La collana della Scuola di Alta Formazione Dottorale accoglie le migliori tesi di dottorato dell'Università degli Studi di Bergamo, insignite della dignità di stampa e sottoposte a procedura di *blind peer review*.

This research provides an analysis of the position the taxpayer holds in a State aid procedure and explores rights, protection tools and availability of systems of protection and guarantees for the taxpayer. Adopting the perspective of taxpayer involved in a State aid procedure as the subject directly affected by European decisions, this analysis identifies as a benchmark the general principles of European Union and the European Charter of Fundamental Rights, comparing the position of the taxpayer in State aid with the European minimum standard of protection and with the rights foreseen at a general level in the European Union. Actual implications in terms of effectiveness and validity of protection are discussed within the general framework of fundamental rights in the European context.

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Elena Miceli

Taxpayer Protection in EU State Aid Law

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Elena Miceli

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Introduction

The competition policy of the European Union was developed to ensure fair competition, proper functioning of markets and a competitive economy within the internal market. At the centre of the European legal system is the concept of an internal market, defined in Article 26 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) as "*an area without frontiers in which the free movements of good, persons and capital is ensured in accordance with the provisions of the Treaties*". State aid prohibition, together with the prohibition on cartel agreements and abuse of dominant market position, is aimed at ensuring the protection of the internal market.

Traditionally, in the field of State aid law, there has always been an attempt to strike a balance between two conflicting demands which are, on the one hand, the protection of free competition and the internal market and, on the other, the protection of national sovereignty and autonomy of the Member States regarding the choices of internal economic and fiscal policy. While it is true, in fact, that direct taxation falls within the competence of the Member States, it is equally true, and peacefully accepted, that the Member States must exercise their fiscal competence in compliance with Union law[1].

In a multilevel context, the definitive consolidation of the single market required more and more the exercise of a direct action on national scales by the European institutions. This implied the breaking of the traditional intervention schemes based on the competence-attribution binomial[2]. In recent years, in fact, the European Institutions began to implement their coordination action through the expansive exercise of skills and powers already expressly attributed by the Treaties in relation to distinct sectors of intervention. Beyond the strictly political critical issues, it immediately became

[1] To understand European competence in the area of direct taxation, it is relevant to examine the principles governing European competences. The fundamental of European competences is laid down in Article 5, which establishes the principles of conferral, subsidiarity and proportionality. Under the principle of conferral, the Union may act only within the limits of competences conferred upon it by the Member States in the Treaties to attain the objectives set put therein. Competences not conferred upon the Union in the Treaties remain with the Member States. The two other principles, that are key to tax harmonization, limit the exercise of legal competence. The principle of subsidiarity requires that the European Union execute its competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. The principle of proportionality requires that European action not exceed what is necessary to achieve European objectives. There are a few additional principles that indirectly affect European competence in the field, both direct and indirect, taxation and potentially limit the tax sovereignty of Member States. Among these, the prohibition of direct and indirect discriminatory taxation of foreign products and direct and indirect fiscal protection of domestic production play an important role in preventing protectionism (Article 110 TFEU). The inverse principle is the prohibition of direct and indirect tax subsidies on products exported to another Member State (Article 111 TFEU).

[2] EUSEPI S., *L'incidenza della normativa in tema di aiuti di Stato sull'autonomia tributaria degli Stati membri alla luce del nuovo modello di finanziamento,* in *Riv. dir. trib.*, 2, 2016.

evident that the European approach led to an inevitable compression of the taxing power of the Member States and the relative territorial autonomies. In this sense, the search for a tax regime common to the Member States of the European Union seemed increasingly inseparable from European control over State aid [3]. During the years, in fact, the continue interaction between State aid discipline and national tax legislation have contributed to transform the prohibition on selective aid under Article 107 (1) TFEU, not only a powerful policy tool in the hands of the European Commission, but also a substantial constraint to tax sovereignty in the Member States of the European Union[4]. The Commission began to deal systematically with the applicability of prohibition on State aid to taxation, no longer considering it only one of the possible profiles inherent in the prohibition of State aid, but as the precise objective of its action, orienting the extension of the scope of this prohibition to the achievement of further and different objectives, essentially the approximation of direct taxes and the fight against erosion of the tax base[5]. This is closely connected with the fact that Article 115 TFEU, that is the legal basis underlying the approximation of direct taxation, so far has not allowed to achieve appreciable results in this area due to the principle of unanimity contained therein which, in substance, has always guaranteed the right of veto to each country[6].

An essential step of this expansion was represented by the elaboration of the notion of aid[7] and the connection with the contrast at the harmful tax competition[8]. Over the years, the European Commission and the Court of Justice, in fact, seem to have blurred the distinction between the international soft law concept of harmful tax competition (among Member States) with those of State aid and unfair competition (among undertakings)[9]. The unprecedented efforts of recent years to

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[3] JURY F., *Le règime des aides d'Etat: un moteur efficace de la politique fiscale européenne*, in *Revue del'Unione Europèenne*, 620, 2018, 427.

[4] FORRESTER E., *Is the State Aid Regime a suitable instrument to be used in the fight against harmful tax competition*, in *European Taxation*, 1, 2017, 35, according to which The State aid regime should not become a general anti-competition tool at the disposal of the Commission.

[5] In the Commission Decision of 10 December 2018 on State aid SA.34914 (2013/C), implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime, there is the reference to "*certain weaknesses in a tax system*". Accepting that weaknesses in a tax system could, by itself, give rise to State aid would give the European Commission potentially a tool under State aid rules that would reach much further than merely scrutinizing selective tax treatment. In other words, the European Commission potentially could start dictating how Member States' tax system should look like, with the existence of a domestic reference framework no longer being necessary. The fact the European Commission would autonomously decide what constitutes a weakness in a particular tax system and what would not, would go beyond the scope of the State aid rules.

[6] MORETTI M., *Il divieto di aiuti di Stato*, in SACCHETTO C., *Principi di diritto tributario europeo e internazionale*, Giappichelli, Torino, 2016, 118.

[7] LOPEZ S., MOROZ M., *Les Aides d'Etat sous forme fiscale: une répression en marche, au sein de la Commission Européenne*, in *OFIS*, 2018.

[8] TRAVERSA E., FLAMINI A., *Fighting Harmful Tax competition through EU States Aid Law: Will the hardening of Soft law suffice?*, in *EStAL*, 3, 2015, 331, according to which State aid is a useful tool in the fight against harmful tax competition, but it cannot be intended as a full substitute for the positive approximation of the corporate tax system of the Member States.

[9] ROSSI-MACCANICO P., *Commentary of State Aid Review of Multinational Tax Regimes, in EStAL*, 2007, 25.

combat aggressive tax planning and base erosion and profit shifting (BEPS) have put the State aid rules in the spotlight in European tax law and policy. The search for more effective means to fight these phenomena within the European Union so has led the Commission to intensify the State aid review of tax measures which are commonly exploited in tax planning structures. This generated an earthquake in European State aid law, which have reached new territories that thus far seemed to be firmly lying outside the boundaries of State aid, such as mismatches and disparities between different tax systems, loopholes in domestic laws or the lack of effective anti-avoidance rules[10] or the use of double tax treaties to the effect of achieving double non-taxation. The use of the State aid instrument in fighting harmful tax competition strategy and the continuous extension of the limits of the State aid rules by the Commission brought about a heated debate on the incidence in the fiscal national sovereignty[11] and the appropriateness of the State aid rules for combatting tax planning within the European Union. While the possible State aid nature of a fiscal measure is implied in the very definition of State aid under Article 107 TFEU, the reason why the fight against tax avoidance and for a fair tax competition should come under the scope of State aid control is yet indeed not self-evident [12].

Even more recently, there has been an affirmation of an increasingly incisive role of the State aid law in the field of direct taxes[13] through the concentration of control over fiscal measures at both referring tax legislation and also case-by-case measures, mostly rulings and advance pricing agreements. Since 2013 the Commission has extended its action in the area of State aid to emerging forms of passive tax competition, starting a large-scale State aid investigation concerning individual advance transfer pricing tax rulings by national tax authorities[14]. In its recent decisions, the Commission considered that the tax rulings constituted State aid, incompatible with the internal market, as diverged from arm's length principle and therefore provided the respective groups with a selective economic advantage[15]. With regard to this aspect, the Commission specified that the arm's length principle to

[10] In principle, the prohibition of anti-competitive behaviour does not assume, in general terms, a direct relevance for tax purposes because it is intended to regulate only relations between private subjects. BIZIOLI G., *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, Cedam, Padova, 2008.

[11] LYAL R., *State Aid, Tax Integration and State Sovereignty*, in PNANAYI C., HASLEHNER W., TRAVERSA E., *Research Handbook on European Union Taxation Law*, Edward Elgar, 2020, 412.

[12] TRAVERSA E., FLAMINI A., *Fighting Harmful Tax competition through EU States Aid Law: Will the hardening of Soft law suffice?*, in *EStAL*, 3, 2015, 324.

[13] The limited scope of European regulations in respect of direct taxation consist in the fact that, expected that direct taxes may serve as useful tools in pursuing various economic or social aims, the Member States' reluctance to give up their competence is understandable. See ADAMCZYC L., MAJDANSKA A., *The Sources of EU Law Relevant for Direct Taxation*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 9.

[14] TRAVERSA E., SABBADINI P.M., *Rulings et aides d'État fiscales: un état des lieux*, in *Journal de droit européen*, 4, 2017. ROSSI-MACCANICO P., *A new framework for State Aid Review of Tax Rulings*, in *EStAL*, 3, 2015, 371.

[15] PISTONE P., *Diritto Tributario Europeo*, Giappichelli, Torino, 2018, 217.

which it refers is not equivalent to the principle set out in the OECD Transfer Pricing Guidelines[16], but is a general principle for equal treatment. In this sense, it seems that the Commission has adopted its own version of the arm's length principle, arguing that it is inherent in Article 107 TFEU, putting in place in this way a new approach and a new interpretation of the State aid rule to achieve an outcome within the area of tax, which would be hard to achieve through the legislative route[17]. Instead of identifying tax advantages as departures form generally applicable law, the Commission identified tax advantages as departures from external tax policy norms, and, in this way, tried to use the State aid instrument to accomplish European wide harmonization outside the European tax legislative process[18]. The recent conduct of the Commission have drawn criticism, mainly in the literature[19], in that it seems that it overturned the vertical and horizontal structure of the European legal order[20] and created a broad interpretation of State aid to bring evermore areas of taxation within its scope[21].

The Commission's new approach in the field of taxation, the widening of State aid control and of the new notion of aid have a significant impact in practice not only for Member States and for their fiscal sovereignty, but above all for taxpayers as beneficiaries of a fiscal measure, potentially configurable as State aid, entailing for them a profound legal uncertainty[22].

In this context, characterized by the contrast between, on one hand, the widening of control by the European Commission and the continuous expansion of the notion of State aid and, on the other, the attempt by Member States to protect fiscal sovereignty, however, no attention is paid to the taxpayer involved in a State aid procedure although the latter is the subject directly affected by European decisions. Consequently, emerges the need to find a new balance of interests that takes into account

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[16] HASLEHNER W., *Transfer pricing rules and State aid law*, in PNANAYI C., HASLEHNER W., TRAVERSA E., *Research Handbook on European Union Taxation Law*, Edward Elgar, 2020, 444. According the author, the principle described by the Commission could be different from the OECD version due to the different underlying purposes: protecting a free and undistorted internal market on the one hand, and the allocation of profits for taxation purposes to sovereign nations on the other.

[17] GORMSEN L., *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, in *Journal of European Competition Law & Practice*, 7, 2016, 369; GORMSEN L., MIFSUD-BONNICI C., *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax,* in *Journal of European Competition Law & Practice*, 8, 2017, 423.

[18] Regarding the unclear definition of the reference framework of the general tax system and how the relevant comparison should be established, see PETERS C., *Tax Policy Convergence and EU Fiscal State Aid Control: In Search of Rationality*, in *EC Tax Rev*, 2019, 6.

[19] Among the others, SCHÖN W., *Tax Legislation and the Notion of Fiscal Aid: A Review of 5 Years of European Jurisprudence*, in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 23, according to which State aid control is not a panacea which can be used to cure all defects of tax legislation.

[20] SABBADINI P.M., LUTS J., *Evaluation institutionelle des actions de la Commission en metiere d'aides d'Etat contre la concurrance fiscale passive*, in *Revue des affaires européennes*, 2019.

[21] FORRESTER E., *Is the State Aid Regime a suitable instrument to be used in the fight against harmful tax competition*, in *European Taxation*, 1, 2017, 20.

[22] FORT E., *EU State Aid and Tax: An evolutionary approach*, in *European Taxation*, 9, 2017,382.

above all taxpayers' protection and rights, especially in the fiscal area due to the relevance of the interests involved and because the concrete tax consequences directly affect the taxpayers.

This research, therefore, is focused on the taxpayer protection in European State aid law and intends to analyse what position does the taxpayer hold in a State aid procedure and what are the taxpayer' right; what are the protection tools that the taxpayer has and if is there a (effective?) system of protection and guarantees for the taxpayer. The purpose of this work is to systematically examine the State aid discipline, adopting the taxpayer's perspective, and to provide a picture of the position of the taxpayers as beneficiaries during the investigation and recovery procedures, thought the analysis of the potential rights that the same can invoke.

