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Recovering unlawful advantages in the context of EU State aid tax ruling investigations

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ABSTRACT: The European Commission has recently begun to focus increasingly on the compatibility of Member States' tax ruling procedures with EU State aid law. In that respect, it has ordered the recovery of unlawfully granted advantages through those procedures. This article examines to what extent the application of EU law principles of legitimate expectations and legal certainty are to take stock in State aid recovery proceedings of this particular legal certainty-enhancing and legitimate expectations-creating tax ruling context. It additionally questions whether recovery in this particular context should be tailored to the specific national ruling framework having resulted in the advantage granted in violation of Article 107 TFEU.

KEYWORDS: State aid, recovery, tax rulings, legal certainty, legitimate expectations

1. Introduction

The European Commission's on-going or recently closed State aid investigations into Member States' tax ruling procedures[1] generate important legal

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[1] The on-going Commission investigations follow on to a request for information addressed to all Member States with a view to obtaining more transparency regarding tax practices. In a number of cases, the Commission adopted decisions to open formal proceedings, three of which resulted in negative decisions ordering the recovery of aid granted as a result of tax rulings. The Commission's investigation and final decisions so far are Commission Decision in case SA.38373 (*Apple*), 11 June 2014, [2014] OJ C 369/22, negative decision rendered on 30 August 2016, see http://europa.eu/rapid/press-release_IP-16-2923_en.htm; Commission Decision in case SA.38375 (*Fiat Finance & Trade*) of 11 June 2014,[2014] OJ C 369/37, which resulted in a negative final decision with recovery rendered on 21 October 2015, see press release on http://europa.eu/rapid/press-release_IP-15-5880_en.htm; Commission Decision in case SA.38374 (*Starbucks*) of 11 June 2014, [2014] OJ C 460/11,

questions on two fronts. On the one hand, it can be questioned legitimately whether advantages flowing from (corporate) tax rulings granted to undertakings are selective aid measures.[2] This question is all the more relevant since rulings generally result from a legal-procedural framework permitting a differentiated administrative application, in particular circumstances, of generally applicable tax law provisions.[3] Whilst recent Commission decisions seem to voice the conviction that such ruling decisions can constitute selective advantages indeed,[4] it will be up to the EU courts to confirm and refine the notion of selectivity in this regard.[5]

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which resulted in a negative final decision with recovery rendered on 21 October 2015, see press release on http://europa.eu/rapid/press-release_IP-15-5880_en.htm; Commission Decision in case SA.34914 (*Gibraltar ruling practice*) of 16 October 2013, [2013] OJ C348/6, resulting in a decision of 1 October 2014 to extend proceedings; Commission Decision in case SA.38944 (*Amazon*) of 7 October 2014, [2015] OJ C 44/13; Commission Decision in case SA.37667 (*Belgian Excess Profit Rulings*) of 3 February 2015, [2015] OJ C 188/24, which resulted in a negative final decision with recovery rendered on 11 January 2016, see press release on http://europa.eu/rapid/press-release_IP-16-42_en.htm; see most recently also Commission Decision in case SA.38945 (*McDonalds*) of 3 December 2015, [2016] OJ C258/3, opening of investigations announced in press release http://europa.eu/rapid/press-release_IP-15-6221_en.htm. See for background also Lisa Lindvahl Gormsen, "EU State Aid Law and transfer pricing: a critical introduction to a new saga", *Journal of European Competition Law & Practice*, 7 (2016): 369 and Dimitrios Kyriazis, "From Soft Law to Soft Law through Hard Law: The Commission's approach to the State aid assessment of tax rulings", *European State Aid Law Quarterly*, 15 (2016): 428.

[2] Eduardo Traversa and Alessandra Flamini, "Fighting harmful tax competition through eu state aid law: will the hardening of soft law suffice?", *European State Aid Law Quarterly*, 14 (2015): 323-331.

[3] According to the General Court, such measures were not necessarily to be considered as selective, see Judgment of 7 November 2014, *Autogrill /Commission*, T-219/10, EU:2014:939, paragraph 45; and Judgment of 7 November 2014, *Banco Santander/Commission*, T-399/11, EU:T:2014:938, paragraph 49: the mere finding that a derogation from the common or "normal" tax regime exists cannot give rise to selectivity. The Court of Justice, for its part, in Judgment of 21 December 2016, *European Commission /World Duty Free Group/Banco Santander/Santusa Holding* , joined Cases C-20/15 P and C-21/15 P, EU:C:2016:981, disagreed and ruled that such derogations can constitute State aid.

[4] In paragraph 170 of its 2016 Notice on the notion of State aid, the Commission confirmed that where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation – Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] O.J. C262/1. In a preparatory document, it was also confirmed, however, that the mere existence of a ruling system does not constitute in itself State aid, see §5 of DG Competition – Internal Working Paper – Background to the High Level Forum on State Aid of 3 June 2016, available at http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf.

[5] Cases currently pending before the General Court in the specific context of tax rulings and also questioning the selectivity issue are Case T-755/15, *Luxemburg v. Commission*, first plea in law; Case T-759/15, *Fiat Chrysler Finance Europe v. Commission*, first plea in law; Case T-760/15,

On the other hand, the tax ruling investigations also provoke fresh debates on the scope and extent of recovery obligations flowing from EU law. More even than the selectivity question, problems associated with recovery directly touch national authorities and courts involved in the recovery of unlawfully granted aid to corporations through tax rulings. Although the obligation to recover fully unlawfully granted incompatible State aid has been enshrined directly in Article 16 of Procedural Regulation 2015/1589, the Commission is not required to recover the aid if this would be contrary to a general principle of Union law. This exception, addressed to the Commission, has as a consequence been extended to national authorities and courts which are, in practice, tasked with effectuating recovery in compliance with the Commission decision.

In practice, EU law principles of legal certainty and the protection of legitimate expectations established or maintained by public authorities that the aid was lawful and/or compatible have been considered to play potentially a mitigating role in this context. Generally, parties have failed to invoke those principles successfully, as the Court of Justice interpreted them strictly. As a result, both principles have not been considered to be meaningful defences enabling undertakings to contest recovery. At the same time, and remarkably, similar principles enshrined in national law also structure the use of the tax ruling procedures in the context of national law. Tax rulings are believed to increase legal certainty and to create legitimate expectations that a specific tax situation is not illegal from a national tax law point of view.

Given this peculiar function of tax rulings, it can legitimately be questioned to what extent the application of EU law principles of legitimate expectations and legal certainty applicable in State aid recovery proceedings are to take stock of this particular legal certainty-enhancing and legitimate expectations-creating national law context and whether recovery in this particular context should be tailored to the specific national ruling

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Netherlands v. Commission (Starbucks), in which a similar argument will be developed as a common thread throughout the pleas in law; see also Case T-636/16, *Starbucks and Starbucks Manufacturing Emea v. Commission*, first and second pleas; Case T-778/16, *Ireland v. Commission*, seventh plea; Case T-783/16, *Government of Gibraltar v. Commission*, first and second pleas; T-892/16, *Apple Sales International and Apple Operations Europe v. Commission*, eleventh plea. The Belgian excess profit ruling decision has given rise to multiple actions for annulment, Case T-131/16, *Belgium v. Commission*; as well as actions initiated by businesses having benefited from those rulings, see pending cases T-201/16; T-263/16; T-265/16; T-278/16; T-311/16; T-319/16; T-321/16; T-324/16; T-335/16; T-343/16; T-350/16; T-351/16; T-357/16; T-370/16; T-371/16; T-373/16; T-388/16; T-420/16; T-444/16; T-467/16; T-637/16; T-681/16; T-800/16; T-832/16; T-858/16 and T-867/16 in that respect.

framework having resulted in the advantage granted in violation of Article 107 TFEU.

This article addresses those questions in three main parts beyond this introduction and a brief conclusion. The second part will set the scene for the recovery debate by emphasising the specific nature of tax rulings and their specific attention paid to legal certainty and the creation of legitimate expectations in the relationship between national tax authorities and individuals/businesses subjected to national tax obligations. Despite the importance of such considerations within the framework of national tax law, EU State aid recovery decisions operate in accordance with similar, yet differently applicable, EU law principles tailored to the nature of aid recovery proceedings. Whilst those principles may bear the same names as the principles guiding tax ruling procedural frameworks, they do not necessarily protect the same interests as the national principles underlying tax ruling procedures. The question therefore remains as to whether those EU principles do indeed apply and, if so, how they can impose breaks on tax ruling aid recovery proceedings.

