Recovery of Fiscal State Aid in Tax Ruling Cases and Principles of Legitimate Expectations and Legal Certainty

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Abstract: This paper will shed a light on the application of legitimate expectations and legal certainty principles against recovery orders in tax ruling cases. Between 2014 and 2022, the European Commission's investigations and the decisions following these investigations in some member states' tax ruling practices caused a massive boom in European Union State Aid law literature. Apple, Fiat, and Starbucks cases are among the main scenarios in that storyline. Recoveries of fiscal state aid were ordered as unpaid taxes for up to ten years in the past in these cases. To illustrate, the recovery order was 13 billion euros for Apple and around 20-30 million euros for Fiat and Starbucks decisions. Most interestingly, pleading general principles of European Union law such as legitimate expectations and legal certainty principles against recovery orders did not succeed in opposing the estimations. Therefore, this paper will try to address the application of legitimate expectations and legal certainty principles against recovery orders. The main focus will be how these principles should be applied when it deals with the novel and unpredictable interpretations of European Union State Aid rules. To this end, the clear examples from the Apple, Fiat, and Starbucks tax ruling cases will be drawn. This paper will argue that legitimate expectations and legal certainty principles should not be applied in a restrictive way.

Keywords: EU State Aid Law; Legitimate Expectations; Legal Certainty; General Principles of EU Law; Tax Rulings.

1. *Introduction*

This paper will focus on how the general principles of European Union ('EU') Law, such as legitimate expectations and legal certainty principles were interpreted in tax ruling cases.

In 2014, the European Commission ('EC') began to concentrate on the compatibility of tax rulings granted by some Member States with EU State Aid law. The EC ordered the recovery of unlawfully granted fiscal state aid in sheerly excessive amounts as unpaid tax advantages including Fiat, Starbucks, and Apple decisions. The ECJ recently put an end to the EC's previous practice on tax ruling cases with its landmark Fiat judgment dated the 8th of November 2022 (Joined Cases C-885/19 P and C-898/19 P). However, the ECJ's seminal judgment did not bring any clarity on the use of general principles against the EC's recovery order since the judgment mainly dealt with establishing an error of law in the determination of the reference framework.

Taking into account that general principles, such as legitimate expectations and legal certainty, are one of the few available ways to counter recovery orders, it is important to analyze how these principles were interpreted by both the EC and General Court ('GC') in cases in question. As it will be further discussed, in case of novel and unpredictable interpretation of EU State Aid rules, stringent application of these principles can have detrimental effects on the activities

of undertakings conducting business in Europe. General principles of any given law have always been the starting point of their interpretation and the strong basis of litigation strategy in case of disputes for undertakings. That is why it is important not to render their application in a stringent way in order not to deprive undertakings of effective legal protection. This becomes an even more sensitive issue, especially in unpredictable scenarios.

This paper will shed a light on how legitimate expectations and legal certainty principles were applied both by the EC and the GC in Apple, Fiat, and Starbucks cases. This will be done throughout three chapters. First, the recovery order and its purpose will be scrutinized before turning to the recovery orders in cases at hand. Secondly, I will examine the legitimate expectations principle and possible novel and unpredictable interpretations of state aid rules. Thirdly, the legal certainty principle and retroactive application of novel and unpredictable interpretations of state aid rules will be investigated.

The paper will address whether there is a stringent application of legitimate expectations and legal certainty principles in tax ruling cases at hand or not. Because such undermining interpretation can potentially lessen the whole significance of the general principles in question leading to detrimental effects on the legal and economic sphere in the EU. That is why, this paper's purpose is to build better prospects for pleading legitimate expectations and legal certainty principles against recovery orders. These will be done by using and analyzing the treaty provisions of EU law, the CJEU case law, the EC's decisions, the EC's soft law, and the different views of scholars in the legal doctrine.

2. *Recovery of State Aid and Difficulties of Recovering Fiscal Aid*

2.1. *Understanding the Recovery of Aid and its Purpose*

The EC has exclusive competence to assess the compatibility of an aid measure with the internal market according to article 108(2)

of the TFEU[1]. This assessment is subject to review by the GC and the ECJ[2]. Therefore, member states ('MS') shall not put their proposed aid measures into effect until the EC has adopted a decision on the compatibility of the measure in question. This is called a "standstill obligation"[3] for MS and its breach will consequently bring about finding aid measures illegal (unlawful) by the EC.

Finding an aid measure illegal will naturally lead to some consequences. A recovery order is one of them. Recovery of state aid means removing the undue advantage that is granted to undertakings so that market conditions before the illegal aid could be restored. Although EC's this power is not described in TFEU, it is recognized by the ECJ[4]. EC's this competence (subject to 10 years limitation period) is also depicted in the secondary legislation. It is provided by the Procedure Regulation that, when negative decisions are adopted in cases of unlawful aid, the member state concerned will take all needed measures to recover the aid from the beneficiary pursuant to the EC decision[5]. It should be stated in light of article 288 of TFEU that EC decisions are binding. Therefore, following EC's recovery decision, it is for the national courts of MS to give effect to that decision and enforce it[6] as there are no EU law provisions governing this matter[7].

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1. C-354/90, *Saumon* (1991) ECLI:EU:C:1991:440, paragraph 14. See also European commission, *Communication C/2019/5396 - Notice on the recovery of unlawful and incompatible State aid* (2019) OJ C 247 at paragraph 11.

2. *Id.* at 11. See, e.g.,C-275/10, *Residex,* 2011 ECLI:EU:C:2011:814.

3. Consolidated version of the Treaty on the Functioning of the European Union, (2007) OJ C 115/47, article 108(3).

4. C-70/72, *European Commission, v. Germany,* 1973 ECR 813, at 13.

5. Council of the European Union, *Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification)*, OJ L 248, 24.9.2015, article 16(1).

6. Kelyn Bacon, *European Union Law of State Aid* at 6 (Oxford Competition Law 3rd ed. 2017).

7. Krzysztof Jaros and Nicolai Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid,* 3(4) European State Aid Law Quarterly 573, 573 (2004).

