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REMISSYTTRANDE
Vår referens: 2021/05/006
Er referens: Fi2021/02030/S1

2021-06-15

Finansdepartementet

Via e-post till:
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Utkast till lagrådsremiss Riskskatt för kreditinstitut

Sammanfattning

Bankföreningen avstyrker förslaget till skatt för kreditinstitut såsom det presenteras i utkastet till lagrådsremiss *Riskskatt för kreditinstitut*. I utkastet till lagrådsremiss kvarstår problem med den föreslagna skatten som särskilt drabbar bolånekunder, företags investeringsförmåga och samhällets förutsättningar att genomföra klimat-investeringar. Att inkludera skulder i svenska bankers utländska filialer i skattebasen skapar samtidigt nya problem. Skatten har numera ett än mer oklart motiv, är fortsatt rättsosäker samt har negativa effekter på tillväxt och för konkurrensen på marknaden för finansiella tjänster. Skatten skapar därutöver snedvridningar mellan kreditinstitut med olika legal struktur. Dessutom står förslaget till skatt med stor sannolikhet i strid med EU:s statsstödsregler och de fria rörligheterna.

Som Bankföreningen lyfte i remissyttrandet avseende promemorian *Riskskatt för vissa kreditinstitut* innebär förslaget att svenska banker får en betydande nackdel i konkurrensen med utländska banker. Genom att i utkastet till lagrådsremiss utöka skattebasen till skulder hänförliga till svenska bankers utländska filialer skapas nya problem. Svenska bankers konkurrenskraft och förutsättningar för att långsiktigt finansiera investeringar hos svenska hushåll och företag försämras ytterligare. Den tidigare påpekade sannolika effekten av skatten – att utlåning till svensk allmänhet förskjuts mot att ske genom t.ex. låneförmedling från en utländsk bank – förstärks. Dessutom innebär ändringen att förslaget inte längre handlar om beskattning av kreditgivning i Sverige, utan kreditgivning generellt och även i utlandet. I såväl promemorian som i utkastet till lagrådsremiss bortses från det faktum att de indirekta kostnader som skatten är avsedd att täcka uppstår där låntagaren finns. Regeringen önskar således beskatta svenska kreditinstitut för risken för påstådda indirekta kostnader som i så fall uppstår i andra länder. Det föreslagna skatteuttaget skulle motsvara en genomsnittlig höjning av bolagsskatten med upp till 50 procent, från 20,6 procent till ca 30 procent.

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Bankföreningen har anmält regeringens förslag till riskskatt för vissa kreditinstitut till EU-kommissionen för prövning om huruvida förslaget strider mot EU:s statsstödsregler. De ändringar som föreslås i utkastet till lagrådsremiss ändrar inte Bankföreningens bedömning att skatten sannolikt är olaglig, tvärtom.

Bankföreningen hänvisar utöver vad som anförs i detta yttrande till det bifogade remissyttrandet avseende promemorian, bortsett från styckena 3.2 och 3.5 däri.

1 Bakgrund

Regeringen har den 24 maj 2021 lämnat ett utkast till lagrådsremissen *Riskskatt för kreditinstitut*. I utkastet till lagrådsremissen har gjorts vissa ändringar jämfört med tidigare promemoria *Riskskatt för vissa kreditinstitut*. Två förändringar av avgörande betydelse är att undantaget för skulder hänförliga till svenska kreditinstituts utländska filialer har tagits bort samt att möjligheten till avräkning för utländsk skatt inskränkts.

2 Synpunkter på förslaget

Bankföreningen anser att de föreslagna ändringarna i utkastet till lagrådsremiss är så stora att förslaget bör dras tillbaka, analyseras ytterligare och återremitteras om regeringen fortfarande avser att gå vidare med förslaget. De godtyckliga skälen till att införa skatten samt de motsägelsefulla uttalanden som finns i utkastet till lagrådsremiss innebär dessutom att förslaget av rättssäkerhetsskäl bör dras tillbaka. De förändringar som är gjorda i utkastet till lagrådsremiss råder inte bot på tidigare påpekade tolkningssvårigheter, snedvridningar och olyckliga incitament.

2.1 Negativa samhällsekonomiska konsekvenser av förslaget

Förslaget kan öka risken

De svenska bankerna är bland världens mest välkapitaliserade och bäst rustade att motstå en finansiell kris. Dessutom är de svenska systemen för resolution, krishantering och insättningsgaranti finansierade långt utöver gällande EU-krav. Den sammantagna behållningen i resolutionsreserven, insättningsgarantifonden och stabilitetsfonden är cirka 133 miljarder kronor, vilket är drygt 100 miljarder kronor mer än vad som följer av EU-krav. Att svenskt näringsliv och svenska hushåll har sin huvudsakliga lånefinansiering från svenska stabila banker minskar riskerna för att en finanskris skulle få indirekta realekonomiska konsekvenser i Sverige. Det bör här noteras att den finansiella regleringen har stärkts i hela världen efter finanskrisen och Sverige har gått längre än kanske något land i att stärka sitt banksystem.

Bankföreningen och andra remissinstanser (t.ex. Finansinspektionen som den 10 juni 2021 avstyrkte det reviderade förslaget till riskskatt) har i yttranden på promemorian påpekat att förslaget kan öka risken genom att finansiering i högre

utsträckning kan komma att ske från utlandet eller genom aktörer som inte står under tillsyn. I utkastet till lagrådsremiss bemöts detta med att det framstår som "*osannolikt att finansiering från aktörer som varken står under tillsyn i Sverige eller något annat land blir betydande*". Bankföreningen delar inte den uppfattningen, se vidare under avsnitt 3.1.

Förstärkta konkurrenssnedvridningar på svensk och internationell marknad

Med de förändringar som föreslås i utkastet försämras ytterligare svenska bankers förutsättningar att konkurrera i Sverige och i utlandet på grund av den ökade skatte-belastning som förslaget innebär. Till det ska även adderas att den tidigare, åt-minstone teoretiska, möjligheten till avräkning av utländsk motsvarighet till riskskatt inskränks för de svenska kreditinstituten. Det anförda skälet för detta är att risken för indirekta kostnader i Sverige inte minskar genom att kreditinstitutet erlägger en mot-svarande skatt i ett annat land. Bankföreningen anser att regeringen har fel när den inte tar hänsyn till att indirekta kostnader skulle kunna uppstå där låntagaren finns. Det är av det skälet inte rimligt att beskatta ett svenskt kreditinstitut för kostnader som skulle kunna uppstå för verksamhet i ett annat land. Men, om utformningen av skatten måste genomföras på det föreslagna sättet, dvs. inkludera skuld hänförlig till utländsk filial, för att undvika att förslaget till riskskatt på den punkten skulle strida mot etableringsfriheten, måste rimligen också finnas en möjlighet att eliminera en dubbelbeskattning.

Skatten fördyrar investeringar i välfärd och för klimatomställningar

Kommunägda Kommuninvest står för närmare 60 procent av finansieringen av svenska kommuner och kommunala bostadsföretag, främst i små och medelstora kommuner. Den fördyring som skatten skulle medföra har således central betydelse för finansieringen av investeringar i välfärd, bostäder och infrastruktur. Att vilja införa en skatt som fördyrar investeringar när tvärtom det motsatta behövs, vid en tidpunkt när hela världens regeringar försöker skapa förutsättningar för återhämtning efter pandemin, är kontraproduktivt.

Skatten försvårar dessutom Sveriges möjligheter att göra nödvändiga investeringar i teknikomställning för att uppnå Sveriges högt uppsatta klimatmål och åtaganden i Parisavtalet.

2.2 Skälen är än mer omotiverade

I det ursprungliga förslaget avsågs att beskatta vissa kreditinstitut baserat på skulder hänförliga till verksamhet i Sverige i syfte att kompensera för risken för så kallade indirekta kostnader vid en finanskris. Den delen gäller fortsatt för utländska kredit-institut som har filialverksamhet i Sverige. Likaså beskattas upplåning i svenskt kreditinstitut som vidareutlånas till utländskt koncernbolag. I utkastet till lagråds-remiss har en betydande förändring gjorts, genom att skattebasen utvidgats till att

omfatta även skulder hänförliga till svenska kreditinstituts utländska filialverksamhet. I det sammanhanget måste klargöras var de indirekta kostnaderna uppstår. Regeringen verkar vara av åsikten att de indirekta kostnaderna uppstår där långivaren finns. Bankföreningens uppfattning är att de *direkta* kostnaderna uppstår där långivaren befinner sig, men att de påstådda *indirekta* kostnaderna enbart skulle kunna uppstå där låntagaren finns. Genom att skattebasen utökas till att gälla även svenska bankers kunder i utländska filialer urholkas således det grundläggande syftet med skatten, nämligen att kompensera för risken indirekta kostnader vid en finanskris.

Motiv för riskskatten

Statens kostnader för en finanskris kan delas upp på direkta kostnader och indirekta kostnader. De **direkta** kostnaderna uppstår vid resolution av en bank eller om insättningsgarantin utlöses. Dessa ska i princip täckas av resolutions- respektive insättningsgarantiavgiften. De direkta kostnaderna bärs av den stat där banken har sitt säte, oavsett om kostnaderna uppstår i den inhemska delen av banken eller i en utländsk filial. Det är därför logiskt att resolutions- och insättningsgarantiavgifterna utgår från en banks juridiska hemvist. De **indirekta** kostnaderna av en finanskris uppstår på grund av spridningseffekter från bankerna till den övriga ekonomin och inträffar där låntagarna finns. Den logiska skattebasen kopplad till indirekta kostnader är därför lån i låntagarens hemland, oavsett om dessa lån tas från banker med juridisk hemvist i hemlandet eller utlandet.

Ett renodlat exempel illustrerar tydligt principen att direkta kostnader uppstår där långivaren (banken) finns och indirekta kostnader uppstår där låntagarna finns.

Exempel: En bank har all sin upplåning i Sverige, men all sin utlåning i utlandet. Om en sådan bank hamnar i kris kommer den att minska sin utlåning och i värsta fall ställa in betalningarna. De direkta kostnaderna för en resolution och insättningsgaranti kommer att bäras av de svenska långivarna till banken och bankens aktieägare. De indirekta kostnaderna i form av minskade investeringar och därmed följande ekonomiska nedgång kommer att inträffa i utlandet.

I utkastet till lagrådsremiss sägs på s. 28 att ”*Inget av de befintliga regelverken syftar dock till att kompensera för indirekta kostnader som kan uppstå vid allvarliga störningar i det finansiella systemet eller finansiella kriser. Det är därför rimligt att kreditinstitut som på grund av sin storlek och betydelse för den finansiella marknadens funktionssätt riskerar att orsaka väsentliga indirekta kostnader för samhället vid en finansiell kris betalar riskskatten.*”.

Utifrån ovanstående citat förefaller det tydligt att den föreslagna riskskatten är tänkt att kompensera för **indirekta** kostnader.

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På s. 44–45 anges däremot följande:
”*Genom att beakta skulder hänförliga till verksamhet i utländska filialer undviks också dels ett skatteincitament för omstrukturering från utländska dotterföretag till filialer – vilket skulle öka den svenska statens risk – dels risken för skatteplanering genom att långivning till svenska kunder sker från filialer i utlandet. Sådan långivning kan fortfarande ske genom utländska dotterföretag men verksamhet i ett utländskt dotterföretag, som är föremål för den utländska statens banktillstånd, finansiella tillsyn och resolutionsåtgärder m.m., utgör inte samma risk för indirekta kostnader i Sverige vid en finansiell kris som verksamhet i ett svenskt kreditinstitut. Detta gäller oavsett om det svenska kreditinstitutet bedriver verksamheten i Sverige eller i en utländsk filial. Till skillnad från vad som gäller om verksamheten bedrivs i en filial behöver inte störningar i ett utländskt dotterföretag per automatik sprida sig till den svenska marknaden genom det svenska kreditinstitutet.*”

Av ovanstående citat framstår det som att risk för indirekta kostnader beror på en banks sammanlagda storlek i Sverige och i utlandet. De indirekta kostnaderna för en bank i kris bör i princip, allt annat lika, fördelas mellan olika länder i proportion till bankens utlåning i dessa länder.

I avsnittet om avräkning av utländsk skatt anges på s. 51:
”*Riskskatten ska träffa kreditinstitut som vid en finansiell kris riskerar att orsaka väsentliga kostnader för det svenska samhället. En eventuell motsvarande skatt i den stat där verksamheten bedrivs kan fylla samma funktion där. Om avräkning för den utländska skatten skulle ges från den svenska riskskatten så skulle den svenska skatten minska trots att risken för väsentliga kostnader för samhället vid en finansiell kris är oförändrad.*”

Det här hänger inte ihop med synen att utländska filialer orsakar indirekta kostnader i Sverige. Det kan inte vara så att utländska bankers filialers utlåning i Sverige orsakar indirekta kostnader i Sverige, medan svenska bankers filialers utlåning i utlandet orsakar exakt lika mycket indirekta kostnader som utlåning inom Sverige.

Slutsats: Regeringen hävdar att risken för indirekta kostnader i Sverige är lika stor vid utlåning från utländska bankers svenska filialer, som från svenska bankers utlåning. Samtidigt hävdar regeringen att utlåning från svenska bankers utländska filialer orsakar lika stora indirekta kostnader i Sverige som svenska bankers utlåning i Sverige. Detta är en självmotsägelse, men skattebasen är utformad som om denna självmotsägelse vore sann.

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Finanskrisers förlopp

En finanskris börjar med ökad osäkerhet om en eller flera bankers förmåga att återbetala sina lån. En enstaka banks problem behöver inte sprida sig till andra banker, men om så sker uppstår en finanskris som berör hela eller åtminstone större delen av finanssektorn.

Spridning från finansiell sektor till realekonomin

Vid en finanskris får bankerna svårare att finansiera sig. Det leder i sin tur till att banker får svårare att finansiera nyutlåning. Det påverkar privatpersoners och företags möjlighet att finansiera investeringar med lån. De lånefinansierade investeringarna utgörs främst av bostäder för privatpersoner och fastigheter, maskiner med mera för företag. Minskade investeringar leder till minskad produktion av investeringsvaror, som i sin tur leder till lägre efterfrågan på arbetskraft. Ökad arbetslöshet och minskade löneutbetalningar minskar hushållens konsumtion och försvagar dessutom statens finanser. Hushållens minskade konsumtion leder till minskad produktion av konsumtionsvaror vilket slår ytterligare på arbetslösheten och löneutbetalningarna.

De indirekta kostnaderna av en finanskris sprider sig till den reala ekonomin och skulle kunna vara stora. Det är dock långt ifrån självklart att det motiverar en bankskatt. Efter finanskrisen 2008 – 2009 har banker både i Sverige och internationellt både tillförts mycket eget kapital och reglerats mycket hårdare. Dessutom har resolutionsramverk gjort att problem i en bank oftare kan hanteras utan att behöva spridas till andra banker. Risken för en finanskris är nu därför mycket mindre än vad den var när finanskrisen inträffade 2008. Det är därför inte självklart att bankbranschen sticker ut i jämförelse med exempelvis branscher som investeringsvaruindustri och byggnadsindustri, vad gäller realekonomiska konsekvenser av konjunktursvängningar. Om så är fallet är mycket svårt att avgöra med någon större säkerhet. Om vi för resonemangets skull ändå antar att banker skapar negativa effekter i mycket större utsträckning än andra branscher[1] kan man fråga sig om den aktuella utformningen av riskskatten är befogad.

Hur finanskrisen slog mot svensk ekonomi kan illustrera kopplingen mellan bankerna och realekonomin. Investeringarna föll i både Sverige och omvärlden, huvudsakligen för att finansmarknaderna fungerade sämre. Det drabbade svensk exportindustri väldigt hårt, eftersom den är mycket inriktad mot investeringsvaror. De minskade investeringarna i omvärlden var relaterade till försämrade lånemöjligheter i utländska banker. Denna kanal utgör därför inget motiv till att beskatta svenska banker.

[1] I utkastet till lagrådsremiss uttrycks denna åsikt på s. 27: ”Även om ekonomiska svårigheter i andra branscher och sektorer i vissa fall kan spridas och få negativa konsekvenser för andra delar av samhället har den finansiella sektorn en särställning.”

Minskade investeringar i Sverige var kopplade till försämrade lånemöjligheter för svenska låntagare. Om svenska banker försämrar utlåningsmöjligheterna i utlandet har det inga negativa effekter på svensk ekonomi[2].

Sammanfattningsvis kan tre slutsatser dras:

- Utgångspunkten att banker skulle kunna orsaka stora negativa indirekta effekter på svensk ekonomi är inte självklar. Reformer av regleringar och kapitalkrav har gjort banksektorn betydligt mer motståndskraftig.
- Normalt sett har banker en stor positiv effekt på samhällsekonomin, då de möjliggör investeringar på en helt annan nivå än vad som vore möjligt om företag och hushåll skulle vara tvungna att hitta finansiering på annat sätt.
- Om man trots det skulle acceptera utgångspunkten att banker skapar stora negativa indirekta effekter för svensk ekonomi, är det utlåning till svenska låntagare som är relevant. Ur ekonomisk synvinkel är det därför endast sådan utlåning som i så fall borde beskattas, inte utlåning till utländska låntagare.

Av ovan följer att två frågor måste besvaras av regeringen:

1. Är det motiverat eller ens legitimt att beskatta svensk eller utländsk verksamhet om denna verksamhet inte medför indirekta kostnader för Sverige?
2. Är den föreslagna riskskatten egentligen en förtäckt resolutionsavgift? Hur motiverar regeringen i så fall att man avviker från resolutionslagstiftningen genom att ta ut avgiften på utländska bankers svenska filialer?

2.3 Sammanfattning

Det är inte rimligt att låta svenska banker bekosta påstådda indirekta kostnader när det är osannolikt att de svenska bankerna ens skulle vara anledningen till att en finansiell kris uppstår och i synnerhet inte indirekta kostnader som inträffar i utlandet. Vidare är utredningen kring motiven till den föreslagna skatten så pass bristfällig att Bankföreningen anser att förslaget bör dras tillbaka. Det framstår som högst oklart hur de nya skatteintäkter som staten skulle få om den föreslagna skatten blir genomförd, är avsedda att vara länkade till statens möjligheter till finansiell krishantering vid en allvarlig finansiell krissituation. Vad som anförs om syftet med den föreslagna nya skatten framstår som klart missvisande. Det som föreslås är i sak inte något annat än en nytillkommande skatt som rent allmänt ökar statens inkomster och därigenom bidrar till att vidga möjligheterna att öka statens utgifter för olika ändamål.

Här kan tilläggas att de medel som skulle tillkomma på statsbudgetens intäktssida vid ett genomförande av riskskatten på intet sätt föreslås hållas reserverade eller förbehållna för det angivna ändamålet att ge stöd vid en finansiell kris. Mycket talar för att statens nya intäkter från riskskatten kommer att ha utnyttjats till fullo för att

[2] Vill man vara helt exakt så kan minskade investeringar i utlandet i viss utsträckning spilla över i minskad svensk export. Kvantitativt sett är dock denna kanal oväsentlig.

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finansiera olika slag av tillkommande statsutgifter redan långt innan en ny finanskris eller liknande eventuellt uppkommer i en framtid. Bankföreningen anser att det är anmärkningsvärt hur långt regeringen är beredd att gå för att utan skäliga motiv driva igenom en högre beskattning på de svenska bankerna och i slutändan ökad kostnad för svenska och utländska bankkunder och fördyra viktiga investeringar i klimatåtgärder och infrastruktur.

3 Synpunkter av teknisk karaktär

3.1 Gränsvärdet och kretsen av skattskyldiga

Bankföreningen noterar att gränsvärdet om 150 miljarder kronor kvarstår, trots att det med största sannolikhet innebär ett olagligt statsstöd till de institut som faller under gränsvärdet. Bankföreningen konstaterar att det fortfarande saknas en analys som visar varför enbart institut med skulder överstigande 150 miljarder kronor ska omfattas av skatten.

Genom avgränsning till reglerade kreditinstitut utesluts den oreglerade skuggbanks-verksamheten, till vilka bostadskreditinstituten räknas. De nya aktörerna, t.ex. bolånefonder, är betydande konkurrenter på bolånemarknaden och tar allt större marknadsandelar. Bara mellan december 2020 och april 2021 har deras andel av nyutlåningen ökat från 4,1 procent av totala nettoutlåningen till 5,1 procent.

Marknadsandelen avseende nya banklån och bankinlåning uppgår för de företag som inte träffas av skatten till mellan 20 och 30 procent, beroende på typ av tjänst men också beroende på geografisk marknad. De mindre bankerna och kreditinstituten bedriver en intensiv konkurrens och deras marknadsandelar tenderar att växa. Dessa företag är marknadsaktörer som inom vissa ramar bedriver i huvudsak likartad verksamhet på samma marknad och förutsätts kunna konkurrera med varandra på lika villkor. I linje härmed har man hittills i Sverige tillämpat den normalt allmänt accepterade principen om skattemässig likabehandling.

I utkastet till lagrådsremiss görs emellertid en annan bedömning. Man hävdar att det endast är de institut som enligt förslaget blir belastade med den nya skatten som utgör en potentiell risk för väsentliga indirekta kostnader för samhället. De sägs därför befinna sig i en annan rättslig och faktisk situation avseende syftet med skatten än övriga banker och kreditinstitut. Man urskiljer alltså dessa företag som en särskild kategori. Det finns emellertid inget redovisat underlag för hur man gjort bestämningen av den nedre beloppsgränsen för skattskyldighet. Ett underlag för hur man kommit fram till denna beloppsgräns har efterlysts från många håll men redovisas fortfarande inte. Gränsen framstår som tämligen arbiträr. Även företag som ligger under beloppsgränsen skulle kunna orsaka väsentliga indirekta kostnader vid ett fallissemang, möjligen bortsett från särskilt små aktörer. I Sverige verksamma

banker och kreditföretag bedriver i stort sett likartad verksamhet på samma marknad och förutsätts konkurrera med varandra på lika villkor oavsett om de ligger över eller under den föreslagna beloppsgränsen för skattskyldighet för skulderna. Förslaget belastar banker och kreditinstitut som ligger över beloppsgränsen med en ökad kostnadsbörda som snedvrider förutsättningarna för konkurrens på lika villkor.

Det i utkastet till lagrådsremiss framlagda förslaget till riskskatt påverkar även konkurrensen i förhållande till utländska aktörer. Det träffar vad gäller svenska banker och kreditinstitut sådana skulder som är hänförliga till verksamhet som bedrivs i Sverige samt verksamhet i utlandet till del verksamheten bedrivs inom ramen för utlåning från Sverige eller genom en utländsk filial. Såvitt gäller utländska banker och kreditinstitut omfattar den föreslagna riskskatten endast verksamhet som bedrivs från en etablerad filial i Sverige och som i denna svenska filialverksamhet har skulder som når upp till tröskelvärdet. Vidare innefattas inte utländska institut som bedriver verksamhet i Sverige utan fast driftsställe. I nuvarande utformning omfattas inte heller utländska institut som bedriver verksamhet i Sverige genom ett fast driftställe, men där filialverksamheten sker i form av låneförmedling. En kreditgivare kan genom att förmedla ett lån från ett utländskt hypoteksbolag inom koncernen undvika att skuld bokas i en svensk balansräkning.

Andra former av verksamhet som utländska banker och kreditinstitut bedriver med inriktning mot svenska kunder omfattas inte av den föreslagna riskskatten. Däremot omfattas svenska bankers omfattande utlåning till företag med verksamhet i utlandet som nämnt av den föreslagna riskskatten.

Den förslagna riskskatten skulle medföra en omfattande fördyring av verksamheten i svenska banker och kreditinstitut som inte drabbar utländska banker med inriktning på svenska kunder annat än i de speciella fall dessa bedriver en särskilt omfattande filialverksamhet i Sverige. Det kan beräknas att i genomsnitt 15 – 20 procent av de stora svenska bankernas utlåning sker i stark konkurrens med utländska banker som inte omfattas av den nu föreslagna skatten. Här uppkommer alltså fördyring som medför en väsentlig konkurrenssnedvridning till de svenska företagens nackdel.

3.2 Skattens storlek

I utkastet till lagrådsremiss saknas motiv till varför skattesatsen ska uppgå till 0,05 procent det första året och därefter 0,06 procent, liksom en analys av vilka och hur stora de indirekta kostnaderna är. Den föreslagna storleken på skattebasen och skattesatsen har hela tiden förståtts vara valda för att generera en viss förutbestämd skatteintäkt, en uppfattning som nu stärks av förslaget att utöka skattebasen och samtidigt sänka skattesatsen för att riskskatten därmed fortsatt omotiverat ska inbringa 5 miljarder kronor årligen till statskassan.

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3.3 Skuld som skattebas

Bankföreningen och flera andra remissinstanser som yttrade sig på promemorian anser att skuld som skattebas är olämplig, eftersom det inte finns någon tydlig koppling mellan storlek på skuld och risk. Det sätt på vilket de framförda synpunkterna bemöts i utkastet till lagrådsremiss skulle kunna tyda på en motvilja att ta till sig av fakta och argumentationen är dessutom motsägande. I utkastet till lagrådsremiss anförs:

"Dessutom är storleken på ett kreditinstituts skulder en indikator på institutets storlek även vad gäller andra faktorer som t.ex. omsättning, skatteförmåga, anställda och antalet kunder."

Bankföreningen önskar att regeringen utvecklar på vilket sätt den anser att detta skulle vara relevanta kopplingar till risk för att det uppstår indirekta kostnader.

Bankföreningen och flera andra remissinstanser har påpekat att om syftet med skatten verkligen vore att minska risken för indirekta kostnader, bör ett annat mått för att mäta risken användas för att därmed ge kreditinstituten incitament till ett lägre risktagande. Regeringen avfärdar den kritiken bl.a. med:

"Det vore inte lämpligt om Skatteverket – inom ramen för ordinarie beskattning – skulle göra en bedömning av den risk som ett visst kreditinstitut utgör för de makroekonomiska förhållandena vid en viss tidpunkt. Ett dynamiskt system som det som används i det finansiella regelverket för att bestämma skattskyldigheten utifrån risktagandet i respektive kreditinstitut skulle leda till osäkerhet beträffande beskattningen och är därför inte lämpligt för beskattningsändamål."

Bankföreningen undrar om det, såsom föreslås, istället anses rättssäkert och berättigat att ta ut en hög skatt från ett fåtal skattskyldiga på en grund som i princip samtliga remissinstanser anser inte har en koppling till risk och som regeringen dessutom inte kan motivera på ett trovärdigt sätt?

Argumentationen är även svår att förstå när man skriver att skuld är ett bra mått på risk men av förenklingsskäl vill man inte exkludera några skulder som inte är kopplade till risk.

"Huruvida en skuld typiskt sett saknar samband med kreditinstitutets risk saknar dock betydelse för om den ska beaktas vid beräkningen av beskattningsunderlaget eller inte."

Med uttalanden som dessa är det för Bankföreningen uppenbart att regeringen är medveten om att den valda skattebasen inte har något med mått på risk att göra. Skattebasen har valts av förenklingsskäl och den föreslagna skatten har inget med

risk för indirekta kostnader att göra. Såsom påpekats av flera remissinstanser måste en skatt vara motiverad för att vara legitim. De nu och tidigare anförda argumenten håller inte för att göra skatten legitim. Förslaget bör därför dras tillbaka.

3.4 Skuld hänförlig till filialverksamhet utanför Sverige

En stor förändring jämfört med det ursprungliga förslaget är att skattebasen utökats till att också omfatta kreditinstitutets skulder som är att hänföra till verksamhet i en utländsk filial. Genom förändringen undviks den svåra bedömningen att avgöra om skuld är att hänföra till svenskt huvudkontor eller utländsk filial. Men, justeringen leder till nya och större problem.

För det första försämrar förslaget svenska bankers konkurrensmöjligheter genom att de får en klar nackdel när de beskattas på skuld att hänföra till verksamhet som bedrivs i utlandet. För det andra innebär förslaget också, tvärtemot vad regeringen påstår, fortsatt en olik behandling av svenska kreditinstitut med filialstruktur och svenska kreditinstitut med dotterbolagsstruktur, vilket redogörs för i nästa stycke. Slutligen innebär utvidgningen av skattebasen till att omfatta skuld hänförlig till utländsk verksamhet en betydande ändring i vad som initialt verkar har varit avsett med skatteförslaget.

Som lyfts ovan bygger förslaget på fel förutsättningar och innebär att regeringen vill beskatta svenska kreditinstituts utländska verksamhet för kostnader som inte ens kan komma att uppstå i Sverige, utan i utlandet. Det är något helt annat än det tidigare påstådda motivet att beskatta kreditinstituten för risken för indirekta kostnader hänförliga till verksamhet i Sverige.

3.5 Filial- respektive dotterbolagsstruktur hanteras fortfarande inte lika

Skattemässig neutralitet för riskskatten?

I den utformning som riskskatten hade i promemorian kunde det vara fördelaktigt att bedriva verksamhet i utlandet i filialform. I utkastet till lagrådsremiss är det istället fördelaktigt att bedriva verksamhet i dotterbolagsform. Skattemässig neutralitet uppnås alltså varken i promemorian eller i utkastet. Förslaget strider sannolikt således fortsatt mot etableringsfriheten.

I utkastet till lagrådsremiss finns en motivering till den bristande neutraliteten, nämligen att svenska staten står för vissa kostnader för verksamhet som bedrivs i svenska bankers utländska filialer, men inte för verksamhet som bedrivs i svenska bankers utländska dotterbolag. Dessa kostnader bör enligt Bankföreningen dock i princip vara täckta av resolutions- och insättningsgarantisystem. Om den föreslagna skatten i själva verket är en modifierad avgift för dessa kostnader bör det under-

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sökas om skatten är förenlig med relevant EU-lagstiftning om resolutions- och insättningsgarantiavgifter.

Två exempel som tillsammans visar den bristande neutraliteten av riskskatten

Som visas i exemplen nedan blir riskskattebasen lägre i promemorian om utländsk verksamhet bedrivs i filialform än i dotterbolagsform. I utkastet till lagrådsremiss blir riskskattebasen istället högre i filialfallet än i dotterbolagsfallet.

Exempel 1 (filialfallet)

En svensk bank bedriver verksamhet i Sverige och i en dansk filial. Banken har utlåning på 800 miljarder kronor (mdkr) i Sverige och 200 mdkr i Danmark. Banken har ett eget kapital på 80 mdkr, varav 10 mdkr är allokerat till den danska filialen. Banken har inlåning på 100 mdkr i Danmark och 820 mdkr i Sverige.

	Banken	*- varav svensk del*	*- varav dansk filial*
Tillgångar			
Utlåning till svensk allmänhet	800	800	-
Utlåning till dansk allmänhet	200	-	200
Utlåning till den danska filialen	-	90	-
Summa	**1 000**	**890**	**200**
Skulder och eget kapital			
Inlåning	920	820	100
Lån från svenska delen av företaget	-	-	90
Eget kapital	80	70	10
Summa	**1 000**	**890**	**200**

Riskskattebas promemorian: 820 mdkr – 90 mdkr = 730 mdkr
Riskskattebas utkastet: 920 mdkr

Exempel 2 (dotterbolagsfallet)

En svensk bank bedriver verksamhet i Sverige och i ett danskt dotterbolag. Banken har utlåning på 800 mdkr i Sverige och 200 mdkr i Danmark. Banken har ett eget kapital på 80 mdkr, varav 10 mdkr ligger i det danska dotterbolaget. Banken har inlåning på 100 mdkr i Danmark och 820 mdkr i Sverige.

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	Banken	*- varav svenskt moderbolag*	*- varav danskt dotterbolag*
Tillgångar			
Utlåning till svensk allmänhet	800	800	-
Utlåning till dansk allmänhet	200	-	200
Utlåning till danskt dotterbolag	-	90	-
Aktier i danska dotterbolaget	-	10	-
Summa	**1 000**	**900**	**200**
Skulder och eget kapital			
Inlåning	920	820	100
Lån från svenskt moderbolag	-	-	90
Eget kapital	80	80	10
Summa	**1 000**	**900**	**200**

Riskskattebas promemorian: 820 mdkr
Riskskattebas utkastet: 820 mdkr

Anledningen till att det uppstår en diskrepans mellan skatteunderlaget för filial respektive dotterbolag är att inlåningen från dansk allmänhet blir beskattad om verksamheten drivs i filial. Det kan starkt ifrågasättas varför inlåning från danska bankkunder för att finansiera utlåning till andra danska bankkunder ska ligga till grund för svensk beskattning. Risken att utlåningen till en dansk kund resulterar i indirekta kostnader i Sverige är högst osannolik. Dessutom innebär det en orättfärdig olikbehandling mellan filialer och dotterbolag.

Förslaget kan även fortsatt komma att gynna utländska banker (utländskt huvudkontor) framför svenska banker (svenskt huvudkontor).

1) Svenskt huvudkontor allokerar skuld till utländsk filial ⇨ Ingår i skattebas
2) Svenskt huvudkontor lånar ut till utländskt dotterbolag ⇨ Ingår i skattebas
3) Det svenska huvudkontoret flyttar utomlands (den svenska verksamheten blir filial till det utländska huvudkontoret) och det nya huvudkontoret lånar ut till annan utländsk filial eller utländskt dotterbolag ⇨ Ingår inte i skattebas

Bankföreningen anser att skatten i situation 1 och 2 ovan måste behandlas på samma sätt som situation 3, dvs. den aktuella skulden ska undantas från skattebasen. Det tidigare förslaget inbjöd till att förlägga koncernens treasury-verksamhet utanför Sverige och från ett annat land finansiera övriga koncernbolag utanför Sverige. Detta incitament kvarstår. Det nuvarande förslaget inbjuder därutöver till att förlägga säte utanför Sverige och på så sätt undvika att skuld hänförlig till filial utanför Sverige beskattas.

Ett annat exempel på konkurrenssnedvridning är att en filial normalt sett har en högre andel skuld än eget kapital jämfört med en egen legal enhet. Beskattningsunderlaget blir således större för en filial än för en egen legal enhet (utan utländsk filial) och därför bör undersökas om beskattningsunderlaget för en filial bör reduceras med ett belopp motsvarande ett normalt kapitalbehov för att neutralisera den skillnad av beskattningsunderlag som annars uppstår mellan filialer och egna legala enheter. Detta skulle kunna göras genom att man beaktar den allokering av eget kapital/skuld som görs inom ramen för transfer pricing-justeringar avseende filialer.

3.6 Gränsöverskridande koncerninterna lån försvåras

De föreslagna reglerna verkar medföra en mer fördelaktig beskattning för inhemska koncerninterna lån jämfört med gränsöverskridande sådana. Anledningen till detta är att vid en inhemsk lånetransaktion undantas skuld till svenskt kreditinstitut som ingår i samma koncern, i syfte att undvika dubbelbeskattning. Om ett svenskt kreditinstitut istället finansieras från ett utländskt koncernbolag som i sin tur erlägger en särskild bankskatt, uppstår en dubbelbeskattning som enligt förslaget skulle vara mycket svår att lösa genom avräkning. Detta skulle kunna strida mot den fria rörligheten givet den mer fördelaktiga beskattningen för inhemska koncerninterna lån jämfört med gränsöverskridande sådana.

3.7 Nekad avräkningsmöjlighet för svenska kreditinstitut

I utkastet till lagrådsremiss föreslås ändringar i möjligheten till avräkning för utländsk motsvarighet till riskskatt. Bankföreningen vill inledningsvis påpeka att den föreslagna lagtexten är mycket svår att förstå. Bankföreningens tolkning av förslaget är att ett svenskt kreditinstitut som driver verksamhet i utlandet via en filial, inte har rätt till avräkning för utländsk motsvarighet till riskskatt som erläggs i utlandet av den utländska filialen. Inte heller har en svensk filial till ett utländskt kreditinstitut möjlighet till avräkning för utländsk riskskatt som huvudkontoret erlägger på skuld som är att hänföra till den svenska filialen. Det är primärt den förstnämnda situationen Bankföreningen har starka invändningar mot.

Bankföreningen ifrågasätter kravet på att en utländsk motsvarighet till riskskatten måste vara baserad på ett *identiskt* underlag för att avräkning ska vara möjlig. Bankföreningen anser att det är tillräckligt att den utländska skatten är *jämförbar* med den svenska för att avräkning ska kunna medges. Diskussionen om avräkning försvåras genom att den föreslagna riskskatten inte är en inkomstskatt; det är inte tal om en traditionell skatt på avkastning. Eftersom skälen till den föreslagna riskskatten för kreditinstitut inte är trovärdigt underbyggda, bör därför rimligtvis all utländsk särbeskattning av finansiell verksamhet utgöra en avräkningsbar skatt. Det som torde vara av vikt är att det rör sig om en jämförbar skatt erlagd av en och samma beskattningsbara person och att den utländska skatten utgår på grund av att

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subjektet är ett kreditinstitut eller motsvarande. Något krav på att den utländska skatten ska tas ut på grund av att verksamheten skulle orsaka indirekta kostnader kan inte finnas. Varför inkomstskatter tas ut varierar mellan stater och det ifrågasatts normalt inte vid avräkning av utländsk skatt om den i utlandet är uttagen för att finansiera ett specifikt ändamål. Slutligen anser Bankföreningen att de hinder mot avräkning som föreslås innebär ett tydligt brott mot etableringsfriheten, genom att en filialetablering utomlands blir synnerligen kostsam för ett svenskt kreditinstitut, jämfört såväl med dotterbolagsetablering utomlands som inhemsk expansion.

Exempel på olikbehandling på grund av riskskatten
Låt oss anta att vi har riskskatt i Sverige och motsvarande skatt i Utland. Avräkningsreglerna gäller enbart för koncerninterna lån. Till den del lån finansieras genom upplåning i en filial uppstår därför fortfarande dubbelbeskattning.

	Bank A, huvudkontor i Sverige	Bank B, huvudkontor i Sverige, filial i Utland	Bank C, huvudkontor i Sverige, dotterbolag i Utland
Upplåning i Sverige	95	47,5	47,5
Upplåning i Utland	0	47,5	47,5
Utlåning i Sverige	100	50	50
Utlåning i Utland	0	50	50
Riskskattebas i Sverige	95	95	47,5
Riskskattebas i Utland	0	47,5	47,5
Total riskskattebas	95	142,5	95

Som framgår tydligt i tabellen ovan missgynnas etablering i filialform av riskskattens utformning och avsaknad av avräkningsmöjlighet.

