

C-484/19 Lexel in new perspectives

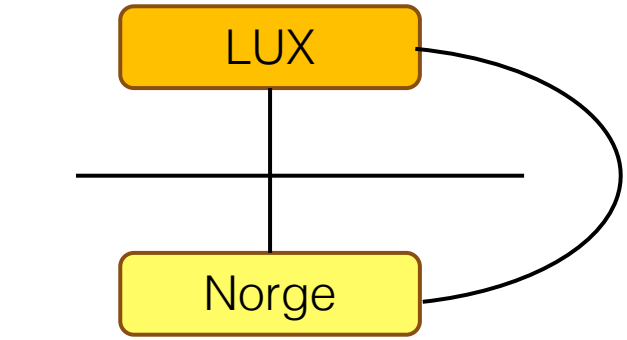
CÉCILE BROKELIND

Latest news

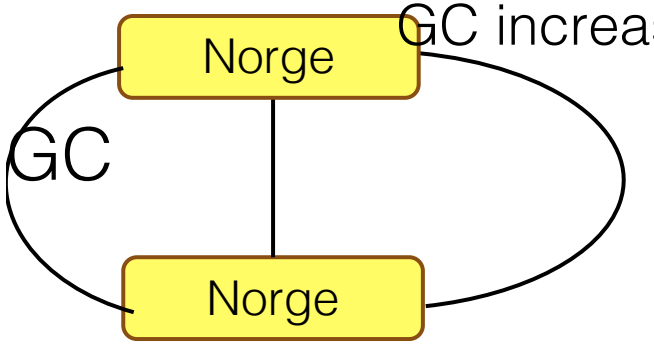
- C-585/22 NL HD 2 September 2022
- section 10a §1 c interpretation against background of Lexel AB C-484/19 ART. 49& 63 TEUF
- Direct or indirect influence > 33% and interest taxed < 10% in the hands of recipient
- Question of whether ALP interest level exonerates taxpayers from abuse presumtion

EFTA court- PRA-group E-3/21- 1 June 2022

Limited interest deduction 30% EBIDTA



GC increases EBIDTA



No limitation

- Norwegian rules= Swedish
- ATAD art 4. (30% EBITA)
- Restriction art. 31 EES-avtalet
- Justified for need to prevent abusive practices but only to the extent > ALP's level of indebtness

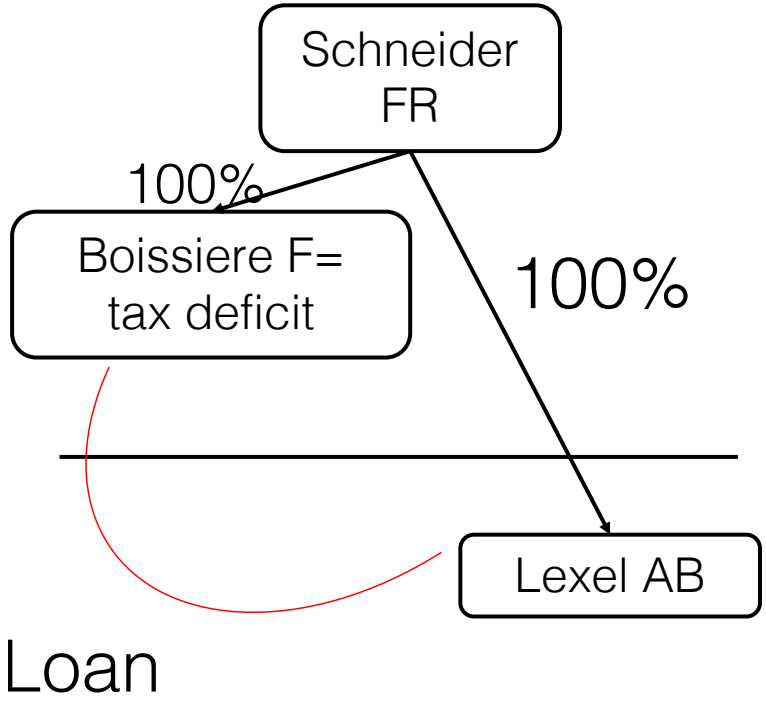
Swedish background info



Swedish rules in dispute

- Gerenal right to deduct interest expenses (ITA 16:1)
- Associated companies (significant influence) MAY NOT deduct (ITA 24:10a-e)
  - Unless recipient taxed at a min of 10% (24:10 d), then deduction granted. However, in presence of substantial benefit, the taxpayer must show that the loan is 75% busines motivated)
  - If 10% N/A , and if the main reason (75%) for incurring the debt is that the group of associated companies would receive a substantial tax benefit, then no deduction for interest expenses may be made either (24:10 e) (EEA) *more difficult to show*