As it is also stipulated by the ECJ, recovery is the logical consequence of finding state aid incompatible with the internal market[8]. This interpretation makes an obvious sense as it stems from the use of the word "abolish" in article 108(2) TFEU. Therefore, the purpose of recovery is to restore the situation that used to exist in the competitive structure of the internal market prior to illegally granted aid[9]. Additionally, recovery decisions must also include interest from the date of payment to the date of repayment[10]. Recovering the aid amount itself and adding interest to it serves to remove all the advantages aid beneficiaries enjoyed from the date it was put at their disposal until it is paid back[11].

Thus, it is essential to understand that a recovery decision is neither punishment nor a penalty, and it should not be used like any of these. The purpose of aid recovery is to remove the distortive effects on the competition, establish the status quo ante, and go back to the economic equilibrium that used to exist before unlawful aid. That is why recovery must be limited to the financial advantage arising from the aid[12] since it is not equivalent to imposing a fine. However, the recovery order can be punitive if it runs well above the multi-million-euro mark to ten years back as a result of the retroactive application of new law[13]. We will get back to this point later.

After establishing the purpose and sensitive nature of recovery of state aid, we are now turning to see what happened in the cases of Apple, Starbucks, and Fiat.

2.2. *Recovery Order in Recent Tax Ruling Cases*

At the beginning of 2014, the EC started inquiries into the tax ruling practices of six MS, including Luxembourg, Ireland, the Netherlands,

8. C-310/99, *Italy v. EC,* 2002 ECLI:EU:C:2002:143, at 98.

9. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 16 (cited in note 1).

10. C-480/98, *Magefesa*, ECR 2000 I-8717, at 36-40.

11. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 16 (cited in note 1).

12. Bacon, *European Union Law of State Aid* at 6 (cited in note 6).

13. Liza Lovdahl-Gormsen, *European state aid and tax rulings* at 63 (Edward Elgar Publishing 1st ed. 2019).

the United Kingdom, Cyprus, and Malta. Speaking of tax rulings, they are individual decisions in different formats adopted by national tax authorities. They entail a procedural tool of national fiscal policy that allows authorities to fix the application or interpretation of fiscal rules to the envisaged necessities of tax contributors[14].

In the same year, the EC opened formal investigations against Ireland (for granting Apple incompatible State aid), Luxembourg (for providing Fiat with unlawful tax benefits), and the Netherlands (for providing Starbucks with illegal tax breaks)[15]. These investigations mainly dealt with the transfer pricing rulings of tax authorities of mentioned member states. In these investigations, the EC took the direction that any tax ruling doing more than interpreting the general tax scheme can potentially qualify as state aid[16]. Now we will consider all these three cases respectively.

In 2015, the EC concluded its investigations against Luxembourg stating that the country breached its standstill obligation since the tax ruling for Fiat constituted state aid under Article 107 of TFEU. Thus, the country was required to recover the unlawful and incompatible aid from Fiat[17]. Following the recovery decision, an action for annulment was brought before the GC by Luxembourg and Fiat. However, the GC dismissed the appeals and upheld the EC's decision[18]. Ireland (C-898/19 P) and Fiat (C-885/19 P) therefore brought two separate appeals against that judgment before the ECJ. As it is already mentioned, the ECJ set aside the GC's judgment and annulled the EC's decision in its judgment in 2022.

Turning to the Starbucks case, the EC found that an advance pricing arrangement between the Netherlands tax authorities and Starbucks constituted an incompatible aid in 2015. Therefore, the EC

14. Pieter Van Cleynenbreugel, *Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations*, 1 Market and Competition Law Review 1 15, 18 (2017).

15. Nina Hrushko, *Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings*, 43(1) Brooklyn Journal of International Law 327, 338 (2017).

16. See *ibid*.

17. State aid which Luxembourg granted to Fiat (2014/C ex 2014/NN) see European Commission, *Decision 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat*, OJ 2016 L 351, at 1.

18. T-755/15 and T-759/15, *Fiat* ECLI:EU:T:2019:670.

ordered the recovery of the fiscal state aid[19]. The Netherlands and Starbucks applied annulment actions. They mainly argued whether the measure in question is selective or not. Subsequently, the GC annulled the EC's decision[20].

When it came to investigations against Ireland, the EC concluded that the measure in question constituted state aid which was incompatible, thus, recovery was ordered. According to the EC's calculations, Apple had received from Ireland 13 billion euros in unlawful tax advantages which should be recovered[21]. Ireland also joined Apple to seek annulment before the GC[22]. Eventually, this decision was annulled by the GC as it found that EC failed in showing the requisite legal standard that there was an advantage for fulfilling the requirements of Article 107(1) TFEU[23].

As it is witnessed, the EC ordered recoveries in sheerly excessive amounts in unpaid taxes for up to ten years into the past, which were around 20-30 million euros in Fiat and Starbucks decisions[24], and approximately 13 billion euros in Apple decision. Therefore, those decisions drew significant attention from the media and caused a sudden boom in legal literature. The U.S. Department of the Treasury also condemned these tax ruling cases in its White Paper (August 24, 2016).

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19. State aid SA.38374 implemented by the Netherlands to Starbucks (2014/C ex 2014 NN) see European Commission, *Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks*, OJ 2017 L 83 at 38.

20. T-760/15 and T-636/16, *Starbucks* (2019) ECLI:EU:T:2019:669.

21. European Commission, *Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP), implemented by Ireland to Apple* C/2016/5605, OJ 2016 L 187 (2017).

22. The reasons why Ireland and other countries rejected receiving huge amounts of money and joined appeal actions together with aid beneficiaries will further be discussed.

23. T-778/16 and T-892/16 2020, *Ireland and Apple v. European Commission,* ECLI:EU:T:2020:338.

24. Hrushko, *Tax in the World of Antitrust Enforcement: European Commission's State Aid Investigations into EU Member States' Tax Rulings* at 341 (cited in note 15).

