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Subject: **State Aid SA.56348 (2021/N) – Sweden**
Swedish tax on credit institutions

Excellency,

1. PROCEDURE

(1) Sweden approached the Commission at an early stage of the elaboration of a legislative proposal for a risk tax on credit institutions (hereinafter the "risk tax").

(2) While the legislative process advanced, Sweden kept the Commission services updated of the main relevant developments.

(3) On 3 September 2021, Sweden notified to the Commission for legal certainty a Bill concerning a draft Proposal for an Act (2021:000) on risk tax on credit institutions (Lag om Riskskatt för kreditinstitut, hereinafter the "Act") as well as draft amendments to the Act on foreign tax credit (1986:468), i.e. amendments to chapter 1, section 3 and introduction of a new chapter 5, sections 1 and 2, (hereinafter "amendments to the Foreign Tax Credit Act" and together with the "Act", the "notified measure").

(4) On 30 September 2021, the Commission sent to Sweden a request for information further to market information that came to the Commission's possession. Sweden provided its answer on 5 October 2021.

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Utrikesminister Ann Linde
Utrikesminister
Utrikesdepartementet
Arvfurstens palats
Gustav Adolfs torg 1
SE - 103 23 Stockholm
SVERIGE

(5) Sweden informed the Commission that the Bill will be signed into law on 16 December 2021 and will enter into force on 1 January 2022. Sweden exceptionally agrees to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union ("TFEU"), in conjunction with Article 3 of Regulation 1/1958[1] and to have this decision adopted and notified in English.

2. DETAILED DESCRIPTION OF THE MEASURE

(6) According to the notification, the Act will introduce a new annual tax applicable to large credit institutions operating in Sweden, subject to certain conditions set out therein.

(7) Sweden submits that the objective of the tax is to strengthen public finances with contributions from large credit institutions potentially creating significant indirect costs to the society, thereby creating scope to cope with such indirect costs future financial crises may entail. In particular, financial crises often result in significant direct and indirect costs for the society. Direct costs to the State arise when the State has to take measures to maintain financial stability, for example, by covering losses or recapitalising banks of systemic importance with taxpayers' money in order to reduce the risk of a crisis spreading into the economy. Indirect costs arise when the economy declines and, thus, public finances deteriorate.

(8) Against this background, those financial market participants, namely large credit institutions, that, given their size and importance, risk causing significant indirect costs to the society in the event of a financial crisis would be liable to the tax.

(9) The Act will apply to 'credit institutions', as defined in the relevant provisions of Swedish law.[2] According to the Act, the term 'credit institution' has the same meaning as it has under the Income Tax Act. The Income Tax Act defines a 'credit institution' as 'a Swedish bank and Swedish credit market company and foreign banking companies and foreign credit companies in accordance with the Banking and Financing Business Act (2004:297).[3]

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1 Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

2 Chapter 2, Section 4a of the Swedish Income Tax Act (1999:1229) in conjunction with the Banking and Financing Business Act (2004:297).

3 According to the Banking and Financing Business Act (2004:297), as subsequently amended, 'bank' means a banking company, a savings bank and a member bank (Chapter 1, Section 5(2)). The term 'banking company' means a limited liability company, which has obtained a licence to operate a bank (Chapter 1, Section 5(3)). 'Savings bank' means an undertaking referred to in the Savings Banking Act (1987: 619) and 'member bank' an economic association within the meaning of the Act (1995:1570) on member banks (Chapter 1, Section 5(17) and (16) of the Banking and Financing Business Act, respectively). "Banking" means a business, which includes both payment intermediation via general payment systems and receipt of funds, which, after cancellation, are available to the creditor within a maximum period of 30 days (Chapter 1, Section 3). Under Chapter 1, Sections 4 and 5 (12) to (14) of the Banking and Financing Business Act, a credit market company is a company, which has a licence to operate a financing business, that is to say, a business in which activities have the purpose of: 1. receive repayable funds from the public; and 2. grant credit, provide a guarantee for credit or acquire receivables or let movable property for use (leasing) for financing purposes. Under Chapter 7, Section 1 of the Banking and Financing Business Act, a bank and a credit market company may only engage in financial activities and activities that are intrinsically linked to it.

(10) Swedish credit institutions, as referred to in recital (9)[4], will be liable to risk tax if the sum of their liabilities, less provisions and untaxed reserves, exceeds a threshold limit at the beginning of the fiscal year. Foreign credit institutions will be liable to risk tax if they have liabilities that are attributable to their business operations carried out from a Swedish branch and the sum of such liabilities, less provisions and untaxed reserves, exceeds the threshold limit at the beginning of the fiscal year. This threshold limit is set at SEK 150 billion (approx. EUR 15.1 billion)[5] in total liabilities for the fiscal year starting in 2022. As of 2023, the threshold will be adjusted annually by reference to changes in the 'price base amount' between the year in which the tax year in question begins and the year in which the previous tax year begins, as specified in the applicable Swedish law.[6]

(11) In case of credit institutions belonging to a group with several credit institutions, the threshold will apply taking into account the combined liabilities of Swedish credit institutions belonging to the group at the beginning of a fiscal year. When calculating the combined liabilities in case of foreign credit institutions that are part of a group, only the liabilities attributable to the foreign credit institutions' business operations that are carried out from a Swedish branch will be considered.

