Interest deduction; external loan with which according to art. 10a Wet Vpb financed suspicious legal acts, will be refinanced in 2009 with an also external bond loan, now issued by an affiliated Luxco, and diverted through the US parent of the group; international triple dip, in the Netherlands via the Bosalgat; the interest charges are non-commercial according to art. 8 and 8b Wet Vpb? Limited art. 10a Wet Vpb the interest deduction? fraus legis? If so: saved by EU law (CJEU Groupe Stéria)? Violation of the principle of trust?

Facts: The stakeholder is part of a global concern. It is transparent according to US tax standards. She is the mother of a corporate income tax group. with BV 1 and BV 2 and later also BV 3 and BV 4.
In 2006 to 2008, the fiscal unity borrowed money from a bank syndicate under a Euro credit facility (ECF). The external debt of € 482 million outstanding under the ECF in June 2009 was refinanced in that month with a public bond loan of € 500 million issued by a Luxembourg group company (Luxco). Luxco has lent € 482 million in US dollars (currency risk externally hedged) to interested parties' parent US Inc, which has lent that amount in euros to the interested party, who deposited the money in its joint indirect cash management subsidiary BV 5, which transferred that amount to two loans of € 191 million resp. € 291 million provided to BV 2 and BV 3. In a rescheduling in December 2010, these loans were provided directly by Luxco to BV 2 and BV 3.
The € 482 million ECF loan refinanced in 2009 was used at group level for: (i) capitalization of Irish Ltd 1 by BV 2 and BV 3; with the capital, Ltd 1 bought the Irish Ltd 2 from a group company, (ii) redemption to the [H] Pool (financing for external acquisitions raised by the French group company SA 1 in 1998) by the French group company SNC (in the Netherlands fiscally transparent, but not in France), (iii) capital contributions to subsidiaries, external acquisition, two internal acquisitions and internal expansion of the stake in [M] SpA 2 by BV 2, and (iv) loan to / capital contribution in the French subsidiary SA 2 for the acquisition of the French SA 3.
The dispute is whether the interest on interested parties' debt to US Inc of € 482 million and - after refinancing - on the debts of BV 2 and BV 3 to Luxco of € 191 million respectively. € 291 million is tax deductible, in particular (i) whether the interest charges are business within the meaning of art. 8 and 8b Wet Vpb; (ii) if so, or art. 10a Wet Vpb then prevents interest deduction; (iii) if so, or art. 10a of the Corporate Income Tax Act must then not apply due to incompatibility with the EU freedom of establishment; (iv) if so, whether a deduction can nevertheless be refused due to abuse of law, or (v) whether a refusal to deduct violates the principle of legitimate expectations.

The Court of Appeal of The Hague did not consider the interest charges to be inconsistent because (i) it follows from HR BNB 2016/197 that a group is free to choose whether to finance a participating interest and to choose to place economic interests and (financial) resources in a Dutch company, company, even if that choice is motivated for tax purposes; (ii) the inspector has failed to demonstrate that the funding raised lacks any reasonable grounds, and (iii) interested parties acting in the corporate interest must be deemed to have been carried out in view of the business interests of its own company, so cannot be seen as satisfaction of the shareholder's personal needs within the meaning of HR BNB 2002/290. HR BNB 2017/162 implies that - apart from comparing newly created interest charges against 'purchased' profit - the Bosal gap must be accepted as part of the system of the Wet Vpb. The Bosal gap is a sufficient explanation for the tax benefit from the funding diversions through Dutch companies.

According to the Court, this means that it only concerns the application of art. 10a Wet Vpb. The Court first examines whether EU law (CJEU Groupe Stéria: per-element assessment of the effects of a fiscal unity) prevents the application of art. 10a, by comparing the non-resident daughters with domestically joined daughters. Art. 10a would then continue to apply to (i) the capital contribution in Ltd 1, (ii) the loan to / capital contribution in SA 2 and (iii) the redemption to the [H] Pool, because the acquisition of Ltd 2, the external acquisition of SA 3 and the acquisitions by SA 1 in turn are contaminated legal acts within the meaning of art. 10a. The case of [M] SpA, on the other hand, would not be affected by art. 10a, so that the interested party can deduct the interest under EU law insofar as the loans relate to [M] SpA.

With regard to the other legal acts, the interested party has made it plausible that the interest on both the loan from US Inc to the interested party and on the loan from Luxco to BV 2 and BV 3 was materially due to third parties, so that evidence to the contrary ex art. 10a (3) (a) Wet Vpb has been delivered (HR BNB 2017/156).

The Court has dismissed the reliance on the principle of legitimate expectations unnecessarily.

AG Wattel notes that all art. 10a legal acts took place before June 2009 and that until June 2009 the tax authorities accepted the deduction of the interest on the financing of those legal acts (the ECF loans). He assumes that the tax authorities have started to refuse deduction from Luxco's interim shift in June 2009 because art. 10a of the Corporate Income Tax Act became applicable and he realized that due to the shift of US Inc, the box check of the stakeholder, the existing shift of the SNC and animal hybrid nature, the interest deducted in the Netherlands was
also deducted in the US and France. In June 2009, however, apparently nothing material changed in the amount of external financing and in what was (ultimately) financed with it.

According to the AG, the dispute can then be reduced to two questions: (i) does the deduction of interest also in France and/or the US (double or triple dip) lead to the deduction in the Netherlands resulting in fraud legis? (ii) Do the shifts/refinancing from June 2009 mean that art. 10a Wet Vpb obstructs the previously acceptable deduction?

According to AG Wattel, the answer to question (i) is in the negative, given HR BNB 2014/79 (Australian RPS) and HR BNB 2016/197 (funding freedom: Italian telecom). According to him, the answer to question (ii) is also negative because the Court of Appeal considered sufficient parallelism between the public bond loan issued by Luxco and the internal loans (art. 10a (3) (a) Wet Vpb). According to AG Wattel, the principal appeal thus fails, so that the cross-appeal does not come to light. He nevertheless discusses the individual grounds of cassation.

Ad principal plea (i): the terms of the loans are at arm’s length. Art. 8b The Corporate Income Tax Act does not then play a role according to the AG. It follows from HR BNB 2016/197 (Italian Telecom) that taxpayers are free in their choice of financing their participations and are also free to place (financial) resources in a Dutch group company, also for tax reasons. That freedom is only limited by art. 10a Wet Vpb, in case of fraud legis and withdrawals (favoring shareholder(s) as such). The AG agrees with the Court that intercompany actions in (possibly anti-tax) group interests do not satisfy the private needs of shareholders, so that the loans have not been raised on the basis of non-business (shareholder) motives and also art. 8 Wet Vpb has therefore not been violated. Ad principal plea (iv): it follows from HR BNB 2017/156 that if an associated debt is in fact due to a third party (debt parallelism), the contrary evidence ex art. 10a (3) (a) Wet Vpb has been delivered. The terms, repayment schedules, interest payments, loan size and dates of entering into must be viewed in conjunction, and this is what the Court has done. It follows from HR BNB 2019/98 that the remainder is an opinion on facts and that only accounting coverage parallelism can be sufficient. The Court has applied the correct legal standard and its factual judgment is not incomprehensible or insufficiently reasoned. Principal plea (ii) essentially relies on fraud legis. The interest expenses are not set off against purchased profits and it is not stated that improper tax loss has accumulated on the part of the ultimate recipient of interest. The Court of Appeal’s opinion that sufficient debt parallelism exists implies that, in the end, sufficient charges will be made on the interest or that the question of the countervailing charge is no longer relevant. This implies the incomprehensible opinion that the stakeholder could not, like the stakeholder in HR BNB 2017/162, pump up the Bosalgat as they see fit. The Court has further held factually that loans do not lack any reasonable non-fiscal basis, so that they are apparently not comparable with the outstanding purchase price in HR BNB 1989/217 (holding construction), who did not fulfill any function in any corporate financing and did not change control or equity relationships. Finally, given that essentially the same interest deduction already existed in the Netherlands in 2006 to 2008 and the Court’s parallel judgment, the AG held that the Court could only rule that the predominant explanation for interested parties lies in the - in his opinion incorrect caused by the CJEU - Bosalgat.
Ad principal plea (iii): would art. 10a Wet Vpb or fraus legis do stand in the way of interest deduction, AG Wattel is of the opinion that invoking the EU freedom of movement fails. It follows from HR BNB 2012/213 and HR BNB 2017/162 that anti-tax abuse is not protected by the EU traffic freedoms. Insofar as there is any question of unequal treatment, this is justified by the need, also acknowledged under EU law, to prevent abuse of law. He considers this ground to be well-founded, but that does not lead to cassation because art. 10a Neither Wet Vpb nor fraus legis prevents the interest deduction.

For the sake of completeness, AG Wattel concludes that incidental plea (i) is unsuccessful because the Court rightly compared the imaginary joining of the non-resident participations with a domestic fiscal entity and that the incidental plea (ii) lacks purpose because the Court of Appeal in the question whether the interested party could reasonably interpret statements made by the inspector as a promise of a certain purport, did not disregard the case law on this, while otherwise it concerns a sufficiently substantiated judgment about facts.

Conclusion: principal appeal in cassation unfounded; Conditional incidental appeal not to be considered.

Locations
Rechtspraak.nl
Viditax (FutD), 24-07-2020
V-N Today 2020/1903
FutD 2020-2174

Conclusion

ATTORNEY GENERAL

AT THE

SUPREME COURT OF THE NETHERLANDS

Number 19 /05112
Date July 3, 2020
Tax Chamber A
Subject / period Corporate income tax 1 January 2009-31 December 2010

Nos. Court of Appeal BK-17/00943 to 17/00945
Nos. Court 16/4632 to 16/4634

CONCLUSION

PJ Wattel

in the case of

the State Secretary for Finance

against

[X] BV
And vice versa

1. Overview

1.1 The interested party, [X] BV, is part of the [A] group, a global financial services provider [...]. It is headquartered in the United States and its shares are listed on the [Q] stock exchange.

1.2 The interested party is transparent according to American tax standards as a result of a choice to that effect under the American check-the-box rules.

1.3 It is the parent company of a fiscal entity for Corporate Income Tax (Vpb) with [BV 1] BV (BV 1) and [BV 2] BV (BV 2). [BV 3] BV (BV 3) was the parent company of a second fiscal unity, to which, among others, [BV 4] BV (BV 4) was added. This second fiscal unity was included in the fiscal unity with the interested party as parent as of 1 February 2008.

1.4 In the years 2006 to 2008, the fiscal unity borrowed money from a bank syndicate under a Euro credit facility (ECF). Redemption was guaranteed by [D]. The money has been used for loans and capital contributions to group companies for external, but mainly internal, acquisitions, all of which occurred prior to June 2009.

1.5 The external debt of € 482 million outstanding under the ECF in June 2009 was refinanced in that month with a public bond loan of € 500 million issued by the Luxembourg group company [E] SA (Luxco). Luxco on-loaned € 482 million in US dollars (foreign exchange risk hedged externally) to interested parties parent US Inc, which lent that amount in euros to the stakeholder, who deposited the money in its joint indirect cash management subsidiary BV 5. BV 5 provided that amount in two loans of € 191 million and € 291 million respectively to BV 2 and BV 3. In a rescheduling in December 2010, these loans were provided directly by Luxco to BV 2 and BV 3, so without US Inc, stakeholder and BV 5 in between.

1.6 The € 482 million ECF loan thus refinanced in 2009 was - before June 2009 - used at group level for the following amounts for the following legal acts:
- € 195 million: BV 1 borrowed € 195 million under ECF in 2006 and deposited this amount into BV 2, which in turn capitalized together with BV 3 a newly established Irish Ltd 1 (apparently by them). Ltd 1 used the capital to purchase the Ireland based Ltd 2 from a group company.
- € 45 million: BV 3 and BV 4 founded a French SNC in 2007, which is fiscally transparent by Dutch standards, but not by French standards. SNC merged with its French subsidiary SA 1 in 2008, giving it a bank debt of € 45 million to the cash pool managed by BV 2 ([H] Pool), ie the remainder of an (apparently external) financing that was raised by SA in 1998. 1 was engaged for external acquisitions and was refinanced in 2004 from the [H] Pool. BV 3 lent € 65,000 to SNC under the ECF in 2008 and SNC itself borrowed € 240 million under the ECF, thus taking the bank debt of € 45 million at the [H] Pool. repaid and took over various participations from BV 3 and BV 2.
- € 191 million: BV 2 has (I assume in 2008) borrowed € 191 million under the ECF for (i) capital contributions to subsidiaries in Norway, Singapore and Switzerland, (ii) (apparently external) takeover of [J] BV and (apparently internal) acquisitions of [K] Ltd. 1005 and [L] Ltd. and (iii) (apparently also internal) expansion by 8.71% of its 86.96% stake in [M] SpA held through a transparent Spanish SC.
- € 51 million: in May 2009 Luxco borrowed € 291 million under the ECF, which it lent on under the same conditions to BV 3, which lent it on to SNC under the same conditions. SNC thus repaid its own ECF debt of € 240 million and lent the remainder of € 51 million to its new French subsidiary SA 2 for the acquisition of SA 3, which took place in May 2009 against debt acknowledgment. SA 2 has partially repaid this loan; the remainder has been converted into share capital.

1.7 The interested party (ie the fiscal unity) has charged, among other things, the interest owed on its debt of € 482 million to US Inc in its taxable profit for 2009 and 2010. As of mid-December 2010, it has deducted the interest that its subsidiaries BV 2 and BV 3 owed to Luxco. The inspector declined the interest deduction and corrected the 2009 and 2010 taxable profit upwards accordingly.

