The new Commission Notice on the recovery of unlawful and incompatible State aid

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1. Introduction
The success and credibility of the Commission’s State aid policy is very much dependent on the effective and timely implementation of negative Commission decisions ordering recovery. Any failure by a Member State to implement a negative decision ordering the recovery of illegal and incompatible aid effectively consolidates the competitive advantage for the aid recipient and may lead to irreparable damage to the competitive position of its competitors.

In spite of the serious consequences that a failure to implement a negative Commission decision can have, information collected by the Commission is cause for concern: there is hardly a single case in which the Member State’s recovery obligation was fulfilled during the deadline imposed in the recovery decision.

The Commission therefore addressed the long duration of national recovery procedures in its State Aid Action Plan (the SAAP) (2). Following publication of the SAAP in 2005, the Commission adopted a series of measures, which included setting up a dedicated recovery unit within DG Competition, adopting a more systematic approach to the follow-up of its negative decisions, monitoring Member States’ compliance with their recovery obligations and systematically applying the Deggendorf (3) case law of the European Court of Justice (ECJ).

These measures have led to a very significant reduction of outstanding recovery claims and aid amounts. Out of a total of €8.96 billion to be recovered under decisions adopted since 2000, about €7.0 billion have effectively been recovered as of December 2007 (4). Together with the aid amounts ‘lost’ in bankruptcy proceedings (5), the recovered amounts as of December 2007 demonstrate the fulfilment of about 92% of the Member States’ overall recovery obligations. This is a significant improvement compared to the 25% reported in December 2004 and the 70% reported in December 2005.

In spite of the progress demonstrated by these figures, the average duration of national recovery proceedings remains a major concern from the perspective of effective State aid policy. Of the 47 recovery decisions still pending, 20 were adopted more than four years ago. Five were even adopted more than eight years ago. The table below shows the number of recovery decisions adopted since January 2000 and the extent to which they have already been implemented.

<table>
<thead>
<tr>
<th>Year</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Number of recovery decisions adopted</td>
<td>16</td>
<td>20</td>
<td>23</td>
<td>10</td>
<td>23</td>
<td>12</td>
<td>6</td>
<td>9</td>
<td>119</td>
</tr>
<tr>
<td>Number of recovery cases closed</td>
<td>14</td>
<td>10</td>
<td>19</td>
<td>6</td>
<td>17</td>
<td>7</td>
<td>2</td>
<td>2</td>
<td>77</td>
</tr>
</tbody>
</table>

Source: DG Competition

Against this background, the new recovery notice (the Notice) explains the Commission’s approach towards recovery. It aims to build on the progress made to date and to further improve implementation of the Commission’s recovery decisions.

This article starts by briefly summarising the overall content of the Notice (section 2 below) and goes on to provide a more in-depth analysis of some of the key issues addressed, namely the tension between the use of national procedural law and the requirement of immediate and effective recovery and the particular problems arising in the event of actual or potential bankruptcy of the beneficiary (section 3). Finally, the article explains the new approach which the Commission intends to adopt for setting information and recovery deadlines in future decisions (section 4).

(1) Directorate-General for Competition, unit H-4. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
(3) See section 2 below.
(4) The statistics provided in this article refer to decisions within the remit of DG Competition. Figures are calculated as of 31 December 2007.
(5) Although it is often impossible to recover the full aid amount in bankruptcy proceedings, the economic advantage is usually cancelled as a result of the termination of the beneficiary’s economic activity.
2. General overview of the Notice

The Notice mainly covers the following areas.

Principles of recovery policy

The Notice gives a general overview of the way in which the Commission’s recovery policy has developed over the years and recapitulates the current legal framework, especially Articles 14 and 15 of the Procedural Regulation (6).

Article 14 of the Procedural Regulation requires the Commission to order recovery where it declares an aid measure unlawful and incompatible with the common market. The only two exceptions explicitly envisaged by the Regulation relate to situations where ordering the recovery would be contrary to a general principle of law (Article 14(1)) (7) or where the expiry of the ten-year limitation period under Article 15 of the Procedural Regulation prevents the Commission from ordering recovery.

The Notice also deals with cases where exceptional circumstances make it absolutely impossible for the Member State to implement the recovery decision. Whereas the exceptions explicitly envisaged by the Procedural Regulation prevent the Commission from ordering recovery, the absolute impossibility to implement the decision effectively provides a justification for the Member State not to comply with a Commission recovery decision. In this respect, the Notice refers to several judgments by the Community courts which clarify that ‘absolute impossibility’ is to be understood in a very restrictive sense. For example, the ECJ has consistently taken the view that the Member States may not rely on requirements under their national legal systems or on other types of, even insurmountable, internal difficulties (8). Where the Member State encounters unforeseen or unforeseeable difficulties in implementing the recovery decision within the prescribed time-limit, it needs to raise these difficulties with the Commission according to the principle of loyal cooperation.

