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TAXATION AND CUSTOMS UNION  
Direct Taxation, Tax coordination, Economic Analysis and Evaluation  
**The Director**

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Lise Winther Jensen  
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by e-mail: [LJe@skm.dk](mailto:LJe@skm.dk)

Dear Ms Jensen,

I would like to thank you for your follow up questions on the Commission Recommendation of 14 July 2020 regarding making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions.

As for our response of 21 September 2020 to your first set of questions, I would like to reiterate that the Recommendation represents the official position of the Commission on the issues it deals with. All the relevant Commission Services, including the Legal Service, contributed to the completion of this Act. As such, the Recommendation reflects the Commission's views on the interpretation and application of the Union's fundamental freedoms, as established in the EU Treaties, and is addressed to Member States. It does not prejudice, however, any future pronouncement of the European Court of Justice on this issue.

Against this background and in view of your follow-up questions, I would like to make the following comments:

Article 49 TFEU prohibits "*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State*". It is therefore clear that a host Member States cannot discriminate against persons or legal entities from another Member State who wish to establish themselves in the host Member State, just as the Member State of origin cannot discriminate when a person or legal entity previously established in its territory desires to establish itself in another Member State.

A discrimination can be direct or indirect. An indirect discrimination involves treating residents and non-residents in an equal manner, but makes it *de facto* much easier for residents to comply with the rules.

There can only be a restriction or discrimination when the party that desires to establish itself in another Member State (the non-resident) is treated less favourably than a resident. There is no longer discrimination if a non-resident is treated in the same manner as a resident. In such a case, there is no violation of Article 49 TFEU.

If you bring this line of thought within the context of the Recommendation, the Act recommends Member States to treat both the national situation – the Danish government granting State financial support to a Danish undertaking held directly by entities in listed jurisdictions – and the transnational EU situation – the Danish government granting State financial support to a Danish undertaking held by one or more other undertakings resident in one or more other Member States and ultimately held by entities in listed jurisdictions – in an identical manner. It cannot therefore amount to a restriction of one of the Treaty freedoms.

In this regard, I would like to reiterate the point made in our response of 21 September: not treating these situations as identical but only refraining from granting State financial support to Danish undertakings directly held by entities in listed jurisdictions would amount to a preferential treatment of the transnational situation (“reverse discrimination”) which is allowed but not required under the Treaty freedoms.

The above interpretation is of general application as it arises from primary EU law and is in no way limited to the Recommendation of 14 July 2020 or specific aspects thereof.

We can give an affirmative answer to your request for confirmation on whether the Recommendation applies in situations where the undertaking in question benefits from a non-selective economic advantage. Indeed, the Recommendation is meant to cover State support provided to companies irrespective of their form and is not limited to cases that would potentially qualify as State Aid.

I hope that these explanations bring some more clarity to the Commission’s views.

I should like to thank you once again for your firm engagement in actively contributing to the fight against tax evasion and avoidance in the internal market.

Yours sincerely,

(e-signed)

Benjamin ANGEL

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