

Competition *State aid brief*

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The 2019 Commission Notice on the recovery of unlawful and incompatible State aid

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Introduction

From their origins, the provisions on State aid have remained substantially unchanged: since the Treaty of Rome in 1957, the supervision of aid granted by Member States has always been based on a general prohibition, some exceptions, and a system of monitoring and enforcement, with complementary powers assigned to the European Commission (the 'Commission') and the Member States.

None of the Treaties, however, has established what happens after the Commission has decided that a given aid measure is unlawful and incompatible with the internal market. Instead, it was the Court of Justice, in 1973¹, which confirmed that the Commission may order a Member State to recover incompatible aid by way of a remedy. As the case law states, recovery is the 'logical consequence' of finding an aid measure to be unlawful.² Thus, according to the Court, the Commission must order the recovery of incompatible aid³ through a 'recovery decision'.

If the Treaty rules on State aid are of a 'vital nature'⁴, the specific provisions governing the immediate and effective recovery of State aid incontrovertibly play an essential role, ensuring the coherence and solidity of the whole State aid supervision system.

In 2007, the Commission clarified its policy on the implementation of recovery decisions by adopting its first comprehensive communication on the recovery of unlawful and incompatible State aid (the '2007 Recovery Notice')⁵. That communication took

stock of the most recent case law and the objectives and measures ensuing from the State Aid Action Plan⁶ to further improve the implementation of the Commission's recovery decisions.

Changes in the economic and financial situation, and the development of trade, both in the European Union and worldwide, have led to changes in State aid policy and the design of Member States' aid measures.

From the Commission's perspective, the key policy development has been the 2012 State Aid Modernisation ('SAM'),⁷ under which it streamlined and consolidated a number of guidelines. A package of legislation has also strengthened Member States' responsibility, while boosting cooperation between them and Commission in the field of State aid enforcement. As a result, Member States now grant more aid without prior checks by the Commission: since 2015, over 96% of new aid measures, for which expenditure was reported for the first time, have been covered by the General Block Exemption Regulation ('GBER')⁸. The

In a nutshell

The European Commission has adopted a new Notice on the recovery of unlawful and incompatible State aid, replacing the previous notice of 2007. Based on the latest case law of the Union Courts, the new Recovery Notice explains the rules and procedures governing the recovery of State aid, and how the Commission works with Member States. In line with the State Aid Modernisation, it contributes to the enforcement of State aid policy. The new Recovery Notice takes into account comments received in a public consultation that ended in April 2019. The Commission has also consulted the Member States and the EFTA Surveillance authority.

¹ See: Judgment of the Court of Justice of 12 July 1973, *Commission v Germany* ('Kohlegesetz'), C-70/72, ECLI:EU:C:1973:87, paragraph 13.

² See: Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* ('Tubemeuse'), C-142/87, ECLI:EU:C:1990:125, paragraphs 65-66.

³ See: Judgment of the Court of Justice of 7 March 2002, *Italy v Commission* ('Employment Measures I'), C-310/99, ECLI:EU:C:2002:143, paragraph 99.

⁴ See: Judgment of the Court of Justice of 13 May 2014, *Commission v Spain*, C-184/11, ECLI:EU:C:2014:316, paragraph 69.

⁵ OJ C 272, 15.11.2007, p. 4. See also C. Lessenich, M. Koska and N. Marinas, The new Commission Notice on the recovery of unlawful and incompatible State aid, Competition Policy Newsletter Number 1 – 2008, available at

http://ec.europa.eu/competition/publications/cpn/2008_1_8.pdf (Accessed 31 July 2019).

⁶ State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009, SEC(2005)795, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0107> (Accessed 31 July 2019).

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM/2012/0209 final, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0209> (Accessed 31 July 2019).

⁸ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

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Commission, for its part, has stepped up downstream monitoring to ensure that Member States eliminate distortions to competition by recovering any aid disbursed in breach of State aid rules.

At the same time, the case law on recovery of the General Court and of the Court of Justice of the European Union (the 'Union Courts'), although soundly anchored in its key principles, has developed further, bringing greater clarity, and interpretations that are more closely tailored to specific circumstances. In accordance with that case law and the guidance set out in the 2007 Recovery Notice, the Commission has improved its practice and cooperation with the Member States, learning from the enforcement of a significant number of recovery decisions. Over 2008–2018, it adopted 122 recovery decisions⁹, with more than €2.9 billion of aid recovered and about €1.3 billion of aid 'lost' in insolvency proceedings¹⁰.

