diskrimineringsombudsmannen

Case ANM 2015/525 **document** 64
Manager Maria Stensson

Banks

Oversight regarding the Bank's handling of customers with fiscal connections to the United States

The Discrimination Ombudsman, DO, has reviewed whether the Bank's handling of customers with tax ties to the USA is compatible with the provisions of the Discrimination Act (2008:567, DL).

DO's decision

DO's investigation does not support the assessment that the Bank's handling of customers with tax ties to the United States is discriminatory in a way that is related to ethnic affiliation. DO closes the case.

About the case

Background to DO's decision to initiate supervision

DO has received a report from a former customer of the Bank. In his report, he essentially stated the following. On March 5, 2015, he received questions in the bank's web service about citizenship or tax liability in the United States. He answered the questions in the affirmative and then received a letter from the Bank stating that the Bank cannot deal with customers with a tax connection to the United States due to the special tax rules that apply to such customers. The bank therefore terminated his accounts effective April 6, 2016. He was asked to dispose of all securities or move them to another institution.

The investigation into the matter

The bank has commented on the matter and has summarized the following.

The bank is a purely internet player and offers various services in savings and investments via the internet. The bank's business concept is to challenge the traditional banks by being able to offer savings and investment services at lower prices and fees. This business concept is based on the Bank's operations being conducted in a cost-effective and streamlined manner and that the services provided to the Swedish market are standardized and scalable. The bank

Box 3686
103 59 Stockholm

E-post do@do.se
Webb www.do.se

Telephone 08-120 20 700
Fax 08-120 20 800

Organization number 202100-6073
Visit Torsgatan 11, Stockholm

has SEK 0 in deposit fee. Traditional banks charge fees that cover administration.

The bank has entered into a so-called QI agreement with the US tax authority (IRS). The IRS has signed a similar agreement with the majority of Swedish banks. The agreement regulates the fact that the Bank's customers pay a lower withholding tax on share dividends in American companies in accordance with the double taxation agreement between Sweden and the United States. In order to prevent US taxpayers from taking advantage of this, the Bank certifies within the framework of the QI agreement to the IRS that it does not accept clients with US citizenship, including persons with dual citizenship, and/or US tax residence which also includes persons who do not have US citizenship but on due to residence or possession of a green card are liable for tax and/or declaration in the USA. It is possible to receive such customers within the framework of a QI agreement, but this would have required the Bank to separately account for these customers' various holdings and distributions and report these in a special way. The bank cannot handle these demands without implementing major changes in technical systems and administrative routines, which would be associated with major costs. The bank is registered with the IRS as "compliant".

Those who are not must pay a kind of punitive tax of 15% on all business that goes through the United States.

In recent years, a relatively new American regulation (Foreign Account Tax Compliance Act, abbreviated FATCA) has also been added. FATCA has further increased the type of reporting that banks with customers who are US citizens and/or have US tax residency need to do.
It is about reporting balance/value on accounts, interest income, dividends and more regarding customers with US citizenship and/or US tax residency. For the year 2016, FATCA reporting is further expanded to also include compensation from the sale and redemption of financial instruments. This is another reason for this restriction at the Bank.

The bank has not calculated what it would cost to provide the requested information to the IRS. The bank would either have to hire staff to take care of these control tasks manually or rebuild the system so that the tasks can be produced automatically. The cost will be the same regardless of the number of customers. It would not be financially justifiable in view of the Bank's business model and the small number of customers involved.

The type of account that the notifier had and which was closed is a so-called Share and fund account. It is a securities depository that has been packaged with a connected liquid account to simplify liquid management in connection with trading in financial instruments. For technical reasons, the two parts cannot be separated in the Bank's back office system, which means that it is not possible to close the securities part in order to leave the liquid account. In order to fulfill the statutory contractual obligation, the Bank offers the option of opening a savings account, which is a completely different type of account.

The bank wants to emphasize that the rules have nothing to do with ethnicity, but with the very extensive reporting requirements set by the IRS. Americans are not prohibited as customers of the Bank, as long as they are not citizens of or have American tax residence in the United States. The bank has 450,000 customers. Of these, 118 have had to close their accounts with the Bank due to the QI problem.

Legal regulation in the area

According to chapter 2 12 § 1 DL, discrimination is prohibited for those who, outside of private and family life, provide goods, services or housing to the public.

By direct discrimination is meant that someone is disadvantaged by being treated worse than someone else is treated in a comparable situation, if the disadvantage is related to some basis of discrimination, for example ethnic affiliation, 1 chapter 4 section 1 DL.

