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Ministry of Enterprise and Innovation

Department for Business, Competition and
Agriculture, Division for Competition, State Aid and
Framework Conditions

**HT.5261 - Draft Commission Notice on the recovery of unlawful
and incompatible State aid (*recovery notice*) – additional written
comments from Sweden**

At the multilateral meeting on the 7th of March 2019, Member States were given the opportunity to express their views on the draft recovery notice to the Commission. One of the matters that was discussed during the meeting was that the Commission has omitted the timetable for the implementation of a recovery decision (paragraph 40-43 in the 2007 notice) from the draft notice. Sweden would hereby like to add the following comments on this matter, in addition to the comments on the draft that we sent to the Commission on the 1st of March.

In the new draft, reference is made in e.g. paragraph 17 and 61 to the Procedural Regulation Article 16(3), whereby the Member State concerned must implement recovery effectively and immediately, not only to its aim but to its effect. Reference is also made to the fact that a “recovery deadline” is set in the Commissions recovery decision, setting two deadlines for the Member State concerned to first (i) submit precise information on the measures it has planned and already undertaken to execute the decision and then (ii) fulfil the recovery obligation (paragraph 71).

In the 2007 notice, the timetable was clearly stated in paragraph 42, as was also the motives for extending the deadline for recovery that had been applied up until then:

42. The Commission recognizes that the two months deadline for the execution of the Commission decisions is too short in the majority of cases. Therefore, it decided to prolong

to four months the deadline for the execution of the recovery decisions. From now on, the Commission will specify two time limits in its decisions:

— a first time-limit of two months following the entry into force of the decision, within which the Member State must inform the Commission of the measures planned or taken,

— a second time-limit of four months following the entry into force of the decision, within which the Commission decision must have been executed.

These time limits are not mentioned in the draft notice besides the 2-month limit in paragraph 148, referring to the first period during which a Member State must inform the Commission of the measures planned or taken.

148. In order to refer a matter under Article 108(2) TFEU to the Court of Justice, the Commission must first establish which obligation imposed on the Member State by the recovery decision was not fulfilled. Generally, the recovery decision includes two different types of obligations: (i) to inform the Commission of the measures taken or to be taken to implement the decision within 2 months of its service and keep it informed about the state of play of the case following the recovery deadline; and (ii) to execute the obligation to recover the State aid within the recovery deadline.

To add to this matter, during the meeting several member states advocated for extending the recovery deadlines.

The Swedish general view on this matter is that recovery of illegal and incompatible state aid should be done effectively and immediately. This is regulated in the Procedural Regulation and by the courts jurisprudence, and we understand that the Commission has neither any other ambitions nor possibilities in this regard. The swift completion of recovery proceedings is important also from an economic point of view, to make sure that the distortion of competition can be remedied as soon as possible. A speedy recovery is of particular importance when the beneficiary is still performing economic activity on a market.

Our understanding is also that the practices of the Commission will not change in connection to the drafting of the recovery notice. The recovery notice is rather meant to describe the past and current Commission practice in the field, and not to set new standards for the future.

That being said, Sweden would like to suggest that the current time limits for recovery proceedings of 2 plus 2 months as a baseline should be retained. This would then need to be clarified in the current draft text. An expressly set time limit is an important signal to the Member States and increases the continuity, legal certainty, equal treatment and transparency of the recovery proceedings in the Member States. Article 108.2 stipulates that *[i]f the State concerned does not comply with this [recovery] decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct*. If other states are to be able to execute their rights as given in this article, the time limit given to the Member State subject to the recovery decision needs to be predictable and transparent.

If the Commission however has experience implying that the current time limit is too strict in particular types of cases, for instance when insolvency proceedings are involved, then the Commission is invited to give account for this in the text to clarify that the Member States in the recovery decision can be granted a (fixed) longer timetable in those certain situations.

In addition to this, Sweden would like to suggest that the Commission should start to collect and keep statistics on how long recovery cases take to complete, also in relation to certain key parameters that are relevant in recovery situations. Such statistics could be very useful as a basis for best practice discussions with and between Member States.