The analysis of the protection of taxpayers' rights is, in particular, carried out by identifying as a benchmark the general principles of European Union and the European Charter of Fundamental Rights, as well as the application of these principles in tax cases by the Court of Justice, comparing the position of the taxpayer in State aid with the standard of the rights foreseen at a general level in the European Union, identifying the concrete implications in terms of effectiveness and validity of taxpayer's protection and the existing ontological differences with the general framework of fundamental rights in the European context. The unwritten general principles of law and the European Charter of Fundamental Rights, as primary law, in fact, constitute the main sources of fundamental rights in European law. On one hand, the general principles of European Union law are inherent in the legal system of the European Union as a whole, and they have always been considered as the most important source of the supranational legal order, of which they express the legal values defined as material and substantial[23]. Article 6 (3) TEU states that the general principles have 'constitutional status' and they are located at the same level as the European Treaties. On the other, the European Charter, proclaimed in recognition of the role of fundamental rights within the European legal system, constitute the primary source of European fundamental rights.

In this field, it is necessary to ask if a different level of protection of the taxpayer in the State aid field and the different application, extremely restrictive in respect to the general context, can be justified compared to that established in general and in principle in the European legal order and by the European general principles and the European Charter, considering that scenarios, in which fundamental rights are not duly protected and recognized, do not appear to be tolerated under European Union law.

The study concerning taxpayer rights and his protection tools is so conducted through two level of analysis: the first level relating the State aid Investigation procedure, in relation to which two aspects

[23] The general principles represent the substantial core of European Union law. The expression of material constitution is used in MORTATI C., *La Costituzione in senso materiale*, Milano, Giuffrè, 1940.

of the taxpayer's position emerge, that are the right to be heard and the right to privacy; the second level is related to Aid Recovery procedure, in reference to which two limits are expressly established, in order to prevent the recovery of a State aid, that are the compatibility with the general principles of the European Union and the limitation period.

In particular, the first chapter contains a general introduction on the topic of State aid, with specific regard to the field of taxation and the incidence of the prohibition of State aid in the area of direct taxation and the methodology to establish if a fiscal measure entails State aid, through the analysis of the advantage and selectivity conditions and to the so-called three-step approach. Furthermore, the chapter contains an overview of the European Commission's decisions relating to tax rulings (in particular, in the following cases: Starbucks, Apple, Fiat, Belgium Excess Profit, Amazon, Engi[24]) with the aim of carrying out an analysis, in key criticism, of the Commission' interpretation and to outline the critical points of the State aid framework and of the current state of art.

The second chapter, after the analysis of the State aid investigation procedure, focuses on the possible rights that can be invoked by the taxpayer during this phase. In particular, the first section analyses the possible profiles of the right to be heard and to participate at the State aid investigation procedure, adopting the benchmark of the right to a good administration, expression of the good faith principle, established by the Article 41 of the European Charter of fundamental rights as the right that implies that a person who may be adversely affected by an administrative act is entitled to take any available legal steps to protect his rights. Section two contains the analysis of the right to privacy and confidentiality that could be invoked by the taxpayer, as well as the possible connection with the right to access to State aid file, always taking as a reference parameter the fundamental rights expressly established in the European Charter.

The third chapter is related to State aid recovery procedure and it is organized into two sections. Section I contains the analysis of the limit expressly provided for a recovery order, that is the compatibility with the general principles of European Union. The position and the rights of the taxpayer are here analysed in view of the general principles of the European legal system, i.e. legal certainty and protection of legitimate expectations[25], used as a benchmark. The analysis focuses on

[24] The analysis of the recent approach adopted by the European Commission will focus, for the purposes of this work, exclusively on formally concluded negative decisions: Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands; Commission Decision of 30 August 2016 on State aid to Apple, SA.38373 (2014/C), Ireland; Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg; Commission Decision of 4 October 2017 on State aid to Amazon, SA.38944 (2014/C), Luxembourg; Commission Decision of 20 June 2018 on State aid to GDF Suez, SA.44888 (2016/C), Luxembourg; Commission Decision of 11 January 2016 on State aid Excess profit tax ruling system in Belgium, SA.37667 (2015/C), Belgium; Commission Decision of 3 December 2015 on State aid to MC Donald's Europe, SA.38945 (2014/C), Luxembourg.

[25] TRAVERSA E., MODONESI D., *Les principes de sécurité juridique et de la confiance légitime en droit douanier et fiscal*, in *Revue du Droit de l'Union Europeenne*, 2, 2015, 10, according to which the principle of legitimate expectation corresponds to an extension of the protection of the taxpayer.

these principles starting from the specific cases constituted by recent decisions concerning tax rulings with the perspective of taxpayer receiving the State aid. This is because the recent Commission activity has raised many questions to be evaluated in light of this principles, with particular regard to the notion of fiscal aid and its application foreseeable.

Despite the general context in which the aforementioned principles develop, European Courts and Commission advocate a specific and stricter meaning of these principles in the sphere of State aid, whose recognition is granted only in exceptional circumstances. This particularly narrow meaning of legal certainty and legitimate expectations is unique and substantially different from the scope we usually find in general European law, national Member State's order or International law in contrast with the application of these principles in the State aid field.

In this sense, in fact, at European level, the principle of legal certainty, as interpreted by the Court of Justice, implies that European standards must present the characteristics of clarity and predictability for the administrated. The European judge has in fact specified that "*the principle of legal certainty requires that a regulation that imposes charges on the taxpayer is clear and precise so that he can unambiguously know his rights and obligations and can act adequately*"[26] and that "*European rules enable those concerned to know precisely the extent of the obligations imposed on them, and that those persons be able to ascertain unequivocally what their rights and obligations are and take steps accordingly*"[27]. At the same time, the principle of protection of legitimate expectations affords a measure of protection for any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations[28]. Furthermore, these principles must be observed all the more strictly in the case of rules that have financial and fiscal consequences[29].

Finally, Section II focuses on possible issues that may arise in the recovery phase, mainly due to the lack of harmonization in the rules for recovery.

Compared to the ever increasing rise and evolution of the State aid law in the field of taxation, the recognition of basic rights of participation and defence of the taxpayer seems indispensable and essential in the current context. The auspice is that a renewed interest in the topic may inevitably lead to an actual implementation of a taxpayer protection system as a standard minimum, through a coherent, systematic and non-fragmentary overall view of the European legal system, which emerges from the content of rights protected by the European Charter and from general principles of European law derived from national constitutional traditions of Member States.

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[26] Case C-169/1980, *Amministrazione delle Dogane v Societé Anonime Gondrand*.
[27] Case C-610/10, *Commission v Spain*.
[28] Case C-289/9, *Mavridis v Parliament*, par. 21.
[29] Case C-94/05, *Emsland-Starke*, par. 43.

Chapter 1. Fiscal State Aid

1. The concept of State Aid in the field of taxation: introduction

The application of the criteria of Article 107 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) to the domain of direct taxation is notoriously difficult[1].

The difficulty with the definition of the notion of fiscal State aid coincides with the concerns about the legitimacy of EU fiscal State aid control. In fact, the recent European Commission decisions have affected the autonomy of the Member States in the area of direct taxation[2].

EU fiscal State aid law is currently suffering from the difficulties with the definition of the notion of fiscal aid and the concerns about the legitimacy of EU fiscal State aid control. This asset origins in the absence of agreement about the goals and functions of EU fiscal State aid control. There is, in fact, no normative agreement on the supposed performance of European Commission (hereinafter also referred to as: the Commission) of fiscal State aid control[3]. Furthermore, the Court of Justice's extensive interpretation of Article 107 TFUE has made it possible for the European Commission to bypass the resistance of the Member States to comply with EU fiscal State aid control.

Present-day discussions about the scope of the EU fiscal State aid control are another sign of the fact that the expectations about tax law in the EU are considerably changing. In this sense, the State aid analysis about tax ruling is actually related to the vivid debate about the scope and interpretation of EU merger control and about the legal notion of fiscal aid.

The need to be more transparent and accountable about the way the European Commission is making new fiscal State aid policies is increasingly felt by many parties. There is no doubt that State aid in the field of taxation plays a major and ever-growing role in competition law[4]. While Member States undoubtedly enjoy fiscal autonomy in respect of their direct taxation systems, any fiscal measure must comply with the State aid rules, which bind Member States and benefit from primacy over domestic legislation. International tax competition was not the original focus of the State aid control

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[1]See SCHÖN, *Tax legislation and the notion of fiscal aid: a review of 5 years of European jurisprudence*, in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 3, 26.

[2] NANETTI F., MAMELLI G., *The creeping normative role of the EC Commission in the twin-track struggle against State aids and harmful tax competition*, in *EC Tax Review*, 2002, 11. See also FANTOZZI A., *The applicability of State aid rules to tax competition measures: a process of* "de facto" *harmonization in the tax field?*, in *Tax Competition in Europe*, IBFD, 2003, 121.

[3] PETERS C., *The legitimacy of EU Fiscal State Aid control: what is your legitimation narrative?* in V.V. A.A., *New Perspective on Fiscal State Aid*, Kluwer Law International, New York, 2019, 29.

[4] SHON W., *State Aid in the Area of Taxation*, in HANCHER L., OTTERVANGER T., SLOT P., *EU State Aid*, Sweet & Maxwell, London, 2016.

foreseen by the establishment of Articles 107 and 108. However, alongside the evolution of secondary and supplementary law, the application of direct taxation has surfaced as a priority for the enforcers of the State aid system. As early as 1974, the Court of Justice clarified that the Commission's competence in the field of State aid control also comprises the area of direct taxation.

The power to tax (and the corresponding budgetary power) is still in the hands of the national governments and parliaments. The fundamental decision of whether or not an economic transaction is subject to tax lies within the scope of national sovereignty[5].

The standard situation covered by Article 107 (1) TFEU is one where the State examines its financial possibilities and hands out capital or other funding to a single enterprise or a certain group of enterprises, thus interfering in a market otherwise not affected by the State. In the field of tax legislation, the situation is more specific and relevant: in this context, the State is always present, as all enterprises have to comply with the rules of a comprehensive tax system covering all sorts of economic transactions.

In tax matters, free competition is not guaranteed by public non-interference, but by a wide-reaching collection of taxes from everyone whose economic situation is comparable to that of other taxpayers. Therefore, it is accepted that the application of the State aid rules to the tax field requires some specific instruments and benchmarks. The analysis is not restricted to tax in a narrow sense, meaning public charges levied by the State or sub-national government entities without consideration. It has also to be extended to other public charges such as social security contributions, capital duties, road tolls or royalties.

The Commission and the Courts have systematically applied the State aid rules to tax measures since the creation of the internal market. EU law plays a major role in disciplining the national legislator's tendency to control economic behaviour by tax incentives. However, it is evident from evaluation that there are underlying issues with the application of State aid rules to the field of taxation. The notion of 'tax selectivity' is a key example of such problematic application. The courts have attempted to overcome problems with the nature of selectivity, resulting in a broad application. Under a taxation point of view, the benchmark test is purely 'internal' and it does not take into account the competitive effects of tax rules. This is due to the lack of harmonization of direct taxes within the internal market: Member States retain the right to shape their tax systems in a competitive fashion, and therefore measures should not be compared against any foreign system.

In general, the notion of State resources is very broad, covering all public funds, whatever their source and their destination, and it includes financial assistance granted by regional and local authorities and

[5] See SCHÖN, *State Aid in the area of taxation*, in HANCHER L., OTTERVANGER T., SLOT P., *EU State Aid*, Sweet & Maxwell, London, 2016, 397.

by other public authorities and public bodies. The aid must confer an economic advantage deriving from State resources. In the field of taxation, in particular, the aid generally consists of income foregone by the State or the absence of a gain for the State in question[6].

The term "aid" is not defined in the European Treaties. Nonetheless, it is settled case law that this concept is wider than just aid provided in the form of subsidies, and instead also includes aid delivered through a reduction of the charges normally borne by an undertaking. So, the prohibition of State aid does not only apply to aid in the form of direct subsidies, but also covers more indirect forms of aid, such as relief from fiscal and para-fiscal levies. For example, renouncing tax revenue is, arguably, a more direct means of giving aid than a classic subsidy (where money is first received into a Member State's coffer in the form of tax revenue and then given to the subsidy's beneficiary). A reduction of tax revenue otherwise due to a Member State has the same effect as a subsidy: it consumes Member State's resources.

In tax cases, the prerequisite stated in Article 107 (1) TFEU that aid must be granted by a Member States or through State resources is fulfilled not by direct funding but by the budgetary restraint of the State to levy charges. In this sense, in the past years the Court has ruled that a favourable tax treatment can have the exact same effect as a direct subsidy in causing distortions to the market[7]. At the same time, the definition of State aid is broader than a subsidy.

The Court of Justice stated that the concept of aid encompasses not only positive benefits, but also all measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. These measures are recognized as State aid[8] and, without being subsidies in the strict sense of the word, are of the same character and have the same effect of subsidies[9]. This includes all tax rules providing relief from the normal level of taxation for such businesses. As the charges which are normally included in the budget of an undertaking include direct taxes, any measure which results in a reduction of taxes "normally" paid by an undertaking can be regarded as aid within the meaning of Article 107 (1) TFEU. The prohibition of State aid therefore can be applied abstractly to all fiscal measures since aid can be provided in any form.