LEXEL 2020



- 10% taxation fufilled
- Tax advantage predominant (offest interest against tax losses in FR)
- Restriction= In practice no limitation when group contribution OK=>**Borrower's tax residence decisive**
- Justification grounds
  - Allocation taxing powers (no)
  - Abusive practices (yes but no)
  - Both together (no)

Before and… after Lexel

2013

”mainly tax motivated”

2014 Commission’s proceedings

2019

”Exclusively tax motivated transactions”

2020 LEXEL

2020= HFD ruling in return of C-484/19

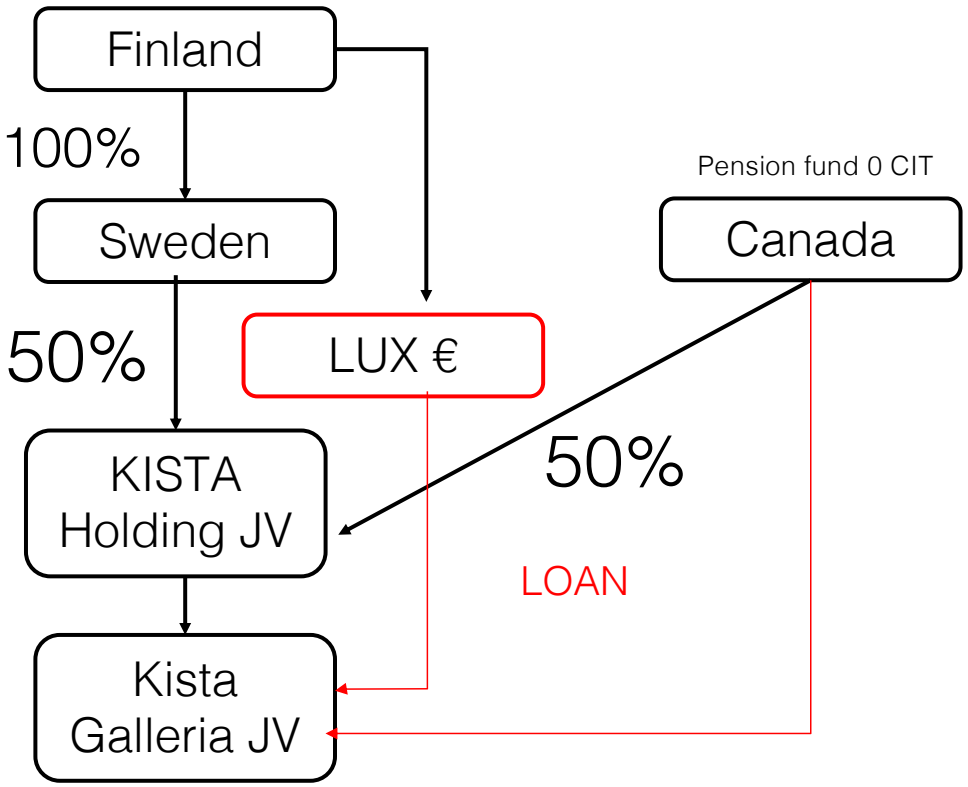
2021= HFD applies Lexel in Inspecta AB (19-10) (Group contribution had been granted)

2022= Appeal courts rulings on situations involving third states lenders/ultimate parents

