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ARTICLE

Attracting Multinational Tech-Companies Through Environmental Tax Incentives

Yvette Lind*

In this contribution, Sweden´s favourable tax regime which awards a significantly reduced electricity tax rate to data centres is examined. The findings of the paper are applicable to other jurisdictions, such as Denmark and Finland, as they are subject to similar conditions. Data centres are, when subject to the tax regime, subject to less than 2% of the normal electricity tax tariff. Multinational tech-giants benefit heavily from it while many domestic companies (colocation centres) are excluded due to its technical design and attached administrative case law. Initial calculations indicate there is tax savings of more than SEK 500 million (circa Euro 50 million) on an annual basis. Therefore, the tax regime acts as an international tax competition tool through its fiscal state aid function while, at the same time, eroding the tax bases and business life of northern Sweden. It does not initially appear to infringe on EU state aid rules nor the principle of non-discrimination. This Illustrates that there is still some margin of freedom for individual Member States to compete through tax measures. Additionally, tax policy objectives of the tax regime are considered and analysed. In particular, the impact it has had on not only international tax competition but also the economy of local municipalities, local business life, and progressive climate goals. A critical commentary focusing on sustainability is applied throughout the paper.

Keywords: Multinational enterprises, tech-companies, tax incentives, energy taxation, international tax competition.

1 Background and research approach

The digital market demands a greater number of reliable power supplies for data centres as digital platforms continue expanding. Studies indicate that data centres used 1% of world's energy consumption in 2019, and forecasts expect the energy consumption to drastically increase over the next couple of years.[1] The power density of data centers has more than doubled over the last few years, allowing an increase in the data treatment capacity within the same space while the availability of electric power is becoming increasingly constrained in metropolitan areas. More often, it becomes unrealistic to increase the power supply in larger cities as the power distribution infrastructure is already pushed to its limits.

Therefore, most of the new hyper scale data centres are built in cold and remote areas where free cooling is available. The north of Sweden has proven to be a highly strategic location for such data centres. This is not only because of the cold climate and rural remoteness but also due to the existence of renewable energy sources that primarily stem from wind and water. Over the past couple of years, Sweden has managed to attract multinational tech-giants such as Facebook, Microsoft, Amazon, and Netflix to build their data centres in Sweden. Most noticeable was Facebook´s decision to choose Luleå, a northern city close to the Finish border, as the location for its first European data centre with the capacity to serve more than 800 million Facebook users.

Sweden´s preferential tax treatment of data centres, in combination with very low pricing of electricity and a low property tax,[2] may also have influenced the great interest in establishing data centres within the Swedish jurisdiction. As of 2017, Sweden has offered a reduced electricity tariff to data centres resulting in a reduction of electricity taxation by over 98% compared to the normal rate set

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1 One of the most prevalent studies, and most recent ones, was done by IEA (International Energy Agency): G. Kamiya, *Data Centres and Data Transmission Networks*, Tracking report by IEA (June 2020), https://www.iea.org/reports/data-centres-and-data-transmission-networks (accessed 14 Feb. 2021).

2 The property tax will have an effect on the operating costs of the data centre, and a low or non-existent property tax will naturally reduce the costs for the company and, as a result, have an impact on their business strategy when choosing locations. The property tax is deductible as an operating cost for commercial properties. The current tax rate is 1% of the property value. Regulated in SE: Income Tax Act, Ch. 16 §17 SFS 1999:1229.

forth in the Swedish Electricity Tax Act.[3] Later, in September 2018, the Swedish tax Agency clarified the application of the tax reduction. Supporting themselves on EU state aid rules, the tax agency argued that only taxpayers that were considered as end-consumers of the electricity could take part of the reduction and rebate.[4] As a result, many data centres subject to so called colocation[5] were found to be ineligible to benefit from the tax regime while data centres owned and operated by one single company, such as Facebook, Microsoft, or Google, may still utilize the favourable tax regime.

The aim of this study is to describe and analyse the Swedish tax reduction from two main lines of inquiry: (1) an EU (tax) law perspective where the tax regimes compliance with EU law is investigated, and (2) a sustainability discussion in which the tax regime´s impact on the coherence of the Swedish legal system, and the Swedish climate agenda is examined. The first line of inquiry is done through a traditional tax technical study based upon Swedish legal sources (legislation, preparatory works, and administrative case law) and EU law (fundamental freedoms and state aid provisions). Emphasis is placed upon exclusion criteria that, in practise, disadvantage domestic data centre companies. The administrative clarification that excludes colocation centres compared to wholly owned ones would be one such example. In practise, such exclusion criteria result in a more inferior situation for domestic undertakings compared to multinational ones as the latter owns their own data centres while the former consists of smaller domestic actors providing their facilities as services to other local consumers. Based upon the results of the study, the second line of inquiry is done through a tax policy discussion in which differing policy objectives are discussed and measured against each other in this context. These policy objectives include international tax competition,[6] tax neutrality, tax sustainability, support of domestic businesses, and environmental priorities.

This article initially provides a brief introduction to EU state aid provisions and fiscal state aid in Chapter 2 as the core of the paper is to analyse the Swedish tax regime from an EU law perspective. The author does not find it necessary to include the basics of the fundamental freedoms or EU tax law in general as the audience is knowledgeable in these areas. Chapter 4 later links into this reasoning as it provides a concluding analysis with reference to EU law. Chapter 3 provides an extensive exploration of the Swedish Electricity Tax Act and its impact on differing taxpayers primarily through the examples of domestic undertakings compared to multinational ones as a means of analysing the tax regimes' cross-border effects. The Swedish political discourse, through an extensive amount of preparatory works, is applied as a red thread to provide a more comprehensive understanding of the motives behind the tax regime, Sweden ´s current ambition to attract multinational enterprises to its jurisdiction, and its failure to ensure a coherent environmental strategy despite its ambitious climate goals and green government. Chapter 5 summarizes the discussions of the paper and makes some brief policy recommendations on how to best move forward with the Swedish strategy.

