Reports of Cases

Case T-112/22

Ideella föreningen Svenska Bankföreningen med firma Svenska Bankföreningen, Näringsverksamhet
and
Länsförsäkringar Bank AB
v
European Commission

Judgment of the General Court (Fourth Chamber, Extended Composition) of 17 April 2024

(State aid – Swedish tax law – Tax on the systemic risk of credit institutions – Decision not to raise any objections – Selective nature – Objective of the measure – Derogation from the reference system)

1. *Aid granted by a Member State – Examination by the Commission – Preliminary review and main review – Commission's duty to initiate the main review procedure in the event of serious difficulties – Circumstances enabling the existence of such difficulties to be established – Judicial review – Burden of proof*

   (Arts 107 and 108 TFEU; Council Regulation 2015/1589, Art. 4(3) and (4))

   (see paragraphs 21-26)

2. *Aid granted by a Member State – Concept – Selective nature of the measure – Measure conferring a tax advantage – Reference framework for determining the existence of an advantage – Material scope – Measure constituting its own reference framework – Conditions – Clearly defined tax regime which pursues specific objectives*

   (Art. 107(1) TFEU)

   (see paragraphs 30-32, 46, 47)

3. *Aid granted by a Member State – Concept – Selective nature of the measure – Measure conferring a tax advantage – Tax on the systemic risk of credit institutions – Tax with the purpose of providing budgetary room to cope with future financial crises – Tax base established on the basis of the liabilities of credit institutions – Tax base determined in a manner that is consistent with the objective of that tax – Ability of the Commission to conclude that a tax is not selective without initiating the formal investigation procedure*

   (Art. 107(1) TFEU)

(see paragraphs 56-61)

4. *Aid granted by a Member State – Concept – Selective nature of the measure – Measure conferring a tax advantage – Tax on the systemic risk of credit institutions – Tax with the purpose of providing budgetary room to cope with future financial crises – Institutions subject to the tax – Credit institutions that have accumulated a level of liabilities that exceeds the threshold laid down in legislation – Identification of the taxable persons and setting of the threshold for liability to the tax falling within the Member State's own powers – Identification of the taxable persons and setting of the threshold for liability to the tax in a manner that is consistent with the objective of that tax – Ability of the Commission to conclude that a tax is not selective without initiating the formal investigation procedure*

   (Art. 107(1) TFEU)

(see paragraphs 71-82, 88-99)

5. *Aid granted by a Member State – Concept – Selective nature of the measure – Measure conferring a tax advantage – Tax on the systemic risk of credit institutions – Tax with the purpose of providing budgetary room to cope with future financial crises – Institutions subject to the tax – Credit institutions that have accumulated a level of liabilities that exceeds the threshold laid down in legislation – Taking into account of the liabilities of branches for the purpose of assessing that threshold – Whether permissible – Ability of the Commission to conclude that a tax is not selective without initiating the formal investigation procedure*

   (Art. 107(1) TFEU)

(see paragraphs 103-106)

6. *Aid granted by a Member State – Concept – Selective nature of the measure – Derogation from the general tax system – Differentiation between undertakings in a comparable factual and legal situation – Criteria for assessment – Comparison in the light of the objective pursued by the common tax regime as a whole*

   (Art. 107(1) TFEU)

(see paragraphs 116-124, 127)

Résumé

Sitting in extended composition, the Court dismisses the action for annulment brought against the decision of the European Commission by which it decided that a Swedish tax on systemic risk payable by credit institutions does not constitute State aid within the meaning of Article 107(1) TFEU.[1] In its judgment, the Court examines in detail the Commission's conclusion that that tax does not fulfil the selectivity criterion laid down by that provision.

[1] European Commission Decision COM(2021) 8637 final of 24 November 2021 on State aid SA.56348 (2021/N) – Sweden: Swedish tax on credit institutions ('the contested decision').

In 2021, the Kingdom of Sweden notified the Commission of a draft law on a systemic risk tax on credit institutions ('the tax'), which was to be payable by all Swedish credit institutions whose liabilities exceed the threshold of 150 thousand million Swedish kronor (SEK) for tax years beginning in 2022. For tax years starting in 2023 or later, that threshold is to be multiplied by a factor. The draft law notified also provides that foreign credit institutions are also to be taxed where they have liabilities attributable to commercial activities carried out from a Swedish branch and the sum of those liabilities exceeds the value of the abovementioned thresholds. In total, nine credit institutions have a level of liabilities that exceeds the prescribed thresholds.

For the 2022 tax year, the tax rate was set at 0.05% of the sum of the liabilities of the credit institutions liable to the tax. For the 2023 tax year, that rate was to be increased to 0.06%.

Without initiating the formal investigation procedure, the Commission found that the tax did not constitute State aid, within the meaning of Article 107(1) TFEU, as it did not satisfy the selectivity criterion.

Taking the view that the Commission had infringed their procedural rights by adopting that decision without initiating the formal investigation procedure, a Swedish association of bankers and a financial entity which was a member of that association brought an action for annulment before the Court.

Findings of the Court

Since the Commission is obliged to initiate the formal investigation procedure provided for in Article 108(2) TFEU if, in the light of the information obtained during the preliminary examination stage, it still faces serious difficulties in assessing the notified measure in the light of Article 107(1) TFEU, the applicants claim that the Commission should have experienced such serious difficulties as regards the selective nature of the tax.

According to settled case-law, in order to classify a national tax measure as selective within the meaning of Article 107(1) TFEU, the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation. As a third step, the Commission must ascertain whether that differentiation is justified since it flows from the nature or general structure of the system of which the measure forms part.