Court of Appeals rulings

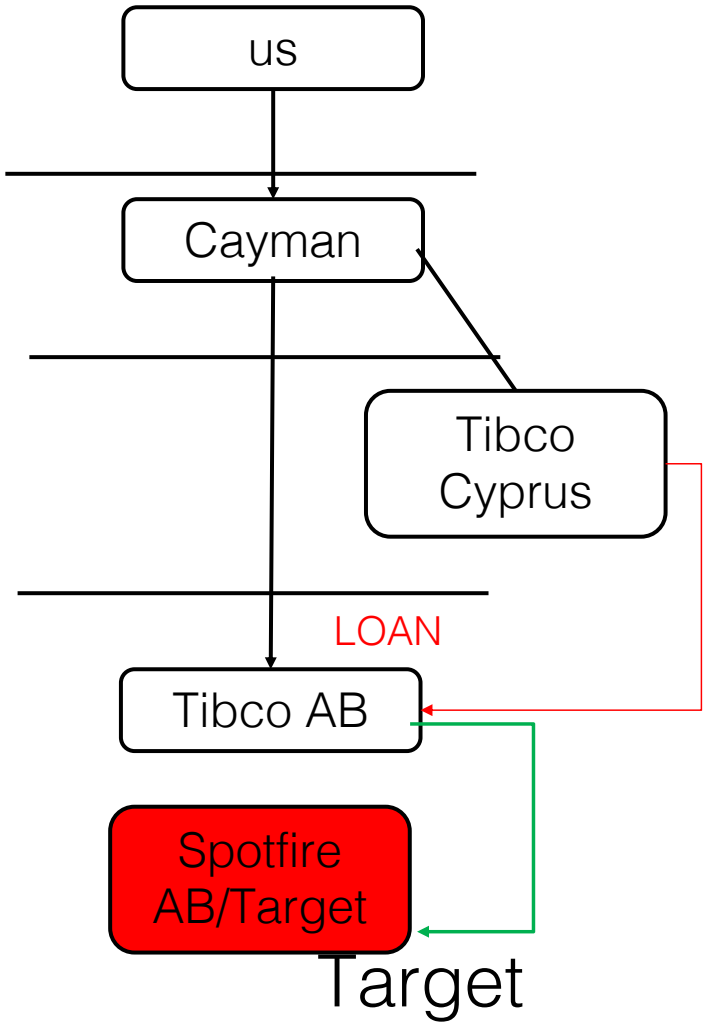
- Zinkgruvan KR Göteborg 3505-3509-18 28 jan 2022
- Tibco Sweden KR Göteborg 849-851-19, 28 jan 2022
- Kista Gallerian KR Stockholm 8374-20,18 aug 2022

KISTA 18-8-22



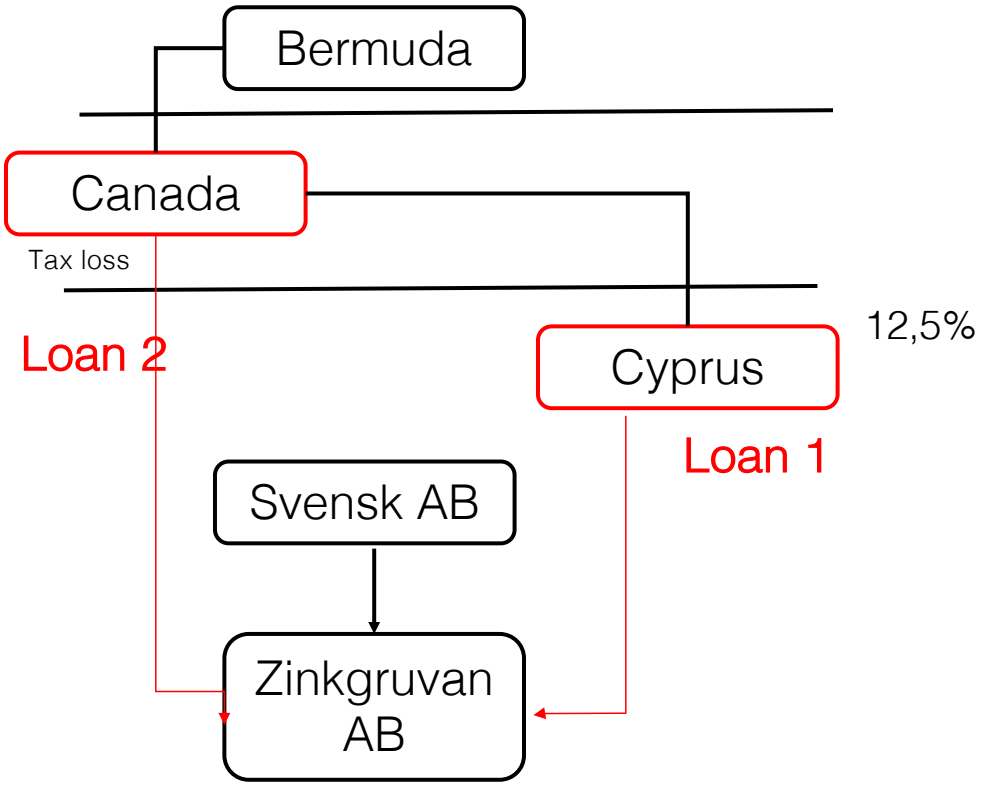
- JV Canada/Sverige
- Interest 6%
- Internal finance bank LUXArt.63 TEUF N/A (Art. 49 TFEU applicable only)
- 2013 rules. Neither 10% nor exception applicable
- No commercial purpose SINCE tax advantage (Canadian fund untaxed)
- No group contribution (requires 95% ownership)=> no Lexel situation
- Leave to appeal asked for on 31 October