(12) In this context, provisions and untaxed reserves, as well as the following liabilities will not be taken into account for the purpose of calculating the threshold: liabilities to Swedish credit institutions that are part of the same group and liabilities to foreign credit institutions that are part of the same group, to the extent that the claims corresponding to the liabilities are attributable to a foreign credit institution's business operations carried out from a Swedish branch.

(13) The tax base, in case of Swedish credit institutions, consists of the sum of the Swedish credit institutions' liabilities, and, in case of foreign credit institutions, of the sum of the liabilities attributable to the foreign credit institution's business operations carried out from a Swedish branch, at the beginning of the fiscal year.

(14) Provisions and untaxed reserves, as well as the following liabilities will not be taken into account when calculating the tax base: (1) liabilities to a Swedish credit institution that is part of the same group as the credit institution subject to the tax, (2) liabilities to a foreign credit institution that is part of the same group as the credit institution subject to the tax, to the extent that the claims corresponding to the liabilities are attributable to the foreign credit institution's business operations carried out from a Swedish branch (i.e. for the provision to be applicable, both the

[4] Any reference to the term 'credit institutions' in this decision should be understood as encompassing the entities falling within its definition in the provisions of Swedish law.

[5] Based on the exchange rate on 5 November 2021 (EUR 1 = SEK 9.9033).

[6] The price base amount is fixed annually by the Swedish government in the year preceding the year to which the price base amount applies and is defined by Sections 6 and 7 of Chapter 2 of the Swedish Social Insurance Code (Socialförsäkringsbalk (2010:110), as amended by Act 2018:1290), which provides as follows: «*Section 6. Certain calculations specified in this code shall be based on a price base amount or increased price base amount calculated for each year. Section 7. The price base amount is calculated by multiplying the base number 36 396 by the comparative figure that indicates the relationship between the general price situation in June the year before that to which the price base amount refers and the price situation in June 1997. The calculated price base amount is rounded to the nearest hundred kronor*».

debtor and the creditor must be liable to risk tax), (3) certain other liabilities, as referred to in the Swedish Resolution Act,[7] in particular, subordinated debt in the form of relevant capital instruments, subordinated debt other than relevant capital instruments, and non-derivative or derivative debt instruments whose original maturity is at least one year, provided that the creditor's right to payment is set out in the agreement of the claim and, where applicable, the prospectus, which can be effectively written down or converted into shares in the event of a resolution of a credit institution.

(15) The tax rate will be fixed at 0.05% of the tax base during the first-year phase-in period and it is proposed to be increased to 0.06% for fiscal years as of 2023.

(16) Finally, under the amendments to the Foreign Tax Credit Act, credit institutions may be entitled to a reduction in the risk tax by offsetting foreign tax calculated on a comparable tax base as the risk tax based on the sum of liabilities, paid by another credit institution of the same group in another European Economic Area ("EEA") State (the "foreign tax credit"). It presupposes, however, that the credit institution holds liabilities towards the foreign credit institution within the same group, when the latter either is liable to risk tax in Sweden but the claims corresponding to the liabilities are not attributable to business operations carried out from a branch in Sweden, or would have been liable to risk tax, had it carried out activities from a branch in Sweden.

(17) As it aims to mirror the treatment of intra-group liabilities in domestic intra-group situations covered by the Act, the foreign tax credit will be subject to the following limitations:

(a) First, it will be allowed only to the extent to which the risk tax would have been reduced, had the liabilities at hand qualified as intra-group liabilities relating to activities attributable to the foreign credit institution's business operations from a branch in Sweden and had those liabilities been deducted from the tax base (see recital (14)). The tax credit is available only if the foreign credit institution is part of the same group as the credit institution that could be entitled to the foreign tax credit and the claims corresponding to the liabilities are attributable to the foreign credit institution. Further, the foreign tax credit will be limited to the foreign tax calculated on the liabilities that would have been deductible if the conditions for a deduction from the tax base in domestic intra-group situations would have been met.[8]

(b) Second, if the foreign credit institution is allowed to deduct the relevant foreign tax for income tax purposes in the foreign State and the income tax in that foreign State is reduced as a result of that deduction, the foreign tax which may be allowed as a credit against the Swedish risk tax shall be reduced by an amount equivalent to the tax effect of such deduction (i.e.

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[7] See, in particular, Section 15(2a), (2b), (3a) and (3b) of Chapter 21 of the Swedish Resolution Act (Lag (2015:1016) om resolution).

[8] For example, if the taxpayer's liabilities to the foreign credit institution amounts to 1 000 and that foreign credit institution paid a foreign tax of 5 on a tax base of 5 000, the foreign tax credit, under the first paragraph amounts to 1 (5 * 1 000 / 5 000).

the reduction of the foreign credit institution's corporate income tax obtained as a result of a deduction of the relevant foreign tax). The purpose of that limitation is to take account of the income tax advantage (in the foreign State) resulting from a possible deductibility for income tax purposes of the foreign tax. If such foreign tax is deductible for income tax purposes in the foreign State, the described limitation will reduce the tax credit by an amount corresponding to such advantage. This will prevent a "double advantage", that could occur first in the foreign State (deductibility of the tax) and second in Sweden as a result of the foreign tax credit.