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4. Skattens förenlighet med EU-rätten

EU:s statsstödsregler innebär ett förbud mot statliga åtgärder som påverkar handeln mellan medlemsstaterna och snedvrider konkurrensen genom att otillbörligt gynna vissa företag. Bankföreningen har under arbetet med yttrandet på promemorian låtit Ulf Bernitz, professor i europeisk integrationsrätt, och Jérôme Monsenego, professor i internationell skatterätt, analysera om förslaget som lades fram under hösten 2020 kan komma att strida mot EU-rätten. Rättsutlåtandena konstaterar att det första förslaget om riskskatt kommer att leda till konkurrenssnedvridning mellan svenska kreditinstitut med skulder över respektive under gränsvärdet, men också mellan svenska kreditinstitut och utländska kreditinstitut utan fast driftställe i Sverige. Förutsättningarna som låg till grund för rättsutlåtandet om olikbehandlingen mellan utländska filialer och utländska dotterbolag har i och för sig ändrats, men även utkastet till lagrådsremiss behandlar filialstruktur annorlunda jämfört med dotterbolagsstruktur, varför utlåtandena till största del fortsatt är relevant. Som Bankföreningen påpekar i avsnitt 3.7 innebär de föreslagna begränsningarna till avräkning för utländsk motsvarighet till riskskatt sannolikt ett nytt hinder mot etableringsfriheten.

Enligt Bankföreningen står förslaget med stor sannolikhet i strid med EU-rätten på följande grunder:

Skattens territoriella omfattning

Skattens nya territoriella omfattning är enligt Bankföreningens tolkning den största förändringen jämfört med hur skatten var utformad i promemorian från hösten 2020. Frågan om den territoriella omfattningen är ganska bred och inbegriper flera delfrågor, framförallt avräkningsmekanismen. Förslagets förenlighet med den fria rörligheten kan därför fortsatt ifrågasättas, eftersom den breda territoriella omfattningen kopplad till den snäva avräkningsmekanismen skulle kunna innebära ett hinder till utländsk etablering i länder med andra former av skatter på finansiell verksamhet. Dessutom är avräkningsmekanismen begränsad till EES-området. Detta ger upphov till frågan om avsaknaden av avräkningsmekanism mot tredje land kan strida mot den fria rörligheten för kapital, som även gäller utanför EU. Skattens territoriella omfattning kan även skapa statsstödsrättsliga frågor. Stöd skulle kunna anses ges till utländska banker (som endast beskattas för sin svenska verksamhet) och till koncerner som organiserar sig med utländska dotterbolag istället för filialer.

Olikbehandling av inhemska och gränsöverskridande fusioner

I avsnitt 3.5 har visats olikbehandling av koncerner med dotterbolag respektive filial. Enligt Bankföreningen bör det även undersökas om förslaget är EU-stridigt genom att det hindrar gränsöverskridande fusioner. Vid en inhemsk fusion av två svenska banker uppstår ingen ökning av skattebasen, annat än att respektive instituts skulder räknas samman. Vid en gränsöverskridande fusion mellan en svensk och utländsk

bank (hemmahörande i ett land med en särbeskattning av finansiell verksamhet) där den utländska verksamheten blir en filial till den svenska banken, sker en motsvarande ökning av skattebasen, men skattebelastningen blir därtill avsevärt högre om inte avräkning för den utländska skatten skulle medges.

Koncerninterna lån

De föreslagna reglerna verkar medföra en mer fördelaktig beskattning för inhemska koncerninterna lån jämfört med gränsöverskridande sådana. Detta skulle kunna utgöra ett hinder mot gränsöverskridande koncernintern utlåning, som kan strida mot den fria rörligheten. Det kan också ifrågasättas om de föreslagna reglerna innebär ett statsstöd till inhemska koncerner eller koncerner med inhemsk verksamhet, i och med den särbehandling som föreslås för gränsöverskridande koncerninterna lån. Reglerna verkar också innebära en fördel för koncernintern långivning jämfört med utlåning mellan utomstående företag, sett till avräkningsmöjligheterna för utländsk skatt. I så fall kan reglerna möjligen innebära ett statsstöd till företag som väljer koncernintern utlåning, jämfört med utlåning mellan oberoende företag.

Gränsvärdet för att erlägga riskskatt

Gränsvärdet för att erlägga riskskatt är oförändrat jämfört med det tidigare förslaget. I utkastet till lagrådsremiss lyfts fram två av EU-domstolen nyligen avgjorda fall som enligt utkastet till lagrådsremiss skulle tyda på att förslaget till riskskatt inte strider mot statsstödsreglerna; kommissionen mot Polen, C-562/19 och kommissionen mot Ungern, C-596/19. Bankföreningen anser att förutsättningarna i de två fallen och den föreslagna riskskatten inte är direkt jämförbara. För det första är skatten i rättsfallen baserad på omsättning och inte skuld. En skatt på omsättning har en åtminstone något närmre koppling till ett bolags intjäning och skatteförmåga än skatt på skuld. För det andra är skatten i de två fallen progressiv och innebär ingen olikbehandling av företag med omsättning över respektive under en viss nivå, det vill säga en undantagen del av omsättningen blir inte beskattad för någon. Slutligen är dessa rättsfall av betydligt mer nationell karaktär. Den föreslagna riskskatten skulle däremot ha en stor påverkan på internationell konkurrens på den europeiska marknaden.

Övriga frågor

Som Bankföreningen och flera andra remissinstanser har påpekat tar riskskatten, sitt namn till trots, inte hänsyn till hur riskfylld en banks verksamhet är. Detta skulle kunna innebära att stöd ges till banker som lämnar krediter med hög risk, eftersom sådana banker kan ha högre lönsamhet och därmed en bättre förmåga att betala riskskatten.

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Slutsats

Med skattens numera bredare territoriella omfattning blir det en större del av den finansiella verksamheten som beskattas med riskskatten. Detta utökar skillnaden jämfört med andra finansiella institut som är undantagna från skatten, samt med andra sektorer som inte omfattas av skatten.

I de fyra bifogade rättsutlåtandena bedöms att den tidigare föreslagna skatten sannolikt innebär ett otillåtet statsstöd riktat till de kreditinstitut som inte behöver betala den. De fyra rättsutlåtandena bifogas. Som redogjorts för ovan finns tydliga argument för att ta in flera rättsutlåtanden.

SVENSKA BANKFÖRENINGEN

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Bilagor:

1. Bankföreningens yttrande på promemorian *Riskskatt för vissa kreditinstitut*
2. Rättsutlåtande *Angående EU-rättslig bedömning av förslagen i departementspromemorian Riskskatt för vissa kreditinstitut, särskilt sett i relation till EU:s statsstödsregler*, av professor Ulf Bernitz
3. Rättsutlåtande *Analysis of the liabilities threshold in the proposal for a risk tax on certain credit institutions from a state aid perspective*, av professor Jérôme Monsenego
4. Rättsutlåtande *Risk tax for certain credit institutions - State aid analysis with respect to the exclusion of foreign liabilities connected to the Swedish credit market*, av professor Jérôme Monsenego
5. Rättsutlåtande *Risk tax for certain credit institutions – high level review of other potential issues of compatibility with EU law*, av professor Jérôme Monsenego

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REMISSYTTRANDE
Vår referens: 2020/09/004
Er referens: Fi2020/03725/S1

2020-11-10

Finansdepartementet

Via e-post till:
fi.registrator@regeringskansliet.se

Riskskatt för vissa kreditinstitut

Sammanfattning

Bankföreningen avstyrker förslaget till riskskatt för vissa kreditinstitut. Skatten har ett oklart motiv, är rättsosäker samt har negativa effekter på tillväxt och konkurrens. Lagtexten är svårtolkad och därutöver skapar den snedvridningar mellan kreditinstitut med olika legal struktur. Dessutom står förslaget till skatt med stor sannolikhet i strid med EU:s statsstödsregler.

Förslaget innebär att svenska banker får en betydande nackdel i konkurrensen med utländska banker. Bankföreningens uppskattning är att de största bankerna möter utländsk konkurrens för i genomsnitt 15–20 procent av den verksamhet som återfinns på den svenska bankens balansräkning, på grund av att verksamheten utgörs av utlåning till stora företag som har direkt tillgång till en internationell bankmarknad. En sannolik effekt av skatten är att utlåning till svensk allmänhet förskjuts mot att ske genom låneförmedling från en utländsk bank.

Att skatten enbart träffar ett fåtal aktörer på den svenska marknaden ger upphov till betydande konkurrenssnedvridningar. Aktörer vars skulder inte når upp till gränsvärdet och aktörer som använder alternativa finansieringsformer så som värdepapperisering eller bolånefonder, gynnas i förhållande till dem som träffas av skatten.

Genom ökade lånekostnader för svenska företag, kommuner och hushåll kommer skatten i förlängningen även att fördyra investeringar.

Sannolikheten är ytterst låg för att svenska kreditinstitut vid en finansiell kris riskerar att orsaka väsentliga indirekta kostnader för samhället mot bakgrund av de stabilitetsskapande åtgärder som genomförts de senaste tio åren.

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Kapitaltäckningskraven har sedan 2008–2009 skärpts avsevärt och i än högre grad för svenska banker än för banker i andra länder. Ett omfattande krishanterings-regelverk har införts i syfte att eliminera risken för att skattemedel ska behöva användas för att hantera finansiella kriser. Sverige har dessutom byggt upp ekonomiska skyddsvallar i form av unikt stora avsatta medel. De senaste fem åren har de svenska bankerna betalat in 37 miljarder kronor till insättningsgarantifonden och resolutionsreserven. De totala medel som är avsatta för att hantera banker i kris är närmare 130 miljarder kronor.

I sin konstruktion framstår skatten som rättsosäker. Det saknas bärande motiv till varför gränsen för att omfattas har satts till skulder på 150 miljarder kronor. Konstruktionen med ett gränsvärde innebär dessutom en betydande och tillväxt-hämmande tröskeleffekt eftersom banker som passerar tröskelvärdet får en omedelbar skatteeffekt på omkring 100 miljoner kronor.

Grunden för skatteuttaget är *skulder hänförliga till verksamhet som kreditinstitutet bedriver i Sverige*. Lagförslaget är svårtolkat i detta avseende. Omfattas till exempel de skulder som svenska banker har och som används för att finansiera bankernas utländska dotterbanker? I författningskommentaren anges att skulder som är hänförliga till verksamhet i ett utländskt fast driftsställe inte ska beaktas. Skillnaden mellan hur skatten träffar banker med filial- respektive dotterbanksstruktur strider sannolikt mot etableringsfriheten och inbjuder tillsammans med andra delar av förslaget till olika former av skatteplanering.

Mot bakgrund av att enbart ett fåtal av de konkurrerande aktörer som säljer finansiella tjänster träffas av skatten har Bankföreningen gett två professorer – Ulf Bernitz, professor i europeisk integrationsrätt, och Jérôme Monsenego, professor i internationell skatterätt – i uppdrag att göra rättsliga bedömningar av om förslaget strider mot EU:s statsstödsregler. Båda två konstaterar att skatten är selektivt missgynnande och inte kan rättfärdigas mot bakgrund av sitt oklara syfte. Deras slutsats är att förslaget till riskskatt sannolikt strider mot EU:s statsstödsregler.

1 Bakgrund

Regeringen föreslår en särskild skatt för ett fåtal kreditinstitut. Skatten benämns riskskatt och ska betalas av kreditinstitut med en viss minsta skuldmassa hänförlig till verksamhet som kreditinstitutet bedriver i Sverige. Syftet med skatten beskrivs som att större kreditinstitut bör betala mer skatt för att täcka upp för framtida eventuella indirekta kostnader orsakade av en finansiell kris. Den angivna anledningen till att enbart kreditinstitut med skulder överstigande en viss nivå omfattas är att större kreditinstitut anses ge upphov till mer omfattande indirekta kostnader för samhället vid en finansiell kris.

Skatten är tänkt att tas ut oavsett om kreditinstitutet gör vinst eller förlust och kommer inte att fonderas eller på annat sätt öronmärkas för några indirekta kostnader orsakade av en finansiell kris.

Skatteuttaget beräknas år 2022 vara cirka 6,3 miljarder kronor och ska från och med år 2023 ökas med cirka en miljard kronor. Enligt Bankföreningens beräkning motsvarar skatteuttaget en genomsnittlig ökning av bolagsskatten för de aktuella kreditinstituten från 20,6 procent till cirka 30 procent.

2 Övergripande synpunkter på förslaget

Bankföreningen anser att lagförslaget saknar legitimitet och att det i flera avseenden kommer att leda till negativa effekter. I de följande avsnitten lämnar Bankföreningen övergripande synpunkter på förslaget.

2.1 Skälen är otillräckliga

Förslaget innebär att initialt nio kreditinstitut kommer att betala en särskild skatt. Dessa nio institut utgörs av fem svenska banker, två svenska filialer till utländska banker och två offentligt ägda kreditinstitut. Instituten är sinsemellan olika till storlek, verksamhetsinriktning, ägarstruktur och riskprofil.

För att en omfattande skattepålaga, som endast träffar en avgränsad grupp, ska vara legitim måste det finnas tydliga och skäliga motiv till varför just denna grupp ska träffas av skatten. Att beskatta en sektor för risken att den orsakar indirekta kostnader i samhället är en aldrig tidigare prövad beskattningslogik som kräver en grundligare utredning än vad som finns i promemorian. Bankföreningen anser att de i promemorian angivna skälen till skatten är otillräckliga för att ge skatten legitimitet.

Utöver skälen till skatten måste även basen för skatteuttaget vara välmotiverad. Även i denna del kan förslaget ifrågasättas. Jämför till exempel med resolutions-avgiften där avgiften differentieras beroende på ett antal riskindikatorer. Någon sådan viktning görs inte när det gäller underlaget för den föreslagna skatten.

2.2 De indirekta kostnaderna är inte kvantifierade

Regeringen har vid tidigare lagda förslag hävdat att ett motiv för att införa en skatt på den finansiella sektorn är att branschen skulle vara underbeskattad, vilket visat sig svårt att leda i bevis. Den här gången motiveras inte den föreslagna skatten med detta argument. Istället hänvisar promemorian till risk för substantiella kostnader vid en eventuell kris, men utan att kvantifiera dessa. För att skatten ska anses motiverad bör det åtminstone finnas en analys som visar att det angivna motivet till skatten är relevant för införandet och att det valda skatteuttaget motsvarar den kostnad som samhället riskerar att drabbas av. Eftersom en sådan analys saknas anser Bankföreningen att den föreslagna skatten inte är motiverad.

I promemorian anges att *"[s]yftet med förslaget i denna promemoria är att stärka de offentliga finanserna för att därigenom skapa utrymme för att klara en framtida finansiell kris. Därför föreslås att kreditinstitut som vid en finansiell kris riskerar att orsaka väsentliga indirekta kostnader för samhället ska betala riskskatt. Om förslaget inte genomförs uteblir de intäkter skatten beräknas ge upphov till och förstärkningen av de offentliga finanserna kommer inte till stånd."*. Med tanke på att de belopp som skatten ska generera inte kommer att fonderas är det oklart hur ett utrymme för att klara en framtida finansiell kris ska skapas. Den sista meningen i citatet är i och för sig sann, men ett analogt resonemang kan föras för vilken skattehöjning eller utgifts-minskning som helst. Det är inte ett argument som skapar legitimitet för att särskilt beskatta ett fåtal kreditinstitut.

2.3 Gränsvärdet saknar bärande motivering

Gränsvärdet på 150 miljarder kronor för att träffas av skatten förefaller godtyckligt uppskattat och saknar bärande motivering. Förslaget brister bland annat eftersom det saknas en klar koppling mellan storlek på skuld och risken för att orsaka indirekta kostnader vid en finansiell kris. Vidare återspeglar inte skattebasen risken för att kreditinstitutet går omkull och uppskattar inte de indirekta kostnaderna för det fall institutet gör det.

Risken för indirekta kostnader torde påverkas av ett antal faktorer som var och en behöver identifieras och kvantifieras för att i sin tur göra det anförda motivet för skatten trovärdigt. Det kan handla om till exempel risken för att ett enskilt kreditinstitut går omkull, vilket till viss del beror på hur riskfyllda tillgångarna är, hur starkt kreditinstitutet står efter de stabilitetsstärkande lagstiftningsåtgärder som genomförts de senaste åren, vilken miljö man verkar i och vilken egen motstånds-kraft institutet har att möta en i omvärlden stressad situation genom en stark verk-samhet. Förslaget beaktar inte någotdera.

Erfarenhetsmässigt kan i vissa situationer betydligt mindre kreditinstitut medföra stora risker för finansiell instabilitet. När Carnegie bedömdes som ett systemviktigt

institut i november 2008 hade institutet skulder på i storleksordningen 40 miljarder kronor. I den då rådande situationen, med betydligt lägre kapital- och likviditetskrav, bedömdes att en konkurs i Carnegie skulle ha fått långtgående konsekvenser för den finansiella stabiliteten. Generellt sett medför problem i stora kreditinstitut större konsekvenser än i små kreditinstitut, men kostnaderna för ett eventuellt fallissemang är långtifrån den enda parametern av intresse. Risken för att ett problem uppstår är minst lika viktig. Det är därför även i detta hänseende svårt att se att den föreslagna skatten är särskilt träffsäker.

2.4 Reformer som minskat risken för såväl direkta som indirekta kostnader

Bankerna lyder redan under flera regelverk vars huvudsakliga syfte är att minimera risken för att skattemedel ska behöva användas för att hantera finansiella kriser. Ett av dem är resolutionsregelverket. Kärnan i resolutionsprocessen är att bankernas ägare och långivare snarare än skattebetalarna ska bära eventuella förluster. Den EU-rättsliga basen för resolutionsregelverket begränsar också kraftigt staternas möjlighet att använda offentliga medel för att hantera kriser. Eventuella statliga insatser i samband med en kris ska, efter att aktie- och fordringsägarna har tagit största möjliga del av kostnaderna, finansieras av medel ur resolutionsreserven. Bankerna betalar årligen en avgift till resolutionsreserven så länge som behållningen i resolutionsreserven understiger tre procent av bankernas och institutens sammanlagda garanterade insättningar. Resolutionsreserven uppgick till 43,5 miljarder kronor vid utgången av 2019, vilket motsvarar drygt 2,7 procent av de sammanlagda garanterade insättningarna. Detta gör den svenska resolutionsreserven till den största i Europa.

Utöver resolutionsreserven finns stabilitetsfonden och insättningsgarantifonden. Stabilitetsfonden uppgår till cirka 40 miljarder kronor och kan användas av staten för att förebygga uppkomsten av finansiella kriser. Insättningsgarantifonden, som även den finansieras av avgifter från banker och kreditinstitut, uppgår till drygt 44 miljarder kronor och ska användas för att skydda insättarna i den händelse ett institut går i konkurs.

Svenska banker har betalat 37 miljarder kronor i resolutions- och insättningsgaranti-avgift under de senaste fem åren. De fonder och reserver som är avsatta för att stötta bankers kunder och det finansiella systemet i händelse av kris uppgår idag till närmare 130 miljarder kronor. Fonderna och reserverna är större än i något annat EU-land.

Kapitaltäckningsreglerna har till syfte att stärka stabiliteten i det finansiella systemet. Kapitaltäckningsreglerna anger miniminivån på det kapital som bankerna måste ha för att kunna möta oförutsedda förluster i verksamheten. På så sätt begränsas storleken av de eventuella förluster bankerna kan ådra sig för det fall en kund eller en grupp av kunder inte kan infria sina åtaganden mot banken. Vilket kapitalkrav

som gäller för en svensk bank följer dels av EU-regler och svensk lagstiftning, dels av beslut som fattas av Finansinspektionen inom ramen för myndighetens tillsyn. De tre stora svenska bankerna har i jämförelse med resten av EU höga kapitalkrav. Dessutom håller bankerna kapital som med marginal överstiger kapitalkraven. Detta betyder att bankerna sammantaget har mycket goda förutsättningar att hantera eventuella oförutsedda förluster.

Enligt Bankföreningens uppfattning är de risker som ligger bakom skatteförslaget mer eller mindre eliminerade genom de skyddsvallar som byggts upp efter finanskrisen 2008/2009 och att branschen redan gott och väl täcker sina egna kostnader avseende risker för samhällsekonomin.

Bankföreningen vill dessutom poängtera att ursprunget till finanskriser sällan är att hänföra till större svenska kreditinstitut, utan istället till händelser i omvärlden. Som exempel kan nämnas finanskrisen 2008 som hade sitt ursprung i en värdepapperiserad bolånemarknad i USA och den europeiska statsskuldkrisen 2010 som hade sitt ursprung i hög offentlig skuldsättning och svaga statsfinanser. Bankföreningen anser det omotiverat att belägga en snäv krets av aktörer inom en bransch med skatt för en kostnad som dessa eller branschen med stor sannolikhet inte kommer att ge upphov till.

2.5 Förslaget kan öka risken

Det finns ett antal mekanismer som talar för att riskerna i det finansiella systemet snarare ökar än minskar om skatten skulle införas.

Stora internationella bolag med bas i Sverige har alternativet att finansiera sig på den internationella marknaden. Dyrare lån från svenska banker kommer att ge incitament att välja utländska banker. När det råder stor osäkerhet på finansmarknaderna har det historiskt visat sig att banker i första hand värnar sina kärnkunder på den lokala marknaden. Att ha ett starkt och konkurrenskraftigt inhemskt bankväsende är därför en trygghet för svenska företag i kristider.

Svenska banker är numera hårt reglerade, men frågan är vad som händer nästa gång det blir oro på finansmarknaderna om utlåningen skiftat över till värdepappersmarknaden och oreglerade företag. Finanskrisen 2008 hade sitt ursprung i s.k. subprime-lån, där lånen finansierades av skuggbanker. Den nu föreslagna skatten skulle leda till ett ökat inslag av finansieringsformer likt det som skapade finanskrisen i USA. Därmed lämnas en större del av risken i det finansiella systemet utanför de skyddsmekanismer samhället byggt upp med kapitalkrav och annan reglering. Då försvagas det finansiella systemets motståndskraft och kontraproduktivt nog kan skatten öka riskerna i ekonomin.

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Bankerna har likviditetsbuffertar för att stärka sin motståndskraft mot tillfälliga likviditetsstörningar. Erfarenheter från tidigare finansiell oro visar att bristande likviditet ofta varit en utlösande orsak till att banker hamnat i kris. Den skatt som nu föreslås kommer att medföra att kostnaden även för upplåning som används för att finansiera hållande av likvida medel ökar. Därmed kan det konstateras att skatten motverkar uppbyggnad av likviditetsbuffertar och att den således *ökar* risken för finansiell instabilitet.

2.6 Negativ särbehandling av en specifik bransch

Annan verksamhet än bankverksamhet kan ge upphov till indirekta kostnader för skattebetalare om verksamheten fallerar. Ett företag som är dominerande inom sin bransch, eller en dominerande arbetsgivare inom ett visst geografiskt område, orsakar stora indirekta kostnader för skattebetalarna vid en större kris eller konkurs. Ett stort företag har oftast ett antal underleverantörer och en konkurs kan därmed slå ut många andra företag. Någon särskild beskattning för andra branscher för att täcka upp för indirekta kostnader har dock inte föreslagits. Varför den finansiella sektorn ska hanteras annorlunda, när det inte är påvisat att det finns en indirekt kostnad för staten, förklaras inte.

Även andra branscher skapar positiva och negativa indirekta effekter på ekonomin. Byggsektorn och investeringsvaruindustrin är starkt procykliska. Svensk export är i stor utsträckning inriktad mot investerings- och kapitalvaror, vilket tenderar att skapa starkare konjunktursvängningar än för export av konsumtionsvaror. Om beskattning ska ta hänsyn till indirekta effekter i form av starkare konjunktursvängningar framstår det som inkonsekvent att lägga en skatt på bankverksamhet men inte på bygg-verksamhet eller investeringsvaruindustri.

2.7 Bankerna är stora bolagsskattebetalare

Svenska banker är stora bolagsskattebetalare och bidrar med väsentligt större bolagsskatteintäkter i förhållande till både antal anställda och till förädlingsvärde än de flesta andra branscher. De tre stora svenska bankerna och Nordeas svenska bankfilial är samtliga bland de allra största bolagsskattebetalarna i Sverige. Till detta ska läggas att bankerna redan har en särbeskattning genom avdragsförbudet för räntor på efterställda skulder. När bankerna redan står för en mycket stor del av bolagsskatteintäkterna är det svårt att se legitimiteten för ytterligare beskattning, i synnerhet när det i promemorian inte ens kan fastslås storleken på de kostnader som uppges vara motiv för skatten.

2.8 Konkurrenssnedvridningar på svensk och internationell marknad

De samhällsekonomiska konsekvenserna av förslaget kan delas upp i två frågor. Den ena frågan är om en högre beskattning av bankverksamhet medför snedvrid-ningar jämfört med verksamhet i andra branscher. Generellt sett gäller att

beskattningen bör vara neutral mellan olika branscher, om det inte finns särskilda skäl som talar emot det.

Den andra frågan är om och i vilken grad utformningen av den föreslagna skatten är snedvridande inom finanssektorn. Frågan kompliceras av att det inte är helt tydligt hur den föreslagna skatten kommer att tillämpas.

Effekter på inhemsk konkurrens

Eftersom skatten inte omfattar alla kreditinstitut och då det föreslagna gränsvärdet inte heller beaktar all risk, leder detta till en omotiverad snedvridning av konkurrensen. Konkurrenssnedvridningen tar sig olika uttryck och är olika stark på olika delmarknader. Exempelvis har sparbankerna (som inte träffas av skatten) ofta en stark lokal ställning på såväl marknaden för utlåning till små och medelstora företag som för olika tjänster riktade till hushållskunder.

Ett annat konkret exempel är bolånemarknaden. Skulder som används för att finansiera bolån utgör en betydande del av det totala skatteunderlaget, varför det finns skäl att anta påverkan kan bli extra stor på denna marknad.

På den svenska bolånemarknaden finns totalt sett ett tjugotal aktörer. Den långsiktiga trenden är mycket tydlig; nya aktörer tillkommer och de mindre aktörerna växer snabbare än de större. För tio år sedan hade gruppen aktörer som inte berörs av den föreslagna skatten en marknadsandel vad gäller nya bostadslån på 3,6 procent. År 2019 hade marknadsandelen mer än sexfaldigats till 23 procent.

Den föreslagna skatten innebär således en betydande konkurrenssnedvridning mellan de sju banker som blir skattskyldiga, och därmed får en högre finansierings-kostnad, och övriga aktörer på marknaden.

Skatten ger vidare incitament att välja finansieringsformer som inte belastas med skatt. På bolånemarknaden torde det i första hand bli aktuellt med värde-papperisering av tillgångar eller att använda finansiering i form av så kallade bolåne-fonder. De aktörer som använder alternativa finansieringsformer har på kort tid kommit upp i en utlåningsvolym om cirka 30 miljarder kronor. Båda dessa finansieringsformer brukar kategoriseras som skuggbanksverksamhet eftersom de inte är reglerade i samma utsträckning som bankernas vanliga finansiering.

Även på marknaden för bankinlåning från hushåll, där aktörer som inte träffas av skatten har en marknadsandel på 27 procent, blir konkurrenssnedvridningen tydlig.

En annan viktig konkurrenssnedvridning kan uppstå när en utländsk bank riktar sig mot den svenska marknaden genom *förmedling* av lån i den svenska verksamheten. Beviljandet av lånen och även upptagande av skulder för att finansiera kredit-

givningen kan ske från utlandet. Svenska banker som har utländska filialer skulle i princip kunna sköta utlåning från sin utländska filial och på så sätt undvika skatten. I dessa situationer finns ingen svensk skattebas. Svenska aktörer utan utländska filialer, som SBAB, Kommuninvest och SEK, har inte den möjligheten.

Bankerna bedriver även annat än traditionell bankverksamhet, till exempel kapitalkrävande venture capital-verksamhet. Med förslaget uppstår en konkurrenssnedvridning även här eftersom en bank som träffas av skatten får betala riskskatt på den typen av verksamhet medan aktörer i andra sektorer slipper.

Effekter på internationell konkurrens

De stora svenska bankerna, och även de stora nordiska banker som har filialverksamhet i Sverige, har samtliga verksamhet som är internationellt konkurrensutsatt. Det kan till exempel vara frågan om att bankerna finansierar stora svenska exportföretag som i sin tur kan använda krediten för verksamhet i andra länder än i Sverige. Det kan också vara frågan om finansiering direkt från den svenska moderbanken till utländska motparter. Vidare kan "icke-svensk" verksamhet finansieras genom bankernas utländska dotterbolag (som i sin tur kan finansieras genom den svenska moderbanken) eller genom utländska filialer. I samtliga dessa fall sker finansieringen ofta i hård konkurrens med utländska banker. En ökad finansieringskostnad med sju räntepunkter bedöms av bankerna ha mycket stor betydelse för möjligheten att konkurrera med utländska aktörer.

Bankföreningen har inhämtat uppgifter från de tre stora svenska bankerna och kommit fram till att i genomsnitt 15–20 procent av den totala utlåningen sker i stark konkurrens med utländska banker.

Ett konkret exempel är Svensk Exportkredit (SEK) som har tre huvudtyper av affärer: lån till utländska köpare av svenska varor och tjänster, rörelsekrediter till exporterande bolag samt köp av fakturor som företagen ställt ut till sina utländska kunder. Av den totala utlåningen på 270 miljarder kronor vid utgången av år 2019 avsåg enbart cirka en tredjedel den svenska marknaden. SEK har avgörande betydelse för att svenska exportföretag ska kunna hävda sig i internationell konkurrens. En betydande del av SEK:s exportfrämjande verksamhet är finansiering av utländska kunder till svenska exportföretag. Om denna finansiering fördyras kan det leda till att svenska exportörer går miste om stora, och för svensk ekonomi viktiga, affärer.

2.9 Skatten fördyrar investeringar

Banklån används för att finansiera företagens investeringar och hushållens bostäder. Högre skatt på bankers upplåning leder till högre räntor på bankers utlåning. Med dyrare och därmed mindre tillgängligt kapital minskar företagens förmåga att

investera i nya innovationer och maskiner vilket begränsar den svenska ekonomins tillväxtpotential. Vidare fördyras, som nämns ovan, svensk export med resultat att tillväxten hämmas.

Kommunägda Kommuninvest står för närmare 60 procent av finansieringen av svenska kommuner och kommunala bostadsföretag, främst i små och medelstora kommuner. Den fördyring som skatten skulle medföra har således central betydelse för finansieringen av investeringar i välfärd, bostäder och infrastruktur.

2.10 Svenska bankers indirekta effekter på svensk ekonomi

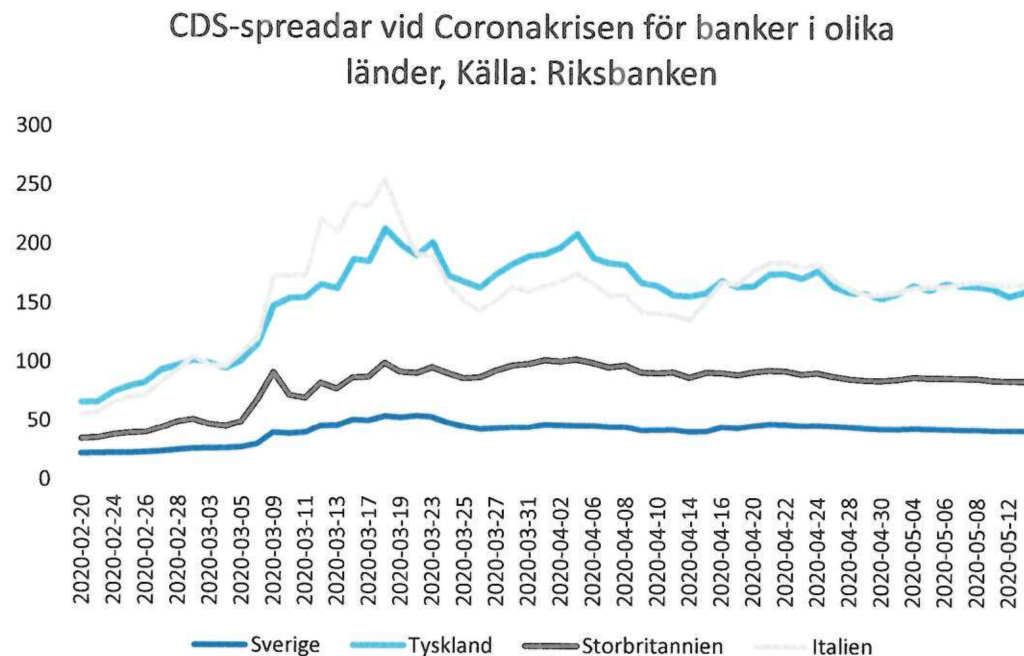
I grund och botten har svenska banker stora positiva indirekta effekter på svensk ekonomi. I en krissituation kan ett svagt banksystem medföra indirekta kostnader för andra delar av ekonomin.

Det är inte enkelt att kvantifiera de positiva och negativa indirekta effekterna av bankverksamhet på svensk ekonomi. De positiva effekterna torde vara mycket stora, då banker står för en mycket stor del av finansieringen av företagens investeringar och privatpersoners bostäder. Även under en djup kris kan det mycket väl vara så att banker netto skapar positiva indirekta effekter. En förutsättning torde dock vara att bankerna är starka nog att upprätthålla sin verksamhet även i oroliga tider. I det följande beskrivs de svenska bankernas motståndskraft i jämförelse med banker från andra länder.

Det finns olika sätt att mäta hur riskfyllda banker är. Det går att köpa försäkring mot betalningsinställelse på obligationer utgivna av banker. En sådan försäkring kallas för en Credit Default Swap, CDS. Den som ställer ut en CDS åtar sig att ersätta köparen av en CDS för kostnaderna för en eventuell betalningsinställelse (kallad credit event). För att överta risken måste utställaren av en CDS få betalt. Denna betalning kallas CDS-premie. Priset på CDS-kontrakt kan observeras på daglig basis, på samma sätt som räntor, börskurser eller råvarupriser. Räntan på obligationer som ges ut av banker kan ses som summan av den riskfria räntan och CDS-premien. För att kunna göra vinst måste banker kunna finansiera sig till en lägre ränta än de tar på sin utlåning. Om CDS-premien ökar kraftigt innebär det att bankens räntekostnader ökar och i längden är det en ohållbar situation om skillnaden mellan inlåningsräntan och utlåningsräntan inte är tillräckligt stor för att täcka bankens kostnader.

Risken för betalningsinställelse, som kan mätas genom CDS-premien, varierar förstås mellan olika banker och över tid. Vid finanskrisen, eurokrisen och inledningen av coronakrisen steg CDS-premierna generellt sett. Ökningen tenderade att vara störst för de banker som redan innan krisen hade högre CDS-premier än andra banker.

Nedan visas utvecklingen av CDS-premierna vid inledningen av coronakrisen. Till att börja med kan man konstatera att svenska banker har mycket starkare förtroende än andra europeiska banker (faktum är att svenska banker har starkare förtroende än nästan alla andra banker i världen). Ser man på CDS-premier är de mycket låga.



När WHO utlyste pandemi steg riskpremierna för banker i alla länder. Av de här jämförda länderna var Sverige på lägst nivå innan coronakrisen och Sverige hade också minst ökning när krisen slog till.[1]

[1] Data över CDS-premier är inte allmänt tillgängliga. Att Sverige, Tyskland, Storbritannien och Italien visas i diagrammet beror på att det är de länder som Riksbanken publicerat uppgifter ifrån. Den övergripande bilden, att svenska banker är bland de allra säkraste i världen, stämmer dock även om man ser till ett bredare urval av länder.

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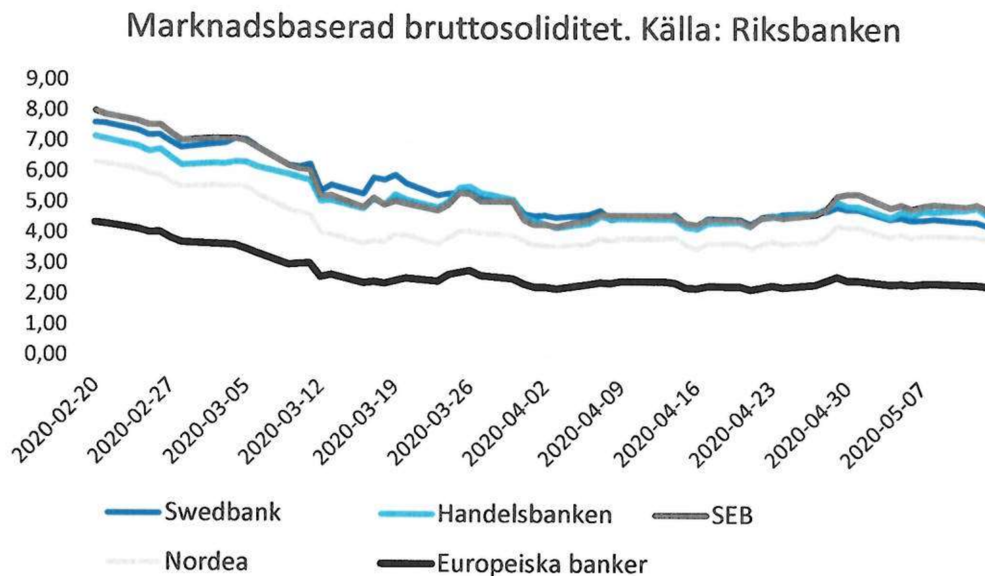

Ett annat, grovt, mått på bankers finansiella ställning är dess marknadsbaserade bruttosoliditet, det vill säga bankers börsvärde i förhållande till dess utlåning. Även här kan vi se att svenska banker ligger bra till i en europeisk jämförelse. I samband med coronakrisen förlorade bankaktier i värde, men även efter aktieprisfallet hade de banker som har stor verksamhet i Sverige betydligt högre börsvärde i förhållande till utlåning än europeiska banker i genomsnitt. Det innebär att svenska banker har mer marginaler att ta av om kreditförlusterna skulle stiga.

Sist men inte minst är svenska banker mycket högt rankade av de kreditvärderings-institut som utvärderar kreditrisker vid utlåning till olika banker.

Sammantaget är det tydligt att svenska banker har större motståndskraft och medför betydligt mindre risker för den finansiella stabiliteten än banker i andra europeiska länder.

3 Tekniska synpunkter på utformningen av lagförslaget

Utformningen av lagen leder till tolkningssvårigheter, snedvridningar och olyckliga incitament. I de följande avsnitten lämnas tekniska synpunkter på utformningen av lagförslaget.

3.1 Kretsen av skattskyldiga och skattens storlek

Bankföreningen konstaterar att det saknas en analys som visar varför institut med skulder överstigande 150 miljarder kronor ska omfattas av skatten. Gränsvärdet förefaller skönsmässigt bestämt.

