

# New EU State aid Recovery Notice strengthens Commission's hand

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On 22 July 2019, the European Commission published a new State aid Recovery Notice on its website (publication in the Official Journal of the European Union will follow).<sup>[1]</sup> The new Notice replaces the Recovery Notice of 2007<sup>[2]</sup> which was introduced to address the slow and sometimes inadequate implementation of State aid recovery decisions by EU Member States. Without actual recovery of unlawful aid, the State aid rules are toothless and therefore largely ineffective. As a consequence, the Commission considered actual and speedy recovery essential to an effective State aid policy. The new Recovery Notice builds on the experience the Commission has acquired with recovery proceedings over the last decade and incorporates some of the case law of the European courts during this period. It provides more detail on certain aspects of the recovery procedure, in particular on how the beneficiaries of the aid and the amount to be recovered are to be identified. The new Notice also contains specific details for recovery of aid granted through tax measures, a focus of State aid enforcement in recent years. It states, for example, that national limitation periods applicable to recovery of tax arrears must be left unapplied if this would impede full recovery of the aid.

The new Notice follows a consultation on a draft which the Commission published in the beginning of 2019 and to which 18 Member States and 11 other stakeholders responded.<sup>[3]</sup> Despite some critical comments from stakeholders, the final version of the Notice does not contain many substantive changes compared to the draft. The only exception to this is probably an instance where the Commission has made the text stricter, namely where it requires that Member States "should" extend recovery to undertakings which were not originally beneficiary of aid, but to which aid was transferred later on. In the draft, the Commission had more ambiguously stated that this "may have to" be done.

Stakeholders had been particularly critical of the, in their view, one-sided reference in the draft Notice to case law which sees few limitations on the recovery of State aid. According to these respondents, the Commission should accept that recovery should not be attempted in some instances, e.g. if the Commission has created legitimate expectations,<sup>[4]</sup> when the necessary information for recovery is unavailable,<sup>[5]</sup> or when a national court ruling dealing specifically with the existence of aid becomes final.<sup>[6]</sup> The Commission did not soften its strict approach in the final version of the new Recovery Notice.

Several respondents had also pointed to continued uncertainty over the identification of aid beneficiaries and the quantification of the aid amounts to be recovered. Although the new Notice contains additional clarifications on this, there also appears to be a tendency in the Commission's decisional practice to leave these matters open in the original decision which identifies the existence of unlawful aid and orders its recovery. Although lack of cooperation of Member States and beneficiaries may sometimes explain this approach, it leads to further uncertainty during the recovery process and seems to have played a role in the recent annulment of some Commission decisions by the General Court.<sup>[7]</sup> So the concerns of the stakeholders in this respect are quite justified.

A final hot potato is the interplay between State aid recovery and insolvency proceedings. The Commission is adamant that, if the aid amount cannot be recovered from the beneficiary, not only should it then be forced into insolvency: no restructuring or temporary continuation of its activities should even be allowed unless the full aid amount is recovered. Some of the case law of the European Courts indeed points in this direction, but it remains hard to reconcile this approach with the objective of national and European insolvency proceedings. While State aid recovery proceedings aim to retroactively remove the distortive effects of unlawful aid, the restructuring of businesses under insolvency legislation takes into account other objectives as well, for example maintaining jobs.<sup>[8]</sup> It is only a matter of time before the European courts will have to decide which objectives should be given priority.

In the meantime, Member States and State aid beneficiaries are well advised to heed to the views of the Commission in the new Recovery Notice.

[1] See [http://ec.europa.eu/competition/state\\_aid/legislation/recovery\\_notice\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/recovery_notice_en.pdf).

[2] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4

[3] The draft Notice and most of the responses to the consultation are available here: [http://ec.europa.eu/competition/consultations/2019\\_recovery\\_notice/index\\_en.html](http://ec.europa.eu/competition/consultations/2019_recovery_notice/index_en.html).

[4] While the new Recovery Notice mentions legitimate expectations as a possible limitation to recovery, it only describes instances where legitimate expectations do not arise, and no instances where they do.

[5] See C-214/07 *Commission v France* ECLI:EU:C:2008:619, point 13.

[6] The Court of Justice stated in case C-505/14 *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742 that a final judgment of a national court confirming a contract but without specifically examining the question of whether that contract entailed State aid, does not prevent a national court from concluding in a subsequent judgment that the contract nevertheless constitutes State aid. Whether the principle of *res judicata* could prevent recovery in other circumstances was not finally decided by the Court of Justice in this case.

[7] See, for example, T-131/16 *Belgium v Commission* ECLI:EU:T:2019:91 and T-865/16 *Fútbol Club Barcelona/Commission* ECLI:EU:T:2019:113.

[8] See, for example, the recently adopted Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive 2017/1132 (Directive on restructuring and insolvency), OJ L 172, 26.6.2019, p. 18.