(c) Third, the foreign tax credit cannot exceed the amount of risk tax attributable to the reduction of the tax base, which would be allowed if the liabilities to the foreign credit institution at the beginning of the fiscal year were deductible as in cases referred to in recital (14) above.[9]

3. THE POSITION OF SWEDEN

(18) Sweden submits that the notified measure does not constitute State aid and that it notified the measure for reasons of legal certainty.

(19) Sweden recalls that the purpose of the tax is to strengthen public finances with contributions from large credit institutions potentially creating significant indirect costs to the society in the event of a financial crisis, thereby creating scope to cope with such indirect costs future financial crises may entail. Although economic difficulties in other industries and sectors can spread and have a negative impact on the society, the banking sector has a special status due to its central role in the economy and the sensitivity of the financial system. The risk that a credit institution causes in the event of a financial crisis significant indirect costs to the society varies with the size and importance of the institution. While factors other than the size of a credit institution might also be considered when assessing the risk of causing indirect costs in the event of a financial crisis, the size of an institution is one of the most important factors. Large credit institutions are systemically important and given their size and role in the economy and the financial system risk causing significant indirect costs to the society. They should therefore pay an additional tax.

(20) In Sweden's opinion there are no other credit institutions that may generate a comparable risk to cause significant indirect costs in the event of a financial crisis besides large credit institutions. Smaller credit institutions are not critical to the financial system and do not affect macroeconomic developments to the same extent.

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9 The foreign tax credit will be given by a ratio where the numerator is represented by the intra-group liabilities to the foreign credit institution and the denominator is represented by the tax base of the risk tax. If, in the example in footnote 8, the tax base under the Act is 40 000 and, hence, the risk tax is 20 (40 000*0.05%), in this example the foreign creditable tax will be limited to 0.5 (20*1 000 / 40 000), i.e. only as much as is attributable to the liabilities to the foreign credit institution (which, in this example amount to 1 000).

(21) Moreover, the Swedish financial system is bank-dominated and non-bank financial intermediation is limited in comparison. In this respect, as regards particularly the so-called mortgage funds, which are not subject to the tax, Sweden submits that mortgage funds are not traditional banks; instead, their business model is to sell mortgages to other companies, which in turn create investment products on this basis. As of 2016, they can issue mortgages to households but they do not take deposits or offer loans to non-financial corporations. To provide mortgages to consumers, a permit from the Swedish Financial Supervisory Authority is required. So far, mortgage funds' mortgages only constitute a small proportion of total mortgages and currently only four mortgage funds actively provide mortgages to consumers. The liabilities of these four companies amounted in 2019 to approximately SEK 6 billion. Against this background, Swedish institutions outside the traditional banking system are not large enough to give rise by themselves to risk for significant indirect costs.

(22) Sweden further submits as regards the design of the tax, that, given the importance of the liabilities for a credit institution's stability and capacity to support the real economy with credit, the size of the institution's liabilities is considered to be an appropriate measure of its importance and size and for indicating the risk that it may cause indirect costs in the event of a financial crisis. It is therefore appropriate to determine which credit institutions should be liable to pay the risk tax having regard to the size of the credit institutions' liabilities.

(23) Sweden notes in that respect that it would not be appropriate for the Swedish tax authority to assess the risk that each credit institution poses to the macroeconomic conditions at a certain point in time. Determining tax liability based on a more dynamic approach would not be suitable since the primary competence of the Tax Authority is not to carry out such an assessment. Besides, such an approach could lead to uncertainty regarding taxation and is therefore not suitable for tax purposes. Therefore, the size of the credit institution's liabilities is considered to be a suitable metric for measuring the credit institution's importance and size and its contribution to the risk of causing significant indirect costs in the event of a financial crisis.

(24) The Swedish government further submits that the threshold determining tax liability should be set at SEK 150 billion for the fiscal year beginning in 2022. Like other regulations concerning credit institutions, which distinguish between large and small credit institutions, that threshold divides credit institutions into large and small ones. According to Sweden, using such a threshold is consistent with the objective of the risk tax by making liable to the tax only those financial market participants that risk causing significant indirect costs to the society in the event of a financial crisis.

(25) Sweden submits, in particular, that the liabilities of the credit institutions that are subject to pay risk tax on that basis are estimated to represent more than 90 per cent of the total liabilities of all credit institutions operating in Sweden and the tax will be levied on market participants that conduct the main part of the banking operations in Sweden. In addition, no credit institution with liabilities less than SEK 150 billion is assessed by the Swedish National Debt Office as critical to the financial system.

(26) As regards the calculation of the threshold and the tax base, Sweden submits that liabilities in a Swedish credit institution should be included in the calculation, regardless of whether they are attributable to a foreign branch or to the Swedish operations, since the risk of financial instability and indirect costs in Sweden in the event of a financial crisis is not less if liabilities are attributable to operations in a Swedish credit institution's foreign branch compared to its Swedish operations.

(27) Sweden further clarifies that domestic intra-group financing is exempt from risk tax to avoid double-counting of liabilities. Such exemption also applies in relation to liabilities incurred by a Swedish credit institution towards a foreign credit institution that belongs to the same group, if the corresponding claims are attributable to the activities of a Swedish branch of that foreign credit institution. By contrast, such liabilities to a foreign credit institution are not exempted when the corresponding claims are not attributable to the activities of a Swedish branch. However, in the latter situation, if the foreign credit institution does pay a corresponding tax in its 'home State', a tax credit corresponding to the foreign tax is granted subject to certain conditions. The above rules are consistent with the tax base consolidation mechanism under the Act (summarized in recital (14) points 1 and 2).