2.3. *Recovery of Fiscal Aid and Arising Issues*

Recovery of any type of aid brings about numerous issues. The situation can be more complicated in tax ruling cases given the complex nature of the arm's length principle ('ALP') (which serves to ensure that taxes are correctly imposed where conflict of interests can occur)[25]. Nonetheless, the unlawfully granted aid should be identified, the obligation of recovery should be based, and the taxpayer's rights and the state's obligations should be clarified while ordering the recovery of fiscal state aid[26]. To this extent, the main difficulties were related to the amount of the quantum in tax rulings cases in question. According to the Notice on Recovery (para. 66) it is the EC's role to quantify the aid to be recovered. Following this, it is also mentioned that if that is not possible, the EC describes the methodology by which the MS has to identify the beneficiaries and determine the amount of recovery.

Therefore, the EC's position in its Fiat decision can be considered justified as in paragraphs 363 and 367, this is clearly mentioned, and it provided Luxembourg with a methodology to recover an alleged aid measure (methodology in recital 311 should especially be mentioned). The GC in its turn did not accept an appeal on this argument[27].

One of the mainly used arguments against the recovery orders is the impossibility. However, in none of these three cases, it was brought into action. It is not surprising as the ECJ rejected this ground where the aid had to be recovered from huge numbers, even thousands, of small undertakings which have been granted tax exemptions[28]. Impossibility ground is likely to be successful where MS can show that the company is liquidated and has no recoverable assets[29].

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25. Dimitrios Kyriazis, *Tax rulings and State aid: musings on recovery*, in Leigh Hancher and Juan Jorge Piernas López (eds.), *Research Handbook on European State Aid Law Edward* at 317 (Elgar Publishing 2nd ed. 2021).

26. Alexandre Maitrot de la Motte, *The Recovery of the Illegal Fiscal State Aids: Tax Less to Tax More*, 26 European Commission, Tax Review 60, 77 (2017).

27. T-755/15 and T-759/15 2019, *Luxemburg v. European Commission* and *Fiat Chrysler Finance Europe v. European Commission* (cited in note 18).

28. C-75/97 1999, *Kingdom of Belgium v. Commission of the European Communities*, ECR I-3671, at 90.

29. Bacon, *European Union Law of State Aid* at 18 (cited in note 6).

Moreover, a recovery order of fiscal aid will potentially lead to numerous procedural[30] and administrative issues[31] before the national courts. They will not be further discussed in this work due to its purposes.

2.4. *Recovery of Fiscal Aid and General Principles of EU Law*

On the other hand, the cases at hand provoke fresh debates on the general principles of EU law.

Article 6(3) of the TEU entails that general principles are to be located at the same level as Union treaties. That is why it is accepted that they have constitutional value[32]. In light of this provision, general principles of EU law are binding, and their character cannot be undermined.

Article 16(1) of Procedure Regulation provides that the aid will not be recovered if this would be contrary to the general principles of EU law. Paragraph 32 of the Notice on Recovery enshrines that among them principles of "legitimate expectations" and "legal certainty" are invoked frequently in the context of the implementation of the recovery obligation.

Those principles should also be understood within the framework of tax rulings in national laws. A tax ruling ensures more predictable and specific guidance on how national tax provisions will be applied with regard to given undertaking[33]. This role of tax rulings serves to achieve legal certainty. It should also be stated that the adoption of any tax ruling entails institutionalized dialogue between tax authorities and undertakings. The outcome of such dialogue can legitimately create an expectation from the undertakings' perspective. After the tax ruling, undertakings will expect that specific tax law provisions will be applied in a way defined in the ruling itself with regard to them[34]. Although in the case of conflict, EU state aid law provisions will prevail

30. An obvious one could be combining the limitation periods which are not the same under EU state aid law and under national tax laws.

31. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* (cited in note 7).

32. Bucura Catalina Mihaescu, *Recovery of Unfaithful Aid and the Role of the National Courts*, in *State Aid Law of the European Union* at 389 (Oxford University Press 2016).

33. Van Cleynenbreugel, *Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations* at 20 (cited in note 14).

34. See *ibid*.

(because of primacy and effectiveness) over these legal effects of tax rulings under national law. Nevertheless, what is being mentioned in this paragraph should be kept in mind.

In the EU state aid law, principles of legal certainty and legitimate expectations are subject to restrictive interpretation[35]. EC depicted on the Notice on Recovery (para. 33) that generic claims on the alleged infringement of EU general principles cannot be accepted. This is justified in protecting the effectiveness of EU state aid control.

Claims against recovery on these grounds almost never succeed. From this perspective, the cases at hand are extremely insightful since there were several issues that were expected to make successful arguments against recovery on general principles. However, in all of them, the EC did not accept those arguments. The ones, which have been annulled by the GC, do not elaborate more on the general principles but discussions will extend to the GC's Fiat decision.

Both principles will now be discussed in separate chapters, and it will be argued why they should not be applied stringently.

3. *Principle of Legitimate Expectations as a Defense against Recovery*

3.1. *Understanding Legitimate Expectations as a General Principle of EU Law in State Aid Field*

The legitimate expectations principle is a part of the EU constitutional and administrative law[36]. In general, legitimate expectations will exist where it derives from the legal situation that the addressee relied on, that reliance being reasonable and proportionate[37]. However, its application in the EU state aid law is slightly different. Since the recovery is considered the logical consequence of finding an aid

35. Claudia Saavedra Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations*, 15(2) European State Aid Law Quarterly 270, 274 (2016).

36. Herwig C.H. Hofmann, Gerard C. Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* at 172 (Oxford University Press 2011).

37. Paul Craig, *EU Administrative Law* at 777 (Oxford University Press 2nd ed. 2012).

measure illegal, it cannot be considered disproportionate to the objective of the TFEU[38].

In EU state aid law, the following criteria should be fulfilled to establish legitimate expectations: (1) precise, unconditional, and consistent assurances by the EU authorities, (2) assurances should be reasonable, and (3) the assurances given should comply with the applicable rules[39]. Among these conditions, especially the first one is problematic.