In order to clarify the question of whether a tax measure could qualify as aid under Article 107 of the TFEU (formerly Article 87 of the EC Treaty), the 1998 Commission Notice on the application of the

[6] Opinion of Advocate General Léger in Case C-159/01, *Netherlands v Commission*, par. 84.

[7] Since Case C-173/73, *Italy v Commission*, par. 12-13.

[8] Case C-75/97, *Belgium v Commission*, par. 23; Case C-308/01, *GIL Insurance*, par. 69; Case C-143/99, *Adria-Wien-Pipeline*, par. 38.

[9] Case C-83/01, C-93/01 and C-94/01, *Chronopost SA, La Poste and Republique française v Union française de l'express (Ufex), DHL International, Federal express international SNC e CRIE SA*; Joined Cases C-78/08 to C-80/08, *Paint Graphos*, par. 45; Case C-30/59, *Steenkolenmijnen*; Case C-387/92 – *Banco Exterior de España*.

State aid rules to measures relating to direct business taxation[10] proposed clarifications and a road map to determine whether or not past and future national measures could comply with State aid procedural requirements. The EU Commission issued a detailed set of directions as to the types of tax provisions and practices that could be identified as State aid. With reference to Article 107 of the TFEU, being the core of the EU State aid system, there is a description of each criterion to be fulfilled in order to have a tax measure considered as prohibited. The 2004 report[11] provided an initial review of the actions that have been undertaken by the EU Commission since 2001 rather than outlining an exhaustive list of all tax State aid cases handled since the 1998 Notice. From the report, it is evident that the EU Commission's investigations were not based on new guidelines, but rather on custom practices applicable in other areas. Therefore, in assessing the compatibility of tax measures with the State aid system, the EU Commission based its rationale on Court of Justice case law, which provided it with an opportunity to clarify the application of State aid rules to tax measures.

On May 19th, 2016, the EU Commission published its final notice on the notion of State aid[12] (from now also 2016 Notice) with the objective of providing clarification to public authorities and companies and to facilitate public investment by identifying measures that do not need prior approval. The 2016 Notice identifies specific issues concerning tax measures that have been subject to recent investigations by the EU Commission. Amongst the tax measures identified, the 2016 Notice focused on cooperative societies, undertakings for collective investment, tax amnesties, tax rulings and settlements, depreciation/amortization rules, fixed basis tax regimes for specific activities, anti-abuse rules and excise duties.

According to the Commission, the advantage may be provided through a reduction in the firm's tax burden in various ways, including but not limited to: a reduction in the tax base (such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet), a total or partial reduction in the amount of tax (such as exemption or a tax credit), deferment, cancellation or even special rescheduling of tax debt. In addition, identifying State aid in the form of tax benefits causes considerable difficulties because, unlike direct aid by way of financial assistance, rather than the granting of an advantage in the shape of a State benefit, it consists of a dispensation from the disadvantage of taxation. The market economy operator test or private investor

[10] Commission Notice on the application of State aid rules to measures relating to direct taxation, Nov. 11, 1998, OJ C 384, Dec. 10, 1988.

[11] European Commission, Report on the Implementation of the Commission Notice on the application of the State Aid Rules to Measures relating to Direct Business Taxation, C/434/2004.

[12] Commission Notice on the notion of State aid as referred to in Art. 107 (1) TFEU, C/2016/2946.

test applied to direct subsidies does not normally work here, since there is no subsidy if the State acts as a private investor would[13].

The lack of stringency in Court of Justice decisional practice and the tendency to continuously widen the scope of control mean that there is no visible pattern to the European Commission's initiation of State aid proceedings. As a rule, the intention to grant an advantage is irrelevant to the classification as State aid; what matters in practice is solely the potential effect. This creates a risk that virtually any ruling that gives an advantage can potentially become prohibited State aid under EU law.

As a rule, referring to the definition of the notion of State aid[14], the regulatory provisions aimed at defining the ordinary tax system are not, by nature, State aid, but fall within the fiscal power of the Member States. Measures other than the previous ones which favour certain undertakings or certain productions may have a general character, and therefore not incompatible with European law, or have a special and, therefore, selective character[15]. Although prohibited, selective measures can be justified because of the nature or structure of the tax system.

According to the Court of Justice, favourable tax measures can be considered as an aid, provided that they are not generally applicable to all economic operators. Then, the Court indicates the evaluation to be followed to classify a State measure as selective[16].

This uncertainty translates into difficulty for national courts not only to correctly apply the selectivity criterion, in particular with regards to the determination of the relevant reference framework, but more generally to understand the exact extent of their mission in the application of the State aid rules[17].

At the regulatory level, the relevant part of Article 107 TFEU[18] is the first part, which prohibits State measures which are incompatible with the internal market. Not all State aid is automatically

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[13] SHON. W., *Tax legislation and the notion of Fiscal aid - A review of five years of European jurisprudence*, Mark Plank Institute for Tax Law and Public Finance, Working Paper 6, 2015,3.

[14] The notion of fiscal aid includes not only positive benefits, i.e. grants, loans or the assumption of participation in the capital of companies, but also all those interventions which, in various forms, alleviate the burdens that normally affect the budget of a company and which, consequently, without being subsidies in strictly speaking, they have the same nature and produce identical effects, see DE MITA E., *«Tassa sul lusso» incompatibile con il diritto comunitario – L'imposta sullo scalo turistico in Sardegna di aerei e imbarcazioni da diporto tra contrasto alla libera prestazione di servizi e natura di aiuto di Stato*, in *GT Riv. giur. Trib.*, 2, 2010, 117.

[15] Tax concessions represent a derogation from the ordinary tax treatment in force in a national system and that all the concessions can abstractly fall within the scope of the aforementioned art. 107 TFEU. TESAURO F., *Processo tributario e aiuti di Stato*, in *Corr. Trib.*, 45, 2007, 3365.

[16] Case C-6/12, *P Oy*, par. 19.

[17] TRAVERSA E., *State Aid and Taxation: can an anti-avoidance provision be selective?*, in *EStAL*, 3, 2014, Annotation on the Judgement of the Court of Justice of 18 July 2013 in Case C-6/12, *P Oy*.

[18] Art. 107 TFUE provides: "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*

2. The following shall be compatible with the internal market:

prohibited. Article 107 (2) permits certain, very limited, categories of aid that are considered compatible with the internal market. More relevant to tax measure is Article 107 (3) TFEU, which gives the Commission discretion to approve certain broader categories of aid that may be declared compatible with the internal market. These provisions are drafted in a broad way in order to be more inclusive, and this is where the Commission retains greater discretion.

If a Member State wants to introduce a new measure likely to entail State aid, it must notify it to the Commission under Article 108 (3) TFEU prior to implementation[19]. Pending a final decision from the Commission, a Member State is prohibited from implementing the aid.

As mentioned, not all tax measures will be decided to constitute State aid, they must meet the following four general cumulative criteria prescribed by Article 107 TFEU. Firstly, the measure must be granted by a Member State or through State resources: it is necessary for State resources to be involved. The concept of State aid covers all financial means by which public authorities may support undertakings, regardless of whether or not those means are permanent assets of the public sector. For example, the exemption of taxes has the effect of mitigating a charge that an undertaking would normally have to bear. It will directly result in a loss of revenue for the State as it has effectively renounced revenue it would have otherwise been entitled to collect. The measure is therefore granted by the State through resources and is imputable to the State. Likewise, if a tax ruling gives rise to a loss of State resources by reduction in the tax payable by the company, it results in loss of tax revenue, which would otherwise have been available to the Member State concerned.

Secondly, the measure must confer an economic advantage to the beneficiary. A measure confers an economic advantage if the financial situation of an undertaking is improved as a result of State

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(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurrences;
(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:
(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission".

[19] Art. 108 (3) TFEU provides: "*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*".

intervention on terms differing from normal market conditions. In particular, it is necessary to carry out a full Articles 101 and 102 TFEU type analysis to show that this is the case. Moreover, the form of the measure is irrelevant. The European Courts have developed a "market economy operator test" to verify whether transactions made by public bodies are carried out in line with normal market conditions. It is necessary to assess whether, in similar circumstances, a private operator of a comparable size operating in normal conditions of a market economy could have concluded a transaction on the same conditions. Thirdly, the measure must be selective (it must favour certain undertakings, the production of certain goods or the provision of certain services): in general, selectivity can be either material (relating to certain sector of the economy) or regional (relating to certain geographical area). The latter two criteria, economic advantage and selectivity, are inextricable linked. In fact, as we will see later, the term advantage has often been used interchangeably with selectivity in reference to taxation, and the process of determining each in case law is alike.

Finally, there must be a (potential) distortion of competition and there must be an effect (or a potential effect) on trade between Member States. Normally, where a measure distorts competition it usually also has the potential to affect trade between Member States[20].

The tax nature of a State advantage is no obstacle to State aid review, nor is the fact that the measure has international effects *per se* sufficient to exclude the possible State aid nature of a tax measure.

For tax measures to be classified as State aids, it is first necessary to identify an advantage and then to determine that the advantage is granted selectively. In the field of taxation, the advantage may take various forms. Furthermore, in order to establish if such an advantage has been granted there must be a comparison to the normal tax system of the particular State.

According to the Court of Justice, the identification of an advantage for the purposes of State aid law depends on the “normal taxation regime” applicable to comparable undertakings[21]. Any derogation from that regime is a “selective measure” and is classified as State aid. In other words, in order to determine whether a measure is selective, it has to be examined whether, within the context of the particular national system, that measure constitutes an advantage for certain undertakings in comparison with others that are in a comparable legal and factual situation. It may thus be that a taxation system does not constitute State aid even though it does not correspond in all respects to the general system of corporate taxation of the Member State. Moreover, the tax measures must cover a

[20] Opinion of Advocate General Kokotte in Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna.* According to Advocate General Kokotte, in relation to tax legislation, it is always to be presumed that trade between Member State is affected where those favoured by such legislation perform an economic activity in the field of cross-border trade or where it is conceivable that they are in competition with operators established in other Member States.

[21] Case C-81/10, *France Telecom v Commission*, par. 16.

broad category of transactions in a non-discriminatory manner, in order to qualify as general measures[22].

As early as the 1970s, the Court of Justice of the European Union confirmed that the Treaty's State aid prohibitions apply to selective advantages granted through the Member States' respective tax codes. In that regard, the Court made clear that it is irrelevant to the State aid prohibitions what method a Member State uses to grant a benefit; rather, it is the effect of a particular State measure which is decisive. Thereafter, toward the end of the 1990s, the Commission started to actively investigate tax provisions which appeared to grant prohibited selective advantages to enterprises.

The application of the notion of State aid as provided in Article 107 TFEU with regards to measures relating to direct business taxation is a far more complex process than the normal examination of direct subsidies because it involves not only European law principles but also national tax law[23]. Unfortunately, the application of the State aid rules in this field of law too often still leads to uncertainty. As will be shown below, multiple uncertainties exist as to the criteria to be used to determine whether an apparently favourable tax regime effectively constitutes State aid. The unresolved question relating to the qualification of a direct tax measure under Article 107 (1) TFEU, is how should it be established whether a direct tax measure constitutes aid within the meaning of this provision?

2. The interplay between State Aid prohibition and direct taxation: an historical view

Throughout the construction of the European Union and its unified market, the powers of the European authorities constantly expanded, except in the field of taxation. This concentration of powers was a prerequisite to achieving a single market without borders and building a common area of freedom, security and justice. In order to achieve such homogeneity between all Member States, national legal systems were put under the purview of EU law, resulting in a conflict between the conditions and restrictions of the "law of integration" and the territoriality principle.

Despite the exception in respect of indirect taxation, taxation has largely remained in the hands of each Member State due to a general desire not to forfeit the fiscal power associated with allowing national lawmakers to control their budgets. In fact, tax sovereignty implies that there is an inseparable relationship between a sovereign State and its inherent prerogative to levy taxes within its territorial jurisdiction. Such a national prerogative, in principle, has been preserved, which is

[22] SÀNCHEZ RYDELSKY M., *Distinction between State Aid and General Tax Measures,* in *EC Tax Review*, 2010, 152.

[23] ROSSI-MACCANICO P., *State Aid Review of Business Tax Measures – Proposal for State aid control for Direct Business Tax Measures,* in *EStAL*, 2007, 215.

evident in the absence of common legislation on direct taxation. From an EU law perspective, there are few references to taxation other than in Articles 110 to 113 of the TFEU. These legal provisions deal with taxation in the context of harmonization and prohibit any legislative action by the EU authorities in tax matters unless unanimity is reached amongst the Member States.

In fact, any new tax measure, which requires implementation by all Member States, necessitates for unanimity between the Member States. Except for indirect taxes, in principle, Member States remain free to decide whether to introduce or abolish tax burdens, i.e. increase or reduce their taxes within their jurisdiction.

Despite the structure thus outlined of European and national prerogatives, tension emerged between the application of national rules on direct taxation and European law, especially in the field of State aid.

For over 60 years, the European Union has been built on core principles, values and fundamental freedoms, such as free competition and trade between its economies. Amongst the obstacles to these freedoms, State aid, in its many forms, has been identified as an instrument for distortion.

To preserve competition and the development of the EU Single Market, a State aid legal framework was implemented currently within Articles 107 to 109 of TFEU. This system aims to control aid granted by sovereign states to companies, but also to safeguard the proper functioning of the internal market, as well as to avoid any discrimination or protectionism that would affect competition.