1.8 The dispute is whether the interest on interested parties' debt to US Inc of € 482 million and - after refinancing - on the debts of BV 2 and BV 3 to Luxco of € 191 million respectively. € 291 million is tax deductible, in particular (i) whether these interest charges are business within the meaning of art. 8 and 8b Wet Vpb; (ii) if so, or art. 10a Wet Vpb still prevents interest deduction; (iii) if so, or art. 10a of the Corporate Income Tax Act must then not
apply due to incompatibility with the EU freedom of establishment; (iv) if so, whether a deduction can nevertheless be refused due to an abuse of law, or (v) whether a refusal to deduct violates the principle of protection of legitimate expectations.

1.9 The District Court of The Hague has rejected the reliance on the principle of protection of legitimate expectations, and has considered the deduction of interest on the loan provided by US Inc to be excluded in principle by art. 10a Wet Vpb because the interested party has no evidence to the contrary under art. 10a (3) Wet Vpb has delivered. According to the Court, the internal and external debts do not run sufficiently parallel, given (i) the currency risk and (ii) interested parties tax invisibility in the US. Purpose and scope of art. 10a The Corporate Income Tax Act requires, according to the Court, that all steps between the external financing and the taxpayer are investigated, and from the perspective of US Inc there is tax legally no loan to the interested party. The interested party has not demonstrated that the legal acts were predominantly based on business considerations. The countervailing tax test was set up by the Court at US Inc, where no interest received is observed because the debtor (the interested party) is invisible there for tax purposes.

1.10 In spite of this, the Court has ruled that interested parties' appeal is well-founded. To the extent that the loan from US Inc refinanced the acquisition of participations that could have been added to a domestic establishment, the Court finds that the interest deduction restriction is contrary to the EU freedom of establishment (the Groupe Stéria case law of the CJEU).

1.11 With regard to the loans later provided by Luxco directly to BV 2 and BV 3, the Court considered that these conditions are largely the same as those of the external bond loan, which means that in the light of HR BNB 2017/156 that with regard to those loans (although ) to the double arm's length test of art. 10a (3) (a) Wet Vpb has been met. On the Inspector's appeal to fraus legis , the court considered that, according to HR BNB 2017/162, a tax-motivated Bosai hole structure only violates the purpose and purport of the Wet Vpb insofar as interest is set off against purchased profits, which is not plausible in this case. The fact that the interest is also deductible at the French SNC does not conflict with the purpose and purport of Dutch tax law.

1.12 The Court of Appeal of The Hague has upheld the judgment of the District Court, but partly on different grounds. He did not consider the interest charges unprofitable because (i) from HR BNB2016/197 (Italian Telecom) follows that a group is free in the choice of financing a participating interest and in the choice to place economic interests and (financial) resources in a Dutch company, even if that choice is fiscally motivated; (ii) the inspector has not demonstrated that the funding raised is without reasonable grounds, and (iii) interested parties acting in the corporate interest must be deemed to have been carried out in view of the business interests of its own company, so cannot be seen as satisfaction of personal needs of the shareholder according to HR BNB 2002/290 ( Race horses ). HR BNB 2017/162 ( Crédit Suisse), according to the Court of Appeal, entails that - except in the case of discounting newly created interest charges against 'purchased' profit - the Bosai gap must be accepted as part of the system of the Wet Vpb. In this case, the Bosai hole is a sufficient explanation for the tax advantage resulting from the disputed financing divergences through Dutch companies.

1.13 According to the Court, this means that the interest deduction exclusively based on art. 10a Wet Vpb must be assessed. However, the Court first examines whether EU law precludes the application of that provision. In the Italian telecom case the CJEU has ruled that a restriction on the freedom of establishment due to abuse is only justified if that restriction is specifically aimed at preventing that abuse. This is not the case in the present case because the difference between internal and cross-border situations does not only arise from Art. 10a Wet Vpb, but also from art. 15 Wet Vpb (fiscal unity), which has no anti-abuse purpose. Nevertheless, interested parties' recourse to EU law partially fails, namely in respect of (i) the capital contribution in Ltd 1, (ii) the loan / capital contribution in SA 2 and (iii) the redemption to the [H] Pool, because the acquisition of Ltd 2, the external acquisition of SA 3 and the acquisitions by SA 1 are in turn contaminated legal acts within the meaning of art. 10a (1) (c) Wet Vpb. The case of [M] SpA, on the other hand, would not be affected by art. 10a Wet Vpb, so that the interested party can deduct the interest owed to US Inc and Luxco under EU law insofar as the loans relate to [M] SpA. With regard to the other - even after imaginary joinder - still contaminated - legal acts, the interested party has demonstrated that the interest on both the loan from US Inc to the interested party and the loan from Luxco to BV 2 and BV 3 was materially due to third parties, so that evidence to the contrary ex art. 10a (3) (a) Wet Vpb has been delivered (see HR BNB2017/156). The Court of Appeal does not consider the currency difference to be relevant in assessing the parallelism between internal and external financing, as the State Secretary also
A hybrid intermediary such as the stakeholder does not detract from debt parallelism, any more than the mere replacement of one internal loan by another, as long as the internal loans can always be traced back to the external loan.

1.14 The Court has dismissed the principle of legitimate expectations unnecessarily.

1.15 In principle, the Minister proposes four grounds for cassation:

Means (i) : art. 8 and / or art. 8b Wet Vpb have been violated because the Court of Appeal wrongly (a) considers the financing costs to be business-related, based on a too broad concept of 'concern', and did not investigate which other than anti-tax group interest would be served by the diversion of the refinancing, so that its judgment is inconsistent with HR BNB 1989/217, and (b) regards acts in anti-tax group interest as acts with a view to the business interests of interested parties own company.

Means (ii): the Court has wrongly seen the Bosal hole as a sufficient explanation for the tax advantage from the funding diversions through the Netherlands, now that it essentially concerns an anti-tax holding construction as failed in HR BNB 1989/217, and so on . In one case, the distinction between own and purchased profits is less relevant.

Means (iii) art. 49 TFEU has been infringed because the Court wrongly, in particular contrary to the CJEU judgments T Danmark and Others (C-116/16 and C-117/16), upheld that provision without examining whether the triple dip construction stakeholder's concern is aimed at improper tax benefits.

Means (iv) : art. 10a Wet Vpb has been violated because the Court wrongly ruled that (a) the expansion of the interest in [M] Spa, if done domestically, also after refinancing via an affiliated body outside art. 10a Wet Vpb would have fallen, (b) the interest was materially owed to third parties, although when assessing debt parallelism all links between the external financing and the stakeholder must be considered and in this case there is no connection between the external loan and the internal on-loan, and (c) replacing one internal loan with another would not lose the link with the external loan, without nevertheless examining whether, after refinancing, the terms of the new internal loan are still comparable to those of the external loan. bond loan.

1.16 The person concerned proposes, as a component b, or c cassation of principal agent (iv) lead to cassation, conditional cross appeal in, to the effect that:

(i) for 'virtually merged' foreign subsidiaries it is irrelevant for which the capital deposits were used, therefore also not whether that use would be contaminated, now it follows from HR BNB 1989/17 that the comparison with actual merger is not carried through to other elements of the hypothetical addition of the foreign subsidiary. Contaminated legal acts by a non-resident group company fall, according to her, in any case outside art. 10a Wet Vpb because there is no Dutch base erosion;

(ii) the reliance on the protection of legitimate expectations has been wrongly rejected. The Inspector raised the confidence that the structure as it existed in 2006-2008, including the SNC, was fiscally acceptable because, after an investigation, he imposed the assessments for those years on that point in accordance with the returns and because during the assessment and the objection phase 2009 and 2010 expanded with him on art. 10a Wet Vpb because there has been spoken. The judges of fact should not have stopped at the question whether a concrete promise had been made, but should have investigated whether trust had been created in her legally worthy of honor.

1.17 To the list keeps ons, I note the following. From the file I conclude that all but one art. 10a legal acts (external but mainly internal acquisitions) took place before 2009, and that SA 3 was acquired in May 2009, so also before the refinancing in June 2009. I further conclude that until June 2009 the tax authorities will deduct the interest on the financing of those legal acts (the ECF loans). The deduction was apparently only refused from June 2009, when the ECF financing was replaced by the also external bond loan issued by the affiliate Luxco and initially diverted through US Inc. Broadly speaking, two things changed in June 2009: (i) Luxco was placed between the external financing and the stakeholder and (ii) US Inc was placed between Luxco and the stakeholder, with the stakeholder being checked as fiscally transparent in the US. Apparently neither the amount of external funding nor what was financed with it changed materially. The question therefore arises as to why interest deduction was (indeed) refused from June 2009. I gather from the file that the tax authorities from Luxco's interim transfer in June 2009 art. 10a Wet Vpb considered applicable (until that time, borrowing was directly external under the ECF) and realized that due to the offset of US Inc, the stakeholder 's box check , the existing offset of the SNC and animal hybrid character, the interest deducted in the Netherlands was also deducted in the US and also in France.
1.18 In this way, the rather unclear dispute can, in my opinion, be reduced to two questions: (i) does deduction of interest also in France and / or the US (double or triple dip) lead to deduction in the Netherlands resulting in fraus legis? (ii) the postponements refinancings from June 2009 lead to art. 10a Wet Vpb obstructs the previously acceptable deduction? The answer to question (i) is in my opinion negative, given the Australian RPS judgment HR BNB 2014/79 and the finance freedom judgment HR BNB 2016/197 (Italian telecom): in 2009 and 2010 it was not in itself contrary to the purpose and tenor of the Dutch tax law for the taxpayer to construct an international mismatch, unless the interest burden is also separate from that international mismatch, therefore in itself, would artificially relate to a loan (detour) that does not fulfill a real function in the corporate financing of the group. In my opinion, the answer to question (ii) is also negative - also regardless of any application of EU law and also if the financed and after imaginary joinder are still visible legal acts contaminated - provided that on the basis of art. 10a (3) (a) Wet Vpb evidence is provided of sufficient parallelism between the public bond loan issued by Luxco and the internal loans on which the disputed interest was paid.

1.19 The Court ad (i) held that the tax authorities have not proven that there is - in short - baloney loans or - omwegian not covered by your finance freedom judgment HR BNB 2016/197 (Italian telecom) and Bosal gat judgment HR BNB 2017/162 (Crédit Suisse), and ad (ii) that sufficient debt parallelism has been made plausible. Partly in view of your Australian RPS judgment HR BNB 2014/79, both judgments seem to me to be based on correct legal standards. For the rest, in my opinion, these are factual and thus unassailable in cassation, because sufficiently substantiated judgments.

1.20 In my opinion, the principal appeal fails, so that the incidental does not come up. I will nevertheless discuss the individual grounds of cassation of both parties.

1.21 Ad principal plea (i): it is not in dispute that the terms of the loans are at arm's length. Then art. 8b Wet Vpb in my opinion no role. It follows from HR BNB 2016/197 (Italian Telecom) that taxpayers are free in their choice of financing their participations and also have the freedom to place (financial) resources in a Dutch group company, also for tax reasons. That freedom is only limited by art. 10a Wet Vpb and fraus legis and withdrawals (favoring shareholder(s) as such). I agree with the Court that acts of group companies in (potentially objectionable anti-tax) group interests do not satisfy the private needs of shareholders for racehorses, Cessnas or Bentleys (see for example HR BNB 2002/290), so that the loans were not raised on the basis of non-business (in the sense of shareholders) motives and also art. 8 Wet Vpb has therefore not been violated.

1.22 Ad principal plea (iv) I believe that the Court could rule that art. 10a Wet Vpb does not limit the interest deduction either. It follows from HR BNB 2017/156 that if an associated debt is in fact due to a third party, the contrary evidence ex art. 10a (3) (a) Wet Vpb has been delivered. In determining whether sufficient debt parallelism exists, maturities, repayment schedules, interest payments, loan size and dates of contracting must be considered in conjunction and the Court has done so. From HR BNB 2019/98 follows that the answer to that question is otherwise a judgment on facts that you will in principle refrain from, and that also only accounting coverage of the internal by the external loan can be sufficient evidence to the contrary. The Court has applied the correct legal standard and its other factual parallel judgment does not seem to me to be incomprehensible or insufficiently motivated.

1.23 Principal plea (ii) is in essence an appeal to fraus legis (the tax authorities see an anti-tax holding structure), so that the question arises whether there is still scope for this if (a) invoking art. 10a Wet Vpb fails due to sufficient debt parallelism, (b) partly tax-driven group financing via the Netherlands is not in itself abuse (HR BNB 2016/197; Italian telecom) and (c) the Bosal hole must be accepted as part of the system of the Corporate Income Tax Act (HR BNB 2017/162; Crédit Suisse). In fact, the Court has held that the interest expense is not set against purchased profits. It has not been stated that improper tax loss has accumulated in the eventual interest recipient. The Court of Appeal's opinion that sufficient debt parallelism exists implies that, in the end, sufficient charges will be made on the interest or that the question of the countervailing charge is no longer relevant. This implies the incomprehensible opinion that the interested party could not pump up the Bosal hole at their own discretion. The Court of Appeal has also ruled in fact that there is no question of - in short - nonsense without reasonable non-tax grounds, so that the loans are apparently not comparable with the purchase price remaining owed in the holding structure in HR BNB referred to by the tax authorities.1989/217, which had no corporate financing function and did not change anything in terms of equity ratios and control. Finally, given that essentially the same interest deduction already existed in the Netherlands in 2006 before the financing was diverted in June 2009 through
Luxembourg and the US to (also) create dips outside the Netherlands and that the Court's parallel judgment in cassation, in my opinion stands, it seems to me that the Court could only conclude that the predominant explanation for interested parties' advantage lies in the Bosal gap - unjustly caused by the CJEU.