TIBCO 28-1-22



- External acquisition- Internal loan market level
- Adm. County court refers to OYAA=> 63 N/A
- Court of appeals refers to thin cap GLO
- No right to group contribution since PC in third country=> Lexel N/A
- No leave to appeal

ZINKGRUVAN 28-1-22



- First loan shifted to Canada, becomes loan 2
- Claim on Canadian PC but internal bank in Cyprus
- Market based % interest
- No right of establishment for Canadian lender, only art. 49 applies.
- No leave to appeal

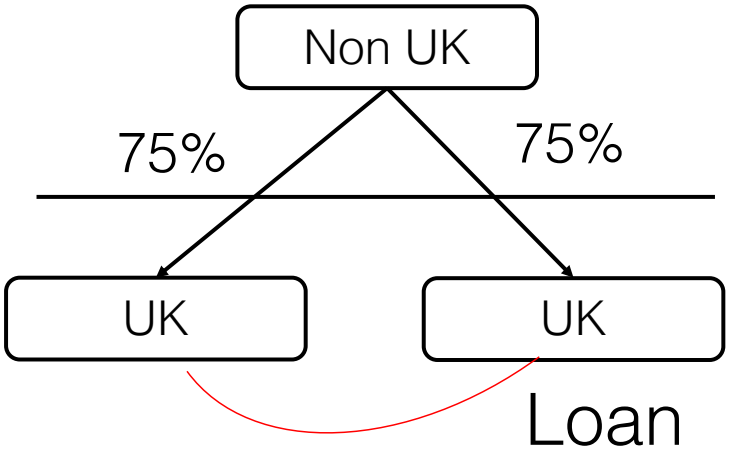
TFEU 63, 49 or both?

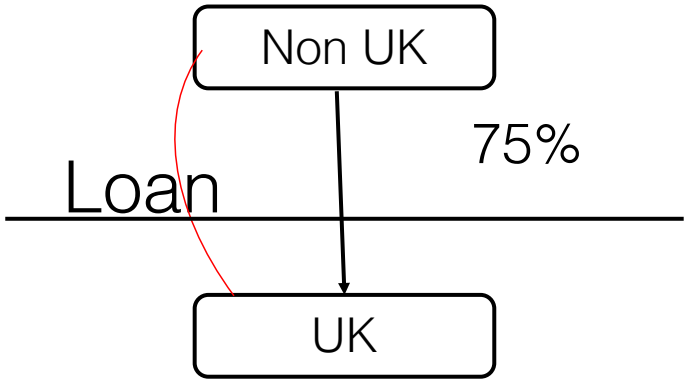


EUD case law

- 2007 THIN CAP GLO C-524/04
- 2011 FII GLO 2- C-35/11
- 2013 ITELCAR C-282/12
- 2019 LEXEL C-484/19
- 2022 PRA group E-3/21
- C-436/08 Haribo § 37
- BO cases C-115/16, C-118/16, C-119/16 C C-299/16 Z §. 158
- C-342/20 A SCPI
- C-707/20 Gallhaler pending