Building on the assertion that national judges will have to apply exclusively EU law principles of legal certainty and legitimate expectations, the third part of the paper will offer a cursory overview of EU legislation and case law on recovery proceedings and remedies. Whereas legal certainty and legitimate expectations principles do play a role in recovery proceedings, the application of these principles in that particular context is unlikely in general to avoid aid granted by virtue of tax rulings from being recovered. At the same time, however, the specific context of tax rulings may justify or facilitate the successful invocation of the EU law principles of legal certainty and of the protection of legitimate expectations as a means to mitigate or structure some recovery obligations. Such mitigation or structuring will necessarily have to be done by national authorities and judges tasked with recovery proceedings, under the guidance offered by the Court of Justice. The fourth part of the article explores opportunities available for national authorities and judges in this respect within the realm of EU law.

2. Do EU aid recovery principles apply to their full extent in the peculiar context of the tax ruling investigations?

Tax rulings represent a particular procedural tool of national fiscal policy that permits authorities to bend the application or interpretation of fiscal rules to the envisaged necessities of tax contributors. This is done in the

interests of legal certainty and with a view to establish legitimate expectations in the minds of those contributors (a.). Legal certainty and legitimate expectations thus generated are nevertheless protected as a matter of national (tax) law. As similar principles do exist in EU law, the question remains whether national authorities and judges in a State aid recovery procedure should apply the national or the EU principles. On the basis of the Court of Justice's case law on the matter, it is nevertheless clear that EU principles should be relied on, even when national judges are reviewing a national recovery order or ordering recovery of aid themselves (b.). The applicability of EU law principles means that the limits and conditions attached to those principles under EU law rather than national law will have to be taken into consideration by national judges in tax ruling aid recovery proceedings.

a. The peculiar nature of tax rulings

Although tax rulings appear in many different formats or guises, they generally encompass an individual decision adopted by a tax authority.[6] Such a decision, normally taken in compliance with a specific procedural framework established by national tax law, solidifies or confirms a particular interpretation of national tax law provisions vis-à-vis an individual undertaking.[7] Its binding nature, as well as the opportunities to challenge a tax ruling decision, are highly dependent on the features of the national procedural rules in place and differ significantly as a result across the different EU Member States.[8] In any case, the aim of a ruling is to make advanced pricing arrangements, to determine the appropriate level of taxation on the basis of the specific information granted or to ensure more predictability in terms of the future interpretation or application of tax law provisions

[6] According to the 2016 Commission Notice, a tax ruling is meant to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally, see §169 2016 Commission Notice on the notion of State aid.

[7] See for an overview, Elly Van de Velde, "'Tax rulings' in the EU Member States", *Study for the ECON Committee of the European Parliament*, (2015): 26-27, http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf. According to the author of the study, the concept of "tax ruling" is actually inaccurate as it fails to grasp the variety of arrangements that can be made between national tax authorities and tax contributors. Given that the European Commission refers to "tax rulings" in its particular State aid context, this paper will use that notion to refer to any tax arrangement which may be subjected to State aid scrutiny.

[8] See *ibid.*, note 7, 39-43, for a cursory overview and additional references.

regarding this undertaking. From the point of view of the individual or company concerned, a tax ruling decision precisely seeks to increase legal certainty and to create legitimate expectations as a matter of national law. The European Commission explicitly acknowledged this feature, deeming tax rulings included within a legal framework to be perfectly legal from the point of view of EU law, as long as no selective advantages would be granted to specific individuals or companies.[9]

In terms of legal certainty, a tax ruling seeks to offer more predictable and concrete guidance as to how more or less open-ended national tax law provisions will be applied in relation to a specific individual/company. Such guidance has two immediate consequences. On the one hand, it presupposes that tax authorities can deviate from or mould the application of national tax law provisions to tailor them to specific cases. Tax rulings in that respect can vary from mere guidance on how generally applicable tax provisions will in essence be applied in the case at hand to concrete deviations from the stringent application of those rules. In any case, the individual or company concerned can be reassured regarding the application of the rules at stake. In doing so, the decision creates a more certain tax law enforcement environment for the individual/company concerned. On the other hand, they result in an individualised application of tax law provisions to the specific individual or business. From that point of view, it should not surprise that the tailoring of generally applicable rules to a specific business results in such rulings being considered selective measures, potentially granting some advantage to the beneficiary of the ruling and making the general application of tax law less transparent and predictable from the point of view of outsiders.

Given that tax rulings generally flow from specific procedures enabling an institutionalised dialogue between the individual/company concerned and national tax authorities, the outcome of such dialogue may legitimately create the expectation that the tax authorities will apply the law in relation to the individual/company concerned as outlined in the ruling itself. By institutionalising a ruling procedure, effectively national authorities not only seek to make the application of tax law more predictable in general, but to create a working relationship of trust and mutual understanding

[9] See the Commission's press release in the *Fiat Finance* decision, http://europa.eu/rapid/press-release_IP-15-5880_en.htm.

between tax authorities and the addressee of the ruling decision.[10] That is all the more the case if a tax authority adopting a ruling decision operates within a legal framework permitting such rulings. If authorities then remain within the perimeter established by that national legislation, individuals or companies can legitimately expect to rely on the ruling decision being in compliance with national tax law. In some instances, national law itself can even permit tax authorities, or specifically a specialised ruling commission, to adopt a ruling in disregard of this measure. In the absence of such a procedural framework, a *contra legem* decision is generally not amenable to establishing legitimate expectations vis-à-vis individuals or companies in their interaction with national authorities.[11]

As a result, it is clear that, from the point of view of national law, tax rulings contribute essentially to establishing certainty in the legal relationship between individuals and tax authorities, by effectively creating an expectation regarding the application of tax law vis-à-vis the individual or company involved. To the extent that national law allows for a ruling decision to be adopted, it can even be argued that such expectations are indeed considered legitimate and worthy of protection in national law. Such national law protection does not necessarily imply that the same principles can be relied upon to escape from a recovery decision in the context of EU State aid law.

b. Applying EU law general principles in national tax ruling recovery cases?

Although national tax rulings can indeed result in legal certainty and legitimate expectations as a matter of national tax law, this does not necessarily mean that those very national law principles can be invoked as a break on the recovery of State aid that needs to be recovered. Overall, the Court of Justice maintained that national authorities are bound by EU law principles whenever they are acting within the scope of EU law.[12] An obvious situation of acting within the scope of EU law is the implementation or application of EU legal provisions.[13] The EU's Charter of Fundamental Rights also

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[10] See to that effect already, Carlo Romano, *Advanced Tax Rulings and Principles of Law: Towards a European Tax Rulings System?*, (Amsterdam: IFBD publications, 2002): 444.

[11] Velde, *op. cit.*, note 7, 44.

[12] See for an early confirmation of this, Judgment of 28 October 1975, *Rutili*, 36/75, EU:C:1975:137.

[13] See in the context of fundamental rights, where a broad interpretation of such "implementation" has been offered by the Court, in Judgment of 7 May 2013, *Fransson*, C-617/10, EU:C:2013:280, paragraph 21 (administrative and criminal procedures); Judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 64 (arrest warrant procedures).; confirmed by Judgement of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 25. For criteria developed to determine

refers explicitly to its provisions being applicable whenever Member States implement EU law.[14] According to the Court of Justice, implementing EU law can refer to the application of clear EU legal provisions[15] or even to a derogatory interpretation of such provisions if supranational law allows for such interpretation.[16] It is equally well-accepted case law that Member States' administrations and decentralised authorities are equally under the obligation to apply EU law and EU law general principles whenever they apply or implement European Union rules.[17]

This situation clearly applies to Commission decisions which impose an obligation to recover unlawful incompatible aid. In those circumstances, national authorities and judges have no choice but to apply this directly applicable Commission decision. In doing so, it follows from *inter alia* the *Wachauf* judgment that "higher ranking EU law principles are also binding on the Member States when they implement EU rules". In their interpretations, "the Member States must, as far as possible, apply those rules in accordance with the higher ranking EU law principles".[18] Such higher ranking law includes general principles of European Union law. Such general principles govern the functioning of EU institutions as well as Member States' courts and authorities when implementing European Union law.[19]

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whether or not national law can be considered an implementation of EU law, see Judgment of 18 December 1997, *Annibaldi*, C309/96, EU:C:1997:631, paragraphs 21 to 23; Judgement of 8 November 2012, *Iida*, C40/11, EU:C:2012:691, 79; and Judgement of 8 May 2013, *Ymeraga and Others*, C87/12, EU:C:2013:291, paragraph 41. See for a general analysis from the point of EU fundamental rights, Laurent Pech, "Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominiguez*", *Common Market Law Review* 49, (2012): 1841-1880.

[14] Article 51(1) Charter of Fundamental Rights in the European Union.

[15] Judgment of 13 July 1989, *Wachauf*, 5/88, EU:C:1989:321, paragraph 20.

[16] Judgment of 18 June 1991, *Elliniki Radiophonia Tileorassi (ERT)*, C-260/89, EU:C:1991:254, paragraph 43.

[17] Judgment of 22 June 1989, *Fratelli Costanzo*, 103/88, EU: C: 1989:256; see for Maartje Verhoeven, "The 'Costanzo Obligation' and the principle of national institutional autonomy: Supervision as a bridge to close the gap?", *Review of European Administrative Law* 3 (2012): 23-64.