1.24 Ad principal plea (iii): would art. 10a Wet Vpb or fraus legis do stand in the way of interest deduction, then I agree with the Minister that invoking the EU freedom of movement fails. From HR BNB 2012/213 and HR BNB2017/162 follows that anti-tax abuse is not protected by the EU freedoms of movement. To the extent that there would be unequal treatment - contrary to the opinion of the CJEU, persons subject to taxation are not comparable to non-subject persons, and his remarkable assumption in C-398/16 (Italian telecom) that the Netherlands does fight cross-border profit drainage is incorrect but let it run domestically if a fiscal unity is entered into - it is justified by the need, also professed under EU law, to prevent abuse of law. Principal ground (iii) therefore seems to me to be well-founded, but does not lead to cassation because, in my opinion, Art. 10a Neither Wet Vpb nor fraus legis prevents the interest deduction.

1.25 Should you come to it, I believe that incidental plea (i) is unsuccessful because, in my opinion, the Court rightly compared the imaginary merger of the non-resident participations with a domestic fiscal unity; then, according to the Court's findings, contaminated legal acts are still visible. Also incidentally means (ii) missing in my goal since the Court the question whether the person concerned reasonably statements by the inspector as a promise of a certain scope could conceive, your law did not infringe on that, while the remainder of a sufficiently reasoned judgment is about facts that you do not enter.

1.26 I recommend that you declare the Minister's principal appeal in cassation unfounded and that the conditional reasoned judgment is about facts that you do not enter.

2 The facts and the dispute in factual instances

The facts

2.1 The [A] group is a global financial services provider / adviser [...]. In the years at issue, the head office ([D]) was located in the United States and the shares were listed on the stock exchange of [Q].

2.2 Until 1 February 2008, the interested party [X] BV was the parent company of a fiscal unity for corporate income tax purposes together with [BV 1] BV (BV 1) and [BV 2] BV (BV 2). The stakeholder is fiscally transparent by American standards on the basis of an entity classification election, better known as check-the-box.

2.3 [BV 3] BV (BV 3) is the parent company of a second fiscal entity for corporation tax, to which, among others, [BV 4] BV (BV 4) has been added. This fiscal unity has been included in the fiscal unity with the interested party as parent company on 1 February 2008.

2.4 BV 1 borrowed € 195 million in 2006 under a credit facility guaranteed by [D] with a bank syndicate, the Euro Credit Facility (ECF). BV 1 deposited this amount as share premium in BV 2 in 2007, which paid the largest part as capital in BV 3. BV 2 and BV 3 paid the total of € 195 million as capital into a newly established Irish holding company [Ltd 1 ] Ltd (Ltd 1), thus representing Ireland-based [Ltd 2] Ltd. (Ltd 2) from a UK group company for £ 130,851,772.71.

2.5 BV 3 (for 99%) and BV 4 (for 1%) founded the French [...] SNC (SNC) on 28 November 2007, which is fiscally transparent by Dutch standards, but not for French tax purposes. BV 3 sold its subsidiary [SA 1] SA (SA 1) to SNC on 6 December 2007 for € 550 million. The purchase price has not been paid, but has been recognized as guilty. On December 12, 2007, BV 3’s claim of € 550 million on SNC was converted into capital. SA 1 merged with (legally swallowed up by) SNC on January 15, 2008. As a result, SNC obtained, among other things, a bank debt of € 45 million to [A]’s cash pool managed by BV 2 at [H] (Pool). That bank debt is the remainder of a loan, raised in 1998 by SA 1 for external acquisitions, and refinanced in 2004 from the [H] Pool. BV 3 borrowed € 65 million under the ECF on 6 February 2008 and lent that amount on to SNC. On February 6, 2008, SNC borrowed a total of € 240 million under the ECF in two loans: one of € 195 million and one of € 45 million. SNC has thus paid off its residual debt of € 45 million to the [H].

2.6 SNC acquired Ltd 1, [F] NV and [G] from BV 3 on 7 February 2008 for € 255 million (financed from the € 195 million ECF loan and the € 65 million loan from BV 3) and € 5 million additional participation. From this € 255 million, BV 3 repaid its ECF debt of € 60 million and on 7 February 2008 lent € 195 million to BV 1, which also
2.7 BV 2 - presumably in 2008 - borrowed €191 million under the ECF for (i) capital contributions to subsidiaries in Norway (€10 million), Singapore (PM) and Switzerland (PM), (ii) (external) purchase of [J ] BV (€73.4 million) and (internal) purchases of [K]. Ltd. 1005 (€53,997,000) and [L] Ltd. (€13,568,000) and (iii) on December 10, 2008 (apparently also internal) expansion by 8.71% of its 86.96% stake in [M] SpA held through a transparent Spanish SC (€12,115,000).

2.8 [E] SA (Luxco), a Luxembourg-based finance company of the [A] group, borrowed €291 million under the ECF on May 29, 2009. It lent that amount on the same conditions to BV 3, which lent it on to SNC under the same conditions. SNC thus paid off its own ECF debt of €240 million and lent the remainder of €51 million against guilty acknowledgment to its subsidiary [SA 2] SA (new) (SA 2) for the acquisition, on May 25, 2009, of [SA 3] SA (SA 3). SA 2 repaid part of the €51 million to SNC with cash acquired from SA 3; the remainder of SA 2’s debt to SNC has been converted into capital.

2.9 On June 24, 2009, Luxco placed a public bond loan of €500 million. From the net proceeds, it provided a US dollar loan of €482 million to its US sister company [... Inc (US Inc), which holds all shares in the stakeholder. Luxco has hedged the currency risk with an external hedge. US Inc has converted the loan amount back into euros and lent €482 million to the interested party on July 1, 2009, who deposited that amount as capital in its joint indirect subsidiary [BV 5] BV (BV 5), making a direct 99.996% interest in BV 5. BV 5 has provided two loans from this deposit within the fiscal unity: €191 million to BV 2 and €291 million to BV 3. BV 2 and BV 3 thus have their ECF debt or debt to Luxco repaid. Luxco repaid its ECF debt on July 1, 2009.

2.10 On December 13 and 14, 2010 BV 2 and BV 3 each took out a loan under the ECF and thus repaid their debts to BV 5. BV 5 has distributed the net interest income as a dividend and repaid capital for €482 million to the stakeholder, who has still repaid its debt to US Inc on December 14, 2010 including outstanding interest. US Inc, still on December 14, 2010, has paid off its debt to Luxco. Luxco has, still on December 14, 2010, settled the hedge and lent €191 million to BV 2 and €291 million to BV 3.

2.11 In its tax returns for 2009 and 2010, the interested party charged the interest it owed in those years on its debt of €482 million to US Inc to its taxable profit. As of mid-December 2010, it has deducted the interest that its subsidiaries BV 2 and BV 3 owed to Luxco.

2.12 The Inspector has refused that interest deduction and interested parties corrected taxable profit upwards accordingly.

The dispute

2.13 The dispute is whether the interest on the loan provided by US Inc to the interested party in the amount of €482 million and the interest on the loans subsequently provided by Luxco to BV 2 and BV 3 in the amount of €191 and €291 million can be deducted from the interested party. More specifically, it is in dispute whether (i) the interest expense is business expense; (ii) if so, or art. 10a Wet Vpb then stands in the way of their deduction; (iii) if so, or art. 10a of the Corporate Income Tax Act must then remain applicable due to incompatibility with the EU freedom of establishment (CJEU Groupe Stéria); (iv) if so, whether deduction can still be refused on account of fraus legis; and (v) whether the principle of protection of legitimate expectations is violated if no deductions are allowed.

The District Court of The Hague 4

2.14 The District Court rejected the reliance on the principle of protection of legitimate expectations because none of the documents submitted contain a concrete commitment from the Inspector.

2.15 The Court found the interest on the debt to US Inc not deductible under art. 10a Wet Vpb because contaminated legal acts were affiliated refinanced and no counter-proof of arm’s length (Article 10a (3) (a) (b) Wet Vpb) has been provided. Parallelism between the internal and the external loan was lacking due to the currency risk incurred and because the parallelism did not exist under both civil and tax law: all links between the external financing and the taxpayer must be considered and, from the perspective of the US Inc, there is no question of - after all, tax invisible - interested party loan. Nor has the interested party otherwise argued that the legal acts and loans were predominantly based on business considerations. The countervailing tax assessment must take place with the direct creditor (US Inc), but the stakeholder is fiscally transparent.
according to US standards, so that US Inc does not receive anything from it under tax law. The Court considered irrelevant that BV 5 paid to the interested party a dividend received under US tax law by US Inc and taxed there.

2.16 Nevertheless, the Court upheld the appeal of the interested party, based on the EU freedom of establishment, in particular the Groupe Stéria judgment of the CJEU on the possibility for taxpayers to rely only on parts of the fiscal unity regime in cross-border situations. Insofar as the acquisition of participating interests has been refinanced with the US Inc loan and those participating interests could have been added to a domestic branch, the interest deduction limitation of art. 10a Wet Vpb in the current state of the case law of the CJEU not compatible with EU law, according to the Court.

2.17 The Court found the conditions of the loans provided by Luxco to BV 2 and BV 3 largely equal to the conditions of the external bond loan. In view of HR BNB 2017/156, this means that the double arm’s length test of art. 10a (3) (a) Wet Vpb has been paid and the interest deduction is not limited by art. 10a Wet Vpb.

2.18 On the appeal of the inspector on fraus legis, the District Court considered on the basis of HR BNB 2017/162 that in a case such as this only a violation of the purpose and purport of the Wet Vpb occurs insofar as the interest is set off against purchased profits, which is not the case. The fact that the interest is also deductible at the SNC in France does not conflict with the purpose and purport of the Dutch tax law because only the Bosal hole is used to that extent, which, according to HR BNB 2017/162, is not contrary to the purpose and scope of the system of the Wet Vpb.

The Hague Court of Appeal §

2.19 The Court upheld the Court’s ruling, but partly on different grounds. He did not consider the interest charges unprofitable because of HR BNB2016/197 (Italian telecom) follows that a taxpayer has freedom of choice in financing a participation and is also free to transfer its economic interests and (financial) resources to a company established in the Netherlands, even if that choice is determined by fiscal considerations. The inspector has not demonstrated that the funding raised is without reasonable grounds. Stakeholders acting in corporate interests should, according to the Court of Appeal, be seen as acting with a view to the business interests of their own company; it cannot be equated with satisfaction of a shareholder’s personal needs as defined in HR BNB 2002/290 (Race Horses).

2.20 According to the Court of Appeal, it follows from HR BNB 2017/162 that - apart from cases of created interest charges against ‘purchased’ profit - it must be accepted that using the Bosal hole is not contrary to the system of the Wet Vpb. The Bosal -gat According to the Court, even in the contested funding diversions along the Netherlands account for interest’d endes interest deduction benefit. Now that it has been established that interest is not set against ‘purchased’ profits but only against the unit’s own operational profits, the Court sees no scope for the application of fraus legis.

2.21 According to the Court, the deductibility of the interest must therefore only be based on Art. 10a Wet Vpb are assessed. Before doing so, he addresses interested parties’ assertion that that provision should not apply due to incompatibility with the EU freedom of establishment, in particular the per-element approach of the fiscal unity in CJEU Groupe Stéria. The Court finds that the CJEU in the Italian telecom case (joined cases C-398/16 (Italian telecom) and C-399/16 (X BV and N BV, BNB 2018/92; final judgment HR BNB2019/17)) considers a restriction of the freedom of establishment to be justified only by the need to combat abuse if that restriction specifically seeks to prevent that abuse, which was not the case in that case because the difference in interest deduction between internal and cross-border cases did not arise only from art. 10a Wet Vpb, but also from art. 15 Wet Vpb, which has no anti-abuse purpose, so that interest deduction could not be refused on the basis of combating abuse. The CJEU judgment T Danmark and Y Denmark Asp., Joined cases C-116/16 and C-117/16, ECLI: EU: C: 2019: 135, does not alter this, according to the Court, because that case was not about combating abuse as a justification for a restriction of establishment.

2.22 From HR BNB2019/17, the Court infers that a resident mother with a resident daughter, which can be joined, and a resident mother with a non-resident daughter, which cannot be joined, must be compared on the basis of an entirely internal situation, so that an investigation must be carried out or (i) the non-resident subsidiary, if domiciled, could have been added, and (ii) the linked loan by that non-resident subsidiary for a contaminated legal act as referred to in art. 10a Wet Vpb has been used. The Court thus rejects interested parties’ assertion that it would be irrelevant whether the virtually joined non-resident company itself also carried out contaminated legal acts. The Court considers it plausible that Ltd 1, SA 2 and SPA, if domestically established,
could have been merged, [H] pool, because the acquisition of Ltd 2, the external acquisition of SA 3 and the acquisitions by SA 1 were in turn contaminated legal acts, which could not be decontaminated by merging the acquired holdings after acquisition.

2.23 On the other hand, the interest deduction on the loan relating to the SpA would, according to the Court, in a domestic situation not be affected by Art. 10a Wet Vpb because no contaminated action would be observed when adding the SpA. The general statement of the tax authorities that in such a domestic case the interest deduction would be contested on the basis of fraus legis, the Court finds insufficient to rule that the interest would not be allowed to be deducted, so that the interest owed to US Inc and Luxco deductible to the extent paid on loans pertaining to the SpA.

2.24 Then the question remains whether the interest deduction is affected by art. 10a Wet Vpb in the cases referred to in 2.22 in which interested parties fail to invoke EU law (the capital contribution in Ltd 1, the loan / capital contribution in SA 2 and the redemption to the [H] pool). This is not the case if internal financing runs parallel to external borrowing. The Court examined that parallelism on the assumption that the disputed loans are wholly linked to contaminated legal acts. According to the Court, the interested party has, according to art. 10a (3) (a) The Corporate Income Tax Act required proof to the contrary provided by demonstrating that the interest on both its debt to US Inc and that on the debts of BV 2 and BV 3 to Luxco was materially owed to third parties according to HR BNB's standard 2017/156. The Court considers the difference in currency between the internal and the external loan to be irrelevant for the parallelism, as the State Secretary himself propagates. According to the Court of Appeal, a hybrid link in the financing chain does not remove the parallelism either. Nor is the link with the external bond loan lost by the mere replacement of one internal loan by another, as long as the internal loans can always be traced back to the external loan.

