CHAPTER 11

The Temporal Application of State Aid Rules to Domestic Tax Measures: A Sensitive Matter

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§11.01 INTRODUCTION

Timing issues are very sensitive in European Union (EU) State aid law for the Commission, the Member States, and the beneficiary undertakings. This is particularly the case in tax matters. This chapter aims to explore the *ex ante* and *ex post* effects that may derive from the temporal application of State aid on the adoption and implementation of tax measures. The analysis is divided into three main sections, which correspond to three types of temporal effects that characterize the application of EU State aid law. Section 11.02 generally analyses the temporal framework of the Commission's review of the Member States' action for compliance with EU State aid law; it highlights the *ex ante* effects of EU State aid law on the adoption of new tax provisions and explains how the temporal application of State aid provisions can lead to conflicts with domestic procedural tax rules. Section 11.03 concentrates on the issues linked to the recovery of unlawful aid (*ex post* effects); it draws attention to the way the passage of time exacerbates the problems that Member States and undertakings could face when aid measures need to be recovered. Finally, §11.04 assesses the criticisms levied against the Commission regarding its evolutive interpretation of State aid provisions, allegedly to pursue political objectives that go beyond State aid law's initial goal. Such an evolutive interpretation could aggravate the negative *ex post* effects resulting from recovery decisions.

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Although the temporal application of EU State aid law raises questions in fields other than tax law, this chapter concentrates on tax cases and emphasizes the specific problems that derive from the application of State aid law to taxation.[1]

§11.02 THE TIME FRAME OF EU STATE AID REVIEW

The application of EU State aid law takes place within an established timeframe. Various procedural rules limit the application of EU State aid law from a *ratione temporis* perspective (§11.02[A]). Considering the divergences between these deadlines and domestic procedural tax rules, conflicts can arise (§11.02[B]).

[A] General Overview

Member States are required, in principle, to notify the Commission of any plans to grant aid measures. This notification requirement makes the adoption of new aid measures subject to an implicit waiting period.[2] According to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU):

> The Commission shall be informed, *in sufficient time* to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall *without delay* initiate the procedure provided for in paragraph 2. The Member State concerned shall *not put its proposed measures into effect until* this procedure has resulted in a final decision. (emphasis added)

Before the final decision of the Commission, Member States must not implement the proposed aid measure. In other words, the *ex ante* State aid review obliges the Member States to put a hold on the implementation of the planned aid.[3] The length of this standstill obligation largely depends on the assessment of the Commission.

If the Commission finds that the notified measure does not constitute aid or falls within one of the derogations set out in the TFEU, the Commission's final decision must be taken within two months and the Member State may proceed with its new aid plan.[4] If the Commission does not issue a decision within this two-month period, the aid is deemed to be authorized.[5] Thereafter, the notifying Member State may implement the measure after giving the Commission a second notice (this time of its intent to

1. For a detailed overview of State aid law in taxation matters, see Wolfgang Schön, *State Aid in the Area of Taxation*, *in EU State Aids* 393-440 (Leigh Hancher, et al., eds., Sweet & Maxwell 5th ed. 2016).
2. *See* Art. 2, Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) [2015] OJ L 248/9 (hereinafter 'CR 2015/1589'). However, certain categories of aid may be exempt from the notification requirement in accordance with Arts 108(4) & 109 TFEU.
3. Article 3 CR 2015/1589.
4. Article 4(5) CR 2015/1589. The two-month period starts on the day following the receipt of a complete notification.
5. Article 4(6) CR 2015/1589.

implement the measure), unless the Commission issues a decision within an additional period of fifteen working days.[6]

If, however, the Commission raises doubts as to the compatibility of the aid measure with EU State aid law, it must issue a decision to initiate a formal investigation procedure, which takes much longer.[7] The Commission, in principle, should make its decision within eighteen to twenty months from the date it opens the formal investigation procedure.[8]

If a Member State fails to notify an aid measure (such failure is called 'unlawful aid') or if an otherwise authorized aid is used by a beneficiary in contravention to the Commission decision ('misuse of aid'), the procedural rules differ.[9] A first difference is the fact that the deadline of two months (with regard to the first decision of the Commission) and the deadline of eighteen to twenty months (for the formal investigation procedure) do not bind the Commission.[10] Moreover, the Commission can order the Member State to suspend the unlawful or misused aid measure (a 'suspension injunction')[11] and, under certain conditions, can require the Member State to provisionally recover the unlawful aid measure (a 'recovery injunction').[12] When the Commission takes a negative decision regarding an unlawful or misused aid, a recovery decision follows, which means that the Member State will be asked to recover the aid, including interest, from the beneficiaries.[13] The powers of the Commission to recover aid are subject to a limitation period of ten years, but that period may be interrupted (when an action is undertaken by the Commission) and suspended (in case of proceedings pending before the Court of Justice of the European Union (CJEU)).[14]

[B] Conflicts and Tensions with National Procedural Tax Rules

The ten-year limitation period for the recovery of aid may seem excessive in cases of fiscal aid because shorter national time limitations may apply to the recovery of unpaid taxes. For example, the Belgian deadlines for the imposition of unpaid income taxes range from three years (for undeclared or delayed declaration of income) up to seven years (in case of 'fraudulent intent').[15] Moreover, the time period for recovery of unpaid income taxes is five years, starting on the day when the taxes should have been paid.[16] Given the potential differences between EU State aid law and domestic

6. Article 4(5) & 4(6) CR 2015/1589.
7. Article 4(4) CR 2015/1589.
8. Article 9(6) & 9(7) CR 2015/1589.
9. The concepts of unlawful aid and misuse of aid are defined in Arts 1(f) & 1(g) CR 2015/1589. *See also* Chapter III (on unlawful aid) & Chapter V (on misuse of aid) of CR 2015/1589.
10. Articles 15(2) & 20 CR 2015/1589.
11. Articles 13(1) & 20 CR 2015/1589.
12. Article 13(2) CR 2015/1589.
13. Articles 16 & 20 CR 2015/1589.
14. Article 17 CR 2015/1589.
15. Article 354 of the Belgian Income Tax Code (hereinafter 'BITC').
16. Article 443bis BITC.

procedural tax law as regards the recovery period, taxpayers may experience their parallel application as a conflict between two sets of rules, one in which EU law will ultimately prevail.[17] Two main hypotheses can be distinguished.