(28) Sweden finally considers that the risk tax does not distort or threaten to distort intra-Union trade nor affects competition in the internal market. It submits that the tax does not discriminate between Swedish credit institutions and foreign credit institutions with branches in Sweden. It also submits that competition in the Swedish banking market has limitations and the fact that the tax will be levied on market participants that conduct the main part of banking operations in Sweden, i.e. larger credit institutions, may rather lead to better competition in the Swedish banking market.

(29) According to Sweden, the proposal for a risk tax for certain credit institutions is not selective and does not distort or threaten to distort competition. Therefore, the proposed measure does not constitute State aid.

4. ASSESSMENT OF THE MEASURE

(30) By virtue of Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") "*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*."

(31) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage to an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

4.1. Selectivity

(32) A measure provides a selective advantage if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU. The Court of Justice has established that the selectivity of a fiscal measure should in principle be assessed by means of a three-step analysis.[10] First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether the derogatory measure is justified by the nature or the general scheme of the reference tax system. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) TFEU.

4.1.1. Identification of the reference system

(33) The reference system constitutes the framework against which the selectivity of a measure is assessed.

(34) The Court of Justice has clarified that, outside the spheres in which Union tax law has been harmonised, the determination of the characteristics constituting each tax - including the taxable persons, the choice of tax rate, which may be proportional or progressive, and also the determination of the basis of assessment and the taxable event - falls within the discretion of the Member States, in accordance with their fiscal autonomy, that discretion having, in any event, to be exercised in accordance with Union law.[11]

(35) Such characteristics constituting the tax, as defined by the Member States, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. This is particularly the case for special-purpose levies, which do not form part of a wider taxation regime. As a result, and provided that the boundaries of the levy have not been designed in a clearly arbitrary or biased way, the reference system is, in principle, the levy itself.

(36) The Commission can, nonetheless, assess and demonstrate that a reference system has been configured according to manifestly discriminatory parameters intended to circumvent Union law on State aid.[12] It should be recalled in that respect that

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[10] See, for example, Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands (NOx)*, Case C-279/08 P, EU:C:2011:551; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, Case C-143/99, EU:C:2001:598; Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550 and EU:C:2010:411; Judgment of the Court of Justice of 29 April 2004, *GIL Insurance,* Case C-308/01, EU:C:2004:252.

[11] Judgment of the Court of Justice of 16 March 2021, *Commission v Hungary*, C-596/19 P, ECLI:EU:C:2021:202, paragraph 44.

[12] *Ibid*, paragraphs 48 and 49.

the Court of Justice has consistently held that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used.[13] The Commission will therefore evaluate whether the boundaries of the reference system have been designed by Sweden in a consistent manner, in the light of the objective of the tax, or, conversely, in a manifestly discriminatory manner, intended to circumvent Union law on State aid.

(37) The determination of the reference system, which is based on such elements as the tax base, the taxable persons and the tax rates, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of the Member State concerned. Where it appears that a measure is clearly severable from the general tax system of the Member State concerned, the reference system may equate to the measure itself, where the latter appears as a rule having its own legal logic and it is not possible to identify a consistent body of rules external to that measure.[14]

(38) In the present case, the reference system is that of a special-purpose risk tax, based on the following elements, which are further assessed in the following sub-sections:

- a tax base relying on the credit institutions' liabilities, subject to specific adjustments, as outlined in recitals (13)-(14);

- a tax rate of 0.05% for the fiscal year starting in 2022, as outlined in recital (15);

- taxable persons, defined as credit institutions established in Sweden or carrying out business operations through a branch in Sweden, as outlined in recital (9);

- the existence of a threshold as outlined in recitals (10)-(12);

- a consolidation mechanism for intra-group situations when calculating the threshold and the tax base, as outlined in recitals (11)-(12) and (14) respectively.

(39) The above elements are consistent with the objective of the risk tax. In particular, taxable persons are credit institutions that risk causing significant indirect costs to the society in Sweden in the event of a financial crisis.

(40) Furthermore, the risk tax is not part of the Swedish corporate income tax or VAT regime. It pursues its own logic and is independent and distinct from any other tax regime applied in Sweden. Therefore, the risk tax does not form part of a wider

[13] Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, Case C-487/06 P, EU:C:2008:757, paragraphs 85 and 89 and the case-law cited there, and Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands (NOx)*, Case C-279/08 P EU:C:2011:551, paragraph 51.

[14] See in this sense, Judgment of the Court of Justice of 6 October 2021, *World Duty Free Group SA and Spain v Commission*, joined Cases C-51/19 P and C-64/19 P, ECLI:EU:C:2021:793, paragraphs 62-63.

taxation regime. Accordingly, in the case at hand, the reference system is confined to the risk tax.

(41) As background, Sweden explained that large credit institutions are key to the efficient functioning of the economy and serious disruptions in any of them can lead to serious issues. Although the banking sector is subject to a regulatory framework aimed at strengthening its stability at individual and systemic level by laying down requirements to enhance credit institutions' resilience, future financial crises cannot be ruled out. Such crises often result in significant direct and indirect costs for the society and prolonged negative consequences for households, undertakings and the public sector.

