

25 April 2019

# EAPB response to public consultation on Draft Commission Notice on the recovery of unlawful and incompatible State aid

Register ID: 8754829960-32

## Background

The European Association of Public Banks, EAPB, welcomes the possibility to provide feedback on the Draft Commission Notice on the recovery of unlawful and incompatible State aid.

As National and Regional Promotional Banks and institutions (NPB) EAPB members perform a public mission of fostering economic development and social cohesion. They act on the basis of a public mandate -defined by law- and support their competent authorities' socio-political objectives. They thus often also play a key role in granting State aid.

Overall, the draft notice offers a clearer structure and more detailed information than the current 2007 Recovery Notice. However, the draft recovery notice seems to seek to enhance the role of the European Commission (EC) in the implementation of recovery decisions and thus limit the procedural autonomy of Member States. The clear allocation of roles between the EC and Member States in the context of the recovery of illegal aid is blurred. In our view, this runs counter the jurisprudence of the European Court of Justice (ECJ), according to which only Member States are responsible for the implementation of a Decision of the EC to recover aid. This principle is also explicitly recognized in the current 2007 Recovery Notice. While national authorities have no discretion as to the question "if" aid needs to be recovered, in the absence of EU rules, the "how" the recovery takes place must follow the procedures of the respective Member State.

More specifically, we would like to make the following comments on the draft Notice published:

### Paragraph 23

In this paragraph it is noted that the EC *"may elaborate on the standard of proof and the type of evidence required for the Member State to determine, among other things, the identity of the aid beneficiaries, the amount of aid subject to recovery and the amounts finally recovered."*

The term "standard of proof" seems inappropriate here, since it is not further specified. Moreover, the Recovery notice is not meant to be a procedural regulation for Member States who are responsible for deciding on the "how" of the recovery. It should be ensured that this competence conferred on the EC does not interfere with the procedural autonomy of the Member States.

### Paragraphs 25, 26 and 27

While paragraph 25 refers rightly to Article 13 (2) of the Procedural Regulation, it can only be inferred indirectly from paragraph 26 that the EC appears here to refer to Article 16 (2) of the Procedural Regulation, i.e. to the recovery Decision. It would be desirable to clarify paragraph 26 in that regard. In the draft, the "alternative recovery scenario" ("recovery order" vs. "recovery decision") is only mentioned in paragraph 27.

### Paragraphs 30 and 32

As regards paragraphs 30 and 32, the question arises as to what the '*restrictive interpretation*' refers to. Here, a reference to the case law would be welcome in the form of a footnote.

### Paragraph 66

Paragraph 66 stresses that *"Member States play a crucial role in rendering recovery policy effective."* Compared to the 2007 Notice, the role of Member States is weakened. We believe the previous wording should be maintained:

"The Member State is responsible for the implementation of the recovery decision." (paragraph 44 of the 2007 Recovery Notice).

#### Paragraph 68

In paragraph 68 the EC recommends the establishment of a coordinating authority for the implementation of recovery decisions, as "*experience shows that a central, coordinating body contributes to the immediate and effective execution of recovery decisions*".

This statement in the Recovery Notice from 2007 (paragraph 46) is more balanced: "*The authors of the Enforcement Study conclude that the existence of such a central body appears to contribute to a more efficient implementation of recovery decisions*". It further stresses that *Community law does not prescribe which organ of the Member State should be in charge of the practical implementation of a recovery decision. It is for the domestic legal system of each Member State to designate the bodies that will be responsible for the implementation of the recovery decision.*" We believe the current wording should be maintained.

#### Paragraph 70

The EC recommends the establishment of "*fast-track, specialised administrative procedures*" for the implementation of recovery decisions. It should be clarified here that EU law does not require national recovery to be achieved through the adoption of administrative acts and enforcement orders alone. According to ECJ jurisprudence, recourse to civil law and the ordinary courts is also possible, provided that the procedure chosen guarantees the immediate and effective enforcement of the Commission decision on a case-by-case basis (see ECJ, C-527/12 - Commission / Germany (Biria)).