A first type of temporal tensions between EU State aid law and domestic tax law can be explained by the fact that the recovery of unlawful aid may have effects comparable to the application of national tax law.[18] Consequently, the application of EU State aid law may give taxpayers the impression that national time limitations are extended beyond their normal duration. For example, Belgium's provisions implementing the Commission decision on its so-called *Excess Profit Tax Ruling System*,[19] assimilate the aid to be recovered with Belgium's corporate income tax.[20] From an international viewpoint, the qualification of the aid to be recovered as a tax could have significant legal consequences. The *Apple* case[21] illustrates the point: Apple could argue that the recovered aid must be qualified as a tax, for which the United States is required, under the applicable double tax convention, to grant a tax credit.[22] Thus, the United States – not Apple – would ultimately bear the costs of such recovery. At first glance, in both the *Belgian excess profit* tax *ruling* and *Apple* cases, the temporal application of EU State aid law seems difficult to reconcile with domestic procedural tax rules. Indeed, the ten-year limitation period for the recovery of aid seems to clash with the principle of non-retroactivity of tax laws and/or with the national limitation periods that apply when the tax administration decides to recover taxes that have not been paid on time.

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Yet, in its prior case law, the CJEU made clear that differences between limitation periods under EU State aid law and national procedural rules cannot serve as an argument to reduce the recovery period. In *Alcan Deutschland*,[23] the CJEU pointed out that a failure to observe national limitation periods does not limit or disallow the

17. *See* Alexandre Maitrot de la Motte, *The Recovery of the Illegal Fiscal State Aids: Tax Less to Tax More*, 26 EC Tax Rev. 75, 81 (2017).
18. *Ibid*. De la Motte rightly notes that the recovery of unlawful State aid implies 'the necessity to proceed as if the procedural rules had been respected before delivering the aid: it implies the *retroactive* effects of the decisions under which the aids are restored'.
19. Comm'n Decision (EU) 2016/1699 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (notified under document C(2015) 9837) (Text with EEA relevance) [2016] OJ L 260/61 (hereinafter Comm'n Decision on the Belgian Excess Profit Tax Ruling System).
20. Articles 103 & 117 *Loi programme du 25 Décembre 2016*, Moniteur Belge (hereinafter 'M.B.') 29 December 2016, 90879.
21. Comm'n Decision (EU) 2017/1283 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (notified under document C(2017) 5605)) (Text with EEA relevance) [2017] OJ L 187/1 (hereinafter 'Comm'n Decision on Apple').
22. The US used this argument, unsuccessfully, to support its application for leave to intervene in the case brought before the CJEU (*Apples Sales Int'l & Apple Operations Eur.* v *Comm'n*, T-892/16, Order, EU:T:2017:925, paras 16–25). *See also* U.S. Department of the Treasury, *State Aid Investigations of Transfer Pricing Rulings: White Paper*, 24 August 2016, available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-aid.pdf (accessed 9 August 2018).
23. *Land Rheinland-Pfalz* v *Alcan Deutschland*, C-24/95, Judgment, EU:C:1997:163.

recovery of unlawful aid.[24] Its reasoning seems logical: national limitation periods should not apply to Commission decisions on unlawful aid, which are binding pursuant to Article 288 TFEU.[25] In other words, there is no real conflict between EU State aid law and time limitations established in domestic tax law. Although they present similarities, the limitation periods under EU State aid law and under national tax law have different targets, which explains why national procedural tax rules do not apply in a case of recovery of unlawful aid.

EU State aid law is primarily aimed at Member States to ensure that they do not distort the internal market by means of aid measures. In this context, a ten years limitation period on the recovery of unlawful aid is justified by the need to ensure the effectiveness of EU State aid law. At the same time, the ten-year period is intended to preserve some legal certainty vis-à-vis the Member States and the aid recipients (who may also be taxpayers).[26] In contrast, the limitation periods provided in Member States' tax laws are primarily targeted at taxpayers. Among other objectives, they aim to limit the period for examining or re-examining fiscal matters, relieving taxpayers from the obligation to keep documents that can be used as supporting evidence for the information mentioned in their tax return.[27]

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24. *Ibid.* paras 35–38. Please note that this case is not a tax case. According to the Court,

> Where the national authorities … allow the time-bar provided for in national law in respect of revocation of the decision granting the aid to come into effect, that situation cannot be treated in the same way as the situation where a trader does not know whether the competent administrative authorities are going to reach a decision, and where the principle of legal certainty requires that such uncertainty be brought to an end after a certain period has elapsed. … The 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.

See Comm'n v *Greece*, C-183/91, Judgment, EU:C:1993:233, para. 17.

> Where an aid has been granted, as in the present case, in the form of a tax exemption and has duly been found to be unlawful, it is not correct to argue … that recovery of the aid in question must necessarily take the form of a retroactive tax, which would as such be absolutely impossible to enforce, having regard in particular to the general principles of Community law.