Notice on Recovery (para. 39) provides any person can enjoy legitimate expectations if they received precise, unconditional, and consistent assurances from the EU institutions. Therefore, it is not derived from the context of this document that these assurances can only be given by the EC itself. Scholars who analyzed the ECJ case law on the matter, go on to correctly emphasize that precise assurances expanded to include reliance on past EC decisions as well as the CJEU judgments which do not even concern beneficiaries or their situations directly[40]. In addition, how assurance is given to the party enjoying legitimate expectations is not relevant in this regard[41]. However, the situation was different in the EC's tax ruling decisions. For example, EC mentioned in its Fiat decision that the expectation must arise from previous EC action in the form of precise assurances for a claim of legitimate expectations to succeed[42]. This position was also upheld by the GC which will be further discussed in this paper.

It is for the recipient undertaking to invoke claims on the existence of exceptional circumstances according to which it had entertained legitimate expectations[43]. (Exceptional circumstances mentioned

38. C-142/87 1990, *Kingdom of Belgium v. Commission of the European Communities* ECLI:EU:C:1990:125, at 66.

39. Bacon, *European Union Law of State Aid* at 38 (cited in note 6).

40. Lovdahl-Gormsen, *European state aid and tax rulings* at 71-72 (cited in note 13).

41. C-537/08 2010, *Kahla Thüringen Porzellan GmbH v. European Commission*, ECLI:EU:C:2010: 769, at 63.

42. Cases T-755/15 and T-759/15 2019, *Luxemburg v. European Commission and Fiat Chrysler Finance Europe v. European Commission* (cited in note 18).

43. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 576 (cited in note 7).

here are the subject of case-by-case analysis)[44]. That is the reason why the EC did not find arguments admissible on the grounds of legitimate expectations both in the Fiat decision and Starbucks decision. Even though it was a member state (Luxembourg) in Fiat[45] and the interested party (the Dutch Association of Tax Advisors) in Starbucks decision[46], the EC continued to analyze the matter and rejected claims.

The legitimate expectations principle has also a connection with the principle of good faith[47]. An important point is that the legitimate expectations principle is not entailing legal rules that shall remain unchanged. In that relevant authorities have a margin of discretion within which they can alter policies[48]. Nevertheless, showing to act in a good faith can potentially protect aid beneficiaries from unforeseeable changes in legal order. The same will not apply where changes were foreseeable. For this reason, the courts assess foreseeability. Meaning that the market participant, who is a prudent and well-informed one, could have foreseen the alterations made by EU institutions[49]. On this matter, more will be elaborated while discussing legal certainty.

3.2. *Diligent Businessman Benchmark versus Fore*See*ability of Illegality of Aid Measure*

As mentioned, using legitimate expectations as a defense against recovery is not easy. Conditions for this defense are established in the case EC v. Germany by the ECJ[50]. This test is called "diligent businessman benchmark" in the doctrine. According to this, aid must have been granted in compliance with the procedure in Article 108 TFEU and a diligent businessman should normally be able to determine

44. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 39 (cited in note 1).

45. Cases T-755/15 and T-759/15 2019, *Luxemburg v. European Commission and Fiat Chrysler Finance Europe v. European Commission* (cited in note 18).

46. C-502/2017, *Starbucks* at para 439 (cited in note 19).

47. C-T-115/94, *Opel Austria GmbH v. Council* (1997) ECLI: EU:T:1997:3 at 93.

48. C-52/81, *Offene Handelsgesellschaft v. Eu*ropean Commission, (1982) ECLI:EU:C:1982:369 at 27.

49. Lovdahl-Gormsen, *European state aid and tax rulings* at 69 (cited in note 13).

50. C-5/89, *European Commission, v. Germany* (1990) ECLI:EU:C:1990:320.

whether that procedure has been followed or not[51]. Exceptional circumstances have to exist for exceptions from this rule (which is a matter of case-by-case approach)[52]. Now this has been a settled case law as the benchmark commonly applied in the practice. And it applies to big multinationals and small & medium size undertakings without prejudice[53]. In other words, diligent undertakings are under "duty"[54] to make sure that aid is granted lawfully before receiving it.

However, the diligent businessman benchmark is being applied very strictly which leaves almost no space for the protection of the expectations stemming from the unlawfully granted aid[55]. According to the Notice on Recovery, if a standstill obligation is breached, MS cannot invoke legitimate expectations against recovery[56]. The same applies to the aid beneficiary as well, unless exceptional circumstances apply[57]. That is how this was applied by the EC in its decision against Apple saying that otherwise would render treaty provisions ineffective[58].

Some argue that the strict application of the diligent businessman benchmark can only be considered accurate when there is no doubt about the aid character of the measure in question[59]. The others make a comparison with the investment treaty law and show the drastic difference that legitimate expectations are one of the most successful claims in that field[60]. The logical conclusion derived from this analysis was that stringent application of the legitimate expectations principle

51. See *id.* at 14-16.

52. See *ibid.*

53. Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations* at 274 (cited in note 35).

54. See *ibid.*

55. See *ibid.*

56. European commission, *Notice on the recovery of unlawful and incompatible State aid* at 40 (cited in note 1).

57. See *id.* at 41.

58. European Commission, *Decision (EU) 2017/1283* at 442 (cited in note 21).

59. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 578 (cited in note 7).

60. Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations* at 276 (cited in note 35).

leaves limited scope for exceptions since any illegally granted aid is considered to distort competition in EU state aid law[61].

From another author's standpoint, with whom we strongly agree, the EC and the CJEU should consider how easily the alleged aid beneficiary could have identified that aid was being granted in order not to render the legitimate expectations defense against recovery utterly meaningless in cases of illegal aid[62]. It has to be mentioned to this end that novel interpretation of state aid rules constitutes a significant threat to the legitimate expectations of aid beneficiaries. Especially, in some complex transactions state aid elements can be invisible or very difficult to detect[63]. Transfer pricing agreements in three cases which are our discussion points are obviously considered as complex transactions. Therefore, it will now be assessed whether we are dealing with novel and unpredictable interpretations of state aid rules or not.

3.3. *Legitimate Expectations versus EC's Novel and Unpredictable Interpretation of State Aid Rules*

The main purpose of this section is to show that the EC's interpretation of Article 107(1) TFUE in cases at hand is novel and unpredicted, thus, a diligent businessman could not foresee it. For this purpose, it will not be argued whether the EC was right to interpret Article 107(1) in this particular way. It will be argued that it was not right to reject arguments claiming this novelty interpretation contrary to general principles. The main reference point will be the Fiat case since the EC's position there was upheld by the GC.

