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Dear Sir/Madam,

The CFE ECJ Task Force has issued an Opinion Statement on the EFTA Court decision of 1 June 2022 in Case E-3/21, *PRA Group Europe*, on the discriminatory interaction between the "interest barrier" and group contributions.

At issue in *PRA Group Europe* was the interaction of the Norwegian "interest barrier rule" ("interest limitation rule"), which generally limit the deductibility of interest payments to affiliated resident and non-resident entities to 30% of EBITDA, and the group contribution rules, which permit tax effective transfers between group members, but are limited to Norwegian entities. As group contributions also increase the EBITDA of the recipient Norwegian entity (and decrease it at the level of the paying Norwegian entity), companies in the Norwegian tax group can achieve interest deductions under the interest barrier rules where profits ("tax EBITDA") and interest expenses are distributed

unevenly between the companies in the group, while a similar opportunity to escape (or lessen the impact of) the interest barrier rules is not available to cross-border groups. The EFTA Court took a combined perspective on the interaction of those rules and found them to constitute an unjustified restriction of the freedom of establishment under Articles 31 and 34 of the EEA Agreement. The EFTA Court's decision is particularly interesting from an EU law perspective, as the interest barrier rule of Article 4 of the Anti-Tax Avoidance Directive (ATAD) similarly foresees the option for Member States to introduce a domestically-limited "interest barrier group" to permit a calculation of exceeding borrowing costs and the EBITD at the local group level.

The CFE ECJ Task Force welcomes the EFTA Court's progressive impetus on fundamental freedoms doctrine: PRA Group Europe AS makes it clear that for purposes of identifying a restriction, for establishing comparability and for justification, a combined perspective on the interaction of two sets of rules – here the interest barrier on the one hand and the group contribution regime on the other – is necessary. From that perspective, the interaction of the Norwegian rules on the "interest barrier" and on group contributions leads to unjustified discrimination in cross-border situations.

However, if asked to decide on a similar case, the CJEU might take a different approach. First, the CJEU could take a different perspective on the available grounds of justifications and, e.g., accept the coherence of the tax system as such ground. Second, Article 4 ATAD gives the Member States the option to treat an "interest barrier group" as a single taxpayer and to limit the group perspective to domestic settings. Even if such an option in the ATAD is not viewed as "exhaustive harmonization", one could wonder if the mere existence of the ATAD and the value judgments made by the EU legislature therein could lead to a different outcome in the EU (CJEU) vis-à-vis the EEA (EFTA Court).

We invite you to read the statement and remain available for any queries you may have.

Kind regards,

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