See also Comm'n v *Aer Lingus,* Joined Cases C-164/15 P & C-165/A5 P, AG Opinion, EU:C:2016:515, para. 83; *Comm'n* v *Aer Lingus*, Joined Cases C-164/15 P & C-165/A5 P, Judgment, EU:C:2016:990, para. 114.

25. This supremacy of EU law is explicitly recognized in the Belgian provisions implementing the Comm'n Decision on the Belgian Excess Profit Tax Ruling System (*see* Art. 116 *Loi Programme de 25 Décembre 2015*, M.B., 29 December 2016).
26. *See* Recital 26 CR 2015/1589, 9-20. One may wonder why the limitation period for the recovery is of ten years and not shorter or longer. As is usually the case with limitation periods, the adoption of a 10-year limitation period was likely based on a subjective choice. On the determination of limitation periods and a 'reasonable/excessive time frame', see *Groupe Gascogne* v *Comm'n*, C-58/12 P, AG Opinion, EU:C:2013:360, paras 70–95, particularly para. 94 ('In my view there is a transitional stage, during which there has undoubtedly been delay, but the delay is not yet 'excessive' delay. Again, *this is the realm of subjective judgement rather than hard* analysis~~.~~ **(emphasis added)).** **ADD « (emphasis added)). »**
27. Under the BITC, the obligation is to keep accounting information for 7 years (Arts 315 & 315*bis* BITC).

These different objectives can lead to a second type of temporal tensions between the application of EU State aid law in tax matters and Member States' procedural tax rules regarding evidence and records keeping, when national tax and accountancy laws prescribe obligations to retain fiscal and accounting information for a period shorter than ten years. Under EU State aid law, interested parties – which include beneficiary undertakings – may submit comments following the start of the Commission's formal investigation procedure.[28] Therefore, the question arises as to how interested parties would preserve their ability to adequately intervene in a formal investigation procedure, if – considering national provisions on the conservation of documents – they stopped keeping fiscal and accounting information that may have been relevant in a State aid case. Consequently, the ten-year limitation period for the recovery of aid might encourage undertakings to keep information for a period that exceeds national deadlines so as to be able to provide the Commission with relevant information. This would indirectly expand the limitation periods set at the national level. From this perspective, the temporal application of EU State aid law would impact Member States' competence to freely define procedural rules in tax matters, including limitation periods. That could lead to an indirect limitation of Member States' sovereignty beyond the obvious effects that State aid law has on Member States' tax competence.

The information provided by undertakings can also play an important role in the Member States' determination of the amount of aid to be recovered. Without appropriate information, Member States may not be able to accurately determine the amount of fiscal aid to be reimbursed, transforming the determination of said amount into a mere approximation, which could, ultimately, be disadvantageous for the beneficiary undertakings. The next section analyses in more detail the temporal issues raised by the recovery of unlawful aid.

§11.03 TEMPORAL ISSUES RAISED BY THE RECOVERY OF AID

Two main criticisms can be levied against the temporal frame that applies to the recovery of aid. The first criticism relates to the calculation of the aid to be recovered (§11.03[A]). The second criticism concerns the legal uncertainty that derives from the recovery of unlawful or misused aid over a period of the prior ten years (§11.03[B]).

[A] The Consequences of the Passage of Time on the Calculation of the Aid to Be Recovered

The passage of time is likely to play a negative role in the accuracy of the determination of the amount of aid to be recovered. Indeed, the fact that recovery can be required for

28. Articles 6 & 24 CR 2015/1589.

aid measures that were granted years ago adds to the complexity that usually characterizes the calculation of the aid to be recovered in tax matters.[29]

In comparison to non-fiscal aid measures, the recovery of fiscal aid usually amounts to an extremely difficult – if not impossible – exercise.[30] In contrast to direct subsidies, fiscal aid measures are integrated into the national tax system. Consequently, the determination of the aid requires a ‘reconstruction’ of the amount of tax that should have been paid in absence of fiscal aid.[31] In principle, the determination of the net amount of aid to be recovered falls under the responsibility of the Member States, although, in some cases, the Commission explicitly explains how to do so.[32] The aid can be recovered only for its *net* amount, which means that taxes previously paid “on the aid received” may reduce the amount of the aid to be recovered.[33]

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29. Claire Micheau, *State Aid and Taxation in EU Law*, *in Research Handbook on European State aid Law* 193, 208 (Erika Szyszczak ed., EE Publishing 2011). (‘In certain cases, it can be difficult to reconstruct past events without inventing economic operations which could have been carried out.’)
30. *Contra* Comm’n Decision on Apple, *supra* n. 21, para. 444:

> As regards the alleged difficulty in quantifying the aid amount, this case deals with the relatively straightforward situation where a fiscal measure grants its beneficiary a reduction in its taxable base and thus is corporation tax liability. The Commission can identify no difficulty in determining the amount to be recovered in such a situation, and does not see any parallels to the aid measure identified in the France Telecom decision, which concerned a situation where aid was granted on the basis of a public pronouncement by a government minister having the effect of increasing that company’s creditworthiness on the market.

