

Comments on the Draft Notice on the recovery of unlawful and incompatible State aid

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1. INTRODUCTION

1.1. The Centre of European Law King's College London welcomes the initiative of the European Commission to update the 2007 Recovery Notice as to provide further certainty and transparency for all parties concerned. The new Notice represents also an opportunity to reflect the changes in the legal landscape brought by the Lisbon Treaty and the EU Charter of Fundamental rights and, in the State aid area, by the SAM and the GBER's innovations whereby Member States are now the co-enforcers of EU State aid law.

1.2. The following comments are intended to provide some further clarifications and specific addenda that could hopefully enhance the effectiveness of the new Notice.

2. THE LEGAL VALUE OF THE NOTICE

2.1. In the interest of completeness, we suggest amending Paragraph 7 of the Draft Notice. The following sentence should be added at the end: *'This notice binds the discretion of the European Commission, who cannot depart from its provisions without giving reasons that comply with the principles of equality, legal certainty, and legitimate expectations.'* Whilst we agree that a Notice cannot create or alter any right or obligations as compared to those laid out in the Treaty and Regulations, Paragraph 7 can mislead the reader into believing that the draft Notice does not follow the general regime of EU guidance instruments, as established in the case law of the Union Courts. Indeed, the Court *acquis* provides that such instruments do create supplementary obligations for the European Commission, because they bind the discretion of the Commission, who 'cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations.'¹

3. THE GENERAL PRINCIPLES OF EU LAW

3.1. Subheading 2.2.1 *"The general principle"* could be logically confusing. It may be better to replace it with *"The Treaty provisions"*.

3.2. The style of introductory Paragraphs 28 to 30 seems unnecessarily defensive. In particular, Paragraph 29 could be misinterpreted. Whilst no comprehensive list of principles is provided for in primary legislation, many principles of high relevance to State aid law are indeed enshrined in the Treaty and in the Charter of Fundamental

¹ Judgment in Joined Cases C-189/02, C-202/02, C-205/02, C-208/02 and C-213/02 *Dansk Rørindustri and others v. Commission*, [2005] ECLI:EU:C:2005:408, para 211; Judgment in Case C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya v. Commission*, [2011] ECLI:EU:C:2011:372, para. 120; Judgment in Case C-75/05 P and C-80-05 P *Germany v. Kronofrance*, [2008] ECLI:EU:C:2013:458, para 60.

Rights, such as the principle of proportionality in Article 5(1) TEU, the right to good administration in Article 41 of the Charter, and the right to an effective remedy and fair trial in Article 47 of the Charter. These are principles of constitutional importance for the European legal order, corollaries of the rule of law. However, the current formulation of Paragraph 29 underscores the importance of general principles of law. The current Paragraph 30 could be redrafted along the following lines: *'The general principles of Union law are of constitutional importance for the European legal order. The Commission commits to observe these principles in the context of State aid recovery. However, generic claims about an alleged infringement of a general principle of Union law cannot be accepted. Such claims need to be accompanied by evidence that, in particular cases, and in accordance with the case law of the Union Courts, specific general principles of Union law have been breached by a recovery procedure.'* Thus, Paragraph 30 becomes redundant and can be deleted.

3.3. Paragraph 32 seems to suggest that the principle of legitimate expectations would only apply in exceptional circumstances and on a case-by case basis. It seems necessary to clarify further when the EC will consider that these exceptionally circumstances may occur. Some indications drawn for the Court case law could be included, such as for instance a situation of uncertainty and/or lack of clarity, a breach of the Commission of its duty of care, or of an equivocal situation which the Commission was under a duty to clarify before it could take any action to order the recovery of the aid already paid.² Others can be usefully derived from the decisional practice of the EC.³

3.4. At paragraph 36, it would be appropriate to include an explanation of the differences between the principle of legal certainty and the protection of legitimate expectations. Although the case-law might lead to a different conclusion, they are indeed separate concepts. Whilst the principle of legal certainty requires 'legal rules to be clear and precise and aims to ensure that situations and legal relationships remain foreseeable',⁴ the protection of legitimate expectations requires a public authority to properly exercise its powers and it provides that the authority's interest does not prevail over that of the person concerned in seeing a certain situation maintained, so that the interest might legitimately be assumed to be stable.⁵ Specific examples can be drawn from the EC decisional practice and the Notice should also restate that the application of the principle of legal certainty is separate from the principle of legitimate expectations and its application does not depend on the conditions required for the creation of a legitimate expectation on the part of the recipient of the aid.⁶

3.5. Further, Paragraphs 36-39 rely exclusively on case law where the principle of legitimate expectations (allegedly) does not apply. Although it is true that the interpretation of the Courts is very restrictive, it may be advisable to add a paragraph explaining when such a principle indeed applies. For instance, the General Court has recently defined the scope

² See Cases C-223/85 *RSV v Commission*, [1987] ECLI:EU:C:1987:502, paras 14-17; C-408/04 P *Commission v Salzgitter*, [2008] ECLI:EU:C:2008:236, para 106.