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I promemorian saknas även motiv till varför skattesatsen ska uppgå till 0,06 procent det första året och därefter 0,07 procent, liksom en analys av vilka och hur stora de indirekta kostnaderna är. Den föreslagna storleken på skattebasen och skattesatsen synes vara valda för att generera en viss förutbestämd skatteintäkt.

Genom avgränsning till reglerade kreditinstitut utesluts den oreglerade skuggbanks-verksamheten. Vidare innefattas inte utländska institut som bedriver verksamhet i Sverige utan fast driftsställe. Sannolikt omfattas inte heller utländska institut som bedriver verksamhet i Sverige genom ett fast driftställe, men där filialverksamheten sker i form av låneförmedling.

3.2 Skuld hänförlig till verksamhet i Sverige

Skattebasen utgörs av kreditinstitutets skulder, minskat med skulder till annat kredit-institut inom koncernen, till den del de fordringar som motsvarar skulderna är hänför-liga till verksamhet kreditinstitutet bedriver i Sverige. Avsättningar och obeskattade reserver ska inte ingå, inte heller vissa efterställda skulder enligt lagen om resolution. Vidare ska skulder hänförliga till verksamhet i utländskt fast driftställe inte beaktas, förutsatt att det inte bedriver verksamhet i Sverige.

Bankföreningen anser att såväl begreppet *skuld hänförlig till verksamhet kredit-institutet bedriver i Sverige* som begreppet *skuld hänförlig till utländskt fast driftställe* är svårtolkade och måste förtydligas.

Med skulder som är hänförliga till verksamhet i Sverige avses huvudsakligen in- och upplåning (inklusive emittering av värdepapper) som används för att finansiera kreditgivning i den svenska verksamheten, men även andra typer av skulder som är ett resultat av verksamheten i Sverige omfattas. Det framstår initialt klart att skulder i det svenska kreditinstitutet som används i verksamhet i utländsk filial inte ingår, men den avgränsningen kan i praktiken vara mycket svår att göra. Ett exempel är när en utländsk filial till ett svenskt kreditinstitut placerar överskottslikviditet i kreditinstitutets centrala upplåningsfunktion (Treasury) i Sverige. Ska den interna skuld till filialen som bokförs i det svenska kreditinstitutet ingå i den svenska verksamhet som omfattas av riskskatten?

Det är också oklart om upplåning i det svenska institutet som vidareutlånas för att användas för kreditgivning i ett utländskt koncernbolag ingår i skattebasen. Bank-föreningen menar att förslaget strider mot etableringsfriheten om upplåning i det svenska kreditinstitutet som vidareutlånas till ett utländskt koncernbolag ingår i skattebasen, till skillnad från upplåning i kreditinstitut som används i en utländsk filials verksamhet.

3.3 Valet av skattebas kontra risken för indirekta samhällskostnader

Beskattningen baseras på skuld utan beaktande av risken på tillgångssidan. Vid finanskriser är det erfarenhetsmässigt bankernas tillgångssida som har lidit. I promemorian anförs trots det och utan hänvisning till källor eller empiri att storleken på skulderna är ett bra riskmått. Jämfört med resolutionsregelverket, vilket beaktar riskfylld tillgångsmassa som en bank hanterar, tar förslaget sikte enbart på skuld-sidan utan hänsyn till om den finansierar riskfyllda tillgångar eller inte. Med andra ord: i förslaget behandlas en skuld som finansierar svenska bolån till mycket kredit-värdiga låntagare, eller för den skull en skuld som finansierar svenska kommunlån, på samma sätt som en skuld som finansierar riskfyllda blancolån.

3.4 Tröskeleffekt till följd av gränsvärdet

Det förhållandet att skattskyldigheten inträder om skulderna överstiger 150 miljarder kronor medför en betydande tröskeleffekt. Tröskeleffekten av att vid ingången av år 1 ha skulder under gränsvärdet, för att vid ingången av år 2 överstiga det är en ökad beskattning på cirka 100 miljoner kronor. Varierar institutets risk för indirekta kostnader så märkbart enbart på grund av att institutets skulder ligger över eller under gränsen, att det motiverar cirka 100 miljoner kronor i skillnad i skatt?

3.5 Filial- respektive dotterbolagsstruktur hanteras inte lika

I den föreslagna lagtexten står att skulder hänförliga till verksamhet som kredit-institutet bedriver i Sverige ska ingå i underlaget. Som påpekats ovan råder dock oklarhet kring vad som gäller om man som svensk bank lånar ut till utländskt dotter-bolag för kreditgivning i det utländska dotterbolaget; är det utlåning som ingår i verk-samhet som bedrivs från Sverige och ska finansieringen för kreditgivningen till dotterbolaget ingå i skatteunderlaget? Är det skillnad jämfört med utlåning till en filial?

Nedan följer ett exempel som illustrerar problemet. En svensk bank bedriver verk-samhet i Sverige och i en utländsk filial. Balansräkningen ser ut enligt nedan.

	Banken	- *svenska huvud-kontoret*	- *utländska filial-verksamheten*
Tillgångar			
Kassa och likvida värdepapper	150	150	-
Inlåning i svenska delen av banken	-	-	30
Internationell utlåning	200	150	50
Utlåning svensk allmänhet	800	750	50
Utlåning utländsk allmänhet	200	30	170
Fordran på den utländska filialen	-	238	-
Summa	**1 350**	**1 318**	**300**
Skulder och eget kapital			
Inlåning allmänheten	420	370	50
Inlåning från den utländska filialen	-	30	-
Internationell inlåning	80	70	10
Emitterade värdepapper	770	770	-
Skuld till huvudkontoret	-	-	238
Eget kapital	80	78	2
Summa	**1 350**	**1 318**	**300**

Enligt Bankföreningens tolkning kan underlaget för riskskatt beräknas på följande sätt:

1. Sammanlagda skulder *Beräkning: summan av skulder och eget kapital (1 350), minskat med eget kapital (80).*	1 270
2. Avgår	
Utlåning från utländsk filial till utländsk allmänhet	-170
Internationell utlåning från utländsk filial	-50
Utlåning från utländsk filial till svensk allmänhet	-50
3. Underlag för skatt	1 000

En fråga är hur de 50 miljarder kronor som avser utlåning från den utländska filialen till svensk allmänhet ska hanteras. Bankföreningens tolkning är att eftersom utlåningen sker från den utländska filialen ska de 50 miljarder kronorna reducera underlaget för riskskatt. En annan fråga är hur de 30 miljarder kronor som avser lån från den utländska filialen till det svenska huvudkontoret ska hanteras. I tabellen ovan har Bankföreningen antagit att utlåningen från filialen till huvudkontoret inte reducerar underlaget, men denna tolkning är inte självklar. Givet dessa antaganden uppgår underlaget till 1 000 miljarder kronor.

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Beräkningen kan även göras med utgångspunkt endast i den svenska balansräkningen. Om det är korrekt kan underlaget beräknas på följande sätt:

1. Sammanlagda skulder i svenska balansräkningen *Beräkning: summan av skulder och eget kapital (1 318), minskat med eget kapital (78).*	1 240
2. Avgår *Fordran på utländsk filial*	-238
3. Underlag för skatt	1 002

Skillnaden i resultat mellan de två beräkningsmetoderna är således hänförlig till det egna kapitalet i den utländska filialen. Det leder till frågan om allokering av fritt kapital enligt OECD:s vinstallokeringsrapport, eller liknande justeringar där bokningar i balansräkningen och risktagandet finns i olika länder eller delas mellan olika länder, ska beaktas vid beräkning av underlaget av riskskatten. Vidare måste klargöras om utgångspunkten för beräkningen ska vara bankens balansräkning eller det svenska huvudkontorets balansräkning.

Vi använder oss av samma siffror och förutsättningar som i exemplet ovan, men verksamheten i utlandet bedrivs nu i ett dotterbolag istället för filial.

	Koncernen	*- svenska moderbanken*	*- utländska dotterbolaget*
Tillgångar			
Kassa och likvida värdepapper	150	150	-
Inlåning i svenska banken	-	-	30
Internationell utlåning	200	150	50
Utlåning svensk allmänhet	800	750	50
Utlåning utländsk allmänhet	200	30	170
Fordran på det utländska dotterbolaget	-	238	-
Summa	**1 350**	**1 318**	**300**
Skulder och eget kapital			
Inlåning allmänheten	420	370	50
Inlåning från det utländska dotterbolaget	-	30	-
Internationell inlåning	80	70	10
Emitterade värdepapper	770	770	-
Skuld till svenska banken	-	-	238
Eget kapital	80	78	2
Summa	**1 350**	**1 318**	**300**

Enligt Bankföreningens tolkning är utgångspunkten för att beräkna underlaget för riskskatt 1 240 miljarder kronor, dvs. summan av skulder och eget kapital

(1 318 miljarder kronor), minskat med eget kapital (78 miljarder kronor). Underlaget uppgår då till 1 240 miljarder kronor, jämfört med 1 000 eller möjligen 1 002 miljarder kronor i filialstrukturen ovan.

Förslaget kan även komma att gynna utländska banker (utländskt huvudkontor) framför svenska banker (svenskt huvudkontor).

1) Svenskt huvudkontor lånar ut till utländsk filial ⇨ Ingår inte i skattebas
2) Svenskt huvudkontor lånar ut till utländskt dotterbolag ⇨ Ingår i skattebas
3) Det svenska huvudkontoret flyttar utomlands (den svenska verksamheten blir filial till det utländska huvudkontoret) och det nya huvudkontoret lånar ut till annan utländsk filial eller utländskt dotterbolag ⇨ Ingår inte i skattebas

Slutsatsen är att det bör anses strida mot EU:s etableringsfrihet om upplåning i ett svenskt kreditinstitut beskattas olika beroende på om kreditinstitutet vidareutlånar medlen till en utländsk verksamhet som bedrivs i filial- eller dotterbolagsform. Detta eftersom förslaget missgynnar en lokal utländsk bolagsetablering framför att det svenska bolaget bedriver filialverksamhet i utlandet. Likaså inbjuder förslaget till att förlägga koncernens treasury-verksamhet utanför Sverige och från ett annat land finansiera övriga koncernbolag.

Men förslaget kan också leda till nackdel för utländska banker. Ett exempel på snedvridning är när en utländsk banks svenska filial inte behåller årets resultat som eget kapital, utan för över resultatet till huvudkontoret och istället tar filialen upp ett lån från huvudkontoret. Skulden kan sägas ha sitt ursprung i filialens verksamhet i Sverige. I ett svenskt bankaktiebolag hade årets resultat bokförts som eget kapital och i den delen skulle ett internt lån inte behövts ta upp. Om den skuld filialen bokför till det utländska huvudkontoret ska ingå i underlaget uppstår en snedvridning som missgynnar utländska bankers svenska filialverksamhet. Promemorian ger ingen vägledning om reglerna kopplat till allokerat fritt kapital enligt OECD:s vinstallokeringsrapport skulle påverka underlaget.

3.6 Avräkning av utländsk skatt

Beskattningsunderlaget ska enligt förslaget minskas med kreditinstitutets skulder till ett annat kreditinstitut som ingår i samma koncern, till den del de fordringar som motsvarar skulderna är hänförliga till verksamhet som det andra kreditinstitutet bedriver i Sverige. Genom denna inhemska exemptmetod undviks *svensk* dubbelbeskattning (det vill säga svensk riskskatt två gånger) i situationen att ett svenskt kreditinstitut tagit upp en skuld och vidareutlånat medlen till ett annat svenskt koncernbolag som också är skattskyldigt.

Däremot ska skuld till utländsk filial och utländskt dotterbolag inkluderas, förutsatt det inte bedriver verksamhet i Sverige. För att i någon mån läka snedvridningen att

skuld till utländskt dotterbolag ingår i beskattningsunderlaget, medan skuld till inhemskt dotterbolag inte ingår, föreslås i promemorian en mekanism för avräkning av utländsk motsvarighet till riskskatten.

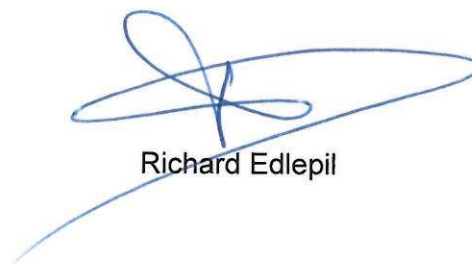
Avräkningsmekanismen är komplicerad och därtill endast teoretisk då det förefaller otroligt att en motsvarande bankskatt skulle införas ens i ett fåtal länder. Förslaget leder därför till snedvridningar och en uppenbar risk för dubbelbeskattning om den utländska skatten inte motsvarar den föreslagna svenska.

4. Skattens förenlighet med EU-rätten

EU:s statsstödsregler innebär ett förbud mot statliga åtgärder som påverkar handeln mellan medlemsstaterna och snedvrider konkurrensen genom att otillbörligt gynna vissa företag. Bankföreningen har låtit ta in rättsutlåtanden från Ulf Bernitz, professor i europeisk integrationsrätt, och Jérôme Monsenego, professor i internationell skatterätt, för att analysera om förslaget strider mot EU-rätten. Utlåtandena konstaterar att förslaget kommer att leda till konkurrenssnedvridning mellan svenska kreditinstitut med skulder över respektive under gränsvärdet, men också mellan svenska kreditinstitut och utländska kreditinstitut utan fast driftställe i Sverige.

I båda rättsutlåtandena bedöms att den föreslagna skatten sannolikt innebär ett otillåtet statsstöd riktat till de kreditinstitut som inte behöver betala den. De två rättsutlåtandena bifogas.

SVENSKA BANKFÖRENINGEN



Hans Lindberg Richard Edlepil

Bilagor:

1. Rättsutlåtande av Ulf Bernitz, professor i europeisk integrationsrätt vid Stockholms universitet
2. Rättsutlåtande av Jérôme Monsenego, professor i internationell skatterätt vid Stockholms universitet

R Ä T T S U T L Å T A N D E

Angående EU-rättslig bedömning av förslagen i departementspromemorian Riskskatt för vissa kreditinstitut, särskilt sett i relation till EU:s statsstödsregler

1. Uppdraget

Finansdepartementet har i september 2020 lagt fram en promemoria (Fi2020/03725/S1, nedan Promemorian) i vilken föreslås att Sverige ska införa en ny lag om riskskatt för vissa kreditinstitut, avsedd att träda i kraft 1 jan. 2022. Svenska Bankföreningen är remissinstans. Bankföreningen har gett mig i uppdrag att i anslutning till remissarbetet göra en rättslig bedömning av lagförslaget med särskild inriktning på hur det torde förhålla sig till EU:s statsstödsregler.

Jag har tagit del av promemorian och har fått kompletterande information om relevanta förhållanden från Bankföreningen. Jag ber att få anföra följande.

2. Faktiska förhållanden i korthet

Det är en på flera sätt ny typ av beskattning av banker och kreditinstitut som föreslås i Promemorian. Den tar till skillnad från vad som är normalt och vedertaget inte sikte på att beskatta företagens inkomster utan företagens skulder föreslås vara skattesubjekt. Den föreslagna nya skatten, benämnd riskskatt, är vidare inte generell utan träffar bara banker och

kreditinstitut vars skulder överstiger ett visst gränsvärde. Detta har utan motivering satts till 150 miljarder kronor för år 2022, beräknat på koncernbasis. Gränsvärdet är indexerat. Underlag för beräkningen är de skulder som är hänförliga till den verksamhet som banken eller kreditinstitutet i fråga bedriver i Sverige, se vidare avsnitt 3.

Bankföreningen har beräknat att den föreslagna "riskskatten" skulle omfatta nio banker och kreditinstitut medan övriga skulle gå fria. För de berörda företagen skulle skatten slå hårt med det föreslagna uttaget 0,06 procent av beskattningsunderlaget för år 2022 och 0,07 procent för år 2023 och senare år. Det motsvarar enligt Bankföreningens beräkning en höjning av bolagsskattesatsen från 20,6 procent till cirka 30 procent.

Det som nu föreslås att bli infört i Sverige är alltså en helt ny typ av skatt med speciell utformning och kraftiga skattehöjande effekter.

3. Bristande konkurrensneutralitet

Det kan konstateras att den föreslagna skatten inte är neutralt utformad genom att den endast träffar vissa stora kreditinstitut. Bristen på neutralitet visar sig i två skilda hänseenden.

Genom att den föreslagna nya skatten bara träffar sådana banker och andra kreditinstitut vars skulder överskrider gränsvärdet 150 miljarder kronor, beräknat på koncernbasis, träffar skatten inte banker och kreditinstitut vars skulder ligger under gränsvärdet. Hit hör bland annat alla sparbanker, andra medelstora och mindre banker samt ett antal aktörer på bolånemarknaden. Marknadsandelen för de företag som inte träffas av skatten varierar framför allt beroende på typ av tjänst men också beroende på geografisk marknad. På marknaden för bankinlåning från svenska hushåll var marknadsandelen för de institut som inte träffas av skatten 27 procent år 2019. På marknaden för nya bolån var motsvarande marknadsandel 23 procent samma år. Här uppkommer en tydlig konkurrenssnedvridning. Bankföreningen har framhållit att de mindre bankerna och kreditinstituten bedriver en intensiv konkurrens och att deras marknadsandelar tenderar att växa.

Den föreslagna nya skatten är vidare avgränsad på så sätt att de skulder som föreslås ligga till grund för beräkningen av tröskelvärdet 150 miljarder kronor är sådana skulder som är hänförliga till den verksamhet som kreditinstitutet bedriver i Sverige. Skatten föreslås även omfatta utländska banker som har filial i Sverige och som i den svenska verksamheten har

skulder som når upp till tröskelvärdet. Skulder hänförliga till svenska bankers och kreditinstituts verksamhet i utlandet omfattas enligt förslaget av skattskyldighet till del verksamheten bedrivs inom ramen för utlåning från Sverige. I vissa hänseenden synes det dock föreligga oklarhet om vad som är avsett att ingå vid beräkningen av tröskelvärdet. Svenska banker har en omfattande utlåning till företag med verksamhet i utlandet och utländska banker har förmedling av lån till företagsverksamhet i Sverige. Det senare ligger utanför sådan verksamhet som omfattas av den föreslagna nya skatten till den del den inte sker genom svensk filial. Bankföreningen har framhållit att i genomsnitt 15 – 20 procent av de stora svenska bankernas utlåning sker i stark konkurrens med utländska banker som inte omfattas av den nu föreslagna skatten. Här uppkommer en väsentlig konkurrenssnedvridning.

De snedvridande effekterna förstärks genom att den föreslagna nya skatten skulle få en hög tröskeleffekt. Ett institut som passerar gränsvärdet för skatteuttag om 150 miljarder utsätts därigenom för en direkt och omedelbar skatteeffekt i storleksordningen 100 miljoner kronor.

Sammanfattningsvis kan konstateras att den föreslagna skatten brister väsentligt i konkurrensneutralitet.

Jag återkommer i avsnitt 5 till en bedömning från statsstödssynpunkt av denna bristande konkurrensneutralitet.

4. Har den föreslagna skatten en övertygande motivering?

Bankföreningen har bett mig överväga frågan huruvida den föreslagna "riskskatten" har en övertygande motivering.

Den föreslagna skatten motiveras med att stora kreditinstitut riskerar att orsaka samhällets stora kostnader vid en eventuellt uppkommande ekonomisk krissituation och att detta gör det motiverat att pålägga dessa företag en särskild "riskskatt". Som bakgrund erinrar man i Promemorian om den ekonomiska krisen på 1990-talet och den mycket omfattande bankkrishantering från statens sida som då förekom. Man nämner också finanskrisen 2008, vars effekt på de offentliga finanserna dock blev begränsad.

Man pekar vidare i Promemorian på att särskilt de stora bankerna har en central roll i samhällsekonomin. I Promemorian uttalas bl. a. att den föreslagna skatten har till "syfte att

förstärka de offentliga finanserna för att därigenom skapa utrymme för att klara en framtida finansiell kris" (sid. 24) och att "skatten är tänkt att kompensera för indirekta kostnader i Sverige i händelse av en finansiell kris" (sid. 25). I Promemorian uttalas vidare att "ett högt risktagande hos kreditinstituten ökar sannolikheten för att en finansiell kris inträffar och att samhällskostnaderna blir betydande" (sid. 23). Det är dock inte så att man föreslår att de nya intäkter som skulle inflyta till staten om den föreslagna skatten blir införd ska reserveras eller fonderas för användning i en eventuell framtida krissituation. Förslaget är utformat som en ren skattehöjning som skulle förstärka statsbudgetens intäktssida. Såsom förslaget är utformat i Promemorian ställs det inte upp några hinder för att använda de nytillkommande skatteintäkterna för statliga utgiftsökningar av vilket slag som helst. Härigenom förblir det oklart vad som är den föreslagna skattens egentliga syften och legitima intresse.

Den framförda motiveringen för den nya skatten går förbi och beaktar inte de grundläggande förändringar som har skett sedan bankkrisen på 1990-talet när det gäller att förebygga och hantera finansiella krissituationer.

Här märks först och främst det särskilda förfarande, resolution, som gäller sedan 2016 för finansiella företag som har hamnat i kris, väsentligen banker och andra större kreditinstitut. Reglerna om resolution bygger på ett EU-direktiv om krishantering och överensstämmer i huvudsak med vad som tillämpas inom EU:s bankunion.[1] Det grundläggande syftet med resolution är att rekonstruera eller avveckla viktiga finansiella företag som fallerar, om möjligt utan att det inträffar betydande störningar eller avbrott i samhällsviktig verksamhet. Det är dock endast systemkritiska banker och ev. andra finansiella företag som får vara föremål för resolution. Vid resolution gäller att det är företagets ägare och borgenärer som ska bära förlusterna så långt möjligt. Statens roll har begränsats till att kunna gå in i sista hand för att rädda systemkritiska företag. Medel avsatta i resolutionsreserven kan därvid användas för skuldnedskrivning, konvertering av skulder till eget kapital och återkapitalisering. Staten kan även agera genom Riksgälden för att garantera skyddade insättningar.

Utmärkande för regelverket om resolution är som framgått att det endast får användas under strikta förutsättningar. För att undvika s.k. moral hazard, alltså att ägare inte ska kunna förlita sig på statligt stöd i krissituationer, är regelverket helt medvetet endast inriktat på

[1] Se Europaparlamentets och rådets direktiv 2014/59/EU om inrättande av en ram för återhämtning och resolution av kreditinstitut och värdepappersföretag, Proposition 2015/16, Genomförande av krishanteringsdirektivet och Ulf Bernitz, Bankstöd och resolution i Sverige och EU, Festskrift till Göran Millqvist, 2019 s. 153 ff.

rekonstruktion i en krissituation av systemviktiga företag. Andra finansiella företag förutsätts skola avvecklas i en krissituation. Genom detta EU-rättsliga regelverk är alltså förutsättningarna för statligt stöd till banker och andra kreditinstitut i finansiella svårigheter starkt reglerade och kringgärdade. Situationen är härigenom en helt annan än under den ekonomiska krisen under 1990-talet, då det i Sverige som bekant förekom ett mycket omfattande statligt stöd till banker m.m. Det EU-baserade regelverket för resolution medför att en liknande massiv stödinsats från statens sida inte skulle vara möjlig numera. Hänvisningen i Promemorian till 1990-talskrisen och dess hantering är alltså missvisande.

Promemorian beaktar inte heller att det i Sverige har lagts upp mycket stora ekonomiska reserver för krishantering av finansiella företag i svårigheter. Sverige har ett väsentligt högre avgiftsuttag till resolutionsreserven än vad EU:s regler kräver och vad som i allmänhet tillämpas i Europa. Resolutionsreserven uppgick till 43,5 miljarder kronor vid utgången av 2019 och förvaltas av Riksgäldskontoret. Vidare är att märka att det i Sverige i samband med finanskrisen 2008 infördes en särskild s.k. stödlag enligt vilken kreditinstituten, särskilt bankerna, ålades att betala avgifter till en särskild stabilitetsfond. Fonden har bibehållits efter tillkomsten av regelverket om resolution och resolutionsreserven. Syftet med stabilitetsfonden, som likaledes förvaltas av Riksgäldskontoret, är något oklart sedan Sverige infört en särskild resolutionsordning. Den hålls emellertid fortsatt tillgänglig för stödåtgärder. Stabilitetsfonden uppgår till ca 40 miljarder kronor. Härutöver finns en av banker och andra kreditinstitut finansierad insättningsgarantifond som uppgår till cirka 44 miljarder kronor. Den är avsedd att säkerställa den särskilda statliga insättargarantin, baserad på EU-rätten.

Svenska staten förfogar sålunda över mycket stora ekonomiska reserver avsedda att kunna tillgripas i händelse av en ekonomisk kris som träffar bankerna och andra kreditinstitut.

Härtill kommer att Sverige tillämpar internationellt sett speciellt höga kapitaltäckningskrav för banker.

Mot bakgrund av de snäva förutsättningarna för att kunna tillgripa resolution, de mycket omfattande ekonomiska medel som är tillgängliga för svenska staten för stödåtgärder samt de höga svenska kraven för banker på kapitaltäckning framstår den motivering som lagts fram för den föreslagna skatten inte som övertygande. Det framstår som högst oklart hur de nya skatteintäkter som staten skulle få om den föreslagna skatten blir genomförd är avsedda att vara länkade till statens möjligheter till finansiell krishantering vid en allvarlig finansiell krissituation. Vad som anförs i Promemorian om syftet med den föreslagna nya skatten framstår

som starkt missvisande. Det som föreslås i Promemorian är i sak inte något annat än en nytillkommande skatt som rent allmänt ökar statens inkomster och därigenom bidrar till att vidga möjligheterna att öka statens utgifter för olika ändamål. Kvar står dock att den anförda motiveringen för förslaget om införande av en "riskskatt" på de stora bankernas och kreditinstitutets skulder är att det trots den reglering och tillsyn som omgärdar kreditinstituten och de stödmöjligheter som står till förfogande skulle finnas behov av nya skatteintäkter för att täcka stödåtgärder och liknande för det fall att nya finansiella kriser uppstår i framtiden.

Sammanfattningsvis framstår inte den motivering som lagts fram för förslaget att införa en ny typ av skatt, baserad på de stora bankernas och kreditinstitutens skulder, som övertygande mot bakgrund av de snäva förutsättningarna för att kunna tillgripa resolution, de mycket omfattande ekonomiska medel som är tillgängliga i nuläget för svenska staten för stödåtgärder samt de höga svenska kraven för banker på kapitaltäckning.

5. Är utformningen av den föreslagna skatten förenlig med EU-rättens statsstödsregler?

I Promemorian görs bedömningen att utformningen av den föreslagna nya skatten torde vara förenlig med EU:s regler om statligt stöd. Bankföreningen har bett mig att överväga om denna bedömning kan antas vara korrekt.

Den föreslagna skatten är som behandlats i avsnitt 3 inte neutralt utformad utan träffar endast vissa stora banker och andra kreditinstitut. Som där framgått brister utformningen i flera hänseenden i konkurrensneutralitet.

Det finns anledning att närmare överväga om denna snedbelastning kan innefatta ett sådant gynnande/missgynnande av företag som utgör otillåtet statsstöd enligt EU:s statsstödsrätt. Utgångspunkten vid en rättslig bedömning av denna fråga är unionsrättens grundläggande bestämmelsen om förbud mot statsstöd i artikel 107.1 i fördraget om EU:s funktionssätt (FEUF), som lyder:

"Om inte annat föreskrivs i fördragen, är stöd som ges av en medlemsstat eller med hjälp av statliga medel, av vilket slag det än är, som snedvrider eller hotar att snedvrida konkurrensen genom att gynna vissa företag eller viss produktion, oförenligt med den inre marknaden i den utsträckning det påverkar handeln mellan medlemsstaterna."

Otillåtet statsstöd behöver inte ha formen av utbetalning av ekonomiska förmåner och liknande från det allmänna utan kan även ha den formen att företag har ekonomiska fördelar eller åsamkas ekonomiska nackdelar genom bristande neutralitet vid bestämning av skatter och avgifter som ska betalas till det allmänna.[2] Det kan påpekas att begreppet ekonomisk fördel uppfattas vidsträckt på statsstödsområdet och inbegriper varje ekonomisk förmån eller fördel som ett företag inte skulle ha fått under normala marknadsförhållanden.[3]

En oproblematisk utgångspunkt för det följande är att svenska banker och kreditinstitut normalt har en verksamhet som i vart fall i någon omfattning berör ett eller flera andra EU/EES-länder än Sverige, ofta ett antal sådana länder. EU-rättens grundläggande krav på att samhandeln mellan medlemsstaterna ska vara berörd för att regelverket om statsstöd ska vara tillämpligt är alltså uppfyllt.

Det står vidare klart att den föreslagna nya skatten inte omfattas av de särskilda undantagen inom ramen för regelverket om statsstöd för regionalstöd, kulturstöd, avhjälpande av allvarlig ekonomisk störning m.m. i artikel 107.2 och 107.3 FEUF. Den omfattas heller inte av den förordning genom vilken vissa kategorier av stöd förklarats förenliga med den inre marknaden.[4]

En central utgångspunkt för bedömningen är att skatter och därmed jämställda avgifter, som genom bristande neutralitet medför ett selektivt missgynnande av vissa företag, kan vara att bedöma som otillåtet statsstöd genom att medföra att dessa företag åsamkas högre kostnader. Skatter och avgifter, som medför ett selektivt missgynnande, kan indirekt utgöra ett från statsstödssynpunkt otillåtet gynnande av andra företag som slipper kostnaderna. Den ovan citerade fördragstexten talar som framgår om "snedvrida konkurrensen genom att gynna vissa företag eller viss produktion." Skatteselektivitet är en välkänd form av statsstöd. Vid bedömningen av frågan om det föreligger en sådan selektivitet är det vedertaget att tillämpa en trestegsmetod.[5]

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[2] Se till det sagda C. Quigley, European State Aid Law and Policy, 3 ed., Oxford 2015.

[3] Kommissionens tillkännagivande om begreppet statligt stöd som avses i artikel 107.1 i fördraget om Europeiska unionens funktionssätt (2016/C 262/01) punkt 66.

[4] Kommissionens förordning (EU) 651/2014 genom vilken vissa kategorier av stöd förklaras förenliga med den inre marknaden enligt artiklarna 107 och 108 i fördraget.

[5] Kommissionens tillkännagivande om begreppet statligt stöd (EUT C 262, 19.7.2016 punkt 128 ff. och avsnitt 5.4. Trestegsmetoden tillämpas av EU-domstolen vid avgörande av om skatteregler har en utformning som kan strida mot statsstödsreglerna, se t ex mål C-20/15 P och C-21/15 P, EU:C:2016:981, World Duty Free Group m.f. och mål C-203/16 P, Dirk Andres mot kommissionen, EU:C:2017:1017, särskilt generaladvokat Wahls yttrande i målet. Se vidare bl a J. Monsenego, Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base, Kluwer Publ., 2018.

I ett första steg identifieras ett referenssystem i form av en avgränsning att ha som riktmärke vid bedömningen.

I ett andra steg ska det fastställas om en viss åtgärd, i detta fall en skattehöjning, utgör ett undantag från referenssystemet på så sätt att åtgärden gör åtskillnad mellan ekonomiska aktörer som befinner sig i en faktiskt och rättsligt jämförbar situation. Man ska härvid beakta de mål som eftersträvas med åtgärden. Görs det en åtskillnad mellan aktörer i jämförbar situation är åtgärden att betrakta som selektiv.

I ett tredje steg ska det undersökas om selektiviteten kan motiveras och berättigas av vad som brukar benämnas referenssystemets art eller allmänna systematik. Analysen i det följande sker enligt denna ordning.

Det första steget är som nämnt avgränsning av referensramen. I detta fall, där utgångspunkten är skatt på skulder, synes referensramen för bedömningen med hänsyn till den föreslagna skattens utformning böra avgränsas till banker och kreditinstitut som är verksamma med att bedriva utlåning till kunder på den svenska marknaden. Dessa företag är marknadsaktörer som inom vissa ramar bedriver i huvudsak likartad verksamhet på samma marknad och förutsätts kunna konkurrera med varandra på lika villkor. De befinner sig härigenom i en jämförbar situation, där huvudprincipen är skattemässig likabehandling.[6]

Promemorian gör på denna punkt en annan bedömning, se sid. 35. Man framhåller att ett specifikt kreditinstituts betydelse för dess påverkan på det finansiella systemet är beroende på institutets storlek och komplexitet samt omfattningen av dess verksamhet. Man hävdar att det endast är de institut som enligt förslaget blir belastade med den nya skatten som utgör en potentiell risk för väsentliga indirekta kostnader för samhället. De är därför i en annan rättslig och faktisk situation avseende syftet med skatten än övriga banker och kreditinstitut. Promemorian synes bygga på uppfattningen att den referensram som ska användas för den statsstödsrättsliga bedömningen endast ska anses omfatta de företag som blir skattskyldiga enligt förslaget. Man urskiljer alltså dessa företag som en särskild kategori.

Denna snäva avgränsning av referensramen framstår inte som övertygande. Det finns inget redovisat underlag för hur man gjort bestämningen av den nedre beloppsgränsen för skattskyldighet. Gränsen framstår som tämligen arbiträr. Härtill kommer att även företag som

[6] Likvärdiga konkurrensförutsättningar och åtgärder för att begränsa snedvridningar av konkurrensen bedömdes ingående av kommissionen i t ex dess beslut K(2010) 3124 slutlig ang. statligt omstruktureringsstöd till Carnegie Investment Bank.

ligger under beloppsgränsen skulle kunna orsaka väsentliga indirekta kostnader vid ett fallissemang, möjligen bortsett från särskilt små aktörer. Som nämnt bedriver i Sverige verksamma banker och kreditföretag i stort sett likartad verksamhet på samma marknad och förutsätts konkurrera med varandra på lika villkor oavsett om de ligger över eller under den föreslagna beloppsgränsen för skattskyldighet för skulderna.

Sammanfattningsvis bör referensramen – till skillnad från resonemanget i Promemorian - innefatta banker och kreditinstitut som är verksamma med att bedriva utlåning till kunder på den svenska marknaden oberoende av beloppsgräns.

D*et andra steget* innefattar som nämnt en bedömning av om den föreslagna skatten är selektiv genom att göra skillnad mellan banker och kreditföretag som befinner sig i en faktiskt och rättsligt likartad situation, dvs tillhör samma referensram.

Såsom belysts ovan i avsnitt 3 brister den föreslagna skatten i två hänseenden i konkurrensneutralitet.

Den ena situationen avser förhållandet mellan särskilt stora banker och kreditinstitut på den svenska marknaden och övriga, relativt sett mindre aktörer på denna marknad. Genom att den föreslagna nya skatten bara träffar sådana banker och andra kreditinstitut vars skulder överskrider gränsvärdet 150 miljarder kronor, beräknat på koncernbasis (i nuläget totalt nio företag eller koncerner) träffar skatten inte svenska banker och kreditinstitut vars skulder ligger under gränsvärdet. Hit hör bland annat alla sparbanker, andra mindre och medelstora banker samt ett antal aktörer på bolånemarknaden. På flera betydelsefulla delmarknader har de institut som inte träffas av skatten sammanlagda marknadsandelar på 20 procent eller högre. Förslaget om ett tröskelvärde för skattskyldighet på 150 miljarder kronor i skulder är inte förenligt med den grundläggande principen om skatteneutralitet genom att den inte träffar företag vars utlåning ligger under tröskelvärdet. Den föreslagna skatten skulle härigenom slå selektivt, verkar konkurrenssnedvridande och strida mot den grundläggande principen om likabehandling och skatteneutralitet.

Den andra situationen avser förhållandet mellan utländska banker och de svenska banker och kreditinstitut som enligt förslaget i promemorian ska betala skatt även på de skulder i sin svenska balansräkning som används för att finansiera utlåning i stark konkurrens med utländska banker och kreditinstitut utan att detta sker via svensk filial. Det kan exempelvis vara frågan om svensk exportfinansiering eller finansiering av svenska företags utlandsverksamhet. Utlåning av den typen uppskattas av Bankföreningen ha en andel motsvarande i genomsnitt 15–

20 procent av beskattningsunderlaget. Också i detta hänseende skulle den föreslagna skatten slå selektivt och verka konkurrenssnedvridande.

Promemorian gör här en annan bedömning genom att som nämnt utgå från att de banker och kreditinstitut som enligt förslaget ska belastas med den nya skatten utgör en egen kategori (se sid. 35). Enligt Promemorian omfattar referensramen endast dessa företag. Promemorian når med denna utgångspunkt slutsatsen att det faktum att andra kreditinstitut inte kommer att beskattas inte innebär ett selektivt gynnande av dessa företag ur statsstödshänseende.

Promemorians bedömning av referensramen är som redan nämnt inte övertygande. Utgår man, som ter sig korrekt, från en referensram som innefattar de banker och kreditinstitut som är verksamma med att bedriva utlåning till kunder på den svenska marknaden oberoende av beloppsgräns står det klart att den föreslagna skatten slår selektivt och verkar konkurrenssnedvridande.

En tänkbar invändning i viss mån i linje med resonemanget i Promemorian skulle kunna vara att den föreslagna skatten träffar den övervägande delen av utlåningen från svenska banker och kreditinstitut och att selektiviteten i utformningen därför inte skulle ha någon egentlig betydelse. Skatten träffar som framgått inte mindre och medelstora svenska banker och kreditinstitut och omfattar inte heller utländska banker som direkt konkurrerar med svenska banker till den del denna verksamhet inte sker inom ramen för svensk filial (se avsnitt 3 ovan). Det räcker emellertid att endast ett fåtal företag gynnas eller missgynnas av en selektiv skatteåtgärd för att en fördel eller nackdel ska anses föreligga som medför att statsstödsreglerna anses vara tillämpliga.[7] Invändningen att den föreslagna skatten endast skulle undanta en relativ sett mindre del av marknaden och därför vara godtagbar kan alltså inte anses bärkraftig.

Sammanfattningsvis innebär det sagda att den föreslagna skatten är selektiv genom att göra åtskillnad mellan aktörer i jämförbar situation och genom att brista i konkurrensneutralitet. Det innebär att man har att gå vidare till steg tre för att pröva om det föreligger sådana omständigheter som skulle göra skattens utformning godtagbar från statsstödssynpunkt.