See also Comm’n Decision on the Belgian Excess Profit Tax Ruling System~~’~~, *supra* n. 19, para. 202. Note the slightly different phrasing in Comm’n Decision 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) regarding Luxembourg’s ruling with Fiat [2016] OJ L 351/1, paras 363, 365–369 (hereinafter ‘Comm’n Decision on Fiat’); Comm’n Decision (EU) 2017/502 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands for Starbucks [2017] OJ L 83/38, paras 442–448 (hereinafter ‘Comm’n Decision on Starbucks’). **remove ’**

31. *See* Micheau, *supra* n. 29, at 208, quoting *Unicredito Italiano*, C-148/04, AG Opinion, EU:C:2005:522. *See also* Claire Micheau, *State Aid, Subsidy and Tax Incentives Under EU and WTO Law* 391 (Kluwer Law International 2014).
32. On this question, see Micheau, *supra* n. 29, at 208 (quoting *France* v *Comm’n*, C-102/87, Judgment, EU:C:1988:391, para. 33).
33. Notice from the Commission: Towards an Effective Implementation of Comm’n Decisions ordering Member States to Recover Unlawful and Incompatible State aid [2007] 2007/C 272/05, 15 November 2007, 4–17:

> National authorities are allowed to take into account the incidence of the tax system in order to determine the amount to be reimbursed. Where a beneficiary of unlawful and incompatible aid has paid tax on the aid received, the national authorities may, in accordance with their national tax rules, take account of the earlier payment of tax by recovering only the net amount received by the beneficiary. ... the national authorities will need to ensure that the beneficiary will not be able to enjoy a further tax deduction by claiming that the reimbursement has reduced his taxable income, since this would mean that the net amount of the recovery was lower than the net amount initially received.

Two recent cases (*Aer Lingus/Ryanair*[34] and *Scuola Elementare Maria Montessori* v *Commission*[35]) offer insight into the difficulties that characterize the determination of the amount of aid to be recovered in tax matters.

First, in the case *Aer Lingus/Ryanair,* disagreements among the Commission, the General Court, and the CJEU as to the reconstruction of past events for the determination of the amount of aid to be recovered illustrate the complexity surrounding this issue under EU State aid law. The Commission concluded that the aid to be recovered was the difference between a high-rate air travel tax (ten euros) and a low-rate air travel tax (two euros), thus eight euros per passenger.[36] The General Court annulled that part of the Commission decision, holding that the Commission erred as a matter of law because it did not take into account the fact that part of the aid could have benefited the customers of Aer Lingus and Ryanair.[37] However, the CJEU disagreed with the General Court and confirmed the Commission decision. According to the CJEU, the recovery of unlawful aid did not need to be based on the economic benefits derived from the advantage. It stated:

> 91 … the recovery of unlawful aid with a view to *re-establishing the status quo ante does not imply reconstructing past events differently on the basis of hypothetical elements* such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible.
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> 92 It follows, as the Advocate General observed, in essence, in point 62 of his Opinion, that recovery of such aid entails the restitution of the advantage procured by the aid for the recipient, not the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage. That benefit may not be the same as the advantage constituting the aid and there may indeed be no such benefit, but that cannot justify any failure to recover that aid or the recovery of a different sum from that constituting the advantage procured by the unlawful aid in question.[38] (citation omitted, emphasis added)

Second, in the recent Italian case, *Scuola Elementare Maria Montessori* v *Commission*, the Commission recognized that it was 'absolutely impossible' to recover an aid measure.[39] That case concerned a scheme allowing an exemption from the municipal tax on real estate and a corporate tax reduction for real estate used by

34. *Comm'n* v *Aer Lingus*, Joined Cases C-164/15 P & C-165/15 P.
35. *Scuola Elementare Maria Montessori* v *Comm'n*, Joined Cases C-622/16 P & C-624/16 P, AG Opinion, EU:C:2018:229.
36. *See* Comm'n Decision (EU) 2013/199 on State aid case SA.29064 (11/C, ex 11/NN). Differentiated air travel tax rates implemented by Ireland (notified under document C(2012) 5037, 2013/199/EU, [2013] OJ L 119/30, para. 70.
37. *Ryanair* v *Comm'n*, T-500/12, Judgment, EU:T:2015:73, paras 120–153; *Aer Lingus* v *Comm'n*, T-473/12, Judgment, EU:T:2015:78, paras 104–128.
38. *Comm'n* v *Aer Lingus*, Joined Cases C-164/15 P & C-165/15 P, paras 91–92.
39. Comm'n Decision (EU) 2013/284 of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy (notified under document C(2012) 9461) (Text with EEA relevance) [2013] OJ L 166/24, paras 1, 198. *See also Scuola Elementare Maria Montessori* v *Comm'n*, T-220/13, Judgment, EU:T:2016:484, para. 20.

non-commercial entities and intended exclusively for certain goals. The Commission had accepted the arguments made by the Italian authorities, stating 'it is impossible to extrapolate retroactively from the cadastral databases the data concerning real estate belonging to non-commercial entities which was used for activities of a non-exclusively commercial nature'.[40] The General Court confirmed the Commission decision. However, an appeal of that decision is pending. If the CJEU follows Advocate General (AG) Wathelet's opinion, delivered on 11 April 2018,[41] it may annul the decision of the General Court based on the argument that the exception to the recovery of unlawful aid should be interpreted strictly.[42]

[B] Legal Uncertainty and Recovery of Unlawful Aid

The second main criticism of the lengthy time period for the recovery of unlawful aid is linked to the financial risks and legal uncertainty that it creates for undertakings.[43] The length of the recovery period has a direct impact on the economic situation of the beneficiary undertakings, particularly when they are asked to repay aid that they never thought was incompatible with EU State aid law.[44] The temporal application of EU State aid law should neither violate the principle of legal certainty nor the legitimate expectations of the beneficiary undertakings.

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The principle of legal certainty interacts with the temporal application of EU State aid law in three main respects.