2.25 The Court rejected the interested party's alternative reliance on the principle of protection of legitimate expectations on the same grounds as the District Court, adding that no commitment or deliberate position can be read in the internal memos, not even in connection with the audit report, apart from how the interested party could have derived confidence from documents with which it only became known during the objection phase.

3 The case in cassation

3.1 The Minister of Finance has filed a timely and regular appeal in cassation. The interested party has filed a statement of defense and has lodged a separate conditional cross-appeal in cassation.

Principal appeal (the Secretary of State)

3.2 Means (i) eight art. 8 and / or art. 8b Wet Vpb violated because the Court of Appeal wrongly (a) does not assess the financing costs as non-business and (b) regards acting in - outside the stakeholder's own interest - as acting with a view to the business interests of stakeholder's own company.

3.3 Ad (i) (a) the Minister explains that the Court has interpreted the term 'concern' too broadly: without further motivation it is not clear why the interested party would have the freedom to finance group companies in which it had no interest or responsibility. Furthermore, the Court wrongly failed to investigate whether business reasons existed to direct the financing over the Netherlands. The freedom of choice referred to in HR BNB 2016/197 (Italian telecom) cannot, in his view, be interpreted as freedom of arbitrariness and cannot be used to create an interest burden in the Netherlands for anti-tax reasons with non-business legal acts, as in this case. The Court's judgment is therefore incompatible with HR BNB 1989/217.

3.4 Regarding part (i) (b), the Minister is of the opinion that in application of the arm's length principle of art. 8b Wet Vpb (also) important is whether the parts of a group serve their own business interests. He does not consider it commercially viable for a Dutch company to avoid Dutch tax by means of non-business legal acts in order to benefit the group from that tax advantage. The Minister refers to Van Sonderen's annotation to HR BNB 2015/165 (Mauritius) in support of his view that it does not fit into the system of the Corporate Income Tax Act to allow deduction of interest charges on group financing that are artificially and only within the group. have been diverted to countries including the Netherlands for anti-tax reasons.

3.5 Plea (ii) argues that the Court wrongly considers the Bosal gap in the diversions via Dutch companies to be a sufficient explanation for the tax advantage enjoyed by the interested party. The Court in its view HR BNB 2017/162 (paragraph 3.2.3.5) misinterpreted by assumption to assume that any construction which interest
versus *non*-gekochte so *private* profits are put still would be in line with purpose and intent of the law. HR BNB 2017/162 concerned the purchase of profit companies, while in this case there is no (external) purchase at all, so that the distinction between ‘own’ and ‘purchased’ profits is irrelevant. In this case it becomes Bosal gap caused by purely internal hangings, which the Minister considers to be comparable to the frauslegian holding structure in HR BNB 1989/217.

3.6 Means (iii) considers art. 49 TFEU because the Court wrongly granted the invocation of EU law without examining whether the *triple dip* construction is essentially only aimed at a tax advantage. The question is whether the specific facts and circumstances are such that the general prohibition of abuse of rights under EU law precludes an appeal to the freedom of establishment. In his view, the CJEU held in the *T Danmark* judgments that EU law contains a general legal principle according to which individuals cannot rely on EU law to support fraud or abuse.

3.7 Medium (iv)eight art. 10a Wet Vpb violated. The Court has wrongly or unintelligibly ruled (a) that the expansion of the interest in [M] SpA, if done domestically, would not have been affected by art. 10a Wet Vpb, (b) that it would have been made plausible that the interest was materially due to third parties (debt parallelism) without examining all links between the external financing and the stakeholder; according to the Minister, there is no connection between the external loan and the internal loan, and (c) that the mere replacement of one internal loan by the other internal loan does not lose the connection with the external loan, without nevertheless examining whether after the refinancing the conditions of the new internal loan are still sufficiently comparable with those of the external bond loan. The Minister points out that from the judgment of the Court of Appeal in The Hague of 17 April 2018, ECLI: NL: GHDHA: 2018: 951, it follows that stricter requirements are imposed on the debt parallelism than the Court of Appeal has made in this case and that is why in his opinion the Court's judgment incompatible with HR BNB 2019/98, ground 4.2.1. Incidentally, the Minister is of the opinion that debt parallelism can only be an issue if the interested party first demonstrates a real financing need, so that in principle this parallelism is only part of the arm’s length test for external acquisitions; he refers to the conclusion of AG Wattel of 6 December 2018, ECLI: NL: PHR: 2018: 1358, section 6.12.

Defense (interested party)

3.8 In submission (i) under (a) the interested party states that since HR BNB 2002/290 (Racehorses) it has been established that costs incurred by a company are deductible, unless a statutory provision precludes this. It is not disputed that the investments made were financed *at arm’s length*. The borrowed funds were used by the group for business purposes. The Dutch group companies have always borrowed externally. The international *mismatches* stated by the State Secretary are the result of qualification differences that do not affect the Dutch tax (HR BNB2006/82). The Court has rightly ruled that the stakeholder acted in the interest of the group and that this must be seen as acting with a view to the business interests of its company. Under tax law, there is the freedom to organize the financing within a group as desired, and HR BNB 2002/210 confirms that a restriction of the freedom can only be justified in exceptional situations. *Ad plea (i) under (b)*, the interested party considers correct the Court's opinion that also from the point of view of the interested party itself, its actions are not without reasonable grounds. From HR BNB2016/197 (Italian telecom) follows that acting in the interest of the group can be regarded as actions with a view to the business interests of one's own company, so that business is done at a Dutch level. There is no discussion about the arm’s length of the terms and conditions agreed between the group companies concerned and no debt has been created.

3.9 *Ad plea (ii)* the interested party refers to HR BNB 2017/162, from which it follows, in its view, that making use of the Bosal hole is only unacceptable in so far as the overriding aim of tax avoidance creates an interest deduction that is contrary to the system of the Corporate Income Tax Act (Wet Vpb), and that this applies if interest charges are created and settled against purchased profits. This is not the case here. According to the interested party, in this case it is not possible to *rely on fraus legis* because the interest deduction clearly under Art. 10a of the Corporate Income Tax Act, sufficient evidence to the contrary has been provided within the meaning of art. 10a (3) Wet Vpb and not art. 10a Wet Vpb is structured. HR BNB1989/217 was pointed out before the introduction of art. 10a Wet Vpb and that provision is, among other things, a codification of that judgment. Unlike in HR 1989/217, there is a real financing need in stakeholder cases and there are real economic transactions. The inspector, on whom the burden of proof rests, has not indicated which specific legal acts would be contrary to the purpose and scope of the tax law.
3.10 On plea (iii), the interested party notes that the CJEU judgments in T Danmark and Y Denmark Asp. is about refusal of EU Parent-Subsidiary Directive benefits, while her case is about an appeal to freedom of establishment. If there was an abuse, then according to the case law of the CJEU, this does not detract from access to the freedom of establishment. The interested party refers to Case C-417/10, 3M Italia Spa, ECLI: EU: C: 2012: 184, which in its view concerned similar issues and implied that there is no general principle in EU law requiring Member States to combat abuses in the field of direct taxation or to oppose the application of a favorable national provision if the taxable transaction is based on abuse. The Court has rightly ruled that when invoking the freedom of establishment, abuse is only discussed as a possible justification. From HR BNB 2019/17 (Italian telecom, final judgment after CJEU X BV and X NV) it follows that a difference in interest deduction options cannot be justified by the objective of combating abuse.

3.11 Ad agent (iv) the interested party believes that if SpA would have been merged into the fiscal unity on 10 December 2008, art. 10a Wet Vpb would not have been applicable. With regard to the parallelism between the external bond loan and the internal loan (s), the point is whether materially, the issue is ultimately borrowed from a third party. The tax treatment of the intermediate companies is not relevant for that assessment. From the case law on art. 10a of the Corporate Income Tax Act or the rationale of that provision does not follow that a hybrid intermediary would break through an existing debt parallelism. Should the debt parallelism not only exist under civil law but also tax law, then art. 10a Wet Vpb also focus against erosion of the foreign tax base. Incidentally, according to the stakeholder, fiscal debt parallelism should be assessed from a Dutch fiscal perspective: the fact that the stakeholder is transparent for tax purposes in the US does not alter the fact that the loan was in fact provided by third parties. The Court has rightly held that the parallelism has continued. The assertion that the Court of Appeal is wrong to be less strict than your assessment framework in HR BNB 2019/98 is incorrect, because HR BNB 2019/98 refers to the assessment framework included in HR BNB 2017/162 and the Court of Appeal has assessed the debt parallelism with that assessment framework. The statement that parallelism is only important for external acquisitions is incorrect. The interested party refers to the parliamentary history of art. 10a Wet Vpb, literature and the decision of 23 December 2005, no. CPP2005 / 2662M, BNB 2006/90. The interested party also considers incorrect the assertion that the link between the external loan and the internal financing, if it existed at all, was in any case lost since the refinancing on 14 December 2010.

Conditional incidental appeal (interested party)

3.12 In the event that part b or c of principal ground of appeal (iv) leads to cassation, the interested party incidentally proposes two grounds. According to incidental plea (i), art. 49 TFEU infringed by the Court wrongly rejecting the per-element approach in (i) the capital contribution in Ltd 1, (ii) the loan to and capital contribution in SA 2 and (iii) the [H] pool, now also in ‘virtual subsidiaries, as with domestic subsidiaries, is irrelevant whether the capital contributions / loans have been used for legal acts that would be contaminated stand alone. From HR BNB AAfter all, 2019/17 follows that the comparison with a genuine consolidation is not extended to other elements of the hypothetical situation in which the foreign subsidiary would have been merged into a fiscal unity. Contaminated legal acts by a foreign group company fall, according to the interested party, by definition outside art. 10a Corporate Income Tax Act because it does not erode Dutch basis.

3.13 Incidental plea (ii) disputes the Court's rejection of the reliance on the principle of protection of legitimate expectations. The Inspector has certainly raised the confidence that he accepted the structure as it existed in 2006-2008 for tax purposes. In the assessment procedure and in the objection phase, the Tax and Customs Administration has expanded on art. 10a Wet Vpb spoken. The judges of fact should not so much have considered whether the Inspector had made a concrete promise, but rather whether confidence had been aroused in the interested party by law. Moreover, the Court wrongly assumes that the Inspector could not inspire confidence in the interested party during the objection phase.

Defense incidental (the State Secretary)

3.14 The State Secretary is of the opinion that the interested party does not rely on art. 49 TFEU. Incidentally, he is of the opinion that the interested party incorrectly and incompletely quotes HR BNB 2019/17, since it only follows from the unquoted second sentence of ground 2.4.2 that the Groupe Steria case law of the CJEU does not create a permanent establishment to which the object exemption applies. is. The Court has indeed established a correct standard by not including the fiscal profit of the virtual foreign subsidiary to be added in
the comparison with a domestic consolidation, but the consequences of imaginary consolidation for art. 10a (1)
Involve the Corporate Income Tax Association Act. Ro 2.4.2. from HR BNB2019/17 does not exclude that it
remains important whether the virtually joined companies have themselves carried out contaminated legal acts.
This would also be investigated in a purely domestic situation. A different interpretation would lead to
international groups being able to have contaminated legal acts performed by a foreign group company and thus,
unlike domestic companies, art. 10a Wet Vpb can disable. Contaminated legal acts by foreign group companies,
as in the present case, also result in Dutch tax base erosion.

3.15 With regard to the principle of trust, the State Secretary is of the opinion that the interested party could not
derive any confidence from the audit report and the internal memos.

Reply principal (the Secretary of State)

3.16 According to the State Secretary, the Court of Appeal has incorrectly interpreted the concept of 'concern'
within the meaning of HR BNB 2016/197 and the interested party disregards the fact that there are limits to the
freedom of financing within the system of the law. These limits are apparent from HR BNB 1989/217 and also apply if the financed legal acts were commercial (HR BNB 2017/162, ground 3.2.3.5) and regardless of whether those legal acts from the perspective of the group involve equity or loan capital. funded (HR BNB 2015/165). The interested party has not proved that the financing was a corporate decision. Unlike in HR BNB 2017/162, in this case no effective taxation takes place on the disputed interest income.

your pending case with nr. 19/05296, the Secretary reiterated that if there is abuse of law, no appeal can be
done on EU law. The CJEU judgment 3M Italia SpA , to which the interested party refers, has been superseded by the CJEU judgment T Danmark and Y Denmark Asp ., C-116/16 and C-117/16, ECLI: EU: C: 2019: 135 and mandatory to apply the doctrine fraus legis , which also existed in the years at issue, in other words to deny the interested party recourse to EU law.

3.18 The State Secretary reads in the aforementioned conclusion in section 1.13. that there is scope for the
application of fraus legis , even if art. 10a Wet Vpb does not strictly apply, but its standard is being violated. In the application of art. 10a Wet Vpb and fraus legis wrongly focused mainly on the strictly legal context and too little assessment of all legal acts that indicate artificial tax avoidance, also given that there is no compensatory levy. In this application of art. 10a Wet Vpb and fraus legis must check whether commercially meaningless intermediate steps have been taken.

Rejoinder principal (the interested party)

3.19 The interested party repeats that, according to HR BNB 2016/197, a group has freedom of choice in the way
of financing a participation and that tax reasons for engaging a Dutch company are not relevant to the
assessment of the motives in the context of art. 10a (3) (a) Wet Vpb. It also reiterates that international
mismatches are not combated by art. 10a Wet Vpb and not fraus legis . Finally, it reiterates that the (ultimate)
interest income is indeed included in the tax.