[18] Judgment of 13 July 1989, *Wachauf*, 5/88, EU:C:1989:321, paragraph 19. More generally, see, Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, "The scope of application of fundamental rights on Member State action: In search of certainty in EU adjudication", *Eric Stein Working Paper 01/11* (2011), http://www.era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/EU_Adjudication.pdf.

[19] On general principles, see among others Takis Tridimas, *The General Principles of EU Law* 3rd edition (Oxford: Oxford University Press, 2016); Xavier Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006); Ulf Bernitz and Joakim Nergelius, *General Principles of European Community Law*, (The Hague: Kluwer Law International, 2000); Ulf Bernitz, Joakim

The foregoing implies that national judges will be called upon to apply EU law general principles to the detriment of their national counterparts in cases where they are interpreting or applying Commission decisions ordering aid to be recovered. *A fortiori* and more generally, the same conditions governing the applicability of EU law principles apply whenever they are operating within the scope of EU law, interpreting directly applicable Treaty provisions allowing some leeway to Member States' actors.[20] By virtue of the principle of primacy of EU law and the accompanying duty of national courts to "disapply'" national rules and principles contrary to EU law, national judges confronted with a recovery procedure will be obliged, as a matter of EU law, to ensure that EU law principles are being applied correctly.[21] In the tax ruling State aid cases where recovery has been ordered, potential legal certainty and legitimate expectations claims will thus have to be determined solely on the basis of EU law conditions.[22]

3. State aid recovery proceedings: revisiting the basics

To the extent that EU law principles are applicable in State aid recovery decisions, it is necessary to sketch the contours in which they operate. This section therefore revisits the basics of State aid recovery and the role of EU law principles of legal certainty and the protection of legitimate expectations in that regard.

Articles 107 and 108 TFEU do not explicitly refer to an obligation to recover aid granted by Member States to undertakings in violation of EU law. Recovery as such only constitutes a particular procedural remedy

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Nergeliu and Cecilia Cardner, *General Principles of EC Law in a Process of Development* (Alphen a/d Rijn: Kluwer Law International, 2008).

[20] Judgment of 21 November 2013, *Flughafen Frankfurt-Hahn*, C-284/12, EU:C:2013:755, paragraph 31.

[21] Judgment of 15 July 1964, *Costa Enel*, 6/64, EU:C:1964:66; Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH*, 11/70, EU:C:1970:114; Judgment of 09 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 106/77, EU:C:1978:49; Judgment of 6 May 1980, *Commission v. Belgium*, 102/79, EU:C:1980:120, paragraph 15; Judgment of 26 May 1982, *Commission v. Belgium,* 149/79, EU:C:1982:195, paragraph 19; Judgement of 2 July 1996, *Commission v. Luxemburg*, C-473/93, EU:C:1996:263, paragraph 26; Judgement of 11 January 2000, *Tanja Kreil v. Bundesrepublik Deutschland*, C-285/98, EU:C:2000:2, paragraph 23; Judgment of 18 July 2007, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA*., C-119/05, EU:C:2007:434. See also Bruno De Witte, "Retour à 'Costa' – La primauté du droit communautaire à la lumière du droit international", *Revue Trimestrielle de Droit Européen* 20, 3 (1984): 425-454.

[22] In Judgment of 18 July 2007, *Lucchini,* C-119/05, EU:C:2007:43, paragraphs 60-63, the Court implicitly acknowledged this, stating that a national law principle could not impede the effective recovery of unlawful aid.

accompanying the *standstill* and notification procedures that have been set up at a later stage (a.). At the same time, EU secondary legislation recognised that principles of EU law can limit effectively or constrain the full recovery of aid in the interests of legal certainty or the protection of legitimate expectations created by national authorities providing aid. The Court of Justice has nevertheless interpreted both recovery-limiting principles strictly (b.). On top of that, the specific remedial system established by EU law in the context of State aid recovery proceedings limits the invocability of those principles before any national judge if similar arguments can be made in front of an EU Court (c.).

a. Recovery as a procedural remedy

The Treaty provisions on State aid do not mention recovery as an instrument of EU policy. Article 108(2) TFEU permits the European Commission to review constantly Member States' aid schemes in existence at the time of the entry into force of the Treaty in that particular Member State. Upon finding that aid granted by a State or through State resources is not compatible with Article 107, or that such aid is being misused, the Commission may decide that the State concerned shall "abolish or alter such aid" within a period of time to be determined by the Commission. In this context, the Treaty only allows for future remedies to be imposed on Member States, without altering aid measures granted in the past. As confirmed later in EU secondary legislation, such aid has been previously approved or deemed approved by the Commission. Therefore the Commission should not be allowed to use a recovery injunction with regard to any misuse of such aid.[23]

In Article 108(3) TFEU, however, it is stated that the Commission shall be informed of any plans to grant or alter new aid regimes. If it considers that any such plan is incompatible with Article 107, the Commission services shall without delay initiate a compatibility procedure, which may result in the same decision to abolish or alter the aid as offered in Article 108(2) TFEU. At the same time, and in addition, the Member State concerned "shall not put its proposed measures into effect until this procedure has resulted in a final decision". This sentence implies that Member States need to have the approval of the Commission prior to granting new aid measures to undertakings. In the absence of such approval, the aid granted will be

[23] See, in that regard, recital 28 to Council Regulation 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 (codification), [2015] OJ L248/9 (hereafter Regulation 2015/1589).

considered *unlawful* aid, regardless of its compatibility with the conditions laid out in Article 107 TFEU.

Legal questions about the existence of a recovery remedy emerged in the context of such unlawful aid. In its *Commission v. Germany* judgment, the Court of Justice inferred from the modification or abolition options in Article 108(2), as referred to in Article 108(3) TFEU, that "to be of practical effect, this abolition or modification of unlawfully granted new aid may include an obligation to require repayment of aid granted in breach of the Treaty, so that in the absence of measures for recovery, the Commission may bring the matter before the Court".[24] As a result, the Court accepted recovery as a remedial consequence flowing from the procedural framework outlined in Article 108 TFEU. That position has since been confirmed in the Court's case law.[25]

In the absence of clear provisions on how, when and what to recover, Member States did not however always engage in full recovery of unlawfully granted aid.[26] Following a 1983 Communication, the Commission procedural regulations particularly introduced recovery as an explicit remedial mechanism. The procedural Regulation envisages recovery at two stages in the Commission's procedure analysing the compatibility of new aid regimes. In addition, the Court of Justice recognised a recovery obligation to be imposed on national courts even in the absence of Commission decisions being adopted.

Firstly, the Commission may adopt an injunctive decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market. The Commission is under no obligation to recover any unlawfully granted aid at this stage. In fact, the Regulation only permits the adoption of a recovery injunction if there is urgency to act, the aid character

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[24] Judgment of 12 July 1973, *Commission v. Germany*, 70/72, EU:C:1973:87, paragraph 13.

[25] Judgment of 11 December 1973, *Markmann KG v. Germany and Land of Schleswig-Holstein*, 121/73, EU:C:1973:153; Judgment of 11 December 1973, *Nordsee, Deutsche Hochseefischerei GmbH v. Germany and Land Rheinland-Pfalz*, 122/73EU:C:1973:154; and Judgment of 11 December 1973, *Fritz Lohrey v. Germany and the Land Hessen*, 141/73, EU:C:1973:155; more recent examples include Judgment of 08 May 2003, *Italy and SIM 2 Multimedia v. Commission,* joined cases C-328/99 and C-399/00, EU:C:2003:252, paragraph 66; Judgment of 08 March 2011, *Mediaset v. Commission*, C403/10 P, EU:C:2011:123, paragraph 122.

[26] Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, [2007] *OJ* C272/4, paragraph 10 (hereafter Commission Recovery Notice).

of the measure is not in doubt and a serious risk of substantial and irreparable damage to a competitor persists.[27] In other instances, the Commission will first have to close its procedure by adopting a formal incompatibility decision – a negative decision – confirming that the investigated aid measure is indeed incompatible with the conditions outlined in Article 107 TFEU.[28]

Secondly, Article 16 of the same Regulation holds that where decisions establishing the incompatibility of a Member State's aid measure with Article 107 TFEU are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. In those situations, the Regulation leaves the Commission no choice but to adopt a recovery decision, obliging the public authorities concerned to recover the sums unlawfully granted prior to having obtained the Commission's approval for doing so.[29] The purpose of such recovery is to obtain the re-establishment of a competitive situation in which the recipient did not receive aid. By repaying the sums unlawfully obtained, the recipient forfeits the advantage which he enjoyed over his competitors in the market, and the situation as it existed prior to the granting of the aid will be restored.[30] From that point of view, recovery is not considered a penalty;[31] it rather is a consequence of a Member State not having respected the procedures in place for granting aid to undertakings in compliance with Article 107 TFEU. This also implies that the recipient would be capable, in principle and provided that all conditions are fulfilled in that regard, of claiming damages from the Member State which failed to comply with those procedures imposed on it by European Union law.[32]

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[27] Article 13(2) Regulation 2015/1589.