First, the principle of legal certainty is one of the justification grounds for the temporal rules surrounding State aid law. As discussed in section §11.02[B], time limitations are justified by the need to ensure legal certainty vis-à-vis the Member States and the beneficiary undertakings. The principle of legal certainty is part of the objectives mentioned several times in the preamble of the Council Regulation laying down procedural rules for the application of EU State aid law.[45] Some time limits are primarily designed as a guarantee of legal

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40. Comm'n Decision (EU) 2013/284, *supra* n. 39, paras 195, 197 ('it is not possible to obtain the necessary information to calculate the amount of tax to be recovered. Therefore, enforcing a possible recovery order would be impossible in objective and absolute terms'). *See also* de la Motte, *supra* n. 17 ('the beneficiaries of a tax exemption are in principle unknown', referring to *Comm'n* v *Italy*, C-214/07, Judgment, EU:C:2008:618, paras 64–66).
41. *Scuola Elementare Maria Montessori* v *Comm'n*, Joined Cases C-622/16 P & C-624/16 P, AG Opinion, paras 111–127.
42. In support of his decision, AG Wathelet refers to *Comm'n* v *Belgium*, C-591/14, Judgment, EU:C:2017:670, para. 44.
43. The prohibition of State aid and the need to ensure legal certainty may be difficult to reconcile (Antoine Winckler François-Charles Laprévote, *Reconciling Legal Certainty, Legitimate Expectations, Equal Treatment and the Prohibition of State Aids* 10 Eur. St. Aid L.Q. 321–326 (2011)).
44. Legal uncertainty arises when undertakings cannot foresee the consequences of EU State aid law, due to the lack of clear and precise rules. For a detailed explanation of the principle of legal certainty, see Juan Salvador Pastoriza, *The Recovery Obligation and the Protection of Legitimate Expectations: The Spanish Experience*, in 6 *State Aid Law and Business Taxation* 253 (Isabelle Richelle, et al., eds., MPI Stud. in Tax L. and Pub. Fin., Springer 2016).
45. Recital 7 CR 2015/1589.

certainty vis-à-vis Member States that comply with the notification requirement, which explains why, if a Member State does not respect its notification obligations or the standstill clause, the Commission is not bound by such time frame.[46] Some other time limitations, such as the recovery limitation period of ten years, also seem to be justified by the need to ensure legal certainty vis-à-vis undertakings.[47]

Second, the principle of legal certainty is a general principle of EU law that can be invoked to limit the recovery of unlawful aid measures. Indeed, unlawful aid should not be recovered if it leads to a violation of a general principle of EU law.[48] In this hypothesis, time interacts with the principle of legal certainty in a less systematic way, namely when the passage of time (such as the length of time elapsed between the adoption of an aid measure and the initiation of the investigation procedure by the Commission) contributes to the creation of a situation of legal uncertainty. For example, when assessing the Spanish 'Tax Lease' aid system,[49] the Commission accepted a limitation on the recovery of the aid based on this principle. The Commission determined that its prior decisions and the complexity of the measures at stake may have led to legal uncertainty for a period of about five years, ending when it published its decision in the *GIE Fiscaux* case[50], which clarified the situation, and thus removed the possibility of legal uncertainty.[51]

Third, legal certainty is an important principle not only in EU law but also in Member States' domestic law. This national dimension of the principle of legal certainty has been mentioned in the Commission's recent decisions regarding tax rulings.[52] In this context, some Member States argue that the negative decisions of the Commission highlight that EU State aid law can undermine the objective of national tax legislatures to enhance the legal certainty of their tax system. The Commission decisions not only question the

46. *Ibid*. Recital 22.
47. *Ibid*. Recital 26; *see also ibid.* Recital 27 (regarding limitation periods for the imposition and enforcement of fines and periodic penalty payments).
48. Article 16(1) CR 2015/1589:

> Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ('recovery decision'). The Commission shall not require recovery of the aid *if this would be contrary to a general principle of Union law*. (emphasis added)

49. *See* Comm'n Decision 2014/200 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System (notified under document C(2013) 4426) (Only the Spanish text is authentic) (Text with EEA relevance), (hereinafter 'Comm'n Decision on SA.21233') [2013] OJ L 114/1, paras 261–262.
50. Comm'n Decision 2007/256 on the aid scheme implemented by France under Article 39 of the General Tax Code State aid, [2006] OJ L 112/41.
51. Note that this decision has been annulled by the General Court on the ground that the Commission decision regarding the unlawful aid was 'vitiated by a number of errors' (*Spain & Others* v *Comm'n*, Joined Cases T-515/13 & T-719/13, EU:T:2015:1004, para. 209). The Court did not rule on the plea based on the principle of legal certainty.
52. *See* Comm'n Decision on Apple, *supra* n. 21, paras 438-444.

compatibility of tax systems under EU State aid law, but also question the fiscal practices that are aimed at reinforcing legal certainty in the domestic tax systems.[53] Nevertheless, there is no reason to believe that tax rulings should be deemed compatible with EU State aid law because they pursue an objective related to the principle of legal certainty in Member States' legal framework. Under EU State aid law, the principle of legal certainty only allows limitations on recovery decisions when the uncertainty results from the unpredictable application of State aid provisions. The fact that domestic aid measures (such as tax rulings) have been justified by, among other objectives, the principle of legal certainty is irrelevant under State aid law.[54] This is not surprising: Member States should not be able to rely on their intention to guarantee the legal certainty of their tax system, if they have not previously taken every appropriate measure to ensure that their tax regime complies with EU law (including the freedom of movement and, under EU State aid law, the notification requirement). That would imply notifying the Commission of such tax rulings prior to their implementation, which has not been done by any of the Member States. The Commission rightly uses this argument in its decision, stating that '[a] long lapse of time as such is insufficient to claim legal certainty and a delay can be imputed to the Commission only from the time when it learnt of the existence of the aid'.[55]