Article 107 (1) TFEU does not prevent the Member States from introducing, reducing or abolishing a tax in order to further its economic aims. However, the uncertainty caused by possible State aid action concerning tax measures which seem to deviate from a ‘normal’ tax system inevitably impacts upon States properly exercising their right to shape and modify their tax systems.

The rules on State aid form part of the overall competition objectives of the European Union, as highlighted by the TFEU, which assigns exclusive competence regarding the establishment of competition rules necessary for the functioning of the internal market to the European Union.

Competition policy is an instrument used to achieve the European Union’s objectives, including a high level of economic growth, prosperity, competitiveness and cohesion between Member States through the establishment of a common market.

The principal issue associated with State aid in the field of taxation is the conflict with the ongoing sovereignty of Member States over their tax systems. The interplay between tax sovereignty and State aid law results in a requirement for mutual consideration and balancing of the interests of national tax sovereignty versus the protection of the market against tax-induced distortions[24].

[24] Case C-501/00, *Spain v Commission*, par. 123. Advocate General Poiares Maduro named this a "*rule of double neutrality*". Accordingly, "*national tax rules must be neutral in regard to the exercise of the freedoms of movements (...).*

In the field of State aid, the European Commission, subject to review of the Court of Justice, is free to determine its own policy and does not depend on the Council for its implementation, as is the case for the adoption of secondary tax legislation. In order to avoid implementation by Member States of State aid that could distort competition, the EU Commission was granted the power to control and verify the compatibility of State measures to ensure the functioning of the internal market. As a result, the EU Commission has strong investigative and decision-making powers in a wide range of fields, including taxation.

Apart from the prerogatives granted to the EU Commission, the Court of Justice also plays an important role in the evolution of tax action within the European Union. Indeed, the Court of Justice has, in many decisions, considered that the sovereignty of the Member States in tax matters does not justify national tax rules which result in the discrimination or unjustified restriction of cross-border activities covered by the fundamental freedoms of the EC Treaty. As a result, even though Member States benefit from fiscal autonomy in respect of direct taxation, their national tax measures have to comply with fundamental principles.

The Court of Justice of the European Union has consistently stated that the powers retained by the Member States, must nevertheless be exercised consistently with EU law. Those limits set by EU law on the Member States' taxing powers are essentially motivated by the objective of achieving the Internal Market and include (*i*) the prohibition of fiscal State aid, (*ii*) the freedom of movement and the principle of non-discrimination and (*iii*) the competence conferred by the Treaty to the Council to adopt secondary legislation aiming at the harmonization or the approximation of national tax laws.

Moreover, although the implementation of a tax measure is the responsibility of national authorities, it remains true that the exercise of such a power may, where appropriate, be incompatible with Article 107 of the TFEU[25].

However, although the Court clarified, early on in the decision process, that the concept of State aid could potentially encompass tax measures, it took a long time before the Commission started to use its powers to monitor Members States' tax rules, and even longer to consolidate its practice and develop a fiscal State aid policy. In the State aid field, it has only been in the past 20 years that European authorities have adopted a new approach to fiscal State aid. Tax measures, in fact, have not always been subject to the strict scrutiny that began in the late 1980s.

The reluctance of reducing the application of State aid to tax matters, however, changed with a new political approach by European authorities. This new approach sought to harmonize the Member States' tax rules, fight unfair methods of tax competition amongst Member States and remove tax

On the other hand, the exercise of the freedoms of movements must be as neutral as possible in regard to the tax arrangements adopted by the Member State".

[25] Case C-156/98, *Federal Republic of Germany v Commission of the European Community*.

obstacles to the functioning of the internal market and it has translated into a growing and increasingly incisive European impact on the fight against harmful tax practices.

In the meantime, at international level, the Organization for Economic Cooperation and Development (hereinafter, OECD) published a report in 1998 entitled Harmful Tax Competition – An Emerging Global Issue, which reaffirmed the importance of fighting harmful tax competition due to the interaction between the States' tax systems. This asset resulted in the adoption of several European resolutions, as well as case law supporting competition in the internal market. The bottom line was that, due to political pressure from certain Member States, fiscal distortions within the European Union that result in excessive loss of tax revenue with regard to business taxation, the taxation of savings income and the existence of withholding taxes on cross-border interest, as well as royalty payments between companies, should be abrogated.

The intention of European authorities was, basically, to interfere with national tax measures by applying the fundamental freedoms.

In December 1997, the Ecofin Council adopted the Code of Conduct on Business Taxation (the Code), which encouraged the EU Commission to issue guidelines on State aid rules on business taxation and commit to the strict application of the aid rules. Moreover, the Code provided for coordinated action by all Member States to remove harmful tax competition within the European Union so as to improve tax transparency through a system of information exchange between Member States and assessments of any tax measures covered by the Code.

Although the Code was a non-binding agreement, it clearly had political force. Member States undertook to roll back existing tax measures that constituted harmful tax competition and refrain from introducing any future measures that could distort the Single Market. Moreover, according to paragraph J of the Code, the EU Commission made a commitment to issue guidelines on State aid rules. As such: "*fight against harmful tax or unfair tax was aimed not only at a more effective use of State aid law but also at general tax measures which lure foreign capital and other investment away from their source country, by offering tax rates or tax bases or an administrative practice which did not reflect the true balance of taxes and public services of the poaching Member State*".

Although monitoring State aid and tackling harmful tax competition both have the same goal, i.e. reducing distortions of competition within the internal market, the procedure for examining tax schemes, from the viewpoint of State aid, is distinct from work in connection with the Code. In fact, the qualification of a tax measure as harmful will not necessarily affect its possible qualification as State aid. At the same time, it was clearly stated that the tax systems in Member States should not contain harmful tax measure but also had to be in line with State aid rules. It was even stated that

some of the tax measures covered by the EU Code of Conduct could fall within the scope of the State aid provisions.

Further to the Code and a communication in October 1997, the Commission undertook to draw up guidelines on the application of Articles 87 and 88 of the EC Treaty to measures relating to direct business taxation and committed itself to the strict application of the aid rules concerned[26]. This is considered the starting point of a new EU State aid policy on business taxation, which clarified and reinforced its application and its incidence. The well-known phenomenon of intra-EU tax competition has been going on for decades, triggering EU reactions such as the adoption of the Code of Conduct and the application of State aid rules to selective tax regimes[27].

Within the European Union, the European Commission play a relevant and active role in the reaffirmation the OECD's project on BEPS[28], releasing several new legislative proposals and deciding to start to combat certain international tax planning strategies on the basis of the EU State aid rules.

The OECD countries define harmful tax competition in part by reference to deviations from a domestic-law reference base, and the Commission was inspired by the OECD when it announced that its own tax-expenditure approach would use a reference-law benchmark. Maintaining conformity between the EU State aid standard and the OECD harmful tax-practices standard has two advantages: on the one hand, it prevents the EU from becoming a relatively unattractive target for investment because its tax competition rules are stricter than those of other States, and, on the other hand, it makes non-European States that have signed on to the international consensus standards, but not State aid enforcement, more likely to accept the results of State aid investigations.

According to OECD Report on *Harmful Tax Competition: an emerging global issue*[29], a series of harmful effects tax measures can have exist and are: "*distorting financial and, indirectly, real investment flows; undermining the integrity and fairness of tax structures; discouraging compliance by all taxpayers; re-shaping the desired level and mix of taxes and public spending; causing undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property and consumption; and increasing the administrative costs and compliance burdens on tax authorities and taxpayers*".

[26] Commission Notice on the Application of the State Aid rules to measures relating to Direct Business Taxation, 98/C 348/03, 3, point 1.

[27] TRAVERSA E., *Ongoing Tax Reforms at the EU Level: Why trust matters*, in *Intertax*, 3, 2019, 244.

[28] In 2013, the Organization for Economic Cooperation and Development (OECD) launched the project on Base Erosion and Profit Shifting (BEPS) with the object to create one single set of consensus-based, international tax rules to protect tax base of countries. The BEPS package was finalized in 2015 and contains fifteen Actions that should provide governments the domestic and international instruments.

[29] OECD, *Harmful Tax Competition: an emerging global issue*, 1998.

The OECD and European Union have identified several key factors in considering a regime to be harmful. In particular, the OECD has postulated five key factors and seven additional factors in identifying harmful tax practices. The key factors are: (*i*) the system imposes a low or zero effective tax rate on the relevant income; (*ii*) the regime is ring-fenced; (*iii*) the lack of transparency in the operation of a regime, which makes it harder for home countries to adopt defensive measures; (*iv*) the lack of effective exchange of information, which is evidenced by the failure to notify foreign tax authorities of a regime granted to its taxpayer; and (*v*) the granting of tax advantages without any real economic activity and substantial economic presence. The additional factors generally help to spell out some of the principles and assumptions that should be considered in applying the key factors themselves. These additional factors are: (*i*) an artificial definition of the tax base; (*ii*) a failure to follow international transfer pricing principles; (*iii*) foreign source income being exempted from residence country taxation; (*iv*) a negotiable tax rate or tax base; (*v*) the existence of secrecy provisions; (*vi*) access to a wide network of tax treaties; and (*vii*) promotion of the regime as a tax minimization vehicle.

According to the Commission, based on principles affirmed in the Code of Conduct, there are five criteria in identifying potentially harmful tax measures and they are as follows:

- the system applies an effective level of taxation that is considerably lower than the general level of taxation in the country concerned. This may arise because the schedule rate itself is very low or because of the way in which a country defines the tax base to which the rate is applied;
- tax advantages are granted only to non-residents or in respect of activities that are isolated from the domestic economy and, therefore, have no effect on the national tax base, as a consequence of which the country offering the system may bear little or none of the financial burden of its own preferential tax legislation and, similarly, taxpayers within the system may benefit from the infrastructure of the country providing the preferential system without bearing the cost incurred to provide that infrastructure;
- tax advantages are granted without any real economic activity and substantial economic presence. The absence of a requirement that the activity be substantial is important since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven. There should be an adequate link between real economic activity carried on by entities covered by the tax privilege at issue and the profits in respect of which that benefit is granted;
- the basis for profit determination for companies departs from internationally accepted rules, particularly those approved by the OECD; and
- there is a lack of transparency in the operation of a system and a lack of effective exchange of information, which makes it harder for home countries to adopt defensive measures. Non-

transparency is a broad concept that includes, among others, favourable application of laws and regulations, negotiable tax provisions (for instance through tax ruling) and a failure to make administrative practices widely available. A lack of exchange of information is evidenced by a failure to notify foreign tax authorities of a regime granted to its taxpayer. Even where there are no formal secrecy laws, administrative policies or practices may impede the exchange of information.

Focusing on what is relevant in our case, EU State aid rules, already in the past and especially recently with the Commission's decisions on tax rulings, were used by the European Commission as a tool to combat tax avoidance. The first wave of investigation in the Commission's momentum occurred at the end of the 1990s. While the Member States had endorsed the Code of Conduct in the area of business taxation, the Commission adopted its Notice on the Application of State Aid Rules to Measures Relating to Direct Business Taxation (so-called State Aid Business Tax Notice). It then launched several investigations against favourable tax measures adopted by Member States, mostly in order to attract foreign investment, many of them ending with a negative decision. A second wave started a few years ago and is still ongoing. Since 2013, the Commission, as it will be specified intended hereinafter, started investigating individual tax rulings obtained by multinational companies, mostly concerning the application of transfer pricing rules. These investigations seem to be in line with the modernization of State aid regulation, which was launched in 2012 to contribute to sustainable growth, as well as budgetary consolidation.

Finally, the European Commission, in its 2016 Notice on the notion of State aid[30], mentions that the provision of anti-abuse rules may be justified with measures to prevent tax avoidance by taxpayers: this implies that anti-tax avoidance rules may give rise to selectivity and that such rules may, but not necessarily by definition, be justified.

As it has been sometimes argued, it seems that the Commission is currently using its powers in the area of State aid as an instrument for carrying out not only a fiscal State aid policy, but a genuine tax policy through State aid control, as an alternative to traditional harmonization and coordination via secondary law instruments, which the Commission is unable to get through the Council due to the unanimity rule and the opposition of some of the Member States. This way fiscal harmonization in the field of direct taxation for corporations has failed in the last decade, as Member States perceive such harmonization as a restriction on their tax sovereignty[31].

It is undoubted that Member States are restricted to some extent in their choice how to design anti-tax avoidance measures under EU State aid rules, but it is currently at all unclear to which extent.

[30] Commission Notice on the notion of State aid as referred to in Art. 107 (1) TFEU, C/2016/2946, par. 183.

[31] LAMPREAVE P., *Harmful Tax Competition and fiscal State Aid: two sides of the same coin?,* in *European Taxation,* 5, 2019.

There is a broad doctrinal debate with regards to the relationship between measures to tackle unfair tax competition within the internal market and the EU State aid rules can be considered as similar tools used for the sole purpose of carrying out tax harmonization in the European Union. The main doctrine views State aid rules as "backdoor rules" to fight harmful tax competition[32]. In doing so, it is stated that the Commission is exceeding the power attributed to it by the Treaty on the Functioning of the European Union. The question, in this case, is whether anti-tax avoidance rules may be scrutinized under State aid rules as well and, in relation to this, whether this conduct is compatible with the economic freedoms included in the Treaty on the Functioning of the European Union (TFEU).