[28] Recital 25 *juncto* recital 28 Regulation 2015/1589.

[29] See Article 16(1) Regulation 2015/1589, stating that the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid.

[30] Recital 25 Regulation 2015/1589. See for earlier case law pronounciations in that regard, Judgement of 10 June 1993, *Commission v. Greece*, C-183/91, EU:C:1993:233, paragraph 162; Judgment of 08 June 1994, *Spain v. Commission*, joined cases C-278/92, C-279/92 and C-280/92, EU:C:1994:235, paragraph 75.

[31] See among others, Judgment of 17 June 1999, *Belgium v. Commission*, C-75/97, EU:C:1999:311, paragraph 65.

[32] On this remedy, acknowledged by the Court of Justice and its conditions, see Judgment 26 January 2010, *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado,* C-118/08, EU:C:2010:39; Judgment of 24 March 2009, *Danske Slagterier v. Bundesrepublik Deutschland*, C-445/06, EU:C:2009:178; Judgment of 13 June 2006, *Traghetti del Mediterraneo SpA v. Repubblica italiana,*C-173/03, EU:C:2006:391; Judgment of 20 October 2005, *Staat der Nederlanden (Ministerie*

An Article 16 Commission "recovery decision" obliges the Member State concerned – and more specifically the aid-granting public authority – to recover the amount of aid unlawfully granted from the beneficiary undertaking(s), as well as interest at an appropriate rate fixed by the Commission.[33] The recovery decision being a binding instrument of EU secondary legislation according to Article 288 TFEU, the "immediate and effective execution" of the Commission's decision is to be ensured at the national level.[34] Article 16(3) of the Regulation confirms this, stating that in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law. Recital 25 of the Regulation confirms this, holding that "Member States should take all necessary measures ensuring the effectiveness of the Commission decision". That is not to say, however, that the Commission decision has to be recognised, as a matter of EU law, automatically as an executive title that can be opposed to an undertaking without any intervention by a national judge. EU law respects national procedural systems requiring a judicially sanctioned execution procedure in which a national judge has to confirm the enforceability of an administrative decision, at least to the extent that such condition equally applies in relation to similar national decisions.[35] According to the Court of Justice, most notably in its *Scott* judgment, such procedures cannot, however, impede the immediate and effective execution of the Commission's decision.[36]

A 2007 Commission recovery notice added additional soft law guidance, summarising the case law up to that point and outlining a framework balancing Commission and national authorities' roles in the recovery process. As far as the Commission is concerned, it promises to continue its present practice of identifying in its recovery decisions, where possible, the identity of the undertaking(s) from whom the aid must be recovered.[37] In addition, the decision will outline specific elements indicating the amount to be recovered as well as time-limits within which such a recovery is to

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van Landbouw, Natuurbeheer en Visserij) v. Ten Kate Holding Musselkanaal BV, Ten Kate Europrodukten BV, Ten Kate Produktie Maatschappij BV, C-511/03, EU:C:2005:625; Judgment of 30 September 2003, *Gerhard Köbler v. Republik Österreich*, C-224/01, EU:C:2003:513.

[33] Article 16(2) Regulation 2015/1589.

[34] Article 16(3) Regulation 2015/1589.

[35] Commission Recovery Notice, paragraph 52.

[36] Judgment of 2 September 2010, *Commission v. Scott*, C-290/07 P, EU:C:2010:480, paragraphs 64-66.

[37] Commission Recovery Notice, paragraph 32.

take place.[38] It should be remembered that Regulation 2015/1589 imposes a limitation period of ten years, which can be interrupted or suspended.[39] If, at the stage of the implementation, it appears that the aid was transferred to other entities, the Member State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented.[40] From the Member States' legal systems point of view, 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.[41] Once the beneficiary, the amount to be recovered and the applicable procedure have been determined, recovery orders should be sent to the beneficiaries of the unlawful and incompatible aid without delay and within the deadline prescribed by the Commission decision. The authorities responsible for carrying out the recovery must ensure that these recovery orders are enforced and that recovery is completed within the time-limit specified in the decision. Where a beneficiary does not comply with the recovery order, Member States should seek the immediate enforcement of its recovery claims under national law.[42]

Thirdly, Article 108(3) TFEU, final sentence has direct effect, implying that any unlawful grant of aid can, even in the absence of a Commission procedure, be contested before a national court. The typical scenario in this case is a competing undertaking lodging a complaint against a public authority for having granted an advantage to its competitor without having notified the Commission of its intentions. National judges confronted with such a claim are obliged to determine the unlawfulness of the aid and will therefore have to order the immediate recovery of such unlawful aid.[43] At the same time, given that Article 107 does not have direct effect, national jurisdictions cannot rule on the compatibility of unlawfully granted aid with EU law as such.[44] The Court therefore accepted that national courts

[38] Commission Recovery Notice, paragraph 37.

[39] Article 17(1) Regulation 2015/1589.

[40] Commission Recovery Notice, paragraph 32.

[41] Commission Recovery Notice, paragraph 46.

[42] Commission Recovery Notice, paragraph 54.

[43] See already Judgment of 11 December 1973, *Lorenz*, 120/73, EU:C:1973:152; Judgement of 9 October 1984, *Heineken*, joined cases 91/83 and 127/83, EU:C:1984:307; Judgment of 8 November 2008, *Adria Wien*, C-143/99, EU:C:2001:598.

[44] Judgment of 21 November 1991, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v. French Republic*, C-354/90, EU:C:1991:440; Judgment 18 July 2007, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA*., C-119/05, EU:C:2007:434.

could stay any preliminary recovery proceedings until the Commission adopted a decision on the compatibility of the unlawfully accorded advantage with Article 107 TFEU. In *CELF I*, the Court further maintained that a full recovery of unlawfully granted aid would indeed no longer be necessary if the Commission subsequently declares the aid compatible with the EU law.[45] At the same time, precisely because national courts should be able to take all measures to initiate recovery if the aid has been unlawfully granted[46], they cannot be forced to stay proceedings until the Commission or the Court delivered a final judgment on the compatibility of such aid.[47] In the 2013 *Flughafen Frankfurt Hahn* judgment, the Court of Justice added that "the national courts' task is […] to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision".[48] To that extent, a national court is obliged as a matter of EU law "to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure". Those measures may include the suspension of the implementation of the measure in question and the ordering of the recovery of payments already made. The national court may also decide to order other provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.[49] An example in this regard is a national judge ordering the transfer of sums already granted to a blocked account, so that such aid could be granted to the undertakings concerned more easily in case the Commission at a later stage deems it compatible with Article 107 TFEU.[50] In doing so, national courts are effectively *applying or*

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[45] Judgment of 12 February 2008, *CELF I*, C-199/06, EU:C:2008:79, paragraph 55. See also Paul Adriaanse, "Appropriate Measures to Remedy the Consequences of Unlawful State Aid: An Analysis of the ECJ Judgment of 12 February 2008 in Case C-199/06 (*CELF/SIDE*)", *Review of European Administrative Law* 2, (2009): 74-75.

[46] Judgment of 8 March 2011, *CELF II*, C-1/09, EU:C:2011:123, paragraphs 29-30.

[47] Judgment of 8 March 2011, *CELF II*, C-1/09, EU:C:2011:123, paragraph 31. See also Thomas Jaeger, "Settling into a weak effet utile standard for private State aid enforcement", *Journal of European Competition Law & Practice*, 1 (2010): 319-324.

[48] Judgment of 21 November 2013, *Flughafen Frankfurt-Hahn*, C-284/12, EU:C:2013:755, paragraph 31.

[49] Judgment of 21 November 2013, *Flughafen Frankfurt-Hahn*, C-284/12, EU:C:2013:755, paragraph 45.