In view of these developments, the Commission adopted a new Recovery Notice in July 2019¹¹ (the '2019 Recovery Notice'), designed as a handbook to explain recovery all the way from A (general principles) to Z (consequences of failure to recover incompatible aid).

In line with the objectives of the SAM, the 2019 Recovery Notice increases transparency and streamlines practice as regards the recovery of State aid. In particular, the Notice clarifies what the Commission does to assist Member States and how the principle of sincere cooperation established by Article 4(3) TEU is put into practice in this domain.

The 2019 Recovery Notice was adopted following a public consultation¹², which ran from 4 February to 29 April 2019. The Commission also received comments during a meeting with the Member States, the EEA States and the EFTA Surveillance authority, held on 7 March 2019.

The next section of this article gives a general overview of the 2019 Recovery Notice. The third section summarises selected issues, namely the topics most thoroughly discussed with Member States and the key innovations since the 2007 Recovery Notice, while the last section concludes the article.

General overview of the 2019 recovery Notice

The Notice deals with five main topics, divided into the following sections.

General principles

The 'General Principles' section describes the procedure on the basis of which the Commission orders a Member State to recover any aid that is incompatible with the internal market. After explaining the purpose of recovery and how it should be implemented, the 2019 Recovery Notice goes on to emphasise the importance of the principle of sincere cooperation referred to in Article 4(3) TEU, in making it quicker and easier to implement recovery decisions.

This is followed by a description of the obligation to recover any aid improperly granted and the limits to that obligation, namely (i) the general principles of European Union law and (ii) the limitation period established by Article 17(1) of the Procedural Regulation¹³.

As regards (i), the 2019 Recovery Notice describes the content of the principle of legal certainty, the protection of legitimate expectations, *res judicata*, and the principle that 'no one is obliged to do the impossible'. It also provides specific examples based on the most relevant and recent case law of the Union Courts¹⁴ (see below).

As regards (ii), the Notice sets out the case law on the interpretation of the limitation period established by Article 17 of the Procedural Regulation in a systematic fashion.

The roles of the Commission and Member States

The 2019 Recovery Notice, like the 2007 version, describes the respective roles of the Commission and the Member States. However, in line with the principle that their complementary roles are framed within the principle of sincere cooperation, it deals with this matter in a section separate from the one on implementing a recovery decision. In this, it differs from the 2007 version.

The 2019 Recovery Notice introduces a non-exhaustive list of the Commission's usual practices and initiatives following the adoption of a recovery decision. It also summarises how Member States should meet their obligation to recover any aid improperly granted.

Implementing the recovery decision

The section entitled 'Implementing the recovery decision' covers most of the matters that a Member State should or may be required to address, in cooperation with the Commission, to meet its recovery obligation.

⁹ Statistics on recovery are available on DG Competition's website: <http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html> (Accessed 31 July 2019).

¹⁰ The amount of aid recovered cited here does not include the additional €3.1 billion provisionally recovered by Ireland from Apple. Where the aid beneficiary is insolvent, the Member State concerned by the recovery decision must register the State aid claim in the schedule of liabilities of the aid beneficiary. Even if not all the aid is recovered in that context, the liquidation of the beneficiary and the cessation of its activity remove the economic advantage brought about by the aid.

¹¹ Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, p. 1.

¹² Available at <http://ec.europa.eu/competition/consultations/2019_recovery_notice/index_en.html> (Accessed 31 July 2019).

¹³ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9.

¹⁴ See, by way of example, the Judgment of the Court of Justice of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, C-622/16 P to C-624/16 P, ECLI:EU:C:2018:873.

Like the rest of the 2019 Recovery Notice, this section takes the form of a logically ordered sequence of events. It starts with the 'recovery deadline' – the deadline the Commission sets in its recovery decisions – generally four months – with the possibility of an extension. This is followed by a description of the 'kick-off meeting' offered by the Commission and an account of the principles and rules governing the identification of the aid beneficiary and the amount of aid to be recovered. The text further clarifies and provides guidance on provisional recovery, alternative means of recovery (e.g. recovery in kind), and recovery from insolvent beneficiaries, both in the context of bankruptcy and – for the first time – restructuring proceedings. It ends with the natural epilogue of a recovery procedure: information from the Commission's departments that the Member State concerned has – provisionally or definitively – implemented the recovery decision.