(42) Against this background, as stated in recital (7), the objective of the risk tax is to strengthen public finances with contributions from large credit institutions potentially creating significant indirect costs to the society, thereby creating scope to cope with such indirect costs future financial crises may entail.

(43) The main features of the reference system will be assessed below.

4.1.1.1. Taxable persons

(44) The scope of the Act covers credit institutions established in Sweden or carrying out business operations through a branch in Sweden. It makes liable to the tax those market participants, whose failure (or a serious disruption in their activities) risks causing significant indirect costs to the Swedish society in the event of a financial crisis. In assessing which credit institutions are at risk of causing significant indirect costs to the society, Sweden considered that the size of the institutions is an important factor.

(45) In this respect, as noted by Sweden, credit institutions are central to the economy, since their main activities are key to its efficient functioning. Thus, although a comprehensive regulatory response has been taken since the 2008 global financial crisis, serious disruptions in credit institutions' activities can still lead to major problems and both direct and indirect costs for the society. Large credit institutions, in particular, may be systemically important, have a significant influence and impact on the markets and are critical to the real economy. Given their role, their failure or serious difficulties are more likely to cause severe negative effects and, thus, significant indirect costs to the economy on an individual basis in the event of a crisis, compared to smaller credit institutions. As Sweden submits, smaller credit institutions, which are not critical to the financial system, may affect macroeconomic developments to a different extent than larger ones. This is also reflected in their treatment in the Union's prudential and resolution framework applicable to credit institutions. For example, contributions to the resolution fund are calculated in proportion to a bank's liabilities. Thus, focusing the scope of the tax on credit institutions and linking its design to the credit institutions' size does not reveal a manifestly discriminatory element in the design of the tax.

(46) It should be further noted that credit institutions are also subject to a comprehensive prudential regulatory framework, which covers all critical activities given the risks that may emanate from credit institutions and their activities. Other financial institutions are subject to a different and typically lighter regulatory regime, which is in itself an indication that their capacity to

generate systemic risks, and, ultimately, indirect costs, is different and typically lower than the credit institutions' capacity. In this regard, the focus of the risk tax on credit institutions does not reveal a manifestly discriminatory element.

(47) For the sake of completeness, as regards mortgage funds**,** the Commission acknowledges that those funds are active in the mortgage lending business and, thus, may engage in similar activities as credit institutions as regards the provision of credit to households. However, those funds do not engage in other critical activities carried out by credit institutions, such as taking deposits or offering loans to non-financial corporations. Moreover, as Sweden notes, even in the market of household mortgages their total share remains significantly low.[15] In addition, their funding, business model and regulatory treatment is different from that of credit institutions. Notably, the mortgage fund business does not give rise to the same level of potential asset – liability mismatches and maturity transformation (i.e. using short-term funding for long-term lending) due to its narrow scope of providing credit and selling investment products to investors. As a consequence, these funds are not subject to a regulatory framework comparable to the comprehensive prudential framework, including its key pillars capital and liquidity regulation and leverage requirements, applicable to credit institutions, and are not able to generate significant indirect costs in the same magnitude as credit institutions. Thus, as stated in recital (46) above, the Commission considers that the focus of the risk tax on credit institutions does not reveal a manifestly discriminatory element.

(48) Against that background, having regard also to the considerations submitted by Sweden as set out in recitals (20)-(21), the Commission therefore considers that the definition of the undertakings subject to the risk tax does not reveal a manifestly discriminatory element in the design of the tax.

4.1.1.2. Metric and threshold for taxation

(49) Sweden has further identified the size of a credit institution's liabilities as a metric suitable to represent the systemic risk that may be caused by a credit institution and the risk of significant indirect costs to the society in the event of a financial crisis. The tax liability is thus triggered when the liabilities of a credit institution or a group of credit institutions exceed a threshold at the beginning of a fiscal year, set at SEK 150 billion for the fiscal year starting in 2022.

(50) As noted by Sweden, the size of a credit institution's liabilities is in principle an indicator of its overall size, as are other relevant factors such as turnover, employees and number of clients. Sweden asserts that the volume of liabilities can constitute a relevant indicator of both a credit institution's importance and of its contribution to the risk its failure may pose to the macroeconomic environment in the event of a crisis. The Commission recalls that liabilities are redeemable on demand or at a specified maturity by the creditors of credit institutions and are thus a 'source of instability' for credit institutions with regard to their capacity to

[15] Namely around 1% in the market for household mortgages. As noted above, in recital (21), according to information submitted by Sweden, so far, mortgage funds mortgages only constitute a small proportion of total mortgages and currently only four mortgage funds actively provide mortgages to consumers. The liabilities of these four companies amounted in 2019 to approximately SEK 6 billion, which is significantly below the threshold of SEK 150 billion.

maintain lending, to sustain losses on credits and thereby also to transmit risk to the financial system and the real economy. The Commission thus observes that using the sum of liabilities as a metric for defining which credit institutions should be subject to the risk tax constitutes an element that is inherent in the reference system, consistent with its objective, and does not reveal a manifestly discriminatory element in the design of the tax.

