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Directorate-General for Competition
State aid registry
HT.5261 Review of Recovery Notice

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Department of Tax Law

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Subject: HT.5261 Public Consultation Recovery Notice

Dear Sir, Madame,

I would like to use this opportunity to send you some observations with regard to the proposed text of the 2019 Notice on the recovery of unlawful and incompatible State aid for your consideration.

The 2007 Notice gave an indicative timetable for recovery (pt. 42, 2007), including a four month period for execution of a recovery order that has hence been an often-used period mentioned in Commission decisions. Is it intentional that no such indication is included in the 2019 Notice, as the text now refers to the actual period mentioned in the decision (see, for instance, pt. 71 of this draft)? If four months is no longer named as a suitable starting point, could you clarify what factors would determine a suitable period from the Commission's point of view?

The views presented at pt. 105 on quantification of recoverable fiscal aid are rather restrictive and necessarily so. At the same time however, they are subject to interpretation. In case an unlawful (income) tax measure would have to be recovered, only "automatically applicable deductions" are to be taken into account when recalculating taxable income, excluding any that would have needed prior authorisation by the Member State. However, if such a deduction would require an application to allow authorities to verify whether formal conditions were met, so where there is a non-discretionary process, the text of the accompanying footnote 109 might be read to suggest that such mere formality in itself would prevent taking the deduction into account. While, admittedly, this could follow from a strict interpretation of the Unicredito case, it seems to be at odds with the Court's finding that one should restore "ordinary treatment which […] would have been granted on the basis of the operation actually carried out." (see footnote 108 of your draft). Maybe footnote 109 could be amended in this respect.

At pt. 135 it might be helpful to clarify what is meant by claims being registered "at the appropriate rank". It probably refers to the same ranking as would have been available to the national authorities based on the underlying (unlawful) aid instrument. In case of fiscal aid, for instance, tax authorities would in most Member States be privileged creditors had the recoverable amount of tax due been assessed correctly from the start. (See the Frucona Košice case law in this respect.)

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One textual remark to conclude. At pt. 39 it is suggested that legitimate expectations cannot be based on an earlier Commission decision, even though footnote 46 provides the necessary nuance. The second part of that footnote – with reference to Forum 187 – contains a rather relevant exception that, in my opinion, deserves to be moved to the main text despite it being a rare one.

Should you have any further questions regarding this submission, I am available to answer any questions that might arise.

Yours sincerely,

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Professor of Comparative Tax Law*

* The author is also of counsel to Loyens & Loeff N.V., Amsterdam. This letter reflects the author's personal views and does not necessarily reflect those of Maastricht University nor Loyens & Loeff N.V.