The recent evolution of State aid control as a tool in the fight against harmful tax competition has to be understood in the light of the extremely plastic nature of the State aid concept, which leaves the Commission and the Court broad powers of interpretation as to its ultimate meaning and extent. As we will see, over the last decade, the Commission has extended the concept of 'selectivity' of fiscal measures far beyond what some might have expected, despite the notion of harmful tax measures developed in the Code of Conduct.

3. The methodology of State Aid review of tax measures

State aid can be defined as an economic or financial advantage, conferred directly or indirectly on a selective basis to companies by national public authorities. A company that receives support, either through subsidies or tax incentives (i.e. public resources) obtains an advantage over its national and European competitors that it would not have had under normal circumstances[33].

Fiscal State aid typically is granted in the form of negative aid, i.e. by means of an indirect grant of aid trough the tax system. Therefore, in order to determine whether a tax measure may constitute an economic advantage, it must be established whether the resulting tax burden is lower than that which similar undertakings would be liable to pay.

In general, a tax measure constitutes State aid when the following four criteria are met. To fall under Article 107 (1) TFEU, a Member State must grant an advantage, out of State resources to a particular undertaking[34] on a selective basis and this advantage distort or threatens to distort competition and affects trade.

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[32] TRAVERSA E., FLAMINI A., *Fighting Harmful Tax competition through EU States Aid Law: Will the hardening of Soft law suffice?*, in *EStAL*, 3, 2015, 323.

[33] FORT E., *EU State Aid and Tax: An evolutionary approach*, in *European Taxation*, 9, 2017, 374.

[34] The prohibition of State aid applies only when the beneficiary, regardless of its legal form of organization or means of being financed, is engaged in economic activities. An economic activity, in this regard, is any activity consisting in offering goods and services on a given market. The notion of undertakings in Art. 107 (1) TFEU must be interpreted

First of all, the measure must be granted by a Member State or financed through State resources: the granting of an advantage directly or indirectly through State resources, and the imputability of such a measure to the State, are two separate and cumulative conditions for State aid to exist[35]. As tax measures are usually issued by the tax authorities of a relevant State, determining whether or not the measure stems from state intervention should be straightforward. With regards to a transfer of State resources, a decision to grant a certain tax advantage will always result in a loss of tax revenue for the State. Such a shortfall in tax will ipso facto be considered a transfer of State resources pursuant to Article 107 of the TFEU, being equivalent to the consumption of State resources in the form of a fiscal expenditure.

Second, there must be an advantage to the recipient. This condition not only governs positive benefits, such as subsidies, but also carries advantage in the form of a reduction in the tax burden of a taxpayer and therefore mitigates those charges normally included in the budget of an undertaking. Moreover, an economic advantage is characterized by the fact that a private undertaking could not have received the aid under normal conditions in the market without intervention by the State. It includes any kind of advantage of a monetary nature, either granted by the State (for example, subsidies or loans) or owed to the State but not collected (for example, taxes and social security payments), such as, for example, in case of a reduction in the tax base (such as special deductions, special or accelerated depreciation); a total or partial reduction in the amount of tax (such as tax exemption or a tax credit); deferment of tax collection, cancellation or special rescheduling of tax debt. The form of the advantage would not be relevant in determining whether or not it confers an economic advantage on the beneficiary undertaking. Only the effect of the measure granted by the State would be relevant, not the cause or objective of the State intervention.

Third, the measure must be granted on a selective basis. A tax measure is selective if it deviates from the common tax system applied by a Member State. In order for a tax measure to confer a selective advantage, it must favour certain undertakings compared with others which are in a comparable legal and factual situation in the light of the objectives of the tax system in question.

Finally, the advantage is liable to affect trade between Member States and might distorts or threatens to distort competition.

The selectivity element, as well as its application in combination with the condition of advantage, is probably the most challenging and difficult requirement and, as such, deserves special attention.

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accordingly. See MILADINOVIC A., *The State Aid Provisions of the TFEU in Tax Matters*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 113.

[35] Case C-379/98, *Preussen Elektra*, par. 58-62.

3.1. State Aid criteria: selectivity and advantage

In matters of direct taxation, given the absence of harmonization, Member States are, in principle, free to design their tax measures. However, when those measures grant a tax benefit, State aid rules do apply. As seen, the absence of harmonization in direct taxation effectively creates a large scope for the application of the State aid rules and thus explains the crucial importance of finding the right answer to the question when a tax measure is an aid or not. This absence also explains the recurring discussions in this context about tax sovereignty and State aid rules.

As we will see below, recent developments in the jurisprudence indicate a tendency for the criterion of advantage not to be clearly distinguishable from the selectivity criterion. From 2016[36] onwards, the Court began to make a reference to the selectivity condition in combination with the condition of advantage, referring in particular to a "*selective advantage*" as a constituent element for a finding of aid. This create significant confusion with respect to the distinction between the concept of advantage and the criterion of selectivity within the framework of Article 107 (1) TFEU and its application to tax law[37]. These are different elements of Article 107: the granting of an advantage has to be distinguished from the selectivity of the measure. At the same time, both concepts require a comparison: to identify an advantage one has to compare the situation of the recipient with the situation of other market players; to identify selectivity one has to compare certain undertakings and goods with others undertakings and goods.

The combination of the conditions of selectivity and advantage demonstrates the proximity of those two requirements mostly in the field of fiscal aid.

On the one hand, the Court highlighted that selectivity must be distinguished from the detention of an economic advantage[38], in order to clarify that not all State measures that confer an advantage constitute State aid, but only measures which grant such an advantage in a selective manner to certain undertakings[39].

Although the Court insists, in several occasions, on keeping the conditions of selectivity and advantage distinct, it has not been maintained a rigorous separation between those conditions when examining fiscal measures under State aid rules[40]. In this sense, for example, the Court held that, in order to decide whether a measure confers an advantage to its beneficiary, it is necessary to compare

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[36] Case C-524/14, *Commission v Hansestad Lubeck*, par. 40.

[37] NICOLAIDES P., *Fiscal State Aid in the EU: the limits of Tax Autonomy*, in *World Competition*, 27, 2004, 792.

[38] Case C-15/14, *Commission v MOL*, par. 59.

[39] Case C-20/15 and C-21/15, *Commission v World Duty Free Group*, par. 56; Case C-6/12, *Oy*, par. 18.

[40] In fact, the Court has repeated that the identification of the reference framework, i.e. the benchmark for establishing selectivity, is of particular importance in the case of tax measure since the very existence of an advantage may be established only when compared with "normal taxation". See Case C-88/903, *Portugal v Commission*, par. 51.

that measure with the ordinary or tax system. The tax treatment of other undertakings under the ordinary tax system is therefore compared with the result of the measure with the tax treatment of the beneficiaries through a selectivity assessment.

Moreover, the recent Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU explicitly separates the two tests from each other.

The joint examination by the Court of Justice of these two criteria clearly emerges from the analysis of three of the more famous cases in the area of State aid: *Presidente del Consiglio dei Ministri v Regione Sardegna*[41], *Paint Graphos*[42] and *Commission and Spain v Government of Gibraltar and United Kingdom*[43]. These cases clearly show that in assessing whether a tax measure constitutes a prohibited State aid, there is not only a close connection between the criteria of financing from State resources, given advantage and selectivity, but that they even merge with each other and eventually they can be exchanged arbitrarily[44]. Moreover, different treatment of different taxpayers was considered to be an advantage without any further examination. While it was recognised that a detection of an economic advantage could create a rebuttable presumption of selectivity, it is evident that this presumption has many risks, especially if it applies in cases of direct taxation.

There are several reasons for a dubious legitimacy of this presumption. Firstly, as recognised by the Court, economic advantage and selectivity are two separate conditions, which require separate analysis. Secondly, Member States have explicit sovereignty in relation to direct taxation. Thirdly, in matters of tax law, in particular, the decisive criterion is whether a provision is selective because the other conditions laid down in Article 107 (1) TFEU are almost always satisfied. Thus, by presuming in tax cases that an advantage leads to selectivity, effectively reduces the first two steps of the analysis to assess whether the arm's length principle has been applied correctly[45]. The strong similarities between the advantage test and the selectivity test manifest also on other aspects. Both distinguish between one group of taxpayers enjoying a tax benefit and another group of taxpayers subject to reference treatment. Both tests involve the necessity to identify a benchmark defining the foil against which forbidden State aid can be ascertained.

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[41] Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna*.

[42] Joined Cases C-78/08 to C-80/08, *Paint Graphos and others*.

[43] Joined Cases C-106/09 and C-107/09, *Commission and Spain v Government of Gibraltar and United Kingdom*.

[44] AG Kokott, Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna*: "*renunciation of tax revenue by confining the tax liability to non-residents was sufficient for the presumption that finance is provided by the State or through State resources for the purposes of Article 87 (1) EC*".

[45] GORMSEN L., *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, in *Journal of European Competition Law & Practice*, 7, 2016, 375.

There is no doubt about the significant confusion with respect to the distinction between the concept of advantage and the criterion of selectivity within the framework of Article 107 (1) TFEU and its application to tax law[46].

In the field of taxation, this has led to the establishment of two apparently distinct tests: on the one hand, in order to identify a tax advantage one has to inquire whether the taxpayer is relieved of charges normally included in the budget of an undertaking; on the other hand, in order to find selectivity one has to identify a system of reference and to determine whether a given measure constitutes a derogation from that system[47].

Both the notion of advantage and the notion of selectivity therefore seem to look for a benchmark or a reference system which enables the Commission and the Courts to establish a normal level of taxation and to assess the exceptional nature of the measure in question.

This confusion between advantage and selectivity is also clearly visible in the test applied by the Court to tax benefits since its judgment in *Adria-Wien Pipeline*[48]: the only question to be determined is whether, under a statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods in comparison with other undertakings which are comparable in a legal and factual situation in light of the objective pursued by the measure in question. According to the case-law of the Court, a measure which, although conferring an advantage to its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity.

Bearing in mind this conceptual confusion between the two criteria mentioned in the cited jurisprudence, it is considered necessary to examine, severally, the notions of advantage and selectivity.

The concept of "advantage" refers to the financial benefit that accrues to the enterprise on account of the State's action. State aid delivered through the tax system is, basically, tax savings, delivered through deductions, exemptions, credits, deferral, or cancellation or rescheduling of tax debts, and the like. An advantage in the form of tax incentives is not excluded from the scope of Article 107 of the TFEU. Although both tax legislation and the implementation of tax arrangements are matters for

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[46] NICOLAIDES P., *Fiscal State Aid in the EU: the limits of Tax Autonomy*, in *World Competition*, 27, 2004, 792.

[47] See SCHÖN, *State Aid in the area of taxation*, in HANCHER L., OTTERVANGER T., SLOT P., *EU State Aid*, Sweet & Maxwell, London, 2016, 407.

[48] Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*, par. 41. This case is of interest because it developed the earlier case-law and shed light on the comparison which should be drawn between groups of undertakings "in the light of the objective pursued by the measure in question". In addition, it offers an example of a standalone measure (i.e., an environmental tax not being part of a wider system of taxation, such as the corporation tax), where the Court could not draw an external comparison based on the general corporation tax system, since the measure was not part of the general corporation tax system.

national authorities, the exercise of that competence might, in certain instances, prove incompatible with the TFEU.

As contemplated by both the EU Commission and the Court of Justice, the granting of a tax advantage reducing the overall tax liability of a company can be accomplished through: a reduction in the tax base by modifying the standard method of tax computation (for example, special deductions, special or accelerated depreciation arrangements and, notional methods of calculation of the tax base, such as the cost-plus method); a total or partial reduction in the amount of tax (for example, a tax exemption or credit) resulting in a lower effective tax burden of the taxpayer company; a deferment of the collection of taxes due by the company, cancellation or even special rescheduling of tax debt further to negotiations with the tax authorities (for example, a lack of administrative measures to recover taxes, ineffective action by the tax authorities and the cancellation of taxes). Consequently, a measure allowing certain undertakings a reduction in their tax payable, or a postponement of payment of taxes normally due could trigger a finding of State aid.

To determine if a fiscal advantage exists, a comparison with the "normal" tax system applicable to the undertakings will have to be made. To classify a tax measure as advantageous, however, such a comparison with an EU standard (i.e. elaborated autonomously by EU authorities regardless of a Member State's policy) would not be possible, as that would interfere with EU sovereignty. In addition, as Member States still have fiscal sovereignty in direct taxation matters, it would not be possible to "*assess the existence of an advantage allegedly caused by a direct tax measure of one of the Member States with reference to the abstract notion of what a direct tax system ought to look like*" [49]. The comparison will thus be based on the tax system of the respective Member State in which the beneficiary of the advantage is established, in light of the objective pursued by that advantage. In this respect, the only benchmark available to the EU Commission and the Court of Justice to evaluate a tax measure as advantageous would be the general tax system in effect in a specific State[50].

While this practice seemed to be well-established, the European Commission, in recent State aid decisions[51], as we will see extensively below, appears to have departed from this practice, now considering that a tax measure would qualify as an advantage if it constitutes a derogation from the tax standard as determined by the EU Commission itself. Under this new approach, it appears that the EU Commission is now analysing the tax measure based on its own standards and not the general tax

[49] ENGELEN F., GUNN A., *State aid: Towards a Theoretical Assessment Framework*, in RUST A., MICHEAU C., *State Aid and Tax Law*, Kluwer Law International, New York, 2013, 140.

