EUROPEAN COMMISSION

Legal Service

Brussels, 17 May 2023
sj.c(2023)5076477

Administratīvā apgabaltiesa
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Object: Opinion of the European Commission in Case No A420210321 (AA43-0734-22/5) pending before the Administratīvā apgabaltiesa

Dear Madam,

The European Commission (the 'Commission') has the honour to submit an opinion in response to the request submitted on 25 August 2022 by the Regional Administrative Court of Latvia, on the basis of Article 29(1) of Regulation 2015/1589 (the 'Procedural Regulation')[1].

The Commission recalls that, in accordance with Article 29(1) of the Procedural Regulation and point 117 of the Commission's notice on the enforcement of State aid rules by national courts[2], opinions of the Commission are not binding on the national court. Only the Union Courts can give a binding interpretation of the Union's State aid rules. Therefore, the Commission's opinion is without prejudice to the possibility or obligation for the national court to ask the Court of Justice of the European Union for a preliminary ruling regarding the interpretation or the validity of Union law in accordance with Article 267 of the Treaty on the Functioning of the European Union ('TFEU').

1. RELEVANT FACTS AND PROCEDURE

(1) This opinion is based on the factual findings made by the Regional Administrative Court in its request decision, which the Commission assumes to be accurate.

(2) The case pending before the Regional Administrative Court concerns an undertaking that applied for aid to the State Revenue Service (*Valsts ieņēmumu*

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1 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

2 Commission notice on the enforcement of State aid rules by national courts (OJ C 305, 30.7.2021, p. 1) (the 'Enforcement Notice').

dienests) under the aid scheme approved by the Commission in case SA.59592[3] (hereinafter: the 'aid scheme') The Commission subsequently approved amendments to the aid scheme in cases SA.61338, SA.61873, SA.63046, SA.100596 and SA.101506.[4] The Commission authorised the aid scheme under Article 107(3)(b) TFEU in light of sections 2 and 3.1 of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the 'Temporary Framework').[5]

(3) The State Revenue Service considered that the applicant was not eligible for aid under the aid scheme. While the applicant's main economic activity was retail sale of clothing and footwear, in the period from 20 August 2019 to 24 May 2021 one of its (additional) activities encompassed administration of financial markets (NACE code 6611). Since both the Temporary Framework (point 20bis) and the national legal basis for the aid scheme excluded aid to credit and financial institutions from their scope, the applicant's request was denied.

(4) The applicant brought an action before the District Administrative Court (administratīvā rajona tiesa) to be granted aid under the aid scheme. The applicant argued that only on an occasional basis, it acquired and sold securities (shares and options issued in the public market) on the public stock market, through brokerage services and a securities trading platform.

(5) That court granted the application, considering that the applicant was not to be regarded as a financial institution, as administration of financial markets was not its principal activity. In assessing that criterion, the first instance court relied on the definition of 'financial institution' laid down in Article 4(1)(26) of Regulation (EU) No 575/2013[6].

(6) The State Revenue Service lodged an appeal to the Regional Administrative Court against that judgment. In its appeal, the State Revenue Service argued that the first instance court had not taken into account the purpose of State aid legislation and the Commission's guidelines for the grant of the aid in question. In this regard, the State Revenue Service referred to the Ministry of Finance's view that the Temporary Framework does not provide for the possibility of providing support

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3 Commission Decision C(2020) 9355 final of 16 December 2020 in case SA.59592 (2020/N) – Latvia – COVID-19: Grants to companies affected by the COVID-19 crisis to ensure the flow of working capital (OJ C 122, 9.4.2021, p. 1).

4 Commission Decisions C(2021) 837 final of 3 February 2021 in case SA.61338 (2021/N) (OJ C 260, 2.7.2021, p. 1), C(2021) 1504 final of 1 March 2021 in case SA.61873 (2021/N) (OJ C 260, 2.7.2021, p. 1), C(2021) 4136 final of June 2021 in case SA.63046 (2021/N) (OJ C 260, 2.7.2021, p. 1), C(2021) 9537 final of 14 December 2021 in case SA.100596 (2021/N) (OJ C 135, 25.3.2022, p. 1) and C(2022) 579 final of 27 January 2022 in case SA.101506 (2022/N) (OJ C 71, 11.2.2022, p. 1).

5 Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6) and C(2021) 8442 (OJ C 473, 24.11.2021, p. 1).