According to chapter 1, section 4, point 2 DL, indirect discrimination means that someone is disadvantaged through the application of a provision, a criterion or a procedure that appears to be neutral but which may particularly disadvantage people belonging to a certain discrimination ground if there is no justified purpose and the means used are appropriate and necessary to achieve the purpose.

In the preparatory work (proposition 20017/08:95 page 490-492) the following is stated regarding the concept of indirect discrimination, among other things.

Indirect discrimination is expressed in the fact that the persons in question, compared to others, find it more difficult to fulfill the criterion or the provision, or that the procedure entails a negative effect for them. In order to determine whether a requirement may particularly disadvantage people from a certain group, a comparison must be made between the group to which a person belongs and some other group. The comparison must aim at the proportion of those who can, or cannot, fulfill the requirement in the groups being compared. If the comparison shows a significant difference in the two groups' opportunities to typically meet the requirement, this suggests that indirect discrimination is at hand. The difference between those who can and cannot fulfill the requirement in the groups being compared should be significant for someone from a group to be considered to have been disadvantaged by the set requirement. An actual comparison must be made between the groups in question.

There is a certain scope for the application of a criterion, a provision or a procedure, despite the fact that this has a negative effect and may particularly disadvantage people connected to one of the grounds of discrimination. This so-called balancing of interests is decisive for the question of whether a certain procedure should be considered permissible or impermissible as indirect discrimination. The balance of interests is considered to mean that a criterion etc. can be tested based on the business needs of the employer, the training provider, the authority, the trader, etc. In order for a measure that typically has negative effects for a certain group to be permitted, two requirements must be met. For

first, the purpose must be objectively acceptable. When it is established that an apparently neutral criterion etc. typically disadvantages a certain group, the question is whether the person applying this criterion seeks to achieve an important purpose. This purpose must be worthy of protection in itself and be sufficiently important to justify giving priority to the principle of non-discrimination. Second, the measure (the means to the end) must be appropriate and necessary. If there are other, non-discriminatory action alternatives or means to achieve an inherently acceptable purpose, the disadvantage in principle constitutes indirect discrimination in violation of the law.

According to chapter 1, chapter 5, section 3, point DL, ethnic affiliation means national or ethnic origin, skin color or other similar relationship.

DO's assessment

The bank has stated that persons with US citizenship or tax residency in the US may not have a fund depository in the bank. The reason for this is that it would require the Bank to report these customers' holdings and distributions in a special way, which would require major changes in technical systems and administrative routines and thus entail major costs.

The DO states at the outset that there is nothing to indicate that the Bank would refuse people with American ethnic affiliation to become customers if they are not citizens of or have tax residence in the United States. Nor is there any indication that the real reason for the Bank's rules would be ethnic considerations (compare the judgment of the European Court of Justice in case C-83/14 of 16 July 2015, CHEZ Razpredelenie Bulgaria AD). The bank's handling cannot therefore constitute direct discrimination related to ethnic affiliation. DO instead has to take a position on whether the Bank is guilty of indirect discrimination by applying a procedure that typically disadvantages people with a certain ethnic affiliation. If this is deemed to be the case, the question is whether there is a legitimate purpose and the means used are appropriate and necessary to achieve the purpose.

In DL, ethnic affiliation is defined as national or ethnic origin, skin color or other similar relationship. In the preparatory work for DL, the following is stated, among other things. National origin means that people have the same nationality, such as Finns, Poles or Swedes. Ethnic origin means that people have a relatively uniform cultural pattern.
Some examples are national minorities such as Roma and Sami (proposition 2007/08:95 pages 496-497).

The bank has explained that the reporting obligation to the IRS applies to persons with tax residence in the United States, i.e. persons with US citizenship, persons with dual citizenship and persons without US citizenship who have a green card or reside in the United States. DO's investigation has not been able to provide an answer to the question of how large a proportion of those who are disadvantaged by the Bank's rules have American ethnicity or other ethnicity. The fact that a person has American

citizenship does not necessarily mean that the person is of American ethnicity. Taken together, these circumstances mean that it cannot be concluded that the Bank's rules particularly disadvantage people with American ethnic affiliation.

In this assessment, there is no reason for DO to take a position on whether the Bank's handling of persons with tax residence in the USA has a legitimate purpose and the means used to achieve the purpose are appropriate and necessary. DO therefore closes the case.

Decisions in this matter have been made by Rickard Appelberg following a proposal from Maria Stensson. Martin Mörk also participated in the final handling of the case.

This decision cannot be appealed. The assessments that the DO makes in decisions are not legally binding and the decision does not affect individuals' ability to bring an action for discrimination compensation themselves in the district court.

Rickard Appelberg
Head of Unit, Legal Unit, Community Life and Education

Copy for information to the notifier's representative