3.20 According to the interested party, the assertion that the Court of Appeal misinterpreted the term 'concern'
within the meaning of HR BNB 2016/197 falls outside the legal dispute in cassation and is at least mixed factual
and legal. According to the interested party, the companies that (indirectly) fall under US Inc are also part of
the same group as the interested party. She repeats that her case is not comparable to HR BNB 1989/217
because in her case there is a real financing need and there are real economic transactions. The statement of the State Secretary that, unlike in HR BNB2017/162, the disputed interest income would not be effectively taxed, is incorrect and, moreover, irrelevant for the answer to the question whether the double arm’s length test of Art. 10a (3) (a) Wet Vpb.

3.21 According to the interested party, AG Wattel’s conclusion of January 31, 2020, ECLI: NL: PHR: 2020: 102, to
which the Secretary of State links up, wrongly limits the fundamental right to invoke EU law. It reiterates that freedom of establishment can also be invoked by alleged abusers and that Cases T Danmark and Y Denmark Asp ., C-116/16 and C-117/16, are not relevant as the question is not whether abusive the EU Parent-
Subsidiary Directive is done, but whether the freedom of establishment is obstructed. From T Danmark and Y
Denmark Asp . does not appear that 3M Italia Spais outdated, nor is there an obligation on national courts to
combat abuse. Should such an obligation exist, it would apply to the Member State, which would have to refuse
to apply EU law provisions if an attempt is made to obtain an EU law advantage through fraud or abuse.
3.22 The State Secretary argued in cassation for the first time in his reply that the Court should have considered whether commercially meaningless intermediate steps had been taken in the financing. That is a proposition that requires factual research so that there is no room for it in cassation. Since, according to the Court, there was sufficient parallelism between the internal and external (bond) loan, it cannot be seen that the Court in the context of the application of art. 10a Wet Vpb should have considered whether commercially pointless intermediate steps had been taken. Moreover, according to the interested party, it would be contrary to HR BNB 2016/197 to make a commercially pointless intermediate step as fraus legis see. Now in this case not artificial to art. 10a Wet Vpb has been structured, the comments of AG Wattel on this in his opinion of 31 January 2020 are not relevant in this case. There can be no question of conflict with the purpose and purport of the Wet Vpb because the evidence to the contrary referred to in art. 10a (3) Wet Vpb has been delivered.

Reply incidental (the interested party)

3.23 The interested party repeats that it follows from HR BNB 2019/17 that for the question of whether there is a conflict with EU law, it is not necessary to investigate the 'virtually joined' subsidiaries for which they have used the money. She refers to Marres's note in BNB 2019/17. She believes that the CJEU was not sensitive to the risk of cherry picking that a per-element approach of the fiscal unity could entail. If account were taken of the legal acts performed by the 'virtually joined' daughters, then, according to the interested party, it would be contrary to CJEU Kolpinghuis Nijmegen (C-80/86) and the Dutch principle of legality (see HR BNB 2003/122) a tax liability created by the application of the EU Treaty freedoms.

3.24 The interested party maintains that the Tax and Customs Administration has created a legally relevant confidence in her that the interest deduction was approved.

Rejoinder incidental (the State Secretary)

3.25 Interest deduction abuse such as that at issue is, according to the Secretary of State, combated both domestically and cross-border, and an abuser cannot launder her abuse by invoking EU law. The interested party omits all relevant considerations from T Danmark and Y Denmark Asp. to quote. It follows from paragraphs 82 to 88 that national courts are also obliged to independently assess whether EU law is being abused.

3.26 The argument that the way in which the Court of The Hague applies EU law would create tax liability in cross-border cases is incorrect. It concerns the assessment of the deductibility of Dutch profit from an interest expense entered in the Netherlands. The Court does not include foreign profits in the Dutch tax in any way. The Court was therefore right to co-evaluate the legal acts performed by the virtual joined companies abroad, just as would be the case in an entirely domestic situation.

3.27 According to the State Secretary, no confidence can be derived from documents that the interested party only became aware of during the hearing on 28 October 2015.

4 For the overview

4.1 In 2009 and 2010, the interested party externally refinanced the amount of € 482 million previously borrowed externally under the ECF with an external bond loan via Luxco and until December 2010 via US Inc. The ECF withdrawals had been used for loans to and capital contributions to group companies for external but mainly internal acquisitions. Due to the transition of a French SNC for tax purposes in the Netherlands and, until December 2010, US Inc (which has checked the stakeholder in the US as fiscally transparent), tax mismatches were created, which meant that the group interested parties could apparently deduct the costs of financing those acquisitions three times. ( triple dip: deduction in France; no pick-up in the Netherlands; deduction in the Netherlands; no pick up in the US; deduction in the US).

4.2 I understand the position of the tax authorities that because of the Luxco shift in 2009 art. 10a CITA was activated (until then was borrowed directly external) and not the party itself (real) financing had only got into the flow of funding to the internal verhangingen the Bosal- the gap in addition to (double) deduction elsewhere: according to the tax authorities, the loans were only routed through the Netherlands for anti-tax reasons. He therefore does not consider the interest deductible, because (i) the loans were thereby granted on non-commercial, i.e. anti-tax grounds (solely to enable its group to avoid tax), so that art. 8 and 8a Wet Vpb
prevent deduction, or (ii) the loans and the contaminated legal acts financed by them under art. 10a of the Corporate Income Tax Act, or (iii) interested party ('s concern) has acted in *fraudem legis*, and (iv) no access to EU freedoms exists because EU law does not cover abusive practices.

4.3 From the file I conclude that all but one from art. 10a Wet Vpb, considering that suspicious legal acts (external but mainly internal acquisitions) took place before 2009, and that SA 3 was acquired in May 2009, so also before the refinancing in June 2009. I further conclude that the tax authorities until June 2009, at least before 2009 has accepted the deduction of the interest on the external financing of those legal acts (the *ECF* loans). The deduction was apparently not declined until June 2009, when the external *ECF* financing was replaced by the also external bond loan issued by the affiliate Luxco and initially diverted through US Inc.

4.4 Broadly speaking, two things changed in June 2009: (i) Luxco was placed between the external financing and the stakeholder (its unit) and (ii) US Inc was placed between Luxco and the stakeholder, with the stakeholder *checked* became tax transparent in the US. However, as far as I can see, neither the amount of external funding nor what was financed with it changed materially. The question therefore arises as to why the tax authorities (did) refuse the interest deduction from June 2009. This does not become very clear to me from the procedural documents, but I assume that from the 2009 Luxco shift in 2009 art. 10a the Corporate Income Tax Act considered to be applicable (until then, borrowing took place directly externally under the ECF) and also realized that due to (i) the shift of US Inc, (ii) the *box check* of the interested party as transparent in the US, (iii) the pre-existing shift of the SNC and (iv) the hybrid nature of that SNC, the interest deducted in the Netherlands was also deducted in the US and also in France, which is the obvious reaction: deduction is fine, but not from interest that you already deduct (twice) elsewhere.

4.5 In this way, the tax-technically unclear dispute can be reduced to two questions: (i) does the deduction of the same interest charge also in France and / or the US (*double or triple dip*) lead to interest deduction in the Netherlands leading to *fraus legis*? (ii) the postponements / refinancings from June 2009 lead to art. 10a Wet Vpb obstructs the interest deduction? The answer to question (i) is in my opinion negative, given your *Australian RPS* judgment HR *BNB* 2014/79 and your *finance freedom* judgment HR *BNB*2016/197 (Italian telecom): it is not in itself contrary to the purpose and purport of Dutch tax law for the taxpayer to organize an international *mismatch* if the interest burden is not related to an artificial loan or detour that does not have a real - other than anti-tax - function in the corporate financing of the group. The answer to question (i) is also in the negative, irrespective of EU law (CJEU *Groupe Stéria*) and irrespective of whether the legal acts resulting after the imaginary joining of the foreign subsidiaries are also contaminated, provided that they are contaminated by art. 10a (3) (a) Wet Vpb required proof of sufficient parallelism between the public bond loan issued by Luxco and the internal loans on which the disputed interest is paid.

4.6 The Court ruled ad (i) that the tax authorities have not proven that it concerns - in short - *nonsense loan constructions* that are not covered by the *Bosal* gat judgment HR *BNB* 2017/162 (Crédit Suisse) and your financing freedom judgment HR *BNB*2016/197 (Italian telecom), and ad (ii) that the interested party has demonstrated sufficient debt parallelism. Both judgments seem to me to be based on the correct legal standards and otherwise factual and therefore inviolable in cassation, because they are not insufficiently motivated, although the tax authorities are understandably not convinced. It also seems to me socially not to explain that a global concern in the middle of the state budget crisis, which was caused by the need to keep irresponsible companies afloat, deducts its simple interest charges three times and does not pay tax anywhere, but according to the state of Dutch law cannot remedy this, which underlines the need for international regulatory cooperation, which, among other things, combat international *mismatches* such as the one at issue.

4.7 In my opinion, the principal appeal in cassation fails. I will nevertheless discuss the individual grounds of cassation.

5. **Principal means (i): are the interest charges not businesslike within the meaning of art. 8 or 8b Wet Vpb?**

5.1 Art. 8 (1) Wet Vpb states, among other things, art. 3.8 Income Tax Act 2001 applicable to the determination of the taxable profit for corporation tax. Art. 3.8 The Income Tax Act 2001 provides that taxable profit includes all benefits that are obtained from a company. It follows, according to your case law, that the influence of
shareholder (s) and affiliated entities on the profit of a company must be undone because the results of that influence are not caused by the company's conduct of business by the company but in its connection with those shareholders and connected bodies.

5.2 Art. 8b (1) Wet Vpb read in the disputed years:

"If a body participates, directly or indirectly, in the management or supervision of or in the capital of another body and conditions are agreed or imposed between these bodies with regard to their mutual legal relationships (transfer prices) that deviate from conditions. which would have been agreed in the course of trade by independent parties, the profits of those entities shall be determined as if the latter terms had been agreed upon."

5.3 Art. 8b Wet Vpb is the Dutch codification of the in art. 9 OECD Model Tax Convention established *arm's length* principle that requires intra-group transactions to be accounted for for tax purposes on the basis of prices and conditions that would have been agreed upon by comparable but unaffiliated market affiliated companies.

5.4 It is not in dispute that the conditions of the loan from US Inc to the interested party and those of the subsequent loans from Luxco to BV 2 and BV 3 are *at arm's length* and that (therefore) no non-commercial loans within the meaning of HR *BNB* 2012/37. I do not see what role art. 8b Wet Vpb could still play. If the loan is an anti-tax bullshit loan, as the Secretary of State essentially states, it is not about the arm's length or the inconsistency of the terms of the transaction, but an entirely fraudlegian legal act, where art. 8b Wet Vpb, in my opinion, is not concerned. Art. 10a Wet Vpb and the unwritten prohibition of abuse of rights (*fraus legis*), which the other means are about.

5.5 Then art. 8 Wet Vpb in conjunction with art. 3.8 Income Tax Act 2001. I understand principal plea (i) as meaning that the disputed loans only serve the purpose of diverting in itself real corporate financing along a country with a *Bosal* hole, only for that hole (interest deduction on participation financing without the taxability of participation income in return) Antifiscal, although the same interest costs are already charged to the group's profits in two other countries.

5.6 In your opinion, the system of the IB and Vpb Acts implies that entrepreneurs and shareholders enjoy freedom of enterprise and financing in principle. *You* confirmed this freedom of financing in HR *BNB* 2016/197 (Italian telecom): it is decided in the system of the Corporate Income Tax Act that a taxpayer, also a group, has freedom of choice in financing participations and has the freedom to (financial) resources to be placed in a Dutch group company, even if that choice is motivated by taxation. However, art. 10a Corporate Income Tax Act violates that freedom if an intra-group financing structure ultimately serves a business purpose, but the method of financing is not commercially (anti-tax) motivated:

"2.6.3. (…).

In the first place, it is enclosed in the system of the Act that a taxpayer, in the present case a group, has freedom of choice in the way of financing a company in which he participates (cf. HR 7 February 2014, no. 12/03540, ECLI: NL: HR: 2014: 224, BNB 2014/79).

However, the fact that a deposit of capital in an affiliated entity serves to achieve business-based purposes does not preclude considerations that are not predominantly business-like underlying the method of financing. After the introduction of the double arm's length test laid down in Article 10a, paragraph 3, opening words and letter a, of the Act, the fact that a financing structure set up within a group ultimately serves a commercial purpose does not therefore preclude a loan from an affiliated entity that is part of that financing structure, falls within the scope of the exclusion of interest deduction (cf. HR June 5, 2015, no. 14/00343, ECLI: NL: HR: 2015: 1460, BNB 2015/165).

In the second place, a taxpayer, and in the present case a group, has the freedom to transfer his economic interests and (financial) resources to a company established in the Netherlands, even if that choice is determined by circumstances in the sphere of taxation. Unlike with regard to the aforementioned infringement of the taxpayer's freedom with regard to the choice of his financing structure, it does not appear from the parliamentary discussion of Article 10a of the Act that the introduction of that provision is intended to restrict this second freedom. For this reason it must be assumed that the fact that the Dutch company was engaged by the group for tax reasons, for the purposes of Article 10a (3) (a),
Now principal means (i) pertains to the arm's length nature of the interest charges within the meaning of art. 8 Wet Vpb and not non-arm's length in the sense of art. 10a of the Corporate Income Tax Act of the method of in itself commercially priced and conditional financing, I will suffice with the observation here that interested parties, subject to the application of art. 10a Wet Vpb and possibly fraus legis, enjoys freedom of choice of financing, as well as the freedom to place (financial) resources in a Dutch group company. The judgment is (therefore) more relevant for the principal pleas regarding the application of art. 10a Wet Vpb and fraus legis

5.7 I agree with the interested party that curtailing this freedom of financing is only possible in exceptional situations, namely if the financing acts involved amount to withdrawals or expenditure for shareholder motives. As the conclusion for HR BNB 2014/80 points out, the corporate policy and financing freedom of an entrepreneur and his shareholder(s) can only be infringed by excessive costs that serve the personal needs of the entrepreneur / shareholder. Making use of international mismatches does not make interest costs unnecessary in the sense of art. 8 Wet Vpb in conjunction with art. 3.8 IB Act:

"8.10 Just as freedom of contract exists under civil law, there is freedom under tax law and freedom of entrepreneurial policy: the tax authorities have - except for excessive Cessnas, racehorses and Bentleys - not to interfere with the entrepreneurial policy and therefore also not with the corporate financing policy, neither on the side of the financier, nor on the side of the financed, but to comply with the (actual) financing chosen by those parties. Under corporate tax law, shareholders' equity includes the participation exemption for the recipient and non-deductibility for the payer of the fee (the dividend). Conversely, debt capital includes deductibility and taxability. The main sport in corporate tax is therefore the creation of mismatches between these two regimes, as in the cited Prêt participatif judgment and in the pending case about the Australian Redeemable preference shares."