Aside from the principle of legal certainty, undertakings can rely on the principle of legitimate expectations.[56] This principle was successfully invoked in the *Belgian Coordination Centres* case.[57] The CJEU found that the principle of protecting legitimate expectations had been infringed by the Commission decision not to lay down transitional measures for some coordination centres.[58] This case law highlights that the adoption of transitional measures may be used to protect the legitimate expectations of beneficiary undertakings if no overriding interest of the Union precludes such a transitional period.[59] The CJEU also explained that the application of such a transitional period should take place in accordance with the principle of equal treatment: a transitional period should not favour certain undertakings over others.[60]

53. Edoardo Traversa & Pierre Sabbadini, *Rulings et aides d'Etat fiscales : un état des lieux*, 18 J. Droit Eur. 138 (2017).
54. Comm'n Decision on Apple, *supra* n. 21, para. 410. ('It is true that tax rulings in general are a valid and often-used means by tax administrations to provide legal certainty, but this fact does not exempt tax rulings from scrutiny under the State aid rules.')
55. *Ibid.* para. 440.
56. *See* Comm'n Decision on SA.21233, *supra* n. 49, para. 218. *See also* the detailed reasoning on the principle of legitimate expectation in *France* v *Ladbroke Racing & Comm'n*, C-83/98 P, AG Opinion, EU:C:1999:577. *See also* Salvador Pastoriza, *supra* n. 44.
57. *Belgium* v *Commission*, Joined Cases C-182/03 & C-217/03, EU:C:2006:416.
58. *Ibid.* para. 149.
59. *Ibid.*
60. *Ibid.* paras 168–175.

In principle, legitimate expectations arise only after the aid has been properly notified by the Member States.[61] Therefore, protecting the legitimate expectations of undertakings is intrinsically linked to the State aid procedural rules that require Member States to notify the Commission of new aid or changes in existing aid schemes. Moreover, it is for the beneficiary undertakings, not the Member States, to raise arguments based on the principle of protecting legitimate expectations.[62]

The restrictive approach of the CJEU and the Commission towards the principle of protecting legitimate expectations can be criticized due to the excessive burden it imposes on the recipient undertakings. This question is extremely relevant in tax matters. Indeed, while it is relatively easy for undertakings to realize that a direct subsidy can be defined as an aid measure, it is not always true for fiscal aids. In a hypothetical example in which a direct subsidy is granted but not notified to the Commission, the undertaking must exercise caution and accept the potential risk that the aid may be deemed unlawful in the future. In the case of tax measures, however, the assimilation of a tax deduction, a tax credit, or even a tax ruling, to an 'aid measure' is not always as clear as in the case of direct subsidies.[63] Fiscal aid measures are often integrated into the general tax system, which can make it difficult, if not impossible, for undertakings to be aware that such measures should have been notified by the Member State that designed and offered the 'aid scheme'.

The Commission's and the CJEU's interpretation of the need to protect legitimate expectations could also be considered excessively restrictive in the light of the financial risks that undertakings will face following a recovery decision that could potentially cover aid measures granted in the past ten years (or even before, when the ten-year limitation period has been interrupted or suspended). In its past case law, the CJEU refused to take into account 'risks of serious economic repercussions' for undertakings, considering that the 'objective [of the recovery decision] was to abolish the aid, and …

61. *See*, *among others*, *Land Rheinland-Pfalz* v *Alcan Deutschland*, C-24/95, para. 25; *Demesa & Territorio Histórico de Álava* v *Comm'n*, Joined Cases C-183/02 P & C-187/02 P, para. 44, Judgment, EU:C:2004:701; *Zweckverband Tierkörperbeseitigung* v *Comm'n*, T-309/12, Judgment, EU:T:2014:676, para. 238 (citing *Comm'n* v *Italy*, C-217/06, Judgment, EU:C:2007:580, para. 23); *SinnLeffers* v *Comm'n*, T-620/11, Judgment, EU:T:2016:59, para. 188; *HGA & Others* v *Comm'n*, C-630/11 P, paras 40, 134; *Comm'n* v *Salzgitter*, C-408/04 P, Judgment, EU:C:2008:236, paras 104–107; *Italy* v *Comm'n*, T-60/06, Judgment, EU:T:2016:233, para. 217.
62. *See Apple, supra* n. 21, para. 442; Comm'n Decision on the Belgian Excess Profit Tax Ruling System, *supra* n. 19, para. 198; Comm'n Decision on Starbucks, *supra* n. 30, paras 439–440; Comm'n Decision on Fiat, *supra* n. 30, para. 357; Comm'n Decision of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon [2017] OJ L 153/1, paras 625–626 (hereinafter 'Comm'n Decision on Amazon').
63. On this issue, see Wolfgang Schön, *State aid Law and Business Taxation*, *in Tax Legislation and the Notice of Fiscal Aid: A Review of 5 Years of European Jurisprudence* 3, 17–18 (Isabelle Richelle et al., eds., Springer 2016), who states:

> First of all, we have to account for the fact that most tax legislation does not award individualized benefits to individual persons in an explicit manner. This has to be compared with the area of direct subsidies where it is evident that the state awards a specific sum to a specific firm. But tax legislation nearly always defines in a generalized fashion the requirements which have to be met to qualify for a certain tax benefit and it is up to each and every taxpayer to arrange his or her affairs in order to meet those requirements.

that objective could be attained by proceedings for winding up the company'.[64] It is not clear whether such reasoning is justified.[65] On the one hand, the impact of recovery decisions on investors would be much less significant if the recovery would take into account the economic risk that it creates for undertakings. At worst, EU State aid law would lead to the recovery of aid measures, yet only when such reimbursement would not seriously affect the economic activity of the enterprise. On the other hand, taking account of the economic risk for undertakings in the assessment of the aid to be recovered could lead to discrimination between undertakings, as they would be treated differently based on their economic situation. Indeed, it may be difficult – if not impossible – to define 'serious economic risk' for undertakings without creating unjustified discrimination between enterprises.

