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by e-mail: lbn@skm.dk

Subject: Follow up on the Commission 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 – your email of 31 August 2021

Dear Ms Nielsen,

I would like to thank you for your third set of 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 responses of 21 September and 15 December 2020 to your first and second set of questions respectively, 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 request for clarification and the arguments that your Services brought forward, I would like to make the following comments.

Regarding the existence of an unlawful 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 unlawful restriction of the Freedom of Establishment.

In support of this view, you make reference to a list of judgments by the Court of Justice of the European Union (ECJ) in the field of ‘restriction’ on the fundamental freedoms and you draw a distinction from the concept of discrimination. You argue 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.*”

You also quote the recent case C-71/20, VAS Shipping ApS of 8 July 2021 where the ECJ confirmed in 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*”.

We can agree that the notion of a direct tax restriction goes beyond a mere discrimination on the grounds of nationality and covers measures providing for a difference in treatment between domestic and cross-border activities, where the cross-border situations/activities are treated less favourably. We would also wish to clarify that this line of thought has to be placed within the contours of the concept of the Freedom of Establishment. In a situation where the link to an EU listed jurisdiction involves indirect ownership, the right of establishment of one (or more) EU-resident entity, which is interposed between the Danish beneficiary (‘interposed entity’) and the entity in the EU listed jurisdiction, is not affected. This is because **the criterion of exclusion from the State financial support in Denmark is not the place of residence of the interposed entity but the residence of the ultimate beneficial owner, i.e. of the entity in the EU listed jurisdiction.** The latter being outside the EU, the Freedom of Establishment is out of scope. It follows that the concept of ‘restriction’, as analysed and delineated by the ECJ is not applicable within this set of facts. It would have been applicable if the exclusion from financial support were contingent upon conditions linked to characteristics and circumstances associated with any EU-resident interposed entities (which, for instance, is the case in C-299/02, *Commission v. Kingdom of the Netherlands*).

Furthermore, it should also be noted that the one (or more) EU-resident interposed entity/entities would itself/themselves not be eligible for the financial support in its/their own Member State of establishment in accordance with the Commission’s Recommendation. In other words, **none of the EU-resident entities in the chain of control between the Danish beneficiary and the entity in an EU listed jurisdiction is eligible for the financial support in their respective Member State. This cannot be seen as a restriction on the right of establishment of these interposed entities in Denmark.**

Finally, even if nevertheless the ECJ found a restriction, this would be justified by the need to ensure fiscal supervision and prevention of tax evasion and money laundering in connection with jurisdictions that have failed the EU listing criteria and therefore suffer fundamental failures in the fields of tax transparency and harmful tax competition.

We sincerely hope that the above points clarify your doubts in connection with the Commission Recommendation of 14 July 2020.

You also addressed a second question, which involves whether the Commission’s interpretation of the notion of ‘restriction’ on the Freedom of Establishment is limited to the issues covered by the Recommendation or should be understood as applicable in all contexts. Although the principles that permeate the fundamental freedoms are common, as a matter of principle, in all fields of the single market, it is obvious that these have to be interpreted in line with the features of each policy area where there is EU law.

I hope that the explanations above bring more clarity to the issues that your Services have raised. In this regard, I wish 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.

Yours sincerely,

(e-signed)

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