5.8 The Inspector referred to, inter alia, HR BNB 2002/290 (Race horses) before the judge of fact. That case concerned a private limited company operating an employment agency in the metal industry wishing to charge the costs of keeping racehorses and their participation in trotting competitions against the profit. You have ruled that a company's expenditures are of a commercial nature only if they are made to satisfy the personal needs of the shareholder(s):

"3.3. (…). Contrary to what has been deduced in the literature from the judgment of the Supreme Court of 21 September 1994, no.29 199, BNB 1995/15, expenditure incurred by a company is merely of a commercial nature - and therefore cannot be charged to of profits - if and to the extent that they are made to satisfy the personal needs of the shareholder(s)."

3.4. These judgments and the related conclusion do not, in this sense, show an error of law and, as intertwined with valuations of a factual nature, cannot otherwise be tested for correctness in cassation. (…)."

5.9 The fact that the group to which the interested party belongs benefits for tax purposes from the disputed financing structure through an undesirable triple dip does not, in my view, imply that the loans satisfied the personal needs of the shareholder, as in Racehorses (or in the Cessna judgment HR BNB 2002/210). I agree with the Court that acting in the corporate tax interest cannot be equated with satisfying the personal needs of shareholders / natural persons who love Duindigt or turboprops. The Court's opinion that the financing does not lack any reasonable ground seems to me factual and not insufficiently motivated, now that the burden of proof that it does lack that ground rests on the tax authorities.

5.10 The State Secretary's reference to HR BNB 1989/217 (holding construction; fraus legis) does not seem to me to be accurate in the context of purifying the relationship between participation and shareholder from the influence of private shareholder needs. That case concerned a BV which in December 1978 had bought the shares in a group company with money borrowed from its shareholder established in Curacao. From January 1, 1979, the BV formed a fiscal unity with that participation, as a result of which the interest charges on the loan flowing to Curacao drained the fiscal profit of the participation. The inspector refused the interest deduction. You considered:

"4.3. With regard to the question whether the foiling of the levying of corporation tax (...) is contrary to the purport of the Wet Vpb. '69, the following applies.

4.3.1. If a private limited company finances its business (...) by incurring debts towards third parties, the interest owed in this respect must, in accordance with Article 8, paragraph 1, of the Corporate Income Tax Act. 69 in connection with Section 7 of the Income Tax Act 1964, to be charged to the company's
profits for the purposes of corporation tax; In principle, this also applies to interest in respect of amounts made or left available to the company by the shareholders by way of a loan.

4.3.2. It is implicit in the Court's findings: that the construction followed by the interested party and its shareholder (…) in the present case implies that the interest of [the shareholder; PJW] (...) in [the participation: PJW] has been converted into an interest comprising all shares in the stakeholder as well as an interest-bearing loan from the stakeholder; However, this conversion did not materially alter the financial position of (…) [the holding; PJW], nor in the interest or control of (…) [the shareholder; PJW] in (…) [the investee; PJW], which means that the stakeholder to (…) [its shareholder; PJW] was not intended to contribute to the financing of the company (...) and that the interest due on it was not related to the conduct of that company; (…).

4.3.3. Accepting a construction as referred to above under 4.3.2 as permissible for tax purposes would (…) result in a (…) company being able to charge considerable amounts as interest to its profit at will and thus the levying of corporation tax in full or could be partly thwarted by - if desired repeatedly - without this having any significance for its financial position or for the financial position or the control of those in whom it rests, acting in accordance with the construction referred to. This consequence, which would amount to accepting an interest deduction for which an adequate justification cannot be indicated, is contrary to the purpose and purport of the Wet Vpb. 69. In view of the considerations under 4.3.1,

4.3.4. The circumstance that such an interest deduction, if accepted, would have been made possible by the application of Article 15 of the Vpb. ‘69, does not stand in the way of the foregoing. After all, this article cannot be attributed the purport to enable the deduction of costs that should not be deducted according to the purpose and purport of the law. ”

In my view, it does not follow from this fraus legis judgment on a case in which essentially nothing happened except for an anti-tax effect that if real corporate financing is conducted within a group through the Netherlands within a group of companies, private needs of certain shareholder (s) would be satisfied (so that there would be a withdrawal; thus a disguised dividend). In my view, the reference to HR BNB 1989/217 does not belong in plea (i), but in plea (ii).

5.11 In my opinion, the same applies to the reference to (Van Sonderen’s annotation to) the Mauritius judgment HR BNB 2015/165. 2e The non-business of the ‘non-business diversion’ in that case related to the double arm’s length test in the rebuttal regulation of art. 10a (3) (a) Wet Vpb and not on the arm’s length standard of art. 8b Wet Vpb. The fact that financing may be diverted for anti-tax reasons does not mean that the conditions of that financing are not businesslike in the sense of arm’s length to be. If it were a pricing problem, the tax authorities would not achieve its goal in a stakeholder case, because they do not want to correct the price (the interest), but delete it completely. That is not art. 8 or 8b argument, but an appeal to fraus legis of art. 10a Wet Vpb.

5.12 I therefore believe that principal plea (i) fails.

6 Principal means (iv): state art. 10a Wet Vpb obstructs interest deduction?

6.1 Art. 10a (3) The Corporate Income Tax Act read in 2009 and 2010:

"3. The first paragraph does not apply:

if the taxpayer can demonstrate that the debt and the related legal transaction are predominantly based on business considerations; "

6.2 From EM to art. 10a Wet Vpb follows that if the loan has actually been contracted with a third party, the rebuttal rule of art. 10a (3) (a) Wet Vpb is satisfied: 2f

"As explained (…), the third paragraph, under a, reverses the exclusion from the interest deduction if the taxpayer can demonstrate that the complex of legal acts as well as the loan are predominantly based on business considerations. As an example of a situation in which there may be predominantly commercial considerations, one can think of the case in which a taxpayer whose shares are partly owned by an associated company and partly owned by third parties, for the purpose of a consistent dividend policy the distribution of profit reserves, which distribution is financed by taking out a loan from an affiliated body. Another option is the situation in which there is a loan provided by an affiliated body, while this body in turn borrows from a third. In fact, the loan was then contracted towards a third party. "

6.3 In his Decree of 23 December 2005, the State Secretary already decided that the rebuttal regulation of art. 10a (3) (a) Wet Vpb is met if the loan is ultimately financed externally, i.e., if sufficient debt parallelism (especially in terms of term and repayment schedule) is present: 32

"2.1.2. Parallelism of loan connected persons and external financing

There must be parallelism between the loan provided by the related person and the external financing. This mainly concerns the term and the repayments. Differences in interest payments can be justified if these are based on business considerations. The absence of the intended parallelism may indicate the absence of the link between the internal loan acquisition and the external financing for the acquisition. The burden of proof imposed on the taxpayer applies from year to year. For example, a non-contaminated loan can be contaminated because the external loan is repaid and the internal loan is not. Incidentally, I note that the foregoing also applies to the rebuttal regulation of Article 10a, third paragraph, under a.

6.4 The Memorandum in response to the report on the amendment of art. 10a Corporate Income Tax Act as of January 1, 2007 in the Working on Profit Act states the following about the required debt parallelism, partly in response to the aforementioned Decree of 2005: 33

"The members of the party of the CDA point in the context of the rebuttal scheme of Article 10a to the possibility, laid down for the application of the current provision in the Decree of 23 December 2005, no. CPP2005 / 2662M, UN 2006 / 5.15, that the loan ("debt" in the new provision) and the legal act are commercial if the loan is ultimately financed externally and there is so-called parallelism between the loan and this external financing. These members request confirmation that this policy rule also continues to apply to the situations covered by the new article 10a. The members of the party of the VVD also ask about the non-application of article 10a in eventual external financing. The members of the party of the CDA also ask about the possibility of leaving the requirement of parallelism fall. The requirement of parallelism between the debt and the ultimate external financing is necessary because it must concern situations in which there is a direct link between the two. If that is the case, the amended Article 10a will also not apply."

6.5 The 2005 Decree was updated by Decree of 25 March 2013. 34 Regarding the required debt parallelism, the Decree says:

" 4.2.2 External funding; parallelism loan associated entity (and associated natural persons)

(...).

There may be a successful appeal to the double arm’s length test if the recipient of the interest has taken out an external loan with a view to an external takeover (from the perspective of the group) (see also the judgment of the Supreme Court of 27 September 1995, no. 400, LJN: AA1668). An indication of this is that there is parallelism between the loan provided by the affiliated body or the affiliated natural person, respectively, and the external financing. This parallelism mainly concerns the term and the repayment schedule. Differences in interest payment need not break through the parallelism, if these differences are based on the ‘at arms length principle’. Insofar as a difference in redemption is caused by currency changes, this does not in itself break the parallelism. The absence of the intended parallelism may indicate the absence of a link between the internal loan and the external loan for the acquisition. The burden of proof, which rests on the taxpayer, applies from year to year. A non-contaminated loan can become contaminated, for example if the external loan is repaid and the internal loan is not. Parallelism only exists if the incoming and outgoing loans are parallel under civil and tax law. For example, there is no civil law parallelism if at one of the intermediaries the amount borrowed has not been lent, but has been used as a capital contribution. For example, there is no parallelism under tax law if one or more relevant jurisdictions do not designate the loans as borrowed capital. Parallelism is part of the arm’s length test. If the (parallel) debt is routed through a hybrid entity, which would make interest deductible in more countries, it may not be predominantly business considerations."

6.6 In response to this decision, Van Strien and Elsweier argued that international mismatches, given the purpose of art. 10a Wet Vpb (prevention of Dutch base erosion) does not affect the safe haven of ultimately external hiring: 35

"The parallelism under civil law seems to be (partly) reflected in the non-business diversion (...). This form of parallelism also seems to follow from legal history and case law. In our opinion, it is highly questionable whether this also applies to so-called fiscal parallelism. This is aimed at tax law (foreign) structures. However, the question is whether the presence of ‘disparities’ between countries also implies that there are no business considerations for the application of art. 10a. This certainly does not seem to us to be a foregone conclusion - to put it mildly - but the position of the tax authorities on this is clear. However, the decision offers an escape by stating that in the absence of parallelism 'possible (emphasis JvS / FE) is not possible (is, JvS / FE ) of predominantly business considerations'.

(...).

Now that no attention has been paid in legal history to ‘parallelism under tax law', in our opinion, it is also highly questionable whether in (...) [the example given by the State Secretary with a hybrid loan; PJW] the Supreme Court will follow this (...) new view of the State Secretary. In this example, in the end, borrowing is done externally and there is a link between internal and external financing. The fact that there is no (tax law) parallelism does not detract from this in our view. In addition, if the view of the State Secretary must be followed, the purpose of art. 10a is significantly changed or expanded. This provision constitutes a codification of fraus-legis-law law with regard to loans, in combination with a tightening of that case-law on certain points. In our view, it is essential that both case law and (the legislative history of) art. 10a concerned the prevention of the erosion of the Dutch tax base. Now, with the expansion he advocates, the State Secretary also seems to be focusing on preventing the erosion of the foreign tax base. In our view, art. 10a is not intended above and the State Secretary has interpreted this provision too broadly."

6.7 In HR BNB 2017/156 (Sister Company Judgment) you put the freedom of choice of shareholders to finance their participations with equity capital or borrowed capital and deduced from that starting point that the interest deduction limitation of art. 10a Wet Vpb must be interpreted in a limited way. This means that if the taxpayer makes it plausible that a debt is in fact due to a third party, to the contrary evidence scheme of art. 10a (3) (a) Wet Vpb has been complied with: in your opinion the arm's length of the legal transaction no longer had to be demonstrated separately if there was sufficient debt parallelism. When determining when sufficient debt parallelism exists, it is in any case necessary to consider in conjunction the maturities, repayment schedules, interest payments, size and time of entering into:

“2.4.5.2. When examining the motives for performing the legal act and incurring the debt for that purpose, it is important that the system of the Act stipulates that a taxpayer has freedom of choice in the form of financing a company in which he participates (cf. HR February 7, 2014, No. 12/03540, ECLI: NL: HR: 2014: 224, BNB 2014/79 , and HR June 5, 2015, No. 14/00343, ECLI: NL: HR: 2015: 2167, BNB 2015/165 ). Insofar as Article 10a, paragraph 1, of the Act, read in conjunction with paragraph 3, letter a, of that article, constitutes an infringement of this system by not allowing the deduction of interest owed, this regulation must, also in view of the legal history and the examples used therein are explained in a limited way.