§11.04 THE OBJECTIVE OF THE COMMISSION: PURSUING A NEW TAX AGENDA?

The criticisms related to legal uncertainty triggered by the Commission's negative decisions on unlawful aid should be understood in the context of an evolutive interpretation of State aid law and the internal market. If, over the years, the Commission transforms the meaning of State aid law, undertakings will logically face a substantially higher level of legal uncertainty. Two related arguments can be distinguished.

First, the Commission has been criticized for the inconsistencies that allegedly characterize its recent decisions and the retroactive effects that arise from such inconsistencies and evolutive interpretation.[66] For example, in the *Apple* case, Ireland argued that the Commission decision led to an obligation to retroactively and wrongly apply legal – soft law – principles (such as the Organisation for Economic Co-operation and Development's (OECD) transfer pricing guidelines) to Apple's situation.[67] The Commission disregarded the arguments related to the 'alleged novelty of [its] approach'[68] and argued that its reasoning did not diverge from its previous decisions and

64. *Comm'n* v *Belgium*, C-52/84, Judgment, EU:C:1986:3, para. 14.
65. *Compare* CJEU case law on the temporal limitation of its judgments (*e.g.*, *Skov & Bilka*, C-402/03, Judgment, EU:C:2006:6, para. 51; *Comm'n* v *Greece*, C-178/05, Judgment, EU:C:2007:317, para. 67).
66. *See, e.g.*, Dimitrios A. Kyriazis, *From Soft Law to Soft Law Through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings*, 15 Eur. State Aid L.Q. 428, 434–436 (2016); Saturnina Moreno Gonzalez, *State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings*, 15 EStAl 556 (2016); Daniël S. Smit, *International Income Allocation Under EU Tax Law: Tinker, Tailor, Soldier, Sailor*, 26 EC Tax Rev. 67, 72–73 (2017). For a contrasting view, see Rita Szudoczsky, *Double Taxation Relief, Transfer Pricing Adjustments and State aid Law*, *in* 6 *State aid Law and Business Taxation*, *supra* n. 44.
67. *Apple*, *supra* n. 21, para. 439. On the opportunity for the Commission to rely on OECD Standards, see Edoardo Traversa & Alessandra Flamini, *Fighting Harmful Tax Competition Through EU State aid Law: Will the Hardening of Soft Law Suffice?*, 14 EStAL 323, 330 (2015).
68. *Apple*, *supra* n. 21, para. 443.

existing CJEU case law, referring to several cases, including the *Belgian Coordination Centre* cases, that were issued after the adoption of the Code of Conduct.[69]

As such, an evolutive interpretation of State aid law is not necessarily problematic. The broad nature of State aid provisions and their ultimate goal (namely, to counter policies that affect trade in the internal market) inherently imply that their application, which involves a case-by-case analysis, must evolve over time, as has been the case with the internal market.[70] However, the Commission and the CJEU must avoid adding to the legal uncertainty that can be experienced by undertakings when applying novel approaches to EU State aid law to past situations.[71] The Commission should, in such a case, recognize the evolutive character of its analysis and limit the recovery for prior aid schemes it determines to be unlawful based on such a new approach.

Second, the Commission has been criticized for using State aid law to pursue political goals. In tax matters, in particular, this criticism echoes the argument that EU State aid law should not be used to infringe upon the Member States' tax sovereignty.[72] To a certain extent, these criticisms are reinforced by the Commission's recent communication strategy, which uses its decisions to send political messages to the

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69. *Ibid.* paras 249–250. *See also* Comm'n Decision on the Belgian Excess Profit Tax Ruling System, *supra* n. 19, paras 145–147; Comm'n Decision on Amazon, *supra* n. 62, para. 629.
70. *See* Recital 4 CR 2015/1589:

> In order to ensure legal certainty, it is appropriate that the circumstances under which aid is to be considered as existing aid be defined. *The completion and enhancement of the internal market is a gradual process, reflected in the permanent development of State aid policy. Following those developments, certain measures, which at the moment they were put into effect did not constitute State aid, may since have become aid* (emphasis added).

See Juan Jorge Piernas López, The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond (Oxford Univ. Press 2015). *See also* Andrea Biondi & Martin Farley, The Relationship Between State Aid and the Single Market, in Research Handbook on European State aid Law, supra n. 29, at 277.

71. Edoardo Traversa & Pierre Marie Sabbadini, *State aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax Policy in Disguise?*, *in EU Tax Law and Policy in the 21st Century* 107, 130–131 (Werner Haslehner et al., eds., Kluwer Law International 2017). *See also* Peter J. Wattel, *Stateless Income, State Aid and the (Which?) Arm's Length Principle*, 44 Intertax 791 (2016):

> Whether or not the EU Courts, if they accept the Commission's approach, will also accept recovery ten years back with interest, will most likely depend on the question of whether, even if the Commission's approach may be novel, the companies and the Member States involved should anyway have known better.

