

Action brought on 8 November 2019 – Merlin UK Finco 1 and Others v Commission**(Case T-770/19)**

(2020/C 45/44)

*Language of the case: English***Parties**

Applicants: Merlin UK Finco 1 Ltd (Poole, United Kingdom), Merlin UK Finco 2 Ltd (Poole), Charcoal Newco 1 Ltd (Poole) and Charcoal Newco 1A Ltd (Poole) (represented by: M. Whitehouse and P. Halford, Solicitors)

Defendant: European Commission

Form of order sought

The applicants claim that the Court should:

- annul Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p. 1);
- alternatively, annul Article 2 of the contested decision to the extent that it infringes the applicants' freedom of establishment under Article 49 TFEU or free movement of capital under Article 63 TFEU; and
- order the Commission to pay the applicants' costs.

Pleas in law and main arguments

In support of the action, the applicants rely on eleven pleas in law:

1. First plea in law, alleging that the Commission made an error of law and/or a manifest error of assessment in concluding that the group financing exemption scheme ('the contested measure') gave rise to an economic advantage within the meaning and scope of Article 107(1) TFEU.
2. Second plea in law, alleging that the Commission made an error of law and/or a manifest error of assessment in the identification of the reference system for the purposes of the 'selectivity' analysis.
3. Third plea in law, alleging that the Commission made errors of law and manifest errors of assessment in wrongly or incompletely identifying, and in failing to understand correctly, the relevant objectives of its chosen reference system.
4. Fourth plea in law, alleging that the Commission made errors of law and/or manifest errors of assessment in identifying the contested measure as entailing a derogation from its chosen reference system.
5. Fifth plea in law, alleging that the Commission made errors of law and/or manifest errors of assessment in wrongly classifying the contested measure as prima facie selective, by incorrectly holding that it entailed different treatment of undertakings in a legally and factually comparable situation.
6. Sixth plea in law, alleging that the Commission made an error of law in taking account of Council Directive (EU) 2016/1164 (1) in its assessment of the selectivity of the contested measure, whereas that instrument did not come into force until after the end of the period in which the Commission ruled the contested measure to entail State aid.
7. Seventh plea in law, alleging that the contested decision represents a misuse of power by the Commission contrary to the UK's fiscal sovereignty.
8. Eighth plea in law, alleging that the Commission made manifest errors of assessment in holding the alleged derogation to be not justified in relation to the taxation of non-trading finance profit(s) from qualifying loan relationships falling prima facie within section 371EB ('UK activities') of the Taxation (International and Other Provisions) Act 2010. In relation to the 'qualifying resources' and 'matched interest profits' exemptions, the Commission's decision is also vitiated by its failure to state any reasons in relation to their justification or lack thereof.

9. Ninth plea in law, alleging that the Commission acted in breach of Article 108(2) TFEU and Article 6 of Regulation (EU) 2015/1589 ⁽¹⁾ and in breach of the duty of good administration under Article 41 of the Charter of Fundamental Rights. Specifically, it failed to indicate in its opening decision that it had concerns regarding the justification of the '75% exemption' under section 371ID of the Taxation (International and Other Provisions) Act 2010 to avoid the practical difficulty of carrying out a significant people functions analysis in relation to intra-group lending activity, such as to give interested parties adequate opportunity to comment on this; it failed, in the course of its investigation, to invite any comments in this regard from interested parties; and in the contested decision it chose to ignore such comments as had in fact been provided by interested parties in this regard. In consequence, the contested decision is void.
10. Tenth plea in law, alleging that the Commission erred in law in ruling that taxing a UK company on profits of foreign subsidiaries 'to the extent attributable to domestic assets and activities' does not pose a restriction to the freedom of establishment and that the contested measure is not needed to ensure compliance with the Treaty freedoms.

In support of their application (in the alternative) for annulment of Article 2 of the contested decision, the applicants rely on the following plea in law:

11. Eleventh plea in law, alleging that even if (which is denied) the contested measure entailed a State aid scheme, the Commission made an error of law in holding that recovery of the aid would not infringe the fundamental principles of EU law, and in ordering recovery irrespective of whether the establishment of the CFCs and their making of loans to non-resident group companies in fact entailed an exercise of the freedom of establishment or the free movement of capital. Specifically, in the present case, recovery would infringe the applicants' freedom of establishment under Article 49 TFEU and free movement of capital under Article 63 TFEU. To the extent of such infringement, the recovery order in Article 2 of the contested decision falls to be annulled.

⁽¹⁾ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

⁽²⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

Action brought on 11 November 2019 – Experian Finance 2012 v Commission

(Case T-771/19)

(2020/C 45/45)

Language of the case: English

Parties

Applicant: Experian Finance 2012 Ltd (Nottingham, United Kingdom) (represented by: M. Whitehouse and P. Halford, Solicitors)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

- annul Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p. 1);
- alternatively, annul Article 2 of the contested decision to the extent that it infringes the applicant's freedom of establishment under Article 49 TFEU; and
- order the Commission to pay the applicant's costs.