[50] Judgment of 21 November 2013, *Flughafen Frankfurt-Hahn*, C-284/12, EU:C:2013:755, paragraph 43, refers to any provisional measures that can be taken in this regard.

implementing EU law and will therefore have to act in compliance with EU law general principles.

b. Recovery-limiting EU law principles

In all of the abovementioned scenarios, recovering unlawful (incompatible) aid is presented as a remedial tool that is a necessary complement to the failure by public authorities to respect the *procedural* framework structuring the granting of aid. Article 16(1) of Regulation 2015/1589 states that the Commission shall not require recovery of the aid only if this would be contrary to a general principle of Union law. A general principle that is often invoked in this regard is the principle of sincere cooperation, guaranteed in Article 4(3) TEU. Whilst Member States have tried to invoke the impossibility to recover aid as being contrary to this principle of sincere cooperation, the Court of Justice applied the principle restrictively in this particular context, generally refusing to grant such impossibility requests.[51] At the same time, however, a national courts' or Commission's recovery decision may also have serious repercussions for beneficiary undertakings confronted with it. It should not come as a surprise that precisely those undertakings essentially look for ways to contest the recovery of aid accorded to them unlawfully by Member State public authorities. In that context, the EU law principles of legal certainty (i.) and the protection of legitimate expectations (ii.) have come to play an increasingly important role.

i. Legal certainty

The principle of legal certainty remains a key principle in this regard.[52] According to the Court of Justice, it requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European

[51] Among others, Judgment of 2 February 1989, *Commission v. Germany*, 94/87, EU:C:1989:46; Judgment of 26 June 2003, *Commission v. Spain*, C-404/00, EU:C:2003:373; Judgment of 29 January 1998, *Commission v. Italy*, C-280/95, EU:C:1998:28.

[52] On this principle in general, see among many others Jérémie Van Meerbeeck, "The principle of legal certainty in the case law of the European Court of Justice: From certainty to trust", *European Law Review*, 41, (2016): 275-288 and references included therein. See also, for an earlier holistic approach Juha Raitio, *The principle of legal certainty in EC law* (Heidelberg: Springer, 2003); and Armin von Bogdandy, "Legal equality, legal certainty, and subsidiarity in transnational economic law – decentralized application of Art. 81.3 EC and WTO Law: Why and why not", in *European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, ed. Armin von Bogdandy et al. (Zuidpoolsinge: Kluwer Law International, 2002), 13-37.

Union law.[53] In the context of the recovery of unlawful (incompatible) State aid, the principle has been invoked in three distinctive situations.

Firstly, undertakings often invoke the lack of legal certainty offered by EU decisions ordering the recovery of aid in cases where the Commission only offers an approximation of the amount of money to be recovered. The Court of Justice has always maintained that no provision of European Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered.[54] It is therefore sufficient for the Commission's decision to include information enabling the recipient to calculate the amount itself, without overmuch difficulty.[55] To the extent that this is the case, the principle of legal certainty acknowledged under EU law will still be considered to have been respected.

Secondly, legal certainty is frequently relied on to contest the temporal effects of a recovery decision. In that context, it is generally maintained by beneficiary undertakings that the recovery of aid results in a retro-active application of a new rule classifying a measure as aid, creating legal uncertainty for the undertakings concerned. In principle, the Court of Justice does not accept that legislative changes resulting in the recovery of unlawful aid apply retro-actively as such, precisely because such rules deal with a situation that resulted from unlawful behaviour by public authorities. Applying the rule that the question whether a measure constitutes State aid must be assessed solely in the context of the relevant provisions of the ECSC Treaty and the measures taken to implement it, and not in the light of any earlier decision-making practice of the Commission,[56] the lack of

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[53] Judgment of 8 December 2011, *France Télécom SA v. European Commission*, C-81/10 P, EU:C:2011:811 paragraph 100; earlier references include Judgment of 15 February 1996, *Duff and Others,* C-63/93, EU:C:1996:51, paragraph 20; Judgment of 29 April 2004, *Italy v. Commission*, C-372/97, EU:C:2004:234, paragraphs 116 to 118; Judgment of 24 September 2002, *P Falck and Acciaierie di Bolzano v. Commission*, joined cases C-74/00 P and C-75/00, EU:C:2002:524, paragraph 140; Judgment of 7 June 2007, *Britannia Alloys & Chemicals v. Commission*, C-76/06 P, EU:C:2007:326, paragraph 79; Judgment of 18 November 2008, *Förster*, C-158/07, EU:C:2008:630, paragraph 67. See also Pablo Martín Rodríguez, "A missing piece of European emergency law: Legal certainty and individuals. Expectations in the EU Response to the Crisis", *European Constitutional Law Review*, 12, (2016): 266.

[54] Judgment of 8 December 2011, *France Télécom*, C-81/10 P, EU:C:2011:811, paragraph 102.

[55] See among other cases, Judgment of 12 October 2000, *Spain v. Commission*, C-480/98, EU:C:2000:559, paragraph 25, and Judgment of 12 May 2005, *Commission v. Greece*, C-415/03, EU:C:2005:287, paragraph 39.

[56] Judgment of 22 January 2013, *Salzgitter*, T-308/00 RENV, EU:T:2013:30, paragraph 66.

legal certainty cannot be invoked as a matter of course in this context. The limitation period of ten years for the recovery of aid is in reality deemed a sufficient safeguard in that respect.[57] On top of that, the Court confirmed that the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them.[58]

Undertakings do continue to invoke the principle, particularly in situations where national legislative changes potentially affect the amount of interest they have to repay in addition to the amount of aid recovered. A recent example of such case law relates to national measures adapting the calculation modes of the interest to be paid on recovered unlawful aid. In that context, the Court of Justice confirmed that, although the principle of legal certainty precludes a national regulation from being applied retroactively, namely to a situation which arose prior to the entry into force of that regulation, and irrespective of whether such applications might produce favourable or unfavourable effects for the person concerned, the same principle also requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation was obtained. In that case, if the new law is thus valid only for the future, it also applies, save for derogation, to the future effects of situations which came about during the period of validity of the old law.[59]

Thirdly, legal certainty claims have also been developed more generally in relation to the fact that Member States' public authorities did not act in good faith vis-à-vis the beneficiary undertakings concerned, by granting them aid contrary to Article 107 TFEU. In those circumstances, the Court of Justice reiterated that it may, in applying the principle of legal certainty,

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[57] Judgment of 10 February 1982, *Bout*, 21/81, EU:C:1982:47, paragraph 13; Judgment of 29 January 1985, *Gesamthochschule Duisburg v. Hauptzollamt München-Mitte*, 234/83, EU:C:1985:30, paragraph 20; Judgment of 15 July 1993, *GruSa Fleisch*, C-34/92, EU:C:1993:317, paragraph 22; Judgment of 29 January 2002, *Pokrzeptowicz-Meyer,* C162/00, EU:C:2002:57, paragraph 49; Judgment of 12 November 2009, *Elektrownia Pątnów II*, C-441/08, EU:C:2009:698, paragraph 33; and Judgment of 24 March 2011, *ISD Polska sp. z o.o. and Others v. European Commission*, C-369/09 P, EU:C:2011:175, paragraph 98.

[58] See recently, Judgment of 6 October 2015, *European Commission v. Jørgen Andersen*, C-303/13 P, EU:C:2015:647, paragraph 50.

[59] Judgment of 3 September 2015, *A2A*, C-89/14, EU:C:2015:537, paragraphs 36 and 43 and references to other cases included there.

be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. In order to do so, however, two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties.[60] As governments are deemed to know the scope of the State aid prohibition, it cannot be maintained that [a Member State's] Government was unaware of the prohibition, laid down in Article 108(3) TFEU, of putting an aid measure into effect or of the legal consequences of the failure to notify the measure at issue.[61] In addition, the Court entertains a very strict interpretation of the serious difficulties criterion: mere financial difficulties or difficulties in obtaining recovery will not be sufficient in that regard.[62] In addition, the Court confirmed that Member States' authorities have no choice once a Commission orders recovery, so that the argument of legal uncertainty cannot be invoked against them when the Commission's recovery decision has become final. The Court's *Alcan* judgment confirms this feeling in a very clear way. In that judgment, the Court most clearly stated that "[t]*he principle of legal certainty cannot therefore preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring such repayment. If it could, recovery of unduly paid sums would be rendered practically impossible and the [EU] provisions concerning State aid deprived of effectiveness*".[63]

It results from all three strands of case law that the EU law principle of legal certainty is most often invoked in relation to changes in EU secondary legislation or national legislation accompanying the recovery of unlawful State aid. Overall, however, the Court of Justice has not been willing to extend the principle of legal certainty beyond a mere confirmation that Article 107 TFEU and its judicial interpretation are sufficiently clear and predictable and that every public authority is deemed to know that interpretation. In so stating, the Court also indirectly presupposes that beneficiary undertakings are under an obligation to know those rules, resulting in them diligently checking whether or not the advantage accorded to them

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[60] Judgment of 19 December 2013, *Vent de Colère*, C-262/12, EU:C:2013:851, paragraph 40.

[61] *Ibid*., paragraph 41.

[62] Judgment of 26 June 2013, *Commission v. Spain*, C-404/00, EU:C:2003:373.