2 Brief introduction to EU state aid provisions and state aid through tax measures

The intervention through state resources in market competition is, as a rule, prohibited by EU competition law together with adjacent EU state aid provisions. This prohibition aims to create a situation in which everyone has the same chance of succeeding between undertakings and includes tax measures as these are also considered to have the potential to distort competition neutrality and, subsequently, the trade between Member States.[7] Consequently, a tax measure that results in favourable tax treatment on a selective basis constitutes so called fiscal state aid. The form of the tax measure in question is not important in the context of state aid; instead, it is the factual economic effect of the measure that is considered to be relevant for the compatibility legal analysis.[8] Therefore, fiscal state aid comes in many varieties, e.g., tax subsidies, tax incentives, and tax exemptions alternatively as taxes that apply different tax rates to equivalent tax subjects or sources of income. Direct taxes, tax relief, and tax exemptions are regarded as a tax revenue loss compared to the case if the tax had been collected. Such a loss in state resources may constitutes state aid.[9] EU state aid rules, therefore, ensure that individual Member States do not favour undertakings as a part of ongoing (harmful) tax competition between

Notes

[3] SE: Swedish Electricity Tax Act (1994:1776).

[4] SE: Skatteverket Dnr: 202 321717–18/111, *Den som förfogar över den utrustning i datorhallen som elen förbrukas i ska anses förbruka elen.*

[5] Colocation is the placement of enterprise-owned computers, storage, and networking assets in a third-party leased facility. Colocation facilities typically offer scalability, continuity, and security for applications, data, and systems, removing the need for companies to build, staff, and manage their own in-house server rooms or data centres.

[6] Further similar discussions have been done by others but in differing contexts. For instance, Schön compared company law and tax law when regulating competition in: W. Schön, *Playing Different Games? Regulatory Competition in Tax and Company Law Compared*, 42(2) Common Mkt. L. Rev 331–335 (2005).

[7] *See* for instance: ECJ 2 July 1974, Case C-173/73, *Italy v. Commission*, ECLI:EU:C:1974:71. For a more comprehensive description of the development of EU competition law and EU state aid law and their influence on tax matters, *see* W. W. Bratton and J. A. McCahery, *Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation*, 38(3) Common Mkt. L. Rev. 677–718 (2001).

[8] ECJ 6 Oct. 2015, Case C-66/14, *Finanzamt Linz*, ECLI:EU:C:2015:242.

[9] *See* for instance: ECJ 3 July 2003,Joined Cases C-83/01 P, C-93/01 P, C-94/01, *P Chronopost SA, La Poste and French Republic v. Union française de l'express (Ufex) and Others*, ECLI:EU:C:2003:388.

Member States through a more favourable tax treatment aimed at attracting foreign companies or foreign direct investment (FDI).[10]

In short, the main EU state aid provisions are located in Articles 107–109 Treaty of the Functioning of the European Union (TFEU) of which Article 107 is the point of departure to set its objectives. Article 107(1) TFEU prohibits state aid as a general rule and is supplemented by Article 107(2) which conditions what state aid *shall* be allowed while Article 107(3) TFEU conditions state aid that *may* be allowed. The commission may not have been assigned specific authority to determine state aid in itself[11] as its authority is primarily to determine *if* proposed (domestic) aid is compatible with the internal market.[12] Nonetheless, the commission plays a central part both legally and politically that is especially noticeable in state aid investigation focusing on multinationals and international tax avoidance.

Finally, fiscal state aid measures most commonly result in the Member State choosing *not* to tax to its fullest extent rather than awarding a direct financial benefit as in the case of general state aid. Both the case law from the Court of Justice of the European Union (CJEU) and substantial parts of tax scholarship have generally turned to the fundamental freedoms, specifically the principle of non-discrimination, in an effort to resolve inherent difficulties in finding a benchmark when applying the selectivity test. When dealing with fiscal state aid, there is a noticeable interaction between the fundamental freedoms and state aid provisions.[13]

3 The Swedish electricity tax and its preferential tax treatment of data centres

3.1 *Tax Technical Description of the Swedish Electricity Tax and the Preferential Tax Regime*

The Swedish electricity tax (SET) applies to the energy sector which, in practise, results in a taxation of the consumption of electricity. The tax is calculated per kWh and the same rate applies to all consumption regardless of the primary energy source from which the electricity is generated. Stated differently, renewable energy sources are treated equal to conventional ones such as power planet energy. The tax rate is presently (2020) öre[14] 35,3/kWh (öre 44,13/kWh including VAT).[15] As is standard within most systems, electricity exports are not subject to the Swedish tax but may (naturally) be subject to electricity taxes in the import state.

There are some exemptions to the general tax rate that result in lower taxation, e.g., the residential and commercial sectors in certain municipalities in Northern Sweden are subject to a lower taxation than those in other parts of the country (commonly referred to as Norrlandsskatten).[16] This reduced tax rate for those in the north will be further referred to in this article. However, for now, the present focus is on the reduced tax rate for data centres which was introduced in 2016.[17] As a result of the Swedish tax rebate, data centres pay öre 0,5/kWh (öre 0,63/kWh including VAT)[18] instead of above-mentioned prices. This affords data centres the enjoyment of a tax reduction of more than 98% compared to the consumers or companies in the general sector.

The Swedish electricity tax defines a data centre as:

> *a facility where a trader, who mainly carries out information service activities, information processing or rental of server space and related services, carries out such activities and whose total installed capacity amounts to at least 0,5 megawatts.*[19]

The above-mentioned floor was implemented as a result of discussions during the legislative process. [20] A minimum electricity capacity of the business itself would arguably compel the company to have the data centre as their primary business rather than a part of the main business as a tax planning scheme. In practise, it is required for an installed electricity effect of at least 0,5 mW in order to qualify as a data centre and the tax regime. Later, in 2018, the floor for the 'extensive energy consumption' criterion was lowered from a previous 0,5 mW to 0,1 mW in installed electricity effect.

Notes

[10] W. Schön, *Taxation and State Aid Law in the European Union*, 36(5) Common Mkt. L. Rev. 911–936 (1999).

[11] *See* for instance: ECJ 9 June 2011, Joined cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere' and Others v. Commission*, ECLI:EU:C:2011:368.

[12] Article 108(3) TFEU.

[13] For examples of this interaction *see* for instance: Schön, *supra* n. 10; S. Buriak & I. Lazarov, *Between State Aid and the Fundamental Freedoms: The Arm's Length Principle and EU Law*, 56(4) Common Mkt. L. Rev. 905–948 (2019).