[50] Such a position was also confirmed in the Advocate General's Opinion in *Gibraltar* (Joined Cases C-106/09 and C-107/09), recalling that there is no default tax system under EU law and that the reference framework must be the national framework, understood in light of the objectives pursued by the national legislator.

[51] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg and Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands.

system applicable in the Member State under scrutiny. This new approach seems, in essence, to boil down to whether or not the EU Commission approves of a tax measure as applied to a specific structure, and whether it believes it to be in line with its own tax principles. Also, with reference to this aspect, the issue arises whether the EU Commission is implicitly expanding its role beyond its legal prerogatives by acting as a supranational tax authority that reviews Member States' tax measures.

With regards to the criterion of selectivity, it can be stated, in general, that in order to be identified as prohibited State aid, a tax measure must be selective, i.e. granted to specific undertakings or benefiting certain types of production. When examining tax provisions to determine their State aid applicability, selectivity is of central importance[52]. The meaning of this notion is also decisive for the 'political leeway' of Member States in designing their own domestic tax legislation.

The complexities of selectivity raise sensitive issues when applied to taxation, especially considering the tax measure should be identified as an exception departing from a general tax benchmark[53]. A tax incentive is therefore considered to be selective if it is limited to certain taxpayers or categories of taxpayers based on common features and at the same time excludes other taxpayers that are legally and factually comparable in respect to the object of the tax concerned.

The objective of the selectivity criterion is therefore to determine whether a tax measure is available to all undertakings or productions of goods, or whether the tax measure only applies to some undertakings or productions, at the cost of others. This involves an evaluation of the 'general tax system' in which the measure applies, which will be treated as the 'benchmark' which the measure will be assessed against, a procedure which raises challenging issues in application. Tax measures will almost always be defined in a generalized manner within legislation, which places a responsibility on the taxpayer to arrange their affairs to meet the legislative requirements[54].

Therefore, assessing the selectivity of a particular tax measure requires a 'dividing line' between general and specific tax measures. There is little evidence provided by the Court of Justice to support what is meant by a 'general tax measure', which would subsequently fall outside of the scope of Article 107, and it has largely been left to the literature to deduce a dividing line between general and selective tax measures. It is apparent, however, that a derogation from a general system does not always come within the scope of State aid, as long as it is 'broad enough'.

Despite the absence of an explicit definition of 'general tax measure', it can be agreeably believed that the selectivity criterion excludes any generally-abstract measures of the State from the scope of

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[52] LANG M., *Tax Rulings and State Aid Law,* in *British Tax Review*, 2015, 393.

[53] MICHEAU, C., *State Aid, Subsidy and Tax Incentives Under EU and WTO Law*, Kluwer Law International, 2014, 219.

[54] FORRESTER E., *Is the State Aid Regime a suitable instrument to be used in the fight against harmful tax competition*, in *European Taxation*, 1, 2017, 26.

the State aid prohibition and restricts that scope to measures involving individual or at least identifiable advantages. This is particularly true for tax provisions *sensu stricto*, which are usually generally-abstract worded, but which at the same time necessarily involve differentiations regarding the actual distribution of the overall tax burden among taxpayers[55].

It is therefore necessary, first of all, to determine whether a measure is of general application or, on the contrary, it applies only to certain groups of undertakings or certain sector of economy in a given Member States that are comparable to other undertakings.

In case of taxes, a mere focus on the differentiations involved in a tax would necessarily render any given tax provision selective for the purpose of State aid, since a tax striving for equality can typically not restrict itself to an equal taxation of all taxpayers.

In this sense, selectivity could exist as soon as there is discrimination, i.e. the application of a different tax treatment to identical situations. In this respect, selectivity is considered an exception to the general system applicable to all economic actors, and its test is best characterized as a principle of equality test (i.e. a determination of whether or not the undertakings subject to different tax treatment are deemed to be in a legally and factually comparable situation). The notion of discrimination contained in the condition of selectivity is expressed in the fact that State aid assessment only considers whether a Member State has taxed a company in the same manner as a similarly situated company subject to the same tax in that tax jurisdiction.

The Court's wide interpretations of selective character may considerably limit Member States' rights to freely decide the type and extent of taxes and charges collected (tax autonomy). According to this jurisprudence, only tax norms that include all undertakings of a Member State without differentiation according to tax subject and tax object would not be selective. By contrast, any tax intrinsic differentiation would prima facie have to be regarded as State aid. The Court of Justice, in fact, equate the selectivity to that of establishing discrimination, namely whether a measure discriminates in favour of its beneficiary as compared to undertakings in a comparable factual and legal situation[56].

The evaluation of selectivity, according to the Court, consists in determining whether undertakings enjoy an advantage with regards to comparable undertakings and, if they do, whether that differentiated treatment can be justified by the nature or logic of system of which the measure forms

[55] Only two exception apply to that markedly wide interpretation of the selectivity criterion. Both were developed for the area of taxation. The first exception serves the purpose to come up with a workable selectivity assessment specifically for taxes. Under that test, limitations to the circle of addressees of a tax provision are not deemed as selective if they result from the nature, the inner structure or inherent logic of the tax system (system immanence test). The second exception applies to the territorial selectivity dimension. Here, is excluded a component of the system immanence assessment (case of true regional tax autonomy) from selectivity (*Azores*-test).

[56] Case C-20/15 and C-21/15, *Commission v World Duty Free Group*, par. 54.

a part. Referring to this aspect, it has been proposed to reduce the examination of fiscal State aid to a mere "discrimination" test.[57]

The core issue shall be whether two groups of taxpayers who are in a comparable factual and legal situation are treated differently without any visible justification. The sometimes aporetic quest for a reference system under national tax legislation should be abandoned and replaced by a rule-of-reason examination of existing differentials. Such a non-discrimination test would also lead to an alignment with the theory behind other tax-relevant provisions of the Treaties like the non-discrimination and non-protection clauses in Art. 110 TFEU and the way the fundamental freedoms are brought to bear in the context of taxation[58].

In the selectivity analysis, it is necessary, also, to make a distinction between individual aid measures and aid schemes. With regard to individual aid measures, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective[59]. It is, in fact, not necessary for the Commission to determine whether other undertakings are in comparable factual and legal situations to the beneficiary of the measure to establish selectivity. It is a burden of the Member State that adopted the measure to demonstrate that all comparable companies can benefit from a similar advantage[60]. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity or whether it is generally available to all undertakings in a comparable situation.

According to Article 1 of Regulation EU 2015/1589, an aid scheme is any act on the basis of which, without further implementing measures being required, individual aid awards may be conferred to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid, which is not linked to a specific project, may be awarded to one or several undertakings for an indefinite period of time or for an indefinite amount.

In addition to the question related to the notion of selective tax preference as opposed to general tax policy measure and the distinction between individual aid and aid scheme, another issue is specific to the methodology of State aid review of tax measures in itself. It relates to the interplay between the legitimate prerogatives of Member States in the area of direct taxation and their obligation not to set into effect State aid without prior authorization from the Commission. On this jurisdictional point, the system of State aid review likens a scheme for advance rulings, which is also typical in certain tax legislations to manage fiscal benefits or waiving the application of anti-avoidance rules. Under

[57] Opinion of Advocate General Kokotte in Case C-66/14, *Finanzamt Linz*, par. 88.
[58] Opinion of Advocate General Kokotte in Case C-66/14, *Finanzamt Linz*, par. 103.
[59] Case C-15/14, *Commission v MOL*, par. 60; Case C-270/15, *Kingdom of Belgium v Commission*, par. 49.
[60] Case C-15/14, *Commission v MOL*, par. 60.

the ordinary review procedure for new aid, Article 108 (3) TFEU requires Member States to notify the Commission of any plan to grant State aid, which also applies to tax aid. However, a Member State can notify a tax measure to the Commission also for reasons of legal certainty in order to obtain a formal exclusion of the measure from State aid.

Moreover, it is necessary to underline that selectivity is above all about making a comparison between groups of undertakings. In this context, there are logically only two ways of creating different groups. The first one consists in making a de jure exception to a rule which applies to all in favour of some. The new tax measure creates a new and smaller group, which receives an economic advantage in comparison to the group of which it originally took part, i.e. the reference group. Second, such separate groups can be identified where the tax measure does not apply in effect to all undertakings in the same way, although it is addressed in principle to all undertakings without distinction. In that instance, the comparison is not drawn based on a reference group outside the scope of the tax measure (external comparison), but between all undertakings which fall within the scope of the measure (internal comparison). In the latter situation, one could say that the reference framework is the measure itself. The conclusion must therefore be that in theory both external and internal comparison are based on logic and are valid as such. In other words, they are not mutually exclusive in the sense that they address different situations. In practice, external comparison is relevant in most cases, since the majority of direct tax measures are derived from a more general rule (i.e., taxation of corporate income). Internal comparison remains nonetheless, relevant when no reference system is available.

As an additional remark, the groups need to be comparable, which means that one should identify the appropriate reference framework, or, as stated by the case-law, they should be in a comparable legal and factual situation in light of the objective of the 'measure' or 'system'. In order to be comparable, the measure should be part of the same tax system, i.e., they must have a common tax base (taxation of profits or taxation of property, etc.). This implies the existence of different reference systems which are determined by their respective tax bases.

Considering these introductory comments, the following paragraph addresses the analysis of the test developed by the Court of Justice for assessing the selectivity of tax measures.

There is currently no comprehensive theoretical framework, to the effect of enabling the Commission and the Court of Justice to solve specific cases by applying commonly accepted general principles[61].

The Court of Justice has only recently begun to analyse the notion of selectivity in relation to tax measures. We can indicate the beginning of this analysis in 2013, when the Commission began

[61] See MEROLA M., *The Rebus of selectivity in Fiscal Aid: a nonconformist view on and beyond case law*, in *World Competition*, 2016, 39.

adopting more State aid decisions in the field of direct taxation[62]. From the landmark *Italian Textile case* of 1974 to *Paint Graphos* in 2011, the Court of Justice has developed its approach for assessing the selectivity of a tax measure, leading to what can be described as a three-step approach. In that case the Court of Justice has laid down the principle that a derogation or the exemption of undertakings belonging to a certain sector from the financial charges arising from the normal application of a general social-security system constitutes a selective advantage which can only be justified on the basis of the nature or general scheme of the system. Over the last decade, the case-law has developed its stance for defining the possible departure of the measure from the tax system by drawing internal and external comparisons.

This situation has led to much debate. Some commentators suggest that European approach and, especially, the three-step analysis developed by the Court of Justice cannot work and suggest looking for alternatives. The application of this approach is indeed not without problems: the central issue, with regards to material selectivity, lies in the question of what the appropriate reference framework would be and assess the tax measure under examination against the same.

3.2. The three-step test: reference system, derogation and justification

As we know, selectivity involves determining if a tax measure favours certain undertakings or production of goods with respects to others[63]. When analysing a fiscal measure to establish if it entails State aid, selectivity is quite often the most problematic aspect, because the selectivity test involves the analysis of several aspects, essentially including a question of discrimination and comparability[64]. The identification of the most appropriate methods for determining the existence of the condition of selectivity with regards to a tax measure has had a difficult and tortuous path. At first, the earlier case law of the Court of Justice created a distinction between two approaches on the matter of selective advantage in State aid cases, the so-called “derogation” and “comparability” approaches. In the first case the focus is therefore on the existence of a default rule and an exception to it, while in the latter, on a difference in treatment of comparable undertakings. In the subsequent case law, there was a convergence of these two approaches into one test, consisting of the following steps: identifying what the default rule is (what is normal) and the comparable undertakings in light of the objectives of that

[62] Commission decision of 12 January 2011 on the Spanish rules on the amortization of goodwill, 2011/282/EU; Commission decision of 27 July 2013, 2014/200/EU and Commission decision of 26 January 2011 on the loss carry forward rules in Germany, 2011/527/EU.

[63] See SHON W., *State Aid in the area of taxation*, HANCHER L., OTTERVANGER T., SLOT P., *EU State Aid*, Sweet & Maxwell, London, 2016.

[64] M.LANG, *Selectivity ad a Criterion to determine whether a tax measure constitutes a State aid*, in *Legal Remedies in European Tax La*w, P. PISTONE, IBDF, Amsterdam, 2009.

rule, and whether only a part of the pool of comparable undertakings is treated more favourably by a derogation from the default rule.

Among the different test existing in order to establish selectivity in relation to tax measures[65], the approach most commonly applied by the Court consists in the three-step approach to establish the selectivity of general fiscal scheme.

The three-step approach has been developed by the Court in its jurisprudence, since in 1974 landmark judgement *Italian textiles*[66] and later included in the 1998 Commission Notice on the application of the State aid rules to measures relating to direct business taxation. In order to assess the material selectivity of measures mitigating the normal taxation of undertakings, the Court of Justice has developed this process: "*to classify a domestic tax measure as 'selective', it is necessary to begin by identifying the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation*"[67].

This test comes into play when it is necessary to analyse fiscal measures applicable to undertakings fulfilling specific criteria, which reduce the charges that those undertakings would normally have to beat. In particular, that test is used to establish if a fiscal measure is materially selective.

After the adoption of the Notice of 1998, however, the focus of the three-test has changed. The Court, in fact, shifted emphasis away from looking at the derogation, as it had done in 1974 (also referred to a derogation approach) to looking at an unequal treatment between companies in a factual and legally comparable situation (also referred to as a comparison test).

