

LATVIAN FINAL COMMENTS ON DRAFT COMMISSION NOTICE ON THE RECOVERY OF UNLAWFUL AND INCOMPATIBLE STATE AID (HT.5261)

No.	Place in the document text	Comments
1.	General comment.	The draft Commission communication should be supplemented with an additional clarification regarding recovery of illicit obtaining of the State aid, regarding the aid in the form of financial instruments, similarly, as it is explained with respect to tax relief measures.
2.	General comment.	It is doubtful that the condition of immediate recovery of incompatible aid is always proportionate and clearly balanced. In particular, it is a matter of concern that such immediate recovery activities can lead to insolvency for an undertaking that wouldn't in similar circumstances become insolvent even if observe the idea of recovery to return to the situation before granting unlawful aid. Principle "An aid beneficiary which is not able to pay back the aid and the recovery interest due is in principle surviving in the market only because of the aid it received"(paragraph 126) should be seen in proportional terms to the fine period necessary for recovery. In the light of this, we believe that the time-limits for recovery should be proportionate and should not lead to a situation in which the beneficiary's situation would clearly deteriorate compared to the situation before it received the aid. This is partly in line with paragraph 59 "The aim of recovery is not to maximise the Member States' return but to restore the situation that existed in the internal market before the aid was granted."
3.	General comment.	Please note translation issues to ensure correct interpretation of the provisions, e.g. last sentence of paragraph 48 is not clear enough in Latvian version. Also, the word "punkts" is used to describe both the section and paragraph, which can cause misunderstandings.
4.	46. The date on which aid was granted depends on the nature of the aid in question. For a multiannual scheme	It is unclear why for the automatic multiannual schemes for the purpose of calculating the limitation period the aid must be regarded as not having been awarded to the beneficiary until the date on which it was actually <u>paid out</u> to the beneficiary. The

	<p>entailing payments or other financial advantages granted on a periodic basis, the date of adoption of the legal basis of the aid scheme and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In this case, for the purpose of calculating the limitation period the aid must be regarded as not having been awarded to the beneficiary until the date on which it was actually paid out to the beneficiary.</p>	<p>Regulation 651/2014, article 2, para 28 defines “date of granting of the aid” as “the date when the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime”. Regarding paragraph 46, we would appreciate if the wording would be revised, since also for the automatic multiannual schemes, for instance, tax measures, the “date on which aid was granted” is the date the declaration is submitted to the tax authority (the actual payment is not relevant).</p>
5.	<p>47. The principle referred to in paragraph 46 also applies to an aid scheme entailing fiscal measures granted on a periodic basis (for instance, tax deductions on every annual or biannual tax declaration, etc.), for which the limitation period starts running for each fiscal exercise on the date on which the tax is due.</p>	<p>We would appreciate if some references would be added to this paragraph, e.g. Commission decision of 4.10.2017 on State aid SA.38944 (2014/C) (ex 2014/NN).</p>
6.	<p>86. In the case referred to in paragraph 85, the recovery decision may order the Member State concerned to recover the aid not only from the undertaking which directly benefitted from it but also from the whole group of undertakings forming an economic</p>	<p>Please specify the reference in footnote 91 or clarify paragraph 86 since the reference in footnote 91 does not give justification to the said argument that the aid should be recovered from the whole group of undertakings forming an economic unit.</p> <p>Reference in footnote 91 states that: “Where legally distinct natural or legal persons constitute an economic unit, they must be treated as a single undertaking for the purpose of applying the Community competition rules (Case 170/83 <i>Hydrotherm v Compact</i></p>

	unit or from some of the legal entities belonging to it ⁹¹ .	<i>[1984] ECR 2999, paragraph 11). In the area of State aid, the question whether an economic unit exists arises primarily where the beneficiary of aid needs to be identified (Case 323/82 Intermills v Commission [1984] ECR 3809, paragraphs 11 and 12; Joined Cases T-371/94 and T-394/94 British Airways v Commission [1998] ECR II-2405, paragraph 313). In that respect, it has been held that the Commission has a wide discretion in determining whether companies forming part of a group must be regarded as an economic unit or as legally and financially independent for the purposes of applying the State aid rules (British Airways, paragraph 314)."</i>
7.	91. In an asset deal scenario, the Commission assesses the existence of economic continuity between undertakings on a case-by-case basis, using an open set of non-cumulative criteria. In particular, the Commission may take into account the following criteria : (i) the scope of the transfer (assets and liabilities, maintenance of the workforce and/or management); (ii) the price of the transfer ; (iii) the identity of the shareholders or the owners of the seller and of the buyer; (iv) the time at which the transfer takes place (during the preliminary investigation pursuant to Article 4 of the Procedural Regulation or the formal investigation pursuant to Article 6 of the that Regulation, or after adoption of the recovery decision); (v) the	Regarding paragraph 91 which sets out the criteria for determining economic continuity, we would appreciate if it was clearly determined which criteria and features would exclude the economic continuity.

	economic logic of the operation .	
8.	131. Thus, where a plan providing for the continuation of the activity of the aid beneficiary is proposed to the creditors' committee, the authorities of the Member State concerned can support that plan only if it ensures recovery of the full recovery amount within the recovery deadline. A Member State cannot waive part of its recovery claim if the aid beneficiary continues its activity after the recovery deadline. Likewise, a Member State cannot accept any other solution that would not result either in recovery of the full recovery amount or in the immediate ending of the aid beneficiary's activity.	The practice shows that it is not possible to fully settle claims in Insolvency Proceedings. On the other hand, as a result of insolvency proceedings an undertaking ceases to exist as an entity (unless restructuring plan has been drawn up and agreed with creditors). During the insolvency proceedings creditors' claims are being settled (costs of insolvency proceedings, claims of employees, tax claims of the tax administration (creditor), claims of other unsecured creditors). This process takes unpredictable time. In the light of the above, the question is whether the condition in paragraph 131 "a Member State cannot accept any other solution that would not result either in recovery of the full recovery amount or in the immediate ending of the aid beneficiary's activity" means that, if the state should recover aid from the company who is insolvent (in official insolvency proceedings), it is enough to inform the Commission (according to paragraph 72) that aid will be recovered by completion of the insolvency proceedings (ending of the aid beneficiary's activity)? Or does it follow from the case-law that it is necessary to give priority to state aid recovery proceedings in national law?
9.	137. Following the provisional closure of a recovery procedure, the Member State concerned must keep the Commission updated and continue providing information and evidence at least once per year.	We suggest supplement the paragraph 137 of the draft Commission communication with the information what is the time period within which a Member State must submit the annual information and proofs of the illicit obtaining of the State aid (for example: in the period until the closure of the recovery procedure).
10.	139. Neither the provisional nor the definitive closure of a recovery	Please clarify when the Commission's recovery decision is deemed to be fulfilled, e.g. when the aid is recovered or when the Member State informs the Commission that effort

	<p>procedure precludes the Commission from resuming closer scrutiny of or reopening that case if necessary. In particular, this would be the case when new elements arise which change the existing circumstances or the facts which had led to the closure.</p>	<p>has been made to recover the aid and no further recovery is possible. Please clarify if there is any limitation period for procedures mentioned in this paragraph.</p>
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