In the Fiat decision, the EC disregarded claims on legitimate expectations that Luxembourg did not receive assurances from the EC but from the CCG and the OECD's Forum on Harmful Tax Practices[64]. Although the novel interpretation argument was raised on the principle of legal certainty by Luxembourg, the novelty of interpretation

61. See *id.* at 278.

62. Dimitrios, *Tax rulings and State aid: musings on recovery* at 324 (cited in note 25).

63. Jaros, Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 578 (cited in note 7).

64. European Commission, *Decision (EU) 2016/2326* at 358 (cited in note 17).

will first be analyzed in this section and the legal certainty principle itself will be later considered in the final chapter of this work.

The EC did not accept that its interpretation in question should be considered as leading to unpredictability and novelty, by stating:

There were no previous decisions by the EC that caused uncertainty on the fact that tax rulings pose state aid[65].

There is an express reference in the Notice on Direct Business Taxation to the tax rulings and the circumstances according to which they could be considered granting of state aid[66].

ALP has been applied in its past decision-making practice to find alleged measures constituting state aid, and that finding[67] had been approved[68] by the ECJ[69].

The first one will not be argued, however, this paper will strongly disagree on the second and third points. Let us start with the third limb.

It was in *Forum 187* case[70] for the first time that ALP is used for purposes of calculating transfer pricing by the EU. Though neither in the EC's decision nor in the ECJ's judgment there is an explicit mention of ALP in *Forum 187*. Therefore, some authors are rightfully arguing whether *Forum 187* is a clear legal authority for the ALP or not[71]. Being not dependent on this, in *Forum 187*, the cost-plus method is used in a recommended way by the OECD, "implying that reference is to be made to the OECD Model Convention and Guidelines."[72]. Thus, the ALP applied in *Forum 187*, which is implied by the EC in the third limb above, is the OECD ALP. Therefore, according to the EC decision and the ECJ's judgment in *Forum 187*: undertakings were deemed to enjoy legitimate expectations that if the ALP were applied to tax

65. See *id.* at 361.

66. See *ibid.*

67. European Commission, *Decision 2003/757 of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium*, OJ 2003 L 282 at 25.

68. Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v. EC,* ECLI:EU:C2006, at 416.

69. See *id.* at 362.

70. European Commission, *Decision 2003/757* (cited in note 67) and Cases C-182/03 and C-217/03 (cited in note 69).

71. Lovdahl-Gormsen, *European State Aid and Tax ruling* at 78 (cited in note 13).

72. See *ibid.*

rulings, it would be done in line with *Forum 187* based on the OECD Guidelines[73].

However, ALP is applied in a different way in discussed tax ruling cases. One author, who sought to establish the nub of the EC's legal argumentation, correctly indicates: the analysis of tax ruling is done under the EU law-derived ALP that is supposedly based on *Forum 187*[74]. That is to say, there is a disparity between the ALP applied by the EC in these tax ruling cases and the one in the OECD Transfer Pricing Guidelines[75]. The EC itself accepts its departure from the OECD ALP and replaces it with its own[76]. This is enough to show that the EC's interpretation of ALP has changed since *Forum 187,* thus interpretation of tax rulings in question as a state aid within Article 107(1) via EU law-derived ALP has to be considered as a novelty[77].

Turning to the second limb, the Notice on Direct Business Taxation[78] was published in 1998. Even though administrative rulings were mentioned as measures that can amount to state aid in this document, the barrage of fiscal state aid investigations in the first decade of the 2000s mainly focused on selective tax schemes and not on the tax rulings of individual companies[79].

In 2014, the EC published a Draft of the Notice on Notion of State Aid[80] ('Draft'). Although the Draft contained a separate section on tax

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73. Liza Lovdahl 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*, 8(7) Journal of European Competition Law & Practice 423, 431 (2017).

74. Kyriazis, *Tax rulings and State Aid* at 325 (cited in note 25).

75. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 431 (cited in note 73).

76. European Commission, *Decision (EU) 2016/2326*, para. 228 (cited in note 17).

77. Arguing that ALP derived from Forum 187 non-explicitly will not prove this argument wrong. In either way, the Commission's interpretation of tax ruling as state aid by means of ALP will be novel approach in the absence of previous decision-making practice.

78. European Commission, *Notice on the application of the State aid rules to measures relating to direct business taxation*, C-384/03 OJ 1998.

79. Dimitrios A. Kyriazis, *From Soft Law to Soft Law through Hard Law: The EC's Approach to the State Aid Assessment of Tax Rulings,* 15(3) Eur St Aid LQ 428 2016), at 429.

80. European 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,* C/2016/2946 OJ C 262

settlements and tax rulings, it did not contain a specific statement to the effect that a departure from the ALP can confer a selective advantage[81]. In the Draft, we can just find a mere mention of *Forum 187* in one footnote and ALP is not mentioned at all.

In 2016, the final version of the Notice on Notion of State Aid ('Final Notice') was published by the EC[82]. We already know what happened between 2014 and 2016[83] - investigations took place against tax rulings of MS and Fiat, Starbucks, and Apple cases were decided. Final Notice entailed several brand-new issues than Draft. In Final Notice, extensive analysis of *Forum 187*, presentation of new legal principle - ALP, entire paragraph on the discussion of OECD soft-law instruments[84], and assertion that transfer prices departing from a reliable approximation of a market-based outcome established by tax rulings can lead to state aid, appeared[85]. The EC mainly relied on its Fiat and Starbucks decisions (by using them as footnotes) to support these points and put massive effort into the analysis of *Forum 187* as an established case law on EU law derived ALP[86].

Turning to the reason why tax ruling cases in question are the only reference point of the EC in introducing new legal tools in the Final Notice, a few things should be mentioned. Because there are not any legally binding EU law provisions nor case law establishes that ALP must be applied in all 28 MS[87]. It is not a harmonized legal tool. Even if one were persuaded that *Forum 187* endorsed the ALP, it can only be the OECD ALP[88]. Also, *Forum 187* is different from the tax ruling cases in question since companies were taxed on a completely national basis in *Forum 187*[89].