Litigation before national courts

As regards the impact on the recovery obligation of litigation before national courts, there has been no change in the case law of the Union Courts. Thus, the 2019 Recovery Notice essentially reiterates the content of the 2007 Recovery Notice and its reference to the judgments in *Zuckerfabrik*¹⁵ and *Atlanta*¹⁶, with one important clarification: a Member State cannot rely on the interim measures granted by a national court to justify its failure to implement the recovery decision¹⁷.

Consequences of a failure to implement a recovery decision

The last main topic of the 2019 Recovery Notice deals with the consequences of a failure to implement a recovery decision.

From the perspective of a Member State, the Commission may refer the matter to the Court of Justice for a declaratory judgment pursuant to Article 108(2) TFEU and, following that, for a request to impose sanctions on the Member State concerned, in accordance with Article 260(2) TFEU. In particular, the 2019 Recovery Notice states that the Commission systematically considers referring matters to the Court of Justice and lists the infringements it has identified, including any lump sums and penalties imposed.

From the perspective of an aid beneficiary, the case law derived from the *Deggendorf* case¹⁸ means that a Member State's failure to recover aid prevents the payment of any new aid, even if it is compatible with the internal market.

Selected issues

The principle of sincere cooperation

In accordance with the principle of sincere cooperation, as set out in Article 4(3) TEU, 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'

The 2019 Recovery Notice recognises the importance of cooperation between the Commission and the Member State authorities throughout both the recovery phase and the State aid proceedings.

In fact, early cooperation during the formal investigation can contribute to a better recovery decision that is easier to enforce: it may help in identifying the actual aid beneficiary and the amount of aid to be recovered. Similarly, early cooperation may enable a Member State to put forward reasons for a longer recovery deadline than the standard four months or provide justification for applying a general principle of European Union law that would limit or impede recovery. By cooperating, 'Member States can contribute to the adoption of recovery decisions that are more easily enforceable'¹⁹ and that, in turn, may avoid the need for recourse to infringement proceedings.

In addition to the bilateral dialogue during the formal investigation and throughout the recovery phase, the 2019 Recovery Notice explicitly refers to a series of tools that the Commission has been using in recent years to assist Member States. Thus, paragraph 67 cites, among other things: sharing examples of spreadsheets about aid beneficiaries and aid amounts; organising a 'kick-off meeting'; providing a tool to calculate recovery interest; sharing examples of escrow agreements suitable for the provisional recovery of aid; and informing the Member State concerned about the provisional or definitive closure of a recovery procedure.

General principles of European Union law

Article 288(4) TFEU states that a Commission decision is binding in its entirety upon those to whom it is addressed.

The first sentence of Article 16(1) of the Procedural Regulation states that Member States must take all necessary measures to recover the aid from the beneficiary – including interim ones, as established by the Court of Justice²⁰. However, the second sentence of that same article and paragraph notes that the Commission cannot order the recovery of the aid where that is contrary to a general principle of European Union law.

¹⁵ See: Judgment of the Court of Justice of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, C-143/88 and C-92/89, ECLI:EU:C:1991:65, paragraphs 23 and following.

¹⁶ See: Judgment of the Court of Justice of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft*, C-465/93, ECLI:EU:C:1995:369, paragraph 51.

¹⁷ 2019 Recovery Notice, paragraph 145.

¹⁸ See: Judgment of the Court of Justice of 15 May 1997, *TWD v Commission*, C-355/95 P, ECLI:EU:C:1997:241, paragraphs 25 and 26.

¹⁹ 2019 Recovery Notice, paragraph 68.

²⁰ See: Judgment of the Court of Justice of 14 November 2018, *Commission v Greece ('Hellenic Shipyards II')*, C-93/17, ECLI:EU:C:2018:903, paragraph 69.

