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

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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

[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

[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, I do not analyse the potential selectivity of the risk tax because of its sectoral nature, although an incompatibility cannot be excluded.[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

[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

[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

[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.

[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

[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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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".