[14] The Swedish currency is SEK (kronor). There is 100 öre per SEK. 1 SEK is circa 0,099 Euro and 1 öre is circa 0,00099 Euro. Öre is used instead of SEK as öre is used in the Swedish electricity act. Most likely because of simplicity and clarity.

[15] Circa 0,034 Euro/kWH excluding VAT and 0,043 Euro/kWh including VAT.

[16] SE: Swedish Electricity Tax Act (1994:1776), Ch. 11, §9, para. 1 no. 8 and Ch. 11, §4.

[17] SE: Swedish Electricity Tax Act (1994:1776), Ch. 11, §9, para. 1 no. 7.

[18] Circa Euro 0,005/kWh excluding VAT and Euro 0,006/including VAT.

[19] SE: Swedish Electricity Tax Act (1994:1776),Ch. 11, §10.

[20] SE: Lagrådsremiss, *Vissa frågor på elskatteområdet* (9 June 2016), at 95.

In reality, a company that wishes to utilize the tax regime needs to register as a voluntary taxpayer (frivillig skattskyldig) with the tax agency in order to be eligible for repayment of the excess tax (difference between ordinary tariff and the reduced one).[21] The terminology is itself somewhat confusing. To clarify, the electricity tax is normally added directly to the electricity bill by the company providing the electricity. This facilitates the administration and tax collection. This would be why the company wishing to enjoy the tax rebate needs to register as a voluntary taxpayer as it would otherwise not be possible to administer the repayment of the tax.

Further, the SET proposed an assumption of 'energy consumption in an extensive capacity' as a second qualification criteria which was initially assessed to 20 gWh (1 000 000 kWh) on an annual basis. At the present time, this assumption has been lowered to 10 gWh on an annual basis.[22]

Additionally, the company needs to be liable to pay a minimum of SEK 12 000 in electricity taxes in the fiscal year. The tax rebate only applies to the sum exceeding this threshold. This is a requirement that was established so that companies would not feel tempted to tax plan and use more electricity than needed simply to qualify for the tax regime. By implementing a threshold such as this one, there is an effective reduction in the number of taxpayers that qualify for the rebate. The Swedish government argued that this qualification amount is aimed to ease the administrative burden for the Swedish tax agency as there will be an excess of administration surrounding the favourable tax regime (registration of taxpayers, investigation into the fulfilment of the requirements, repayment of taxes, etc.). In reality, this is a requirement that favours significantly larger actors such as multinational tech-companies compared to smaller domestic undertakings.

Of interest is the government´s argumentation of restricting eligibility for the tax reduction to a company's total electricity consumption and not parts of it.[23] The government, once again, made the argument that this would place an excessive administrative burden on the tax agency as they would need to go through the total electricity consumption and subsequently separate differing parts of the consumption to examine whether the conditions for the refund were met. This may sound practical and reasonable while it factually acts as an efficient way of excluding those who are consumers renting or acquiring services from colocation centres, e.g., banks and smaller companies. In the legislative text, this does not seem to have been implemented, and this will be discussed further in chapter 3.3.

Finally, to ensure compliance with EU state aid provisions, there was an exclusion of two groups of aid recipients:

1. Those in financial difficulty, and
2. companies subject to payment claims on the basis of a previous EU Commission decision declaring aid illegal and incompatible with the internal market.

In conclusion, the Swedish legislator paid specific attention to ensuring that the tax reduction would concur with EU state aid provisions. To clarify, the reduced tax rate complies with the minimum requirement established in the EU Energy Taxation Directive (ETD)[24] (öre 0,5/kWh in 2020). This is enforced by the government recently announcing that the minimum rate was raised to öre 0,6/kWh as of the start of 2021[25] in accordance with the 2021 changes that were planned to the ETD.[26] Moreover, certain categories of receivers are excluded, e.g., those in debt and companies subject to payment claims on the basis of previous EU state aid decisions. While many of these qualification criteria are done out of practicality and EU state aid compliance, they are effectively minimizing the group of companies that are eligible for the more favourable tax reduction. The corresponding selectivity criteria analysis is performed in Chapter 4 which concerns the analysis of the tax regimes' compatibility with EU law.

3.2 *Political Motivations and Tax Policy Considerations for the Preferential Tax Treatment of Data Centres*

Initially, the Swedish government ordered a preliminary consequence analysis during the legislative process. In this analysis, emphasis was placed on tax neutrality, (international) competition, public finance, tax redistribution between aid receivers, and the impact on energy efficiency goals.[27] As mentioned, the tax compliance with EU state aid provisions was expressed to be of particular importance.[28]

Notes

[21] *Ibid.*, at 45ff.

[22] SE: Swedish Electricity Tax Act (1994:1776), Ch. 11, §6 para. 1.

[23] *Supra* n. 20, at 46.

[24] Council Directive 2003/96/EC of 27 Oct. 2003 restructuring the community framework for the taxation of energy products and electricity, OJ L 283/51 (31 Oct. 2003).

[25] The motivation of the increased tax rate was motivated by Sweden complying with the minimum levels sets forth in the EU energy tax directive and may be fund in: SE: Skatteutskottets yttrande 2020/21:SkUly *Skattefrågor I budgetpropositionen för 2021*, at 90f.

[26] SE: Fi2020/02949/S2 *Höjd skattenivå för sådan förbrukning av elektrisk kraft som omfattas av minimiskattenivån i energiskattedirektivet.*

[27] SE: SOU 2015:87 Energiskatt på el – en översyn av nuvarande systemet, at 352.

[28] *Ibid.*, at 352.

In the preparatory works, the government argued that the decision to offer a tax reduction to data centres was aimed at placing these specific companies on an equal basis with the traditional industrial sector within Sweden and subsequently lay the foundation for a new tech industry.[29] Consequently, there was an ambition to establish tax neutrality between the traditional industrial sector (mainly the steel and forest industries) and the new tech-industry as the former already enjoyed an identical electricity tax reduction. The traditional industry sector in Sweden benefits from several tax reductions, and the steel industry in particular is heavily promoted compared to other sectors within Swedish business life as it is subject to only the minimum level of electricity taxation and completely exempted from co2 taxation. The government argued that, with this new tax reduction, the two industries will be placed on an equal footing resulting in tax neutrality and an ability to compete on similar terms. This reasoning is, in this author's opinion, flawed. The steel industry is not nor should it be the benchmark for competition nor taxation. It is quite the opposite. It is an extreme case and, instead of arguing that other industries should be subject to the same conditions, the competition advantage that is awarded to the steel industry should be acknowledged. Such a discussion should also probably ensue as to whether this advantage should be mitigated or completely removed.