Det tredje steget innebär som nämnt att man ska pröva om selektiviteten kan motiveras av vad som brukar benämnas systemets art eller allmänna systematik. I detta steg får man undersöka vad som är syftet eller målet med den föreslagna skatten och om detta gör det möjligt att

[7] Se t ex kommissionens beslut 29 juni 2016, C (2016) 4809 final (nr SA.42007) punkt 43, gällande schablonbeskattning av diamanthandlare i Belgien.

rättfärdiga skatten med beaktande av de syften som ligger bakom EU och dess statsstödsregler.[8] För att nämna ett exempel kan en viss avgränsning av en miljöskatt på ett särskilt område vara motiverad av överväganden som har till syfte att styra eller begränsa ett visst slag av konsumtion som bedöms vara mindre lämplig från miljöskyddssynpunkt. En sådan avgränsning kan vara fullt förenlig med EU-rätten.

När det gäller att bedöma om selektiviteten i utformningen av den föreslagna nya skatten kan anses godtagbar vid en bedömning enligt EU:s statsstödsregler gäller det alltså att bedöma syftet med skatten mot bakgrund av EU-rätten och utformningen av statsstödsreglerna.

Syftet med den föreslagna nya skatten har behandlats i Promemorian och ovan i avsnitt 4. Som framgått motiveras skattens införande och utformning med att stora banker och kreditinstitut riskerar att orsaka samhällets stora kostnader vid en eventuellt uppkommande ekonomisk krissituation. Det anförs vidare i Promemorian (sid. 23 ff.) bl a att de stora bankerna har en central roll i samhällsekonomin, att den föreslagna skatten har till "syfte att förstärka de offentliga finanserna för att därigenom skapa utrymme för att klara en framtida finansiell kris," att "skatten är tänkt att kompensera för indirekta kostnader i Sverige i händelse av en finansiell kris" och att "ett högt risktagande hos kreditinstituten ökar sannolikheten för att en finansiell kris inträffar och att samhällskostnaderna blir betydande". De kreditinstitut som föreslås bli skattskyldiga "utgör en potentiell risk för väsentliga indirekta kostnader för samhället". Syftet kommer också till uttryck i den föreslagna benämningen riskskatt.

I Promemorian uttalas att det finns ingen rättspraxis om hur det föreslagna skattesystemet skulle bedömas utifrån EU:s statsstödsregler (sid. 35).

Det står klart att huvudsyftet med den föreslagna skatten är att ge svenska staten en förstärkt buffert för ingripanden med åtgärder vid en eventuellt uppkommande finansiell kris. Vad som ska närmare förstås med väsentliga indirekta kostnader för samhället klargörs dock inte. Sådana åtgärder skulle sannolikt åtminstone till stor del få karaktär av stödåtgärder i EU-rättens mening. Såsom framgått är emellertid möjligheterna för staten att gå in med stödåtgärder för att stöda banker och andra kreditinstitut i finansiella svårigheter numera helt medvetet högst begränsade genom regelverket om resolution. Statsstöd ska ju inte lämnas till svaga finansiella företag i situationer som ligger utanför vad som omfattas av ordningen för resolution. Med tanke på att

[8] Kommissionens tillkännagivande om begreppet statligt stöd nämner i punkt 139 som exempel bl a behovet av att bekämpa bedrägerier och skatteundandragande, behovet av att beakta särskilda redovisningskrav och administrativ hanterlighet.

detta faktum är välbekant förblir det oklart vad det är för slags stödåtgärder m m som den avsedda nya finansiella bufferten är tänkt att tillgodose.

När det gäller att ta ställning hur den föreslagna skatten förhåller sig till det tredje steget vid bedömningen enligt EU:s statsstödsregler gäller det att bedöma om skatten kan rättfärdigas med beaktande av de syften som ligger bakom dessa regler. Bedömningen försvåras i viss mån av den oklarhet som kännetecknar förslaget om denna nya buffert för åtgärder från svenska statens sida vid en krissituation och hur den är avsedd att tillämpas. Såsom den föreslagna skatten utformats och motiverats är det dock svårt att se hur den skulle kunna förenas med EU:s syn på stödåtgärder och därmed kunna godtas vid en bedömning enligt det tredje steget.

Sammanfattningsvis är det min bedömning att den föreslagna "riskskatten" sannolikt strider mot EU:s statsstödsregler på grund av sin selektiva utformning, sina konkurrenssnedvridande effekter och sin inriktning på att bygga upp en buffert för former av stödåtgärder från svenska statens sida, vars tillämpning ter sig svår att förena med EU:s syn på vad som utgör godtagbara stödåtgärder.

6. Anmälan och prövning av statsstöd

I Promemorian uttalas (bl a sid. 34) att även om förslaget att vissa kreditinstitut ska betala riskskatt till staten bedöms inte utgöra statligt stöd avser man att anmäla förslaget till EU-kommissionen för att erhålla rättslig säkerhet. Detta torde få förstås så att man även inom Finansdepartementet har gjort bedömningen att förslaget är tveksamt från statsstödssynpunkt.

En sådan anmälan sker enligt artikel 108.3 FEUF. Anmälan ska ske i så god tid att kommissionen kan yttra sig om alla planer på att vidta eller ändra stödåtgärden. Härvid gäller enligt artikel 108.3 FEUF det s. k. genomförandeförbudet, vilket innebär att det är olagligt för en medlemsstat att genomföra ett icke anmält statsstöd.

Beslutar man sig inom Regeringskansliet för att gå vidare med lagförslaget i Promemorian och göra en anmälan till EU-kommissionen bör Bankföreningen överväga att i nära anslutning till denna anmälan lämna in ett formellt klagomål till kommissionen. Det finns särskilt formulär för detta.

7. Sammanfattande slutsatser

Med hänvisning till vad som anförts i det föregående finner jag sammanfattningsvis

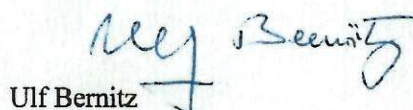
Att den motivering som lagts fram för förslaget att införa en ny typ av skatt, baserad på de stora bankernas och kreditinstitutens skulder, inte framstår som övertygande mot bakgrund av de snäva förutsättningarna för att kunna tillgripa resolution, de mycket omfattande ekonomiska medel som i nuläget är tillgängliga för svenska staten för stödåtgärder samt de höga svenska kraven för banker på kapitaltäckning,

Att den föreslagna skatten är selektiv genom att göra åtskillnad mellan aktörer i jämförbar situation och genom att brista i konkurrensneutralitet,

Att den föreslagna skatten sannolikt strider mot EU:s statsstödsregler på grund av sin selektiva utformning, sina konkurrenssnedvridande effekter och sin inriktning på att bygga upp en buffert för former av stödåtgärder från svenska statens sida, vars tillämpning ter sig svår att förena med EU:s syn på vad som utgör godtagbara stödåtgärder,

Att om man inom Regeringskansliet beslutar sig för att gå vidare med lagförslaget i Promemorian och göra en anmälan till EU-kommissionen bör Bankföreningen överväga att i nära anslutning till denna anmälan lämna in ett formellt klagomål till kommissionen.

Stockholm den 5 november 2020



Ulf Bernitz

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Legal opinion: analysis of the liabilities threshold in the proposal for a risk tax on certain credit institutions from a State aid perspective

Analysis performed by Prof. Dr. Jérôme Monsenego, Professor of International Tax Law at Stockholm University, Sweden

Stockholm, 15 December 2020

1 Purpose of the legal opinion and limitations

This legal opinion is written at the initiative of the Swedish Bankers' Association. The purpose of the opinion is to analyse the compatibility with the State aid rules of the liabilities threshold in the proposal for a risk tax on certain credit institutions as it is presented in a memorandum drafted by the Swedish Ministry of Finance.[1]

This opinion does not contain a fully exhaustive assessment of the compatibility with the State aid rules of the suggested tax, as it only focuses on the analysis from a State aid perspective of the reliance on a liabilities threshold in the design of the tax. Other issues are not in the scope of this opinion.

I have not performed investigations outside the field of State aid law. In that respect, I have been relying on the information contained in the memorandum drafted by the Swedish Ministry of Finance.

2 Short summary of the proposal for a risk tax on certain credit institutions

The suggested tax is designed so that credit institutions (*kreditinstitut*) that have liabilities at the beginning of a tax year that are connected to credit activities in Sweden, pay a risk tax consisting of a percentage of the liabilities after certain adjustments are made to their liabilities. The tax is to be levied, however, only if the liabilities exceed a given threshold. The tax rate suggested for 2022 is 0,06% of the liabilities, and the threshold suggested for 2022 is 150 billion SEK. The tax rate is set to 0,07% as from 2023, and the liabilities threshold is intended to increase each year.

The suggested tax is designed so that credit institutions are divided in two categories: those with liabilities below the threshold, and those with liabilities above it. These two categories are subject to different tax treatments: while the former category does not

[1] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1: https://www.regeringen.se/4a6a7b/contentassets/3098b7791ca64bb2b41cfb810f4a2726/riskskatt-for-vissa-kreditinstitut.pdf

pay the tax at all, the second category pays the tax on all its liabilities. This is illustrated with a simplified example, where banks 1 and 2 are Swedish banks with liabilities on their balance sheets for their credit activities in Sweden:

- Bank 1 has liabilities amounting to 140 billion SEK. It pays no risk tax, because its liabilities are below the threshold of 150 billion SEK.

- Bank 2 has liabilities amounting to 160 billion SEK. It is in the scope of the risk tax, because its liabilities are above the threshold of 150 billion SEK. For year 2022, the tax paid by bank 2 amounts to 160.000.000.000 * 0,06% = 96.000.000 SEK

The suggested risk tax on certain credit institutions does not function as a typical progressive tax; this is because a progressive tax rate would normally be designed so that all undertakings are subject to the same treatment, especially the benefit of lower rates. If the suggested risk tax were designed with a more traditional progressive tax rate, a reduction of the tax base equal to the threshold would be granted to all undertakings. The risk tax would be payable only on liabilities that exceed the threshold. The tax treatment of banks 1 and 2 would be the following:

- Bank 1 has liabilities amounting to 140 billion SEK. It pays no risk tax, because its liabilities are below the threshold of 150 billion SEK.

- Bank 2 has liabilities amounting to 160 billion SEK. It is in the scope of the risk tax, because its liabilities are above the threshold of 150 billion SEK. Bank 2 pays the risk tax only for what exceeds the threshold. For year 2022, the tax amounts to:

    - 160.000.000.000 – 150.000.000.000 = 10.000.000.000
    - 10.000.000.000 * 0,06% = 6.000.000 SEK

Progressive income tax rates or progressive turnover tax rates have, in certain situations, been deemed compatible with the EU fundamental freedoms in view of the fiscal autonomy of the Member States.[2] Their compatibility with the State aid rules is yet to be settled in view of the advantage given to the undertakings that qualify for the lower tax rates.[3] However, the suggested risk tax has a peculiar design, because of the lack of exemption up to the threshold for credit institutions that have liabilities above it. This results in a clear difference in the taxation of the two categories of credit institutions, something that accentuates the potentially selective character of the tax.

[2] See Case C-323/18, *Tesco-Global Áruházak*; Case C-75/18, *Vodafone Magyarország*.
[3] See Case C-562/19 P, *European Commission v Republic of Poland*, Opinion of Advocate General Kokott delivered on 15 October 2020, paragraph 33, last sentence.

3 Methodology to assess the compatibility of a tax measure with the internal market from the perspective of the EU State aid rules

Article 107(1) of the TFEU is drafted as follows: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

According to settled case-law from the Court of Justice of the European Union (hereinafter the "CJEU"), the classification of a national measure as State aid, within the meaning of Article 107(1) TFEU, requires several conditions to be fulfilled cumulatively. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition.[4]

The selectivity criterion is traditionally considered as the most complex element of the State aid definition in the area of taxation, and it is the main issue studied in this opinion. Therefore, in the below section I will be discussing the three other criteria (section 4). I will then focus on the selectivity criterion (section 5).

4 Intervention by the State or through State resources, effect on trade between the Member States, and distortion of competition

First, according to article 107(1) of the TFEU, there must be an intervention by the State or through State resources for a measure to be able to constitute illegal State aid. This requirement is automatically fulfilled with respect to tax measures since only the State, or a public organisation within the State, has the right to levy taxes. The fact that a tax is not levied implies an indirect transfer of resources to the benefit of the taxpayers that are not subject to the tax. Thus, depending on its design, a tax measure may constitute State aid.[5] The risk tax on certain credit institutions suggested in the memorandum would be levied by the Swedish State and it would be imputable to the State. It would strengthen the public finances of the State. Therefore, the risk tax would be considered as an intervention by the State or through State resources for the purpose of the application of the first element of article 107(1) of the TFEU. This criterion is thus fulfilled.

Second, the intervention must be liable to affect trade between the Member States for the measure to potentially constitute State aid. This criterion is normally considered to be fulfilled by the European Commission and by the Union courts when a measure

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[4] See e.g. Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 53.

[5] See e.g. Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, paragraph 132.

affects undertakings that are globally active and operate in several Member States of the Union.[6] The financial sector is open to cross-border trade and it is frequent that banks or other financial institutions in one Member State operate in other Member States, assuming they are allowed to do so.[7] Swedish banks are often active abroad or have foreign clients, and several foreign banks are active on the Swedish market. Therefore, in my view a risk tax on credit institutions would be liable to affect trade between the Member States in the sense of article 107(1) of the TFEU, thereby making this criterion fulfilled.

Third, an intervention must distort or threaten to distort competition for it to be potentially deemed as an illegal State aid. It is usually considered in State aid law that a measure granted by a Member State distorts or may threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. [8] It can reasonably be assumed that the suggested tax measure would distort or threaten to distort competition, since the undertakings subject to the tax and exempted from it are, at least in some respects, competing on similar markets or for similar clients. It is also acknowledged in the memorandum drafted by the Swedish Ministry of Finance that competition would probably be affected if the tax were implemented.[9] Indeed, since it is possible that the banks subject to the risk tax would transfer at least part of this additional cost to their clients via e.g. increased fees, higher interests charged, or lower interests paid, competition might be distorted as credit institutions that are not in the scope of the tax would save this cost and thus be able to sell their products and services at lower prices. Therefore, it can be assumed that this criterion is fulfilled.

The above analysis leaves one criterion to investigate, the selective advantage, which is investigated in the section below.

5 Analysis of the potential existence of a selective advantage

Although the notion of "selective advantage" is frequently used in State aid practice, it is settled case law that the two notions of advantage and selectivity need to be distinguished: "the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage".[10]

[6] See e.g. Commission Decision of 21.10.2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, paragraph 189; see also Case C-53/00, *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)*, paragraph 21.

[7] On the effect on trade and the distortion of competition in the financial sector, see Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, paragraphs 139 and following.

[8] See e.g. Commission Decision of 21.10.2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, paragraph 189, with further references to the case law of the European Courts at footnote 75.

[9] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, pp. 40-41.

[10] See Case C-15/14 P, *European Commission v. MOL Magyar Olaj- és Gázipari Nyrt.*, paragraph 59.

However, the General Court has found that this does not prevent the two criteria from being examined "simultaneously", in situations where they overlap.[11]

For the sake of clarity, I will first analyse the potential existence of an advantage (section 5.1), before turning to the selectivity criterion (section 5.2).

5.1 The potential existence of an advantage

With respect to the existence of an advantage in the sense of article 107(1) of the TFEU, the CJEU has held in numerous cases that measures that relieve an undertaking of a cost, including a tax cost, may constitute an aid.[12] For example, in the *Congregación de Escuelas Pías Provincia Betania* case, the CJEU held that "measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid";[13] on that basis, the Court considered that a tax exemption would confer an economic advantage on its beneficiary.[14] To take another example, in the *ANGED* case the CJEU ruled that an exemption from a tax on large retail establishments that was granted to collective large retail establishments with a surface area equal to or greater than 2 500 m2 did constitute State aid.[15] In the case of the suggested risk tax, and when considering the fact that certain credit institutions are in the scope of the tax while others are not, it is unquestionable that the credit institutions being exempted from the tax receive an economic advantage consisting in this very tax relief. The advantage is all the more patent that the credit institutions that are in the scope of the tax do not benefit from a tax exemption up to the threshold.

The advantage criterion is thus fulfilled. This does not make the tax at breach of the State aid rules: it remains to be investigated whether or not the selectivity criterion is fulfilled.

5.2 The selectivity criterion

With respect to the selectivity criterion, a first question might be whether or not the suggested risk tax on certain credit institutions could be deemed selective because of its sectoral nature: indeed, by only applying to the financial sector, all other sectors are exempted from the tax, and thus indirectly receive an advantage through not being

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[11] See Cases T-778/16 and T-892/16, *Ireland and Others v European Commission*, paragraphs 136-138.

[12] See Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, paragraph 132.

[13] See Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, paragraph 66.

[14] See Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, paragraph 68.

[15] See Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED)*, paragraph 68.

subject to a tax on their liabilities. However, the practice of the European Commission and the case law of the Union courts tend to accept the right of the Member States to impose sectoral taxes. In this respect, the CJEU has especially held that "in the absence of European Union rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors".[16]

This formulation has been used in several cases,[17] and the acceptance of sectoral taxes such as environmental taxes or certain taxes on the financial sector[18] confirms the possibility for the Member States to implement sectoral taxes, as long as they prove non-selective.[19] Therefore, <u>I do not analyse the potential selectivity of the risk tax because of its sectoral nature, although an incompatibility cannot be excluded.</u>[20] Also, the potential selectivity of a sectoral tax is mostly relevant when such a tax is applied homogeneously. In the case of the risk tax on certain credit institutions, the tax includes an intrinsic differentiation. Therefore, in this opinion I shall investigate the potential selectivity that may exist *within* the risk tax system.

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[16] See Joined cases C-106/09 P and C-107/09 P, *European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, paragraph 97.

[17] See e.g. Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED)*, paragraph 50.

[18] For example, the European Commission has found that "the peculiar nature of banking could, in principle, justify the introduction of specific tax rules for the sector": see Commission Decision of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy (2002/581/EC), paragraph 32.

[19] Certain taxes that improve or worsen the competitive situation of one sector have been deemed illegal State aid. See e.g. Case 173/73, *Italy v Commission*; Case C-75/97, *Kingdom of Belgium v Commission of the European Communities*. In this respect see Pierpaolo Rossi, 'The Paint Graphos Case: A Comparability Approach to Fiscal Aid', in Dennis Weber (ed.), *EU Income Tax Law: Issues for the Years Ahead* (IBFD 2013), p. 130: "it is not State aid to apply general taxes to different sectors (e.g. banking compared to manufacturing), but it is State aid to apply sectoral (and therefore non-general) taxes to different sectors (banking compared to manufacturing)".

[20] One may, for example, question the need for an additional tax on credit institutions as they are already contributing to the public finances by paying various types of taxes and by not being able to deduct VAT on their purchases. They are also contributing to schemes such as the bank resolution system, and they are subject to capital requirements. One may also observe that the suggested risk tax is not linked to the ability-to-pay of credit institutions, and may make the financial sector less attractive to investors and customers (see *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 39). Additionally, one may observe that several types of sectoral taxes have a behavioural and not only fiscal objective, such as environmental taxes or taxes on products that are not healthy; in such cases, the sectoral nature of the tax may be compatible with the State aid rules given the fundamentally different situations of the undertakings to which they apply. No such differences exist in the case of the proposed risk tax on certain credit institutions. Finally, certain sectoral taxes apply instead of the normal income tax, such as tonnage taxes (see e.g. the Commission decision SA.45300 approving the Danish tonnage tax) or the Belgian alternative income tax regime for the wholesale diamond sector (see the Commission decision SA.42007, where it accepted such a regime); this is not the case of the risk tax, which applies in addition to the corporate income tax. However, the question of the compatibility with State aid law of the sectoral nature of the suggested risk tax on certain credit institutions is not studied in more details in this opinion, the scope of which is limited to the potential selectivity resulting from the liabilities threshold.

The selectivity criterion implies a prohibition of discriminations between comparable undertakings,[21] which in essence leads to an obligation to provide equal treatment.[22] To test the potential selectivity of a tax measure, the CJEU has developed a method in several steps: one must first identify the ordinary or "normal" tax system applicable in the Member State concerned.[23] Second, one needs to demonstrate that the tax measure at issue is a derogation from that ordinary system to the benefit of only certain undertakings, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation; even if there is no formal derogation included in the tax system from what is deemed as "normal taxation", a measure may still be selective if its effects favour certain undertakings over others (so-called *de facto* selectivity).[24] Third, assuming that a tax measure is *a priori* selective (i.e. it implies a difference in treatment between comparable undertakings) it may nevertheless be justified if it flows from the nature or the general structure of the system of which it forms part,[25] and is in line with the principle of proportionality.[26]

The potential selectivity of the suggested risk tax for certain credit institutions is analysed below in the light of this methodology.

5.2.1 What is the reference system?

The reference system must be determined carefully, because an improperly chosen reference system is likely to lead to a biased State aid analysis.[27]

The European Commission defines the reference system as follows: "a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system".[28] The European Commission observes that the reference system "is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates". Consequently, it will often be the tax system itself that constitutes

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[21] See Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED)*, paragraph 38; Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, paragraph 60.
[22] See Case C-524/14 P, *European Commission v. Hansestadt Lübeck*, paragraph 53.
[23] See Case C-88/03, *Portugal v Commission*, paragraph 56; Cases C-78/08 to C-80/08, *Paint Graphos*, paragraph 49.
[24] See Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 74.
[25] See e.g. Case C-88/03, *Portugal v Commission*, paragraph 52; Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 58.
[26] See Cases C-78/08 to C-80/08, *Paint Graphos*, paragraph 75.
[27] See Case C-203/16 P, *Dirk Andres v European Commission*, paragraph 107.
[28] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 133.

the reference system.[29] This is especially true for sectoral taxes, which are taxes with a narrow scope of application, and where it is logical to take into account the whole sectoral tax as a reference system for it to include all the elements necessary to its full functioning. Examples of sectoral taxes such as turnover taxes applied on the retail sector or environmental taxes illustrate the use of the whole sectoral tax as a reference system, as opposed to excluding from the reference system the undertakings that are excluded from its scope of application.[30] As the General Court emphasises, a reduction from a tax "de facto forms part of the structure of taxation";[31] therefore, although it is exempt from a tax, an exempted activity falls within the sectoral scope of application of the tax. It can also be observed that the European Commission and the Union courts have adopted a broad approach to the determination of the reference system, even for taxes that have broader scopes than a sectoral tax.[32] In certain cases the reference system may even encompass legal provisions that are not included in the tax system under review, if there is a link between the two.[33]

Accordingly, in this case the most correct reference system is the whole risk tax, including the elements of the risk tax that result in the exclusion of certain credit institutions from the scope of the tax. In support of this conclusion, one should keep in mind the fact that the CJEU has repeatedly held that the regulatory technique should not influence the outcome of a State aid analysis; instead, focus is on the effects of a tax.[34] The credit institutions excluded from the scope of the risk tax are, in effect, subject to the same rules as the ones in the scope of the tax, but with a 0% tax rate instead of a 0,06% or 0,07% tax rate. One could not validly argue that the two tax rates operate in parallel, each of them constituting a separate reference system: the reference system needs to be a *consistent* set of rules, which needs to include all its rules so that its effects can be assessed. Also, even though the drafting of the proposal does not

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[29] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 134.

[30] Concurring, see Rita Szudoczky and Balázs Károlyi, 'Progressive Turnover Taxes under the Prism of the State Aid Rules: Effective Tools to Tax High Financial Capacity or Inconsistent Tax Design Granting Selective Advantages?', 19 European State Aid Law Quarterly (2020) 3, p. 256.

[31] See Joined Cases T-836/16 and T-624/17, *Republic of Poland v European Commission*, paragraph 68.

[32] See e.g. the decisions and court cases in the field of corporate income tax. It is in most cases the whole corporate income tax system that constitutes the reference system, as opposed to a specific provision within the corporate income tax. An example is provided by the *Apple* case, where the General Court found that the provisions for the attribution of profits to permanent establishments could not constitute a reference system on its own: see Cases T-778/16 and T-892/16, *Ireland and Others v European Commission*, paragraph 163. Generally on the question of the scope of the reference system, see Jérôme Monsenego, *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base*, Kluwer Law International 2018, pp. 45 and following.

[33] See Case C-308/01, *GIL Insurance Ltd and Others v Commissioners of Customs & Excise*.

[34] See Case C-487/06 P, British Aggregates Association v Commission of the European Communities and United Kingdom, paragraph 89, last sentence; Joined cases C-106/09 P and C-107/09 P, *European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, paragraph 92; Case C-219/16 P, *Lowell Financial Services GmbH v European Commission*, paragraph 92; Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 67; Case C-219/16 P, *Lowell Financial Services GmbH v European Commission*, paragraph 93.

precisely determine a main rule (i.e. the conditions leading to one of the two possible tax treatments) and an exception to it (i.e. the conditions leading to the other of the two possible tax treatments), the selectivity criterion does not necessarily suppose the objective determination of a main rule and an exception.[35] The question of which tax rate is the main one is mostly relevant to determine whether or not taxes have to be reimbursed, and if so how to quantify the amount of the aid;[36] this does not necessarily imply the existence of two separate reference systems.

The next question is whether the suggested tax system implies a difference in treatment between undertakings that are in a comparable situation.

5.2.2 Is there a difference in treatment between undertakings that are in a comparable situation?

The suggested tax system implies a dual treatment of credit institutions: either credit institutions are in the scope of the tax, or they are exempted from it. The size of the liabilities of the credit institutions is one of the parameters that lay the ground for this classification: only credit institutions that have liabilities at the beginning of a tax year that are equal or superior to a certain threshold (150 billion SEK in 2022) would be subject to the tax. Clearly, this implies a difference in treatment to the benefit of only certain undertakings, those that have liabilities below the threshold.

This leads to the question of whether or not the difference in treatment takes place between operators who, in the light of the objective pursued by the tax system, are in a comparable factual and legal situation: are credit institutions with liabilities below and above the threshold in a comparable factual and legal situation, in the light of the objective pursued by the tax system? The question of comparability is complex, and the Swedish Ministry of Finance rightly identified a need to analyse it.[37]

To start with, one should determine the objective pursued by the tax system. This might be a difficult exercise, because the objective of a tax system is not necessarily explicitly mentioned in the legislative material relevant for the tax, such as the preparatory works or the actual tax provisions. Even if the objective of a tax is explicitly mentioned in the tax law or in the preparatory works, in my opinion it would not be correct to fully and solely rely on what the lawmaker chose to mention or not.[38] I believe that a more correct

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[35] For an illustration of this view, see e.g. Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, paragraph 63: “while the tax criterion, relating to the source of production of the electricity, does not appear to derogate formally from a given legal reference framework, its effect is nonetheless to exclude such electricity producers from the scope of that tax”; the effects of a tax system may, accordingly, make it selective (see paragraph 64 of this judgement).

[36] See e.g. Joined Cases C-164/15 P and C-165/15 P, *European Commission v Aer Lingus Ltd and Ryanair Designated Activity Company*.

[37] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 35.

[38] Concurring see Michael Lang, ‘State Aid and Taxation: Selectivity and Comparability Analysis’, in Isabelle Richelle, Wolfgang Schön and Edoardo Traversa (eds.) *State Aid Law and Business Taxation* (Springer 2016), p. 34: “Searching for the legislator’s intention (…) cannot lead to any result”. See also

method rather consists in understanding the essence and the practical operation of a tax system, to be able to deduce its objective. However, this method may not always be satisfactory, for example when a tax system pursues several objectives not necessarily consistent with each other.

In the case of the proposal for a risk tax on certain credit institutions, the main objective of the tax mentioned in the memorandum is the need to strengthen the Swedish public finances to be able to assume the indirect costs caused by future financial crises.[39] However, as from 2023 the tax rate is to increase from 0,06% to 0,07% of the liabilities; the difference (0,01%, or approximately 1 billion SEK per year[40]) is, according to the press release that accompanied the proposal,[41] to be attributed to the defence budget, which is a different objective than the one stated as a main purpose for the tax. In addition, the objective that initially motivated the idea of a "bank tax" (at that time it was not yet, at least not officially, a risk tax on certain credit institutions) was the strengthening of the defence budget.[42] The impression that the proposal for a risk tax on certain credit institutions is motivated by the objective to strengthen the defence budget is consistent with the revenues yielded by the suggested risk tax, which broadly match the revenues to be allocated to the defence budget in the original presentation of a bank tax.

The precise determination of the objective of the tax might be important for the comparability analysis between the two categories of undertakings: if the objective of the tax is generally to strengthen the Swedish public finances, the revenues of which would contribute to different public efforts, it is more likely that the two categories of undertakings will be in a comparable situation. This is because the objective to levy taxes and improve the public finances does not, in itself, mandate a differentiated taxation between credit institutions with liabilities below or above the threshold. If, in contrast, the objective of the tax is really to face the indirect costs caused by a financial crisis, and that the two categories of credit institutions indeed may trigger different indirect costs for the State, a differentiated levy of the risk tax may appear more motivated.

However, in this case I do not believe that the choice of either objective is decisive to proceed with the comparability analysis. This is because the levy of the risk tax is still a tax, which by definition is not directly affected to a special purpose, be it the defence budget or the indirect costs that occur with a financial crisis; it is rather a general

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Case C-562/19 P, *European Commission v Republic of Poland*, Opinion of Advocate General Kokott delivered on 15 October 2020, paragraph 75, where the objective pursued by the tax system is considered to be determined "by way of interpretation from the nature of the tax and its design".

[39] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, e.g. at p. 24.

[40] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 38.

[41] See https://www.regeringen.se/pressmeddelanden/2020/09/forslag-om-riskskatt-for-storre-kreditinstitut-pa-remiss/ (accessed 24 October 2020): "*Den beräknade offentligfinansiella effekten från höjningen planeras användas till ökade försvarsanslag*".

[42] See the press release dated 31 August 2019: https://www.regeringen.se/pressmeddelanden/2019/08/langsiktig-finansiering-av-det-militara-forsvaret/ (accessed 24 October 2020).

contribution to the State's revenues, which may, in turn, be affected (or not) to different purposes. The general character of the risk tax is demonstrated by the fact that it might aim at covering *indirect* costs that occur with a financial crisis (i.e. the deteriorated public finances due to an economic downturn, with no precise determination of who should benefit from the intervention of the State), not the *direct* costs that the State may have to assume in case of financial crisis (i.e. when the State must improve the financial stability by targeting its interventions). The risk tax would apply in addition to existing mechanisms such as the resolution fees and capital requirements, the purpose of which is to mitigate the risk that a financial crisis happens and the exposure of the State in case such a crisis occurs. There is no mention of investments aimed at decreasing the probability of a financial crisis or at minimizing the consequences of a financial crisis that might be financed with the revenues of the risk tax. The suggested risk tax does not either aim predominantly at influencing behaviours, for example by discouraging credit institutions from taking risks that may result in a financial crisis. The risk tax would be affected to the State budget, which supports various types of public expenditures, including (but not limited to) both the defence budget and the indirect costs that occur with a financial crisis. There is no obligation for the State to actually allocate the revenues of the risk tax to certain purposes; the State may also change its priorities over time.

Also, as a subsidiary way of reasoning, if there really were a need to specifically strengthen the financial reserves of the State in view of potential future financial crises, one could have conceived a system that is not a tax, but a fee paid to a blocked account aimed at supporting indirect costs occurring in case of financial crises. The funds could be reimbursed after some time in case the risk has not (fully) materialized. However, the suggested risk tax does not follow this kind of logic: the risk tax is to be paid whether or not the risk materializes, and no reimbursement is envisaged.

Accordingly, in my opinion the objective of the tax, for the purpose of a State aid analysis, is the taxation of the largest credit institutions on the basis of their liabilities registered on a balance sheet in Sweden, to generally finance public expenditure.

Now that the objective pursued by the tax system has been determined, the next question consists in analysing whether undertakings that are in the scope of the tax and those that are exempted from it, are, in the light of this objective, in a comparable factual and legal situation. If they are not in a comparable situation, the differentiation included in the tax system on the basis of the liabilities threshold cannot have a selective nature.

I will analyse factual comparability first. The standard set by the CJEU with respect to factual comparability is such that there must be clear differences between different undertakings with respect to the purpose of a given tax, for these undertakings to be in a different factual situation. For example, electricity producers are not in a comparable situation with respect to a tax on the use of inland waters for the production of electricity, when electricity producers do or do not use water as a source of electricity

production;[43] in such a case, the tax makes sense only with respect to certain undertakings, which are not comparable to other undertakings. It is argued in the memorandum that all credit institutions do not imply the same risks for the functioning of the financial system. The difference would mainly stem from the size of the operators: bigger credit institutions would constitute such an important part of the financial system that when they are exposed to serious difficulties, highly negative consequences may be triggered both for the financial system and for the economy in general.[44] Such institutions would have a systemic importance, as serious difficulties or a collapse would entail a systemic risk for the stability of the financial market. In contrast, smaller credit institutions would not entail such risks for the State.[45] Therefore, it is considered in the memorandum that the two categories of undertakings are not, in the light of the objective pursued by the tax system, in a comparable factual and legal situation,[46] something that would enable a differentiated taxation with a threshold based on liabilities.

I have not performed an independent and critical assessment of the correctness of the alleged relation between the size of the liabilities of credit institutions, and the indirect costs that occur in case of financial crisis. I can nevertheless observe that the criteria leading to classifying a financial institution as risky, or the parameters triggering the application of mechanisms to prevent crises or mitigate their consequences are not identical: this is evidenced by a comparison between the mechanism suggested by the Swedish Ministry of Finance in the memorandum, the criteria used by the *Riksgälden* to determine which institutions are in the scope of the resolution mechanism, the parameters that determine the capital requirements applicable to banks, and the criteria used by the *Finansinspektionen* for the purpose of categorisation. The diversity in these parameters suggests that the size of the liabilities of credit institutions is not, as observed in the memorandum[47], necessarily the only parameter that may trigger indirect costs in case of financial crisis, something that would point to the factual comparability of the two categories of credit institutions. It can also be assumed that different credit institutions with similar liability levels may have different risk profiles, being more or less eager to take on risks when granting loans. Yet, the size of liabilities does not take into account the risk factor connected to each loan. This too points to liabilities not being the only parameter that may trigger indirect costs for the State.

If one nevertheless assumes that the alleged relation between the size of the liabilities of credit institutions and the indirect costs that occur in case of financial crisis is correct, such a relation does not necessarily preclude the comparability between credit institutions with liabilities below and above the threshold. If indeed there is a relation

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[43] See Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, paragraphs 66-67.
[44] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 23.
[45] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 35: ”*På grund av sin marknadsposition är de beskattningsbara kreditinstituten de enda kreditinstitut som på företagsnivå utgör en potentiell risk för väsentliga indirekta kostnader för samhället*”.
[46] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 35.
[47] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 23: ”*Faktorer som spelar roll för detta är institutens storlek, dess betydelse för samhällsekonomin, dess komplexitet och sammanlänkning*”.

between the size of credit institutions and the indirect costs for the public finances that may be triggered in case of financial crisis, the only argument that could justify that the two categories of undertakings are not comparable is if the undertakings exempted from the tax present no risk for the public finances in case of financial crisis, while the undertakings in the scope of the tax would present such risks. In other words, the two categories of undertakings may be in different situations if they indeed trigger different risks, meaning that no risk is associated to smaller credit institutions since they are not deemed in need of contributing to covering the risks of indirect costs, while bigger credit institutions would trigger indirect costs, thereby motivating the levy of an additional tax. If, in contrast, the risk supported by the State is commensurate with the size of the credit institutions, it is my understanding that there is no support in the case law of the CJEU to preclude the comparability of credit institutions with liabilities below and above the threshold.

In my view it would be enough that there is a correlation (not necessarily a strict proportionality) between the liabilities of credit institutions and the level of exposure of the State to indirect costs in case of financial crisis, to find smaller and bigger credit institutions comparable from a factual perspective. If indeed the risk supported by the State is commensurate with the size of the credit institutions, and assuming that the State aims at strengthening the public finances in order to build reserves so as to face future indirect costs, a design of the risk tax that is consistent with this objective would imply that all credit institutions are subject to a tax that is commensurate with the risk that their activities imply for the State. I have not analysed such an alternative design of the risk tax, but one could conceive a tax that is simply proportional to the liabilities, i.e. with no exemption below a given threshold.[48]

The system suggested in the memorandum, which implies that credit institutions are in the scope of the tax if their liabilities exceed the threshold, is not connected to a demonstration that credit institutions with liabilities below the threshold do not trigger any risks, or that indirect costs for the State in case of financial crisis increase exponentially with the level of liabilities of credit institutions.[49] There are actually arguments that would contradict the idea of an exponential exposure of the State, especially the fact that the largest banks are in the scope of the resolution system that protects the State from being too exposed to the costs of a financial crisis, and the capital requirement regulations: thanks to these protection mechanisms, bigger banks do not automatically imply risks for the State that increase exponentially with their liabilities.

The type of financial activities conducted by credit institutions with liabilities below the threshold does not prevent the State from being exposed to indirect costs in case of

[48] Such a tax may, however, prove selective for other reasons, for example because of its sectoral nature.

[49] For a similar reasoning in the area of turnover taxes, see Commission Decision of 4.11.2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover, paragraph 69.

financial crisis;[50] the difference between the two categories of credit institutions is thus not related to the *existence* of risks assumed by the State, but rather to the *extent* of such risks. This means that the need for a threshold to distinguish between the two categories of credit institutions is not objectively proved, especially in view of the completely different consequences depending on whether or not the threshold is exceeded. In addition, the level of the threshold is not either objectively demonstrated: it is acknowledged in the memorandum that it is difficult to determine where the border should go between credit institutions that are, or are not, important from a systemic perspective.[51] The lack of arguments justifying an objectively different situation between the two categories of credit institutions points to their comparability in the light of the objective of the risk tax.

Moreover, absent an objective demonstration that the risks borne by the State materialize only when the liabilities threshold is passed, there is an inconsistency in the design of the tax: while the risks borne by the State seem to increase in a linear fashion as liabilities increase, the tax is only paid by the largest credit institutions, with no exemption up to the level of the threshold. If one goes back to the example in section 2 of this opinion, bank 1 and bank 2 should reasonably be deemed to trigger relatively comparable levels of risks for indirect costs for the State, as their liabilities amount to 140 and 160 billion SEK. Yet only bank 2 would pay the tax, hence the inconsistency between the objective and the design of the tax. The inconsistency is all the more patent that only a few of all the credit institutions active in Sweden are to pay the risk tax: 21 credit institutions, belonging to 9 banking groups (7 Swedish and two foreign) are to pay the risk tax,[52] whereas there are 125 banks (among which 37 are foreign) active in Sweden.[53]

With respect to factual comparability and the compatibility with State aid law of differentiated taxation, a parallel can also be made with case law on differentiated taxation and environmental objectives. There are two cases that are particularly interesting in this respect:

- First, in the *Adria-Wien Pipeline* case the CJEU found that different sectors using more or less energy were in a comparable situation, and that a relief from energy taxation granted only to undertakings manufacturing goods was illegal State aid. The parallel between the *Adria-Wien Pipeline* case and the proposal for a risk tax on certain credit institutions is the following: in *Adria-Wien Pipeline* the Court found that the environmental damage caused by energy

[50] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 35, where it is indicated that the credit institutions in the scope of the tax are the only ones that present risks of *significant* ("*väsentliga*") indirect costs; this means, a contrario, that credit institutions below the threshold may still trigger risks of indirect costs, albeit at a lower level. The notion of significant indirect costs ("*väsentliga indirekta kostnader*") is not defined in the memorandum, and it does not seem to be possibly defined (see p. 41 of the memorandum: "*Det är svårt att avgöra var gränsen går för att ett kreditinstitut ska riskera att orsaka väsentliga indirekta kostnader i händelse av en finansiell kris*").

