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The 2019 Commission Notice on Recovery of Unlawful and Incompatible State Aid

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Abstract: *The European Union has developed its unique State aid rules, prohibiting aid which distorts competition, as an essential part of the integration of the internal market. The primary EU State aid rules, part of the Treaty of Rome 1957, have remained essentially unchanged. However, the Treaties are silent about what happens after the European Commission has issued a decision pursuant to which a given aid measure is unlawful and incompatible with the internal market. It is the Court of Justice which has formally acknowledged the competence of the Commission to order the recovery of unlawful and incompatible aids. In 2007, the Commission issued its first Recovery Notice giving a general overview of the recovery policy and the development of the legal framework. Whereas the 2019 Recovery Notice, which provides the actual guidance on recovery of unlawful and incompatible State aid, considers the increased responsibility of the Member States in State aid enforcement in the framework of the 2012 State Aid Modernisation. Moreover, it takes into consideration the experience gained by the Commission regarding recovery proceedings and it also includes some of the case law of the European courts during the last decade.*

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I. Introduction

In 1973, the Court of Justice formally acknowledged the competence of the European Commission (Commission) to order the recovery of unlawful and incompatible aids.¹ The Commission, taking into account the case law of the EU Courts, established a practice for the recovery of State aids and has provided for the key procedural principles with regard to recovery policy. In 1983 the Commission through a Communication aiming to remind the Member States of their duty to notify any plans to grant or alter aids, expressed its firmness “to use all measures at its disposal to ensure that Member States’ obligations under Article 93 (3) EEC Treaty (now Article 108 (3) TFEU) are respected”.² Further, the EU legislator codified the practice of the Commission in Regulation (EC) No.659/1999.³ Additionally, legal disposition on recovery, were provided also in the Implementing Regulation of 2004.⁴

¹Judgment of the Court of Justice of 12 July 1973, *Commission v Germany* (‘Kohlegesetz’), C-70/72, ECLI:EU:C:1973:87, paragraph 13.

²Commission Communication, OJ C 318, 24.11.1983, p. 3.

³Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999.

⁴Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004.

In 2007, the Commission issued its first Recovery Notice⁵ giving a general overview of the recovery policy and the development of the legal framework. The Communication did build on the objectives of the State Aid Action Plan, for a better enforcement of the recovery decisions of the Commission,⁶ as well as from the most recent case law of the European Courts, at that time.

The current 2019 Recovery Notice approved in the framework of the 2012 reform of state aid regime -the State Aid Modernisation (SAM) - provides the actual guidelines on recovery of unlawful and incompatible State aid.⁷ The Commission within SAM did modernise and consolidate much of the State aid secondary legislation. Following, the Member States' responsibility has been reinforced, while increasing cooperation between them and Commission related to State aid enforcement. Consequently, Member States implement more aid without prior control by the Commission: since 2015, more than 96% of new aid measures for which expenditure was reported for the first time was covered by the General Block Exemption Regulation (GBER).⁸ Additionally, the 2019

⁵Notice from the Commission, towards an effective implementation of Commission decisions ordering Member States to recover unlawful and compatible aid, OJ C 272/4, 15.11.2007.

⁶State Aid action plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, SEC (2005), 795.

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM/2012/0209 final.

⁸Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

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Recovery Notice⁹ takes into account the experience gained by the Commission with regard to recovery proceedings and it also includes some of the case law of the European courts during the last decade.

II. The 2019 Recovery Notice: general overview

The 2019 Recovery Notice (the Notice) is structured around five essential topics, divided into the subsequent sections.

1. General Principles

The first section of the Notice defines the procedure based on which recovery of incompatible aid is ordered by the Commission. The explanation of the purpose of the recovery and the way it should be implemented, is followed by the principle of sincere cooperation. The 2019 Recovery Notice underlines the significance of the above-mentioned principle as provided by Article 4 (3) of the Treaty on the European Union (TEU),¹⁰ in contributing to faster and easier recovery decisions implementation.

After having provided for the purpose of the recovery and the principle of sincere cooperation, the Notice provides for the obligation to recover any aid unlawfully granted and the two limits to that obligation: (i) the general principles of European Union law and (ii) the limitation period.

⁹ European Commission – Communication from the Commission, Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247/1, 23.7.2019.

¹⁰ Consolidated version of the Treaty on the European Union, OJ C 202/1, 7.6.2016.

Related to the general principles of European Union law the 2019 Recovery Notice defines the content of the principle of legal certainty, the protection of legitimate expectations, *res judicata*, and the principle that “no one is obliged to do the impossible”. Additionally, it provides the most important and recent case law of the Union Courts as a specific guidance.

Related to the limitation period as established by Article 17 of the Procedural Regulation,¹¹ the Notice arranges the case law about the beginning, interruption and expiry of the above-mentioned period.

2. The role of the Commission and the Member States

The 2009 Recovery Notice presents a non-exhaustive list of the activities undertaken by the Commission in helping the appropriate Member State in the course of the implementation of a recovery decision. Following, the Notice provides for the way pursuant to which the Member State should implement a recovery decision.

In difference from the 2007 Recovery Notice version, the present Notice provides for the respective roles of the Commission and the Member State in a section, separated from the section related to implementing the recovery decision.

¹¹Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015.

3. Implementing the recovery decision

“Implementing the recovery decision” is the next session which includes issues that a Member State should or may be asked to deal with, in collaboration with the Commission, to fulfill its recovery obligations.

