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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

In April 2020, the Danish authorities concluded that according to EU law COVID-19 financial support cannot be excluded for Danish companies owned or controlled by a company in another EU/EEA Member State, unless the structure of the specific group of companies may be regarded as an artificial arrangement, which is not set up for reasons that reflect economic reality, and which must be considered as an abuse of EU law. This conclusion, which is based on the interpretation of the case law of the ECJ described below, covers companies indirectly owned by companies based in a jurisdiction included on the EU list of non-cooperative jurisdictions.

As the Commission's Recommendation of 14 July 2020 conflicts with the interpretation of the Danish authorities, the matter has been subject to intense public debate in Denmark.

It should be emphasised that it is a high priority for the Danish Government to play an active part in the fight against tax evasion and tax fraud. Thus, the Danish Government fully supports the aim and the purpose of the Commission's Recommendation. However, the Danish authorities are worried that following the Recommendation with regard to undertakings owned or controlled by a company in another EU/EEA Member State would not be in line with EU law, and that it could lead to legal challenges initiated by companies that would be cut off from financial support. This concern is especially relevant in the light of the public focus on the Danish authorities' and the Commission's different interpretations.

It is therefore essential for the Danish Government to obtain certainty regarding the legal reasoning behind the Commission's Recommendation before potentially changing the conditions of receiving COVID 19 financial support or any other kind of financial support in accordance with the Recommendation.

The case law of the ECJ
The Danish authorities' interpretation is based on the view that – in the case of control – the relevant question is whether excluding financial support 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 (which is not relevant for granting COVID 19 financial support), 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.

This case law has been applied consistently in relation to all the fundamental freedoms since a number of landmark-cases from the 1990's, including the judgments in Case C-19/92, *Krauss*, and Case C-55/94, *Gebhard*.

Case C-299/02, *Commission v. Kingdom of the Netherlands*, concerns a situation very similar to the question at hand, namely whether rules liable to hinder or to render the exercise of the freedom of establishment less attractive constitute a restriction if those rules apply to undertakings from other Member States whose owners are situated in third countries.

More specifically, 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.

The fact that the concept of restriction does not presuppose a difference in treatment between internal and cross-border situations has been explicitly stated in numerous judgments which concern the freedom of establishment. Examples are:

Case C-442/02, *Caixa-Bank France*, paragraph 11,
Case C-169/07, *Hartlauer*, paragraph 33.
Case C-140/03, *Commission v. Hellenic Republic,* paragraph 27,
Case C-89/09, *Commission v. France,* paragraph 44,
Joined Cases C-159-161/12, *Venturini,* paragraph 30, and
Case C-384/18, *Commission v. Kingdom of Belgium,* paragraph 75.

Most recently, on 8 July 2021, the ECJ confirmed in case C-71/20, *VAS Shipping ApS,* point 22, that the term "restriction" *"should be understood as measures which, although applied without discrimination on grounds of nationality, may make it more difficult or less attractive to exercise the freedom of establishment"*.

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."

Contrary to the Danish authorities' interpretation of the case law of the ECJ, the Commission seems to consider that it will never constitute a restriction of the freedom of establishment if a Member State excludes the granting of financial support to an undertaking indirectly controlled from a blacklisted country even if the direct owner is an undertaking in the EU/EEA.

In response to previous questions from the Danish authorities[1], TAXUD has confirmed that it is the Commission's view that such an exclusion cannot amount to a restriction of one of the Treaty freedoms. It has further been confirmed that the Recommendation is not limited to COVID 19 financial support or to financial support that involves monies directly paid to undertakings, but that the Recommendation also covers all other forms of financial support, e.g. tax exemptions.

As neither the Recommendation nor TAXUD's previous responses contain a legal analysis commenting on the abovementioned case law, it is difficult for the Danish authorities to follow the legal reasoning behind the Commission's interpretation.

Hence, the Danish authorities would appreciate receiving the Commission's Legal Service's comments on the topic. In particular, the Legal Service is kindly asked to provide legal substantive responses on the following questions:

1. Should it 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 company based in a blacklisted country?
    - **In the negative**, could the Legal Service clarify why it does not agree with the Danish authorities' interpretation of the case law of the ECJ as mentioned above and provide specific references to relevant judgments, outside the area of tax law, that support the Commission's interpretation?
    - **In the affirmative**, would it in the Commission's opinion be possible to justify the restriction with reference to the objective of counteracting tax evasion, and would the Commission consider the restriction as necessary and appropriate in order to attain this objective even if the company has paid taxes during e.g. the last years, which must be considered adequate when compared to the overall turnover or level of activities of the company? If not, what is/are the requirement(s) in the public interest which can justify the restriction, and what are the legal arguments as regards the condition that the measure in question must not be appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary for that purpose?

[1] For convenience's sake, the previous correspondence between the Danish authorities and TAXUD is enclosed.

2. Is the Commission's interpretation of the notion of restriction of the freedom of establishment limited to the issues covered by the Recommendation or is it to be understood that it is applicable in all contexts?

As regards question 2, it is underlined that if the Commission's interpretation of the concept of 'restriction' is to be applicable in all contexts, it would seem to have wide-reaching implications. For instance, it would seem that such a general approach to the concept of 'restriction' would allow for a Member State to decide in the context of privatizations or public tenders (outside the scope of the harmonised rules of Directive 2014/24) to exclude all undertakings, including those from other Member States, with direct or indirect owners in one or more specific third country/countries.