Further, it was expressed that this new tech-industry was expected to create new job opportunities which may be considered slightly contradictory as data centres employ a significantly smaller workforce than the traditional industry sector. For instance, a steel manufacturer that consumes the same amount of electricity as a data centre will have a considerably larger workforce compared to a data centre. Nonetheless, the government predicted that, for instance, Facebook´s data centre would generate 260 new permanent employment opportunities and approximately 300 temporary ones as the data centre was built.[30] In hindsight, this has not been realized. Municipalities in the north of Sweden have, after Facebook opening its data centre in Luleå, stressed that the data centre in question did not result in a wave of new employment. Instead, the news media have reported that merely fifty-six people received employment at the Facebook facility.[31] As a result, these municipalities are suffering tax revenue losses stemming from the tax rebate while not being able to collect income taxes from employees or the data centre itself as it is not fulfilling the requirements for a permanent establishment.[32] Already financially weak municipalities are suffering while wealthy corporations are receiving a more favourable tax treatment. This is an outcome that was both predicted and addressed by several external actors during the legislative process but ignored by the government.[33]

Moreover, the government´s consequence analysis did indicate considerable revenues losses with the implementation of the data centre tax regime, yet it was argued that these losses would be mitigated by a decrease of the northern tax reduction (Norrlandsskatten). By increasing the electricity taxation on residents in the north of Sweden (currently enjoying a partial tax reduction due to longer winters and harsher climate compared to other parts of Sweden), the analysis indicated an increase in overall revenues.[34] This strategy has two major flaws:

1. The tax increase has thus far not been realized resulting in an overall tax loss instead of the predicted and argued financial gains.
2. Placing an increased tax burden on the residents of the north would only be further detrimental for the northern region and its municipalities. Not only would they suffer tax losses due to the preferential tax treatment of the data centres; they would also experience an additional tax burden through increased energy taxation. To be able to attract and financially subsidize multinational tech-companies while penalizing individual taxpayers in a region already suffering from higher unemployment and lower incomes compared to the national average does not result in a fair or sustainable tax policy.

Furthermore, it was argued that the companies that would be eligible to receive the tax relief would do so because they belong to industries that are indeed internationally competitive and, to a large extent, use electric

Notes

[29] *Supra* n. 20.

[30] *Ibid.*, at 66–67.

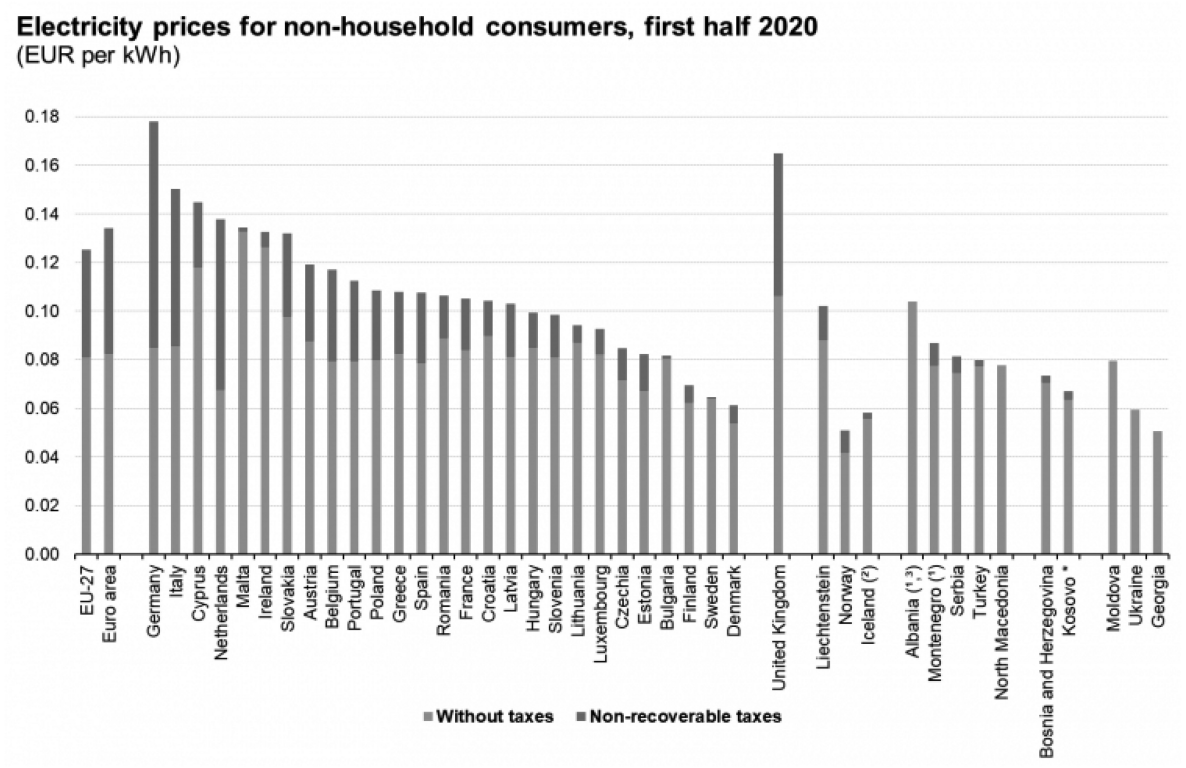
[31] J. Ekström, *Facebook fick 140 miljoner av svenska staten – ledde till 56 jobb*, Breakit (17 Aug. 2020), https://www.breakit.se/artikel/25901/facebook-fick-140-miljoner-av-svenska-staten-ledde-till-56-jobb (accessed 29 Nov. 2020).