6 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

through separation of activities to credit institutions or financial institutions that have several fields of activity.

2. QUESTIONS FROM THE NATIONAL COURT

(7) In its questions, the Regional Administrative Court raises doubts on whether the grant of aid under the aid scheme to an undertaking whose registered activities include the activities listed in points 2 to 12 or 15 of Annex I to Directive 2013/36/EU[7] is compatible with the applicable rules on State aid. More concretely, the Regional Administrative Court asks the Commission to provide its opinion on the following questions:

'(1) Do the support measures provided for in the Temporary Framework cover undertakings whose registered activity is one of the activities listed in points 2 to 12 or 15 of Annex I to Directive 2013/36/EU, but that is not the principal activity of that undertaking?

(2) If the answer to the previous question were in the affirmative, would it be reasonable to regard as the 'principal activity' the activity of the undertaking with the highest proportion of the total turnover in the tax year?'

3. APPLICABLE PROVISIONS OF EU LAW

(8) In this opinion, the Commission does not pronounce itself on the interpretation of Latvian law, but provides its view on how point 20bis of the Temporary Framework should be interpreted, in light of the applicable Union legislation governing credit and financial institutions.

(9) Point 20bis of the Temporary Framework reads:

'Aid to credit and financial institutions is not to be assessed under this Communication except for: (i) indirect advantages to credit or financial institutions channelling aid in the form of loans or guarantees under sections 3.1 to 3.3 pursuant to the safeguards of section 3.4, and (ii) aid under section 3.10 provided the scheme is not targeting exclusively employees from the financial sector.'

(10) That provision needs to be read in the context of footnote 5 to point 6 of the Temporary Framework, which provides:

'Any measures to support credit institutions or other financial institutions that constitute State aid in the meaning of Article 107(1) TFEU, which fall outside the present Communication or are not covered by Article 107(2)(b) TFEU must be notified to the Commission and shall be assessed under the State aid rules applicable to the banking sector.'

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[7] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

(11) A definition of a 'credit institution' can be found in Article 4(1)(1) of Regulation (EU) No 575/2013 but is not relevant for the case at hand, as it has not been argued that the applicant would qualify as a credit institution.

(12) As regards the notion of a 'financial institution', Article 4(1)(26) of Regulation (EU) No 575/2013 defines it as 'an undertaking other than an institution[8] and other than a pure industrial holding company, **the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU**, including an investment firm, a financial holding company, a mixed financial holding company, an investment holding company, a payment institution within the meaning of Directive (EU) 2015/2366 of the European Parliament and of the Council, and an asset management company, but excluding insurance holding companies and mixed-activity insurance holding companies as defined in points (f) and (g) of Article 212(1) of Directive 2009/138/EC' (emphasis added).

(13) In the same vein, Article 4(1)(14) of Regulation (EU) 2019/2033[9] defines a financial institution as 'an undertaking other than a credit institution or investment firm, and other than a pure industrial holding company, **the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points (2) to (12) and point (15) of Annex I to Directive 2013/36/EU**, including a financial holding company, a mixed financial holding company, an investment holding company, a payment institution within the meaning of Directive (EU) 2015/2366 of the European Parliament and of the Council, and an asset management company, but excluding insurance holding companies and mixed-activity insurance holding companies as defined in point (g) of Article 212(1) of Directive 2009/138/EC of the European Parliament and of the Council' (emphasis added). The definition in that Article 4(1)(14) excludes investment firms from its scope, as those are governed specifically by the provisions of Regulation (EU) 2019/2033.

(14) According to Articles 2(1)(2) and 2(1)(4) of Directive 2014/59/EU governing the recovery and resolution of credit institutions and investment firms, as well as according to Article 3(1)1(15) of Regulation (EU) No 806/2014 introducing the Single Resolution Mechanism[10], the concepts of 'credit institution' and 'financial

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8 An 'institution' is defined by Article 4(1)(3) of that Regulation as 'a credit institution authorised under Article 8 of Directive 2013/36/EU or an undertaking as referred to in Article 8a(3) thereof'. Article 8 of that Directive governs the authorisation of credit institutions. Article 8a(3) of that Directive concerns undertakings referred to in Article 4(1)(1)(b) of Regulation (EU) No 575/2013 that on 24 December 2019 carried out activities as investment firms authorised under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349), and that were required to apply for authorisation in accordance with Article 8 of Directive 2013/36/EU by 27 December 2020. Therefore, the definition of 'financial institution' in question excludes credit institutions from its scope.

