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Danish Ministry of Taxation

Questions from the Danish authorities on the Commission's recommendation of 14 July 2020 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions

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1. Indirect ownership via an intermediary company in another EU/EEA Member State.

In the context of the granting of COVID-19 aid, the conclusion of the Danish authorities (until now) has been that the granting of COVID-19 aid could not (except in cases of abuse) be excluded for Danish companies owned/controlled by a company in another Member State, even if this (intermediary) company is owned by a company in an EU listed jurisdiction.

This conclusion has been based on the view that – in the case of a control – the relevant question is whether excluding aid would constitute a restriction of the freedom of establishment. In this context, it follows from the consistent case-law of the ECJ, that *"any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU"* (see e.g. joined cases C-570/07 and C-571/07 Blanco Perez, paragraph 54).

Furthermore, apart from the specific area of tax rules, the ECJ has consistently held that even national measures which do not imply a difference in treatment ("discrimination") between purely internal situations and cross-border situations can be considered as a restriction of the freedom of establishment.

For instance, in case C-299/02, Commission v. Kingdom of the Netherlands, the ECJ examined Dutch rules according to which the shareholders and directors of companies owning seagoing ships, which they wished to register in the Netherlands, had to be based in either the EU or the EEA. The ECJ held that those rules were contrary to the freedom of establishment even if the Dutch rules applied equally to all companies, i.e. they implied no difference in treatment as such between a company owned domestically and a company owned by another company in another Member State.

However, according to the Commission's recommendation (point 3), *"[f]or the purpose of determining whether an undertaking may be granted financial support, it should be irrelevant how many tiers of legal entities or legal arrangements may sit between the undertaking established in the Member State that grants the financial support and the entity in a jurisdiction that features on the EU list."*

A priory, this does not seem to be in line with the interpretation of the Danish authorities as the Commission seems to consider that there is no restriction of the freedom of estab-

lishment if a Member State excludes the granting of financial support to all companies indirectly controlled from a blacklisted country even if the direct owner is a company in the EU/EEA. As the recommendation does not contain any legal analysis, it is however difficult for the Danish authorities to understand the legal reasoning behind the recommendation.

Therefore, the Danish authorities would appreciate the Commission's comments on the topic, including in particular the following specific questions:

- Is the Commission of the view that, in a situation like the one at issue, it should be considered as a restriction of the freedom of establishment to exclude a company from financial support solely with reference to the indirect control from a blacklisted company?

- In the **negative**, could the Commission clarify why it does not agree with the reasoning – including the interpretation of the case-law of the ECJ – of the Danish authorities?

- In the **affirmative**, what is/are the imperative requirement(s) in the public interest which can justify the restriction, and what are the legal arguments of the Commission as regards the condition that the measure in question must be appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose?

As regards the possible justification(s), the Danish Authorities have noted that the Commission's recommendation includes a number of (possible) "Carve-outs" (point 4), including *"where the level of the tax liability in the Member State granting the support over a given period of time (e.g. the last three years) is considered adequate when compared to the overall turnover or level of activities of the undertaking receiving the support, at domestic and group level, over the same period."*

- Could the Commission explain/clarify if this should be understood in such a way that it is the Commission's opinion that it would not be in line with the principle of proportionality to exclude a company from financial support if there is no indication that the company/group has actually used the link to a black-listed country to avoid taxation? However, such an interpretation would not be compatible with the wording of point 4 ("Member states may…").

2. The notion of financial support

According to point 2 of the recommendation:

"'Financial support' means any type of financial assistance available to all undertakings or selective measures, including State aid granted pursuant to the new State Aid Temporary Framework".

- Does this mean that the recommendation applies in situations in which the undertaking in question benefits from an economic advantage even if no monies are directly paid to the undertaking, e.g. tax exemptions?

- In the **affirmative**, does the recommendation apply in such cases even if the advantage is not selective, i.e. a tax exemption that does not constitute State aid?
- In the **negative**, does this not lead to a risk of a difference in treatment as regards e.g. energy taxes where an identical effect can typically be obtained via either the exemption or the reimbursement of the taxes?

3. Shared ownership

According to point 3 (d) of the recommendation:

"Undertakings that receive the financial support should not:

…

(d) share ownership with undertakings in jurisdictions that feature on the EU list of noncooperative jurisdictions."

Whereas point 3 (a)-(c) of the recommendation concern links within the group of companies to which the undertaking in question belongs, the wording of point 3 (d) of the recommendation does not seem to include any specific requirements regarding the ownership shares of the joint owners. However, if the owner from a black-listed country does not hold a controlling interest, would that not mean that the recommendation would lead to a restriction in the free movement of capital?

- Could the Commission please comment on this and explain/clarify how point 3 (d) of the recommendation should be understood?