

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 ^(?) 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 so the contested measure is not needed to ensure compliance with the Treaty freedoms.

In support of its application (in the alternative) for annulment of Article 2 of the contested decision, the applicant relies 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 applicant's 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 12 November 2019 – RDI Reit v Commission

(Case T-778/19)

(2020/C 45/51)

Language of the case: English

Parties

Applicant: RDI Reit plc (London, United Kingdom) (represented by: C. McDonnell, Barrister, B. Goren, Solicitor, M. Peristeraki, lawyer, and K. Desai, Solicitor)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

- hold that there has been no unlawful State Aid, annul Article 1 of the contested decision C(2019) 2526 Final of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption, to the extent that it finds that there has been unlawful State Aid, and set aside the requirement for the UK to recover alleged unlawful State Aid received by the applicant in this context (Articles 2 and 3 of the contested decision);
- in the alternative, annul Articles 2 and 3 of the contested decision, insofar as they require the UK to recover from the applicant the alleged State Aid; and
- in any event, order the Commission to bear the costs incurred by the applicant for these proceedings.

Pleas in law and main arguments

In support of the action, the applicant relies on nine pleas in law:

1. First plea in law, alleging that the Commission misunderstands the context, aim and operation of the UK Controlled Foreign Company (CFC) rules, with respect to the treatment of non-trading finance profits. The Commission's conclusions in the contested decision are based on cumulative manifest errors. In particular, the Commission has made manifest errors in its understanding of the overall UK tax system, in its understanding of the aims of the CFC system, in the specific scope of the Group Financing Exemption and in the definition of qualifying loan relationships.
2. Second plea in law, alleging that the Commission wrongly construes the Group Financing Exemption as a tax exemption and accordingly an advantage. In relation to non-trading finance profits, the Group Financing Exemption represents a charging provision and a part of the definition of the limits of the CFC rules, not a selective advantage. The Commission has provided no quantitative analysis to show that it is an advantage and, in the absence of cogent evidence that the measure in question results in an advantage, the contested decision cannot stand.
3. Third plea in law, alleging that the Commission misidentified the reference system for the assessment of the effects of the CFC rules and wrongly identified the CFC rules as a distinct set of rules from the overall UK corporation tax system. The Commission has not correctly understood the objective of the CFC rules and has failed to consider the UK's margin for discretion.
4. Fourth plea in law, alleging that the Commission has shown manifest errors in its State aid analysis, and has applied the wrong tests when considering the question of comparability. The Commission failed to recognise the different level of risk to the UK tax base as between lending to a group entity which is taxable in the UK and lending to a group entity which is not taxable in the UK and irrationally concluded that intra-group lending is comparable to third-party lending.
5. Fifth plea in law, alleging that even assuming that the CFC measures in question prima facie constituted aid within the meaning of Article 107(1) TFEU, the contested decision wrongly concluded that there was no justification that could apply to defend the compatibility of the measures in question with EU State aid rules. In addition, the contested decision is irrational and inconsistent, in that the Commission has correctly accepted that Chapter 9 of Part 9A of the Taxation (International and Other Provisions) Act 2010 is justified in cases where the only reason for a CFC charge to apply under the counterfactual of Chapter 5 of the said Part 9A would be the 'UK connected capital' test, on the basis that that test may be excessively difficult to operate in practice, but at the same time, and without providing adequate reasoning, the Commission contends that the said Chapter 9 is never justified in cases where the significant people functions test would cause a CFC charge to apply under the said Chapter 5. In fact, the significant people functions test is excessively difficult to apply in practice, such that the Commission should have found the said Chapter 9 to be justified in the context of that test as well and, hence, it should have concluded that there is no State aid.

6. Sixth plea in law, alleging that, were the contested decision to be upheld, enforcement of it through recovery of the alleged State aid from the applicant would infringe fundamental principles of EU law, including the freedom of establishment and the freedom to provide services, noting that, in the applicant's case, the CFCs in question are situated in other Member States.
7. Seventh plea in law, alleging that the recovery order resulting from the contested decision is unfounded and contrary to fundamental Union principles.
8. Eighth plea in law, alleging that the Commission failed to provide adequate reasons for critical elements in the contested decision, such as the conclusion that the CFC charge under the said Chapter 5 could be applied using the significant people functions test without difficulty or disproportionate burden.
9. Ninth plea in law, alleging that the contested decision also breaches the principle of good administration, which requires that the Commission allows transparency and predictability in its administrative procedures and renders its decisions within a reasonable time-frame. It is not reasonable for the Commission to take more than four years to issue its decision opening the investigation in the present case and to give a decision more than six years after the contested measure came into effect.

Action brought on 12 November 2019 – Ashtead Financing v Commission

(Case T-779/19)

(2020/C 45/52)

Language of the case: English

Parties

Applicant: Ashtead Financing Ltd (London, 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 the contested decision C(2019) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning Controlled Foreign Companies (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.

Pleas in law and main arguments

In support of the action, the applicant relies 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.