Implementing recovery policy

The European Commission and the Member States both have an essential role to play to ensure that recovery decisions are implemented effectively and immediately. This is why the Notice provides best practice guidance for both the Commission and the Member States.

- In relation to the role of the Commission, the Notice confirms the Commission’s intention to continue its current practice to identify the beneficiary of the aid and the amount to be recovered in the negative decision where it has the necessary information for doing so. In addition, this section describes the Commission’s new approach towards the setting of recovery deadlines, which is discussed further in section 4 below.

- In relation to the role of the Member States, the Notice deals with a number of issues such as the internal responsibilities for recovery, litigation before national courts and the specific case of insolvent beneficiaries. These issues are discussed in more detail in section 3 below.

Consequences of failure to implement a negative decision

The final section of the Notice deals with the legal consequences where a Member State fails to comply with a Commission recovery decision. There are effectively three different types of legal consequences in the event of such failure to implement the decision.

- Most importantly, failure by the Member State to comply with the decision within the prescribed deadline could lead to an action before the ECJ on the basis of Article 88(2) EC.

- In cases where the ECJ has found against a Member State under Article 88(2) for failure to implement the negative decision, further failure of the Member State to complete the recovery can trigger infringement proceedings on the basis of Article 228(2) EC. The Commission would then ask the ECJ to impose penalty payments on the Member State concerned.

- Finally, the Notice deals with the implications of the Degdorf case law of the Court of First Instance (CFI) in the event of failure to recover illegal and incompatible aid. In the Degdorf judgment, the CFI confirmed that, in the assessment of new aid granted to the same beneficiary, the Commission may take any outstanding repayment into account (9). The Commission explains that, in the application of this judgment, it will ask the Member State submitting a new notification to commit to suspending the new aid until all outstanding aid amounts have been recovered.

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(7) The Court has generally taken a strict approach in this respect. See para. 17 of the Notice.


3. Selected issues

Requirements concerning the application of national law

According to Article 14(3) of the Procedural Regulation ‘recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision’. The use of national law is therefore dependent on whether the domestic legal system offers the Member State authorities the possibility to recover immediately and effectively.

The general reliance on the procedural regimes of the Member States has given rise to a considerable amount of controversy and case law. However, the ECJ is adopting a very firm approach in this respect, underlining the requirements for immediate and effective recovery. A number of recent judgments are particularly relevant in this respect and have shaped the content of the Notice.

In the Olympic Airways case (10), which was decided in 2005, the Greek authorities had argued that the creation of a valid recovery title under national law was sufficient for them to meet their recovery obligations even in the absence of actual payment. The ECJ explicitly confirmed that the Member State authorities are under an obligation to obtain the actual reimbursement of the aid. Consequently, it is not sufficient for the Member State to show that it has taken certain steps towards recovery if these steps do not lead to the recovery of the debt. The only justification for a Member State seeking to avoid actual recovery is to demonstrate that such recovery would be absolutely impossible. In the Olympic Airways case, the Member State had not demonstrated that this was the case.

Another good example is the Scott judgment, which was handed down in October 2006 (11). This case confirms the Member States’ obligation to implement recovery decisions immediately and effectively. In the underlying case, the recovery measures adopted by the national authorities had been subject to a legal challenge before a national court. Under French procedural law, this type of legal challenge gave rise to automatic suspension of the recovery measures. The ECJ concluded that such automatic suspension did not ensure effective recovery and that this provision of national law should have been left unapplied as it prevented the immediate and effective execution of the recovery decision, as required under Article 14(3) of the Procedural Regulation.

Suspension decisions by national courts

Where national recovery measures are referred for judicial review to the national courts, the claimants often combine their claim with an application for suspension of the recovery order until the substantive case has been decided. In the Commission’s experience, such a suspension decision by a domestic court can lead to very significant delays in recovery. In addition, the legal standards and the readiness of national courts to grant such suspensions differs significantly across the EU, thus distorting competition for the companies concerned.

In this context, the Notice refers to the general ECJ case law on whether a national court can grant interim measures to claimants challenging the national implementation of a Commission decision for reasons linked to the validity of this decision (12). According to this case law, the national court is not entitled to grant interim measures where the claimant could have challenged the Commission decision and asked for interim relief before the Community courts. Even where such legal protection before the Community courts would not have been available (e.g. owing to lack of legal standing), the Commission considers that the national court may nevertheless only grant interim relief if the following conditions are met:

- the national court must have serious doubts as to the validity of the Community act. If the validity of the act is not already being tested before the Community courts, the national court must refer this question to the ECJ;
- the granting of interim relief must be necessary to avoid serious and irreparable damage to the claimant;
- the national court must fully respect previous decisions by the Community courts.

Beneficiaries in financial difficulties

Issues concerning the recovery of illegal aid often arise in relation to undertakings in financial difficulties. For such companies, the obligation to reimburse the aid can significantly worsen their financial position and may even trigger bankruptcy proceedings. The Notice therefore clarifies the case law and the approach which the Commission intends to adopt in relation to recovery from such beneficiaries.


