

## Consultation Response - Department of Finance (Ireland)

### Draft Commission Notice on the Recovery of Unlawful and Incompatible State aid

#### Purpose of Consultation

Where the European Commission finds that a Member State has breached EU State aid rules, the Commission orders the Member State to recover the alleged aid. In 2007, the Commission first explained its policy towards the implementation of recovery decisions with the publication of their 2007 Recovery Notice. Since then, the Commission's practice and the case law of the Union Courts has evolved.

The Commission has now published a revised draft Notice which explains the rules and procedures governing the recovery of State aid, and how the Commission works with Member States to ensure compliance with their obligations. This Notice is intended to replace the 2007 Notice and Member States have been invited to provide feedback to the Commission on this draft Notice.

The deadline for response to the consultation is 29 April 2019.

#### Department of Finance (Ireland) comments on the draft Commission Notice on the Recovery of Unlawful and Incompatible State aid.

#### Introduction

The Department of Finance welcomes the opportunity to submit comments on the draft revised Notice.

The introduction to this draft Notice acknowledges (paragraph 6) that the Commission's practice and the case law of the Union Courts has evolved since the Commission first explained its policy and practice in the 2007 Recovery Notice (*'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid'*). As this Notice now seeks to explain those developments and replace the 2007 Recovery Notice, this presents a valuable opportunity to take account of any novel and unprecedented recovery issues which have occurred since this time.

During this time, Ireland has been involved in the largest ever State aid recovery. The comments below reflect this experience of an unprecedented and complex recovery process and are intended to influence the further development of the draft.

#### Setting a Recovery Timeline - General observations

The nature of a recovery obligation is such that it is not always fully within the control of the Member State, but can also be a product of engagement between the Member State authorities, the relevant alleged beneficiary (ies) of the State Aid, and the supervision of such a process by the Commission.

While there may not be a standard deadline for recovery, in practice it has tended to be a four-month period. In setting the recovery period, the Commission should have consideration for the particular circumstances of each case. This should include an assessment of the complexity of recovery calculations, the quantification of the recovery amount, the period covered and the dependence of the Member State on third parties outside their control. Additional time should also be allowed where there is a requirement to seek prior approval of the quantification of the recovery amount from the Commission as an essential pre-condition of effecting recovery.

Therefore, in keeping with the spirit of sincere cooperation, it is considered that the updated Notice should state that the Commission should include evidence as to how it determines that the timeframe for recovery is sufficient and that relevant considerations have been taken into account in setting the recovery deadline.

It is also considered that the draft Notice could be amended to provide that some of this work which is now considered to be carried out once a decision is made by the Commission could be carried out before a formal notice of the provision of State aid by a Member State is made public. This would be of benefit to both the Member State and the Commission.

The following sets out reasons why this is necessary:

- In complex cases, there can be significant complications in the calculation of the recovery amount which needs to be overseen by the relevant authorities in the State and supervised by the Commission. All of this can increase the time required to conclude the implementation of the recovery process and should therefore form part of the Commission's considerations in setting the deadline for recovery.
- The scale of the aid involved is not always recognised in respect of the time period allowed for recovery – essentially the same or similar time periods apply irrespective of the scale of the aid or the complexity of the recovery process.
- There may be difficulties in establishing the number of, the nature of and the details of potential beneficiaries of State aid. In many cases, there may be multiple or even significant numbers of beneficiaries, all of which take time to identify and understand their involvement in the State aid investigation.
- Indeed it is possible that the beneficiary (ies) may no longer be active. There may potentially be a significant time period required to determine whether this is the case before the Member State can even commence the recovery process. This may involve legal analysis or indeed Court action to make such a determination.
- There is a separation of powers in the Member States between the legislative and judicial branches. Where judicial remedies are used to recover State aid, these are under the control of the domestic courts system and there is no basis for the relevant authorities in the Member States to influence or determine such processes.
- The Commission's supervision of the recovery process by itself can lead to delays in recovery – e.g. where there is disagreement on methodological issues; where there is disagreement on potential beneficiaries or indeed other issues which need to be resolved between the Member State and the Commission.

- While the Commission mentions the potential provision of escrow agreements, in certain circumstances given the scale of the aid involved, a bespoke escrow agreement may be necessary and this takes significant time to develop and implement.
- There may be a need for public procurement procedures to facilitate the setting up of the necessary infrastructure for the management of any aid. These are mandatory requirements under European law and the obligation to meet EU legal requirements of procurement should not be considered to result in a breach of a recovery obligation.

Since the Commission first produced its guidelines in 2007, Ireland has been involved in the largest ever State aid recovery obligation. This process uncovered many unprecedented issues which can impact on a Member State's ability to recover within a short and inflexible timeframe. This revised Notice provides an opportunity to update administrative procedures in light of such experiences.