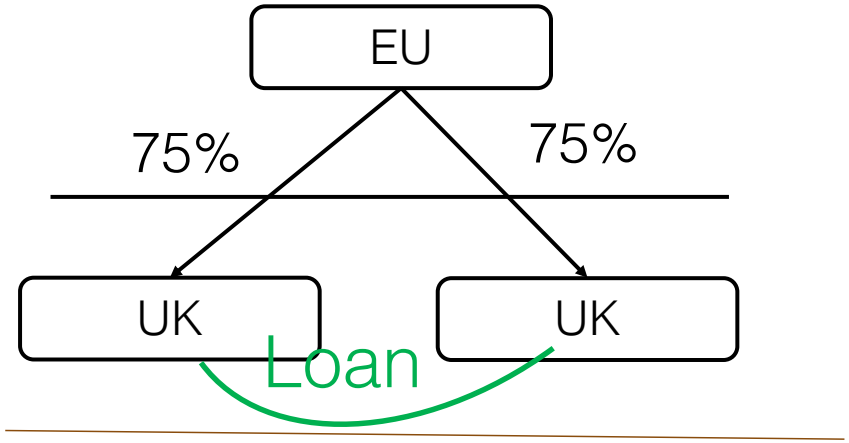
Thin Cap GLO 2007 : 63 N/A

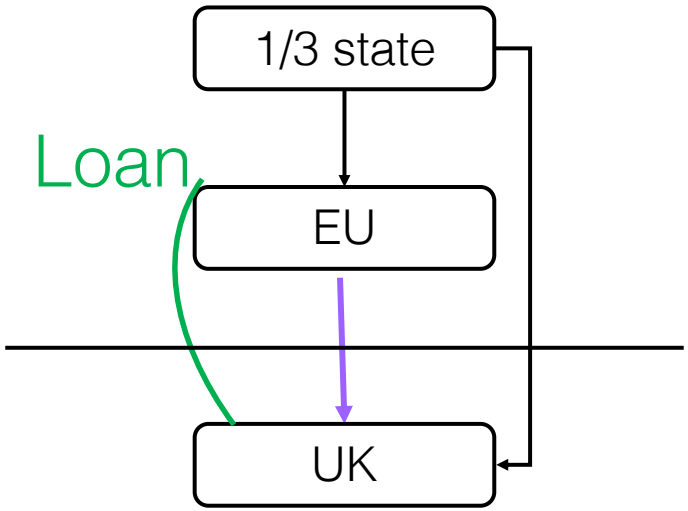


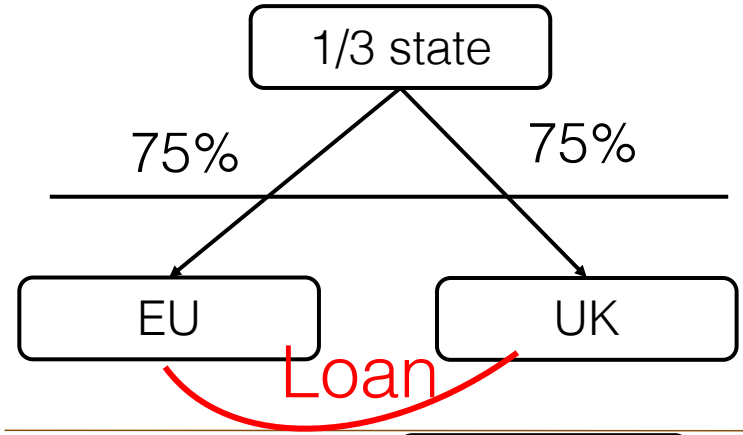


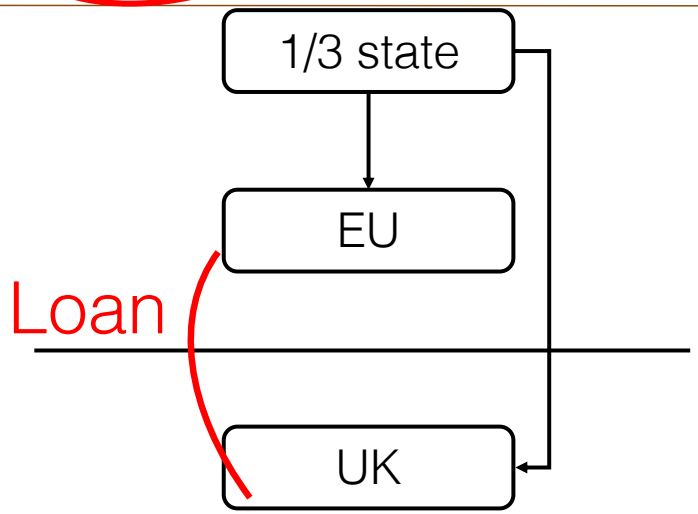
- Thin cap => Interest treated as ND dividend (ACT)
- Even when the interest is market based
- Unless DTA provide that loan or interest are at ALP level
- Change1995= N/A if Recipient pays CIT in the UK
- Change 1998= Applies TP rules as threshold when decisive advantage is found
- Para 23: 49 or 63 FEUF?
- Art. 49 TFEU only