(51) In this context, the use of a threshold to identify those credit institutions that are liable to create significant indirect costs as reflected in the sum of their liabilities and therefore shall be subject to the tax does not reveal a manifestly discriminatory element in the design of the tax and is therefore a legitimate expression of Sweden's tax sovereignty.[16]

(52) As regards the choice of the threshold at hand, which is set at SEK 150 billion for 2022, it is observed that, according to the information submitted by Sweden, by applying this threshold, the Swedish credit institutions and foreign banks' Swedish branches that would be liable to pay risk tax represent approximately 90 per cent of the aggregated balance sheet total of all credit institutions in Sweden (including foreign credit institutions' Swedish branches). Sweden further clarified in this respect that the market shares in relevant submarkets for the credit institutions assessed to pay risk tax amounted to approximately 73-90 per cent in 2020. Thus, the tax will be levied on market participants that conduct the main part of the banking operations in Sweden. In this respect, the fact that, according to Sweden, the credit institutions that would be liable to pay risk tax largely correspond to those assessed by the Swedish National Debt Office as carrying out activities that are critical to the financial system and the real economy, is an additional indication that the threshold has been set in a consistent manner, in the light of the tax's objective, and not in a manifestly discriminatory manner.

(53) Having regard to the above and the considerations set out in recitals (22)-(25), a condition relating to such a threshold and the choice of the threshold at hand does not involve a manifestly discriminatory element in the design of the tax.

(54) Overall, the Commission observes that such a choice in the design of the tax constitutes an exercise of fiscal sovereignty, is consistent with the objective of the tax and does not reveal a manifestly discriminatory element. Accordingly, the fact that credit institutions with liabilities below the threshold are not in the scope of the tax cannot be regarded as conferring a selective advantage on those undertakings.

4.1.1.3. Calculation of the threshold and the tax base

(55) Subject to the considerations set out in the present sub-section, when the liabilities exceed the threshold, the tax base includes all the liabilities of the credit

[16] Such a use of a given threshold may be justified, in line with the case-law. See, in particular, Judgment of the Court of Justice of 26 April 2018, *ANGED*, case C-233/16, ECLI:EU:C:2018:280, paragraphs 52-56 (the 'ANGED case'), in which the Court upheld the use of a condition relating to a sales area threshold, in order to distinguish between categories of establishments that were not in a comparable situation in the light of the objectives pursued by the legislation that imposed that condition, and held that the tax exemption received by certain retail establishments based on the threshold at hand did not confer a selective advantage on those establishments.

institution or group of credit institutions - less provisions and untaxed reserves - including those below the threshold. The risk tax contributions are, therefore, designed to increase with the credit institutions' total liabilities,[17] and, thus, the building up of leverage.

(56) When a foreign credit institution is part of the group, only liabilities attributable to the foreign credit institution's business operations carried out by a Swedish branch will be taken into account in the calculation of both the threshold and the tax base.

- Domestic intra-group situations

(57) The reference system provides for a consolidation mechanism in domestic intra-group situations that excludes from the calculation of both the threshold and the tax base:

(a) liabilities to a Swedish credit institution that is part of the same group; and

(b) liabilities to a foreign credit institution that is part of the same group, on the business operations carried out by a Swedish branch.

(58) The Commission observes that such a mechanism, which follows the same logic as regards the calculation of both the threshold and the tax base, addresses the need to avoid double-counting of the same liabilities and thereby allows to obtain a fair view of the relevant group entities' liabilities (to third parties). It should be regarded as inherent in the reference system and consistent with its objective and does not reveal a manifestly discriminatory element in the design of the tax.

- Treatment of liabilities of foreign branches of Swedish credit institutions

(59) According to the Act, all liabilities of Swedish credit institutions, including those related to liabilities of their foreign branches, notwithstanding if they relate to activities performed in Sweden or not, are relevant for the calculation of the threshold and the tax base. As Sweden submits regarding, in particular, liabilities of foreign branches, branches are not independent legal entities but form a legally dependent part of the credit institution and operate under the same license, as opposed to subsidiaries, which are separate legal entities. Consequently, any financial obligation remains with the parent credit institution. Therefore, a crisis hitting the foreign branch will affect directly the Swedish parent, ultimately causing indirect costs not only in the State where the branch is set up and carries out its activities but also in Sweden. Thus, taking into consideration such liabilities for calculating the threshold and the tax base appears to be an inherent feature of the risk tax regime, consistent with its objective.

(60) It should be further observed in this regard that, as also clarified by Sweden, a foreign subsidiary of a Swedish credit institution, operating under its own license, is an independent legal entity in contrast to a foreign branch. For that reason, a disruption in the business conducted by a foreign subsidiary does not have the same automatic impact on the Swedish parent and, hence, does not pose the same

[17] Subject to the adjustments set out in the present sub-section.

risk of indirect costs in Sweden as operations of a foreign branch. Therefore the treatment of the liabilities at hand when calculating the tax base is consistent with the objective of the tax.

(61) For completeness, the Commission observes that a similar logic applies as far as Swedish branches of foreign credit institutions are concerned, since a disruption in the activities of a Swedish branch of a foreign credit institution may cause indirect costs both in Sweden where the branch operates and in the State where the parent is located.

(62) In addition, the Commission considers relevant that the treatment of Swedish branches is coherent with the principle of territoriality in international tax law, as defined in relation to corporate income taxation[18].

(63) Accordingly, the Commission finds that applying – under the risk tax – the principle of worldwide taxation to Swedish credit institutions and the principle of territoriality to foreign credit institutions is consistent with Sweden's sovereignty in tax matters. In this context, such features should be seen as being inherent to the reference system and consistent with the tax's objective and do not reveal a manifestly discriminatory element in the design of the tax.