[32] The author does not elaborate further in the question on PE in connection to data centres other than stating that, when considering present legal situation in Sweden, data centres do not as a general rule constitute PE. Permanent establishment (fast driftställe in Swedish) is regulated in SE: Income Tax Act, Ch. 2, §29 (1999:1229). A data centre will need to be considered as the 'core business for the corporation' for the requirements for PE to be fulfilled. Furthermore, according to the Swedish Tax Agency, a PE that has no staff and consists of only one server cannot be considered to have any significant people functions that can incur risks or decide on the use of the server. These significant people functions, and associated income, should instead be considered to go to the head office. However, the Swedish Tax Agency considers that the profit for the permanent establishment should reflect an arm's length compensation for the financial ownership of the server. According to the Swedish Tax Agency, the actual use of the server can be an alternative for allocating tangible assets. For more information on this discussion *see* SE: Skatteverkets ställningstagande dnr 202 493137–18/111.

[33] *Supra* n. 20, at 66.

[34] *Supra* n. 27, at 354ff.

power in their production processes.[35] Consequently, the design of the tax reduction (qualifications for receiving aid, minimum threshold for electricity consumption, etc.) was designed in accordance with the needs of larger and more energy-intense corporations. The argument that other countries already have similar favourable tax regimes in place was proposed and, therefore, low taxation was necessary to be internationally competitive.[36] Additionally, to be fair, it is true that, when reviewing neighbouring Nordic states, most of them have applied the strategy of lowering electricity taxes and attracting multinational tech-companies. Denmark and Finland are prominent examples of this. When reviewing Eurostat statistics on energy pricing for non-household consumption, it can easily be seen that the Swedish electricity pricing is currently among the lowest in Europe. This low pricing in combination with the tax reduction, results in the lowest possible tax burden in accordance with the EDT and EU tax rules. This affords Sweden and its Nordic neighbours with an exceptionally competitive electricity tax.[37]



In conclusion, the Swedish government implemented a more favourable tax regime for the tech-industry with the official ambition to infuse tax neutrality and place the two industries on an equal footing as a way of incentivising growth in the tech-industry. However, there are several arguments that contradict the concept of these two industries being equals. In addition to the arguments already put forth, there is also a difference in mobility between corporations that results in corporate tax revenues from the tech-industry for which tech-giants are tax residents in other countries. They are untaxed by Sweden unlike the profits of traditional and less mobile industrial companies. Furthermore, the traditional industry has a significantly higher number of employees that subsequently generate additional tax revenues from both income taxation and pay-roll taxes (social security contributions) in addition to their corporate taxes. A critic could argue that Sweden is strengthening its international tax competitiveness on the expense of its local business life and the economy of its municipalities.

Notes

[35] *Supra* n. 20, at 47.

[36] *Ibid.*, at 69.

[37] Eurostat, *Electricity Prices Statistics for 2020* (2020), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Electricity_price_statistics&oldid=363293#Electricity_prices_for_non-household_consumers (accessed 29 Nov. 2020).

3.3 *The Swedish Tax Agency´s Exclusion of Colocation Centres*

In 2018, the Swedish tax agency issued a statement that acts as administrative case law due to the necessity to clarify the application of the tax rebate.[38] At the core of it was the question of who was to be considered as the factual aid beneficiary of the tax regime. Stated otherwise, it was wondered who is, *in practice*, consuming the electricity.

In the opinion of the Swedish tax agency, only those who possess the equipment for which the electricity is consumed can be considered as those who, in practice, consume the electricity. Therefore, a company renting space in a data centre is the end-consumer and the entity that is eligible to apply for the tax regime, clarifying that the tax regime would only be applicable to the end-consumer instead of, as had initially been the case, allowing the owner of the data centre to apply for the lower taxation through the tax rebate. Effectively, this does not allow the colocation centres themselves to take part of the tax regime with its lower taxation.

The tax agency stated that there may very well be several companies that have equipment in the data centre in which the electricity is consumed. This assessment facilitates several companies being considered electricity consumers in the same data centre and, as a result, being eligible to apply for the tax rebate. For example, one company can be considered to consume the electricity that is used for operating fans and cooling systems while, at the same time, additional companies are considered to consume the electricity running individual servers.

In practise, the clarification had the following outcomes:

> Example 1: A data centre company rents out space in its facility to a banking company that stores data in its own server equipment in the data centre. In this case, it is the banking company that is considered to consume the electricity in the server equipment. The same applies if the banking company leases the server equipment from the data center company. This means that it is the banking company that must meet the requirements imposed on beneficiaries for the banking company to be able to receive the tax rebate. In assessing whether the data centre company itself is expected to consume enough electricity to be approved as a voluntary taxpayer, the consumption in this server equipment cannot be considered. Instead, the consumption is attributed to the banking company.
>
> Example 2: A data centre company stores data in its own server equipment on behalf of a banking company. In this case, it is the data centre company that is considered to consume the electricity in the server equipment. The same principle applies if the data centre company rents server equipment from someone else. This means that it is the data centre company that must meet the requirements imposed on beneficiaries for the company to be able to receive the tax rebate. Consumption of this server equipment may be considered when assessing whether the data centre company is expected to consume sufficient electricity to be approved as a voluntary taxpayer.

As a result, several individual customers/tenants of colocation centres will need to register as voluntary taxpayers and apply for the tax rebate and, by doing so, individually fulfil the qualifying criteria:

1. Passing the electricity taxation threshold of SEK 12 000/year in addition to having these electricity costs at a facility that fulfils the requirements for data centres[39]
2. Not being one of the two excluded groups of aid receivers (in financial difficulty or subject to repayment of previous illegal state aid)

Affluent corporations such as Facebook, Google, and Amazon were unaffected by the clarification as they operate their own data centres. However, domestic data centres for which their business plan was to offer their services to other (local) companies found themselves severely affected. Several data centres had to close down their businesses as they could not afford paying the normal tax rate compared to the preferential tax regime to which they had previously been subject (less than 2% of the normal electricity taxation). Neither could their customers, the end-consumers, enjoy the preferential tax regime as they did not fulfil the requirements, i.e., passing the SEK 12 000 threshold.

Administratively, the clarification and its subsequent changes places the burden of proof for the electricity usage on the end-consumers when they are applying for the tax regime. It is a burden that is difficult to comply with as few data centres currently retain individual electricity records for their customers. Additionally, it will place an additional administrative burden on the tax agency as it will now have to administer 1400–1500 applications compared to a previous number of fifty. This is contradictory to the many arguments initially put forward by the government when proposing the favourable tax regime.

The previously described discussion concerning the legislative process should be noted in this context. The Swedish government discussed the option of restricting

Notes

[38] *Supra* n. 4.