9 Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014 (OJ L 314, 5.12.2019, p. 1).

10 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

institution' have the meaning ascribed to them in Article 4(1)(1) and Article 4(1)(26) of Regulation (EU) No 575/2013.

(15) Among the activities listed in points 2 to 12 and 15 of Annex I to Directive 2013/36/EU, point 7 of that Annex encompasses 'trading for own account or for account of customers in any of the following:

(a) money market instruments (cheques, bills, certificates of deposit, etc.);

(b) foreign exchange;

(c) financial futures and options;

(d) exchange and interest-rate instruments;

(e) **transferable securities**' (emphasis added).

4. THE COMMISSION'S OPINION

(16) As a preliminary remark, point 20bis of the Temporary Framework does not contain a definition either of a 'credit institution' or of a 'financial institution'. In line with settled case-law, it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard not only to its wording but also to the context of the provision and the objective pursued by the legislation in question[11].

(17) The Commission's view is that the exclusion of credit and financial institutions from the scope of most parts of the Temporary Framework is due to the fact that those institutions are subject to specific prudential and supervisory requirements. That specificity implies that also State aid to support those institutions must in principle be designed with due regard to the regulatory framework applicable to them. In this regard, the Commission points in particular to the provisions of Directive 2014/59/EU governing the resolution of credit institutions and investment firms. Under Article 32(4)(d) of that Directive, in principle the grant of State aid to preserve or restore the viability, liquidity or solvency of the entities concerned, is a precondition for that entity to be deemed 'failing or likely to fail', which can in turn lead to such entity being subject to resolution action in accordance with Articles 32(1) or 33(1) of that Directive. Within the framework of the Single Resolution Mechanism, the same rule applies (see Article 18(4)(d) and 18(1) of Regulation (EU) No 806/2014).

(18) As stated in footnote 5 to the Temporary Framework, State aid to support credit institutions or other financial institutions, which falls outside that Framework or is not covered by Article 107(2)(b) TFEU must be notified to the Commission and shall be assessed under the State aid rules applicable to the banking sector (i.e. under the rules enumerated in footnote 4 to the Temporary Framework).

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[11] See, *ex multis*, the judgment of the Court of Justice of 24 September 2020, *NMI Technologietransfer*, C-516/19, EU:C:2020:754, paragraph 44.

(19) In that context, the Temporary Framework makes an explicit reference, in points 6 and 7, to the provisions of Directive 2014/59/EU and of Regulation (EU) No 806/2014, and notably to Article 32(4)(d) of the former and Article 18(4)(d) of the latter. Both of those acts define a 'financial institution' by reference to Article 4(1)(26) of Regulation (EU) No 575/2013.

(20) The Commission thus takes the view that the term 'financial institution' used in point 20bis of the Temporary Framework should be given the meaning ascribed to it in the relevant Union legislation governing the regulatory requirements towards financial institutions. The Commission will hence apply, in its interpretation of point 20bis of the Temporary Framework, the definition of a 'financial institution' given in Article 4(1)(26) of Regulation (EU) No 575/2013 (which lays down prudential requirements for credit institutions).

(21) The above-mentioned definition clearly states that only an undertaking 'the principal activity of which is to acquire holdings or to pursue one or more of the activities listed in points 2 to 12 and point 15 of Annex I to Directive 2013/36/EU' qualifies as a financial institution. By referring to the 'principal activity' rather than just to 'activity', that definition leaves no doubt about the intention of the Union legislator to differentiate between the principal activity and any other (secondary, incidental, ancillary) activity. An undertaking that only pursues one or more of the activities listed in points 2 to 12 and 15 of Annex I to Directive 2013/36/EU as its secondary, incidental or ancillary activity, will not be treated as a financial institution under the Union legislation applicable to the pursuit of financial activities. Neither should it, in the Commission's view, be treated as a 'financial institution' within the meaning of point 20bis of the Temporary Framework. Such an undertaking would thus be eligible for aid under the Temporary Framework.