(2014).

81. Kyriazis, *From Soft Law to Soft Law through Hard Law* at 430 (cited in note 79).

82. European Commission, *Notice on the notion of State aid* (cited in note 80).

83. See paragraph 1.

84. In Draft there is no explicit reference to this extend.

85. Kyriazis, *From Soft Law to Soft Law through Hard Law* at 430-431 (cited in note 79).

86. See *ibid*.

87. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 430 (cited in note 73).

88. Lovdahl-Gormsen, *European State Aid and tax ruling* at 78-79 (cited in note 13).

89. See *ibid*.

Even if *Forum 187* would be accepted as an established case law on ALP, the EC's mentioned approach in the early 2000s is drastically different from what happened in 2014 onwards.

Even though *Forum 187* would be considered an established case law on the application of ALP, there is more to consider. It is mentioned that the barrage of the EC's fiscal state aid investigations in the first decade of the 2000s mainly focused on selective tax schemes and not on the tax rulings of individual companies. This barrage has obviously changed in 2014 and onwards as in tax ruling cases in question.

The way the EC interpreted and applied ALP in tax schemes investigation in the former period was manifested as an air of exploration and superficiality[90]. By borrowing the words of L. Lovdahl-Gormsen, in the latter period the EC "embarked on an aggressive application of the (ALP) as if it were an exact science which produces a precise result on which economic advantage can be determined"[91].

These arguments are persuasive enough to establish that the EC's approach has changed, firstly from the beginning of the 2000s to the 2010s, then even from 2014 to 2016. The interpretation of *Forum 187* as establishing EU law derived ALP was not even foreseeable to the EC itself when it published its Draft, 18 months earlier rendering Fiat and Starbucks decisions[92]. Then, how could it be expected or even demanded that the alleged beneficiaries of the illegally granted state aid could have foreseen this interpretation already in 2006 after the Forum 187 case[93]?

3.4 *Concluding Discussions on the Use of Legitimate Expectations Principle as a Defense against Recovery*

Having the novel interpretation of state aid rules and its unpredictability in recent tax rulings cases established, we can stress that the general principles of EU law under consideration are being treated in a stringent way by both the EC and the GC.

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90. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 431 (cited in note 73).

91. See *ibid.*

92. Kyriazis, *Tax rulings and State aid: musings on recovery* at 323 (cited in note 25).

93. See *ibid.*

Depriving aid beneficiaries of invoking claims on legitimate expectations just because MS breached the standstill clause[94], lessens the whole significance of this defense. Since general principles derive from MS' democratic traditions, the EC decision-making practice and the EU courts' judgments are not fully in accordance with the current legal framework if the functionality of those principles is undermined[95]. For example, when it is translated from French, legitimate expectations means "protection of confidence" *(protection de la confiance légitime)*[96]. Therefore, stringent application of the legitimate expectation principle will leave little or no space for diligent businessmen's confidence. It cannot also be considered functional not letting diligent businessmen rely on their confidence when it was not even possible for them to foresee there was a state aid at stake. Unpredictable novel interpretations of state aid rules, such as in these tax rulings cases, should potentially let diligent businessmen rely on their legitimate expectations.

In the cases at hand, the main problem for this seems to be the assurance issues. Although, the EC says there is not its previous action in the form of precise assurances that tax rulings will not amount to state aid, undertakings assured by the *Forum 187* case suggest that, if the ALP were applied, it would be applied in line with *Forum 187* and it would be the OECD ALP rather than the EC ALP. Also, in some situations, novel interpretations can let legitimate expectations arise even in the absence of assurances. For example, in France Télécom case[97], the EC accepted that novel interpretations of State aid could

94. As we discussed, this is enshrined in the Notice on Recovery. Nonetheless, according to the ECJ, the Commission's soft law including its communication documents are not capable of imposing indented obligations on the MS, therefore are not legally binding. See C-526/14 *Tadej Kotnik and Others v. Državni zbor Republike Slovenije* ECLI:EU:C:2016:570, at 44.

95. Pinto, *The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations* at 285 (cited in note 35).

96. Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: towards a Jus Commune Europaeum?* at 58 (Lund University Faculty of Law 2005).

97. European Commission, *Decision 2006/621/EC of 2 August 2004 on the State Aid implemented by France for France Télécom*, OJ 2006 L 257.

give rise to legitimate expectations under EU law without the need for an assurance[98].

4. *Principle of Legal Certainty as a Defense against Recovery Order*

4.1. *Understanding the Legal Certainty Principle as a General Principle of EU Law in State Aid Field*

The legal certainty principle entails legal norms must be clear and applied in a foreseeable and consistent manner. This principle contains that the precise content of law has to be known to the subjects to whom it is applied, allowing them to plan their conduct accordingly[99]. The legal certainty principle is also confirmed by the ECJ as requiring "rules must be clear and precise and, on the other, that their application must be foreseeable by those subject to them."[100].

It is also elaborated by the ECJ that the legal certainty principle requires EU law provisions to enable addressees to know the precise extent of the obligations imposed on them[101]. And it is not just addressed to legislative bodies but also administrative structures while adopting administrative acts[102]. It is also asserted by the ECJ with regards to vague rules, legal certainty demands them to be interpreted in favor of the addressee[103].

Some scholars consider legal certainty as a legal tool that exists to prevent the EC from acting in an arbitrary manner[104]. Indeed, it is also mentioned by the EC in Recovery Notice that legal rules are required

98. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 429 (cited in note 73).

99. Takis Tridimas, *The General Principles of EU Law* at 242 (Oxford University Press 2006).

100. C-201/*08 Plantanol GmbH & Co. KG v. Hauptzollamt Darmstadt* ECLI:EU-:C:2009:539, at 46.

101. C-345/06 Heinrich ECLI:EU:C:2009:140, para 44.

102. Case T-43/02 Jungbunzlauer AG *v.* European Commission, ECLI:EU-:T:2006:270, para 72.

103. Case 169/80 Administration des Douanes *v.* Gondrand Frères ECLI:EU-:C:1981:171, at 17 et seq.

104. Gormsen, *European state aid and tax rulings* at 65 (cited in note 13).

to be in a predictable manner enabling the interested parties to ascertain their positions in legal situations regulated by the EU law[105].