[51] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, pp. 23 and 41.

[52] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 40.

[53] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 17.

consumption was proportional to this energy consumption, so there was no need for differentiated taxation between service providers and manufacturers: "energy consumption by each of those sectors is equally damaging to the environment".[54] The outcome of the case results in taxation in line with the polluter pays principle, where energy taxation is proportional to the energy consumption, and thus to the environmental damage. Transposed to the context of the risk tax on certain credit institutions, if indeed the liabilities of credit institutions trigger risks for indirect costs that are commensurate to their size, the logic of the *Adria-Wien Pipeline* case would imply that taxation should not be differentiated on the basis of the size of the liabilities, since risks for indirect costs occur in any case: a proportional tax, with no exception or threshold, would ensure that all credit institutions, no matter the size of their liabilities, contribute to the public finances to an extent that is commensurate with the risks they expose the State to.

- Second, in the *ANGED* case the CJEU has found that certain undertakings with different impact on the environment were not in a comparable situation, and thus could be subject to differentiated taxation.[55] This view was confirmed in the *UNESA* case.[56] What is interesting in these cases, for the purpose of the risk tax on certain credit institutions, is the difference that exists between certain environmental taxes and the proposal for a risk tax. Environmental taxes can be specifically designed so as to target polluters. Moreover, environmental taxes often have as a primary objective not to raise fiscal revenue, but to influence behaviours since different operators may have different impact on the environment, so that economic operators that pollute the most change their processes and pollute less. No such characteristics seem to be at hand with respect to the proposal for a risk tax on certain credit institutions, if one accepts the idea – which is an assumption in the memorandum – that the risks to which the State is exposed are commensurate with the size of the liabilities of credit institutions: as already emphasised above, credit institutions cannot be objectively divided in two categories, only one of which presents risks of indirect costs for the State. Therefore, the characteristics of credit institutions do not mandate differentiated taxation, as opposed to certain environmental activities. Furthermore, the risk tax has not as a principal purpose to influence behaviours in terms of the risks taken by credit institutions with the highest liability levels:[57] since all credit institutions imply some level of risks for the State, all credit institutions should be encouraged to mitigate their risks. This means that while in the field of environmental taxation certain operators may indeed be in a different situation with respect to an environmental objective, thus justifying a differentiated tax system, no such clear differentiation can be

[54] See Case C-143/99, *Adria-Wien Pipeline GmbH*, paragraph 52.
[55] See Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED*).
[56] See Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*.
[57] In contrast, capital requirements and the resolution system do intend at minimizing the risks taken by financial institutions.

made between credit institutions, thus pointing to the factual comparability of different credit institutions and the lack of motivation to enact a differentiated tax system.

It results from the foregoing that credit institutions that are in the scope and outside the scope of the risk tax are in a factual comparable situation, seen in the light of the objective of the tax system.

I now turn to the analysis of legal comparability. Incomparability from a legal perspective requires true differences between the categories of undertakings subject to different tax rules, as emphasised in the *Paint Graphos* case.[58] From a legal perspective, credit institutions with liabilities below and above the threshold are not subject to clearly different compliance, accounting, and tax requirements that would rely on the same type and level of liabilities threshold. Here, a parallel can also be made to the bank resolution system, which is a legally binding mechanism relevant for the legal comparability. First, the threshold suggested for the risk tax does not correspond to the scope of the resolution fee: while in 2019 there were 179 institutions that paid the resolution fee,[59] the risk tax is estimated to be paid by 21 credit institutions belonging to 9 groups.[60] The scope of the resolution fee is broader, which tends to indicate that the credit institutions exempted from the risk tax still present a risk for the stability of the financial markets since many banks excluded from the risk tax are nevertheless subject to the resolution fee. Second, the resolution fees aim at preventing the taxpayers, i.e. the State, from supporting banks in case of financial crisis; this contradicts the argument according to which the credit institutions in the scope of the risk tax may trigger systemic risks implying significant indirect costs for the State, while the institutions exempted from the tax would not present such risks. Therefore, credit institutions with liabilities below and above the threshold are in a comparable legal situation, in the light of the objective of the suggested risk tax.

The above analysis leads me to the conclusion that the credit institutions that are in the scope and outside the scope of the risk tax are in a comparable legal and factual situation in the light of the objective of the tax system. Since the suggested risk tax implies a difference in treatment between undertakings that are in a comparable situation, the risk tax is *a priori* selective. The next step in the selectivity analysis consists in investigating whether or not the difference in treatment may be justified by the logic of the tax system, and if so, if it is in line with the principle of proportionality. This is the purpose of the following section.

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[58] See Cases C-78/08 to C-80/08, *Paint Graphos*.
[59] See https://www.riksgalden.se/sv/var-verksamhet/finansiell-stabilitet/sa-finansieras-krishantering/ (accessed 27 October 2020): "*För 2019 betalade 179 institut resolutionsavgift*".
[60] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 38.

5.2.3 May the difference in treatment be justified by the logic of the tax system, and is it in line with the principle of proportionality?

Treating differently credit institutions depending on whether their liabilities are below or above the threshold might be justified, but solely by the inner logic of the tax system. To that end, the reason for discriminating must flow from the nature or the general structure of the system of which the measure forms part.[61] This test is strictly applied by the Union courts and leaves little leeway to the Member States. The European Commission interprets the case law of the Union courts so that a measure may be justified if it "derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system. In contrast, it is not possible to rely on external policy objectives which are not inherent to the system".[62] In other words, it must be the intrinsic characteristics of the tax system that make it necessary to treat differently the two categories of undertakings. This may be the case, for example, with respect to "the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation, or the objective of optimising the recovery of fiscal debts".[63] The judgement of the Grand Chamber of the CJEU in the *A-Brauerei* case illustrates the view of the Court on the possibility to justify a difference in treatment with respect to the intrinsic characteristic of a tax system: the need to avoid double taxation in case of corporate restructurings, and thus in essence the need to preserve the principle of neutrality, justified the exemption from tax in certain cases.[64] In contrast, a tax advantage that is motivated by external reasons, such as the preservation of employment or the safeguard of certain enterprises, has repeatedly been rejected as a justification by the Union Courts.[65]

Considering how the justification test has been applied by the Union courts, in this case the Swedish Ministry of Finance would need to demonstrate that the distinction on the basis of a liabilities threshold is mandated by the inner logic of a risk tax on credit institutions. However, no such argument is found in the memorandum, at least no such argument is referred to explicitly as a ground to justify the *a priori* selective character of the risk tax. And indeed, there does not seem to be intrinsic reasons for exempting credit institutions the liabilities of which are below the threshold, as the tax could very well be levied on any credit institution or not levied at all. Undertakings that exceed the threshold could also be granted an exemption from tax up to the threshold. In other

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[61] See e.g. Case C-203/16 P, *Dirk Andres v European Commission*, paragraph 87; Case C-88/03, *Portuguese Republic v Commission of the European Communities*, paragraph 52.
[62] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 138, and the case law referred to at footnotes 212 and 213.
[63] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 139.
[64] See Case C-374/17, *Finanzamt B v A-Brauerei*.
[65] See e.g. Case C-6/12, *P Oy*; Case C-88/03, *Paint Graphos*, paragraph 82.

words, there are no technical reasons linked to the design of a risk tax for exempting the credit institutions with liabilities below the threshold. The exemption is justified in the memorandum by policy reasons, i.e. the higher exposure of the State to indirect costs in case of financial crisis; such policy reasons should reasonably be deemed *external* to the risk tax system, as opposed to *internal*, as the case law of the CJEU requires. Even the policy argument – which is not valid for justification purposes – can be questioned, as it has not been demonstrated that a risk for the public finances exists only for credit institutions above the threshold. Other external reasons potentially explaining the limited scope of the tax, such as the limitation of the administrative burden on banks and the tax administration, or the higher fiscal revenues produced by banks with higher liabilities, would not either be acceptable justifications. Consequently, the inherent features of a risk tax do not, as such, require the exemption of credit institutions with liabilities below the chosen threshold.

Even if the need to distinguish on the basis of the threshold were mandated by the logic of the risk tax on certain credit institutions, it would still need to pass the proportionality test. To that end, it must be demonstrated that the measures "are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures".[66] In this respect, the memorandum contains no argument pointing to the technical necessity of designing the risk tax with a liabilities threshold, and that the threshold should be set at 150 billion SEK. The difference in treatment between undertakings that are just below and above the threshold appears to go beyond what is necessary to achieve the objective pursued by the tax: if the objective is to improve the public finances so as to assume indirect costs in case of financial crisis, a less important difference in treatment would be achieved with a proportionate tax rate with no threshold, or if an exemption up to the threshold were granted to credit institutions the liabilities of which exceed the threshold.

In addition, no objective arguments are provided in support of the level of the threshold (150 billion SEK for 2022) and the choice of the tax rate (0,06% in 2022), making the difference in treatment between credit institutions in the scope and outside the scope of the tax subjective, as opposed to objective.

Consequently, the design of the risk tax is disproportionate: this is because the difference in treatment goes beyond what is necessary to raise revenues in a manner that is commensurate with the exposure of the State to indirect costs.

[66] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 140, referring to the *Paint Graphos* case.

6 Conclusion

To conclude, the Swedish Ministry of Finance correctly identified the need to inform the European Commission of the project to implement a risk tax on certain credit institutions and notify it in accordance with Article 108(3) of the TFEU. If the suggested risk tax were to be subject to State aid control, it is my interpretation of the case law of the Union courts that the inclusion of a liabilities threshold in the design of the tax would probably make it selective, and thus in breach of the State aid rules.[67]

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Prof. Dr. Jérôme Monsenego
Stockholm, 15 December 2020

[67] A comparable type of analysis, in respect of a tax on financial transactions, is reached in Raymond H.C. Luja, 'Taxing Financial Transactions: A State Aid Perspective', in Otto Marres and Dennis Weber (eds.), *Taxing the Financial Sector: Financial Taxes, Bank Levies and More* (IBFD 2012), p. 148: "A tax aimed at covering *all* financial transactions may not be designed in such a manner that some transactions or financial institutions will escape the tax based on their peculiar characteristics, even if the way out is the result of the normal application of (a generally applicable loophole in) the tax law concerned".

Legal opinion: risk tax for certain credit institutions – State aid analysis with respect to the exclusion of foreign liabilities connected to the Swedish credit market

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Stockholm, 1 February 2021

1 Purpose of the legal opinion and limitations

This legal opinion is written at the initiative of the Swedish Bankers' Association. The purpose of the opinion is to analyse the compatibility with the State aid rules of the territorial scope of a new tax envisaged in Sweden. The suggested tax is a risk tax that would be levied on certain credit institutions. It is presented in a memorandum drafted by the Swedish Ministry of Finance.[1]

This opinion does not contain a comprehensive assessment of the compatibility with the State aid rules of the suggested tax, as it only focuses on an analysis from a State aid perspective of the exclusion of liabilities connected to foreign credit activities for the purpose of the determination of the tax base. Other issues are not in the scope of this opinion, and I have not performed investigations outside the field of State aid law. To conduct this legal analysis, I have been relying on the information contained in the memorandum drafted by the Swedish Ministry of Finance.

The analysis contained in this opinion is not fully exhaustive: because of the complexity of the issue of the territorial scope of the tax, and the diversity of situations where differences of treatment may arise, I have not been able to analyse all issues in the most thorough manner. Different domestic and cross-border situations are described, and several differences in treatment between domestic and cross-border situations are discussed in the light of the State aid rules. Arguments pointing both to the compatibility, and the lack of compatibility with State aid law have been identified. Moreover, certain problems have been identified that have not yet been clearly decided by the Union courts, making it difficult to reach clear conclusions.

Hence, this legal opinion does not contain definitive conclusions as to the compatibility with the State aid rules and the internal market of the territorial scope of the suggested risk tax. This opinion rather contains a contribution to the analysis from a State aid perspective of the exclusion of foreign liabilities. Although further analysis might be

[1] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1: https://www.regeringen.se/4a6a7b/contentassets/3098b7791ca64bb2b41cfb810f4a2726/riskskatt-for-vissa-kreditinstitut.pdf

necessary to come to more precise conclusions, certain tensions have been found (especially in situations where Swedish banks lend money to their clients either from Sweden or from a foreign branch, hereinafter described as "situation 2" and "situation 3"), thus confirming the relevance – as suggested in the memorandum drafted by the Swedish Ministry of Finance – of notifying the suggested risk tax to the European Commission.

2 Terminological precisions and short summary of the proposal for a risk tax on certain credit institutions

2.1 Terminological precisions

Before describing the mechanisms of the suggested risk tax that are relevant for this opinion, certain terminological precisions are made. The object of the risk tax is certain of the liabilities of credit institutions. Indeed, to be able to grant loans, credit institutions may need to borrow money. In addition, there is an important territorial element in the design of the tax: only domestic liabilities, and not foreign liabilities, are subject to the risk tax. In order to distinguish between domestic and foreign liabilities, the suggested risk tax is based on where the credit activities (i.e. the activity of granting loans) that are connected to the liabilities are located, hence irrespective of where the customer is located. In other words, when a credit institution carries out credit activities in Sweden through granting loans to its clients in Sweden or abroad, and that it needs to borrow money to grant these loans, then the liabilities so incurred will be subject to the risk tax. Conversely, liabilities incurred for credit activities carried out outside of Sweden are not in the scope of the tax. Liabilities incurred for other purposes than granting loans to clients are not either in the scope of the tax.

The text of the suggested risk tax relevant for this distinction is the fourth paragraph of the act, first indent, and it is drafted as follows: "*4 § Ett kreditinstitut är skattskyldigt enligt denna lag, om 1. kreditinstitutet har skulder vid beskattningsårets ingång som är hänförliga till verksamhet som kreditinstitutet bedriver i Sverige*". The first sentence of the seventh paragraph of the act follows the same principle, and is drafted as follows: *"7 § Beskattningsunderlaget utgörs av summan av kreditinstitutets skulder vid beskattningsårets ingång, hänförliga till verksamhet som kreditinstitutet bedriver i Sverige.*" A more detailed definition of liabilities connected to credit activities in Sweden, i.e. domestic liabilities, is found at page 25 of the memorandum: "*Med skulder som är hänförliga till verksamhet i Sverige avses huvudsakligen in- och upplåning (inklusive emittering av värdepapper) som används för att finansiera kreditgivning i den svenska verksamheten, men även andra typer av skulder som är ett resultat av den svenska verksamheten omfattas*".

To sum up the above, the following definitions will be used in this opinion:

- Domestic liability: liability that is incurred in Sweden for the purpose of financing credit activities performed in Sweden.

- Foreign liability: liability that is incurred abroad for the purpose of financing credit activities performed outside of Sweden. Here it is important to emphasise that foreign liabilities may be incurred in connection with loans granted to Swedish clients, albeit on the basis of credit activities performed outside of Sweden.

2.2 Short summary of the proposal for a risk tax on certain credit institutions

The suggested tax is designed so that credit institutions (Swedish: *kreditinstitut*) that have liabilities at the beginning of a fiscal year that are connected to credit activities in Sweden, pay a risk tax consisting of a percentage of the liabilities after certain adjustments are made to their liabilities. The tax is to be levied, however, only if the liabilities exceed a given threshold. The tax rate suggested for 2022 is 0,06% of the liabilities, and the threshold suggested for 2022 is 150 billion SEK. The tax rate is set to 0,07% as from 2023, and the liabilities threshold is intended to increase each year.

According to the proposal, a credit institution is liable to the risk tax only if it has liabilities at the beginning of a fiscal year that are connected to credit activities in Sweden. If credit activities are performed by a foreign credit institution, it is only the credit activities performed from a Swedish permanent establishment that are in the scope of the risk tax.[2] My understanding of the memorandum drafted by the Ministry of Finance is that liabilities may be considered connected to credit activities in Sweden no matter if the credit institution is a resident of Sweden or a foreign resident.[3] What matters is where the liabilities that occur in connection with credit activities are deemed to be located.[4] The outcome is the exclusion from the tax base of liabilities connected to credit activities that are carried out outside of Sweden.

How to exactly distinguish between liabilities that are considered as connected to credit activities in Sweden, and liabilities that are considered as connected to foreign credit activities is not entirely clear on the basis of the sole reading of the memorandum. However, no matter where exactly the border goes between liabilities that are in the scope, or outside the scope of the tax base, the fact remains that a distinction is being made between domestic and foreign liabilities, the former being subject to the tax, the latter being exempted from it. Therefore, the suggested tax is designed so that credit

[2] See paragraphs 4§1 and 7§ of the proposal for a risk tax on certain credit institutions. See also the explanatory material: *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 25.
[3] The text of the memorandum supporting this description reads as follows: "*Eftersom skatten är tänkt att kompensera för indirekta kostnader i Sverige i händelse av en finansiell kris, bör endast sådana skulder beaktas som är hänförliga till verksamhet som kreditinstitutet bedriver i Sverige eller, såvitt avser ett utländskt bankföretag eller utländskt kreditföretag, från ett fast driftställe i Sverige*" (see *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 25).
[4] The text of the memorandum supporting this description reads as follows: "*Med skulder som är hänförliga till verksamhet i Sverige avses huvudsakligen in- och upplåning (inklusive emittering av värdepapper) som används för att finansiera kreditgivning i den svenska verksamheten, men även andra typer av skulder som är ett resultat av den svenska verksamheten omfattas. Skulder hänförliga till verksamhet i ett utländskt fast driftställe ska inte beaktas*" (see *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 25).

activities leading to the taking on of liabilities are divided in two categories, subject to different treatments.

The territorial nature of the suggested risk tax is illustrated with a simplified example, where Bank 1 is a Swedish bank with liabilities amounting to 200 billion SEK that are connected to its credit activities in Sweden, and Bank 2 is a foreign bank with liabilities amounting to 200 billion SEK that are connected to its foreign credit activities. Bank 2 has no permanent establishment in Sweden but does lend money to Swedish clients. Banks 1 and 2 compete on the same markets, and certain Swedish clients take loans from both Bank 1 and Bank 2. As I understand it, the tax regime applicable to the two banks would be as follows:

- Bank 1 (the Swedish bank) has liabilities that are in the scope of the tax. The liabilities are above the threshold of 150 billion SEK. For year 2022, the tax paid by Bank 1 amounts to 200.000.000.000 * 0,06% = 120.000.000 SEK

- Bank 2 (the foreign bank) has no liabilities connected to domestic credit activities. It is not in the scope of the risk tax.

Accordingly, there is a difference in the taxation of the two categories of credit institutions, the risk tax being only levied on the Swedish bank with liabilities connected to its credit activities in Sweden.

3 Methodology to assess the compatibility of a tax measure with the internal market from the perspective of the EU State aid rules

Article 107(1) of the TFEU is drafted as follows: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

According to settled case-law from the Court of Justice of the European Union (hereinafter the "CJEU"), the classification of a national measure as State aid, within the meaning of Article 107(1) TFEU, requires several conditions to be fulfilled cumulatively. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition.[5]

The notion of selective advantage is traditionally considered as the most complex element of the State aid definition in the area of taxation, and it is the main issue studied in this opinion. Therefore, in the section below I will be analysing the three other criteria

[5] See e.g. Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 53.

(section 4). I will then focus on the notion of selective advantage, through first analysing the notion of advantage (section 5), before turning to the selectivity criterion (section 6). Concluding remarks are made in section 7.

4 Intervention by the State or through State resources, effect on trade between the Member States, and distortion of competition

First, according to article 107(1) of the TFEU, there must be an intervention by the State or through State resources for a measure to be able to constitute illegal State aid. This requirement is automatically fulfilled with respect to tax measures since only the State, or a public organisation within the State, has the right to levy taxes. The fact that a tax is not levied implies an indirect transfer of resources to the benefit of the taxpayers that are not subject to the tax. Thus, depending on its design, a tax measure may constitute State aid.[6] The risk tax on certain credit institutions suggested in the memorandum would be levied by the Swedish State and it would be imputable to the State. It would strengthen the public finances of the State. Therefore, the risk tax would be considered as an intervention by the State or through State resources for the purpose of the application of the first element of article 107(1) of the TFEU. This criterion is thus fulfilled.

Second, the intervention must be liable to affect trade between the Member States for the measure to potentially constitute State aid. This criterion is normally considered to be fulfilled by the European Commission and by the Union courts when a measure affects undertakings that are globally active and operate in several Member States of the Union.[7] The financial sector is open to cross-border trade and it is frequent that banks or other financial institutions in one Member State lend to foreign clients, or operate in other Member States, assuming they are allowed to do so.[8] Swedish banks are often active abroad or have foreign clients, and several foreign banks are active on the Swedish market. Therefore, in my view a risk tax on credit institutions would be liable to affect trade between the Member States in the sense of article 107(1) of the TFEU, thereby making this criterion fulfilled.

Third, an intervention must distort or threaten to distort competition for it to be potentially deemed as an illegal State aid. It is usually considered in State aid law that a measure granted by a Member State distorts or may threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other

[6] See e.g. Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, paragraph 132.

[7] See e.g. Commission Decision of 21.10.2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, paragraph 189; see also Case C-53/00, *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)*, paragraph 21.

[8] On the effect on trade and the distortion of competition in the financial sector, see Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, paragraphs 139 and following. See also Case C-148/04, *Unicredito Italiano SpA*, paragraph 60.

undertakings with which it competes.[9] It can reasonably be assumed that the suggested tax measure would distort or threaten to distort competition, since the undertakings subject to the tax and exempted from it are, at least in some respects, competing on similar markets or for similar clients. It is also acknowledged in the memorandum drafted by the Swedish Ministry of Finance that competition would probably be affected if the tax were implemented.[10] Indeed, since it is possible that the banks subject to the risk tax would transfer at least part of this additional cost to their clients (via e.g. increased fees, higher interests charged, or lower interests paid), owners or employees, competition might be distorted as credit institutions that are not in the scope of the tax would save this cost and thus be able to sell their products and services at lower prices, and/or earn higher profit margins. Therefore, it can be assumed that this criterion is fulfilled.

The above analysis leaves one criterion to investigate, the selective advantage. Although the notion of selective advantage is frequently used in State aid practice, it is settled case law that the two notions of advantage and selectivity need to be distinguished: "the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage".[11] However, it can be observed that, for instance, the General Court has found that this does not prevent the two criteria from being examined "simultaneously", in situations where they overlap.[12] For the sake of clarity, I will first analyse the potential existence of an advantage (section 5), before turning to the selectivity criterion (section 6).

5 Potential existence of an advantage

With respect to the existence of an advantage in the sense of article 107(1) of the TFEU, the CJEU has held in numerous cases that measures that relieve an undertaking of a cost, including a tax cost, may constitute an aid.[13] For example, in the *Congregación de Escuelas Pías Provincia Betania* case, the CJEU held that "measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid";[14] on that basis, the Court considered that a tax exemption would confer an

[9] See e.g. Commission Decision of 21.10.2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, paragraph 189, with further references to the case law of the European Courts at footnote 75.
[10] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, pp. 40-41.
[11] See Case C-15/14 P, *European Commission v. MOL Magyar Olaj- és Gázipari Nyrt.*, paragraph 59.
[12] See Cases T-778/16 and T-892/16, *Ireland and Others v European Commission*, paragraphs 136-138.
[13] See Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, paragraph 132.
[14] See Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, paragraph 66.

economic advantage on its beneficiary.[15] To take another example, in the *ANGED* case the CJEU ruled that an exemption from a tax on large retail establishments that was granted to collective large retail establishments with a surface area equal to or greater than 2 500 m2 implied an economic advantage and constituted State aid.[16]

In the case of the suggested risk tax, and when considering the fact that certain credit activities are in the scope of the tax while others are not, it is unquestionable that credit institutions with credit activities exempted from the tax, such as foreign banks with no credit activities in Sweden, receive an economic advantage consisting in this very tax relief.

The advantage criterion is thus, in my view, fulfilled. This does not make the tax at breach of the State aid rules: it remains to be investigated whether or not the selectivity criterion is met.

6 The selectivity criterion

The selectivity criterion implies a prohibition of discriminations between comparable undertakings,[17] which in essence leads to an obligation to provide equal treatment.[18] To test the potential selectivity of a tax measure, the CJEU has developed a method in three steps. This methodology has recently been recalled by Advocate General Pitruzzella in his opinion in the *World Duty Free Group* case:[19] one must first identify the ordinary or "normal" tax system applicable in the Member State concerned.[20] Second, one needs to demonstrate that the tax measure at issue is a derogation from that ordinary system to the benefit of only certain undertakings, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation; even if there is no formal derogation included in the tax system from what is deemed as "normal taxation", a measure may still be selective if its effects favour certain undertakings over others (so-called *de facto* selectivity).[21] Third, assuming that a tax measure is *prima facie* selective (i.e. it implies a difference in treatment between comparable undertakings), it may nevertheless be

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[15] See Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, paragraph 68.
[16] See Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED*), paragraph 68.
[17] See Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED*), paragraph 38; Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, paragraph 60.
[18] See Case C-524/14 P, *European Commission v. Hansestadt Lübeck*, paragraph 53.
[19] See the opinion delivered on 21 January 2021, Joined Cases C-51/19 P and C-64/19 P, *World Duty Free Group v Commission*, paragraphs 11-21.
[20] See Case C-88/03, *Portugal v Commission*, paragraph 56; Cases C-78/08 to C-80/08, *Paint Graphos*, paragraph 49.
[21] See Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 74. See also Case C-203/16 P, *Dirk Andres v European Commission*, paragraphs 90-93.

justified if it flows from the nature or the general structure of the system of which it forms part[22] and is in line with the principle of proportionality.[23]

The potential selectivity of the suggested risk tax for certain credit institutions with respect to the territorial scope of the tax is analysed below in the light of this methodology. Accordingly, I shall first determine the relevant reference system (section 6.1). I will then emphasise that within this reference system, a difference of treatment is made between different undertakings (section 6.2). Once a difference of treatment has been confirmed, it can be proceeded with the selectivity analysis. To that end, I will identify the objective pursued by the tax system (section 6.3), before turning to the comparability and the justification analyses (section 6.4).

6.1 What is the reference system?

The reference system must be determined carefully, because an improperly chosen reference system is likely to lead to a biased State aid analysis.[24]

A definition of the reference system is suggested in the Commission notice from 2016. Although this definition has not yet been adopted by the CJEU,[25] it rightfully emphasises the notion of consistency in the definition of the reference system.[26] The European Commission defines the reference system as follows: “a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system”.[27] The European Commission observes that the reference system “is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates”. Consequently, it will often be the tax system itself that constitutes the reference system.[28] This is especially true for sectoral taxes, which are taxes with a narrow scope of application, and where it is logical to take into account the whole sectoral tax as a reference system for it to include all the elements necessary to its full functioning, especially the main rules together with the possible exceptions. Examples of sectoral taxes such as turnover taxes applied on the retail sector or environmental taxes illustrate the use of the whole sectoral tax as a reference system, as opposed to excluding from the reference system the undertakings that are not in its scope of

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[22] See e.g. Case C-88/03, *Portugal v Commission*, paragraph 52; Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 58.
[23] See Cases C-78/08 to C-80/08, *Paint Graphos*, paragraph 75.
[24] See Case C-203/16 P, *Dirk Andres v European Commission*, paragraph 107.
[25] See the opinion delivered on 21 January 2021, Joined Cases C-51/19 P and C-64/19 P, *World Duty Free Group v Commission*, paragraph 37.
[26] See the opinion delivered on 21 January 2021, Joined Cases C-51/19 P and C-64/19 P, *World Duty Free Group v Commission*, paragraph 43.
[27] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 133.
[28] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 134.

application.[29] As the General Court emphasises, a reduction from a tax "de facto forms part of the structure of taxation";[30] therefore, although it is exempt from a tax, an exempted activity falls within the sectoral scope of application of the tax. It can also be observed that the European Commission and the Union courts have adopted a broad approach to the determination of the reference system, even for taxes that have broader scopes than a sectoral tax.[31] In certain rather exceptional cases the reference system may even encompass legal provisions that are not *per se* included in the tax system under review, if there is a link between the two.[32]

Accordingly, in my view in this case the most correct reference system is the whole risk tax, including the territorial elements of the tax that result in the exclusion of liabilities connected to foreign credit activities from the scope of the tax. An alternative view could have been to consider that the two categories of credit activities distinguished by the territorial scope of the risk tax constitute two separate reference systems that operate in parallel. However, in my opinion one could not validly hold such a view: the reference system should preferably be a *consistent* set of rules, which should reasonably include all the rules necessary for the normal operation of the tax system so that its effects can be fully assessed. In addition, the CJEU has repeatedly held that the regulatory technique should not influence the outcome of a State aid analysis; instead, focus is on the effects of a tax.[33] If the reference system was only made of credit institutions with credit activities that are in the territorial scope of the tax or outside the territorial scope, thereby creating two parallel reference systems, the effect of the risk tax consisting in excluding foreign credit activities from the tax base could not be fully assessed as a consequence of the regulatory technique chosen, through excluding in the text of the law liabilities that are not connected to domestic credit activities.

The next question is whether there is, within this reference system, a difference in treatment between different undertakings.

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[29] Concurring, see Rita Szudoczky and Balázs Károlyi, 'Progressive Turnover Taxes under the Prism of the State Aid Rules: Effective Tools to Tax High Financial Capacity or Inconsistent Tax Design Granting Selective Advantages?', 19 European State Aid Law Quarterly (2020) 3, p. 256.

[30] See Joined Cases T-836/16 and T-624/17, *Republic of Poland v European Commission*, paragraph 68.

[31] See e.g. the decisions and court cases in the field of corporate income tax. It is in most cases the whole corporate income tax system that constitutes the reference system, as opposed to a specific provision within the corporate income tax. An example is provided by the *Apple* case, where the General Court found that the provisions for the attribution of profits to permanent establishments could not constitute a reference system on its own: see Cases T-778/16 and T-892/16, *Ireland and Others v European Commission*, paragraph 163. Generally, on the question of the scope of the reference system, see Jérôme Monsenego, *Selectivity in State Aid Law and the Methods for the Allocation of the Corporate Tax Base*, Kluwer Law International 2018, pp. 45 and following.

[32] See Case C-308/01, *GIL Insurance Ltd and Others v Commissioners of Customs & Excise*.

[33] See Case C-487/06 P, *British Aggregates Association v Commission of the European Communities and United Kingdom*, paragraph 89, last sentence; Joined cases C-106/09 P and C-107/09 P, *European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, paragraph 92; Case C-219/16 P, *Lowell Financial Services GmbH v European Commission*, paragraph 92; Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 67; Case C-219/16 P, *Lowell Financial Services GmbH v European Commission*, paragraph 93.

6.2 Is there within the reference system a difference in treatment between different undertakings?

The suggested tax system implies a difference in treatment between different credit institutions, partly because the territorial scope of the tax excludes liabilities connected to foreign credit activities from the tax base. The example mentioned in section 2 of this opinion illustrates a type of difference in treatment that may arise within the reference system.

The existence of a difference in treatment appears whether one is reasoning on the basis of the *de jure* or the *de facto* selectivity test:

- Under the *de jure* selectivity test, a measure implies a difference in treatment if the taxation of certain undertakings deviates from what is deemed as "normal taxation". In this case, "normal taxation" would be the taxation of credit institutions on their liabilities; the exception constituting a difference in treatment would be an exemption from the tax for liabilities connected with foreign credit activities.

- Under the *de facto* selectivity test, a measure might be selective if its effects imply a difference in treatment, without the tax system necessarily including both a principle and a derogation. In this case, if one does not consider the exclusion of liabilities connected to foreign credit activities as an exception to a main rule, the tax system could be seen as producing different, or inconsistent types of effects: credit institutions with domestic liabilities are subject to the tax, while credit institutions with foreign liabilities are exempt from it.

The proposition that the suggested tax system implies a difference in treatment between different credit institutions, no matter if one is reasoning on the basis of the *de jure* or the *de facto* selectivity test, does not make the risk tax selective. One needs to investigate whether or not the difference in treatment takes place between operators who, in the light of the objective pursued by the tax system, are in a comparable factual and legal situation. To answer this question, I will now investigate the objective pursued by the tax system (section 6.3). I will then proceed with the comparability and justification analyses (section 6.4).

6.3 Determination of the objective of the reference system

The determination of the objective of the reference system might be a difficult exercise, because the objective of a tax system is not necessarily explicitly mentioned in the legislative material relevant for the tax, such as the preparatory works or the actual tax provisions. Even if the objective of a tax is explicitly mentioned in the tax law or in the preparatory works, in my opinion it would not be correct to fully and solely rely on

what the lawmaker chose to mention or not.[34] I believe that a more correct method rather consists in understanding the essence and the practical operation of a tax system, to be able to deduce its objective. Similarly, the Commission notice on the notion of State aid insists on the determination of objectives that are "intrinsic" to the system.[35] However, this method may not always be satisfactory, for example when a tax system pursues several objectives not necessarily consistent with each other.

In the case of the proposal for a risk tax on certain credit institutions, the main objective of the tax mentioned in the memorandum is the need to strengthen the Swedish public finances to be able to assume the indirect costs caused by future financial crises.[36] However, as from 2023 the tax rate is to increase from 0,06% to 0,07% of the liabilities; the difference (a tax rate corresponding to 0,01%, or approximately 1 billion SEK per year[37]) is, according to the press release that accompanied the proposal,[38] to be attributed to the defence budget, which is a different objective than the one stated as a main purpose for the tax. In addition, the objective that initially motivated the idea of a "bank tax" (at that time it was not yet, at least not officially, a risk tax on certain credit institutions) was the strengthening of the defence budget.[39] The impression that the proposal for a risk tax on certain credit institutions is motivated by the objective to strengthen the defence budget is consistent with the revenues yielded by the suggested risk tax, which broadly match the revenues to be allocated to the defence budget in the original presentation of a bank tax.

The precise determination of the objective of the tax might be important for the comparability analysis between the two categories of undertakings: if the objective of the tax is generally to strengthen the Swedish public finances, the revenues of which would contribute to different public efforts, it is more likely that the two categories of undertakings will be in a comparable situation. This is because the objective to levy taxes and improve the public finances does not, in itself, mandate a differentiated taxation between credit institutions with liabilities connected to domestic or foreign credit activities. If, in contrast, the objective of the tax is really to face the indirect costs caused by a financial crisis, and that the two categories of credit institutions indeed may

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[34] Concurring see Michael Lang, 'State Aid and Taxation: Selectivity and Comparability Analysis', in Isabelle Richelle, Wolfgang Schön and Edoardo Traversa (eds.) *State Aid Law and Business Taxation* (Springer 2016), p. 34: "Searching for the legislator's intention (…) cannot lead to any result". See also Case C-562/19 P, *European Commission v Republic of Poland*, Opinion of Advocate General Kokott delivered on 15 October 2020, paragraph 75, where the objective pursued by the tax system is considered to be determined "by way of interpretation from the nature of the tax and its design".

[35] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraphs 128 and 135.

[36] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, e.g. at p. 24.

[37] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 38.

[38] See https://www.regeringen.se/pressmeddelanden/2020/09/forslag-om-riskskatt-for-storre-kreditinstitut-pa-remiss/ (accessed 22 January 2021): "*Den beräknade offentligfinansiella effekten från höjningen planeras användas till ökade försvarsanslag*".

[39] See the press release dated 31 August 2019: https://www.regeringen.se/pressmeddelanden/2019/08/langsiktig-finansiering-av-det-militara-forsvaret/ (accessed 24 October 2020).

trigger different indirect costs for the State, a differentiated levy of the risk tax may appear more motivated.

However, in this case I do not believe that the choice of either objective is decisive to proceed with the comparability analysis. This is because the levy of the risk tax is still a tax, which by definition is not directly affected to a special purpose, be it the defence budget or the indirect costs that occur with a financial crisis; it is rather a general contribution to the State's revenues, which may, in turn, be affected (or not) to different purposes. The general character of the risk tax is demonstrated by the fact that it might aim at covering *indirect* costs that occur with a financial crisis (i.e. the deteriorated public finances due to an economic downturn, with no precise determination of who should benefit from the intervention of the State), not the *direct* costs that the State may have to assume in case of financial crisis (i.e. when the State must improve the financial stability by targeting its interventions). The risk tax would apply in addition to existing mechanisms such as the resolution fees and capital requirements, the purpose of which is to mitigate the risk that a financial crisis happens and the exposure of the State in case such a crisis occurs. There is no mention of investments aimed at decreasing the probability of a financial crisis or at minimizing the consequences of a financial crisis that might be financed with the revenues of the risk tax. The suggested risk tax does not either aim predominantly at influencing behaviours, for example by discouraging credit institutions from taking risks that may result in a financial crisis. The risk tax would be affected to the State budget, which supports various types of public expenditures, including (but not limited to) both the defence budget and the indirect costs that occur with a financial crisis. There is no obligation for the State to actually allocate the revenues of the risk tax to certain purposes; the State may also change its priorities over time.

As a subsidiary way of reasoning, if there really were a need to specifically strengthen the financial reserves of the State in view of potential future financial crises, one could have conceived a system that is not a tax, but a fee paid to a blocked account aimed at supporting indirect costs occurring in case of financial crisis. The funds could be reimbursed after some time in case the risk has not (fully) materialized. However, the suggested risk tax does not follow this kind of logic: the risk tax is to be paid whether or not the risk materializes, and no reimbursement is envisaged.

Moreover, for State aid purposes, the Commission emphasised in the 2016 notice on the notion of State aid that one needs to determine the objectives that are "intrinsic" to the system.[40] This position makes sense, as it is reasonable that the intrinsic features of a tax system reveal its objectives. For that reason, it was mentioned above that in my view a correct method to determine the objective of the reference system consists in understanding the essence and the practical operation of a tax system, to be able to deduce its objective. <u>Therefore, it is my understanding that the intrinsic objective of the suggested risk tax, for State aid purposes, is the taxation of credit institutions on the</u>

[40] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraphs 128 and 135.

basis of their liabilities. If one were to formulate a more detailed objective, it could be described as the taxation of the largest credit institutions (because of the liabilities threshold of 150 billion SEK) on the basis of their liabilities connected to domestic credit activities (because of the exclusion of foreign credit activities), to generally finance public expenditure.

