

## **Summary of the Contributions in Response to the Public Consultation on the Notice on the Recovery of Unlawful and Incompatible State Aid**

On 4 February 2019, the European Commission ('Commission') published a consultation which sought views on a draft Recovery Notice (the 'Draft'), intended to replace the 2007 Recovery Notice<sup>1</sup> regarding unlawful and incompatible State aid. The consultation ended on 29 April 2019. There were 29 contributions: 18 from Member States<sup>2</sup> and 11 from organisations and individuals. The non-confidential contributions are available on the [webpage of this consultation](#). The Commission is grateful to everyone who replied.

### **General comments**

The respondents generally considered the 2007 Recovery Notice a useful tool and praised the Commission's efforts to provide updates and clarifications in the Draft, which reflect the developments in the case law of the General Court and the Court of Justice of the European Union (the 'Union Courts'), as well as in the Commission practice since 2007. Overall, they noticed that the Draft stresses the importance of sincere cooperation between the Member States and the Commission to implement recovery decisions correctly.

Few respondents, however, consider that cooperation should be extended to aid beneficiaries as well as other third parties. They also state that the Commission should consider a wider review of State aid rules and procedures.

Some Member States found that, in some instances, the Draft presents a restrictive interpretation of the case law of the Union Courts. Few Member States also considered that the Commission should not make in the Draft any appreciation about procedures or practices that have proved ensuring an immediate and effective recovery of incompatible aid.

### **On Section 2 'General Principles'**

Most of the respondents commented Section 2.4 'Limits to the obligation to recover'. As regards the general principles of legal certainty and legitimate expectations, several respondents stated that the Commission may refer to further case law and practice to illustrate situations that may limit recovery, instead of presenting cases where the Union Courts took a restrictive interpretation of those principles. Some respondents also submitted that the Commission has a restrictive interpretation of the case law on the general principle of *res judicata* (claim preclusion) and its relation with the primacy of European Union law; according to those

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<sup>1</sup> Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4.

<sup>2</sup> BG, CZ, DK, DE, EE, IE, EL, ES, FR, IT, LV, LU, HU, NL, PL, RO, FI, SE.

respondents, national final rulings should be left unapplied only in very limited circumstances. Few respondents requested clarifications on the criteria to establish that some aid is impossible to recover.

### **On Section 3 ‘The Respective roles of the Commission and the Member State concerned’**

Some Member States stated that comments from the Commission about the efficiency of a ‘central, coordinating body’ should be deleted, as they would impinge on their internal organisation of the administration.

### **On Section 4 ‘Implementing the recovery decision’**

Many respondents pointed to the practical difficulties of completing recovery within the deadline set, in particular in the case of fiscal aid or aid to be recovered in the context of insolvency proceedings.

Most of the respondents prefer to have an explicit reference to a standard deadline for the recovering the aid, even if some considered that the current standard four-month period is unrealistic. Several contributions stressed the need of greater flexibility and cooperation between the Commission and Member States as regards requests and grants of an extension to the deadline to execute a recovery decision.

As regards the identification of the aid beneficiaries from whom the aid must be recovered, several respondents requested clarifications about recovery within a group of undertakings and economic continuity, to avoid that recovery is arbitrarily extended to undertakings that have not benefitted from the incompatible aid. Few respondents stated that they interpret the case law cited in the Draft in a different way from the Commission, or that some judgments cited would not apply to State aid.

As regards the quantification of the amount of the aid, several respondents requested the Commission to better describe its obligation to quantify the aid or establish a clear methodology to calculate the amount to be recovered. Some respondents also advocated for more cooperation with the Commission to better quantify the aid to be recovered before adopting a recovery decision. Several respondents demanded clarification of the circumstances in which a retroactive application of *de minimis* Regulation<sup>3</sup> is possible. Some respondents asked the Commission to share with parties other than Member States the recovery interest calculator made available by it.

Most contributions dealt with the recovery from insolvent beneficiaries. Several respondents questioned the Draft objections to restructuring plans and claimed that the principle of proportionality would go against timeliness of recovery, or its very purpose, in certain cases of

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<sup>3</sup> A Regulation establishing that some public support does not meet all the criteria of Article 107(1) TFEU and is therefore exempted from the notification provided for in Article 108(3) TFEU. See, for instance, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

insolvency proceedings. Few Member States stated that the Draft would not be consistent with the purpose of recent or prospective European Union legislation on insolvency proceedings.

Finally, some respondents asked the Commission to clarify under which conditions it may reopen a recovery procedure that was previously considered closed.

**On Section 6 ‘Consequences of a failure to implement a Commission recovery decision’**

Some respondents advocated for the Commission to be flexible in considering absolute impossibility to recover the aid when it assesses whether to open infringement proceedings.

Some Member States asked to clarify how the so-called *Deggendorf* principle<sup>4</sup> would apply to a group of undertakings, or rejected altogether the statements of the Draft in this respect.

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<sup>4</sup> See Judgment of the Court of Justice of 15 May 1997, *TWD v Commission*, C-355/95 P, ECLI:EU:C:1997:241, paragraphs 25 and 26.