That shift culminated with the Gibraltar corporate tax judgement[68] where the Court held that in certain circumstances there was no need for applying the three-step test by the book and to rely on a formalistic derogation as long as the measure was designed to have the effect of relieving a certain group of companies from being taxed on their corporate profits.

Despite the fluctuating and diversified application on a case by case basis, it can be said that the selectivity assessment conducted by means of a three-step test is substantiated in: (*i*) the identification

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[65] The other approaches are the two-step approach and the general availability approach.

[66] Case C-173-73, *Italian Republic v Commission*.

[67] Joined Cases C-78/08 and C-80/08, *Paint Graphos*, par. 45; Joined Cases T-211/04 and T-215/04, *Government of Gibraltar and United Kingdom v Commission*, par. 146.

[68] Joined Cases C-106/09 and C-107/09, *Commission and Spain v Gibraltar and United Kingdom.* ROSSI-MACCANICO P., *The Gibraltar Judgment and the Point on Selectivity in Fiscal Aids,* in *EC Tax Rev*, 18, 2009.

of the reference system, which constitutes the framework against which the selectivity of a measure is assessed; (*ii*) the assessment as to whether the measure at stake derogates from the reference system, as identified under the first step and (*iii*) assessment as to whether the selectivity of the measure can be justified.

It is useful to proceed step by step in the analysis of each evaluation phase. The first step consists in identifying the normal tax regime applicable in the Member State against which the scheme is to be assessed (i.e., the reference framework). The reference framework is the benchmark to establishing whether a measure discriminates in favour of its beneficiaries as compared to similar undertakings. This aspect is of crucial importance for the assessment of selectivity[69]. Considering the fiscal sovereignty of the Member States in devising their tax systems, the identification of the reference framework should be the focal point of any State aid assessment into national tax measures. Where a particular tax measure provides for a clear exception to a general rule, the identification of the reference framework should be rather straightforward. Identifying what the general rule and what the derogation is, is decisive, but the Court's case-law remains silent on how the relevant reference system ought to be determined.

In fact, the Court has only explained that the reference system is the common on normal tax regime applicable in the Member State concerned[70]. The one clear stance the Court has taken is that the identification of the reference system should not depend on the regulatory technique used by Member States. A Member State cannot evade the application of the State aid rules simply by designing a tax system that does not formally provide for an exemption from a general rule, but in fact discriminates between two comparable undertakings[71].

Beyond this reasoning, the Court's guidance on how to identify the reference framework lacked effective clarity and consistency[72]. The selectivity assessment must therefore start the identification of the appropriate reference framework, which in many cases is far from easy[73]. First, the normal/ordinary tax regime (the reference framework) in the Member States concerned has to be identified, in order to serve as a benchmark for establishing whether the measure under scrutiny is

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[69] Opinion of Advocate General Whal in Case C-203/16, *Andres v Commission*, par. 99.

[70] Opinion of Advocate General Whal in Case C-203/16, *Andres v Commission*, par. 100.

[71] In *Gibraltar* case, the measure under assessment was a new corporate income tax regime adopted by Gibraltar according to which companies were taxed on the number of persons employed in Gibraltar (a payroll tax) and the occupation of business property in Gibraltar (a property tax). The Court held that the fact that offshore companies are not taxed under the regime is an "inevitable consequence" of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform. See Case C-106/09 P and C-107/09 P, *Commission v Government of Gibraltar and United Kingdom*, par. 106.

[72] LOEWENTHAL P., *Fiscal Selectivity*, in V.V. A.A., *New Perspective on Fiscal State Aid*, Kluwer Law International, New York, 2019, 29.

[73] TRAVERSA E., *State aid and taxation: can anti-avoidance provision be selective?*, *EStAL* 2014, 516.

selective. The only benchmark form which a tax measure can be identified as a State aid is the general system which has been established by the Member State itself.

Theoretically Member States are free to set their own national and international tax rules as long as they comply with the underlying structure of their tax regime, although, for example, favourable deviations from OECD standards on transfer pricing have been attacked broadly in recent years by the Commission.

The reference system is composed of a consistent set of rules that generally apply on the basis of objective criteria, to all undertakings falling within its scope as defined by its objectives and includes such elements as the tax base, taxable persons, taxable events and the tax rates. As Article 107 (1) of the TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects, the mere objective pursued by State measures is not sufficient to exclude those measures outright from aid classification for the purposes of Article 107 (1) of the TFEU. Nevertheless, it also follows from the Gibraltar decision of the Court of Justice[74], that a measure can be selective if it does not derogate from the reference system, but is an integrated part thereof, i.e. if it can be established that the general system itself favours certain operators over others, although they are both in a comparable legal and factual situation, in light of the objective pursued by the system.

In exceptional cases, the "reference system" itself has been designed to favour certain companies that are in a comparable situation with regards to the underlying logic of the system in question.

The Court of Justice has held that the determination of the reference system has particular importance in respect of tax measures as the existence of an advantage can only be established by comparing the actual taxation of an undertaking to normal taxation[75]. The "normal" tax rate is the rate applicable in the geographical area constituting the reference framework. The reference system need not necessarily be defined within the limits of the Member State concerned, as it might be that an intra-state body is sufficiently autonomous in relation to the central government of a Member State to determine the political and economic environment in which undertakings operate. Nevertheless, when it comes to corporate taxation, generally, the reference framework is the set of rules that is used to determine the tax base applicable in the geographical area that is controlled by a Member State.

Due to the complexity of national corporate tax systems, the identification of the reference framework often proves very difficult. National taxes tend to be complex systems, where to a certain degree, coherence may nevertheless be found in the simultaneous application of apparently distinct tax provisions, which for this reason should not be treated in an isolated perspective. For example, it is

[74] Joined Cases C-106/09 and C-107/09, *Commission and Spain v Gibraltar and United Kingdom*.

[75] VERHAGEN H., *State Aid and Tax Rulings – An Assessment of the Selectivity Criterion of Article 107(1) of the TFEU in Relation to Recent Commission Transfer Pricing Decisions*, in *European Taxation*, 7, 2017, 281.

not uncommon to find in the Member States corporate tax systems combining a (relatively) high nominal tax rate with a (relative) narrow taxable base. The latter is as a rule obtained through several deductions, exemptions and credits (each with different scopes and effects), which lead to a considerably lower effective tax rate. Both from a policy and legal perspective, it would be simplistic, if not ill-advised, to consider that the high nominal tax rate is the normal system and that the provisions narrowing the taxable base are derogations. And this is for a very simple reason: those elements of corporate tax systems are inextricably linked. In other cases, even when a general (normal) tax regime can apparently be identified, it can happen that it coexists with another general (normal) tax regime, making it very hard to establish which one of the two is the "common" one and which of them constitutes an exception. In the light of the existing case-law, it is therefore not unreasonable to consider that at least in tax matters, the prohibition of State aid amounts to a prohibition of discrimination between taxpayers in a comparable legal and factual situation similar to the Treaty fundamental freedoms (which latter scope is however limited to the cross-border context). It is therefore not surprising that the Court of Justice in assessing the existence of an aid in tax matters adopts a practical approach, acknowledging that the assessment of the reference framework requires both familiarity with the provisions under scrutiny and an analysis of their administrative and judicial application as well as of their scope *ratione personae*.

It should be noted that even for cases where the national corporate tax system as such is to be regarded as the reference system, it may be however necessary to preliminarily consider other elements, such as the way the taxable base is determined. In *Paint Graphos*[76], the Court gave clear indications on the essential role which must be attributed to the determination of the taxable base. This case concerned a preliminary ruling from the Italian Court on the tax regime providing a corporate tax exemption for producers and worker cooperative societies. The Court observed that, on the basis of the information at its disposal, for the purpose of calculating the corporate tax, the taxable base of the producer's and workers' cooperative concerned was determined in the same way as that of other types of undertakings, namely on the basis of the amount of net profit earned as a result of the undertakings' activities at the end of the tax year. The Court concluded that the corporate tax was to be regarded as the legal regime of reference for the purpose of determining whether the corporate tax exemptions at issue could have been selective.

Secondly, it may be necessary to identify a specific set of rules within that corporate tax system, which regulates the specific aspect under examination. An example, in this sense, is given by the Spanish scheme on the amortization of financial goodwill, in which the Commission considered that

[76] Joined Cases C-78/08 and C-80/08, *Paint Graphos.* In this case, which concerned the taxation of company income, the Court identified the corporation tax system as the reference framework by referring to the common basis for calculating the corporation tax. The measure was regarded as prima facie selective since there was a derogation from the general rule.

the reference system had to be identified with the corporate tax system and with the rules concerning the fiscal amortization of financial goodwill laid down in the Spanish tax system[77]. In this case, the Court annulled this decision because, according to the European Judge, even considering that measure derogated from the identified reference system, this derogation did not suffice to demonstrate that the measure favoured certain undertakings or certain productions, since such measure was available, *a priori*, to all undertakings[78].

Thirdly, there may be cases where the ordinary corporate tax system comes into play but where it is not identified as the reference system, as was the case for tax incentives in favour of certain restructured banks approved in Italy[79]. Finally, as regards the identifications of the reference system, that step is undoubtedly easier in cases of self-standing levies or of taxes which do not form part of a wider taxation system, such as real estate taxes. In such cases, the reference system is in principle the levy or the tax itself.

It is important to highlight how the Court has stated also that where no reference framework can be found and an external comparison is therefore not possible, the objective of the measure itself becomes the benchmark against which to assess the possible selective nature the measure: an internal comparison should set out clearly whether the undertakings subject to the measure are equally treated or not.

In fact, the Court of Justice, in *Gibraltar* case[80], which represents an interesting example of internal comparison in the context of tax selectivity, ruled that the measure constituted selective aid because "*it's very application resulted in a different tax burden for different undertakings*" and deemed it to be incompatible with State aid rules. The Court used, as the reference framework, a corporate tax system, of which the taxes under exam were an integral part and whose aim was to tax all corporations. The Court of *Gibraltar*'s judgment has been criticized on the grounds that the Court substituted its own logic or rationale for the one used by Gibraltar's government to determine the personal and material scope of Gibraltar's domestic tax system.

In analysing the Commission's lines of reasoning, the Court of Justice held, first, that the General Court's approach, based solely on considerations of the regulatory technique used, disregarded the possible effects of the measures and a prior excluded that no tax liability incurred by offshore companies could result in a selective advantage. Second, the Court took the view that, although it considered in an earlier case that the very existence of an advantage in tax measures may be established only when compared with 'normal' taxation i.e. the reference system, there were still

[77] See Commission Decision of 28 October 2009 in Case C-45/2007.

[78] Cases C-20/15 P and C-21/15, *Commission v World Duty Free Group and others*.

[79] See Commission Decision of 11 March 2008 in Case C-15/2007.

[80] Joined Cases C-106/09 and C-107/09, *Commission and Spain v Government of Gibraltar and United Kingdom*.

cases for which it was not possible to carry out such an external comparison. As the Court held, "*that case-law does not make the classification of a tax system as 'selective' conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings*". Otherwise, the consequence "*would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact*"[81]. The Court further observed that the Commission's decision, contrary to the conclusion of the judgment under appeal, had identified the new regime as the reference framework. The Court of Justice emphasized that the method of introducing a benefit should not matter as benchmarking is not, at least not always, a necessity as part of State aid analysis.

Moving on, the second step consists in determining whether that scheme involves a derogation from that framework insofar as it differentiates between economic operators who, in light of the objective of the reference framework, are in a comparable factual and legal situation. In other words, the second step of the selectivity evaluation is determining whether the measure under assessment gives rise to a discrimination between comparable undertakings.

At first[82], the Court referred to the objective pursued by the measure in question. According to the Court of Justice, a distinction must be made in this respect between the objectives attributed to a particular tax scheme which are extrinsic to it and the mechanism inherent in the tax system itself which are necessary to achievement of such objectives.

The distinction is between, on the one hand, internal objectives that are inherent to the tax system and, on the other hand, external objectives that are assigned to a particular tax scheme. At the level of the comparability examination, the tax system's internal objectives may dictate whether different taxpayers are comparable or not in different factual and legal situations, and therefore treated differently without this being considered prohibited State aid. However, the objectives upon which the national tax system is built on play a decisive role at the justification level as well[83]. In fact, internal objectives can be invoked to justify a different treatment of comparable taxpayers.

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[81] Joined Cases C-106/09 and C-107/09, *Commission and Spain v Government of Gibraltar and United Kingdom*, par. 91.

[82] The first judgment to set out how to asses' comparability is the Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Pegganer Zementwerke*, par. 41. In this case, the Court stated that, as regard selectivity, the only question to be determined is whether, under a particularly statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.

[83] MILADINOVIC A., *The State Aid Provisions of the TFEU in Tax Matters*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 121.

In contrast to internal objectives, external objectives cannot justify a selective measure. The fact that a selective measure is based on objective criteria does not suffice to prove that it is consistent whit the logic of the system concerned. The focus of the comparability assessment is thus on the objective of the reference system under which the measure under assessment has been adopted. That demonstrates the importance of properly identifying the reference system in establishing selectivity in the case of schemes, since the objective of that system determines whether the beneficiaries of the measure under assessment are in a comparable situation to other taxpayers. That begs the question: which objective should be taken into account for the comparability assessment?

While the Court has clearly held that only inherent objective may be taken into account for assessing whether a discriminatory tax measure is justified by the nature and logic of the system, it has given scant guidance on the types of objective that should be taken into consideration for assessing comparability[84]. Different judgments point in different directions: fiscal objectives[85], social objectives and other differences that seem detached from the objectives of the reference system altogether[86].