(22) Neither Regulation (EU) No 575/2013 nor Directive 2013/36/EU lay down specific rules on how to identify an undertaking's 'principal activity' and how to distinguish it from its other activities. In this context, the Commission considers that the identification of such principal activity in accordance with statistical classification rules may be a relevant factor. At the Union's level, Regulation (EC) No 1893/2006[12] establishes the NACE Rev. 2 statistical classification of economic activities. The Introductory Guidelines to the NACE Rev. 2 classification[13] define the concepts of 'principal' and 'secondary' activities for the statistical purposes of that classification.

(23) According to paragraph 49 of the Introductory Guidelines, the principal activity of a statistical unit (i.e. an enterprise or group of enterprises) is the activity which contributes most to the total value added of that unit. By contrast, according to paragraph 50 of those Guidelines, a secondary activity is any other activity of the unit, whose outputs are goods or services which are suitable for delivery to third parties. The value added of a secondary activity must be less than that of the

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[12] Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (OJ L 393, 30.12.2006, p. 1).

[13] Eurostat, Methodological Working Papers, NACE Rev. 2, Introductory Guidelines, Chapter 2, in particular, paragraphs 58-66 (the document is available in English at: https://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF).

principal activity, but the principal activity does not necessarily account for 50% or more of the unit's total value added. According to paragraph 58 of those Guidelines, if the unit performs several economic activities other than ancillary activities[14] (as seems to be the case in the case at hand), the principal activity is determined on the basis of the value added associated to each activity.

(24) Value added is the basic concept for determining the classification of a unit according to economic activities. The gross value added is defined as the difference between output and intermediate consumption. In order to determine the principal activity of a unit, the activities carried out by the unit and the corresponding share of value added have to be known. Sometimes it is not possible to obtain the information on value added associated with the different activities carried out, and the activity classification has to be determined by using substitute criteria. Such criteria could be, *inter alia*, the value of sales or turnover of those groups of products falling within each activity. However, as noted in paragraphs 64 and 65 of the Introductory Guidelines, in cases of enterprises engaging in trade and other activities, the trade turnover figures alone might not be the most suitable indicators for the unknown value added share of the trade activity. A better indicator would be the gross margin (difference between the trade turnover and purchases of goods for resale adjusted by changes in stocks).

(25) In conclusion, the Commission's opinion on the two questions raised by the national court is that:

(1) An undertaking that performs one of the activities listed in points 2 to 12 and 15 of Annex I to Directive 2013/36/EU, but not as its principal activity, does not qualify as 'financial institution' within the meaning of point 20bis of the Temporary Framework and can therefore be eligible for aid under that Framework.

(2) For the purposes of that determination, the principal activity of an undertaking should be determined on the basis of the value added associated to that activity, which is generally defined as the difference between output and intermediate consumption. Although the value of sales or turnover can be a substitute criterion for the value added, according to the Introductory Guidelines to the NACE Rev. 2 statistical classification of economic activities, a more reasonable indicator would be the gross margin (difference between the trade turnover and purchases of goods for resale adjusted by changes in stocks).

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[14] Ancillary activities are those that exist solely to support the principal or secondary economic activities of a unit, by providing goods or services for the use of that unit only, such as accounting, transportation, storage, purchasing, sales promotion, repair and maintenance.

Finally, pursuant to point 129 of the Enforcement Notice, the Commission may also make its opinions publically available on its website.

For this reason, the Regional Administrative Court is requested to give its consent to the publication of the opinion at hand. Should the opinion contain information which is considered confidential including professional secrecy and data protected by the General Data Protection Regulation[15] ('confidential information'), the Regional Administrative Court is asked to provide the Commission services with a non-confidential version thereof or indicate which parts of the opinion would contain confidential information. The Commission would be grateful if the Regional Administrative Court could reply at its earliest convenience at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu, preferably within 2 months after the date of this opinion. In case of objections, the Court is kindly asked to give the reasons for its refusal.

To complement the envisaged publication of the opinion, the Commission also intends to publish the full judgment of the Regional Administrative Court when it is given, cleared from confidential information, on the Commission's website, or to provide a link to the national website where that judgment is published, in order to give broader knowledge to the public and to share good practices with other jurisdictions. To this end, the Commission asks the Regional Administrative Court to provide it with the judgement or with the link to the judgment if it has been published on a national website, at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu. If national law does not foresee such publication, however, the Regional Administrative Court is kindly requested to inform the Commission services thereof, in which case Commission will only publish the opinion at hand.

I trust that the clarifications provided above will be helpful in the resolution of the case at hand.

With kind regards,

[15] Regulation 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).