[63] Judgment of 20 March 1997, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH,* C-24/95, EU:C:1997:163, paragraph 37, building on *inter alia* Judgment of 21 September 1983, *Deutsche Milchkontor and Others v. Germany*, joined cases 205/82 to 215/82, EU:C:1983:233.

has been notified to the Commission and/or can be considered compatible aid. Only in very exceptional circumstances of good faith and serious difficulties could legal certainty offer a way out of recovery in accordance with EU law. In those circumstances, however, undertakings will more likely call upon the more specific principle of legitimate expectations in order to avoid recovery to its fullest extent.

ii. The protection of legitimate expectations

Attached to, yet different from the more abstract principle of legal certainty is the principle protecting the legitimate expectations an individual or company may have derived from a national authority's conduct in particular circumstances. The Court of Justice in principle accepted that a legitimate expectations defence can be developed, but has severely restricted the conditions under which it can be invoked.[64]

According to the Court, in general, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union.[65] In accordance with the Court of Justice's settled case law, that right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him to entertain well-founded expectations.[66] On the basis of that definition, it deserves to be questioned in what circumstances such information could be qualified as sufficiently precise and whether or not national authorities could, as a matter of EU law, establish legitimate expectations in the minds of beneficiary undertakings as well.

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[64] See Krysztof Jaros and Nicolai Ritter, "Pleading legitimate expectations in the procedure for the recovery of State aid: What are the recent developments in case law and the Commission's practice", *European State Aid Law Quarterly* 4, (2004): 573.

[65] On legitimate expectations as a general principle of EU law beyond the realm of State aid, Judgment of 5 May 1981, *Firma Anton Dürbeck*, 112/80, EU:C:1981:94, paragraph 48. Eleanor Sharpston, "Legitimate expectations and economic reality", *European Law Review* 15 (1990): 103-160, remains a useful starting point for academic reflection on this matter.

[66] See e.g. Judgment of 24 November 1987, *RSV*, C-223/85, EU:C:1987:502; Judgment of 20 September 1990, *Commission v. Germany*, C-5/89, EU:C:1990:320, paragraphs 14-15; Judgment of 20 March 1997, *Land Rheinland Pfalz v. Alcan*, C-24/95, EU:C:1997:163, paragraph 25; Judgment of 31 September 1998, *Preussag Stahl AG v. Commission*, T-129/96, EU:T:1998:69, paragraphs 77-78; see for background, Adinda Sinnaeve, "State aid procedures: developments since the entry into force of the procedural Regulation", *Common Market Law Review* 44 (2007):1002-1003.

Regarding the information or indications offered, the Court of Justice only accepts the principle of legitimate expectations if and to the extent that the undertaking concerned was given precise assurances that the EU would act in a specific way. To the extent that a prudent and alert economic operator could have foreseen the adoption of a Union measure likely to affect his interests, he cannot plead that principle once that measure is adopted.[67] Even if the EU had first created a situation capable of giving rise to legitimate expectations, an overriding public interest may preclude transitional measures from being adopted and result in the new – legal rule – being applicable to situations having originated under the old legal regime.[68] Overriding public interests could thus in fact overrule the creation of legitimate expectations. Only to the extent that no such interests can be shown may undertakings rely on a reasonable transitional period being granted in order for them to adjust to the consequences of a Commission decision declaring aid unlawful (and incompatible) and ordering the recovery of such aid.[69]

This principle has been applied particularly in relation to a Belgian tax system, in accordance with which coordination centres of large multinational companies received Belgian tax advantages. An authorisation to benefit from this scheme was to be granted again every ten years. In the particular context of this case, the Commission had, by its 1984 and 1987 Decisions and by its reply of 24 September 1980, given the coordination centres with an authorisation according to Belgian law, grounds to expect that the Treaty rules did not preclude the renewal of their authorisation. By changing its approach and considering the Belgian regime to constitute unlawful State aid, the Belgian coordination centres were on any basis entitled to expect that a Commission decision reversing its previous approach would give them the time necessary to address that change in approach.

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[67] Judgment of 23 February 2006, *Atzeni et al. v. Commission*, joined cases C-346 and 529/03, EU:C:2006:130, paragraphs 64-66; Judgment of 4 April 2001, *Regione Autonoma Friuli Venezia Giulia v. Commission*, T-288/97, EU:T:2001:115, paragraphs 107-108; Judgment of 22 June 2006, *Belgium and Forum 187 v. Commission*, joined cases C-182/03 and C-217/03, EU:C:2006:416, paragraph 147; Judgment of 17 September 2007, *Commission v. Koninklijke FrieslandCampina*, C-519/07 P, EU:C:2009:556, paragraph 84; Judgment of 16 December 2010, *Kahla Thüringen Porzellan v. Commission*, C-537/08 P, EU:C:2010:769, paragraph 63; Judgment of 21 July 2011, *Alcoa Transformazioni Srl*, C-194/09 P, EU:C:2011:497, paragraph 71; Judgment of 13 June 2013, *HGA and Others v. Commission*, C-630/11 P, EU:C:2013:387, paragraph 132.

[68] Judgment of 26 June 2006, *Belgium and Forum 187 v. Commission*, joined cases C-182/03 and C-217/03, EU:C:2006:416, paragraph 148.

[69] *Ibid*., paragraph 149.

At the very least, that element sufficed to entitle coordination centres with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time as or shortly after that decision was notified to have a legitimate expectation that a reasonable transitional period would be granted in order for them to adjust to the consequences of that decision.[70]

The EU law principle of legitimate expectations extends notably to the European Commission, especially when adopting generally applicable soft law guidelines or when having adopted a decision in relation to a similar national aid framework applied to another undertaking. It can nevertheless also be questioned to what extent Member States can – as a matter of EU law – create legitimate expectations regarding the legality of an advantage granted, despite not having notified the European Commission. In general and as a matter of EU law, the Court of Justice frequently reminds us that undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that such aid is lawful unless it has been granted in compliance with the procedure laid down in Article 108 TFEU. Any diligent operator should normally be able to determine whether that procedure has been followed, even if the State in question was responsible for the illegality of the decision to grant aid to such a degree that its revocation appears to be a breach of good faith.[71] As a result, and especially in the context of the conduct of national authorities, the creation of legitimate expectations is only accepted as a matter of theory.[72]

The case law examples outlined here indicate that legitimate expectations can indeed be invoked in principle by beneficiary undertakings in an attempt to limit the scale of a recovery decision. At the same time, however, the successful invocation of the principle is conditioned upon being able to show that the Commission in particular gave accurate and precise information that led undertakings to believe that they could continue to receive the advantage at stake from national public authorities. As a result, the principle of legitimate expectations does not provide an extensive recovery-limiting principle.

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[70] *Ibid*., paragraphs 158-163.

[71] As confirmed recently in Judgment of 21 July 2011, *Alcoa Transformazioni Srl*, C-194/09 P, EU:C:2011:497, paragraph 71.

[72] Judgment of 14 January 2004, *Fleuren Compost v. Commission*, T-109/01, EU:T:2004:4, paragraph 135. See on that point also Alain Giraud, "A study of the notion of legitimate expectations in State aid recovery proceedings: 'Abandon all hope, ye who enter here'?", *Common Market Law Review* 45 (2008): 1408.

c. Limits to recovery-limiting principles flowing from the EU's remedial system

Questions not only focus on the existence and contours of legal certainty and legitimate expectations frameworks, but equally on the appropriate forum where to invoke those remedies. The Court of Justice limited, relying on its *Textilwerke Deggendorf* case law, the scope of arguments that can be addressed before national jurisdictions in subsequent national recovery actions. In the context of tax ruling cases, the traditional application of that case law seems undesirable, given the uncertainties surrounding the scope of recovery-mitigating principles in this particular context.

According to the Court of Justice's judgment in *Textilwerke Deggendorf*, a "national court is bound by a Commission decision adopted under Article 108(2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the fourth paragraph of Article 263 of the Treaty, or did not do so within the period prescribed".[73] As a result, a beneficiary of the aid should in principle directly challenge the Commission decision ordering the recovery, invoking the principles of legal certainty and the protection of legitimate expectations in that context. When the decision can no longer be challenged before the EU courts and national recovery proceedings have been initiated, the beneficiary can in principle no longer question the validity of the Commission decision at hand, including its compatibility with EU law general principles.[74]

An exception to this principle arises where it can be ascertained that the beneficiary concerned could not have any knowledge whatsoever of the decision and its recovery consequences.[75] This exception is not likely to come into play in the context of the tax ruling cases, as those investigations and recovery decisions have been publicised to a large extent by the

[73] Judgment of 9 March 1994, *TWD Textilwerke Deggendorf GmbH v. Germany*, C-188/92, EU:C:1994:90, paragraph 17.

[74] It should not be surprising that one of the tax ruling beneficiaries concerned therefore asserted violations of legal certainty and legitimate expectations in its final point of appeal in T-759/15, *Fiat Chrysler Finance Europe v. Commission.*

[75] Judgment of 9 March 1994, *TWD Textilwerke Deggendorf GmbH v. Germany*, C-188/92, EU:C:1994:90, paragraph 25 *a contrario* and Judgment 23 February 2006, *Atzeni a.o.*, C-346/03, EU:C:2006:130, paragraphs 30-34.