72. *Contra* Saturnina Moreno Gonzalez, *supra* n. 66, at 18. *See also* Philip Andrews, *Uncle Sam Is Right: The EU Probe into Ireland's Tax Treatment of Apple is Overreach*, Kluwer Competition Law Blog; Emily Forrester, *Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?*, 27 EC Tax Rev. 19, 32–33 (2018); Raymond H.C. Luja, *Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?*, 5–6 EC Tax Rev. 312 (2016).

public, specifically pointing out that its State aid decisions have become a tool 'to combat tax avoidance and fight for fair tax competition'.[73]

But, in fact, such criticisms of the role the Commission plays – now personified in the figure of Ms. Vestager – are not new. Although the Commission initially seemed reluctant to assess Member States' tax regimes under State aid law, the CJEU, from very early on, held that tax measures could fall within the ambit of State aid review.[74] The Commission's attitude changed in the 1990s with the release of the Monti Report, which introduced the concept of harmful tax competition and the adoption of the Code of Conduct.[75] In 1998, the Commission adopted a Notice on the application of State aid rules to measures relating to direct business taxation, clarifying its role in policing the Member States' tax policies.[76]

Considering the constantly evolving nature of EU State aid law, the fact that the Commission uses State aid provisions to review the Member States' tax rulings should not be seen as just a political manoeuvre. As explained above, the application of State aid provisions may evolve along the same lines as the concept of the internal market. The Commission appears to be taking full advantage of the information that was made public in a political context, where fighting against tax avoidance is seen as one of the priorities,[77] which is in line with the role the Treaties grant to the Commission to monitor State aid provisions. From this perspective, the Commission does not seem to be pursuing a political goal that goes beyond enhancement of the internal market.

§11.05 CONCLUSION

The temporal application of EU State aid law to tax matters is extremely sensitive, as demonstrated by the Commission's most recently launched investigations and decisions. *Ex ante*, the State aid procedure contains several time limits that delay domestic legislative processes when adopting new tax provisions. *Ex post*, when the Commission seeks to enforce the prohibition of illegal State aid, there is frequently a mismatch between the period during which the Commission is authorized to seek recovery

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73. *See* European Comm'n Press Release, *State Aid: Commission Extends Information Enquiry on Tax Rulings Practice to All Member States*, Brussels, 17 December 2014, http://europa.eu/rapid/press-release_IP-14-2742_en.htm (accessed 23 July 2018). *See generally*, *Apple, supra* n. 21.
74. A first case mentioned in the literature is *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, 30/59, Judgment, EU:C:1961:2. *See also* Comm'n Decision on Amazon, *supra* n. 62, para. 628, citing *Italy* v *Comm'n*, C-173/73, Judgment, EU:C:1974:71, in response to Luxembourg's argument that 'the Commission adopted a novel approach for a finding of State aid'. *See also* Micheau, *supra* n. 29, at 194; Alexandre Maitrot de la Motte, *Droit fiscal de l'Union européenne* 282 (Bruylant 2016).
75. *See generally*, Maitrot de la Motte, *supra* n. 74; Piernas López, *supra* n. 70, at 59–60.
76. Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998], OJ C 384/3, 3–9.
77. Therefore, one could wonder whether the Commission will start reviewing patent box regimes. *See* Rafael Sanz-Gomez, *The OECD's Nexus Approach to IP Boxes: A European Union Law Perspective*, WU Int'l Tax'n Res. Paper Series, No. 2015-12 (2015) ('If we compare the decisions concerning Spain and Gibraltar, it seems that the Commission's view is that a too narrow drafting of IP boxes (taking into account eligible IP assets and the income to which the benefit applies) could be state aid', quoting Joris Luts, *Compatibility of IP Box Regimes with EU State Aid Rules and Code of Conduct*, 23 EC Tax Rev. 5, 258, 265 (2014) and others).

thereof and the national limitation periods applicable under the Member States' various domestic tax law provisions. The Commission's ability to go back ten years to recover illegal aid raises specific problems, particularly when it comes to aid granted through the tax system.

First, due to the specific design of certain taxes, such as corporate income taxes, it can be extremely difficult to define the exact amount of tax to be recovered. Indeed, it is not always simple to determine what the general regime (i.e., the normal level of taxation) would have been when trying to use it as a benchmark to quantify the advantage the beneficiary undertaking received. For example, the computation of the tax might take account of elements relating to previous or subsequent years (e.g., the carry-forward of losses and depreciation rules).

Second, the principles of legal certainty and of protecting legitimate expectations both play important roles in taxation. In EU State aid law, these principles are subject to an (overly) restrictive interpretation. A softer interpretation of the principle of protecting legitimate expectations is advisable in cases where a long period of time has elapsed between the adoption of the contested tax scheme and the Commission's negative decision. Indeed, in such cases, it can be argued that the passage of time has created an appearance of compatibility (such as when a now-contested tax regime has been known to, and relied upon by, the public). The Commission's recent investigations highlight that Member States have an active role to play in enhancing legal certainty within the internal market: they should notify all aid schemes that could potentially qualify as aid.[78]

Finally, the passage of time also influences the concept of aid itself, as it may be subject to an evolutive interpretation along with the developing concept of the internal market. This is inherent in any legal principle that embodies a certain political or ethical concept of justice or fairness,[79] as the prohibition of illegal State aid undoubtedly does. Yet, changes in the interpretation of State aid provisions must not apply to the past: otherwise, they risk running counter to other fundamental principles of justice and fairness, such as the principle of legal certainty and the rule of law.

78. *See* Margarida Afonso, *Recovery of Fiscal Aid*, *in State Aid and Tax Law* 57–68 (Alexander Rust & Claire Micheau eds., Kluwer Law International 2013).
79. On the role of value in legal interpretation, see Ronald Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Harvard Univ. Press 1997).