[39] SE: Swedish Electricity Tax Act (1994:1776), Ch. 11, §14.

eligibility for the tax regime in accordance with the aid receiver's total electricity consumption.[40] This is a restriction that would have excluded those that are leasing or acquiring services from colocation centres, e.g., banks and smaller companies. The clarification from the tax agency results in a differing application of the tax regime as only end-consumers are eligible to apply for the tax regime., When doing so, they specifically involve the customers of colocation centres rather than the owners of them. Additionally, these customers will have to substantiate what parts of their electricity costs are directly linked to the data centre activity.

In conclusion, the administrative case law issued by the Swedish tax agency clarifies who is to be considered as the actual state aid beneficiary as a precautionary measure, ensuring that the tax regime remains compliant to EU state aid provisions. This may very well be reasonable especially when considering that Swedish environmental taxes have historically been, in many cases, considered incompatible with EU state aid provisions, e.g., the biofuel production tax incentive.[41] In practise, the clarification results in a delimitation of state aid receivers as data centres that were previously eligible are no longer so as an outcome of the end-consumer requirement. Customers who are now eligible to apply for the rebate, instead of the colocation data centres themselves, are excluded in some cases as their electricity consumption is too small to cross the SEK 12 000/year threshold.

3.4 *Preliminary Calculations on Tax Savings for Data Centres*

Calculating the energy consumption and subsequent electricity taxation of data centres is a complex matter for several reasons. Initially, the energy consumption of individual companies applying for the tax regime is not made public in Sweden. Furthermore, part of the consumed energy can be redirected and reused, e.g., excess heating from the cooling is redirected to energy systems that heat private housing within neighbouring municipalities, etc. Therefore, statistics taken from a report from the Confederation of Swedish Enterprise (Svenskt näringsliv) is used as a tool when calculating potential tax savings.[42]

Based upon statistics from 2013, the report states that the maximum capacity of installed data centres at the time had the potential to consume 1,3 tWh (1 300 000 000 kWh)[43] on an annual basis. Further, the Royal Swedish Academy of Engineering Sciences assesses that these data centres will be able to consume 10 tWh on an annual basis in 2045.[44] It should be noted that these estimations are based upon what was applied for and not what was actually consumed. As the latter is not public record, the former will have to suffice. Nevertheless, it should be stressed that it is very difficult to make any exact calculations due to above mentioned circumstances. The same issues and critique have often been highlighted when attempting to calculate potential tax revenues or tax losses in connection to ongoing developments at OECD/G20 and EU level.

The statistics from 2013 are most likely significantly lower than present consumption as not only new data centres have been established since then but also as there has been a significant increase in digital consumption. Yet, regardless of circumstances, these older statistics are used for the following tax calculation and, as they are logically lower than the present consumption, they do not result in overestimated results.

Had these 1,3 tWh (maximal annual consumption of data centres in Sweden in 2013) been subject to the normal electricity tax rate of 2020, it would have resulted in a tax burden corresponding to SEK 573 690 000 (including VAT). Yet, with the tax reduction, the data centres in question will only be subject to a taxation of SEK 8 190 000 (including VAT).

In conclusion, the tax reduction results in revenue losses in the range of SEK 500 million (circa Euro 50 million) on an annual basis even when making cautionary calculations. The data centres that are primarily gaining from this tax reduction are not owned by domestic companies as was described in the previous section. On the contrary, those who have profited the most from this favourable tax treatment are multinational tech-giants. This is feasibly a reason why so many of them (Facebook, Amazon, Google, etc.) have decided to establish their data centres in Sweden.

Notes

[40] *Supra* n. 20, at 46.

[41] *See* State aid SA.48069 (2017/N) – Sweden – Tax reductions for pure and high-blended liquid biofuels, OJ C 380/1 (10 Nov. 2017). Sweden has exempted liquid biofuels from energy and CO⊠ taxation since 2002 under EU state aid rules. The reason for the tax exemption measure was to increase the use of biofuels and to reduce the use of fossil fuels in transport and the Commission investigated the measures under EU state aid rules. The European Commission has granted the continuation of tax exemption measures for biofuels in Sweden up until 31 Dec. 2021 on the basis that the tax exemptions are important for stimulating the production and consumption of domestic and imported biofuels, without unduly distorting competition in the EU. Further, the scheme has also been deemed to assist both Sweden and the EU to deliver on renewables and CO⊠ targets. The exemption can only be granted when operators demonstrate compliance with sustainability criteria as required by the revised Renewable Energy Directive.

[42] Svenskt Näringsliv, *Högre elanvändning år 2045. Samhällsutvecklingen och klimatomställningen kräver mer el* (19 Aug. 2019), https://www.svensktnaringsliv.se/bilder_och_dokument/wth54g_hogre-elanvandning-2045pdf_1138079.html/Hgre+elanvndning+2045.pdf (accessed 28 Nov. 2020).

[43] Based upon an installed effect of 150 mW.

[44] Kungliga Ingenjörs Vetenskaps Akademin, *Framtidens el – så påverkas klimat och miljö – en delrapport* (18 Apr. 2016), https://www.iva.se/publicerat/sveriges-framtida-elproduktion–sa-paverkas-klimat-och-miljo–en-delrapport/ (accessed 28 Nov. 2020).

The author has also identified a consequence which has been left out of the discussions during both the legislative process and the administrative case law set forth by the Swedish tax agency. There is no time limitation attached to the tax regime. Taxpayers are able to utilize this favourable, and financially rewarding, tax measure for as long as they fulfil the requirements attached to energy consumption and taxpayment threshold given, naturally, that the legislation is still in force. Tax rates are generally updated annually and given that there is the possibility for an increase of the tax rate alternately the integration of a time limitation in the legislative act this could mitigate or remove the problem. When considering present legislation, in the case of multinationals, this results in an indefinite favourable tax treatment. If taking into consideration the above-described revenue losses to the Swedish state, in combination with the impact these data centres and the energy consumption linked to them has on the environment, the absence of a time limitation should have been given some consideration by either the government or the tax agency at some stage.

