Skatteministeriet

Danish Ministry of Taxation

Follow-up 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-co-operative jurisdictions

October 2020
File no.2020-7003

Office:
International Coordination

Initials:

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

As explained in the note containing the questions from the Danish authorities (hereinafter "the Note"), in the context of the granting of COVID-19 aid, the conclusion of the Danish authorities has been that the granting of such 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.

That interpretation has been at the centre of intense debate in Denmark, not only in the Parliament but also in the media. The legal basis, including the relevant case-law of the ECJ, of the interpretation of the Danish authorities is therefore publicly known.

If the Danish authorities were to change the interpretation of EU law, it would, in all probability, lead to legal challenges initiated by those undertakings affected by the change in interpretation. Therefore, it is essential for the Danish authorities to be able to understand the legal basis of the interpretation of the fundamental freedoms on which the Commission's recommendation is based in order to assess to which extent it is possible to follow the recommendation in future practice.

In the reply of the Commission (TAXUD) (hereinafter "the Reply") the legal reasoning behind the recommendation is explained in the following paragraph:

> *"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."*

However, the Reply does not contain any references to case-law of the ECJ in support of this statement.

In fact, as already highlighted in the Note, 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*.[1]

Apart from the abovementioned judgments as well as those mentioned in the Note, 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 specifically the freedom of establishment. Examples are:

Case C-442/02, *Caixa-Bank France*, paragraph 11,
Case C-140/03, *Commission v. Hellenic Republic,* paragraph 27,
Case C-169/07, *Hartlauer*, paragraph 33,
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.

In this context, it is also necessary to comment on the Commission's observations in the Reply on the judgment Case C-299/02, *Commission v. Kingdom of the Netherlands*. After stating that this judgment seems to have been *"at the origin of the confusion as to the compatibility of the Recommendation with the Treaty freedoms",* the Commission indicates:

> *"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."*

First of all, the Danish authorities would like to point out that this judgment is just one out of a number of judgments supporting the interpretation of the Danish authorities. The judgment in Case C-299/02 was only singled out because it concerns a situation which is very similar to the question at hand, namely if 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.

Secondly, the comparison made by the Commission does not seem relevant as the Commission compares a situation covered by the rule (one with owners in third countries) and a situation not covered by the rule at all (one where no owners, direct or indirect, are situated in third countries). Similarly, in the context of financial support, the Commission's recommendation necessarily leads to a difference in treatment between e.g. a Danish

[1] As mentioned in the Note, an exception is the specific area of tax law where the ECJ does indeed follow the approach that a difference in treatment between internal and cross-border situations is a precondition for the existence of a restriction of the fundamental freedoms. In the legal doctrine it is generally accepted that the concept of restriction applied by the ECJ in tax cases differs in this respect from the general concept of restriction applied by the ECJ, see e.g. Terra/Wattel (eds), EU Tax Law (2018), Vol. 1, pp. 86 ff., with further references.

company with only Danish owners and a Danish company with direct or indirect owners in listed countries.

The relevant comparison is whether the rule applies in the same way to national undertakings and undertakings from other Member States. That was clearly the case in relation to the Dutch rules as a Dutch undertaking with owners in third countries was treated in exactly the same way as undertakings from other Member States with owners in third countries.

In fact, the Commission itself during the court proceedings in Case C-299/02 even pointed out that the Dutch rules did not imply any difference in treatment between Dutch companies and companies from other Member States.[2]

Therefore, the Danish authorities respectfully ask the Commission:

1. to provide legal substantive comments on the abovementioned interpretation of the case-law of the ECJ and in particular to provide specific references to judgments – outside the area of tax law – which support the Commission's interpretation of the notion of restriction,

2. to indicate whether the Commission's interpretation of the notion of restriction to the freedom of establishment only applies to the specific issues covered by the recommendation or whether it is to be understood as applicable in all contexts, and

3. to indicate, if the interpretation is limited to the issues covered by the recommendation, the specific reasons and legal arguments justifying a distinct interpretation of the fundamental freedoms in this specific context.

As regards the lasts two questions, it is underlined that the interpretation indicated in the Reply would seem to have wide-reaching implications if generally adopted. For instance, a Member State would then be able 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, as long as such a rule would also apply to undertakings from the Member State itself.

As mentioned in our Note, we would be interested in hearing the Commission's view on what the imperative requirement(s) in the public interest is/are which can justify the restriction, and what the legal arguments are as regards the condition that the measure in question must be appropriate for ensuring attainment of the objective pursued and does

[2] See the conclusions of Advocate General Léger, paragraph 47: *"It is true that, as the Commission has pointed out, those regulations apply equally to Netherlands companies and to companies constituted under the legal system of other Member States (within the meaning of the first paragraph of Article 48 EC). The said regulations therefore differ in that respect from those examined in Factortame, since the regulations at issue in that case discriminated against companies connected with a Member State other than the Member State concerned by the national regulations in question in each case"* (emphasis added).

not go beyond what is necessary for that purpose. In that context, we also had a question in the Note regarding point 4 of the recommendation regarding the (possible) "Carve-outs".

2. The notion of financial support

The Reply makes it clear that the recommendation is meant to apply 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. However, the Commission does not explicitly answer the additional question posed in the Note, namely whether this means that the recommendation is meant to apply in such cases even if the advantage is not selective, i.e. a tax exemption that does not constitute State aid.

The Commission is asked to please provide an explicit answer to this question.