It has already been mentioned how the purpose of tax rulings is to create legal certainty for individual undertakings which in its turn leads to legitimate expectations. It is also established by the ECJ that legal certainty is even more prominent when the measure in question is able to create financial consequences[106]. Therefore, its role should even be more prominent in advanced pricing agreements. Those had great importance for MS to attract investment and to reassure investors that their rights and property will be protected. Because uncertainty in a complex area like taxation can have detrimental effects on economic activity[107].

Legal certainty is recognized by the Venice Commission among the six essential elements that form the rule of law[108]. In light of Article 2 of TEU, the rule of law is one of the core values that the EU is founded on. The rule of law is legally binding as it is also enshrined in the EU Charter of Fundamental Rights ('EUCFR'). Therefore, it should be respected both by MS and EU institutions, doing otherwise can possibly activate Article 7 TEU.

Rule of law is one of the main issues of contemporary EU law, as some MS (like Poland, Hungary, Czech Republic and etc.) frequently challenge it. In the seminal so-called "Budget Conditionality Cases"[109], there are important insights into the rule of law. Commenting on them, some scholars derive conclusions that the ECJ confirmed rule of law's operational functionality as a founding principle by vesting it with an obligational nature[110].

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105. Recovery Notice para 34.

106. C-94/05 *Emsland-Stärke GmbH v. Landwirtschaftskammer Hannover,* ECLI:EU:C:2006:185.

107. Lovdahl-Gormsen and Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law* at 425 (cited in note 75).

108. European Commission for Democracy through Law (Venice EC), *Report on the Rule of Law,* adopted by the Venice European Commission, at its 86th Plenary Session (Venice March 25-26, 2011), at 41-51.

109. C-156/21, *Hungary v. Parliament and Council* and C-157/21, *Poland v. Parliament and Council*.

110. Xavier Groussot, Anna Zemskova and Katarina Bungerfeldt, *Foundational Principles and the Rule of Law in the European Union: how to adjudicate in a rule of law crisis and why solidarity is essential,* 5(1) Nordic Journal of Eur L. 18 (2022).

What is established is that going against the legal certainty and undermining its constitutional value means doing the same against the rule of law.

4.2. *Legal Certainty and Retroactive Effects of Recovery Orders in the Recent Tax Ruling Cases*

In state aid law, legal certainty is usually used against the temporal effects of a recovery decision. It is invoked by the alleged aid beneficiaries in illegal state aid procedure that recovery order leads to the retroactivity in that there is a new rule qualifying an aid measure as a state aid which leaves the undertaking in an uncertain situation[111].

Luxembourg and Ireland have done the same when they were seeking annulment before the GC. They have also mentioned that especially in cases like theirs where the recovery order can cause serious economic risks and parties were acting in good faith. We will get back to these two points later. However, the GC went on to reject these claims. The GC was just content itself with basically stating that the recovery order does not establish retroactive interpretation since it is the logical consequence of finding an aid measure illegally granted and serving to establish the previous situation used to exist in the market[112].

However, the use of the legal certainty principle cannot be excluded against the retroactivity of the recovery order, especially when EC endorses a novel interpretation of State aid[113]. The same cannot even be the case, just saying that recovery is the logical consequence of finding alleged measures illegal in cases dealing with novel and unpredictable interpretations of state aid as we have already established.

Above all, it is established by the ECJ that legal certainty precludes a rule from being applied retroactively[114]. This makes obvious sense since it is applied both in criminal and administrative laws, inasmuch as the retroactive interpretation of legal norms can have a negative impact on the rights and legal interests of the parties concerned[115]. Under

111. Jaros and Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid* at 31 (cited in note 7).

112. T-755/15, *Fiat* (cited in note 18).

113. Lovdahl-Gormsen, *European state aid and tax rulings* at 69 (cited in note 13).

114. C-98/78, *Racke,* ECR 1979, at 15.

115. Lovdahl-Gormsen, *European state aid and tax rulings* at 69 (cited in note 13).

the legal certainty, the same applies to the benefits too since they can only be withdrawn prospectively.

The ECJ has also recognized that the substantive regulations of EU law should be interpreted as applicable to circumstances that existed before their implementation only if it is unambiguous from their phrasing, purpose, or overall structure that they must be given such effect[116]. It is also indicated that legal certainty requires any factual situation to be assessed according to the existing legal rules at the time when the situation was obtained, thus, the new law will only be valid for the future[117].

By no means, this paper is trying to say that the legal certainty principle should block the future legislative or administrative process of the EU. Nonetheless, it is trying to state that the effects of this norm-creation process must not be retroactive. Especially, in situations like the cases at hand. Therefore, like other aspects of EU law, a novel interpretation and application of State aid should always be forward-looking[118].

One author states that EU institutions have the duty to perform their duties in a predictable manner, thus, their interpretation and application of the law should not be detrimental to undertakings[119]. This paper agrees with this statement and considers that first the EC while adopting recovery order on the basis of novel interpretation, and then the GC while upholding that novel interpretation and applying recovery retroactively, should have applied the Racke test[120]. This test forbids the retrospective application of legal norms, but there may be exceptions where overriding considerations require it and the legitimate expectations of the affected parties are duly recognized[121]. This means that public interest can only retroactively prevail when there is no significant individual interest. Therefore, it has to be stated that the EC should have applied the Racke test before ordering recovery stemming from a novel interpretation contrary to the aid beneficiaries' legal and

116. C-303/13, *European Commission, v. Jorgen Andersen*, EU:C:2015:647 at 50 (2015).

117. C-89/14 *A2A* EU:C:2015:537 2015, at 36-43

118. Lovdahl-Gormsen, *European state aid and tax rulings* at 82 (cited in note 13).

119. See *ibid.*

120. C-98/78, *Racke* at 119 (cited in note 114).

121. See *ibid.* para 20.

economic situation. That is why it should be considered that the legal certainty principle is being stringently applied in the absence of the application of this test.