4 Initial tax analysis of the tax reduction from an EU law perspective

Individual Member States are tax sovereign, yet their tax measures must still comply with EU law; in this case, the fundamental freedoms and EU state aid provisions. As a result of the application of these two legal frameworks, a preferential tax measure may fall into three different types of situations of which the legal outcome differs: [45]

1. A tax measure can result in an obstacle to free movement while, at the same time, comply with state aid rules. Stated differently, the tax measure may result in a more beneficial treatment of the domestic tax subject compared to foreign tax subjects yet without being considered as selective aid.[46]
2. A reversed situation may arise as a tax measure can be considered non-discriminatory while, at the same time, being regarded as a selective tax measure. An example would be a tax reduction for both domestic and foreign actors who produce specific goods. There is no differentiation between actors, hence no discrimination, yet the favourable tax treatment of a specific sector limits market competition and, therefore, risks being considered a selective advantage.
3. A tax measure may also be considered as an obstacle to free movement while, at the same time, being considered a selective tax measure.

In this case, foreign and domestic tax subjects are taxed in accordance with the same rules and standards. There is no separation based upon nationality nor is there any hidden discrimination that results in a less advantageous treatment of foreign tax subjects. On the contrary, it could be argued that foreign tax subjects are factually treated in a more preferable position than domestic ones in this case considering the factual outcome of the end-consumer condition that disadvantages (smaller) local companies.

The fundamental freedoms do not prohibit a Member State from treating a foreign tax subject more favourably than one that is domestic. It is only in the case of a reversed situation when domestic companies are receiving a more preferential tax treatment compared to foreign ones that this violates the principle of non-discrimination. Therefore, EU state aid rules supplement the fundamental freedoms in order for individual Member States to not disturb the internal market through international tax competition measures arising from providing foreign tax subjects with a more beneficial tax treatment.

A tax reduction normally confers a selective advantage unless it is justified by the logic of the tax, a regulated exemption through either one of the EU regulations or otherwise with the support of Article 107(3) TFEU. EU state aid rules are applicable as the cumulative criteria of Article 107(1) TFEU are fulfilled (aid through state resources favours a certain undertaking and risks disturbing the competition between Member States). In our case with the favourable electricity tax regime, which is offered to data centres, we may conclude that all cumulative criteria are fulfilled prima facie. The regime is awarded through state resources to a certain undertaking (sectorial business) and is in the risk of disturbing the competition between Member States as is awarded to multinational corporations.

Therefore, the application of a selectivity test to determine whether there is indeed a case of selective aid may be necessary. Identifying a possible advantage through a tax measure is a benchmarking exercise as was established. In the case of a tax reduction, the tax itself is the benchmark:

> *In order to characterise a tax as 'selective', the ordinary or 'normal' tax system applicable in the Member State concerned must first be identified and it must then be demonstrated that the tax being examined is a derogation from that system, 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.*[47]

This benchmarking exercise may, in most cases, prove to be difficult. However, as this concerns electricity taxation,

Notes

[45] Schön, *supra* n. 10.

[46] *Finanzamt Linz* (C-66/14), *supra* n. 8.

[47] ECJ 7 Nov. 2019, Joined Cases C-105/18 to C-113/18, *Asociación Española de la Industria Eléctrica (UNESA) and others*, ECLI:EU:C:2019:935, para. 61.

the ETD takes priority as the EU has harmonized energy taxes. Article 107(3) TFEU enables for some exemptions from the general state aid framework. Harmonized excise duties such as the electricity tax and road tolls would be examples of such exemptions as they constitute individual reference frames. Their individual reference frames are subsequently constituted by the directive referable to the harmonized excise duty in question. In this case, the reduced tax rate that is applied to data centres corresponds to the minimum level that is admissible under the ETD.[48] Hence, there is no advantage as it does not deviate from the reference frame.

In conclusion, the tax reduction itself does not appear to be in conflict with either the fundamental freedoms nor EU state aid provisions . However, the aim of this article was not only to scrutinize the preferential tax regime itself but also the exclusion criteria, implemented through administrative case law from the Swedish Tax Agency, that factually disadvantage local actors, such as colocation centres. Fiscal state aid may not only be awarded through a reduced tax burden, a tax exemption or tax incentives but also through administrative decisions such as tax rulings. In this case it is of value to consider whether the administrative case law issued by the Swedish Tax Agency may be indeed result in illegal fiscal state aid as it disadvantages local colocation datacentres compared to those wholly owned by multinational corporations. To make a complete state aid assessment of the administrative case law, the factual aid and aid receivers would need to be charted. As there currently are no official records that specify the aid receivers nor the aid received before and after the implementation of the administrative case law, it is difficult to make such an assessment. If one of the local actors where to lodge a complaint to the EU Commission concerning this beneficial tax treatment, the EU Commission would be able to request these records from the Swedish Tax Agency.

Nonetheless, it should be flagged that the factual outcome of the tax regime does, prima facie, seem to act as a tool for international tax competition and may quite possibly distort competition neutrality. This can only be determined if the Swedish tax agency were to disclose itemized records of their decisions when approving taxpayers for the tax regime (before and after the clarification done by the Tax Agency). A possibility would be for one of the smaller, local actors to actively engage in the situation through the support of EU law. Pursuant to Article 24 of the Procedural Regulation,[49] interested parties may submit complaints to inform the EU Commission of any alleged unlawful aid or misuse of aid. Such an action would allow the Commission to request itemized records from the Swedish tax agency, and in turn be able to determine whether the Swedish tax regime is indeed, after the administrative decision, favouring multinationals compared to local competitors.

5 Concluding summary and discussion on how to move forward

Throughout this article, it has become evident that the favourable tax treatment of the tech-industry is indeed making Sweden internationally tax competitive as has been the ambition of the Swedish government. Several tech-giants have decided to establish large data centres in Sweden, e.g., Microsoft recently purchased land outside of Swedish Gävle with the intention of building a data centre, and others such as Facebook, Google, and Netflix are already operating Swedish data centres for their European activities. In this context, it is of importance to consider the Swedish strategy holistically. The discussed energy tax measure is awarding Sweden a competitive edge when combined with other legal and non-legal factors such as minimum level of property taxation, considerably lower property prices in the North of Sweden compared to more populated areas of Europe, very low electricity pricing compared to other EU Member States, access to cool and remote areas which makes out the best conditions for large data centres, access to renewable energy sources etc.