The draft Notice should take account of these issues and set out how a specific date for recovery is selected by the Commission. This is not intended to delay or impede recovery since it is accepted that this is an obligation of the Member State, but to recognise that there are often complex practical and operational issues that must be resolved before a Member State can commence recovery and which requires changes in administrative procedures around the recovery process.

As a general point, the draft guidance could be more explicit and indeed improve on the measures which are available to the Commission in engaging with the Member State as part of the recovery process. Thus, it is considered that there are potential administrative approaches which could allow for a more effective recovery process.

## **Further detailed observations**

### **2 General Principles**

#### **2.2.2. The principle applied to the sharing of information**

The Notice states that the Member State concerned by a recovery decision must report to the Commission regularly about its implementation. Paragraph 23 notes that the Commission may elaborate on the standard of proof or the type of evidence required for the Member State to determine the amount of aid subject to recovery. In circumstances where complex recovery calculations must be shared with the Commission for approval prior to effecting recovery, we submit that additional time must be allowed in the recovery process for these additional steps. It may be useful to outline in the Notice the type of proof required.

It would be useful if there were a requirement on the Commission to specifically address the reasons for a refusal to extend a deadline, supported by practical examples where a Member State has sought such a deadline in good faith with relevant information. It would be useful if the draft guidance were to set out in greater detail the specific conditions under which an extension might be granted.

Paragraph 22 and 23 (and paragraph 71) suggest that the Commission may share spreadsheets or elaborate on the proof and type of evidence required to identify the beneficiaries. It would be useful if it was a requirement on the Commission to provide such spreadsheets where the recovery is difficult and complex. Indeed it may be a useful exercise that as part of the investigation of alleged

State aid that the potential beneficiaries could be determined as part of that process rather than requiring it when a formal decision has been made by the Commission.

## **2.4 Limits to the obligation to recover**

The draft Notice (paragraphs 28- 43) sets out the conditions under which there are limitations to recovery which have been determined by the Union Courts. While these are legal principles and can only be amended or altered by the Union Courts, it is considered that there may be scope for improved administrative arrangements to facilitate the recovery process by the Member State. Under the Court's case-law, the deadline imposed by the Commission must be reasonable.

It may be appropriate to consider whether different administrative approaches should be adopted by the Commission depending on the scale or complexity of the recovery process. It may also be useful for the draft guidelines to separately account for a complex or difficult recovery scenario so as to inform the recovery process.

In our recent experience, we have seen that Commission decisions can vary in the length of time allowed for recovery, though the recitals to Decisions do not explain how the Commission decided on these deadlines. The Notice should state that the Commission should include evidence as to how it concludes that the set period for recovery is sufficient and has been adequately assessed.

In setting the recovery period, the Commission should have consideration for the complexity of calculations, the quantification, the period covered and the dependence of the Member State on third parties outside their control, as well as requirements to seek prior approval of the quantification of the recovery amount from the Commission as an essential pre-condition of effecting recovery.

As these external factors mean that the overall timetable can be beyond the control of the Member State, this should be clearly considered by the Commission in setting the recovery timetable.

## **3. The Respective Roles of the Commission and the Member State concerned**

Paragraphs 64-65 and 66-68, respectively, set out the roles of the Commission and the Member State in the recovery process.

### **3.1 The role of the Commission**

Paragraph 65 (and paragraph 117, see below) reference the existence of an escrow agreement for provisional recovery. From experience, it is important to recognise that one form of escrow agreement may not be suitable in all cases and in order to protect the interest of the Member State, it is important that suitable time and expertise is applied to the development of an escrow agreement in order to ensure that this is fit for purpose. The Commission might consider developing different forms of escrow agreements in order to assist the recovery process and to account for the time required to allow due consideration by Member States when setting the recovery timeframe.

### **3.2 The role of the Member State**

As regards paragraph 67, the Notice indicates that a Commission decision addressed to the Member State is binding on all the organs of the State, including its Courts. It could be recognised in guidance that there are practical and legal boundaries between different elements of the State including the legislature and the judiciary. The domestic courts have their own procedures which are not amenable to amendment by the Member States and this needs to be taken into account in any deadline set by the Commission.

Further clarification on the meaning of paragraph 70 as to the nature of fast-track, specialised administrative procedures in the draft guidance would be welcome.

## **4 Implementing the Recovery Decision calculations**

### **4.1 Request for an extension of the deadline to execute the decision**

In particular it is considered that where the Commission is assessing requests to extend a deadline, it should specifically address the reasons where it refuses to extend a time limit. Indeed it may be appropriate for the Commission to reconsider its approach to such extensions as the draft Notice indicates in paragraph 74 that that “The Commission’s practice is to grant an extension of the deadline to execute its decision only in exceptional circumstances” and that this approach could be modified where it is recognised that there is a complex and difficult recovery process.

