IBERDROLA'S COMMENTS TO THE CONSULTATION ON THE NOTICE ON THE RECOVERY OF UNLAWFUL AND INCOMPATIBLE STATE AID

Participation and rights of interested parties

- In the best practices code from 2018 (at §18), the Commission recommends involvement of the aid beneficiary during the formal investigation procedure. The involvement of the aid beneficiary is, in our experience, equally important during the recovery phase. However, the draft recovery notice does not say anything about the aid beneficiary's participation in this process or right to information. This is unhelpful.

- Moreover, it would be useful for the notice to recall that the Member States, when implementing Union law, must respect not only the principles of sincere cooperation and primacy (as mentioned in the draft notice), but also the procedural rights of the aid beneficiaries under Union law, not least the principle of sound administration (see Articles 41 and 51 of the Charter of Fundamental Rights). This is particularly important when the Member State itself shall quantify the amount of the aid to be recovered.

- In this respect, it is important not to lose sight of the fact that the interests of the Member States and the aid beneficiaries many times do not coincide. Indeed, the Member States may have strong economic and political motives for interpreting and applying the State aid rules in a manner which enables them to obtain restitution of monies paid in the past (or to avoid future liabilities). However, the State aid rules must not be used for purposes other than what they are intended for. Recovery of non-aid or sums in excess of the actual advantage is liable to distort competition in the same way as State aid distorts competition, and would also lead to unjust enrichment (see §24) in breach of a general principle of Union law (see GCEU in T-166/98, Cantina sociale di Dolianova, para. 160). The draft notice also recalls that the aim of recovery is not to maximise the Member States' return (§59).

- All in all, we are convinced that involving the interested parties, transparency and respecting procedural rights will lead to better decisions, and avoid unnecessary litigation during the recovery process (see CJEU in C-210/09, Scott, para. 25).

Legitimate expectations

- Overall, the draft notice contains examples relating to legitimate expectations that are very strict. Other aspects such as the existence of previously communicated aids that are substantially the same or those communications

that are done by Member States or communication by Member States that remains unanswered by the Commission (inactivity by the Commission) should be taken into account in terms of legitimate expectations.

- §39 (bullet 5): The draft notice suggests that legitimate expectations cannot be based on an earlier decision from the Commission. This statement is however contradicted by the Commission's decisions in SA.21233 - Spanish Tax Lease, §250, and in C45/2001 - Headquarters and logistics centres, §§81-82. Both decisions suggest that earlier findings by the Commission that a certain measure does not amount to aid may in fact give rise to legitimate expectations, provided that the cases are sufficiently similar. Indeed, any other view would make it very difficult for Member States and companies to self-assess whether a certain measure amounts to State aid or not.

Res judicata

- §§40-43: It is submitted that findings of the CJEU in C-505/14, Klausner Holz, are more nuanced than what the draft notice might suggest. The CJEU would arguably have reached a different conclusion had the national court that handed down the first judicial decision, which had become definitive, examined whether the measure at hand constituted State aid and had ruled that it did not. Then the principle of res judicata would apply, at national level, and prevent a second national court from reaching a different conclusion.

Role of the national courts

- The notice only deals with the respective roles of the Commission and of the Member States (Section 3), not of the national courts. This is dealt with in the 2009 notice on the enforcement by national courts, but a cross-reference to that notice would be helpful.

Identification of the aid beneficiary

- §§84-87: Even if a "group of undertakings" is deemed to constitute the aid beneficiary, an entity with legal personality within the group must be identified, either by the Commission or by the Member State, in order to enforce the recovery decision pursuant to national law. Moreover, it is submitted that the fact that aid is granted to the "group of undertakings" does not mean that any group entity can be held liable for recovery (in the same way as for other liabilities under EU competition law).

Quantification of the amount to be recovered

- Deadlines established by the Commission to recover aids are practically utopic and should be flexibilized in the draft communication, taking a special account the circumstances of case under recovery.

- Even when the Commission itself quantifies the amount of aid to be recovered, it does not always take into account the taxes paid by the aid beneficiary on this amount. Indeed, this is an effect that is often extrinsic to the aid measure as such. Since the aid beneficiary is not a party to the formal investigation procedure, it is not guaranteed an opportunity to explain these effects to the Commission prior to the adoption of the final decision. And the Member State in question might not be fully informed of the tax impact, or even if it is, might have few incentives to raise this issue with the Commission (see the comment above regarding the economic incentives of the Member States).

- In addition, when calculating the aid to be recovered, negative taxable basis or their minoration or deductions pending application should be expressly considered in the recovery of the aid.

- Moreover, once the Commission's decision has been adopted, the national authorities and courts will for obvious reasons be reluctant to deviate from the quantification made by the Commission, even if the Commission decision clearly fails to take into account the tax impact.

- The Commission decision can be appealed to the Union courts to correct errors. However, it would be helpful, for all parties involved, if the question concerning the tax effects could be settled without recourse to the courts. This could be done in different ways, e.g. by providing for the involvement of the aid beneficiary in the formal investigation procedure or by stating, in the Commission's decision, the gross amount to be recovered prior to the tax effects and saying that the Member State is responsible for calculating the net amount in accordance with the guidelines in recovery notice.

- §101: It would be useful to refer to "taxes" instead of "income tax"". The aid beneficiary may have had to pay taxes other than income tax on the aid.

- §106: The availability of other tax deductions can be of major importance in order to determine whether an undertaking has received aid at all, and, if the answer is affirmative, the amount of aid (see GCEU in T-865/16, Fútbol Club Barcelona). We believe that strict and formalistic requirements mentioned in footnote 109 might not be supported by case-law, and that applying them risks leading to unjust enrichment for the Member State.

<u>Calculation of interest</u>

- §110: We see no valid reason for limiting access to the tool for calculating the recovery interest to the Commission and the Member States. It ought to be publicly available.

- §110: It would be helpful to clarify that the date when the aid was "made available" is not necessary the same date as when the aid is "awarded". Some national authorities confuse these two concepts.

Provisional implementation and alternative means of recovery

- §117: It would be helpful to clarify that no interest accrues as from payment of the aid to be recovered to the escrow account. The money is, as of the date of payment to this account, no longer at the disposal of the beneficiary. Again, this might seem obvious but it has triggered unnecessary discussions.

- §123 (bullet 3): It would be helpful to clarify the meaning of the non-use requirement. We understand that the purpose is to avoid that the aid distorts competition through the continued use of the asset. We assume that the reference to §91 in the draft notice means that this will only apply however if the asset used for recovery in kind meets the requisites for "economic continuity", which will normally not be the case.

Other comments

- One of the main difficulties faced by Member States, is that they don't always have the certainty of whether a certain measure constitutes state aid. In this respect, discussions with the Commission (in particular, in pre-notification periods) to determine this aspect can take a very long time (some time even years). The principle of good faith should be considered in these situations and the Commission should adopt a decision aimed at determining whether there is a state aid as soon as possible, in order to guarantee legal certainty of economic operators.