Additionally, Sweden has clearly expressed its (political) intention to proceed with incentivising tax measures to promote the establishment of the tech-industry and to attract other multinational companies to its jurisdiction. We have seen this pattern of the Swedish government through the highly debated tax advantages,such as a discussed exemption from the Swedish chemical tax[50] which would otherwise have been applied to many of Amazons products in combination with an exemption from the Swedish Employment Protection Act[51] that were awarded to Amazon when negotiating the company's establishment in the Swedish market in 2020.

Above statements have been done from the domestic perspective of Sweden. From an EU perspective there are also some observations that should be highlighted. Leaving potential competition and state aid issues aside, there are some areas of interest to the EU. Considering EU

Notes

[48] European Commission, Directorate-General Taxation and Customs Union Indirect Taxation and Tax Administration, Indirect taxes other than VAT, *Excise Duty Tables Part II Energy Products and Electricity Showing the Situation at 01 July 2020.*

[49] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union, OJ L 248/9 (24 Sept. 2015).

[50] SE: Swedish Chemical Tax (2016:1067).

[51] SE: Swedish Employment Protection Act (1982:80).

data sovereignty, it is beneficial to have data centres, and in particular those of multinationals, within their jurisdiction considering data protection and regulation. Furthermore, from a tax perspective it is also of interest to have these within the EU jurisdiction where there to be a future taxation of the digital market.

From a global environmental perspective, it is of importance to reduce overall environmental harm and the impact by carbon emissions. Providing the case of why it is of value for multinationals to settle within the North of Europe as these countries may provide optimal conditions for these data centres. In other words, cooling which reduces the overall energy consumption of the centres and access to renewable energy sources such as wind and water which are more prevalent in the north due to unpopulated areas and favourable conditions provided by nature itself. Additionally, the transition from the traditional steel – and forest industry towards the new tech-industry calls for greater considerations with reference to the overall tax system and tax policies. Not only from a state perspective but also from both regional and global ones. The north of Sweden has, as has been touched upon previously in this article, traditionally been subject to urbanization and the few jobs that exist are linked to the traditional industries. An establishment of the tech-industry would benefit this region in many ways, yet there is need for serious considerations if this is to take place.

The ambition for Sweden to (remain)[52] internationally tax competitive is reasonable in the global tax context. Yet the author believes it appropriate to question the nature of implemented tax measures and how these impact other tax policy objectives of the Swedish state as it perpetuates an incoherence within the tax system. This includes tax policy objectives such as the sustainability of the tax system and tax revenues, progressive climate goals, and the development or at least preservation of local business life. The Swedish government is currently pursuing an ambitious sustainability agenda that includes the objective of relying completely on renewable energy in 2045. The extensive electricity consumption of the data centres has been accused of threatening the Swedish electricity supply not only at the present time but also long-term.[53] In order for the ambitious climate agenda to be realistic, Sweden will need to considerably expand their renewable energy sources, especially while, at the same time, attracting additional tech-giants with its favourable electricity tax regime.

Of interest in this context is also whether it would be possible, not only for Sweden but any state that is considering the balancing between tax incentives and climate goals, to condition the electricity tax regime. There are already attached requirements such as a minimum threshold of electricity utilization and a threshold for repayment which may be considered as common when designing tax incentives. What would be less common, yet very important, would be to consider the inclusion of sustainability requirements as a way of tipping the scale in favour of the climate and individual climate goals of the country in question. For instance, when considering data centres which are the focus of this study one could require the tax incentive to be dependent on the sole reliance on renewable energy sources which most multinational companies have already implemented as a strategy. One example would be Microsoft which is importing renewable energy from Sweden to its data centre outside of Helsinki. Another example would be how Facebook has, when constructing its data centre in Luleå, integrated an infrastructure which reroutes excess heating from the facility to local housing. It could additionally be included a requirement of interaction with the surrounding community through, for instance, the recruitment of local employees. Requirements such as those proposed could assist in the justification of the revenue losses currently experienced due to the electricity tax regime. It is from a sustainability perspective wise for Sweden, and its Nordic neighbours, to invest in the future tech-industry as it is long-term more beneficial towards the environment than the traditional industries linked to foresting, mining, and steel. However, there needs to be implemented additional actions than merely a tax incentive which currently results in mayor revenue losses.

For instance, Sweden could commit to expanding the electricity supply chain which would create new jobs, provide additional (renewable) energy sources, and contribute with additional revenue sources for the local municipalities through corporate taxes from the local businesses involved in the energy supply expansion, income taxes, and social security contributions attached to their employees, and increased consumption taxes and excise duties would be additional revenues. Through such an investment, it could be argued that the growth of the tech-industry may indeed result in additional employment; not directly at the data centres themselves but at least indirectly through this energy supply expansion. These (indirect) new jobs will enable growth in the more rural, northern parts of Sweden as these areas provide the most suitable conditions for data centres as explained in the introduction of this article. Long-term this could result in a transformation of the North of Sweden, from the traditional industries towards the tech-industry.

Notes

[52] Sweden has, for some time, been highly ranked on different lists comparing international tax competitiveness. *See* for instance, the latest ranking done by Tax Foundation which ranks Sweden as no 7 globally in 2020. D. Bunn & E. Asen. *International Tax Competitiveness Index 2020*, Tax Foundation (2020), https://files.taxfoundation.org/20201009154525/2020-International-Tax-Competitiveness-Index.pdf (accessed 30 Nov. 2020).

[53] T. Mossinge-Norhem, *Nätjättarnas serverhallar hotar elförsörjningen*, Aftonbladet (6 Oct. 2020), https://www.expressen.se/nyheter/natjattarnas-serverhallar-hotar-elforsorjningen/ (accessed 30 Nov. 2020).

Finally, it should be emphasized that the Swedish tax regime appears, for the moment, to be another example of a Member State tax regime that is *potentially* distorting the competition within the internal market, yet that cannot be resolved through the application of EU (tax) law. The tax regime does not infringe on the principle of non-discrimination nor are state aid rules applicable as it fulfils the minimum standard regulated in ETD. As with the recent Apple case, EU (tax) law does not cover all aspects of (harmful) tax competition, at least not at the moment, but considering the EU´s progressiveness in international tax matters concerning tax avoidance, the future is uncertain. The author does not exclude a future scenario in which a domestic competitor launches a formal complaint to the EU Commission concerning potential selective tax treatment of multinationals.