### **4.2 Kick-off meeting**

The Kick-off meeting offered by the Commission aims to facilitate and accelerate the recovery process. It is our view that it should also be a requirement of this meeting to have a realistic and transparent discussion on the possibility of quantifying the recovery amount, and effecting the recovery, within the deadline set by the Commission, taking account of the particular circumstances of the case. If possible, the quantification of the recovery amount should occur within the period of the formal investigation.

It is clear from the Court’s case law that the Commission and the Member State must cooperate if the Member State encounters difficulties in implementing a decision. This includes problems to be resolved after the decision.

Paragraphs 82-83 (and paragraph 71) also sets out the current approach wherein the recovery decision requires the Member State to identify the beneficiaries; the amount to be recovered and the national procedure applicable for recovery. It is considered that it should be possible to make the Member State aware of the decision of the Commission before it is formally announced and allow engagement between the Commission and the Member State on the specific issues that may arise before the decision is formally announced. This would allow for exchange of dialogue on any issues to be addressed and indeed inform the final decision on the Commission on methods of recovery and an appropriate recovery timetable, the possible beneficiaries of the aid and the recovery amount.

#### **4.3.1 Identification of the aid beneficiary belonging to a group of undertakings**

At paragraph 84, the draft guidelines suggest that the “identification of the aid beneficiary is not complex”. We are of the view that this is not always the case. However, where this is the case then it should be possible to identify the beneficiary in all cases during the investigation phase and this could be reflected in the guidelines.

#### **4.3.3 The aid beneficiaries of tax measures**

A similar point can be made in reference to paragraph 95 where in the case of tax schemes “The Member State concerned must identify the undertakings that have benefited from the advantage through the scheme” and it is considered that the draft guidance could be amended to provide that this could be carried out as part of the formal investigation.

#### **4.4 Quantification of the amount to be recovered**

Paragraph 98 refers to the circumstance where the Commission decision has not quantified the precise aid amount. In this circumstance, the Member State cannot lawfully recover the money without knowing the exact amount to recover and cannot rely on an approximation.

Having due regard to the complexities involved in each particular case, the Commission must allow adequate additional time for completion of the calculation process. This process of setting the recovery period must also have regard to the third parties on which the Member State may rely. These may include tax authorities of other Member State and third countries, the taxpayer and also the Commission itself where the Commission has requested that calculations be submitted to the Commission for prior approval. We therefore suggest that the revised Notice should state that the deadline set by the Commission must reflect the specific circumstances of the case and matters which lie outside of the Member State's control.

An alternative approach may be to consider whether some or all of this analysis is carried prior to issuing a formal decision or where that it is not possible that there is consideration of the time and difficulties involved when considering a timeline for an extension.

#### **4.4.1 Tax Measures**

Again having an impact on the deadline for recovery, paragraph 108 states that in order to collect tax amounts, the tax authorities might have to carry out internal tax audits prior to the actual recovery. Such a requirement by the Member State should form part of the consideration of the timeline for recovery. For example, in the case of complex audits (such as those involving a variety of complex factors).

#### **4.6 Provisional Implementation of recovery**

The draft Notice states that the Commission is ready to share examples of suitable escrow agreements. It is our experience that examples which the Commission has developed are designed for simpler factual scenarios that can occur in recovery obligations. In addition, template agreements do not account for a scenario where it is necessary to observe EU and national public procurement rules, or where the legal jurisdiction differs (i.e. civil law vs common law) and where there may be potential third country adjustments.

In keeping with the previous 2007 Notice, this Notice states (at paragraph 117) that in ordinary circumstances a beneficiary would pay over the disputed sums into a bank account controlled by the Member State and await the outcome of the annulment action before the General Court. In ordinary circumstances, the money on deposit would gain interest which reduces the financial risk to the beneficiary. This ignores the issue of credit risk where the amount of aid to be recovered is significant and it is not possible to place it in a single financial institution but may need to be lodged to a number of financial institutions or provide for a more diverse financial management arrangement in order to ensure the safekeeping of the State Aid amount. The level of such risk can derive from the scale of the recovery and needs to be taken into account in the recovery process.

Recent experience has shown that in exceptional circumstances it is necessary to design a bespoke recovery process. For example, to account for circumstances where financial institutions would apply negative interest rates to any sums held. The Commission must act reasonably in setting the recovery timeframe and clearly indicate how such factors have been considered in assessing an appropriate and reasonable timeframe for recovery.

### **6.1 Infringement Proceedings**

Paragraph 148 references how the Commission may refer a failure to recover within the relevant time to the Union courts. However, this should be a last resort and recourse should be made to the level of engagement and co-operation between the Member State and the Commission before such a process is initiated. It is considered that improved administrative processes, in particular before a formal decision is made, would improve the possibility of a timely recovery and reduce or prevent the need to seek a decision from the Courts.