After having determined the objective of the reference system, I shall now consider the comparability and justification analyses.

6.4 Comparability and justification analyses

6.4.1 Introduction

Now that the objective pursued by the tax system has been determined, the next question consists in analysing whether undertakings with domestic and foreign credit activities, are, in the light of this objective, in a comparable factual and legal situation. If they are not in a comparable situation, the differentiation included in the tax system on the basis of the location of the credit activities cannot have a selective nature. If they are in comparable situation, the differentiation included in the tax system is *prima facie* selective. It can still be justified by the nature or the logic of the tax system.

It is argued in the memorandum that all credit institutions and credit activities do not imply the same risks of indirect costs in case of financial crisis. The difference would mainly stem from the size of the operators.[41] In addition, it seems to be implied in the memorandum that only domestic credit activities might trigger risks of indirect costs.[42] However, this argument is not made very clearly. It is not either investigated in the memorandum whether credit institutions with liabilities connected to domestic and foreign credit activities are in a factual and legal comparable situation. Yet this question is central to the assessment of the compatibility of the suggested risk tax with the State aid rules. Therefore, I now turn to analysing this question.

The comparability analysis is often a difficult exercise, and it is particularly complex in this case. This is partly due to the diversity of situations that may occur. Therefore, I do not perform a single comparability and justification analysis. I first need to identify the situations where differences in treatment might occur, and choose the most relevant for the comparability and justification analyses (section 6.4.2). I will then consider several situations, and analyse them separately (sections 6.4.3, 6.4.4, and 6.4.5).

6.4.2 Identification of situations where differences in treatment might occur

[41] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 23.

[42] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 25: "*Eftersom skatten är tänkt att kompensera för indirekta kostnader i Sverige i händelse av en finansiell kris, bör endast sådana skulder beaktas som är hänförliga till verksamhet som kreditinstitutet bedriver i Sverige eller, såvitt avser ett utländskt bankföretag eller utländskt kreditföretag, från ett fast driftställe i Sverige*".

There are at least eight different situations that might be relevant to analyse in the light of the State aid rules, when these situations are subject to different tax treatments. These eight situations are not exhaustive, and there may be different variants between these situations.

1) Swedish credit institution with all activities in Sweden.

2) Swedish credit institution with foreign branch from which some sales and credit activities are being carried out and directed towards Swedish clients (whether remotely or with some limited physical presence).

3) Swedish credit institution with foreign branch from which some credit activities are being carried out, while all sales activities remain in Sweden.

4) Foreign credit institution with all activities abroad, and no loans are granted to Swedish clients.

5) Foreign credit institution with Swedish branch from which some sales and credit activities are being carried out towards Swedish clients.

6) Foreign credit institution with Swedish branch from which some sales activities are being carried out towards Swedish clients, while all credit activities remain abroad.

7) Foreign credit institution with Swedish branch from which some credit activities are being carried out towards Swedish clients, while all sales activities remain abroad.

8) Foreign credit institution with all activities abroad and no branch in Sweden, but with some sales and credit activities directed towards Swedish clients, whether remotely or with some limited physical presence in Sweden, but with no branch located in Sweden.

I now assume – based on my understanding of the tax regime suggested in the memorandum – that the above situations would be subject to the risk tax as follows:

1) Situation 1: all liabilities are in the scope of the risk tax

2) Situation 2: some liabilities are in the scope of the risk tax (those which are connected to the domestic credit activities), while some other liabilities are not in the scope of the risk tax (those which are connected to the foreign credit activities exercised through the foreign branch).

3) Situation 3: same tax treatment as situation 2.

4) Situation 4: no liabilities are in the scope of the risk tax.

5) Situation 5: some liabilities are in the scope of the risk tax (those which are connected to domestic credit activities through the Swedish branch), while some other liabilities are not in the scope of the risk tax (those which are connected to the foreign credit activities exercised at the foreign head office).

6) Situation 6: in principle the foreign credit institution might be subject to the risk tax because of the existence of a Swedish branch, but in practice there should be no liabilities in the scope of the risk tax because the credit activities are located abroad.

7) Situation 7: same tax treatment as situation 5.

8) Situation 8: same tax treatment as situation 4. The lack of Swedish branch prevents any liability to the risk tax: the memorandum is clear as to the absence of tax liability when a foreign credit institution has no permanent establishment.[43]

In my view the most relevant comparison for State aid purposes is between domestic and foreign credit activities, when the former ones are subject to the risk tax while the latter ones are exempt from it, but when both do lend money to Swedish clients: it is at this point that a difference in treatment most obviously occurs and needs to be analysed in the light of the State aid rules. In other words, one needs to compare the tax treatment of a Swedish credit institution with Swedish activities (situation 1) that is in the scope of the risk tax (assuming the other criteria are met, such as the liabilities threshold), with the tax treatment of credit institutions with foreign liabilities that are not in the scope of the risk tax but that do lend money to Swedish clients. Comparisons between situations with cross-border elements but subject to differentiated taxation may also be relevant to analyse (e.g. a comparison between situations 6 and 7); however, a priority had to be made, and it was chosen to focus the analysis on a comparison between domestic and cross-border situations.

The domestic element of the comparison shall thus be situation 1, to avoid any doubt as to the liability to the risk tax of the chosen domestic situation (it is assumed that the other criteria are met, such as the liabilities threshold). It now needs to be determined which cross-border situations to compare to situation 1. In the examples above, situation 2 is relevant to compare to situation 1, when foreign credit and sales activities are carried out by the foreign branch and directed towards Swedish clients: here, a difference in treatment exists since the risk tax will be applicable to situation 1, but not situation 2. Situation 3 is also relevant to consider (i.e. a Swedish credit institution with a foreign branch from which some credit activities are being carried out, while all sales

[43] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, particularly at p. 25 where it is mentioned that "*Eftersom skatten är tänkt att kompensera för indirekta kostnader i Sverige i händelse av en finansiell kris, bör endast sådana skulder beaktas som är hänförliga till verksamhet som kreditinstitutet bedriver i Sverige eller, <u>såvitt avser ett utländskt bankföretag eller utländskt kreditföretag, från ett fast driftställe i Sverige</u>* (my underlining)".

activities remain in Sweden), although it makes in principle no difference with situation 2 as to the place of the liabilities, and may be less frequent in practice. Therefore, the analysis that is made for situation 2 should, in principle, be equally relevant for situation 3. However, since situation 2 may be more frequent in practice than situation 3, and for the sake of simplicity, no distinction is made below between situations 2 and 3. Only in the conclusions is it recalled that the conclusions relevant for situation 2 may be equally valid for situation 3.

Moreover, there are five situations that concern foreign credit institutions: situations 4 to 8. However, not all these situations are the most relevant to investigate in this opinion. I will now review situations 4 to 8 to consider which one(s) should be chosen for the comparability and justification analyses:

- Credit institutions in situation 4 are out of the scope of the risk tax, because they have no branch in Sweden. They have no remote sales or credit activities directed towards Swedish clients. There are good reasons not to subject such credit institutions to the risk tax, as they have no connection to Sweden. Situation 4 is, accordingly, not a relevant benchmark for comparison with situation 1.

- Credit institutions in situation 5 are in the scope of the risk tax to the extent of their liabilities that are deemed connected to domestic credit activities. No fundamental difference in treatment exists with credit institutions in situation 1 when it comes to their activities directed towards Swedish clients, as both are liable to the risk tax.[44] Given the lack of important difference in treatment with situation 1, situation 5 is not a particularly relevant benchmark for comparison with situation 1 and will thus not be investigated in this opinion.

- Credit institutions in situation 6 are not in the scope of the risk tax because no liabilities are connected to domestic credit activities. All credit activities are located abroad. However, sales activities are exercised from a Swedish branch towards Swedish clients. Situation 6 is a relevant benchmark to use as a comparison with situation 1, because while credit institutions in both situations grant loans to Swedish clients, only credit institutions in situation 1 are subject to the risk tax.

- Credit institutions in situation 7 are in the scope of the risk tax to the extent of their liabilities that are deemed connected to domestic credit activities. No significant difference in treatment exists with credit institutions in situation 1 as both are liable to the risk tax. Given the lack of important difference in treatment with situation 1, situation 7 is not a relevant benchmark for comparison with situation 1.

[44] However, other issues may arise, especially in the light of the fundamental freedoms. Such issues are, however, outside the scope of this opinion.

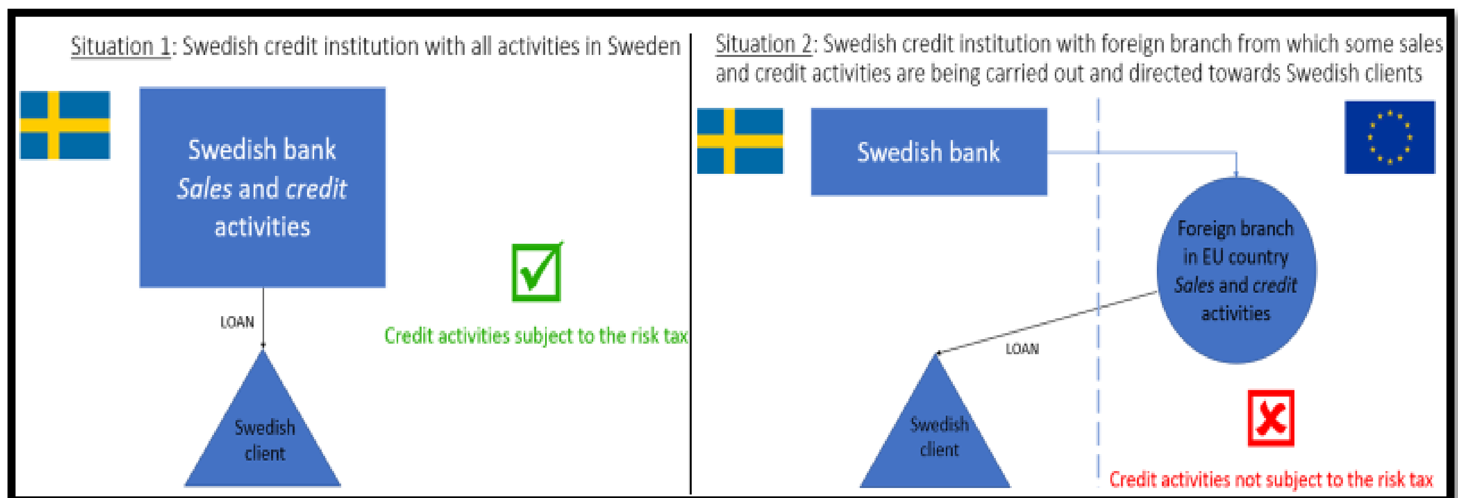
- Credit institutions in situation 8 are not in the scope of the risk tax because of the lack of a permanent establishment in Sweden. However, in situation 8 it is assumed that some sales and credit activities are directed towards Swedish clients, whether remotely or with some limited physical presence in Sweden that does not lead to the existence of a permanent establishment. Situation 8 is a relevant benchmark to use as a comparison with situation 1, because while credit institutions in both situations grant loans to Swedish clients, only credit institutions in situation 1 are subject to the risk tax.

To conclude, the most relevant situations to compare with situation 1 are situations 2, 6 and 8. It must also be emphasised that cross-border situations are not purely theoretical: in reality foreign banks or foreign branches do lend money to Swedish clients. In situations 2, 6 and 8, loans are granted to Swedish clients, but without the foreign credit activities being subject to the risk tax; this is because the credit activities that trigger the liabilities are located abroad (i.e. they would normally appear on a foreign balance sheet), not in Sweden. In these cases, a difference in treatment appears to the disadvantage of Swedish credit institutions in situation 1, and to the advantage of credit institutions in situations 2, 6 or 8. These four situations are illustrated with pictures that are found in appendices 1, 2, 3, and 4, at the end of this opinion.

After having determined which situations to use as a benchmark, I will now proceed with the comparability and justification analyses between situations 1 and 2 (section 6.4.3), situations 1 and 6 (section 6.4.4), and situations 1 and 8 (section 6.4.5). Indeed, as these comparisons are different from each other, I need to analyse them separately. Given the complexity and the diversity of these situations, I have not been able to analyse them in an exhaustive manner. Moreover, definitive answers are difficult to provide given that certain questions do not receive a precise answer in the case law of the Union courts. This confirms the relevance of notifying the suggested risk tax to the European Commission, as suggested in the memorandum drafted by the Swedish Ministry of Finance.

6.4.3 Comparability and justification analyses for situations 1 and 2

To be able to easily compare situations 1 and 2, a picture summarising these situations is presented below:



Situations 1 and 2 could be compared, to some extent, to the *World Duty Free Group* case. In this case, the Grand Chamber of the CJEU found that a measure that favoured cross-border transactions over domestic transactions was selective.[45] The CJEU also held that “a measure (…) designed to facilitate exports, may be regarded as selective if it benefits undertakings carrying out cross-border transactions, in particular investment transactions, and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, in the light of the objective pursued by the tax system concerned, carry out other transactions of the same kind within the national territory”.[46] Since the effect of the suggested risk tax is to provide an advantage to foreign credit activities, it could be compared to an aid to certain export activities: the design of the risk tax provides an incentive to Swedish credit institutions to carry out their credit and sales activities towards Swedish clients from a foreign branch.

In the case of the suggested risk tax, a difference is made between two resident credit institutions, one having domestic activities, the other having foreign activities directed towards the domestic market. In other words, situation 2 has a cross-border element and is subject to a worse treatment than a purely domestic situation.

I will consider factual comparability first. The standard set by the CJEU with respect to factual comparability is such that there must be clear differences between different undertakings in the light of the objective of a given tax, for these undertakings to be in a different factual situation. For example, electricity producers may or may not be in a comparable situation with respect to a tax on the use of inland waters for the production

[45] See Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*.
[46] See Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 119.

of electricity, when they use or do not use water as a source of electricity production;[47] in such a case, the tax makes sense only with respect to certain undertakings, which are not comparable to other undertakings.

From a factual perspective, situations 1 and 2 are comparable when it comes to the presence of the headquarters and the clients in Sweden. Since the European financial sector is largely subject to similar legal – albeit not fiscal – rules, and given that banks are both global and mobile, it is easy for banks to lend from abroad, for example to avoid a domestic bank tax. The fact that domestic and foreign banks have the same clients should, accordingly, be granted some importance in the factual comparability. Despite outsourcing sales and credit functions to the foreign branch, many functions of the bank in situation 2 might still be performed by the head office in Sweden, as is the case in situation 1. The main factual differences concern the sales function (i.e. the direct contact with the clients, potentially including the negotiation of the terms of a loan) and the credit function (i.e. the exercise of functions, by employees of the bank, linked to actually granting loans, assessing risks, deciding on securities, taking on liabilities to provide funds that will be lent to the clients, etc.). These differences are not unsignificant, but do not necessarily imply a lack of factual comparability between situations 1 and 2.

Since factual comparability needs to be assessed in the light of the objective of the tax system – which I suggest consists in the taxation of credit institutions on the basis of their liabilities – a relevant question to ask is how and why liabilities occur. In the present case, credit institutions in situations 1 and 2 that lend money to their Swedish clients might need to take up loans to provide funds to their clients. They would then incur liabilities,[48] no matter where the sales and credit functions are exercised. Therefore, the location of liabilities is not necessarily linked exclusively to the location of the credit activities. The location of liabilities could also be linked to where they arise, i.e. the origin of the liabilities. In that respect, despite the different locations of the credit activities in situations 1 and 2, the origin of the need of credit institutions to borrow money is the same: the conclusion of loan agreements with the clients, and the provision of funds to such clients. Consequently, although the sales and credit activities are located in Sweden (situation 1) or abroad (situation 2), this does not automatically place domestic and foreign liabilities in incomparable factual situations with respect to the objective of the tax system to tax liabilities, since such liabilities occur in connection with loans being provided to the same, Swedish clients.[49] The degree of factual

[47] See Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, paragraphs 66-67.

[48] Once a loan agreement is concluded, credit activities need to be managed, and a credit institution might need to borrow money on the financial markets to be able to provide funds to clients. This is when liabilities arise.

[49] In contrast, it would be irrelevant to tax credit institutions in situation 4, which in my opinion are not comparable to credit institutions in situation 1: indeed, the standard of comparability set by the CJEU in cases such as *UNESA* or *Paint Graphos* supposes, as I understand it, that a tax appears as irrelevant or inapplicable to certain undertakings, for such undertakings and others that are in the scope of the tax to be considered as not comparable.

comparability would be even higher if only credit functions were located in the foreign branch, while sales functions remain at the level of the head office (situation 3).

I now turn to legal comparability. Incomparability from a legal perspective requires true legal differences between the categories of undertakings subject to different tax rules, as emphasised in the *Paint Graphos* case.[50] From a legal perspective, credit institutions in situations 1 and 2 are both resident of Sweden, are subject there to unlimited tax liability for income tax purposes, and are subject to largely similar legal and accounting rules with respect to their Swedish activities. The main difference consists in the existence of a foreign branch, which employs staff responsible for certain sales and credit functions. The branch would normally for accounting and tax purposes prepare financial statements, and it would normally record on its balance sheet the liabilities connected to its credit activities. However, the existence of the liabilities on the balance sheet of the foreign branch would normally not exclude their presence on the balance sheet of the Swedish head office, since the branch and the head office are part of the same legal entity (a Swedish credit institution) which owns both domestic and foreign assets, and incurs both domestic and foreign liabilities. Given the objective of the tax to apply to liabilities, the existence of the liabilities at the level of the Swedish head office would make it possible to levy the risk tax on the foreign liabilities of Swedish credit institutions, not just their domestic liabilities. This possibility may place credit institutions in situations 1 and 2 in a legally comparable situation.

Finally, I will consider potential justifications in case the difference in treatment is deemed *prima facie* selective. Assuming that credit institutions in situations 1 and 2 are in a factual and legal comparable situation, the risk tax would be *prima facie* selective. It may still be justified by the nature or the logic of the tax system. To that end, the reason for discriminating must flow from the nature or the general structure of the system of which the measure forms part.[51] This test is strictly applied by the Union courts and leaves little leeway to the Member States. It must be the intrinsic characteristics of the tax system that make it necessary to treat differently the two categories of undertakings. The judgement of the Grand Chamber of the CJEU in the *A-Brauerei* case illustrates the view of the Court on the possibility to justify a difference in treatment with respect to the intrinsic characteristic of a tax system: the need to avoid double taxation in case of corporate restructurings, and thus in essence the need to preserve the principle of neutrality, justified the exemption from tax in certain cases.[52] In contrast, a tax advantage that is motivated by external reasons, such as the preservation of employment or the safeguard of certain enterprises, has repeatedly been rejected as a justification by the Union courts.[53]

It can also be observed that the Commission notice on the notion of State aid makes clear that "(a) measure which derogates from the reference system (*prima facie*

[50] See Cases C-78/08 to C-80/08, *Paint Graphos*.
[51] See e.g. Case C-203/16 P, *Dirk Andres v European Commission*, paragraph 87; Case C-88/03, *Portuguese Republic v Commission of the European Communities*, paragraph 52.
[52] See Case C-374/17, *Finanzamt B v A-Brauerei*.
[53] See e.g. Case C-6/12, *P Oy*; Case C-88/03, *Paint Graphos*, paragraph 82.

selectivity) is non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system. In contrast, it is not possible to rely on external policy objectives which are not inherent to the system".[54] The Commission provides examples of justifications that might be valid: "The basis for a possible justification could, for instance, be the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation, or the objective of optimising the recovery of fiscal debts".[55]

Considering how the justification test has been applied by the Union courts, in this case the Swedish Ministry of Finance would need to demonstrate that the distinction on the basis of the geographical location of the credit activities is mandated by the inner logic of a risk tax on credit institutions. The memorandum does not contain explicit justifications in this situation, but my interpretation is that it is assumed, in the memorandum, that indirect costs for the Swedish State may only be triggered by domestic credit activities, hence justifying the exclusion from the tax base of foreign credit activities.[56] However, the need to generate fiscal revenues to finance indirect costs in case of financial crisis is – in my opinion – more external than internal to the risk tax since the risk tax does not, *per se*, mandate the taxation of solely domestic credit activities and the exclusion of foreign liabilities from the tax base. In addition, it can be questioned whether risks of indirect costs indeed are triggered exclusively in domestic situations, and not at all in cross-border situations. There is a concrete example in Sweden that might be interesting in this respect: the bank Nordea moved its residence from Sweden to Finland in 2018. The Swedish National Debt Office (Swedish: *Riksgälden*) has expressed the view that Nordea's move of its parent entity to Finland "will not decrease the risks posed to financial stability in Sweden". The Swedish National Debt Office has also considered that "the ability of Swedish authorities to avert and manage these risks will shrink".[57] Experience from the financial crisis in 2008-2009 seems also to support the idea that risks of indirect costs may be incurred as a consequence of the activities of foreign banks: Sweden was affected by the situation of foreign banks, and certain countries with no own banks were nevertheless impacted by the crisis. In other words, the need to generate fiscal revenues on domestic credit activities only, to finance indirect costs in case of financial crisis is not, in my view, a valid justification.

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[54] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 138.

[55] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 139.

[56] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, particularly at p. 25 where it is mentioned that "*Eftersom skatten är tänkt att kompensera för indirekta kostnader i Sverige i händelse av en finansiell kris, bör endast sådana skulder beaktas som är hänförliga till verksamhet som kreditinstitutet bedriver i Sverige*".

[57] See https://www.riksgalden.se/en/press-and-publications/press-releases-and-news/news/2018/risks-stemming-from-nordea-will-not-decrease-following-change-of-domicile/ (accessed 5 January 2021).

Moreover, if the aim of generating fiscal revenues to finance indirect costs in case of financial crisis were deemed as intrinsic to the risk tax system, it would still need to be proportionate.[58] In this respect, the difference in treatment between situations 1 and 2 may not be proportionate: the two banks are Swedish banks with Swedish clients, the only difference being the existence of a foreign branch from which sales and credit activities are carried out. However, it is not obvious that risks of indirect costs are triggered only in situation 1, and not at all in situation 2. It may very well be so that the Swedish State is exposed to risks of indirect costs in situation 2, since the bank is Swedish and certain functions such as management functions are performed in Sweden. As mentioned above, it seems doubtful that no risks at all are incurred in cross-border situations.[59] However, situation 2 is excluded from the scope of the tax. Therefore, it seems (although this question would need to be analysed more in details to provide a more definitive answer) that the difference in treatment may not be proportionate to the actual risks of indirect costs for the Swedish State.

There are other potential justifications when comparing situations 1 and 2. One justification could be the need to avoid double taxation: indeed, if the bank in situation 2 were subject to the risk tax, and that the country of its foreign branch would levy a comparable risk tax on the credit activities of the foreign branch, a situation of international double taxation would arise. However, this justification does not seem convincing. On the one hand, the current case law of the CJEU in the area of fiscal State aid may deem the prevention of domestic double taxation as a valid justification,[60] but not necessarily the prevention of international double taxation. Indeed, international double taxation is not an issue that is intrinsic to a single tax system, as it occurs as a consequence of the combination of several tax systems. This means that the internal logic of a tax system cannot, in my opinion, mandate the elimination of international double taxation by a given State. On the other hand, even if the prevention of international double taxation were an acceptable justification, there may be less discriminatory measures to eliminate such double taxation: the risk tax could be levied on the worldwide liabilities of all Swedish credit institutions, with a tax credit being provided in case a similar tax is levied abroad on the liabilities of a foreign branch.

Another potential justification could be the fiscal principle of territoriality, i.e. the right of a country to tax only domestic activities, and exempt from tax foreign activities. Such a potential justification has not been clearly accepted by the CJEU in the area of fiscal State aid, but it cannot be excluded that this principle is deemed as a valid justification,

[58] For selective measures to be justified, it must be demonstrated that the measures "are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures": see Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 140, referring to the *Paint Graphos* case.
[59] See https://www.riksgalden.se/en/press-and-publications/press-releases-and-news/news/2018/risks-stemming-from-nordea-will-not-decrease-following-change-of-domicile/ (accessed 5 January 2021).
[60] See particularly Case C-374/17, *Finanzamt B v A-Brauerei*.

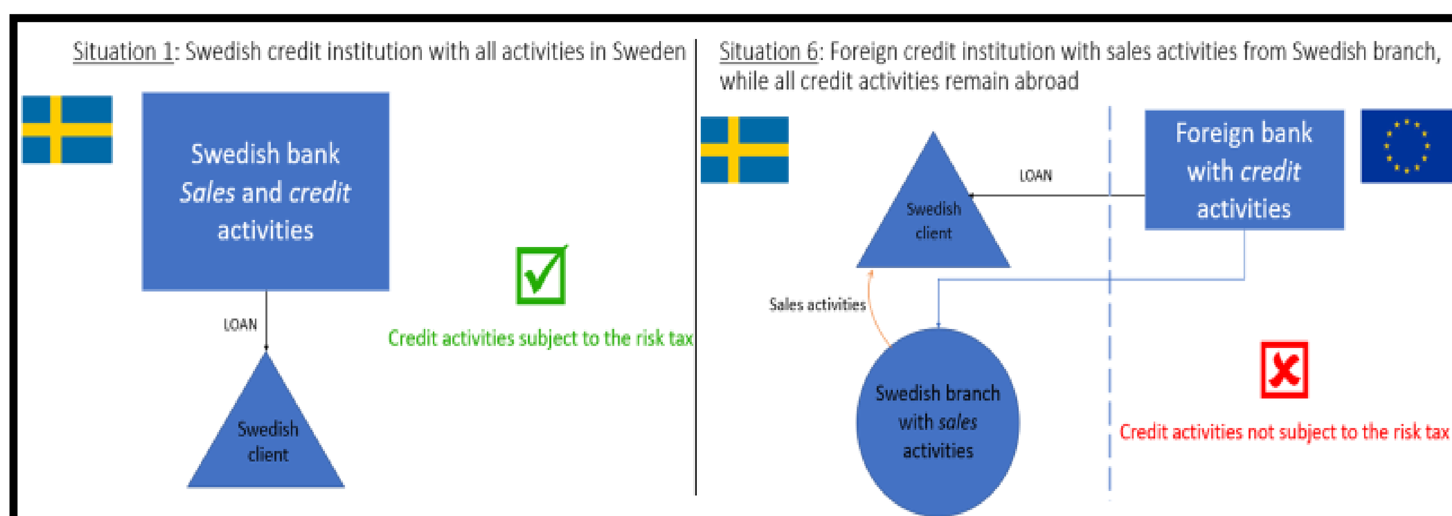
as it is a traditional principle of taxation particularly accepted in the area of the fundamental freedoms applied to direct taxation.[61]

To conclude, there are potential compatibility issues with the State aid rules when it comes to situations 1 and 2. This conclusion should be equally valid if one compares situations 1 and 3, since the degree of factual comparability would be even higher in situation 3. A difference in treatment with situation 1 would thus be less motivated.

After comparing situations 1 and 2, attention is now put on a comparison between situations 1 and 6.

6.4.4 Comparability and justification analyses for situations 1 and 6

To be able to easily compare situations 1 and 6, two pictures summarising these situations are presented below:



To start with, it can be observed that in the field of the fundamental freedoms, resident and non-resident banks have been found to be in a comparable situation with respect to the determination of the tax base.[62] This does not, however, imply that the same result should be reached in the field of fiscal State aid.

[61] See Case C-382/16, *Hornbach-Baumarkt AG v Finanzamt Landau*, paragraph 40, where the principle of territoriality is recognized as a principle "whereby Member States are entitled to tax income generated on their territory". See also Case C-250/95, *Futura Participations SA and Singer v Administration des contributions*, paragraph 22.

[62] See Case C-311/97, *Royal Bank of Scotland plc*, paragraph 29: "It is true that companies having their seat in Greece are taxed there on the basis of their world-wide income (unlimited tax liability) whereas foreign companies carrying on business in that State through a permanent establishment are subject to tax there only on the basis of profits which the permanent establishment earns there (limited tax liability). However, that circumstance, which arises from the limited fiscal sovereignty of the State in which the income arises in relation to that of the State in which the company has its seat is not such as to prevent the two categories of companies from being considered, all other things being equal, as being in a comparable situation as regards the method of determining the taxable base".

From a factual perspective two facts are similar between situations 1 and 6: the sales function and the client are located in Sweden. So both the origin of the need to incur liabilities (the clients to whom a loan is granted), and the actual performance of sales functions are in Sweden. As mentioned above in section 6.4.3, the fact that domestic and foreign banks have the same clients should be granted some importance in the factual comparability analysis, since banks can easily lend from abroad thanks to the European financial sector being largely subject to similar rules, and given that banks are both global and mobile. In contrast, as in situation 2, situation 6 is characterized by the credit function being performed abroad. However, as mentioned above the fact that the credit function is performed abroad does not need to automatically exclude the comparability between the two situations. In this case the existence of liabilities is at least partly linked to the granting of loans, which relies on the performance of the sales function and the conclusion of contracts with the client, both of which are present in Sweden. Consequently, there are arguments pointing both to the comparability and the lack of comparability of situations 1 and 6 from a factual perspective.

From a legal perspective, situations 1 and 6 are marked by an important difference, since the two banks are resident of different countries: Sweden (situation 1) and another country of the European Union (situation 6). Banks in situation 6 have no fiscal residence in Sweden, and no unlimited tax liability for corporate income tax purposes. The liabilities incurred by banks in situation 6 are normally recorded on the balance sheet of the foreign bank, and would probably not be mentioned on the balance sheet of the Swedish branch, since it is assumed in this situation that loans are being granted and managed from the foreign head office. This points to the lack of comparability from a legal perspective, if one is to follow a legal or accounting perspective. The *Paint Graphos* case may also point to the lack of legal comparability between situations 1 and 6, since the consequence of the foreign residence and the foreign registration of liabilities result in the lack of liabilities on a Swedish balance sheet.

On the other hand, one might argue on the basis of the *Gibraltar* case that the exclusion of liabilities from the tax base in situation 6 is a consequence of the choice made in the design of the risk tax to rely on where liabilities are formally incurred based on a legal or accounting perspective, while disregarding the origin of the liabilities. The *Gibraltar* case might support the view according to which one should not pay too much attention to legal incomparability when it is the consequence of the regulatory technique used in the design of the tax.[63] In addition, in situation 6 there is no impossibility to levy a risk tax on the foreign bank. The foreign bank has a branch in Sweden; although a branch

[63] See Joined cases C-106/09 P and C-107/09 P, *European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, paragraph 92, where the CJEU refused a conception of the selectivity criterion according to which "in order for a tax system to be classifiable as 'selective' it must be designed in accordance with a certain regulatory technique". Indeed, the Court found that "the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact".

has a limited liability to corporate income tax, it could be used as a means to levy the risk tax on the foreign bank. Consequently, there are arguments pointing both to legal comparability, and legal incomparability of situations 1 and 6.

If situations 1 and 6 were comparable from a legal and factual perspective, the risk tax would be *prima facie* selective. It may still be justified by the nature or the logic of the tax system. I will first consider the argument according to which only domestic credit activities would trigger a risk of indirect costs. I have already mentioned the objection consisting in the more extrinsic nature of this argument, which is also valid when comparing situations 1 and 6. This argument would also be contradicted by the fact that foreign credit institutions may actually trigger higher risks of indirect costs for Sweden than Swedish banks, because of the high requirements applying in Sweden to ensure financial stability. I have also referred to the view expressed by the Swedish National Debt Office according to which the foreign residence of a bank may not remove all risks for the Swedish financial stability.[64] In other words, I do not find this justification valid.

The need to prevent double taxation would not either be a valid justification, since international double taxation does not occur as a consequence of the tax system of a single State: therefore, the internal logic of a tax system cannot mandate the elimination of international double taxation by a given State since the elimination of international double taxation reflects more an international policy ambition than the intrinsic need of a domestic tax system.

In contrast, the fiscal principle of territoriality might be a more convincing justification. According to this principle, a Member State has normally a right to limit its tax jurisdiction on foreign companies to domestic income. Indeed, non-residents are traditionally taxed on a territorial basis, for example in the areas of income tax, wealth tax, gift tax and death tax. By limiting its taxing rights to its territory, a host State does not tax in an extra-territorial manner, gives priority to the State of residence, and preserves its taxing rights on domestic income. This right has been recognized in the areas of direct taxation and the fundamental freedoms in the *Futura*[65] and *Centro Equestre*[66] cases, but was somewhat contradicted in the *Sofina*[67] case. Transposed to the risk tax, the fiscal principle of territoriality would enable the State where a branch is located to only tax the liabilities allocated to the branch, and disregard the foreign liabilities. However, the fiscal principle of territoriality might not be directly transposable to the area of fiscal State aid and the context of a risk tax on the liabilities of credit institutions. The case law of the CJEU does not explicitly support such a

[64] See https://www.riksgalden.se/en/press-and-publications/press-releases-and-news/news/2018/risks-stemming-from-nordea-will-not-decrease-following-change-of-domicile/ (accessed 5 January 2021).
[65] See Case C-250/95, *Futura Participations SA and Singer v Administration des contributions*, paragraph 22.
[66] See Case C-345/04, *Centro Equestre da Lezíria Grande Lda v Bundesamt für Finanzen*, paragraph 22.
[67] See Case C-575/17, *Sofina SA and Others v Ministre de l'Action et des Comptes publics*.

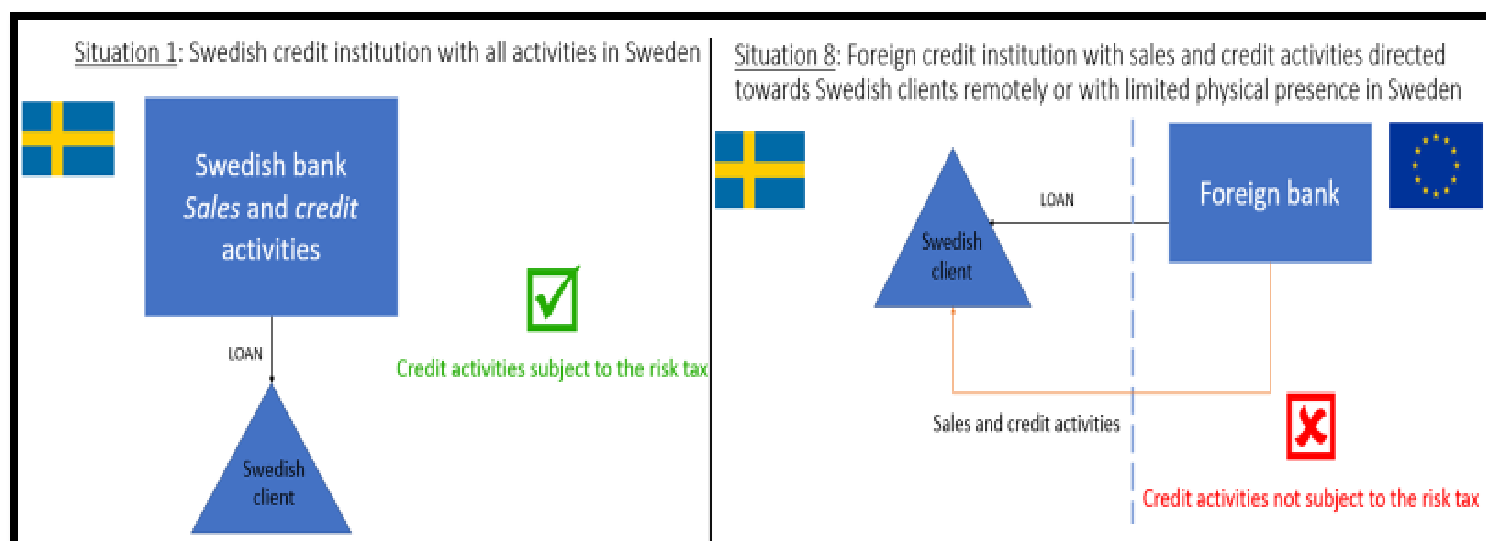
transposition, but it does not either preclude it. Therefore, the validity of this justification cannot be fully ascertained.

Finally, two justifications mentioned in the State aid notice might be relevant in this case: the need to take into account "specific accounting requirements", and "administrative manageability".[68] Since it is assumed in situation 6 that the liabilities are recorded on the balance sheet of the foreign bank and do not appear on the balance sheet of the Swedish branch, there would be no objective way to determine the tax base of the branch if part of the liabilities were to be attributed it. A fiction might be possible, but it might be legally uncertain, and might increase the risk of international double taxation if this method is not recognized by the State of residence of the foreign credit institution. Consequently, these justifications might be valid.

To conclude, there is no clear answer as to the possibility to justify the difference in treatment between situations 1 and 6. After comparing situations 1 and 6, I will finally compare situations 1 and 8.

6.4.5 Comparability and justification analyses for situations 1 and 8

To be able to easily compare situations 1 and 8, two pictures summarising these situations are presented below:



In situation 8 it is assumed that a foreign credit institution has no branch in Sweden, yet lends money to Swedish clients. This situation is not purely theoretical; it is a reality, probably helped by the progress of digitalization. Situation 8 has a factual difference with situation 6, namely the fact that the sales functions are performed remotely, or with limited physical presence in Sweden. This tends to decrease the factual comparability with situation 1. Legally, the foreign bank in situation 8 has no branch in

[68] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph139.

Sweden, which decreases legal comparability. Ultimately, whether or not the situations are comparable in the light of the objective to tax liabilities will ultimately depend on the perspective taken as to the existence of liabilities:[69] under a legal and accounting perspective, the objective to tax liabilities cannot be met, because of the lack of a branch. If one does not rely on a legal or accounting perspective, but rather considers the origin of the liabilities, a higher degree of comparability may exist, since part of the liabilities of the foreign bank may not exist without lending money to a Swedish client, and performing certain sales functions directed towards this client. The *Gibraltar* case may support this view, on the basis that the lack of domestic liabilities in situation 8 is the consequence of the choice made to rely on the existence of a permanent establishment for corporate income tax purposes to potentially be in the scope of the tax, and on legal as well as accounting considerations to potentially attribute liabilities to such a permanent establishment. However, the *Gibraltar* case is sometimes seen as an exception, and the CJEU has not often found situations to be comparable in the area of fiscal State aid on the basis of such a way of reasoning. Therefore, it is unlikely that situations 1 and 8 are deemed factually and legally comparable in the light of the objective to tax the liabilities of credit institutions. This would mean that the difference in treatment between situations 1 and 8 is not selective. If situations 1 and 8 nevertheless were comparable, the two justifications mentioned above concerning "specific accounting requirements" and "administrative manageability"[70] would, in my opinion, be even more valid to justify the advantage given in situation 8, since no branch exists in Sweden and thus no liabilities can in an objective manner be deemed to exist in Sweden.

