paragraphs 60 and 61 of the present judgment, namely where the debts are incurred without business reasons, even though the loan terms correspond to those which would have been agreed between independent undertakings.

83 In particular, as is apparent from the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), the economic validity of the loan and the related transactions at issue in the case giving rise to that judgment had neither been challenged before the Court nor examined by the Court.

84 Consequently, it cannot be inferred from paragraph 56 of the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), that, where a loan and the related transactions are not justified by economic considerations, the mere fact that the terms of that loan correspond to those which would have been agreed between independent undertakings means that that loan and those transactions do not, by definition, constitute wholly artificial arrangements.

85 Therefore, the need to establish that a loan and the related legal transaction are based, to a decisive extent, on economic considerations does not appear to go beyond what is necessary in order to attain the objective pursued.

86 In addition, the referring court asks whether a total refusal of the right to deduct goes beyond what is necessary to achieve the objective pursued, since, in paragraph 51 of the judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34), the Court recalled its case-law according to which, where the tax authorities consider, after examining evidence of any commercial justification for a transaction, that a loan contracted by a taxpayer with a related entity constitutes a purely artificial arrangement, in the absence of any real 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.

87 As the Advocate General observed in points 103 to 105 of his Opinion, where the artificial nature of a given transaction results from an exceptionally high rate of interest on an intra-group loan which also reflects economic reality, the principle of proportionality requires the deduction of the proportion of interest paid on that loan which exceeds the normal market rate. It would go beyond the objective of preventing wholly artificial arrangements to refuse all deduction of that interest.

88 By contrast, where the loan is, in itself, devoid of economic justification and, but for the relationship between the companies and the tax advantage sought, would never have been contracted, it is consistent with the principle of proportionality to refuse the deduction of the whole of the said interest, since such a wholly artificial arrangement must be ignored by the tax authorities when calculating the corporate tax due. The refusal to deduct only a fraction of the interest paid in respect of the said loan would allow the taxpayer to obtain a part, or even the entire tax advantage sought through abusive means, which would call into question the coherence of the anti-abuse regime.

89 Nor does such legislation appear to be contrary to the requirements stemming from the principle of legal certainty which must be complied with in order for legislation not to be regarded as going beyond what is necessary to attain the objective pursued (see, to that effect, judgment of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 59).

90 In that regard, the Court has ruled that the principle of legal certainty requires that rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect, judgment of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 58 and the case-law cited).

91 As the Advocate General observed in points 87 and 88 of his Opinion, it must be noted that it is inevitable that a provision prohibiting abusive practices uses abstract concepts in order to cover the greatest number of situations created for the purpose of tax fraud and avoidance.

92 However, the use of abstract concepts does not mean that the application of the legislation at issue in the main proceedings is left entirely to the discretion of the tax authorities, rendering it unpredictable in its effects, since, as noted in paragraphs 70 and 71 of the present judgment, that application is subject to criteria clearly established in that legislation, enabling the taxpayer to determine the scope of that legislation beforehand and with sufficient precision, without leaving any uncertainty as to its applicability (see, to that effect, judgment of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 57).

93 In the light of all of the foregoing, the answer to the questions referred is that Article 49 TFEU must be interpreted as not precluding national legislation under which, in the determination of a taxpayer's profits, the deduction of interest paid in respect of a loan debt contracted with a related entity, relating to the acquisition or extension of an interest in another entity which becomes, as a result of that acquisition or extension, an entity related to that taxpayer, is to be refused in full, where that debt is considered to constitute a wholly artificial arrangement or is part of such an arrangement, even if that debt was incurred on an arm's length basis and the amount of that interest does not exceed that which would have been agreed between independent undertakings.

Costs

94 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

not precluding national legislation under which, in the determination of a taxpayer's profits, the deduction of interest paid in respect of a loan debt contracted with a related entity, relating to the acquisition or extension of an interest in another entity which becomes, as a result of that acquisition or extension, an entity related to that taxpayer is to be refused in full, where that debt is considered to constitute a wholly artificial arrangement or is part of such an arrangement, even if that debt was incurred on an arm's length basis and the amount of that interest does not exceed that which would have been agreed between independent undertakings.

[Signatures]

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* Language of the case: Dutch.