³ Commission Decision on "*GIE Fiscaux*" of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code — State aid C 46/2004 (ex NN 65/2004), OJ L112, 30.4.2007, p. 41.

⁴ C-63/93 *Duff and Others*, 1996 ECLI:EU:C:1996:51, para 20; Case C-199/03 *Ireland v Commission* [2005] ECLI:EU:C:2005:548, para 69.

⁵ Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport*, [2004] ECLI:EU:C:2004:443, para 70.

⁶ Case C-408/04 P *Commission v Salzgitter*, [2008] ECLI: EU:C: 2008:236, para 106.

of the application of the protection of legitimate expectations in the case *Deutsche Telekom*.⁷

3.6. The Notice could also usefully draw on the rich Commission decisional practice when recovery was not ordered because of legitimate expectations. Indeed, the vast majority of the judgments quoted in the Draft Notice refer to Decisions in which the existence of legitimate expectations was not acknowledged by the Commission. There are nevertheless many other decisions in which recovery was not ordered on grounds of protection of 'legitimate expectations' or 'legal certainty'. These Decisions that became final as they went unchallenged, are very relevant in the context of the Draft Notice.⁸

3.7. Paragraph 38 states that, in case of breach of the standstill obligation under Article 108(3) TFEU, 'the aid beneficiary cannot claim to entertain legitimate expectations that the grant of the aid was lawful, unless exceptional circumstances apply'. The Notice should spell out what these "exceptional circumstances" are. For instance, the notice should rely on case law of the court as to explain that for instance: *'This would be the case if the appraisal of the aid character of a certain measure was not apparent or based on a new and more rigorous application of the rules on State aid concept subject to several possible interpretations.'*⁹

4. THE ROLES OF THE COMMISSION AND THE MEMBER STATES

4.1. The respective roles of the Commission and of the Member States are recognized but not clearly defined in Paragraphs 63-68. The Notice would benefit from the inclusion of case law such as *Guardian Glass* which clarified that the Member State concerned is the only competent authority to implement a recovery decision and that the indications provided by the Commission during the recovery phase are not legally binding for the Member State and thus not challengeable before the EU Courts.¹⁰ Furthermore, it would be useful to include a paragraph on the status of suggestions, opinions or further clarifications that may be given by the Commission to the Member States in the post-

⁷ T-207/10 *Deutsche Telekom v Commission* [2018] ECLI: EU:T:2018:786, para 98-99; see also Case C-298/00 P *Italy v Commission*, [2004] ECLI: EU: C: 2004:240, para 88.

⁸ See for instance: Commission Decision of 16 May 2000 on the aid scheme implemented by Italy to assist large firms in difficulty (Law No 95/1979 converting Decree Law No 26/1979 on special measures for the extraordinary administration of large firms in crisis), 2001/212/EC, OJEU L 79/29 OF 17.3.2001, paras 71-73; Commission Decision of 3 June 2003 on loans for the purchase of fishing quotas in the Shetland Islands (United Kingdom), 2003/612/EC, OJEU L 211/63, 21.8.2003, paras 67-71; Commission Decision of 7 December 2005, Investments of Shetland Leasing and Property Developments Ltd in the Shetland Islands (United Kingdom), OJEU L 81/36, 18.3.2006, paras 55-64; Commission Decision of 13 November 2007 amending Decision 2003/757/EC on the aid scheme implemented by Belgium for coordination centres established in Belgium, 2008/283/EC, OJEU L 90/7, 2.4.2008, para 42-44, 57-58, 85; Commission Decision of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain, 2011/5/EC, OJEU L 7/48, 11.1.2011, paras 167-169; Commission Decision of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain, 2011/282/EU, OJEU L 135/1, 21.5.2011, paras 193, 197-199, 201-202, 208.

⁹ To that effect, see Judgment in Joined Cases C-182/03 and C-217/03 *Belgium v Commission* ("Forum 187"), [2006] ECLI: EU: C: 2006:416, paragraph 71; joined cases C-183/02 P and 187/02 P *Daewoo Electronics Manufacturing España and Others v Commission*, [2004] ECLI:EU:C:2004:701 and Opinion of Advocate General Kokott, delivered on 6 May 2004, ECLI:EU:C:2004:292, para 66.