European Commission. Third parties not addressed by the recovery decision, including trade unions or employees of the envisaged undertakings, would nevertheless still be able to make such a claim before the national jurisdiction.[76] The national court would then be able to apply directly EU law general principles or, in the absence of clarity surrounding their application, refer the matter to the Court of Justice for final confirmation. The Court of Justice remains attached firmly to the aforementioned principles in its case law.

A result of this case law is that the role of national jurisdictions would appear to be rather limited in scope and scale with regards to State aid recovery proceedings. In the context of tax ruling cases, like in any other State aid recovery case, beneficiary undertakings would first of all have to make legal certainty and legitimate expectations claims before the EU Courts, which would limit the scope for national judges to modify or alter the scope of recovery obligations. At the same time, however, it could be submitted that national judges could still, in principle and to the extent permitted by national procedural law, invoke such fundamental legal arguments of their own motion.[77] An unsurprising consequence of this would be that it will depend on the role of the national judge in national procedural law whether or not legal certainty and legitimate expectations claims can effectively be heard in litigation before Member States' jurisdictions in instances where only the beneficiaries, who could have invoked the principles in an EU action for annulment yet refrained from doing so, initiate proceedings at the national level against the implementation of a recovery order. Whilst this offers a significant margin of discretion to both national legislators establishing procedural frameworks and to individual judges, the final authority on the scope and remediation of violations of those EU legal principles will remain with the Court of Justice.

In the context of tax ruling investigations, the two levels of remedial action (direct actions before the EU Courts, which, if possible, exclude indirect EU law general principle actions before national courts) are likely to remain fully applicable. Given that the Commission in its decision-practice so far has ordered full recovery of unlawfully granted aid, beneficiary undertakings will first of all have to make their legitimate expectations and legal certainty claims before the EU Courts. Only third parties or national

[76] See for that argument, Morten Broberg and Niels Fenger, *Preliminary References to the Court of Justice*, 2nd edition (Oxford: Oxford University Press, 2014), 220.

[77] Again, *ibid.*, note 78, 220-221.

courts themselves could additionally invoke those claims before national judges, who could then proceed on their own motion or involve the helpline of the preliminary ruling mechanism of Article 267 TFEU. Such cases could offer a renewed opportunity to reconsider the remedial duality currently in operation. It would be imprudent to conclude that this will inevitably happen in the context of tax ruling recovery proceedings; although the cases may present an opportunity to do so, much will depend on the claims brought forward by the litigants in the context of potential recovery proceedings.

4. Anticipated recovery issues in the context of unlawful tax ruling advantages

The previous section outlined the strict conditions in which EU law principles of legal certainty and the protection of legitimate expectations will be applied. Building on those findings, this section explores to what extent and in what conditions the specific context of tax ruling investigations justify the successful invocation of the EU law principles of legitimate expectations (a.) and legal certainty (b.). In both situations, it will be asked to what extent the tax ruling context enables such invocation. It should be clear, however, that in the absence of published Commission decisions, the analyses and proposals made in this section are of a general nature. Nevertheless, they may prove helpful in cases where a national judge is confronted with a recovery claim following a tax ruling procedure.

a. The EU State aid law principle of legitimate expectations in the context of tax rulings

As mentioned in the previous section, the Court of Justice does not generally accept in practice that a national authority can establish the legitimate expectation that a situation was legal from an EU State aid law point of view. As a result, a national tax ruling decision would generally not be sufficient – by itself – to justify an expectation that the advantage flowing from it does not constitute State aid. The mere existence of a tax ruling procedure or an institutional framework enabling tax rulings does not as such suffice to create legitimate expectations, from an EU law point of view, that such rulings are also compatible with EU law. As such, the fact that a ruling system at the national level contributes to establishing legitimate expectations from a tax law point of view has no direct legal consequences for legitimate expectations that the measure does not constitute State aid and will not

therefore result in a recovery decision. Indeed, a diligent undertaking has to make sure itself whether or not the advantage granted by a tax ruling might constitute State aid and, to the extent that this is the case, has been notified to the European Commission.[78] Furthermore, a tax ruling decision envisages to offer clarity concerning the application and interpretation of national tax law; as such, it does not in general pronounce itself on its compatibility with EU State aid law rules. As a result, and given that Article 16 of Regulation 2015/1589 in principle establishes the full recovery of unlawful and incompatible aid, a ruling decision constituting aid will be amenable to full recovery, even when a ruling decision was meant to offer clarity from the point of view of national tax law. National authorities or national judges will have no choice but to effectively recover the aid, unless a successful legitimate expectations defence can be offered.

In that regard, it is not entirely unimaginable that a consistent conduct by both the Commission and national authorities create an impression that a national legislative framework or scheme does not constitute State aid. The Commission has indeed proven receptive to such arguments in the context of fiscal State aid. The factual circumstances should however be clear and precise as to leave no doubt regarding this finding. Two situations can be distinguished in this regard. On the one hand, the Commission can give signals that the measure at stake does not, or does not in certain circumstances, constitute State aid. On the other hand, the Commission can refrain from taking immediate action, allowing undertakings to believe that the national rule does not constitute State aid. The first situation is more likely to establish legitimate expectations than the second.

In the first situation, the Commission can establish some kind of expectations by giving mixed signals to undertakings regarding its position as to the selectivity or unlawfulness of a particular advantage. In the Commission decision practice, it has thus been accepted that recovery should be limited in instances where "some beneficiaries have been led to believe in good faith that the national measures at issue before the national court would cease to be selective, and therefore cease to constitute State aid, if their benefit were extended to sectors other than the manufacture of goods".[79] In such a case, the Commission accepted that, by virtue of its wording used in a certain

[78] Judgment of 21 July 2011, *Alcoa Transformazioni Srl*, C-194/09 P, EU:C:2011:497, paragraph 71.

[79] See e.g. Commission Decision of 9 March 2004 on an Austrian Energy Tax Rebate Scheme, [2005] OJ L190/15, paragraph 66, resulting from the Court's wording used in Judgment of 8 November 2008, *Adria Wien*, C-143/99, EU:C:2001:598.

decision, it can indeed create an expectation that certain measures should not be considered as State aid. As a consequence, national authorities and courts cannot be coerced into recovering such measures. To the extent that a *diligent market operator* could be led to believe a national authority that a national scheme or national rules did not constitute State aid, on the basis of indications given as such by the Commission or the Court of Justice in previous case law, full recovery would go against the EU law principle of the protection of legitimate expectations.[80] That argument may be relevant in the context of tax rulings, to the extent that the Court is willing to accept that a tax ruling system in itself is not a selective measure, as the General Court already held in *Autogrill* and *Banco Santander*.[81]

The General Court may very soon be inclined to take a clearer first step in that direction. "*In the Belgian tax ruling case, Belgium invoked the legitimate expectations argument – albeit, somewhat contradictorily, under the banner of legal certainty – in asking the General Court for interim measures limiting the immediate recovery of incompatible aid granted, according to the Commission decision, to multiple foreign undertakings*".[82] *Three elements had been adduced by Belgium in that respect. Firstly,* it complained that legal uncertainty is created by the Commission's new approach to the definition of a Member State's tax jurisdiction and its new definition of "the arm's length principle". Due to that legal uncertainty, the magnitude of which is unprecedented, it is highly likely that some undertakings will decide to leave Belgium or no longer invest in Belgium, which will cause irreparable damage to the Belgian economy.[83] Secondly, it argued that, in the event that the contested decision is annulled, it will face serious and irreparable harm due to the enormous administrative work to be invested in, first, determining the amount to be recovered on the basis of the contested decision, which is unclear, and then in repaying the amounts recovered.[84] Thirdly, if the recovery of sums classified as State aid that is unlawful and incompatible with the internal market were to be implemented, the companies from whom that aid would have to be recovered would initiate legal proceedings. The national courts, and it

[80] See similarly, Commission Decision on the tax free provisions introduced by France for setting up establishments abroad, [2002] OJ L 126/27 and Commission Decision of 31 October 2000 on Spain's corporation tax laws, [2001] OJ L 60/1, paragraphs 25-28.

[81] See note 3. That position was confirmed recently in Judgment of 17 December 2015, *Spain et al. v. Commission*, joined cases T515/13 and T719/13, EU:T:2015:1004, paragraph 151.

[82] *Belgium v. Commission*, *op. cit.*, paragraph 10.

[83] *Ibid.*, paragraph 17.