The 2019 Recovery Notice gives an illustrative list of the general principles most frequently invoked in the context of implementing the recovery obligation, and recognises that the Union Courts have interpreted them in a restrictive fashion²¹:

The principle of legal certainty requires that legal rules be clear, precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law²². In State aid proceedings, this principle is balanced by the principle of primacy and the principle of effectiveness of Union law. In substance, any conflict between national and European Union law does not limit recovery. The same applies to any delay in Commission action to tackle unlawful aid.

The principle of the protection of legitimate expectations concerns any person who can entertain expectations that are justified and well founded, having received precise, unconditional and consistent assurances from the competent institutions of the European Union. Those assurances must be given in accordance with the applicable rules²³. After noting that the identification of certain aid measures as unlawful is, in principle, an obstacle to legitimate expectations, the 2019 Recovery Notice gives specific examples of situations which, the Union Courts found, did not create legitimate expectations²⁴.

The principle of *res judicata* establishes that 'judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question'²⁵. The 2019 Recovery Notice summarises and restates all the findings of the case law of the Union Courts on the matter.

The absolute impossibility of recovering aid, stemming from the principle that 'no-one is obliged to do the impossible'²⁶ has also been subject to a very restrictive interpretation. In practice, the Union Courts have specified what *does not* represent an absolute impossibility to recover, with a specific exception²⁷. Based on the most recent relevant case law, the 2019 Recovery Notice lists the situations that do not render recovery impossible, such as national limitation periods, the absence of relevant national law and social unrest.²⁸

²¹ See: Judgment of the General Court of 20 September 2011, *Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, ECLI:EU:T:2011:493, paragraph 283.

²² See: Judgment of the Court of Justice of 15 February 1996, *Duff and Others*, C-63/93, ECLI:EU:C:1996:51, paragraph 20.

²³ See: Judgment of the Court of Justice of 24 March 2011, *ISD Polska and Others v Commission*, C-369/09 P, ECLI:EU:C:2011:175, paragraph 123; judgment of the Court of Justice of 16 December 2010, *Kahla Thüringen Porzellan v Commission*, C-537/08 P, ECLI:EU:C:2010:769, paragraph 63; judgment of the Court of Justice of 16 December 2008, *Masdar (UK) v Commission*, C-47/07 P, ECLI:EU:C:2008:726, paragraphs 34 and 81.

²⁴ 2019 Recovery Notice, paragraph 42.

²⁵ See: Judgment of the Court of Justice of 22 December 2010, *Commission v Slovakia ('Frucona Košice')*, C-507/08, ECLI:EU:C:2010:802, paragraph 59.

The deadline for implementing the recovery decision

Since Member States have a duty to implement the recovery decision, they are required – by the recovery deadline – to abolish the aid measure concerned and recover any aid already disbursed. While they are free to choose the national procedure to implement a recovery decision, implementation of the decision must be immediate and effective,²⁹ and the authority or court responsible for implementation is duty-bound to give full effect to European Union law³⁰.

In line with the importance of the principle of sincere cooperation in the context of State aid proceedings, the 2019 Recovery Notice takes a different stance from its 2007 counterpart as regards the recovery deadline.

The previous notice stated that 'from now on, the Commission will specify two time limits in its decisions: a first time-limit of two months [...] within which the Member State must inform the Commission of the measures planned or taken, [and] a second time-limit of four months [...] within which the Commission decision must have been executed'³¹.

The 2019 Recovery Notice still contains two deadlines, which are, however, set at 'generally [...] 2 months [and] generally [...] 4 months.' The new wording allows for recovery to be better tailored to the specific characteristics of each case; straightforward situations, such as a case where the Member State has started voluntary recovery before the adoption of a recovery decision, may need shorter recovery deadlines, whereas complex cases may need longer deadlines that take account of their specific features.

In addition, the 2019 Recovery Notice increases transparency by specifying why and under which conditions a Member State may request, and the Commission award, an extension to the recovery deadline established by a recovery decision³².

Identifying the beneficiaries from which aid must be recovered

Member States must recover the aid from the beneficiary which actually benefited from it. If the recovery decision does not identify the beneficiary or beneficiaries, the Member State concerned must use the methodology established in the recovery decision and identify the undertakings concerned. The 2019 Recovery Notice

²⁶ Judgment of the Court of Justice of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, C-622/16 P to C-624/16 P, ECLI:EU:C:2018:873, paragraph 79.