It starts with recovery deadline. Back in 2007 the Commission incorporated a four months recovery deadline, within which the Commission negative decision should have been executed. Preceded by a two months deadline for the Member State to inform the Commission of the measures it is going to take or has already taken to comply with the decision. The 2019 Notice preserves these two types of deadlines. However the wording is more general allowing for more flexibility, on a case by case basis. In addition, the 2019 Notice provides for the reasons and in which conditions the Member State can ask for a deadline extension to execute the negative decision of the Commission. Contributing to the transparency of the process. The 2019 Notice continues with an explanation of the “kick-off meeting” proposed by the Commission, followed by a regulation of the identification of the aid beneficiary and the amount of aid to be covered.

Provisional implementation of the recovery, along with recovery in kind is also explained within the section of implementing the recovery decision. Additionally, the 2019 Recovery Notice explains and guides the recovery from insolvent beneficiaries, both in the context of bankruptcy and restructuring proceedings. The later was not part of the 2007 Recovery Notice.

This section finishes with the conclusion of a recovery procedure. Information from the Departments of the Commission according to which the appropriate Member State has: (i) provisionally implemented the recovery decision or (ii) definitively implemented the recovery decision.

4. Litigation before national courts

In this section the Notice acknowledges the possibility of recovery-related litigation cases before the national courts. The 2019 Notice refers to the same judgments referred also in the 2007 Notice: namely *Zuckerfabrik*¹² and *Atlanta*.¹³ This section principally repeats the content of the 2007 Notice. However, it adds an important explanation that a Member State cannot rely on interim measures issued by a national court to justify its failure to implement a recovery decision, referring to its recent case law.¹⁴

5. Consequences of a failure to implement a Commission recovery decision

¹²Judgment of the Court of Justice of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, C-143/88 and C-92/89, ECLI:EU:C:1991:65, paragraph 23.

¹³Judgment of the Court of Justice of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft*, C-465/93, ECLI:EU:C:1995:369, paragraph 51.

¹⁴European Commission – Communication from the Commission, Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247/1, 23.7.2019, paragraph 145. (*Supra note 9*)

The last section of the 2019 Notice deals with the legal consequences in case a Member State fails to comply with a Commission recovery decision. Three different types of such legal consequences are provided for by the Notice.

Importantly, the Commission may refer the matter to the Court of Justice based on Article 108 (2) Treaty on the Functioning of the European Union (TFEU). Specifically, the 2019 Notice lists violations identified referring to case law evolved after the approval of the 2007 Recovery Notice. Following an un-complied declaratory ruling under Article 108 (2) TFEU, the Commission can ask to impose sanctions on the appropriate Member State, pursuant to Article 260 (2) TFEU. The 2019 Recovery Notice refers to case law developed within the last decade related to lump sums or penalties imposed.

Finally, pursuant to the reconfirmed Deggendorf¹⁵ case law, failure of the Member State to recover the payment of aid improperly granted, will prevent the granting of new aid although it is compatible with the internal market.

III. Conclusion

The European Union has developed its unique State aid rules, prohibiting aid which distorts competition, as an essential part of the

¹⁵Judgment of the Court of Justice of 15 May 1997, TWD v Commission, C-355/95 P, ECLI:EU:C:1997:241, paragraphs 25-26.

integration of the internal market. The primary EU State aid rules are included in the articles 107, 108, and 109 of the Treaty on the Functioning of the European Union (TFEU), which have remained essentially unchanged since their inclusion in the Treaty of Rome 1957. Pursuant to Article 108 TFEU the European Commission has the exclusive competence to decide on the compatibility of the national aid measures with the internal market.¹⁶ Member States must notify in advance the Commission of any State aid measure they intend to grant. Only those measures approved by the Commission can be implemented.¹⁷

However, the Treaty is silent about what happens after the Commission has issued a decision pursuant to which a given aid measure is unlawful and incompatible with the internal market. It is the Court of Justice which has formally acknowledged the competence of the Commission to order the recovery of unlawful and incompatible aids.¹⁸ Pursuant to the case law recovery of unlawful aid is the “logical consequence of the finding that it is unlawful”.¹⁹ The aim of the recovery of unlawful aid is

¹⁶ Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and others v France* (“Saumon”), C-354/90, ECLI:EU:C:1991:440, paragraph 14.

¹⁷ See: Article 108 (3) TFEU. Consolidated version of the Treaty of the Functioning of the European Union, OJ C 202/1, 7.6.2016.

¹⁸ Judgment of the Court of Justice of 12 July 1973, *Commission v Germany* (“Kohlegesetz”), C-70/72, ECLI:EU:C:1973:87, paragraph 13. (*Supra note 1*).

¹⁹ Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* (“Tubemeuse”), C-142/87, ECLI:EU:C:1990:125, paragraph 66.

to re-establish the situation existing before the granting of the aid.²⁰ Consequently, the Commission can order the recovery of incompatible aid, through a decision.²¹

In 2007, the Commission issued its first Recovery Notice giving a general overview of the recovery policy and the development of the legal framework. The latter was replaced by the 2019 Recovery Notice, which provides the actual guidelines on recovery of unlawful and incompatible State aid. On one hand, it builds on the changes brought by 2012 the State Aid Modernisation, reinforcing the responsibility of the Member States, while increasing cooperation between them and Commission related to State aid enforcement. On the other hand, the 2019 Recovery Notice considers the experience gained by the Commission regarding recovery proceedings and it also includes some of the case law of the European courts during the last decade.

²⁰Judgement of the Court of Justice of 4 April 1995, *Commission v Italy*, C-350/93, ECLI:EU:C:1995:95, paragraph 26.

²¹ Judgment of the Court of Justice of 7 March 2002, *Italy v Commission* ('Employment Measures I'), C-310/99, ECLI:EU:C:2002:143, paragraph 99.