- Exclusion of certain liabilities when calculating the tax base

(64) The risk tax excludes from the calculation of the tax base, *inter alia*, certain liabilities as referred to in the Swedish Resolution Act,[19] including Additional Tier 1 and Tier 2 capital instruments, subordinated debt other than capital instruments, as well as non-derivative instruments and derivative instruments meeting specific conditions, which could be written down or converted into shares in the event of a resolution of a credit institution (see recital (14)).

(65) Overall, a higher level of subordinated debt, such as the liabilities at hand, can support the effective resolution of credit institutions and can ultimately contribute to effectively reducing risks to financial stability and minimizing systemic risk and, thus, the likelihood for significant indirect costs for the society in the event of a financial crisis. Against that background, the Commission considers that the exclusion of such debt instruments from the tax base, which equally applies to all credit institutions subject to the tax, constitutes a feature that does not reveal a manifestly discriminatory element in the design of the reference system and is consistent with its objective.

[18] According to the principle of territoriality, the Swedish State can design the scope of its taxes only as far as its tax sovereignty extends. In the case of a credit institution having its residence for tax purposes in Sweden, the Swedish tax sovereignty extends towards the worldwide activities of that credit institution. Such sovereignty may be limited by way of bilateral or multilateral tax treaty, by Union law or by domestic legislation. In that case, a tax exemption or tax credit in Sweden is normally provided in order to prevent double taxation. In case of a foreign credit institution with activities in Sweden, the tax sovereignty of Sweden is limited to the "source taxation", which means that it extends only to activities carried out through a permanent establishment (branch) in Sweden.

[19] See, in particular, Section 15(2a), (2b), (3a) and (3b) of Chapter 21 of the Swedish Resolution Act (Lag (2015:1016) om resolution).

4.1.1.4. Interim conclusion

(66) In view of the above, the Commission concludes that the reference system, as defined above in recital (38), has not been configured according to manifestly discriminatory parameters intended to circumvent Union law on State aid.

4.1.2. Derogation from the reference system

(67) As a second step, it is necessary to determine whether the notified measure involves a derogation from the application of the reference system in favour of certain undertakings, which are in a similar factual and legal situation in light of the objective of the reference system.

4.1.2.1. Absence of a derogation as regards the treatment of other financial institutions

(68) The Commission recalls that the scope of the Act covers only credit institutions; thus, other financial institutions are excluded therefrom. As stated above in recital (50), a credit institution's liabilities are a 'source of instability' for credit institutions with regard to their capacity to maintain lending, to sustain losses on credits and thereby also to transmit risk to the financial system and the real economy. The regulatory regime applicable to credit institutions has been designed to take this source of instability into account, as explained in recitals (46) and (47). Other financial institutions, such as insurance companies, pension funds, investment firms and investment funds, do not have a liability structure that gives rise to the same degree of instability and thus are subject to different regulatory regimes, which lack or have lighter provisions with regard to addressing the instability risks arising from liabilities. This is an indication that their capacity to generate systemic risks and, ultimately, significant indirect costs, is different and typically lower than the credit institutions' capacity. Thus, other financial institutions are not in a similar factual and legal situation as credit institutions in light of the objective of the risk tax.

(69) As regards mortgage funds, those funds may engage in similar activities as credit institutions. However, as noted above in recital (47), those funds do not engage in other critical activities carried out by credit institutions and even in the market of household mortgages their share remains significantly low.[20] Their funding, business model and regulatory treatment is different and their business does not give rise to the same level of potential asset-liability mismatches and maturity transformation. Thus, these entities are not subject to a comprehensive regulatory framework comparable to the one applicable to credit institutions and are not able to generate significant indirect costs in the same magnitude as credit institutions.

(70) In view of the above, the Commission concludes that, since other financial institutions are not in a similar factual and legal situation in light of the objective of the risk tax, their exclusion does not constitute a derogation from the reference system.

[20] See footnote 15. According to the information at the Commission's possession, mortgage funds in Sweden are of a significantly small size, such that they would be far from surpassing the minimum threshold for taxation, even if they were included in the scope of the Act.

4.1.2.2. Absence of a derogation as regards the treatment of credit institutions holding liabilities below the threshold

(71) The Commission further recalls that tax liability is triggered when the liabilities of an institution or a group exceed a given threshold. The use of a threshold to this end distinguishes between credit institutions based on their potential to create significant indirect costs, given their size as reflected in the sum of their liabilities. As noted above in recital (45), large credit institutions, in particular, may be systemically important, have a significant influence and impact on the markets, and are critical to the real economy, as opposed to smaller ones. They are therefore more likely to cause significant indirect costs in the event of a crisis. Thus, they are not in a similar factual and legal situation in the light of the objective of the risk tax. For completeness, the Commission refers also to the considerations set out in recital (52) regarding the choice of the threshold in this case, indicating that it has been set in a consistent manner in the light of the risk tax's objective.[21]

(72) Since those credit institutions whose liabilities are below the specified threshold are not in a similar factual and legal situation in light of the objective of the risk tax as credit institutions holding liabilities exceeding this threshold, their exemption does not constitute a derogation from the reference system.