2.4.5.3. What has been considered above implies that it must be assumed that the legislator did not intend to apply the interest deduction restriction in the first paragraph to interest in respect of a debt that has actually been contracted with a third party. This follows in particular from Parliamentary Documents II 1995/96, 24 696, no. 3 , pages 20-21, and Parliamentary Documents II 1995/96, 24 696, no. 8, p. 27, as cited in the judgment of the Court under 4.3.3.4 and in the Opinion of the Advocate General, in sections 4.4 and 4.6. If the taxpayer states, and in the event of dispute, makes it plausible that justify the conclusion that a debt owed by law to an affiliated entity is in fact owed to a third party, that taxpayer has complied with the rebuttal rule of Article 10a (3), letter a, of the Law. This then applies with regard to both the debt and the related legal act, as referred to in that provision. As with the application of the first and third paragraph, letter b, of Article 10a of the Act, when assessing whether such a case occurs, the term, repayment schedule, interest payment, BNB 2016/197, legal consideration 2.7.3). This concerns an assessment of these circumstances in relation to each other (see the explanatory memorandum, Parliamentary documents II 1995/96, 24 696, no. 3, pages 17-18, cited in section 4.7 of the Advocate General's opinion).

(...).
4.2.1. In view of what has been considered above (...), for the interpretation of Article 10a, paragraph 3, letter a, of the Act, the Court of Appeal rightly drew from the development history of this provision the conclusion that the legislature did not intend to limit the interest deduction of Article 10a. of the Act to be applicable to interest in respect of a debt that is materially owed to a third party. (...).

2.3.7.2. Insofar as the ground of appeal disputes the judgment presented above in 2.3.4, it also fails. The Court of Appeal held that [X London Branch] raised funds from third parties in the market for the financing of the loan provided to the interested party, in the form of loan capital, as there is no dispute between the parties. In the light of this finding, it is not inconceivable the Court’s opinion that the parallel between the internal loan from [X London Branch] to the interested party and the external loan from [X London Branch] with which that internal loan was financed is sufficiently plausible to deem. In doing so, the Court of Appeal did not manifest an error of law regarding the concept of parallelism, as described in more detail above in 2.4.5.3.

From this, in particular from ground 2.4.5.3, it seems to follow that the courts of fact have a great deal of discretion in assessing the debt parallelism and that you have not adopted all the criteria stated by the State Secretary in the Decree of 25 March 2013, in particular the requirement of ‘fiscal debt parallelism’.

6.8 According to the government, your judgment in HR BNB 2017/156 could lead to undesirable consequences, as reason for art. 10a Dutch Corporate Tax Act. In the 2018 Tax Plan, art. 10a (3) (a) Wet Vpb added that it must be made plausible that business reasons are the basis for the debt and - regardless of whether it is in fact owed to a third party - also for the related legal act.

6.9 In the years at issue, Art. 10a (3) (a) Wet Vpb is not yet applicable, so in my opinion the Court has rightly assumed that if the interested party demonstrates that the internal loan is in fact due to a third party, the contrary evidence under art. 10a (3) (a) Wet Vpb has been delivered. The decisive factor is therefore whether the internal and external debts run sufficiently parallel.

6.10 Smit notes in FED 2017/123 that with your five parallel criteria (term, repayment schedule, interest payment, size and time of contract) you are more liberal than the Secretary of State in the Decree of 25 March 2013 and then discusses cases in which a qualification conflict leads to double interest deduction or deduction without countervailing tax. He believes that art. 10a Wet Vpb that does not contest:

"If an interesting question that is also addressed in the said decision is whether the requirement of (...) [parallelism; PJW] is paid if, as a result of a qualification conflict, the borrowing and lending leads to a double interest deduction or a deduction without corresponding levy. I would not dare to infer an answer to this question from the present judgment. In a general sense, however, in those cases it seems to me to be a different type of ‘abuse’ than the type of ‘abuse’ for which art. 10a Wet VPB 1969 has been written. Combating by means of a specifically tailored anti-abuse provision seems to me to be more appropriate in that case."

6.11 Although HR BNB 2017/162 (Crédit Suisse) still implied that only accounting traceability from the internal loan to the external loan (accounting coverage parallelism) was insufficient evidence to the contrary within the meaning of Art. 10a (3) (a) Wet Vpb, you seem in HR BNB 2019/98 to consider such a traceability parallel to be sufficient evidence to the contrary. In HR BNB2019/98 you reiterated that when assessing debt parallelism, maturities, repayment schedules, interest payments, size and timing of contracting should be compared in each case. The judge of fact had not disregarded this standard and you considered its application to be intertwined with the valuation of facts that you cannot test for correctness. You stated that the collateral provided is not relevant to the assessment of the parallelism:

"4.2.1. When applying the rebuttal rule of Article 10a, paragraph 3, letter a, Wet Vpb, the question is whether a debt of the taxpayer that is legally owed to a company affiliated with it, is in fact due to a non-affiliated body. As with the application of the first paragraph and the third paragraph, letter b, of Article 10a Wet Vpb, the circumstances of the case must be considered in conjunction with each other. In any case, the term, repayment schedule, interest payment, size and time of entering into the loans must be taken into account (cf. HR 21 April 2017, ECLI: NL: HR: 2017: 640, legal consideration 2.4.5.3). Whether security has been provided for the payment of the debt of the taxpayer to the affiliated entity is irrelevant in this context.

4.2.2. The Court of Appeal did not disregard this in its judgment set out in 3.3.2. Moreover, that judgment does not show an incorrect interpretation of the law. As intertwined with valuations of a factual nature, it cannot otherwise be examined for correctness by the Supreme Court in cassation proceedings. Nor is it incomprehensible or insufficiently motivated. The remedy fails to that extent."

It follows, in my view, that you have chosen the route of detached cassation technique outlined by the Opinion in that case for the debt parallel assessment, namely:

“If the judge of fact only shows that it has (also) looked at the term, repayment schedule, interest payment, size and time of contracting the internal and external loans, in conjunction with each other, any parallel judgment of the judge of fact is in principle good, except if it is incomprehensible. The Sister Company Judgment [HR BNB 2017/156; PJW] allows that easy way and follows that way himself."

It follows that accounting coverage may be sufficient to assume debt parallelism, as long as the judge of fact does not disregard the (relationship between the) five parallel criteria when assessing debt parallelism.

6.12 The editorial office of the UN also concluded that in HR BNB 2019/98 you opted for the easy route of detached cassation technique outlined by the conclusion: 32

“AG Wattel had further suggested that the criterion for the arm’s length test should be that the taxpayers should demonstrate that and which loan (s) was / were externally obtained to specifically (re) finance its activities. In other words: the taxpayer must demonstrate that it has a real financing need and that its internal financier has attracted external money for that financing purpose (see section 6.12 of the AG conclusion). The AG was also of the opinion that from a legal certainty point of view and a litigation economy it would be expedient for the Supreme Court to indicate what those additional requirements above accounting cover are.

The Supreme Court will not take that gauntlet. From ro 4.2.2. de facto follows that, as long as the judge of fact shows that it has taken into account the criteria stated by the Supreme Court in imitation of the legislative history - duration, repayment schedule, interest payment, amount and time of contracting - in its assessment, the factual judgment stands the cassation test. This is different only if the judgment is incomprehensible. Incidentally, we note that the reference included in that legal consideration must not be ground 3.3.2, but 3.2.2. As a result of the freedom that the Supreme Court allows, the judgments of factual courts may also differ in the future with regard to external financing. It is possible that the judges of fact will draw inspiration from the suggested standard of AG Wattel in his conclusion. “scope and time of commencement - having taken into account in his assessment, the factual judgment will pass the cassation test. 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6.13 Marres noted in his annotation to HR BNB 2019/98 as to whether the debt was in fact attracted from a third party: 33

“Who is the actual financier?

1. The importance of this judgment is that it has become somewhat clearer who the ‘actual financier’ is. The identity of the 'actual financier' is first of all important for the application of the rebuttal arrangement of art. 10a paragraph 3 part a Wet VPB 1969. In HR 21 April 2017, no. 16/03669, BNB 2017 / 156c *, the Supreme Court ruled that the taxpayer has already complied with the double arm's length test of that rebuttal arrangement if he demonstrates that a debt which has been legally entered into with an affiliated body, is in fact owed to a third party (i.e. no affiliated person within the meaning of Article 10a paragraph 4 or 5). In that case, according to the Supreme Court, the legal act related to that debt is also predominantly based on
business considerations. Since 2018, the fact that the actual financier is a third is no longer sufficient for a successful appeal to the rebuttal arrangement, but still for proof of the arm's length nature of the debt (not for the legal act as referred to in paragraph 1). Also for the reasonable levy standard in paragraph 3 (b) it is important who the actual financier is, because the compensatory levy of that person must be assessed. Finally, for the purposes of paragraph 1 it is important who the actual financier is: the provision does not apply if neither the formal nor the actual financier is a person related to the taxpayer. It is therefore important for both paragraph 1 and both parts of paragraph 3 who the ‘actual financier’ is. From BNB 2017 / 156c * but still for proof of the arm's length of the debt (not for the legal act as referred to in paragraph 1). 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6. But what is the view of the Supreme Court? Apparently, some degree of parallelism is required to establish that the indirect financier is the actual financier. The Supreme Court considers in the second sentence of paragraph 4.2.2 that the Court of Appeal, with its judgment set out in paragraph 3.2.2, has not shown an error of law. This judgment implies that stakeholders have not demonstrated that 'sufficient parallelism' exists between internal and external financing, or that stakeholders have not made clear that “the characteristics of internal loans and external financing are sufficiently comparable”. The fact that some parallelism is required and that the mere circumstance that money has been indirectly raised from third parties is not sufficient, also follows from the order for reference. It had already been established that the case had actually been hired externally, but the Supreme Court nevertheless referred the case (see also section 6.3 of the Opinion). Little meaningful can be said about the degree of comparability because the Supreme Court leaves this assessment to the fact-finding courts.

(...)

8. A new element is that the Supreme Court explicitly notes that in this context (apparently: in connection with the parallel test) it is irrelevant whether security has been provided to the affiliated entity for the payment of the debt of the taxpayer. This is remarkable because the parties have not (at least not made it known to me) about this and the fact-finding courts have not established or considered anything about it. This consideration of the Supreme Court is apparently a response to the AG’s suggestion to make it clear that it concerns the actual lender and not who the risk bearer is. Earlier judgments of the Supreme Court raised some doubts in
my mind as to whether it concerns the actual lender or the actual risk taker (‘the person who in fact bears the risks associated with being credited’, as expressed in the parliamentary explanations where the Supreme Court referred to in its judgments). Since collateral is relevant to the determination of the risks associated with the creditorship, but not to the determination of the origin of the funds, I infer from this consideration that, as the AG has already argued, it is not the actual risk taker but to the actual lender.

9. Another question is whether parallelism is sufficient, or whether the money is required to be raised for the purpose of the 10a transaction, as the AG (...) argues. In my opinion no indications can be derived from the jurisprudence of the Supreme Court as to the correctness of this position. The emphasis on the criteria ‘term, repayment schedule, interest payment, size and time of contracting the loans’ seems to suggest the opposite. This is remarkable, as it would be impossible to combat an artificial detour that is debt-financed. After all, even in the case of complete parallelism of the characteristics of an internal and external loan, it is possible that the internal loan and the legal act of the taxpayer form part of a completely artificial arrangement.

10. From the above I draw the conclusion (i) that it is crucial to whom the interest is ‘in fact due’, (ii) that that ‘actual lender’ is the actual lender (and not the actual risk bearer), (iii) that in transition situations, only another person (the indirect financier) than the formal financier applies as the ‘actual financier’ if there is a certain degree of parallelism or comparability of the loans, (iv) that in assessing whether this is the case, the must apply the five parallel criteria mentioned above, in conjunction with each other, and (v) that the judge of fact is granted a wide freedom in this regard.

6.14 According to the Court of Appeal, the interested party has made it plausible that the interest on both the loan provided to the interested party by US Inc and the loans provided by Luxco to BV 2 and BV 3 was materially due to third parties and, in my view, has the standard of the (coherence between the) five parallel criteria has not been ignored. That factual judgment does not seem incomprehensible to me. The stricter parallel measure from section 1.14 of the conclusion for HR BNB 2019/98 that the State Secretary wishes has not been adopted by you and therefore apparently rejected. Nor do you have criteria such as ‘fiscal parallelism’ and the absence of international mismatches from the Decisions of the Secretary of State. This seems to me to be inviolable in the Court’s parallel judgment in cassation, unless you would like to revert to the case-law cited, which does not seem likely to me. You apparently want to leave parallel assessments to the judge of fact, who only need to show that attention is paid to at least the five loan characteristics mentioned in relation to each other. No more is necessary. The fact that there is a currency risk, that the financing will flow through hybrid bodies, that one internal loan has been replaced by another and that the interested party did not have a financing need for her own company equal to the amount of the loan ultimately obtained externally, the Court of Justice was obliged on the basis of not to dissuade your case law from assuming sufficient debt parallelism.

6.15 I therefore believe that the principal means parts (iv) (b) and (c) fail. Principal means component (iv) (a) then requires no treatment.

6.16 Principal ground (iv) does not, in my view, lead to cassation.

7 Principal plea (ii): fraus legis?

7.1 Plea (ii) considers incorrect The Court’s opinion that the Bosal –gat adequately explains the tax advantage from the financing channel through Dutch companies. According to the State Secretary, it is essentially a holding structure as in HR BNB 1989/217.