7 Conclusion

To conclude, the territorial scope of the suggested risk tax presents complex challenges from a State aid perspective. Because of the complexity and the diversity of situations where the risk tax may or may not apply, I have not been able to analyse all issues in the most thorough manner. Therefore, this legal opinion does not contain definitive conclusions as to the compatibility with the State aid rules and the internal market of the territorial scope of the suggested risk tax. However, certain tensions with the State aid rules have been identified, thereby justifying further analysis, and the notification of the envisaged risk tax to the European Commission in accordance with Article 108(3) of the TFEU.

From a general perspective, it is assumed in the memorandum that only domestic credit activities may trigger risks of indirect costs for the Swedish State in case of financial

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[69] For example, under an accounting-based perspective the liabilities might appear on the balance sheet of the legal entity that actually takes up a loan. Under an income tax-based perspective, countries that follow the recommendations of the OECD (the so-called authorised OECD approach) would tend to allocate the liabilities to the entity where the significant people functions relevant for the management of loans are actually located. The proposal for a risk tax on certain credit institutions does not contain very precise guidance with respect to this issue.

[70] See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph139.

crisis, hence the exclusion of liabilities connected to foreign credit activities. However, this assumption may not be fully correct. As a result, there may be an inconsistency between the aim and the design of the tax.

Further, the exemption from tax in situation 2 appears as particularly problematic from a State aid perspective. In this case, the degree of comparability with situation 1 is relatively high, the potential justifications of a difference in treatment not particularly strong, and there is a possibility that the advantage given in situation 2 goes beyond what is necessary to achieve the legitimate objective pursued by the risk tax. The *World Duty Free Group* case tends also to support the view that the risk tax may be compared to an aid to certain export activities (exempted from the tax), as opposed to domestic activities (in the scope of the tax). The degree of factual comparability would be even higher in situation 3 (Swedish credit institution with foreign branch from which some credit activities are being carried out, while all sales activities remain in Sweden); a difference in treatment with situation 1 would thus be less motivated.

The difference in treatment between situations 1 and 6 appears more acceptable from a State aid perspective, and even more so for situations 1 and 8. However, since several of the issues emphasised in this opinion do not receive precise answers in the case law of the Union courts, it cannot be concluded with all certainty to the potential compatibility, or incompatibility of the territorial scope of the suggested risk tax with the State aid rules and the internal market. It therefore appears justified to notify the measure to the European Commission, as suggested in the memorandum drafted by the Swedish Ministry of Finance.

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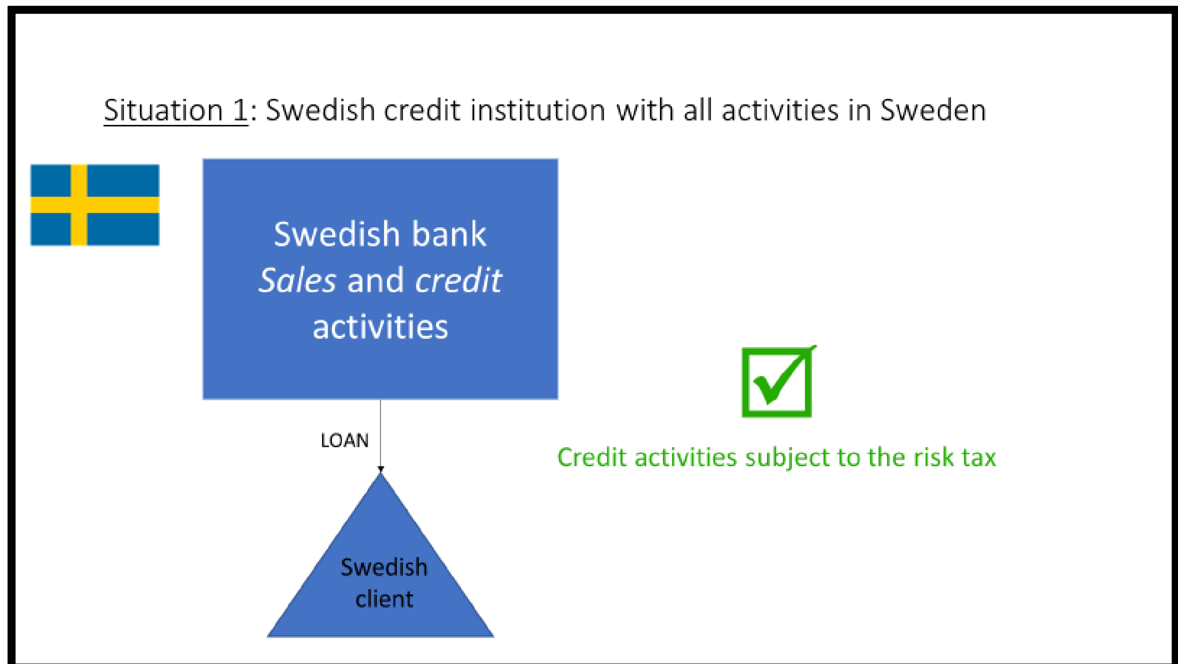
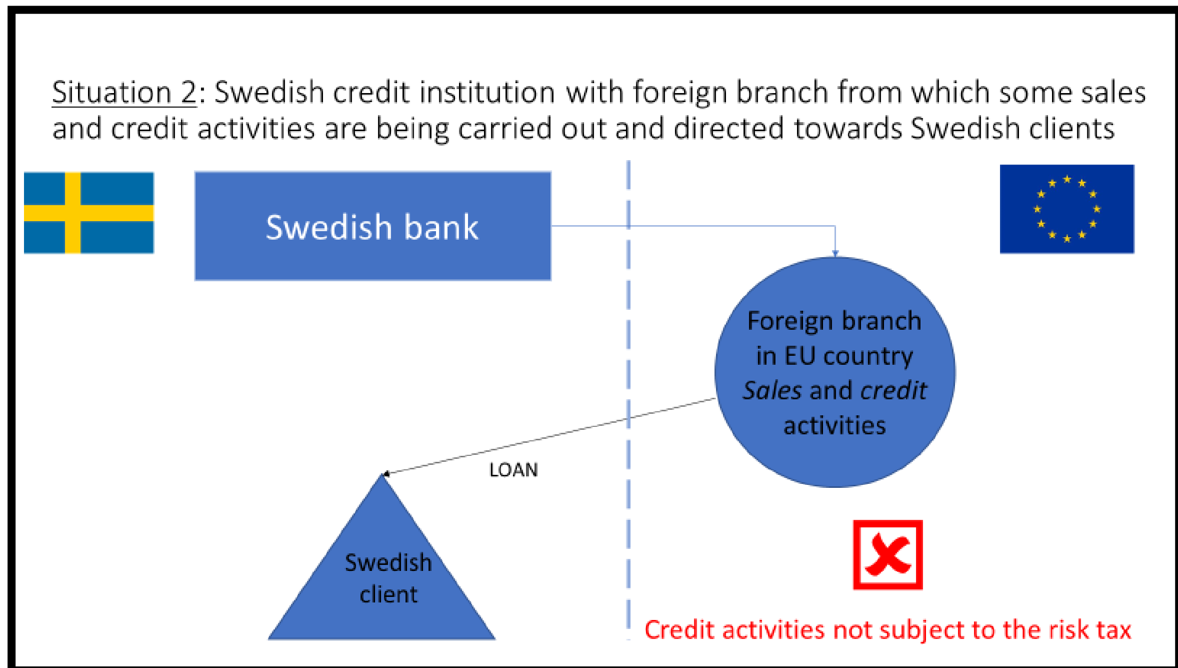
Prof. Dr. Jérôme Monsenego
Stockholm, 1 February 2021

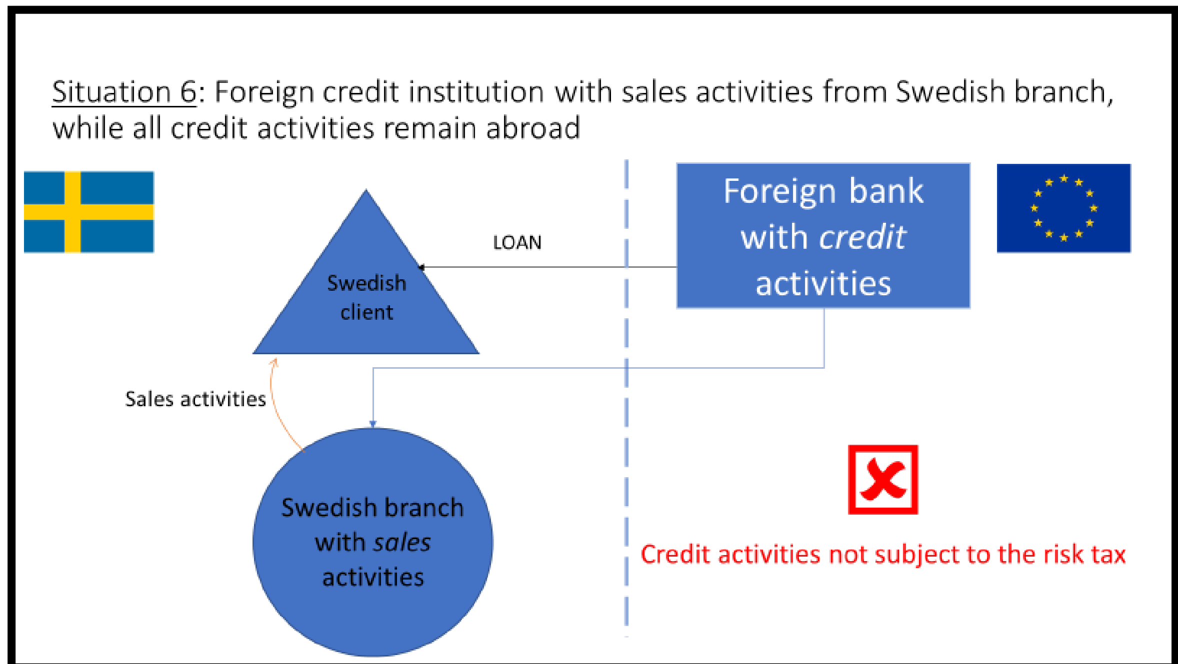
Appendix 1



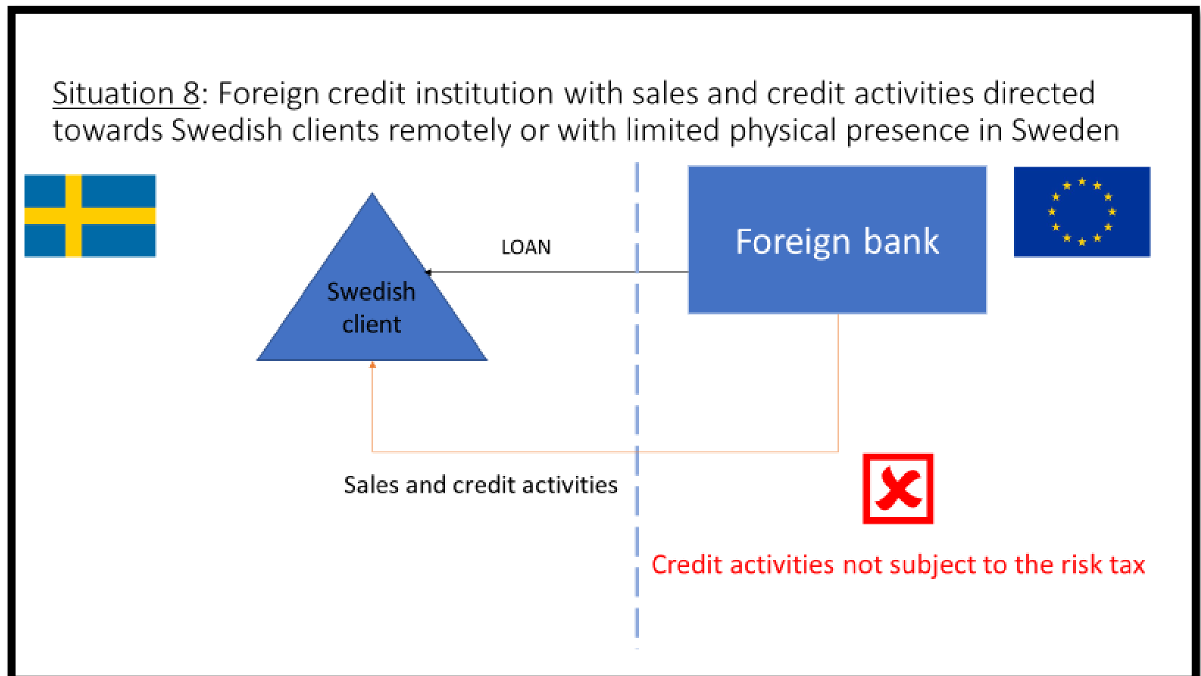
Appendix 2



Appendix 3



Appendix 4



Legal opinion

Risk tax for certain credit institutions – high level review of other potential issues of compatibility with EU law

Opinion written by Prof. Dr. Jérôme Monsenego, Professor of International Tax Law at Stockholm University, Sweden

Stockholm, 8 February 2021

1 Purpose of the legal opinion and limitations

This legal opinion is written at the initiative of the Swedish Bankers' Association. The purpose of this opinion is a high-level review from the perspective of the EU fundamental freedoms and the State aid rules, of certain aspects of the proposal for a risk tax on certain credit institutions as it is presented in a memorandum drafted by the Swedish Ministry of Finance.[1] This opinion does not contain an analysis of the liabilities threshold and the territorial scope of the tax in the light of the State aid rules, since these two aspects of the proposal have been subject to separate legal analyses. Instead, this opinion focuses on certain other potential issues of compatibility with EU law. However, because of the breadth of the questions that are touched upon here, this opinion does not aim at being exhaustive, whether in the choice of the issues that are being explored or in the depth of the analysis of each issue. No final conclusions are reached, so the ideas suggested herein are only tentative. Further analysis would be necessary to come to more precise conclusions.

This opinion is written on the basis of the information contained in the memorandum drafted by the Swedish Ministry of Finance.

This opinion is written according to the following outline. After this introductory section, section 2 of the opinion provides a short summary of the proposal for a risk tax on certain credit institutions. In section 3, it is discussed whether the risk tax may be selective, and thus in breach of the State aid rules, because of the sectoral nature of that tax. Section 4 is dedicated to analysing whether selectivity may be at hand in view of the fact that the risk tax targets only undertakings that qualify as "credit institutions". Next, it is discussed in section 5 whether the levy of tax on liabilities may breach the EU fundamental freedoms on the basis of the ability to pay tax of resident and non-residents credit institutions. Finally, the exemption from the risk tax for domestic intra-

[1] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1: https://www.regeringen.se/4a6a7b/contentassets/3098b7791ca64bb2b41cfb810f4a2726/riskskatt-for-vissa-kreditinstitut.pdf

group liabilities is analysed in the light of the EU fundamental freedoms in section 6 of this opinion.

2 Short summary of the proposal for a risk tax on certain credit institutions

The suggested risk tax is designed so that credit institutions (Swedish: *kreditinstitut*) that have liabilities at the beginning of a fiscal year that are connected to credit activities in Sweden, pay a risk tax consisting of a percentage of the liabilities after certain adjustments are made to their liabilities. The tax is to be levied, however, only if the liabilities exceed a given threshold. The tax rate suggested for 2022 is 0,06% of the liabilities, and the threshold suggested for 2022 is 150 billion SEK. The tax rate is set to 0,07% as from 2023, and the liabilities threshold is intended to increase each year.

3 Selectivity because of the sectoral nature of the tax?

The suggested risk tax has a sectoral nature, since it only applies to credit institutions having credit activities. The risk tax applies, accordingly, to part – albeit not all – of the financial sector. This tax might be described as a "special-purpose levy" or "stand-alone levy", since it does not form part of a wider system of taxation.[2]

Given the fact that the suggested risk tax would not apply to undertakings active in other sectors than the financial sector, it may be wondered whether or not the suggested risk tax could be at breach of the State aid rules because of its sectoral nature, which might make the tax selective. It is not the sole fact that only certain undertakings are in the scope of the tax that may create a conflict with the State aid rules: it is settled case law that the fact that only taxpayers satisfying certain conditions can be subject to a State measure does not, in itself, make it selective.[3] Rather, it is the fact that all undertakings outside the scope of the tax are active in other sectors than the financial sector. Indeed, by only applying to the financial sector, all other sectors are exempted from the risk tax, and thus indirectly receive an advantage through not being subject to a tax on their liabilities. Conversely, only the financial sector would be subject to the tax (albeit not all undertakings within the financial sector), and thus only the financial sector would be negatively impacted by the tax.

The practice of the European Commission and the case law of the Union courts do not generally lead to the conclusion that sectoral taxes are necessarily in breach of the State aid rules. The CJEU has especially held that "in the absence of European Union rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to

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[2] See the terms employed by the European Commission, *in* Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, paragraph 134.

[3] See Case C-417/10, *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v 3M Italia SpA*, paragraph 42.

spread the tax burden across the different factors of production and economic sectors".[4] This formulation has been used in several cases,[5] and the acceptance of certain sectoral taxes such as environmental taxes or taxes on the financial sector[6] confirms the possibility for the Member States to implement sectoral taxes, as long as they prove non-selective.[7]

The view according to which sectoral taxes are not *per se* incompatible with the State aid rules does not imply that sectoral taxes are always compatible with these rules. Sectoral taxes are often introduced with a special purpose of common interest, and would need – in order not to be selective – to correctly target the undertakings that should be subject to such taxes, and be in line with the principle of proportionality so that the differentiated taxation implied by a sectoral tax does not go beyond what is necessary to achieve the objective aimed at by such a tax. For example, environmental taxes might be introduced if they indeed pursue an environmental objective, and target only undertakings the activities of which imply an environmental damage.

When it comes to the proposal for a risk tax on certain credit institutions one may wonder if the main motive identified in the memorandum for the introduction of the risk tax indeed justifies the introduction of a sectoral tax as it is suggested. It is mentioned in the memorandum that the Swedish State is exposed to risks of indirect costs in case of financial crisis. However, the need for additional resources is not explained and quantified precisely in relation to the design and the level of the suggested risk tax. In this respect, the following observations – by no means exhaustive or conclusive – can be made:

- Firstly, it is my understanding that the reason for introducing the risk tax is mainly fiscal (i.e. to improve the public finances), not to the technical difficulty or impossibility to tax the financial sector. This contrasts with certain sectoral taxes that apply *instead of* the normal tax regime. For example, tonnage taxes might apply instead of the income tax.[8] Another example is the Belgian

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[4] See Joined cases C-106/09 P and C-107/09 P, *European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, paragraph 97.
[5] See e.g. Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED)*, paragraph 50.
[6] For example, the European Commission has found that "the peculiar nature of banking could, in principle, justify the introduction of specific tax rules for the sector": see Commission Decision of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy (2002/581/EC), paragraph 32.
[7] Certain taxes that improve or worsen the competitive situation of one sector have been deemed illegal State aid. See e.g. Case 173/73, *Italy v Commission*; Case C-75/97, *Kingdom of Belgium v Commission of the European Communities*. In this respect see Pierpaolo Rossi, 'The Paint Graphos Case: A Comparability Approach to Fiscal Aid', in Dennis Weber (ed.), *EU Income Tax Law: Issues for the Years Ahead* (IBFD 2013), p. 130: "it is not State aid to apply general taxes to different sectors (e.g. banking compared to manufacturing), but it is State aid to apply sectoral (and therefore non-general) taxes to different sectors (banking compared to manufacturing)".
[8] See e.g. State aid – SA.45300 (2016/N) – Denmark Amendment to the Danish Tonnage Tax Scheme, C(2018) 6795 final.

alternative income tax regime for the wholesale diamond sector.[9] In this latter case, the reason for introducing an alternative income tax regime for the wholesale diamond sector is the difficulty to apply the normal income tax rules to the very specific diamond sector, thereby motivating the need for an alternative tax regime. However, the total tax burden of the diamond sector would not significantly change as a result of this alternative tax regime. This is not the type of sectoral tax that is suggested in the memorandum. The risk tax comes *on the top* of the already existing taxes and contributions, and is not related to the technical difficulty or impossibility to tax the financial sector.

- Secondly, there are already certain mechanisms in place that apply particularly to the financial sector, such as the resolution fee or the capital requirements, and it is not analysed in details in the memorandum whether or not these mechanisms may contribute to limiting the indirect costs in case of financial crisis. It is simply mentioned that the resolution fee aims at limiting the direct costs for the State in case of financial crisis; it is also mentioned that the resolution fee and the capital requirements are likely to decrease the willingness of banks to take risks, something that might decrease the risks of indirect costs.[10] Here, it can also be emphasised that the requirements in place in Sweden are generally higher than in most other EU Member States, something that may imply that the risks for indirect costs could be lower in Sweden than in some other Member States. Therefore, given the mechanisms and regulations already in place in Sweden, one may wonder to what extent the State would be exposed to risks of indirect costs in case of financial crisis. The more exposed the State actually is, the more justified it seems to adopt a sectoral tax targeting the financial sector.

- Thirdly, one could wonder to what extent the potential indirect costs for the State might be covered by the taxes and contributions already paid by the financial sector. If the financial sector is profitable during the years without financial crisis, it will probably generate different types of taxes and contributions. During a financial crisis, much less taxes might be paid by the financial sector, and indirect costs might be supported by the State. In this respect, one may wonder to what extent such indirect costs relate to the taxes and contributions already paid before the financial crisis, over a certain period of time. If indeed over a period of time including both prosperous years and financial crises, the financial sector generates too little taxes and contributions to cover the indirect costs it has triggered, then it appears more motivated to adopt a sectoral tax targeting the financial sector. In the opposite case, i.e. if taxes and contributions over time by and large exceed the actual indirect costs incurred by the State, a sectoral tax that comes as an additional tax burden on the financial sector might appear less justified. In addition, the financial sector is already subject to some tax requirements that are more burdensome than other

[9] See e.g. State Aid SA.42007 (2015/N) – Belgium Alternative income tax regime for the wholesale diamond sector, C(2016) 4809 final.
[10] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, p. 23.

sectors, something that may improve the public finances and contribute to covering indirect costs in case of financial crisis. Two examples can be mentioned: firstly, the limitations to the deduction of interest expenses on subordinated liabilities that are not included in a financial institution's own funds.[11] Secondly, the financial sector is in many cases exempt from VAT, which implies that input VAT is not deductible, thus generating more VAT revenues. Also, the exemption from VAT might increase the sale of financial services to individuals as opposed to other types of services that are subject to VAT, thereby potentially increasing the profits and the income tax paid by the financial sector on their profits.

- Fourthly, if indeed there is a need for a sectoral tax on the financial sector because the mechanisms already in place do not prevent or cover indirect costs, and that such costs are not covered by the taxes and contributions already supported by the financial sector over a longer period of time, the introduction of a sectoral tax on the financial sector might be motivated. However, the differentiated taxation implied by a risk tax would need to be in line with the principle of proportionality. The risk tax may not necessarily be in line with the principle of proportionality if the risk tax levied goes well beyond the actual indirect costs supported by the State. In this respect, a quantification of both the risks of indirect costs and of the different taxes and contributions paid by the financial sector might be relevant to support the need for a risk tax. The enforcement of the principle of proportionality seems also particularly important in this case, since the risk tax is levied on liabilities, not on profits: this means that the risk tax is not directly connected to the ability-to-pay of the credit institutions in the scope of the tax, and that the risk tax would contribute to the public revenues even during non-profitable periods.

To conclude, although it is not argued that the above ideas point to the lack of motivation of a sectoral tax on the financial sector such as the suggested risk tax, these arguments raise the question of (i) the need for such a tax and, if need be, (ii) the necessity to quantify it so as to levy a risk tax that is proportionate to the indirect costs that may be incurred by the State.

[11] See the rule included at chapter 24, section 9 of the Swedish Income Tax Act: "*Ett företag som omfattas av Europaparlamentets och rådets förordning (EU) nr 575/2013 av den 26 juni 2013 om tillsynskrav för kreditinstitut och värdepappersföretag och om ändring av förordning (EU) nr 648/2012, får inte dra av ränteutgifter på efterställda skulder som får ingå i kapitalbasen vid tillämpning av den förordningen*". This is a consequence of the 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.

4 Selectivity because the risk tax targets only undertakings that qualify as ”credit institutions”?

4.1 Introduction

The risk tax applies only to credit institutions (Swedish: *kreditinstitut*). The concept of "credit institution" is not defined in the proposal for a risk tax. However, paragraph 2 of the suggested risk tax act concerns terms and expressions used therein. It is mentioned at that paragraph that terms and expressions used in the act have the same meaning and scope as in the Swedish Income Tax Act (Swedish: *Inkomstskattelagen*), unless mentioned otherwise. Chapter 2, paragraph 4a of the Swedish Income Tax Act defines a credit institution as a Swedish bank, a Swedish credit market company, a foreign bank company, or a foreign credit company.[12] The proposal for a risk tax does not mention that other companies than credit institutions that carry out credit activities, or comparable activities, would also be in the scope of the tax.

Given the fact that the suggested risk tax applies only to companies of a certain category, companies belonging to other categories are excluded from the scope of the tax. Yet, it seems that certain undertakings that would not qualify as credit institutions may nevertheless pursue certain credit activities, and thus potentially compete with companies that formally qualify as credit institutions. I have not investigated the extent to which such enterprises actually compete with credit institutions, but my understanding is that there is some level of competition between banks and enterprises that do not formally qualify as credit institutions. An example would be the so-called "mortgage funds" (Swedish: *bolånefonder*). In this respect, Sweden's financial supervisory authority (Swedish: *Finansinspektionen*) mentions the following: "In Sweden, the traditional bank-based financing model for issuing and financing mortgages is currently being supplemented by models where mortgages are being financed in new ways, e.g. alternative investment funds (AIF)".[13] If it is correct that such a competition exists – which I have not verified but which is argued in at least one report written on behalf of the Swedish Competition Authority[14] – then a potential State aid issue may be at hand, since undertakings that compete with each other would be subject to different tax rules.

In the section below I will conduct a high-level selectivity analysis – by no means exhaustive or conclusive – of the choice made in the suggested risk tax to levy the tax only on undertakings that formally qualify as credit institutions.

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[12] See chapter 2, paragraph 4a of the Swedish Income Tax Act (Inkomstskattelag (1999:1229)): "*Med kreditinstitut avses svensk bank och svenskt kreditmarknadsföretag samt utländskt bankföretag och utländskt kreditföretag enligt lagen (2004:297) om bank- och finansieringsrörelse*".

[13] See https://www.fi.se/en/published/important-pms-and-decisions/2019/fis-view-on-preconditions-for-mortgage-based-business-activities/ (accessed 7 January 2021).

[14] See https://www.konkurrensverket.se/globalassets/publikationer/uppdragsforskning/forsk-rapport_2018-2.pdf (accessed 4 February 2021).

4.2 High-level selectivity analysis

Hereunder I shall assume that the risk tax implies an advantage for undertakings that do not formally qualify as credit institutions, since they would not need to pay this tax. I also assume that there is an intervention by the State or through State resources, that the intervention is liable to affect trade between the Member States, and that it distorts or threatens to distort competition. This leaves the notion of selectivity to explore.

The selectivity criterion implies a prohibition on discriminations between comparable undertakings,[15] which in essence leads to an obligation to provide equal treatment.[16] To test the potential selectivity of a tax measure, the CJEU has developed a method in several steps, as recently described by Advocate General Pitruzzella:[17] one must first identify the ordinary or "normal" tax system applicable in the Member State concerned.[18] Second, one needs to demonstrate that the tax measure at issue is a derogation from that ordinary system to the benefit of only certain undertakings, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation; even if there is no formal derogation included in the tax system from what is deemed as "normal taxation", a measure may still be selective if its effects favour certain undertakings over others (so-called *de facto* selectivity).[19] Third, assuming that a tax measure is *a priori* selective (i.e. it implies a difference in treatment between comparable undertakings) it may nevertheless be justified if it flows from the nature or the general structure of the system of which it forms part,[20] and is in line with the principle of proportionality.[21]

The potential selectivity of the criterion consisting in including in the scope of the tax only undertakings that qualify as "credit institutions", is analysed below in the light of this methodology.

4.2.1 The reference system and the existence of a difference in treatment

I have analysed this question in other legal opinions. My suggestion is that the most correct reference system is the whole risk tax, including the elements of the risk tax that result in the exclusion of certain undertakings from its scope.

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[15] See Case C-233/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED)*, paragraph 38; Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and Others v Administración General del Estado*, paragraph 60.

[16] See Case C-524/14 P, *European Commission v. Hansestadt Lübeck*, paragraph 53.

[17] See the opinion delivered on 21 January 2021, Joined Cases C-51/19 P and C-64/19 P, *World Duty Free Group v Commission*, paragraphs 11-21.

[18] See Case C-88/03, *Portugal v Commission*, paragraph 56; Cases C-78/08 to C-80/08, *Paint Graphos*, paragraph 49.

[19] See Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 74.

[20] See e.g. Case C-88/03, *Portugal v Commission*, paragraph 52; Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 58.

[21] See Cases C-78/08 to C-80/08, *Paint Graphos*, paragraph 75.

If one considers the whole risk tax, there is apparently no exception from normal taxation, since only one category of undertakings is in the scope of the tax. However, such a way of reasoning would probably be considered too formal, and the effects of the risk tax could not be fully assessed as a consequence of the regulatory technique chosen by the lawmaker. The CJEU has made clear that the regulatory technique should not influence the outcome of a State aid analysis; instead, focus is on the effects of a tax.[22] Therefore, both the *de jure* and the *de facto* selectivity tests should, in my opinion, lead to the conclusion that a difference in treatment is created by the suggested risk tax:

- Under the *de jure* selectivity test, the normal tax treatment would be a tax on the liabilities of all types of companies with credit activities, i.e. not only undertakings that formally qualify as credit institutions. Within this normal tax treatment, an exception would benefit the undertakings that do not formally qualify as credit institutions.

- Under the *de facto* selectivity test, the design of the tax would appear to favour undertakings that do not formally qualify as credit institutions. In other words, the design of the tax would be inconsistent, as it would produce differentiated effects between undertakings that perform credit activities.

4.2.2 Comparability analysis

The next step of the analysis would be to investigate whether or not the difference in treatment takes place between operators who, in the light of the objective pursued by the tax system, are in a comparable factual and legal situation. This starts by determining the objective pursued by the tax system. I have suggested in another opinion that the intrinsic objective of the risk tax, for State aid purposes, is the taxation of credit institutions on the basis of their liabilities. I have also mentioned in the same opinion that if one were to formulate a more detailed objective, it could be described as the taxation of the largest credit institutions (because of the liabilities threshold of 150 billion SEK) on the basis of their liabilities connected to domestic credit activities (because of the exclusion of foreign credit activities), to generally finance public expenditure.

If the objective of the risk tax indeed is to tax liabilities, there would be arguments both for and against the comparability of the two categories of undertakings. From a factual perspective, it seems that certain undertakings that do not qualify as credit institutions may nevertheless carry out credit activities and compete with credit institutions. By so doing, they are likely to incur liabilities in order to finance their credit activities. The

[22] See Case C-487/06 P, *British Aggregates Association v Commission of the European Communities and United Kingdom*, paragraph 89, last sentence; Joined cases C-106/09 P and C-107/09 P, *European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, paragraph 92; Case C-219/16 P, *Lowell Financial Services GmbH v European Commission*, paragraph 92; Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others*, paragraph 67; Case C-219/16 P, *Lowell Financial Services GmbH v European Commission*, paragraph 93.

follow-up question would be whether or not such liabilities may threaten the financial stability and expose the State to risks of indirect costs in case of financial crisis. I have not investigated this question in details, and two main hypotheses can be distinguished: if the liabilities incurred by undertakings that do not qualify as credit institutions do not expose the State to risks of indirect costs, while it is established that the liabilities of credit institutions do trigger such risks, then the factual comparability between the two types of undertakings may decrease. Conversely, if the State is exposed to at least some level of risks of indirect costs, then some degree of factual comparability between the two types of undertakings would seem to exist.

From a legal perspective, both credit institutions and other undertakings that pursue certain credit activities would, when they incur liabilities, record such liabilities on their balance sheets. However, the two categories of undertakings are not subject to the same requirements with respect to the financial stability, since credit institutions are generally subject to more stringent rules. However, this does not necessarily place these two categories of undertakings in different legal situations from a State aid perspective. Differences in terms of rules relating to the financial stability could be described as the consequence of the choices made by the lawmaker (whether at the domestic or European level). It seems also possible that the lack of requirements on undertakings that do not formally qualify as credit institutions may actually increase threats for the financial stability and risks of indirect costs for the State.[23] Therefore, there does not seem to be fundamental legal differences between credit institutions and other undertakings that pursue certain credit activities that would preclude the comparability between these categories of undertakings.

4.2.3 Justification and proportionality

If companies that do and do not formally qualify as credit institutions are in a comparable situation, the next step consists in investigating a potential justification by the nature or the logic of the reference system. Here, one would need to demonstrate that the distinction on the basis of the qualification as a credit institution is mandated by the inner logic of a risk tax on credit institutions. The most relevant issue to investigate would be whether or not this distinction might be justified by the different risks of indirect costs that these categories of undertakings may trigger. The fiscal need to reinforce the public finances in order to support indirect costs in case of financial crisis would, in my view, normally not be an acceptable justification, since it is a need that is extrinsic to the tax system, as opposed to being inherent to it. If this justification nevertheless were considered as intrinsic to the tax system, it might be acceptable only if credit activities carried out by credit institutions may trigger a risk of indirect cost for the State, while no such risks of indirect costs exist when credit activities are carried out by other types of undertakings. There are no such arguments in the memorandum.

[23] See, for instance, the analysis made by the Swedish Central Bank (Swedish: *Riksbanken*) with respect to newcomers on the mortgage market: https://www.riksbank.se/globalassets/media/rapporter/fsr/fordjupningar/svenska/2018/nya-aktorer-pa-bolanemarknaden-fordjupning-i-finansiell-stabilitetsrapport-2018_1.pdf (accessed 9 January 2021).

If this justification were acceptable, it would finally need to pass the principle of proportionality. In this respect, the distinction included in the scope of the risk tax might be deemed to go beyond the objectives it pursues if companies that do not qualify as credit institutions trigger *some* level of indirect costs for the State, while being *fully* exempt from the tax. On the other hand, if the risk triggered by such undertakings is minimal or even non-existent, the risk tax might be deemed in line with the principle of proportionality.

To sum up, the limited scope of the risk tax to undertakings that formally qualify as ”credit institutions” may potentially be in breach of the State aid rules; further analysis would be necessary to come to more precise conclusions.

5 May the levy of tax on liabilities breach the EU fundamental freedoms? Reflections based on the ability to pay tax

5.1 Introduction and method of analysis

The suggested risk tax implies a levy of tax on the basis of the liabilities of credit institutions, for their credit activities carried out in Sweden. The question may be asked whether such a mechanism may breach the EU fundamental freedoms.

The levy of tax on the basis of liabilities is, at first sight, a neutral mechanism: any undertaking may incur liabilities, and be potentially taxed on such liabilities. The territorial scope of the tax seems also neutral with respect to the fundamental freedoms: both Swedish and foreign credit institutions may be liable to the risk tax, which implies that the country where the head office is located does not affect the liability to tax. In addition, the liability to the risk tax is only on domestic credit activities, no matter where the credit institution has its fiscal residence, which is also a neutral parameter.

However, a question that does not receive an obvious answer is whether Swedish and foreign credit institutions have the same ability to pay the risk tax. The hypothesis that is tested below relates to the possible worse treatment of foreign companies, compared to domestic companies. Were that to be the case, the suggested risk tax may be infringing on the EU fundamental freedoms.

The question is whether the fundamental freedoms inserted in the TFEU, in particular Articles 49 and 54 TFEU, may preclude the legislation of a Member State in relation to the levy of the suggested risk tax, if the consequence of the levy of the risk tax on the basis of liabilities is that foreign credit institutions with a permanent establishment in Sweden are placed in a worse situation than Swedish credit institutions.

It is settled case-law that the freedom of establishment aims to guarantee the benefit of national treatment in the host Member State to companies resident of other Member States by prohibiting any discrimination based on the place where companies are resident. In this respect, the CJEU has found that “(f)reedom of establishment (…) seeks to guarantee the benefit of national treatment in the host Member State, by prohibiting

any discrimination, even minimal, based on the place in which companies have their seat”.[24] The fundamental freedoms would normally prevent restrictions that apply to companies resident of a Member State but being owned by a parent company resident of another Member State, as well as to domestic permanent establishments being part of a foreign company.[25] Therefore, when foreign credit institutions are established in another Member State and pursue credit activities via a Swedish permanent establishment, they would normally be in the scope of the fundamental freedoms and benefit from their protection.

The usual method of analysis applied by the CJEU in the area of the fundamental freedoms and direct tax measures, is based on the following steps. First, it has to be ascertained whether or not there is a different treatment for tax purposes, normally between nationals and non-nationals, implying a worse treatment for those who have exercised their freedom of movement; applied to companies, differences in treatment take often place between resident and non-resident companies. In case there is a difference in treatment, the tax measure is considered a discrimination or a restriction on the freedoms of movement. The next step consists in investigating whether the tax measure differentiates between domestic and foreign companies that are in a comparable situation (comparability analysis). A restriction in comparable situations is nevertheless permissible if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest (justification analysis). It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it (principle of proportionality).[26] I will now go through these steps one by one.

5.2 Is there a potential restriction on the fundamental freedoms?

The first question is whether or not the suggested risk tax implies a difference of treatment to the disadvantage of foreign credit institutions. In the area of the fundamental freedoms, the rules regarding equal treatment forbid not only *overt* discrimination based on the location of the seat of companies, but also all *covert* forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[27] Moreover, the CJEU has found that a tax based on an apparently objective criterion of differentiation but that disadvantages in most cases, given its features, companies whose seat is in other Member States and that are in a comparable situation to companies whose seat is situated in the Member State where

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[24] See Case C-170/05, *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie*, paragraph 22.

[25] See e.g. Case 270/83 *Commission v France*, paragraph 14; Case C-311/97, *Royal Bank of Scotland plc*, paragraph 22.

[26] See Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, paragraph 35.