As regards the first two steps set out above, it is apparent from the contested decision that the Commission defined the reference system as being restricted to the tax, something which the applicants do not dispute.

On that basis, it concluded, first, that the reference system had not been configured according to manifestly discriminatory parameters and, second, that the fact that certain types of operators and operators whose aggregate liabilities were below the threshold set in the draft law were not liable to pay the tax did not constitute a derogation from the reference system.

In support of their action, the applicants dispute that conclusion reached by the Commission.

As regards, in the first place, the Commission's finding that the reference system and, consequently, the tax had not been configured according to manifestly discriminatory parameters, the Court rejects the applicants' various arguments that the Commission should have encountered serious difficulties on that point since the parameters of the tax were manifestly not consistent with its objective.

In that regard, the Court starts by stating that it is apparent from the draft Swedish law that the objective of the tax is to strengthen public finances in order to provide room to cope with future financial crises by requiring the tax to be paid by large credit institutions, the failure or serious disruption of which would, on an individual basis and because of their size and importance for the functioning of the financial system, present a systemic risk and would have a very negative impact on the financial system and on the economy in general, thus causing significant indirect costs for society.

Having made that clear, the Court rejects, first, the arguments that the Swedish legislature's decision to establish the tax base on the basis of the liabilities of credit institutions was contrary to the objective of the tax. In that regard, the Court states that the tax was intended to strengthen national public finances in order to provide room to cope with future financial crises, it being understood that, the higher the level of a credit institution's indebtedness, the greater the risk to the financial system. It follows that defining the tax base according to the level of liabilities of institutions liable to the tax, in order to distinguish between credit institutions according to whether their impact on the financial system is greater or lesser, is consistent with the objective pursued.

Second, the Court rejects the applicants' arguments disputing the determination of which establishments are liable to the tax.

Since the applicants relied, in that context, on an alleged inconsistency between the identification of establishments liable to the tax and the schemes established by Directive 2014/59[2] and Regulation No 575/2013[3] respectively, the Court notes that the objectives pursued by those schemes differ from the objective pursued by the tax notified.

Nor is the Court convinced by the criticisms levelled at the manner in which the institutions liable to the tax are selected that relate to the competitive environment of the Swedish financial sector and to the fact that many financial institutions that are not liable to the tax, which are in competition with credit institutions that are liable to the tax, also cause indirect costs.

In that regard, the Court notes, first, that the Kingdom of Sweden was entitled to determine, by exercising its own powers in the field of direct taxation and in compliance with its fiscal autonomy and EU law, the chargeable event for the tax and the tax base. Second, the applicants have not called into question that only large credit institutions, on an individual basis, by their failure, are capable of creating a systemic risk and of having a very negative impact on the financial system and on the economy in general and of causing significant indirect costs for society. Moreover, nor have they shown that the failure of establishments not liable to the tax, even taken collectively, would have the same consequences.

[2] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190)

[3] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

Third, the Court holds that the applicants have not put forward any arguments which would make it possible to regard the threshold for credit institutions to be liable to the tax as being manifestly inappropriate in the light of the objectives of the tax.

Since the determination of the tax threshold and of the methods for calculating the basis of assessment comes within the discretion of the national legislature, the Kingdom of Sweden cannot be prevented, on the one hand, from introducing a tax with a tax threshold and, on the other hand, from establishing a variation mechanism that goes as far as to exempt credit institutions below that threshold, provided that those elements do not run counter to the objective of the tax. According to the Court, the threshold of SEK 150 thousand million, which is not manifestly discriminatory, is consistent with the objective of the tax, especially since the application of that threshold ensures that those liable to pay the tax represent 90% of the aggregated balance sheet total of all credit institutions in Sweden. Furthermore, it is clear from the file before the Court that there was no credit institution not liable to the tax whose level of liabilities was close to the threshold of SEK 150 thousand million.

Fourth, the Court rejects the applicants' arguments challenging the consolidation mechanism provided for intra-group situations, under which the liabilities of branches are counted towards the tax liability threshold for credit institutions. Since the branches of a Swedish credit institution are connected to that institution and, therefore, their default would also produce effects in Sweden, the Court cannot find that the Commission should have had doubts as to that mechanism.

As regards, in the second place, the Commission's finding that the fact that certain types of financial operators and credit institutions whose aggregate liabilities were below the threshold of SEK 150 thousand million were not liable to pay the tax did not constitute a derogation from the reference system, the Court points out that a tax is not selective if the differences in taxation and the advantages which may flow therefrom stem from the straightforward application, without derogation, of the 'normal' regime, if comparable situations are treated comparably and if those variation mechanisms do not misconstrue the objective of the tax concerned.

With regard to the fact that credit institutions whose liabilities did not exceed the threshold of SEK 150 thousand million were not liable to the tax, the Court holds that the applicants have not demonstrated the existence of a body of consistent evidence capable of showing that the credit institutions whose liabilities exceeded that threshold were, in the light of the objective of the tax, in a factual and legal situation comparable to that of credit institutions whose liabilities did not exceed that threshold. As regards the fact that other financial institutions, such as mortgage funds, were not liable to the tax, the Court also points out that a mere competitive relationship cannot in itself lead to the conclusion that those institutions are, in the light of the objective of the tax, in a factual and legal situation comparable to that of credit institutions liable to the tax.

Therefore, the applicants' arguments concerning the existence of derogations from the reference system do not show that the Commission should have encountered serious difficulties in its assessment in that regard.

In the light of all the findings above, the Court concludes that the applicants have not established that the Commission should have had doubts as to the classification of the tax within the meaning of Article 107(1) TFEU, which should have led it to initiate the formal investigation procedure. The Court therefore dismisses the action in its entirety.