²⁷ See: Judgment of the Court of Justice of 11 September 2014, *Commission v Germany ('Biria Gruppe')*, C-527/12, ECLI:EU:C:2014:2193, paragraph 49.

²⁸ 2019 Recovery Notice, paragraphs 50-53.

²⁹ See: Judgment of the Court of Justice of 11 September 2014, *Commission v Germany ('Biria Gruppe')*, C-527/12, ECLI:EU:C:2014:2193, paragraph 41.

³⁰ See: Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 91.

³¹ 2007 Recovery Notice, paragraph 42.

³² 2019 Recovery Notice, Section 4.1.

gives examples of cases in which it may be more difficult to identify the aid beneficiaries and provides explanations.

In the case of an aid beneficiary belonging to a group of undertakings, the Commission may find, for the purposes of competition law, that these separate legal entities form an economic unit and that recovery affects either some of the undertakings or the whole group, depending on which of them benefited from the advantages accruing from the aid.

Where aid cannot be recovered from the original beneficiary and the resultant advantage has been transferred to a different undertaking, the recovery order should be extended to the latter. The 2019 Recovery Notice describes how economic continuity between undertakings should be assessed in the case of asset deals and share deals, based on Commission practice, as upheld by the case law of the Union Court³³. It also introduces the principles underlying recovery in the case of mergers and other business reorganisations, stating that the Member State concerned must identify the legal successor and recover the aid from this surviving entity³⁴.

Other specific issues associated with the implementation of a recovery decision

Quantification of the amount of aid to be recovered: the 2019 Recovery Notice explains how the Member State must quantify the aid to be recovered if the Commission has not established the precise amount in the recovery decision³⁵.

Tax measures: in line with the *Unicredito Italiano* case law, according to which 're-establishing the status quo ante means returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the tax reduction'³⁶, the 2019 Recovery Notice specifies that the Member State must calculate the correct amount of tax that an undertaking should have paid if it had not benefited from the unlawful aid measure.

Provisional implementation of recovery, alternative means of recovery: the 2019 Recovery Notice explains how the recovery obligation can be provisionally implemented, one way being to pay the amount to be recovered, plus recovery interest, into an escrow account, pending legal challenges³⁷. This section is more detailed than the 2007 Recovery Notice and points out that the Commission is ready to share examples of suitable escrow agreements. There is also a new section dealing with alternative means of recovery, such as recovery in kind or offsetting of State aid claims against the existing credits held by the aid beneficiary³⁸.

Insolvency proceedings: the 2019 Recovery Notice offers greater clarity than the 2007 version regarding the principles underlying recovery from insolvent beneficiaries, which are based on a

significant and consistent body of case law. Moreover, it addresses the specific case of voluntary liquidation, restructuring plans and arrangement with creditors, by providing guiding principles based on its practice and the relevant case law of the Union Courts.³⁹

A new entry point for queries about the recovery of State aid: for the first time, the 2019 Recovery Notice introduces an electronic mailbox to provide additional support: comp-recovery-state-aid@ec.europa.eu.

Conclusion

The 2007 Recovery Notice proved very useful in improving the implementation of recovery policy and contributing to the wider objectives of the State Aid Action Plan. The impetus it gave to recovery undoubtedly helped shape Commission practice and Member State action, which, in turn, contributed to developing the case law of the Union Courts.

The Notice is designed to collect, consolidate and present state-of-the-art recovery of unlawful and incompatible State aid, based on the experience of the Commission's dialogue with Member States, its practice and the most recent case law. It matches the objectives pursued by State Aid Modernisation. Finally, it is to be hoped that it will provide Member States with all the assistance they need to better remedy distortion of competition in the internal market in the post-SAM environment.

³³ 2019 Recovery Notice, paragraphs 91-94.

³⁴ See: Judgment of the Court of Justice of 7 March 2018, *SNCF Mobilités v Commission*, C-127/16 P, ECLI:EU:C:2018:165.

³⁵ 2019 Recovery Notice, paragraphs 98-104.

³⁶ See: Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraph 117.

³⁷ 2019 Recovery Notice, Section 4.6.

³⁸ 2019 Recovery Notice, Section 4.7.

³⁹ 2019 Recovery Notice, Section 4.8.