¹⁰ Judgments in Cases T-354/99 *Kuwait Petroleum*, [2006] ECLI: EU: T: 2006:137, paras 67-69; C-69/13 *Mediaset*, [2014] ECLI: EU: C: 2014:71; Order of the General Court in Case T-170/16 *Guardian Glass*, [2017] ECLI:EU:T:2017:722.

decision phase. Those recommendations on how to implement the recovery decisions cannot be binding as they do not directly pertain to the Commission's assessment.¹¹

- 4.2. Footnote 80 could be usefully inserted in the main text, as it is a particularly relevant point. The Footnote could be also be slightly redrafted modified. Instead of 'It is sufficient for the Commission to include..', we suggest '*The Commission should however include information enabling the recipient itself to calculate that amount without undue difficulty. The Commission is also under a specific obligation to act diligently and impartially and to assess as accurately as possible the actual value of the benefit received from the aid by the beneficiary.*'¹²

5. REQUEST FOR AN EXTENSION OF THE DEADLINE TO EXECUTE THE DECISION

- 5.1. At paragraphs 74 and 76, it is not immediately clear why extensions to the time limit for recovery are only granted exceptionally or why they could not be granted retroactively. The practice seems to be different than what it is mentioned in the Draft Notice text. Short deadlines provided by a Recovery Decision are quite often impossible to meet. Indeed, a certain time extension may have become *de facto* a general rule without infringement actions being brought before the Court on an automatic and systematic basis. Thus, the Notice should make it explicit what is the Commission's actual approach as to provide further transparency and ensure both the effectiveness of the recovery decision and legal certainty.
- 5.2. In our view, the Notice could constitute an opportunity for the Commission to devise a different approach to deadlines in the recovery phase. The Commission's Decisions could include a clause delegating to the Competition Commissioner the granting (or refusal) of extensions of the original deadlines, within certain time limits and according to certain pre-defined criteria. Those delegated decisions should then be published. Such approach would introduce some flexibility into the system, in order to align the official deadline with the circumstances of each case.

6. QUALIFICATION OF THE AMOUNT TO BE RECOVERED.

- 6.1. At paragraph 98, it would also be useful to include the ruling in *Mediaset*¹³ establishing that if the Decision indicates the amount of the recovery that has to be calculated by the Member State, that sum may well be zero.¹⁴

¹¹ Cases T-354/99 *Kuwait Petroleum*, [2006] ECLI:EU:T:2006:137, paras 69; C-69/13 *Mediaset*, [2014] ECLI:EU:C:2014:71.

¹² See Cases C-480/98 *Spain v Commission*, [2000] ECLI: EU: C: 2000:559, para 25; C-415/03 *Commission v Greece*, [2005] ECLI:EU: C:2005:287, para 39; T-366/00 *RENV Scott v Commission*, [2007] ECLI:EU:T:2007:99.

¹³ C-69/13 *Mediaset*, [2014] ECLI:EU:C:2014:71, paras 33 and 37.

¹⁴ See also Case T-468/08 *Tisza Erőmű, v Commission*, [2014] ECLI: EU: T: 2014:235, paras 134-143, as regards the distinction between the existence of an aid and its amount at the moment of recovery.

7. PROVISIONAL IMPLEMENTATION OF RECOVERY

7.1. In our view, the provisional implementation of recovery is automatically achieved when the beneficiary puts the amount in an escrow account. The fact that the Member State cannot recover the money while litigation is still going on is totally logic. Therefore, paragraph 115 could include the following wording: '*Member States should accept provisional repayment*', instead of providing that it "may" do so.

8. ALTERNATIVE MEANS OF RECOVERY

8.1. The offsetting of genuine legal claims is a well-accepted principle in all legal systems of the Member States. We suggest amending Paragraph 124 by stating that it applies normally (not only exceptionally) to State aid recovery as well if the conditions for its application are fulfilled.¹⁵

9. PROVISIONAL AND DEFINITIVE CLOSURE OF RECOVERY PROCEDURES

9.1. At paragraph 139, the Notice explains that the Commission recovery procedure is never definitively closed and could be reopened at any moment in the future. Nevertheless, the Notice should specify that the rule applies only to the Commission vis-à-vis the Member State. Thus, the difference with the subsequent national recovery procedure between the Member State and the beneficiaries should be made explicit. Indeed, the latter should obviously have a beginning and an end in order to comply with EU law and national procedural laws.

9.2. We suggest adding further clarifications at Paragraph 158. The *Deggendorf* case¹⁶ concerns the relationship between the Member State and the beneficiary of the aid. A beneficiary cannot shoulder all the negative consequences in cases where the Member State failed to order recovery and the beneficiary could therefore not repay the aid or if the beneficiary has already paid back the aid claimed by the Member State. The fact that the EC can always reopen the procedure against the Member State cannot imply that a beneficiary could never be compliant under the *Deggendorf* case law. This would be illogical and destroy the incentive for the beneficiary to pay back quickly the aid declared illegal.

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¹⁵ See Case C-369/07 *Commission v Greece*, [2009] ECLI:EU:C:2009:428, paras 65-68.

¹⁶ Case C-355/95 P *TWD v Commission*, [1997] ECLI:EU:C:1997:241.