



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct Taxation, Tax coordination, Economic Analysis and Evaluation
The Director

Brussels
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Dear Ms Legaard Kristensen,

I would like to thank you for the request for clarifications that your Services submitted to the European Commission with regard to the Recommendation adopted on 14 July 2020 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions.

I would like to express the Commission's appreciation and support to Denmark for being amongst the first Member States to introduce rules that refuse state aid in the case of links to non-cooperative jurisdictions for tax purposes. Putting in place an objective mechanism to identify non-cooperative jurisdictions has been a priority of the Commission in the last years. Member States' cooperation to implement this policy at national level is essential to making this process effective.

The Recommendation is part of the Commission's strategy for a speedy and fair recovery in Europe. This goes hand in hand with the long-standing efforts to curb tax avoidance, fraud and abuse and preserve the functioning of the Single Market.

I would like to confirm to you 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 request for clarification and the arguments that your Services brought forward, I would like to make the following comments:

- (i) Regarding the existence of an illegitimate restriction, you express the view that undertakings should be refused State financial support only where they are *directly* held by entities in listed jurisdictions. You thus advance the argument that undertakings which are *indirectly* held by entities in listed jurisdictions – notably, via entities of the same group in other EU Member

States - cannot be refused the financial support. In your analysis, refusing the financial support in such circumstances would amount to an illegitimate restriction of the Freedom of Establishment.

A restriction of one of the freedoms presupposes that the transnational EU situation is treated less favourably than the same situation which is entirely contained within one Member State. The Recommendation, however, 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.

Not to treat these situations as identical but only refrain 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 which is something the Treaty freedoms do not require.

Case C-299/02, *Commission v. Kingdom of the Netherlands*, seem to have been at the origin of the confusion as to the compatibility of the Recommendation with the Treaty freedoms.

In that case, the Dutch rules on ship registration imposed nationality criteria on the director and a majority of the shareholders of the ship-owning company. There was therefore a difference between the purely national situation where a Dutch ship owned by Dutch shareholders is not in any way hindered by the nationality conditions and the transnational situation where a ship to be registered in The Netherlands and owned by foreign shareholders and managed by foreign directors may well be hindered by such specific nationality requirements. It is therefore not analogous to the situation targeted by the Recommendation.

- (ii) We can give an affirmative answer to your question on whether the Recommendation applies in situations where the undertaking in question benefits from an economic advantage even if no monies are directly paid to such undertaking (e.g. tax exemption). Indeed, the Recommendation is meant to apply to State support provided to companies irrespective of its form.
- (iii) Regarding the point on shared ownership, we can confirm that it applies only within the context of a group of controlled companies. More specifically, the provision means that financial support should be refused to an undertaking which is controlled by the same owner as another undertaking where the latter is resident for tax purposes in an EU listed jurisdiction.

I hope that the explanations above bring more clarity about the Commission's views on the issues that your Services have raised. In this regard, I would like to reiterate that the input above is provided in the spirit of cooperation between the Commission and Denmark. The official position of the Commission remains the full text of the Recommendation, as approved by the College of Commissioners on 14 July 2020.

I should like to thank you once again for your firm engagement in the fight against tax evasion and avoidance. My Services, and myself personally, remain at your disposal.

Yours sincerely,

(e-signed)

Benjamin ANGEL