[84] *Ibid.*, paragraph 18.

may be added international arbitration courts, would accordingly be faced with extensive, time-consuming and complex litigation, brought by companies claiming compensation and damages.[85] As a result, Belgium asked the President of the General Court to order that recovery was suspended as an interim measure. In its order of 19 July 2016, the President of the General Court stated that Belgium had failed to establish an accurate and comprehensive picture, as required by the case law, of the economic situation that is claimed to justify urgency. As such, the President did not deem the arguments sufficiently convincing to order a suspension of recovery. He did not, however, exclude that those arguments would be taken seriously by the General Court when deciding the case on its merits.[86]

It is important to note that in most situations falling within this exception, the Commission itself already decided to limit recovery by acknowledging that it had created such expectation. The Commission thus anticipated potential litigation on this point and sought pro-actively to address it by limiting recovery in situations where legitimate expectations appeared to have been created. Nothing would seem to impede, however, that the EU Courts could apply the same principle in instances where the Commission ordered a full recovery. This argument is particularly salient in the context of the tax ruling cases, where the Commission seemingly ordered the full recovery of advantages flowing from such rulings. As the decisions are not publicly available at this time, it is unknown whether the Commission took such arguments into account. The fact that an action for annulment currently pending explicitly evokes a violation of the principle of legitimate expectations may hint at the fact that this principle and the exceptions regarding recovery it creates, have not been addressed fully in the Commission decisions.[87]

In the second situation, the European Commission adopts a negative decision accompanied by a recovery order, yet only after first having explicitly or implicitly considered a national legislative or regulatory framework to be compatible with the State aid provisions. In this case, the Commission created expectations that the regime at stake was to be considered legal. A distinction can be made between explicit and implicit assurances given by the Commission in this regard.

To the extent that the European Commission explicitly deviates from earlier adopted decisions, i.e. by classifying a national measure as a selective

[85] *Ibid.*, paragraph 19.

[86] *Ibid.*, paragraph 26.

[87] See pending case T-759/15, *Fiat Chrysler Finance Europe v. Commission*.

advantage whilst having classified the same or a similar measure as non-selective or compatible in earlier decisions, it can be accepted, as a matter of EU law, that legitimate expectations towards the beneficiaries of the now selective measure had been created. As a result, recovery of aid deemed to be compatible will frustrate the legitimate expectations explicitly created by the Commission in previous decisions concerning similar cases. For that reason, recovery of aid may be limited in time and scope, up to a point in time where there were no doubts that the national scheme in cause needed to be considered as incompatible from the point of view of EU law. The Commission has indeed accepted that such an explicit deviation from expectations created earlier justifies the requirements of full recovery to be toned down.[88] A big issue remaining in this respect is when such certainty is attained and what Commission decisions can be considered identical or similar. This seems to be an issue for the national judge, assisted by the Court of Justice, to determine on a case-by-case basis.

In the absence of the Commission taking or the Court of Justice having taken an explicit position regarding the apparent legality of a now-selective aid measure, it will be up to the competent national jurisdiction to assess whether or not implicit assurances have been offered. In instances where undertakings maintain that the Commission implicitly gave such assurances, e.g. by not initiating a formal procedure in relation to non-notified advantages immediately upon learning those advantages existed, neither the Commission itself nor the Court have proven willing immediately to accept that legitimate expectations have been created. To the extent that a diligent undertaking may indeed entertain doubts as to the compatibility of a measure with Article 107 TFEU, also in light of "the absence of explicit Commission decisions", legitimate expectations would not be created. Although the Commission does indeed have to act in compliance with principles of good administration itself, a mere shift in priorities or in focus in its enforcement practices does not in itself seem to justify the establishment of legitimate expectations.[89] In that context, the expectations generated cannot qualify as a legitimate indication by the Commission that the measure at stake was compatible with Article 107 TFEU.

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[88] E.g. Commission Decision of 2 August 2004 on the State Aid implemented by France for France Télécom, [2006] OJ L 257/11–67, paragraph 263.

[89] On discretion by the Commission in State aid enforcement from a non-legal point of view, see Thomas Doleys, "Managing the dilemma of discretion: The European Commission and the development of EU state aid policy", *Journal of Industry, Competition & Trade* 13 (2013): 23-38.

The overview offered here demonstrates that legitimate expectations can be invoked, but only to the extent that the European Commission explicitly established in a similar decision that tax rulings were compatible. In the context of fiscal aid, however, earlier Commission decisions have generally shown that the selective application of national tax law frameworks to undertakings may be incompatible with Article 107 TFEU. As such, decision practice rather points in the opposite direction, showing that tailored tax advantages may be problematic from the point of view of EU law. It will have to be determined, on a case-by-case basis in the context of specific recovery proceedings, whether or not legitimate expectations can be deemed to have been established. The Court's take on the selectivity criterion will play a central role in that assessment.[90]

b. An obligatory transitional recovery regime in the interests of legal certainty?

The more abstract principle of legal certainty can complementarily offer a legal basis to mitigate undesirable consequences a full recovery of unlawful incompatible aid imposes. The principle above all imposes the establishment of a transitional regime in case the Commission did indeed change its approach regarding the State aid nature of tax rulings on the one hand, and permits the establishment of a predictable recovery procedural framework at the national level on the other hand. Whereas the first situation is particularly tailored to the tax ruling framework, the second situation relates to legal certainty more generally.

In situations where the Commission imposes a full recovery of the advantages granted, but where it can be shown that explicit or implicit assurances regarding the compatibility of the national tax ruling framework had been offered, it can be argued that legal certainty requires recovery be limited to a point in time where it was beyond reasonable doubt that the application of a tax ruling decision would indeed qualify as unlawful State aid. Although Article 16 imposes a 10 year limitation period, legal certainty could require that period to be shortened for tax ruling recoveries. This is nevertheless something that will have to be decided upon on a case-by-case basis. The determination of the starting point of the absence of such reasonable doubt is a matter of fact, to be determined either by the Commission

[90] For an argument that the Court should limit the scope of recovery in the interest of legal certainty, see most vocally, Lisa Lindvahl Gormsen and Clement Mifsud-Bonnici, "Legitimate expectation of consistent interpretation of EU State aid law: Recovery in State aid cases involving advanced pricing agreements on tax", *Journal of European Competition Law & Practice* 8, forthcoming (2017).

or the national judge, subject to Court of Justice validation, where the Commission did not indicate a starting date. At the moment and in the absence of a more detailed binding EU recovery framework, it is unclear to what extent a national court can effectively offer such mitigation, especially in case the European Commission ordered the full recovery.

In principle, national courts should thus be able to mitigate a Commission decision, by virtue of the direct effect of general principles of EU law. Relying on the direct effect of EU law general principles when interpreting a Commission recovery decision, a national court could indeed decide to "disapply" the Commission decision and to interpret it in accordance with EU law constitutional principles. In practice, however, the final authority in establishing the legality of such a decision remains with the Court of Justice. It can indeed safely be stated that national judges will feel more comfortable acting as such once the Court of Justice has acknowledged effectively the possibility to avoid application of a recovery decision by virtue of the EU principle of legal certainty in the specific context of aid related to a tax ruling decision. The General Court's upcoming judgment in *Belgium v. Commission* may, given the questions raised already in the interim proceedings, constitute an occasion for doing so.[91]

In addition to clarifications needed at the EU level, predictable recovery regimes also would require a detailed legal framework surrounding such recovery. At present, a binding legal framework on the application and boundaries of EU law general principles is still lacking, resulting in unpredictability for beneficiary undertakings and national judges called upon to apply a Commission recovery decision or ordering recovery of unlawful aid in the absence of such a Commission decision. A more developed EU law framework would therefore directly contribute to the realisation of the aims of legal certainty and would likely diminish potential litigation on the scope of legal certainty and legitimate expectations exceptions in the context of tax ruling recovery proceedings.

5. Conclusion

The Commission's recent tax ruling investigations raise new legal questions regarding EU State aid recovery proceedings. Those questions particularly concern the extent to which principles of legal certainty or legitimate expectations claims can be invoked in order to mitigate or limit recovery. In general,

[91] *Belgium v. Commission*, *op. cit.*, paragraph 26 clearly points in that direction.

the Court of Justice acknowledged that those principles could be invoked, although their scope of application has been restricted severely throughout the case law. In the interest of maintaining a coherent application and interpretation of EU State aid (recovery) principles, nothing would seem to suggest that the Court will deviate from its previous strict case law in this respect.

Despite this stringent case law, this paper aimed to highlight how EU law arguments can nevertheless y mitigate potentially full-fledged recovery of unlawful incompatible State aid in the context of tax rulings. In any recovery proceedings on the national level, the existing EU law principles of legal certainty and of the protection of legitimate expectations will be the ones to be relied on by national authorities and judges when implementing or enforcing recovery decisions. In applying those principles, chances are slim that a successful legitimate expectations claim will be developed effectively. Legal certainty considerations could nevertheless imply a time limit on the advantages to be recovered. Such a limit nevertheless requires that the Commission gave a clear indication that rulings did not constitute State aid and only recently modified its selectivity approach to such rulings. It is, however, not entirely certain that this is the case in the specific cases at hand. Future litigation will therefore have to show whether or not legal certainty claims as highlighted in this article will indeed prove successful in mitigating full recovery obligations.

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