AG Geelhoed inThin Cap
GLO Art 43 …….. Or not

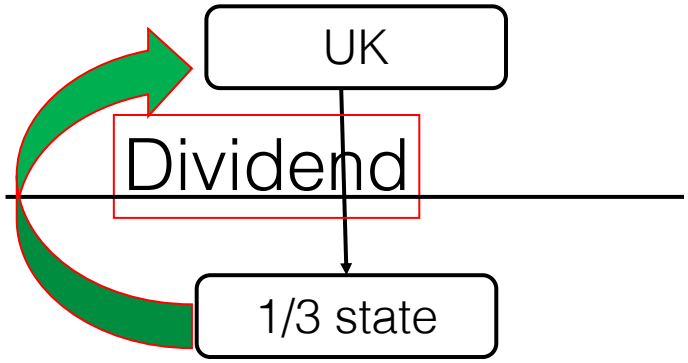






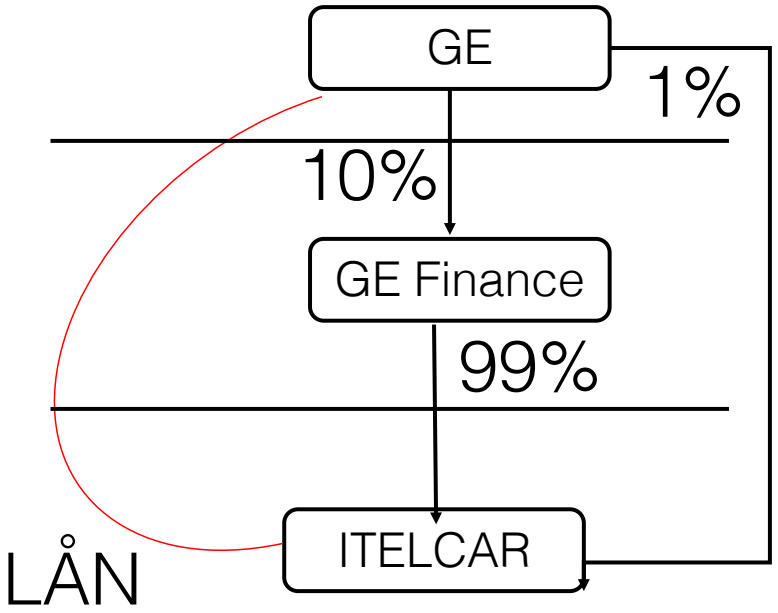


FII GLO 2 2011-63 +49 applies



- Imputation for inbound dividends breaches art. 63
- When internal transactions exempt
- No question of market access, rules applie irrespective the ownership level
- Even when ownership>10%

ITELCAR 2013: art. 63 applies



- No deduction when loan >2x Capital ownership
- Except if taxpayer can prove that the loan is reasonable
- Rules apply between associated companies = 10% K or decisive influence
- OR if beneficiary in tax havens

C-115/16 …DK BO

158. First of all, as the Commission has stated, **the payment of interest connected with a loan concerning two companies resident in different Member States falls within the provisions relating to the free movement of capital**, as referred to in Article 63 TFEU (see, to that effect, judgments of 3 October 2006, Fidium Finanz, C-452/04, EU:C:2006:631, paragraphs 41 and 42, and of 3 October 2013, Itelcar, C-282/12, EU:C:2013:629, paragraph 14). These questions must therefore be examined in the light of that article.

Art 63 FEUF and the Swedish tax rules

- Schön, Dourado = possible
- Swedish tax bases eroded even when interest paid outside the group
- Group's finance center in third countries do not have decisive influence on Swedish borrower.
- Is it possible to presume that third states UPE influence the choice of financing in the Swedish company when the share of ownership is < 10%? And want to enjoy freedom of establishment in the EU?
- Swedish tax authorities have always refused the proof of business motivation in practice
- Review of current rules expected in one year


Thank you !
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