[27] See Cases C-236/16 and C-237/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón*, paragraph 17.

that tax is charged, constitutes *indirect* discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU.[28]

In the case of the suggested risk tax, the text of the law as it is suggested in the memorandum makes no distinction between credit institutions on the basis of where they have their registered office, seat, or place of management. What matters is the place where the credit activities are carried out. This means that all the credit institutions that are carrying out credit activities in Sweden are subject to that tax. Therefore, the suggested law would not seem to imply any *direct* discrimination in the light of the fundamental freedoms. However, the question may be asked whether the design of the risk tax may, as such, imply an advantage to Swedish credit institutions and a disadvantage to foreign credit institutions resident of another Member State. If that were the case, the suggested risk tax may constitute, taking into consideration its characteristics, an *indirect* discrimination.

What may constitute a difference in treatment between resident and non-resident credit institutions is the following. The tax base for the risk tax consists in the level of domestic liabilities. This parameter seems at first sight neutral. However, liabilities have no direct connection with the turnover, the income, or the wealth of a credit institution. Yet, a company's turnover, income, or wealth are the most usual parameters that determine a company's ability to pay tax. This means that the suggested risk tax has a design that does not directly rely on a credit institution's ability to pay tax. It may be so that a credit institution is liable to the risk tax, but has no cash to pay the tax; it may need to borrow money (and thus increase its debts and its liability to the risk tax), sell assets, have capital injected by its shareholders, or find another solution to pay the risk tax.

Here I assume that the most correct and neutral measure of a taxpayer's ability to pay tax is its net income. The potential problem in the design of the risk tax is that a credit institution would be subject to the risk tax no matter how much net income it earns. Since the tax base has no connection with the net income of a credit institution, non-resident credit institutions may support a cost that is proportionally higher than residents as a share of their net income. This is because, while both resident and non-resident credit institutions are subject to the risk tax on their domestic liabilities, resident credit institutions may earn worldwide income from sources outside of Sweden, while non-resident credit institutions would normally – at least according to the traditional principles of taxation applied in most countries, including Sweden[29] – only earn domestic income. Accordingly, while resident credit institutions have an ability to pay the risk tax that is made of all their worldwide income (and capital), non-resident credit institutions would normally only have at their disposal their domestic

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[28] See Cases C-236/16 and C-237/16, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón*, paragraph 18.

[29] A non-resident company does normally not earn foreign profits, but only domestic profits on its domestic activities: it is the consequence of the fact that a permanent establishment, albeit being liable to tax, is not a legal person on its own, and is normally not attributed profits from foreign activities, be it from an accounting or a tax perspective.

income (and capital). However, the tax base remains the same: a fixed percentage of the domestic liabilities. Therefore, it seems possible that non-resident credit institutions pay a risk tax that is proportionally higher than residents as a share of their net income. This is what may constitute a difference in treatment between resident and non-resident credit institutions, to the disadvantage of foreign credit institutions. In other words, a non-resident bank having a branch in Sweden may be subject to the risk tax similarly to a resident bank, but the financial capacity of the branch may be more limited than that of a resident bank. Under such a way of reasoning, the suggested risk tax may create a difference in treatment between domestic and foreign credit institutions, to the disadvantage of the latter.

To illustrate the difference between Swedish and foreign credit institutions from the perspective of their ability to pay tax, four examples are used below:

1) In the first example, a Swedish bank earns both domestic income (10) and foreign income (50). Its total ability to pay tax equals the sum of domestic and foreign income, i.e. 60. Assuming that the risk tax amounts to 0,07% of liabilities amounting to 1000 (i.e. 0,7), it constitutes a higher share of the total profits than the domestic profits, i.e. 7% vs 1,2%.

Bank 1: Swedish bank	
Domestic turnover	100
Domestic costs	90
Domestic profit	10
Foreign turnover (foreign branch)	500
Foreign costs (foreign branch)	450
Foreign profit (foreign branch)	50
Total profits	60
Liabilities	1000
Risk tax (0,07%)	0,7
Percentage risk tax vs domestic profit	7,0%
Percentage risk tax vs total profits	1,2%

2) In the second example, a foreign bank has a Swedish branch. It earns only domestic income (10), since the income attributable to permanent establishments normally does not include foreign income attributable to the head office. Its total ability to pay tax equals its domestic income, i.e. 10. Assuming that the risk tax amounts to 0,7 it constitutes a share of the total profits corresponding to 7%. A difference can be observed with the Swedish bank in the first example, where the risk tax amounted to only 1,2% of the total profits.

Bank 2: foreign bank with Swedish branch	
Domestic turnover	100
Domestic costs	90

Domestic profit	10
Foreign turnover (foreign branch)	0
Foreign costs (foreign branch)	0
Foreign profit (foreign branch)	0
Total profits	10
Liabilities	1000
Risk tax (0,07%)	0,7
Percentage risk tax vs domestic profit	7,0%
Percentage risk tax vs total profits	7,0%

3) In the third example, a Swedish bank incurs domestic losses (-40) and earns foreign income (50). Its total ability to pay tax equals the sum of domestic and foreign income, i.e. 10. Assuming that the risk tax amounts to 0,7 it constitutes a negative share of the domestic profits, i.e. the bank has no ability to pay the risk tax with its domestic profits. If one takes into account the total profits of the bank, it does have an ability to pay the risk tax since the total profits are in excess of the risk tax. In addition, one should observe that the bank will need to pay corporate income tax abroad on its foreign profits, which will decrease its domestic ability to pay the risk tax.

Bank 3: Swedish bank	
Domestic turnover	50
Domestic costs	90
Domestic profit	-40
Foreign turnover (foreign branch)	500
Foreign costs (foreign branch)	450
Foreign profit (foreign branch)	50
Total profits	10
Liabilities	1000
Risk tax (0,07%)	0,7
Percentage risk tax vs domestic profit	-1,8%
Percentage risk tax vs total profits	7,0%

4) In the fourth example, a foreign bank has a Swedish branch. It incurs domestic losses (-40) and earns per definition no foreign income. The permanent establishment of the foreign bank has no ability to pay the risk tax on the basis of its income. The risk tax nevertheless needs to be paid. A difference can be observed with the Swedish bank in the third example, where the bank could use its foreign profits to pay the risk tax.

Bank 4: foreign bank with Swedish branch	
Domestic turnover	50
Domestic costs	90

Domestic profit	-40
Foreign turnover (foreign branch)	0
Foreign costs (foreign branch)	0
Foreign profit (foreign branch)	0
Total profits	-40
Liabilities	1000
Risk tax (0,07%)	0,7
Percentage risk tax vs domestic profit	-1,8%
Percentage risk tax vs total profits	-1,8%

If this high-level analysis is correct, the suggested risk tax may imply a restriction on the fundamental freedoms of foreign credit institutions because of the disadvantage of foreign credit institutions with respect to their ability to pay the risk tax.

At this point, a parallel with the *Vodafone*[30] and *Tesco*[31] cases, both ruled by the Grand Chamber of the CJEU, is relevant. *Vodafone* concerned a progressive tax on the turnover of telecommunications operators, and *Tesco* concerned a progressive turnover tax in the store retail trade sector. The question was whether the fact that the taxes were steeply progressive implied that subsidiaries belonging to foreign groups mainly supported the actual burden of that tax, thus infringing on the freedom of establishment. According to the Court, the tax did not imply a discrimination, and thus did not breach the fundamental freedoms. However, two passages of the case are relevant for the suggested risk tax:

- First, the Court found that a turnover tax did not imply a discrimination to the disadvantage of foreign groups not only based on the neutrality of that tax, but also based on the fact that it would be connected to a person's ability to pay tax: "progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay".[32] While the criterion of liabilities in the suggested risk tax is also neutral, it was argued above that this criterion may create a disadvantage for permanent establishments, when being compared to resident credit institutions. There was no issue related to the ability to pay tax in the Vodafone and Tesco cases because of the nature of the tax and given the fact that it applied to resident companies (albeit owned by foreign shareholders), whereas both the nature of the risk tax and the fact that it applies to non-resident companies creates an issue with respect to the ability to pay tax. Therefore, the suggested risk tax may be

[30] See Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*.
[31] See Case C-323/18, *Tesco-Global Áruházak Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*.
[32] See Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, paragraph 50; see Case C-323/18, *Tesco-Global Áruházak Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, paragraph 70.

at tension with the *Vodafone* and *Tesco* cases, since the lack of connection in the design of the risk tax to a taxpayer's ability to pay may introduce a discrimination to the disadvantage of permanent establishments belonging to foreign credit institutions.

- Second, the Court found that the fact that foreign groups were more affected by the tax than domestic groups did not characterise a discrimination, as it would simply be the result of the fact that foreign groups in this sector achieve a higher level of turnover. Therefore, the Court found that the higher burden of the tax on foreign groups was "fortuitous, if not a matter of chance".[33] The same cannot be said, in my view, of the suggested risk tax: the proportionally higher burden represented by the risk tax for the permanent establishments of foreign credit institutions, compared to domestic credit institutions, is not fortuitous or a matter of chance, but is the direct consequence of the difference between a resident and a non-resident company. Therefore, the suggested risk tax may be at tension with the *Vodafone* and *Tesco* cases, since the difference between residents and non-residents has a permanent, or systematic nature, as opposed to being fortuitous.

It results from the foregoing that the suggested risk tax, although it is not a progressive turnover tax, may be at tension with the *Vodafone* and *Tesco* cases. A possible interpretation of these cases is that they would tend to confirm the idea, presented above, that the suggested risk tax, because of the lack of connection to a credit institution's ability to pay tax, may introduce a discrimination between domestic and foreign credit institutions, to the disadvantage of the latter. This would characterise a restriction on the fundamental freedoms of foreign credit institutions.

5.3 Comparability analysis

For a difference in treatment to be potentially in breach of the fundamental freedoms, it must differentiate between domestic and foreign companies that are in a comparable situation. Indeed, in order to determine whether a difference in tax treatment is discriminatory, it is necessary to consider whether, having regard to the national measure at issue, the companies concerned are in an objectively comparable situation. Whether the cross-border and national situations are comparable must be examined having regard to the purpose and content of the national provisions in question.[34] According to established case-law, discrimination is defined as treating differently situations which are identical, or treating in the same way situations which are different.[35] It may actually be the fact that a Member State decides to subject to tax non-

[33] See Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, paragraph 52; see Case C-323/18, *Tesco-Global Áruházak Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, paragraph 72.
[34] See Joined Cases C-398/16 and C-399/16, *X BV and X NV v Staatssecretaris van Financiën*, paragraph 33.
[35] See e.g. Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue*, paragraph 46.

resident companies that *makes* them in a comparable situation to domestic companies. For example, although in another context, the Grand Chamber of the CJEU has found that "once a Member State, unilaterally or by a convention, imposes a charge to income tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders *becomes* comparable to that of resident shareholders (my emphasis)".[36]

Here, the comparison is between domestic and foreign credit institutions that operate via a permanent establishment in Sweden. In other words, the comparison is between residents and non-residents. Traditionally, while residents have an unlimited tax liability and are subject to worldwide taxation in their State of residence, non-residents have a limited tax liability in the State of source and are subject there to taxation on their domestic income. In certain cases, this distinction may place residents and non-residents in different, non-comparable situations. The CJEU has in several cases emphasised the fact that the ability-to-pay tax is normally concentrated in the State of residence of a taxpayer, thereby finding a difference with the situation of non-residents. However, this concerns mostly individuals and the possibility to have family and personal circumstances being taken into account in the State of source. For example, in the case *Schumacker*, the CJEU found that "(i)ncome received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence. Moreover, a non-resident' s personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is more easy to assess at the place where his personal and financial interests are centred. In general, that is the place where he has his usual abode. Accordingly, international tax law, and in particular the Model Double Taxation Treaty of the Organization for Economic Cooperation and Development (OECD), recognizes that in principle the overall taxation of taxpayers, taking account of their personal and family circumstances, is a matter for the State of residence".[37] In the case *Asscher*, the CJEU considered that "(i)n relation to direct taxes, the situations of residents and of non-residents in a given State are not generally comparable, since there are objective differences between them both from the point of view of the source of the income and from that of their ability to pay tax or the possibility of taking account of their personal and family circumstances".[38]

However, the difference emphasised by the CJEU in relation to individuals relates mainly to the taking into account of personal and family circumstances for individuals, as recalled by the Court in the *Ettwein* case.[39] There is no such issue for non-resident companies. For that reason, the CJEU has often found that resident and non-resident companies could be in a comparable situation. The *Saint-Gobain* case provides an example of situation where a non-resident was entitled to the same treatment as a

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[36] See Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue*, paragraph 68.
[37] See Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, paragraph 32.
[38] See Case C-107/94, *P. H. Asscher v Staatssecretaris van Financiën*, paragraph 41.
[39] See Case C-425/11, *Katja Ettwein v Finanzamt Konstanz*, paragraphs 46 and 47.

resident, as a result of the application of EU law.[40] In the field of the fundamental freedoms it can particularly be mentioned that resident and non-resident banks have been found to be in a comparable situation with respect to the determination of the tax base. For example, in the *Royal Bank of Scotland* case, the CJEU found that "(i)t is true that companies having their seat in Greece are taxed there on the basis of their world-wide income (unlimited tax liability) whereas foreign companies carrying on business in that State through a permanent establishment are subject to tax there only on the basis of profits which the permanent establishment earns there (limited tax liability). However, that circumstance, which arises from the limited fiscal sovereignty of the State in which the income arises in relation to that of the State in which the company has its seat is not such as to prevent the two categories of companies from being considered, all other things being equal, as being in a comparable situation as regards the method of determining the taxable base".[41] In other words, resident and non-resident banks were found to be in a comparable situation. In my view the same reasoning should be transposable to the case of the suggested risk tax, as there are no fundamental differences between the *Royal Bank of Scotland* case and the risk tax with respect to the need to tax residents and non-residents in a similar manner. The purpose of the suggested risk tax does not either mandate a differentiated taxation between resident and non-resident credit institutions; quite the contrary: the suggested risk tax seems to aim at taxing credit institutions similarly, whether they are resident of Sweden or of another country.

Therefore, on the basis of a preliminary analysis, domestic and foreign credit institutions that operate via a permanent establishment seem to be in a comparable situation.

5.4 Justification analysis

A restriction in comparable situations is permissible if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. The justification analysis is a complex exercise that necessitates a deep understanding of both the tax measure at issue, and the way different justifications have been interpreted in the case law of the CJEU.

What is peculiar in this case, is that the suggested risk tax does not imply a direct difference in treatment between resident and non-resident credit institutions: the State does not directly treat these two categories differently. Therefore, there is no need to justify the discrimination on fiscal grounds such as the balanced allocation of powers of taxation between the Member States. Since there is no direct discrimination of permanent establishments, the position taken in the *Royal Bank of Scotland* is not either

[40] See Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland and Finanzamt Aachen-Innenstadt*, particularly at paragraph 47: "companies not resident in Germany having a permanent establishment there and companies resident in Germany are in objectively comparable situations"; see also paragraph 48.
[41] See Case C-311/97, *Royal Bank of Scotland plc*, paragraph 29.

particularly helpful, since in this case the discrimination was direct.[42] Indeed, the worse treatment for non-resident credit institutions does not stem from a heavier tax burden in *absolute* terms, but in *relative* terms: the worse treatment for non-residents is because of the choice of legal form to exercise credit activities through a permanent establishment, rather than through a resident company.

Consequently, the difference in treatment would need to be justified by the intrinsic legal differences between residents and non-residents. In this respect, the CJEU does not generally accept discriminations on the basis of the differences between residents and non-residents. Indeed, it would be contrary to the very purpose of the freedoms of movement if the difference between residents and non-residents could generally justify a different tax burden. For example, in the *Sofina* case the Court rejected the arguments of several Member States, based on the *Truck Center* case, according to which a restriction on the freedom of movement may be "justified on account of a difference in the objective situation of resident and non-resident companies".[43] The argument was rejected, and the difference in treatment could not be justified by an objective difference in situation between residents and non-residents.

Another argument that might constitute a justification in the case of the risk tax could be the principle of territoriality. Indeed, the different ability to pay tax of resident and non-resident credit institutions could be seen as a natural consequence of this principle. The principle of territoriality was recognized by the CJEU in cases such as *Marks & Spencer*: "by taxing resident companies on their worldwide profits and non-resident companies solely on the profits from their activities in that State, the parent company's Member State is acting in accordance with the principle of territoriality enshrined in international tax law and recognised by Community law".[44] This principle was developed in later cases, and the Court has emphasised the right to tax activities carried out in a State's territory on the basis of the principle of territoriality;[45] this would, *a contrario*, imply that a Member State does not need to take into account foreign elements when taxing a non-resident.[46] In other words, under this way of reasoning, the principle of territoriality could allow a Member State to tax non-residents on a pure territorial basis, which would justify the difference between residents and non-residents with respect to their different ability to pay the risk tax. However, I do not find this argument fully transposable to the risk tax. This is because the principle of territoriality has been recognized in the context of income tax, where there is a connection between the extent of a country's tax jurisdiction, and the tax burden of residents or non-

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[42] See Case C-311/97, *Royal Bank of Scotland plc*, paragraph 29.
[43] See Case C-575/17, *Sofina SA, Rebelco SA, Sidro SA v Ministre de l'Action et des Comptes publics*, paragraph 54.
[44] See Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, paragraph 39.
[45] See, for example, Case C-382/16, *Hornbach-Baumarkt AG v Finanzamt Landau*, paragraph 40; Case C-292/16, *A Oy*, paragraph 31.
[46] Generally on this theme see Jérôme Monsenego, *Taxation of Foreign Business Income within the European Internal Market – An Analysis of the Conflict between the Objective of Achievement of the European Internal Market and the Principles of Territoriality and Worldwide Taxation* (IBFD 2012), pp. 223-254.

residents: residents earn worldwide income and are taxed on a worldwide basis, whereas non-residents earn domestic income and are taxed on a pure territorial basis. In contrast, in the case of the risk tax, as already emphasised above there is no such consistency: residents earn worldwide income but are subject to the risk tax on a territorial basis, whereas non-residents earn domestic income and are also subject to the risk tax on a territorial basis. Therefore, the principle of territoriality does not, in my view, constitute a convincing justification – or at least not an equally convincing justification than in the context of income tax – for the difference of treatment in the design of the risk tax between residents and non-residents.

On the basis of this non-exhaustive preliminary assessment, I find no strong arguments to justify the difference of treatment identified in the design of the risk tax with respect to the ability to pay tax of resident and non-resident credit institutions.

5.5 Proportionality test

Even if a difference in treatment is justified, it is also necessary that its application is appropriate to ensuring the attainment of the objective pursued, and does not go beyond what is necessary to attain it. The principle of proportionality is clearly established as a fundamental principle of EU law, as illustrated by cases such as *Marks & Spencer*[47] or *SIAT*.[48]

It is not easy to apply the principle of proportionality to the suggested risk tax, because the difference it implies between residents and non-residents – as mentioned above – is not absolute, but relative. It is difficult to avoid the difference between residents and non-residents in terms of their ability to pay tax (at least if the ability to pay tax is measured on the basis of the net income), because it is a normal consequence of a tax system that the ability to pay tax of residents is made of their worldwide net income, whereas the ability to pay tax of non-residents is made of their domestic income. However, the suggested risk tax seems disproportionate when the risk tax exceeds the net income, for instance in situations where a risk tax needs to be paid while a credit institution incurs domestic losses.

5.6 Preliminary conclusion

To conclude, there are arguments pointing to a possible conflict between the suggested risk tax and the fundamental freedoms, given the lower ability to pay tax of foreign credit institutions, especially in situations where losses are being incurred in Sweden. Nevertheless, a deeper analysis would be necessary to reach more robust conclusions.

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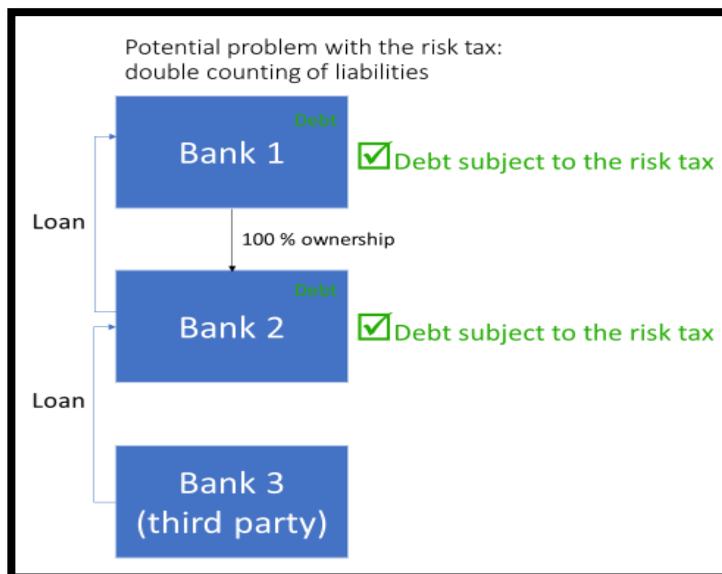
[47] See Case C-446/03, *Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)*, paragraphs 53 and following.
[48] See Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge*, paragraphs 49 and following.

6 Exemption from the risk tax for domestic intra-group liabilities

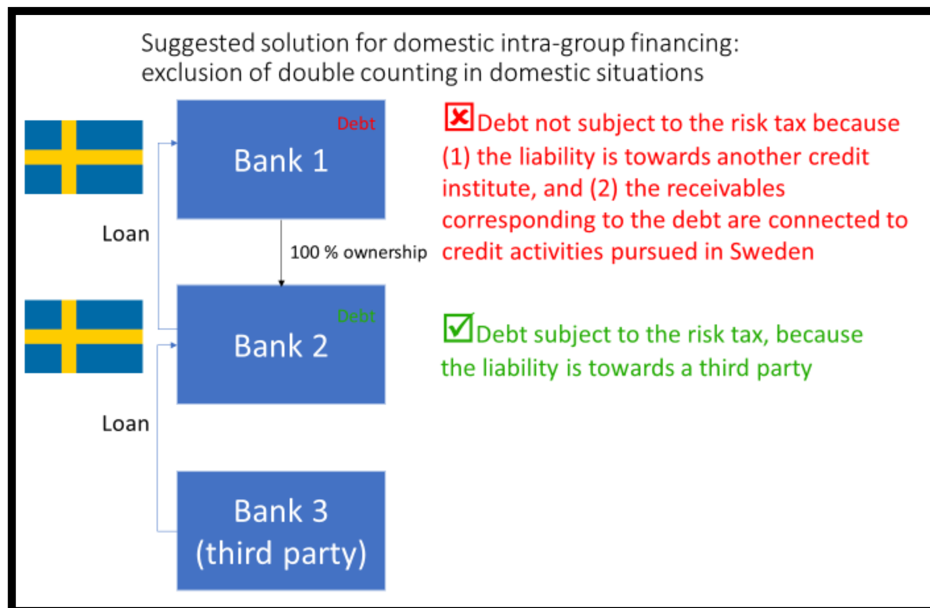
6.1 Introduction

The suggested risk tax contains provisions relating to intra-group liabilities in both domestic and cross-border contexts. The rationale of the suggested mechanism is to exempt from the risk tax intra-group liabilities, so as to avoid the double counting of debts. A risk a double counting indeed exists, which would lead to what one could describe as an imposition in cascade, or a situation of double taxation.

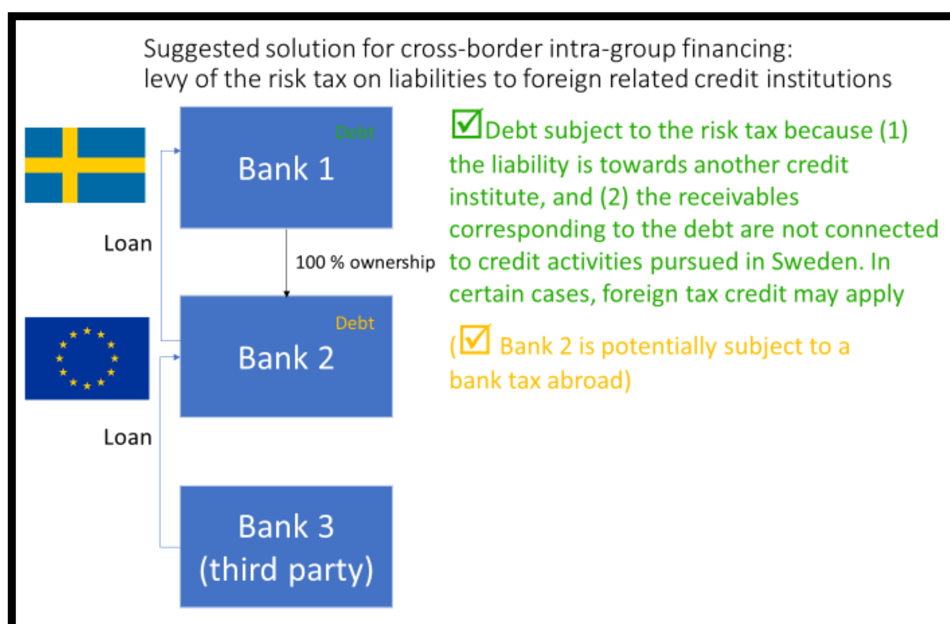
A simple example can illustrate the risk of double counting leading to double taxation. Assume that Bank 1 has a subsidiary, Bank 2. Bank 2 borrows 100 from a third party, Bank 3. Bank 2 thus has a debt towards Bank 3. Bank 2 then uses the funds to lend 100 to Bank 1. Bank 1 thus has a debt towards Bank 2. All banks are resident of Sweden. Without a mechanism to avoid double counting, a situation of double taxation may arise since both the liabilities of Bank 1 and the liabilities of Bank 2 may be in the scope of the risk tax. This situation of double taxation is illustrated below:



It is reasonable to try to avoid the double counting of liabilities and the double taxation that would result from it: not only is double taxation on pure intra-group transactions contrary to the principle of neutrality, but also the risks of indirect costs for the State are not necessarily higher because of the existence of intra-group liabilities. Therefore, it is correct, from a tax law drafting perspective, that the risk tax described in the memorandum contains a mechanism to avoid the double counting of intra-group liabilities. To that end, paragraph 6§, second indent of the suggested risk tax provides for the exclusion of debts to another credit institution that is part of the same corporate group. This exclusion applies only if the receivables corresponding to the debt are connected to credit activities pursued in Sweden. This exception for certain situations of intra-group financing is illustrated below:



However, the exception to the double counting of liabilities does not apply in all intra-group financing situations: as mentioned above, paragraph 6§, second indent of the suggested risk tax provides for the exclusion of debts to another credit institution that is part of the same corporate group, only if the receivables corresponding to the debt are connected to credit activities pursued in Sweden. This means that if intra-group financing is being pursued on a cross-border basis through borrowing funds from a foreign but related credit institution, the exception will not apply, and the liabilities will be subject to the risk tax. In addition, the foreign credit institution related to the Swedish entity may, depending on the tax legislation of its country of residence, be subject to some form of taxation of the financial sector. In certain cases a foreign tax credit may be available in Sweden, up to a certain limit (Swedish: *spärrbelopp*). This situation is illustrated below:



What may be problematic from an EU law perspective is the difference in treatment between domestic and cross-border intra-group financing: whereas the former is exempt from tax, the latter is in the scope of the tax. It will now be discussed whether such a difference in treatment may be incompatible with the EU fundamental freedoms.

6.2 High-level analysis with respect to the fundamental freedoms

The method of analysis relating to the fundamental freedoms is described above at section 5.1. This section applies the same methodology.

6.2.1 Is there a potential difference of treatment to the disadvantage of cross-border situations?

The first question is whether or not there is a potential restriction on the fundamental freedoms. In this case there is a direct difference of treatment, since domestic intra-group financing is exempt from risk tax, whereas cross-border intra-group financing is in the scope of the risk tax, and thus liabilities towards foreign related credit institutions will be taxed. This difference of treatment may impede the exercise of the freedom of movement, since both the establishment of foreign related credit institutions and the granting of loans from a group member established in another Member State may be hindered by the levy of the risk tax on the liabilities of the Swedish borrower. In other words, the tax position of a Swedish credit institution that borrows funds from a foreign related credit institution is less favourable than it would be if it borrowed funds from a domestic related credit institution. Here, it can be emphasised that in certain cases, a foreign tax credit may be available, and amendments to the Foreign Tax Credit Act (Swedish: *Lag (1986:468) om avräkning av utländsk skatt*) are suggested in the

memorandum.[49] However, the possibility, in certain cases, to be granted a foreign tax credit is not sufficient to eliminate all types of differences of treatment: to obtain a foreign tax credit, it is necessary to have paid a foreign tax comparable to the risk tax, and the foreign tax credit is limited to the risk tax that would have been levied without such a foreign tax credit. Accordingly, there would probably be situations with no full elimination of the Swedish risk tax (and thus no full elimination of the differences of treatment emphasised in this section), for example when a tax on the financial sector is levied abroad, but that this tax is not considered as comparable to the Swedish risk tax.

To sum up, the mechanism suggested with respect to the re-inclusion of liabilities towards foreign related credit institutions is likely to result in a difference of treatment to the disadvantage of cross-border situations. The next step is the comparability analysis.

6.2.2 Comparability analysis

Next, for a difference in treatment to be potentially in breach of the fundamental freedoms, it must differentiate between domestic and foreign companies that are in a comparable situation. Here, the comparison is between two situations, depending on where the credit activities connected to the loan to the Swedish entity are being carried out: if the loan is granted from credit activities being pursued in Sweden, the liabilities of the Swedish credit institution will not be in the scope of the risk tax. Conversely, if the loan is granted from credit activities being pursued abroad, the liabilities of the Swedish credit institution will be in the scope of the risk tax. This means that in this case, the comparison is between domestic and cross-border situations.

There is to my knowledge no case law from the CJEU that deals with an exactly similar situation. However, there are cases that do share certain features with the risk tax, from a more conceptual perspective. For example, I find some similarities between the suggested risk tax, and CFC-rules in the context of corporate income taxation: the main rule is non-taxation (whether of foreign subsidiaries for CFC-rules, or of liabilities to related credit institutions for the risk tax), and the exception is the levy of tax to prevent some form of tax avoidance: CFC-rules aim at preventing the avoidance of domestic corporate income taxation, and the inclusion of liabilities towards foreign related credit institutions aims at preventing structures whereby a group chooses to establish financial activities in a country with no, or a lower tax on the financial sector.[50] In relation to CFC-rules the Grand Chamber of the CJEU found domestic and cross-border situations

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[49] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, pp. 30-31.

[50] See *Riskskatt för vissa kreditinstitut*, Fi2020/03725/S1, pp. 26-27: ”*För att motverka att svenska kreditinstitut – i syfte att undgå skattskyldighet – lånar av utländska dotterföretag i stater utan motsvarande skatt på den finansiella sektorn, bör dock skulder till ett utländskt bankföretag eller ett utländskt kreditföretag som ingår i samma koncern beaktas, om de fordringar som motsvarar skulderna inte är hänförliga till verksamhet som bedrivs från ett fast driftställe i Sverige*”.

comparable, as such rules were eventually deemed to constitute a restriction on the fundamental freedoms.[51]

A comparison may also be relevant with transfer pricing rules, which concern payments made to associated enterprises, whether domestic or foreign. In many countries, transfer pricing rules do not apply domestically (because there is no similar risk of tax avoidance in a domestic context), but apply in cross-border situations. The CJEU has considered domestic and cross-border situations comparable, since it found a restriction on the fundamental freedoms, which was nevertheless able to be justified.[52] Other types of parallels may be made: for example, in relation to exit taxes domestic and cross-border situations have generally been found comparable.[53] Also, the elimination of double taxation in domestic and cross-border situations is relevant to emphasise, since such situations have in many important cases been found comparable: one could mention cases relating to the elimination of economic double taxation on dividends both in the State of residence (e.g. the *Manninen*[54] case) and in the State of source (e.g. the *Sofina*[55] case). A last example can be relied on: the *Lexel* case, in which the CJEU found the former interest limitation deductions incompatible with the fundamental freedoms: in this case, the CJEU found domestic and cross-border situations to be comparable. This case seems quite relevant in the context of the suggested risk tax, since in both cases a better treatment is granted when a loan is taken from a domestic lender, whereas a worse treatment is granted when a loan is taken from a foreign lender. In the *Lexel* case the Court found the domestic and cross-border situations comparable.[56]

On the basis of these cases, in my view it would be reasonable to conclude that the domestic and cross-border situations identified above in relation to the risk tax, are comparable. I find no obvious arguments for the non-comparability of domestic and cross-border situations where the risk tax is either applied, or exempted. The need to eliminate multiple taxation is equally relevant in domestic and in cross-border situations, and thus the two situations seem comparable in the light of the objective of the suggested risk tax. The fact that a Swedish credit institution takes a loan with a related credit institution is a business transaction, and it is in my view consistent with the purpose of the EU fundamental freedoms to be able to test such business transactions in domestic and cross-border contexts in the light of the fundamental freedoms. If these situations were not comparable, the effects of the freedom of movement would be diminished. Therefore, it seems that the domestic and cross-border situations identified above in relation to the risk tax are comparable for the purpose of the application of the fundamental freedoms. A restriction on the fundamental freedoms seems, accordingly, to be at hand. This leads to the next step, the justification analysis.

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[51] See Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*.

[52] See Case C-311/08, *Société de Gestion Industrielle SA (SGI) v État belge*. See also Case C-382/16, *Hornbach-Baumarkt AG v Finanzamt Landau*.

[53] See e.g. Case C-371/10, *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam*.

[54] See Case C-319/02, *Petri Manninen*, especially at paragraphs 36 and 37.

[55] See Case C-575/17, *Sofina SA, Rebelco SA, Sidro SA v Ministre de l'Action et des Comptes publics*.

[56] See Case C-484/19, *Lexel AB v Skatteverket*, paragraph 44.

6.2.3 Justification analysis and proportionality test

A restriction to the fundamental freedoms in comparable situations is permissible if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. The most relevant justification in this case seems to be the prevention of tax avoidance. Indeed, it is this objective that the measure aims at. By including liabilities to foreign credit institutions in the scope of the risk tax of a domestic credit institution, the avoidance of the risk tax is prevented: while the normal operation of the mechanism included at paragraph 6§, second indent of the risk tax would be that no tax is levied because of liabilities being towards a related credit institution, the exception to this mechanism leads to re-including the liabilities in the tax base so that the tax is eventually levied.

Here it must be emphasised that without including liabilities towards foreign related credit institutions in the scope of the risk tax, there is no levy of risk tax in Sweden. In contrast, when eliminating multiple taxation in a domestic context, the last borrower before a loan is taken from a third party (if such a loan indeed is taken) would normally be subject to the risk tax. Put simply: the inclusion of liabilities towards foreign related credit institutions gives a chance to levy the risk tax. Therefore, at first sight (i.e. without having investigated this issue at depth), the restriction on the fundamental freedoms implied by the taxation of liabilities towards foreign related credit institutions could potentially be justified by the prevention of tax avoidance, since the effect of the suggested mechanism indeed is the prevention of the avoidance of the risk tax. However, there is no certainty that the foreign related credit entity towards which a Swedish credit entity has liabilities, would borrow funds from a third party: while the risk tax applies automatically by re-including liabilities towards a foreign related credit institution, the foreign lender may very well lend funds with its own resources. In this case, if this situation were purely domestic, there would be no risk tax, because the only liabilities and corresponding receivables would be between Swedish related entities.

Therefore, since there would be no risk tax in this situation, there would be no avoidance of tax if a similar situation existed in a cross-border context. Consequently, the prevention of tax avoidance can hardly be a generally valid justification ground; it might be a convincing justification if indeed a tax would have been levied in a domestic context, but when this is not the case (e.g. when no liabilities towards a third party would have been incurred) there is no avoidance of tax, and thus no possibility to rely on this argument to justify the taxation of cross-border transactions that would have been exempted in a domestic context.

Even if the prevention of tax avoidance were an acceptable justification, the suggested re-inclusion of liabilities towards foreign related credit institutions might go beyond what is necessary to achieve its purpose. It is true that the CJEU has in certain cases accepted the prevention of tax avoidance as a justification,[57] but it has normally been

[57] See Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, paragraph 51: “a national measure restricting freedom of establishment may be

combined with the requirement that the tax measure preventing tax avoidance applies only to a wholly artificial arrangement so as to satisfy the principle of proportionality: in *Cadbury Schweppes*, the Grand Chamber of the CJEU has held that "in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality".[58] In the suggested risk tax, the re-inclusion of liabilities towards foreign related credit institutions is not connected to the concept of wholly artificial arrangement, or even to the more general notion of substance: the re-inclusion of liabilities towards foreign related credit institutions is automatic, as it applies by the sole effect of the foreign location of the receivables connected to the liabilities incurred by the Swedish entity. This means that even if a foreign related credit institution has substance (i.e. a real economic activity), and enters into a genuine business transaction through borrowing funds from a third party to lend such funds to a related Swedish credit institution, the risk tax would still apply on the liabilities of the Swedish entity. This justification is, accordingly, not convincing. Here again a parallel can be made to the *Lexel* case, in which the former Swedish rules on the limitation to the deduction of interest expenses could not be justified by the need to prevent tax avoidance: these rules were not limited to wholly artificial arrangements, and were found in breach of the fundamental freedoms. Since these rules share certain similarities with the suggested risk tax,[59] I would find it correct to reach the same conclusion as to the impossibility to justify the difference in treatment by the need to prevent tax avoidance.

In addition, the Court of Justice has made clear that to satisfy the principle of proportionality, a national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement must give the taxpayer an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification for that arrangement.[60] Yet no such possibility is given to the taxpayer according to the suggested risk tax, which implies the automatic re-inclusion of liabilities in the scope of the risk tax when a Swedish credit institution has a liability towards a foreign related credit institution.

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justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned".

[58] For example, in *Cadbury Schweppes* the Grand Chamber of the CJEU has held that "a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned": see Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, paragraph 51.

[59] The main similarities are that both rules imply a worse treatment for loans towards foreign lenders, than loans towards domestic lenders; additionally, both rules apply even in situations where the foreign lender has a real economic activity. Also, both rules imply a better treatment when loans are taken from unrelated lenders than related lenders.

[60] See Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue*, paragraph 82. See also Case C-484/19, *Lexel AB v Skatteverket*, paragraph 50.

Therefore, considering the case law of the CJEU in relation to the prevention of tax avoidance and the principle of proportionality, it seems that the mechanism introduced in the suggested risk tax to automatically re-include liabilities towards foreign related credit institutions might contain a potential incompatibility with the fundamental freedoms. This preliminary conclusion is, however, not based on an exhaustive investigation, and further analysis would be necessary to come to more conclusive observations.

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Stockholm, 8 February 2021