The Community courts have repeatedly confirmed that the mere fact that the beneficiary is in financial difficulty does not impact on its repayment obligation (14). However, there can be situations where the assets of the beneficiary are not sufficient to meet all outstanding claims. In such cases, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable alternative to recovery. The reason for this approach is that, from an economic perspective, the competitive advantage of the beneficiary no longer exists in the event of formal liquidation.

The Notice confirms the Member State’s obligation to register its recovery claim immediately if the beneficiary is subject to an insolvency proceeding. However, the mere registration of the claim is not always sufficient and can give rise to various difficulties. The reasons for the concerns in this respect mainly have to do with the fact that several national bankruptcy laws allow the relevant company to continue its operations, even in the absence of full recovery. In this type of scenario, the distortive effect of the illegal and incompatible aid on competition would continue. The Commission therefore saw a need to define the obligations of the Member States at different stages in the bankruptcy proceedings.

- **Refusal to register the recovery claim.** There have been instances where an insolvency administrator has refused to register a recovery claim in the proceedings. In this respect, the Notice clarifies that the Member State authorities must take all available steps to challenge the refusal of the administrator. This is prompted by the concern that, if the recovery claim were not formally registered in the proceedings, the Member State authorities would lose any means of ensuring that the Community interest is duly taken into account (14).

- **Decision to continue the activity of the beneficiary.** National authorities also need to challenge any decision of the administrator or the insolvency court which would allow the beneficiary to continue its activity beyond the recovery deadline unless the aid can be recovered fully.

- **Sale of assets.** The notice underlines the fact that, as long as the aid is not fully recovered, the national authorities should oppose any transfer of assets that is not carried out on market terms and/or that is conducted so as to circumvent the recovery decision (15).

- **Status of the claim.** Some national insolvency law systems distinguish between different categories of claims. In this respect, the Notice does not explicitly require that the Member State’s recovery claim is given first-class priority but merely states that the status of the claim would be dependent on national law. However, there have been recent judgments at Member State level which suggest that, in order to ensure effective recovery, national insolvency law must not discriminate against the Member State’s recovery claim as opposed to other types of claims in any way and that, consequently, the recovery claim always needs to be given first-class priority (16). Due account must be taken of the Community interest.

### 4. New approach to information and recovery deadlines

The Notice also explains the Commission’s new approach towards the setting of information and recovery deadlines in its negative decisions.

The background to this new approach is that, in the past, the Commission’s negative decisions only contained a single deadline. During this deadline, the Member State was required to communicate to the Commission the measures it had taken to comply with a given decision. According to the interpretation of the Community courts, this deadline (which was usually set at two months) also determined the date by which the Member State had to complete the recovery (17).

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(13) See Case C-277/00 Germany v Commission (SMI) [2004] ECR I-3925, para. 75.

(14) This was the view taken by the German Federal Court of Justice (FCJ) in its recent SKL judgment. The FCJ held that public authorities that are obliged to recover unlawful aid have to be ranked as first-class creditors. This is the case irrespective of whether, in the absence of the State aid issue, their claim would have been treated as a subordinated claim.

(15) See also the judgment of the Commercial Chamber of Amberg Court of 23.7.2001 in relation to the Commission’s Decision of 18.10.1995, OJ L 53, 2.3.1996, pp. 41-49. In this case, the German court overruled the administrator’s refusal to register a recovery claim for aid granted in the form of a capital exemption.

(16) See also the judgment of the Commercial Chamber of Amberg Court of 23.7.2001 in relation to the Commission’s Decision of 18.10.1995, OJ L 53, 2.3.1996, pp. 41-49. In this case, the German court overruled the administrator’s refusal to register a recovery claim for aid granted in the form of a capital exemption.
To avoid possible confusion about the role of the deadline contained in the decision and to address concerns that the standard two-month period may be too short to complete the recovery proceedings at national level, the Commission has decided to set two separate types of deadlines in their negative decisions.

- Within the first two months (counted from entry into force of the decision), the Member State must inform the Commission of the measures it intends to take or has already taken to comply with the decision. Within that same deadline, the Member State also has to provide evidence that it has already sent the recovery order(s) to the beneficiary(ies).

- Within a further two-month period, the Commission’s decision must then be fully implemented.

Where Member States find it difficult to comply with these deadlines, they need to raise these difficulties with the Commission according to the principle of loyal cooperation. Provided there is sufficient objective justification, the Commission may then extend the deadlines set in the decision (18).

5. Conclusion

Ensuring that the Commission’s recovery decisions are implemented effectively is an essential element of an efficient and credible State aid policy. Although, as demonstrated above, significant progress has been made in this area in recent years, the length of recovery procedures remains a serious concern. It is hoped that the new Notice will allow the Commission and the Member States to work together more effectively to ensure that recovery decisions are implemented quickly and effectively, thus limiting the distortive effect of the underlying aid on competition in the EU.

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(18) Case C-207/05, ibid.