#### Paragraph 71

With regard to the deadlines set out in the recovery decision by the EC, the new draft, in contrast to the Recovery Notice 2007, contains no information on specific time limits for the implementation of a Decision. Paragraph 42 of the 2007 Recovery Notice sets a "*first time-limit of two months following the entry into force of the decision*" and a "*second time-limit of four months following the entry into force of the decision*". EAPB members would prefer keeping specific time limits for the sake of legal certainty. In this context it is noted that paragraph 148 of the draft states a specific deadline of two months for notifying the EC of measures taken or to be taken. A synchronization of the different deadlines should be ensured.

#### Paragraph 81

The EC "*strongly advises*" that Member States use the possibility of a first meeting with its services, although - as it itself acknowledges - they are not obliged to do so.

The voluntary nature of the participation in such a first meeting and the procedural autonomy of the Member States are thereby implicitly limited, so that the formulation "*strongly advises*" should be avoided.

#### Paragraph 97

This paragraph states that the recovery decision of the European Commission is to be implemented by the Member State, even if there is disagreement about the amount to be recovered. The recovery process thus can only be suspended by an intervention of EU courts. This raises the question of generally established right to appeal. This should also apply here, so that the recovery decision becomes final only after the right to appeal has not been used or after agreement has been reached on the amount to recover and enforcement of the recovery by the Member State takes place. The recovery periods should also only begin with the entry into force of the recovery decision.

#### Paragraph 100

This paragraph refers to the retroactive application of the de minimis rule for aid that has been declared unlawful. The text notes that "*the entire amount of unlawful aid must be below the de minimis ceiling.*" It should be made clear that this is the total amount of unlawful aid in relation to an individual undertaking.

#### Paragraph 112

The EC advocates that "*irrespective of the peculiarities of the relevant national legal system, standardised forms and procedures for the service of recovery orders may contribute to a timely and effective execution of recovery decisions.*"

Once again, it appears that the draft notice seeks to introduce a standardized national procedure for the implementation of recovery orders by the Member States. It should be recalled that the forms and procedure, that the draft refers to are the sole responsibility of Member States.

## **Paragraph 115 et seq.**

This paragraph deals with the provisional implementation of still pending recovery orders. Similar to paragraph 97, EAPB members believe that the recovery decision should not be implemented until all legal disputes have been settled. The recovery of aid may have far-reaching consequences for a company concerned. In that respect, the correctness of the recovery decision and the amount of the recovery should have been conclusively established, especially as a provisional repayment, even if made to an escrow account, may jeopardize the liquidity of a company.

## **Paragraph 120**

According to this paragraph Member States "*should make use of any existing provision in their legal order allowing their authorities to order an interim payment of the aid, even when that provision is not designed for the specific purpose of recovering State aid*".

Again, these requirements - in their entirety- limit the general principle that the Member State is responsible for the way in which the recovery decision is implemented.

## **Paragraph 125**

In this paragraph deferrals of recovery or payments in instalments are declared inadmissible. We do not support this prohibition as the deferral and the agreement of installment payments are a common means in the context of receivables management. In order to offset the monetary advantage which the beneficiary receives as a result, an adequate interest rate could be applied.

## **Paragraph 133**

The EC "*considers that the Member State must challenge any decision adopted by its national courts in breach of Union law*".

This statement may lead to far-reaching obligations of Member States in relation to judicial decisions and may - in the worst case- even jeopardize the principle of judicial independence. Similar statements cannot be found in the Recovery Notice 2007. We therefore recommend deleting these considerations.

*\* The European Association of Public Banks (EAPB) gathers over 30 member organisations which include promotional banks such as national or regional public development banks and local funding agencies, public financial institutions, associations of public banks and banks with similar interests from 17 European Member States and countries, representing directly and indirectly the interests of over 90 financial institutions towards the EU and other European stakeholders.*