4.3. *Concluding Assessment of Legal Certainty Principle in Tax Ruling Cases*

After rejecting arguments on retroactive application of recovery, GC also rejected Luxembourg's argument that the EC's decision would have led to serious economic repercussions or caused serious difficulties for it and for other MS. The GC went on to answer this in the following way: recovery of the aid at issue cannot have such negative effects on Luxembourg's economy, since the amount recovered will be allocated to its public finances[122]. This line of reasoning can heavily be argued. One should not think about this in the short term as the GC thought but in a long-term effect on the economy. Taking the Apple scenario as an example, if the EC decision would have been upheld by the GC, that could have irreparably damaged Ireland's reputation as an investment hub for foreign companies, in particular U.S. multinational corporations[123]. That is why, in all three scenarios at hand, MS went on to appeal EC decisions instead of being happy with the money that they could have gained through recovery orders. The GC did not even analyze arguments on retroactivity that parties were acting in good faith, thus, recovery should not be applied.

This paper will now consider that argument. It is true that sometimes governments may grant an illegal tax advantage (maybe for electoral purposes) knowing that they can possibly get it back as an amount recovered with interest[124]. If this is the case, then, legitimate expectations of aid beneficiaries must prevail. As it leaves them in a worse situation while MS gets even enrichment because of interests to be paid. One should ask why would all these MS seek annulment before the GC if they were acting in bad faith? It is obvious that they were not. None of them could have predicted this unforeseen novel approach. Notwithstanding, they were "fighting" for the integrity of

122. See *id* at 415.
123. Hrushko, *Tax in the World of Antitrust Enforcement,* at 352 (cited in note 15).
124. Alexandre, *The Recovery of the Illegal Fiscal State Aids* at 88 (cited in note 26).

their national tax systems. Because the decisions were made by the EC encroach on the fiscal sovereignty of MS. Some even say that the EC attempts to do harmonization through the back door and this is dangerous for the EU[125]. Which is not legally correct either. The tax reform has to be carried through the legislative process by adopting prospectively applied tax laws instead of utilizing state aid rules to bypass this legislative process[126]. That is why, some rightfully point out that the EC tries to achieve its policy objectives in the field of taxation by using its powers under state aid control contrary to the legal certainty principle[127].

Moreover, none of those undertakings acknowledged the risk of the investigations on alleged state aid by the EC in their audited financial statements[128]. Before the EC initiated its investigations, neither internal review nor third-party review and audit conducted by tax and audit professionals revealed any indication that the tax treatment of the affected firms could potentially fall under State aid rules[129]. It should be considered that all those audits and reviews are to follow tax law rules and companies pay a lot of money for them to comply with tax rules. If the EC can anytime change the direction of its assessments and apply them retroactively to ten years back, then, it will be burdensome on undertakings to diligently follow those rules[130]. This can only pave to uncertainty and confusion for the undertakings doing business in the EU, as they no longer can have confidence in the tax rulings adopted by MS that they operate in[131].

As the paper has already established the novelty of the state aid law interpretation in cases at hand, this means the EC imposes the rules after the facts. That is why recovery is inconsistent with the rule of law in these tax ruling cases. This paper is not arguing whether this interpretation was wrong or right as it is mentioned. Nonetheless, it

125. Hrushko, *Tax in the World of Antitrust Enforcement* at 331 (cited in note 15).

126. See *ibid.*

127. Lovdahl-Gormsen, *European state aid and tax rulings* at 83 (cited in note 13).

128. U.S. Department of the Treasury, *White Paper on the European EC's Recent State Aid Investigations of Transfer Pricing Rulings* (US 2016) at 15.

129. See *ibid.*

130. Hrushko, *Tax in the World of Antitrust Enforcement* at 344-346 (cited in note 15).

131. U.S. Department of the Treasury, *White Paper on the European EC's Recent State Aid Investigations of Transfer Pricing Rulings* at 17 (cited in note 129).

tries to state that the EC should have allowed MS and aid beneficiaries a reasonable transitional period to adjust their tax affairs or not to order recovery if it decides to adopt a new interpretation of Article 107 TFEU[132]. And it should have been done in a foreseen manner and not just only towards the selective number of multinational undertakings.

5. *Conclusion*

To culminate, this paper considers that there is a stringent application of the principles of legitimate expectations and legal certainty in analyzed tax ruling cases. Abolishing or leaving no room for aid beneficiaries to invoke these principles against recovery of illegally granted aid, lessens or one might say breaches these general principles of EU law. It has to be mentioned that such an application undermines the whole significance and functionality of the general principles in question leading to detrimental effects on the legal and economic sphere in the EU.

It should have been considered how the alleged aid beneficiaries could have predicted this novel interpretation instead of rendering the legitimate expectations' defense against recovery meaningless. Applying a diligent businessman benchmark in such a restrictive way can only be accurate where there are no doubts regarding the aid character of the measure at issue. When novel and unpredictable interpretations of state aid rules are at stake, exceptions (existence of exceptional circumstances) should not be narrowly interpreted. Underlying factors such as novelty and unpredictability of interpretation, whether parties acting in good faith, the existence of previously given assurances, complexity of the alleged aid measure in question should also be considered before such interpretations.

When it comes to pleading the legal certainty principle against recovery orders, the paper went on to conclude that the application of a novel interpretation of state aid rules should be forward-looking and be done in a foreseen manner. Doing otherwise might breach the legal certainty and the rule of law. Especially in cases where rules are imposed after the facts like in these three cases. When the recovery

132. See *id* at 62.

running well above the multi-million-euro mark is ordered against the selective number of multinational undertakings after novel and unpredictable interpretation of state aid rules, one might rightfully say that recovery serves as a punishment in such a case.

It has to be stated as the final remarks that there is a need for further clarification from CJEU on how to plead these principles against recovery orders. Because the current approach towards the diligent businessman benchmark and retroactive application of novel interpretations is not consistent in cases where possibilities are limited for aid beneficiaries to make sure if an alleged measure is legally granted.