7.2 Remedy (ii) is therefore essentially an appeal to fraus legis, so that the question arises whether there is still scope for this if an appeal to art. 10a The Corporate Income Tax Act fails because there is sufficient debt parallelism, and moreover (a) the funding freedom as referred to in HR BNB 2016/197 (Italian telecom) exists and (b) HR BNB 2017/162 (Crédit Suisse) follows that it is - in my opinion incorrectly Bosal hole caused by the CJEU must be accepted as part of the system of the Wet Vpb. In fact, the Court has found that interest charges are not artificially set against purchased profits as in HR BNB 2017/162 (Crédit Suisse). It has not been stated that the ultimate recipient has improperly accumulated losses. The Court of Appeal’s opinion that sufficient debt parallelism exists implies that, in the end, sufficient charges are levied on the interest or that compensatory levy is no longer relevant. In the judgment of the Court it was therefore concluded that the Bosal hole could not be pumped up by the interested party at their own discretion. Moreover, the Court of Appeal has held in fact that there are no - in short - nonsense loans for which there is no reasonable non-fiscal basis, so that the loans
are apparently not comparable with the purchase price remaining due in the holding structure referred to by the State Secretary in the above (ground 5.10), cited judgment in HR BNB1989/217, which had no function whatsoever in corporate financing and did not change anything in equity positions and control relationships. That cannot be said of the disputed loans: they in any case changed the asset positions.

7.3 Given, moreover, that essentially the same interest deduction already existed in the Netherlands in 2006 to 2008 before the financing was diverted in June 2009 through Luxembourg and the US (to (also) create dips outside the Netherlands) and that, in my opinion, the Court's parallel opinion stands in cassation, it seems to me that the Court of Appeal could not do otherwise than establish that the predominant explanation for interested parties' interest deduction advantage lies in the Bosal gap - completely wrongly caused by the CJEU.

7.4 Because the Bosal gap must be accepted and because HR BNB 2016/197 (Italian telecom) is in agreement with the freedom of financing and the transfer of financing resources to a Dutch group company, there is also no question of a combination of legal acts with an ultimate business purpose in which a step (detour) which - beyond its anti-tax effect - is redundant and can lead to arbitrary and continuous tax avoidance, as in HR BNB 1996/4. In other words: the stakeholder can not manipulate the Bosal hole as they see fit, as the stakeholder in HR BNB 2017/162 (Crédit Suisse) could.

7.5 Nor does the use of international disparities (mismatches) in the classification of money transfers or legal forms lead to conflict with the purpose and purport of Dutch tax law. HR BNB 2014/79 concerned a payment received in the Netherlands on redeemable preference shares (RPS) issued by an Australian group company that replaced a claim from, among others, the stakeholder on that Australian company. The fee on the RPS was seen in Australia as deductible interest and in the Netherlands as an exempt participation dividend. The fact that a double dip arose due to the qualification difference did not conflict with the purpose and purport of the Dutch Corporate Tax Act:

3.4 Submission II (...) argues that the Court of Appeal violated the law, in particular Article 13 of the Act and Article 8:77 of the Awb, by holding that by converting the long-term loan into the RPS and subsequently designating the RPS as a participation does not conflict with the purpose and purport of the Law, because if insufficiently contradicted, it is established that the conversion had no real economic significance and the outcome leads to a leak in the taxation of the group profit.

The remedy fails. The judgment of the Court does not give evidence of an erroneous conception of the freedom of choice of the interested party in the form of financing a company in which it participates. Taking into account the purport of the participation exemption, the use of that freedom of choice does not constitute an act contrary to the purpose and purport of the Act."

7.6 I believe that principal plea (ii) also fails.

8 Principal remedy (iii) and incidental remedy (i): the EU freedom of establishment

8.1 The EU freedom of establishment is not relevant if art. 10a Wet Vpb does not prevent the interest deduction because there is sufficient debt parallelism and the interest deduction is also not prevented by fraus legis. In my opinion, therefore, means (iii) does not get through. I will nevertheless get to it in case you get to it.

8.2 As art. 10a Wet Vpb or fraus legis (does) prevent the interest deduction, then I agree with the Minister that the EU freedom of movement does not change that. In HR BNB 2012/213 considered that interest deduction is not prevented by art. 10a Wet Vpb, deduction can still be prevented by fraus legis, and you confirmed HR BNB 2004/142, in which you ruled that the EU freedom of capital movement cannot be effectively invoked in the evasion of national tax law:

“3.3.5. The Court rejected the interested party's position that limiting the interest deduction on the basis of the doctrine of evasion is contrary to Article 56 EC.

(...)"

3.4.2. Insofar as the complaints are directed against the judgment set out in 3.3.5 above, they cannot lead to cassation, as that judgment is correct. The fight against evasion of national tax law requires no other justification than the finding, which is tailored to the specific case, that such evasion has taken place. In view of the case law of the Court of Justice of the European Union, there is no reasonable doubt that in
the event of circumvention of national tax law it is not valid to invoke the (...) Treaty on the Functioning of the Tax Code. European Union guaranteed free movement of capital (cf. HR 23 January 2004, no. 38 258, Lijn A10739, BN 2004/142). “

8.3 Also in the aforementioned Credit Suisse cases, HR BNB 2017/162, you confirmed the Court’s opinion that no claim can be made on the EU freedom of movement by a taxpayer acting fraudulently:

“3.3.2. The second plea of interested parties I disputes the judgment of the Court, as set out above in 3.3.1, that the refusal of the interest deduction is not contrary to European law. To this end, the plea in law argues that there would be no conflict with the purpose and purport of the Wet Vpb if interested parties had entered into the debts with and / or had invested the funds obtained by entering into those debts in companies established in the Netherlands. The plea further argues that the Court’s judgment that, even if there is abuse, there is no recourse to European law.

3.3.3. The remedy fails. As considered in 3.2.3.6 to 3.2.3.12 above, allowing the interest deduction would, in short, lead to an unacceptable thwarting of the tax that would be payable by interested parties in respect of the at the time of the acquisition. profits already made by them, so that by applying the doctrine of fraus legis that deduction is prevented to that extent. It is settled case law of the Court of Justice that in the event of abuse or fraud, individuals cannot rely on Union law (see for example CJEU 3 March 2005, Fini H, C-32/03, ECLI: EU: C: 2005: 128, para 32 and the case-law cited there). Union law may also not be applied so broadly as to cover abuse (cf. CJEU 21 February 2006, Halifax pic and others, C-255/02, ECLI: EU: C: 2006: 121, paragraphs 69 and 70 and the case-law cited therein). All this entails - as the Court has rightly considered - that the present actions of interested parties, contrary to the purpose and purport of the Wet Vpb, justify a restriction of the treaty freedoms. “

8.4 The conclusion of January 31, 2020 in the pending acquisition finance with you in case no. 19 /02 596 argues rightly in my view that the application of Art. 10a Wet Vpb, as interpreted by you (taking into account the specific facts and circumstances and the anti-abuse objective) and possibly from fraus legis, is consistent with the way in which the CJEU assesses EU anti-abuse justifications for EU free-traffic-obstructing national measures, given your judgment HR BNB 2013 / 137. Incidentally, I believe that there is no unequal treatment between the cross-border situation (no joinder possible) and the internal situation (joinder possible): contrary to what the CJEU apparently believes, persons subject to tax are not comparable to persons who are not subject and it is incorrect - curious - assumption in CJEU C-398/16 (Italian telecom, BNB 2018/92) that the Netherlands would combat soil slaughter erosion in cross-border cases but would not combat inland cases if a fiscal unity is established. The CJEU apparently did not realize that Art. 10a Wet Vpb, in that case the abuse contested could (almost) only occur across borders or did not believe that it concerned abuse (see sections 1.9, 1.12, 1.13 and 1.14 of the conclusion for HR BNB 2019/17). Principal plea (iii) therefore seems to me to be well-founded, but in my opinion it is not relevant because unfortunately art. 10a Neither Wet Vpb nor fraus legis prevent the interest deduction.

8.5 Incidental plea (i) alleges violation of art. 49 TFEU because the Court wrongly rejected invoking the per-element approach of the tax entity ex CJEU Groupe Stéria with regard to the interest deduction on the loans to the extent used for the capital contribution in Ltd 1, the loan to / capital contribution in SA 2 and the repayment at the [H] pole. According to the interested party, HR BNB 2019/17 follows that with the Groupe Stéria‘virtually joined’ non-resident subsidiaries do not need to be investigated whether they have used the funds for contaminated transactions, as it follows from that judgment that the comparison with a domestic fiscal unity is not taken so far as to assume a foreign permanent establishment after imaginary addition of a foreign subsidiary. In addition, according to the interested party, non-resident subsidiaries could not be subject to Dutch soil slaughter erosion. In my opinion, an attempt is made with this argument to eat from two walls. That you in HR BNB2019/17 - incorrectly in my opinion - did not assume a permanent establishment in the imaginary joinder of non-resident subsidiaries (as a result of which the internal debt was - incorrectly in my view - not allocated to that permanent establishment) in no way implies that in EU law imaginary joinder it would be irrelevant what the virtual associates did with the money. After all, this is indeed relevant in the case of entirely domestic fiscal units - which must be compared in order to provide the national treatment required by EU law. The Court, I believe that HR BNB 2019/17 does not mean more than that no foreign vi adopted (think body to leave accrual and prevent complications to avoid or to the legislature about), and the remainder
is indeed national treatment is granted, so the same treatment that would be granted in a completely domestic case of (real) joinder, including the application of art. 10a Wet Vpb on contaminated legal acts of the addressees.

8.6 If you were to do so, then incidental plea (i) would fail in my opinion.

9 Conditional incidental plea (ii): breach of the principle of trust?

9.1 In my opinion, you do not get around to this plea either.

9.2 In answering the question whether the interested party could reasonably interpret certain statements of the inspector as a promise of a certain purport, the Court has, in my opinion, the criteria from your case law on what a promise is and under what circumstances confidence can be derived from it contra legem correctly applied, such as in particular the standard judgments HR BNB 1979/311 and HR BNB 1984/240 and your most recent judgment HR ECLI: NL: HR: 2020: 1069.

9.3 For the rest, in my opinion, this is a by no means incomprehensible or insufficiently motivated judgment about facts that you do not enter into.

10 Conclusion

I propose that you declare the Minister's principal appeal in cassation unfounded and that the conditional cross-appeal of the interested party should not be considered.

The Attorney General at the
Supreme Court of the Netherlands

Advocate General

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1 CJEU, joined cases C-398/16 and C-399/17 (X BV and N BV); your final judgment HR BNB 2019/17.
3 Also referred to as [SA 3] SA.
7 CJEU, Joined Cases C-116/16 and C-117/16, ECLI: EU: C: 2019: 135.
9 The interested party refers to: Marres, Profit drainage through interest deduction, 2008, p. 164; Kok and De Vries, 'Profit drainage perils', WFR 2014/116; Vleggeert, Course Tax Law Vpb.2.2.3.E.b3; Marres' annotation to BNB 2013/137; Ruijschop, 'Decision on the application of art. 10a Wet VPB 1969', NTFR 2013/806; Van Strien and Elsweier, 'The new' art. 10a decision '; the reins are tightened ', NTFR 2013/9.
From the findings of the facts by the District Court and the Court of Appeal, I conclude that the 2006, 2009 and 2010 assessments are in dispute, 2006 apparently in connection with the carry-back period (Article 20 Wet Vpb). In defense in cassation, the interested party states the following, as in the context of her reliance on the principle of trust: 'The SNC structure (as well as the financing structure with deduction of interest on the (ultimate) external debt) already existed in the years before 2009 and is, after an extensive due diligence investigation covering the years 2006 to 2008, accepted by the tax authorities in those years. 'The footnote states: 'See, among other things, part 4 (and appendix 5) of the statement of defense before the Court of 5 July 2016.'

Richtlijn (EU) 2016/1164 van de Raad van 12 juli 2016 tot vaststelling van regels ter bestrijding van belastingontwikkelingspraktijken welke rechtstreeks van invloed zijn op de werking van de interne markt, PbEU 2016, L 193/1 (ATAD 1); Richtlijn (EU) 2017/952 van de Raad van 29 mei 2017 tot wijziging van Richtlijn (EU) 2016/1164 wat betreft hybridemismatches met derde landen, PbEU 2017, L 144/1 (ATAD 2)

Zie bijvoorbeeld HR 31 mei 1978, nr. 18 230, na conclusie Van Soest, ECLI:NL:HR:1978:AX2866, BNB 1978/252 met noot Hofstra (Zweedse grootmoeder), waarin u oordeelde: "dat het Hof hiermede tot uitdrukking heeft gebracht dat het aan belanghebbendes dochter opgekomen voordeel, bestaande uit het niet verschuldigd worden van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; 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dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien van rente over de haar door de grootmoedermaatschappij verstrekte lening, zijn oorzaak niet vond in de bedrijfssuitoefening van belanghebbendes dochter doch uitsluitend in de vennootschappelijke betrekkingen tussen de drie bedoelde vennootschappen; dat het Hof terecht dit voordeel niet tot de winst heeft gerekend, aangezien of
27 Voetnoot in origineel: “Anders M.H.C. Ruijschop in zijn commentaar bij het besluit in NTFR 2013/805, hij meent dat dit past bij het antisbruik karakter van art. 10a.”
29 Zie o.a. de NnaV, Kamerstukken I 2017/18, 34785, D, p. 11-12.
33 BNB 2019/98.
34 Voetnoot in origineel: ‘R.o. 2.4.5.3; zie met name de zin die begint met ‘Evenals’.”
36 Voetnoot in origineel: “De woorden ‘[d]at oordeel’ slaan terug op ‘dit met zijn in 3.3.2 weergegeven oordeel’. Het arrest kent echter geen r.o. 3.3.2. Uit de context blijkt dat r.o. 3.2.2 moet zijn bedoeld (vgl. het commentaar in V-N 2019/16.9).”
37 Voetnoot in origineel:“Zie onderdeel 6.11 van de conclusie, en de literatuur waaraan aldaar wordt gerefereerd.”
38 Voetnoot in origineel:“Zie mijn noten in BNB 2016/197 c, punt 14, en BNB 2017/156 c, punt 5, waarin ik de voorzichtige conclusie trok dat de Hoge Raad van belang leek te achten wie de feitelijke geldverstrekker is.”
39 Voetnoot in origineel:“Zie ook het slot van het commentaar van Van Lindonk in NLF 2019/0831.”