4.1.2.3. Derogation from the reference system as regards the provisions concerning the foreign tax credit

(73) As submitted by Sweden, credit institutions may be entitled to a reduction in the risk tax under certain conditions, by applying the foreign tax credit. That foreign tax credit is calculated on a comparable tax base based on the sum of liabilities and paid by another credit institution of the same group in another EEA State (see above, recitals (16) and (17)).

(74) The Commission considers that credit institutions that are entitled to benefit from a foreign tax credit are in a comparable factual and legal situation, in light of the objective of the risk tax, to those entities that are subject to the risk tax but do not benefit from such a tax credit. In particular, in light of the objective of the risk tax regime (i.e. strengthening public finances with contributions from large credit institutions potentially creating significant indirect costs to the society in Sweden, thereby creating scope to cope with such indirect costs in the event of a crisis), Swedish credit institutions with foreign subsidiaries that are not subject to a tax equivalent to the Swedish risk tax are in a comparable factual and legal situation as Swedish credit institutions with foreign subsidiaries that are subject to a tax equivalent to the Swedish risk tax. Both categories of credit institutions could risk causing significant indirect costs to the society having regard to their liabilities in the event of a crisis, given their size. However, only credit institutions with foreign subsidiaries that are subject to a tax equivalent to the Swedish risk tax would see their risk tax contribution being reduced.

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[21] As noted in footnote 16, such a use of a threshold can be justified, in line with the case-law in the *ANGED* case.

(75) The provisions concerning the foreign tax credit therefore depart from the reference system and the more advantageous treatment granted to credit institutions that could benefit from a foreign tax credit constitutes a derogation from the reference system. In that respect, the notified measure is *prima facie* selective.

4.1.3. Justification of the derogation

(76) A Member State which introduces a differentiation between undertakings, which are in a comparable factual and legal situation, needs to establish that this differentiation is actually justified by the nature and general scheme of the reference system in question.

(77) As stated above, the treatment granted to credit institutions that could benefit from a foreign tax credit constitutes a derogation from the reference system. According to Sweden, the provisions concerning the foreign tax credit are structured in such a way so as to produce a similar outcome for the purposes of calculating the tax base as the provisions concerning the treatment of intra-group liabilities in cases of domestic intra-group situations covered by the Act. The provisions concerning domestic intra-group situations aim at avoiding double counting of the same liabilities and therefore avoid charging risk tax twice on the same liabilities (see recital (58)). The provisions on foreign tax credit aim at preventing economic double taxation in cross-border situations involving a foreign credit institution resident in an EEA State, whose liabilities are not attributable to the activities carried out through a Swedish branch, while mirroring the scope and treatment that apply in domestic intra-group situations.

(78) The Commission observes that this treatment, which avoids (economic) double taxation, can be considered justified by the logic and general scheme of the reference system in question. In particular, the tax credit applies in a cross-border situation where the absence of the tax credit could lead to a double (economic) taxation of intra-group liabilities (Swedish credit institution's liabilities subject to the Swedish risk tax and foreign credit institution's corresponding liabilities subject to the foreign tax equivalent to the risk tax).

(79) Furthermore, it does not go beyond what is necessary to achieve the legitimate objective being pursued, given the limitations to which it is subject, as referred to in recital (17) above. In particular, the application of the foreign tax credit requires that (i) the Swedish credit institution holds liabilities towards the foreign credit institution within the same group; (ii) the foreign credit institution either carries out activities in Sweden directly (*id est*: the activities are not carried out from a branch in Sweden) or does not carry out any activity in Sweden, and (iii) those liabilities would be liable to risk tax if the corresponding claims were attributable to activities carried out from a branch in Sweden. The application of the foreign tax credit is therefore limited to such situations. The Commission observes also that, if the Swedish credit institution holds liabilities towards a foreign credit institution of the same group and the related claims are attributable to the activities of a Swedish branch of the foreign credit institution (and are thus subject to the risk tax), double taxation is already prevented, as the tax base is reduced as a result of the deduction from the tax base set out in recital (14).

(80) Therefore, the rules defining the scope of application of the foreign tax credit ensure that such tax credit does not go beyond what is necessary to achieve the

objective of preventing double taxation. Furthermore, the proportionality of the tax credit is ensured by the limitations outlined in recital (17) that define its scope of application. Those limitations will ensure that the effect of the tax credit is equivalent to the deduction that would have been available in a domestic scenario (involving a Swedish branch of a foreign credit institution).

(81) The Commission therefore concludes that, along those lines, the application of the foreign tax credit is justified and, account taken of its scope of application, it does not go beyond what is necessary to achieve the legitimate objective pursued.

4.1.4. Conclusion on selectivity

(82) The reference system has been designed by Sweden in a consistent manner and has not been configured according to manifestly discriminatory parameters intended to circumvent Union law on State aid. It is not designed in a clearly arbitrary or biased way so as to favour certain undertakings over others, which are in a comparable situation with regard to its underlying logic. Besides, any derogations from it are justified and proportionate, taking into account the objective it pursues, and do not involve a selective advantage to certain undertakings.

(83) The Commission therefore considers that the notified measure is not selective.

4.2. Conclusion on the existence of aid

(84) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all cumulative conditions set out in that provision must be fulfilled.

(85) Since the notified measure is not selective, not all the conditions laid down by Article 107(1) TFEU are met. Therefore, the Commission concludes that the notified measure does not constitute aid.

5. CONCLUSION

The Commission has accordingly decided that the notified measure does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

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Executive Vice-President

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