Compared to this situation, in a series of judgements, the focus of the comparability assessment has passed to the objective pursued by the system in question, rather than the objective pursued by the measure in question for the purposes of assessing whether the beneficiaries of the measure under assessment are in comparable situation to undertakings excluded from the scope of that measure[87].

Form 2011[88] onwards[89], the Court, however, has repeated the test laid down in the past and its focus on the objective pursued by the measure in question, stating that whether undertakings are in comparable factual and legal situation to establish selectivity depends on the objective pursued by the reference system under which the measure under assessment has been adopted. In general, the comparability test consists in examining whether the measure at issue differentiates between

[84] LOEWENTHAL P., *Fiscal Selectivity,* in V.V. A.A., *New Perspective on Fiscal State Aid,* Kluwer Law International, New York, 2019, 48.

[85] In Joined Cases C-106/09 and C-107/09, *Commission v Government of Gibraltar and United Kingdom*, par. 101, the Court pointed to the objective of the proposal tax reform which was to introduce a general system of taxation for all companies established in Gibraltar, and, in the light of that objective, the Court found that offshore and onshore companies were in a comparable factual and legal situations and that the bases of assessment adopted in the proposed tax reform discriminated in favour of the former over the latter.

[86] An example is the Joined Cases C-78/08 and C-80/08, *Paint Graphos*, par. 54. In this judgment, while the Court invoked the objective pursued by the corporation tax regime, namely the taxation of company profits as the benchmark of the comparison, not a single provision of the Italian corporate tax regime is mentioned or assessed in the comparability assessment that follows. Instead, the Court refers to various objectives of EU legislation and a Commission Communication on the promotion of cooperative and other economic operators.

[87] Case C-308/01, *GIL Insurance and Others*, par. 68; Joined Case C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, par. 119; CaseC-88/03 *Portugal v Commission*, par. 54.

[88] Case C-279/08, *Commission v Netherlands*, par. 62.

[89] Case C-323/16, *Euralluminia v Commission*, par. 60; Joined Cases C-234/16 and C-235/16, *Anged*, par. 73; Case C-128/16, *Commission v Spain*, par. 69.

undertakings which are in a similar factual and legal situation, in light of the intrinsic objective of the system.

The starting point for examining that issue can be *Adria-Wien Pipeline*[90], which is one of the milestone judgements of the Court for fiscal State aid[91], in which the Court argued that the measure at issue was selective since undertakings manufacturing goods and undertakings providing services were in a comparable factual and legal situation in the light of the objective pursued by the measure in question.

In fact, the importance of the objective pursued by the system of reference becomes crucial in the context of the comparability analysis, as suggested by the Court in *Region of Sardinia*[92] and *Paint Graphos* judgments. In *Paint Graphos*[93], the Court identified cumulative conditions that must be fulfilled to consider the preferential tax treatment laid down for producers and workers cooperative and falling outside the scope of application of State aid rules. More precisely, the Court indicated that producers and workers cooperatives can be regarded as not being in a comparable legal and factual situation to that of commercial companies when: they act in the economic interest of their members; their relations which members are not purely commercial but personal and individual; the members are actively involved in the running of the business; the members are entitled to an equitable distribution of the results of the cooperative's economic performance.

In sum, any assessment of tax preferences involves a comparison between, on the one hand, the situation of the undertakings concerned in the event of application of those advantageous measures and, on the other hand, a reference system, that is to say an objective standard such as the tax regime applicable under the general law. Moreover, the assessment of selectivity of fiscal preferences is based on the definition of the pool of beneficiary undertakings from a preference. Finally, a comparison between the legal and factual situations of those who benefit from the mechanisms adopted by the Member States in the exercise of their fiscal powers and those being excluded, shall take place with a view to establishing if the selective grant of a tax preference is justified by the nature and scheme of the system of reference.

Finally, the third and final step. If the scheme constitutes a derogation from the reference framework, the third step consists in determining whether that derogation is justified by the nature and logic of the reference framework. Once it has been established that a tax measure discriminates between

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[90] Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*.

[91] LIENEMEYER M., TOMAT F., *Application to specific fields – fiscal aid, in EU Competition Law, Volume IV State Aid*, Claeyes Casteels, 2016, 430.

[92] Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna*.

[93] Joined Cases C-78/08 and C-80/08, *Paint Graphos.*

comparable undertakings under a particular reference system, the final step that remains for establishing selectivity is assessing whether that discrimination can be objectively justified.

The notion of objective justifications is present in numerous internal market provisions, but no mention is made of possible justifications in the text of Article 107 (1) TFEU. The justification by the nature or general scheme of the system is important in tax matters because it takes into account the fiscal logic and the internal consistency of the tax regime. According to the Commission, one can justify measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system.

The justification constitutes the quintessential criterion in determining the selectivity of a tax preference and the proportionality principle governs the criterion[94]. This notion of 'justification by the logic of the tax system' is strictly interpreted. In this respect, also in this phase it should draw a distinction between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it (i.e., social policy, environmental, international competitiveness objectives) and, on the other hand, the mechanisms inherent in the tax system itself and which are necessary for the achievement of such objectives (e. g, the progressive nature of taxation). Only the latter can be taken into consideration for the purpose of this justification. In other words, all sorts of policy objectives may have been attributed to a specific tax measure. However, if the measure results in a selective advantage, it is not selective only if the selective advantage directly results from a feature inherent in the tax system itself without which the objective cannot be achieved.

According to the Court of Justice, a *prima facie* discriminatory measure can turn out to be non-selective if it justified by the nature or general scheme of the system[95]. Preliminarily, it should be noted that when establishing if a measure is justified by the nature or general scheme of the system, one should not forget that the concept should be interpreted narrowly since it is a derogation from the rules of the Treaty. So far, both the Commission and the Union Courts have given a very strict interpretation of that concept and have considered a measure justified by the nature of the system in a limited number of cases.

It needs, therefore, to be determined whether the derogation that was found to exist in step two is justified by the nature, structure, or logic of the general tax system of which it is a part. This is so where the derogation results directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system (for example, the need to fight fraud or tax evasion, administrative manageability, the

[94] ROSSI-MACCANICO P., *The Relationship between State Aid and Harmful Tax Competition,* in RUST A., MICHEAU C., *State Aid and Tax Law,* Kluwer Law International, New York, 2013.

[95] The first mention of a justification precluding the selectivity of a tax measure is in Case C-173/73, *Italy v Commission,* par. 15.

principle of tax neutrality, the need to avoid double taxation). The Court, for example, has accepted justifications based on the principle of fiscal neutrality, the need to tackle tax avoidance, the need to take into account specific accounting requirements, the need to consider the peculiar nature of a sector or activity or the redistributive purpose of tax.

It should be remembered also that the burden of proof for the justification based on the nature and logic of the system lies within the Member States. A measure is considered justified by the nature or general scheme of the system of reference if it derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanism necessary for the functioning and effectiveness of the system. This reference to the nature or general scheme of the tax system proves to be quite challenging to apply because it is not always clear how those "inherent principles" may be identified in relation to a particular tax system or to a specific aid measure such as a fiscal measure[96].

Recent jurisprudence has reiterated that criteria unrelated to the tax system, such as in particular maintaining employment, have no room in a corporate tax context; they can only be taken into account in the context of the comparability of the measure[97]. The fact that the justification must finds its origin in the nature or general scheme of the reference system of which the measure forms a part has been repeated in all judgements[98].

According to the Court[99], a measure finds its origin in the nature and general scheme of the reference system where it directly results from the basic or guiding principles of that system. In other words, measures that are necessary to achieve objectives underpinning the reference system can justify discrimination, whereas measures that seek to achieve an objective that is unrelated to that system cannot justify discrimination.

It is in the 2011 *Paint Graphos* judgment that the Court has further explained how an objective justification can be successfully invoked. The Court affirms, in fact, that tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the State aid rules. According to the Court, a tax exemption must be consistent not only with the inherent characteristics of the tax system in question, but also with regards to the manner in which that system is implemented and that it is therefore necessary for the Member State concerned to

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[96] TRAVERSA E., SABBADINI P., *Anti-avoidance Measures and State Aid in a Post-BEPS Context: An Attempt at Reconciliation*, in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 55.

[97] LIENEMEYER M., TOMAT F., *Application to specific fields – fiscal aid, in EU Competition Law, Volume IV State Aid*, Claeyes Casteels, 2016, 440.

[98] Case C- 88/03, *Portugal v Commission*, par. 52 and Joined Cases C-20/15 and C-21/15, *Commission v World Duty Free Group and Others*, par. 58.

[99] Joined Cases C-78/08 and C-80/08, *Paint Graphos*, par. 68.

introduce and apply appropriate control and monitoring procedures in order to ensure that specific tax measures introduced for the benefit of cooperative societies are consistent with the logic and general scheme of the tax system. The Court holds that it is also necessary to ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what it is necessary[100], in that the legitimate objective being pursued could not be attained by less far reaching measures[101].

One should, however, realize that if proportionality is to be applied, which implies that the tax measure should not go beyond what is necessary, this also involves that where a measure is proportional it can be justified in light of the logic of the system. According to Commission Notice on the Application of the State Aid Rules to Measures relating to Direct Business Taxation, the progressive nature of the tax is regarded as a justification by the logic of the tax system.

These restrictive requirements mean that discriminations resulting from national tax measures are extremely difficult to justify[102]. Other justifications that could possibly meet the aforementioned conditions in relation to tax measures include the need to fight tax fraud or tax evasion, the progressive nature of income tax in light of the ability to pay principle, and the objective of optimizing the recovery of fiscal debts[103].

All things considered, it can be observed that EU law adopts a narrow interpretation of the justification by the nature or general scheme of the system. Only certain justifications have been accepted in a limited number of cases (e.g. principle of tax neutrality, the fight against tax avoidance, the progressive nature of income tax, specific accounting requirements, or the peculiar nature of the sector at issue). The narrow application of this exception to the selectivity assessment would seem to exclude justifying a situation where multinationals benefit from specific rules on taxation.

Therefore, the aid character of a tax preference is appraised on the basis of its effects, not its objectives. The effect of the doctrine developed by the Court of Justice on the selectivity criterion is objective and should not leave much discretion to the Commission. If this holds true, the Commission has no ability to assess or decide whether a tax preference is justified with reference to its aim. However, to the extent that a tax preference is aimed at certain undertakings, it shall be ascertaining whether that criterion of differentiation is objective and is both in conformity with the internal logic of the system (appropriate) and consistently applied (necessary). The Commission's assessment then

[100] Joined Cases C-78/08 and C-80/08, *Paint Graphos*, par. 73.

[101] Joined Cases C-78/08 and C-80/08, *Paint Graphos*, par. 75.

[102] The Court, in fact, did not repeat them in its Case C- 347/17, *A Brauereu*, par. 50, when accepting the need to avoid double taxation as a valid justification for discrimination, while the same justification it accepted in the *Paint Graphos* judgement under the aforementioned conditions.

[103] Respectively, Commission Decision of 29 July 2016, SA.42007, OJ C 369/1 and Commission Decision of 26 May 2010, 2001/276/EU, OJ L 122/76.

focuses on the selectivity criterion, or the justification of the sectorial scope of the tax preference with respect to its nature and objectives, on the basis of the elements provided by the national authorities. Finally, we can see that there is a procedural distinction between the stages of the three-step selectivity test concerning the burden of proof: while the Commission must prove that the first and second steps of the selectivity test have been fulfilled, it is up to the Member State concerned to show that a *prima facie* selective measure is actually justified by the nature of its tax system as part of the third step.

In conclusion, the case-law gives limited guidance to assess whether such measures are selective and thus constitute State aid. As mentioned, different approaches have been adopted to identify the reference framework, the comparability assessment and the search for possible justifications, depending on the nature of the measure under assessment.

No guidance exists on how to identify the reference framework. As regards the comparability assessment, a tension exists between judgments that accept intrinsic objectives beyond the fiscal objective of the reference system to conduct that assessment and judgments that rely solely on its fiscal objective. Another tension exists between the intrinsic objectives that can be taken into account for comparability and those that can be invoked to justify discrimination. It is also unclear the role of the principles of necessity, appropriateness and proportionality in devising justification for discrimination.

4. Overview on recent trends: the EC investigations and decisions and the review of tax rulings under State Aid rules

The idea of a more prominent role for the application of State aid rules in reviewing European Union Member States' tax measures that provide multinational enterprises with the ability to adopt aggressive forms of tax planning involving tax Base Erosion and Profit-Shifting has been emerging more and more in recent years. Due to the existence of tax sovereignty, established as a guarantee of institutional balance and individual rights protection, State aid law should have a clear and limited focus and it should not to be employed to substitute the absence of a tax harmonizing EU legislation. The fight against tax competition is where the risk of overstepping the limits of State aid policy is particularly great. Safeguarding those limits means introducing more sensitivity for the peculiarities of tax measures in the State aid assessment - that is a "more fiscal approach"[104].

[104] JAEGER T., *Tax Incentives Under State Aid Law: A Competition Law Perspective,* in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 55.

Currently, the attention focuses on the Commission's recent investigations and decisions into individual tax rulings granted to multinational companies and its innovative attention on single rulings as the object of review. A development of State aid control was constituted by the wave of revelations concerning strategic international tax-planning by multinational groups of companies, which triggered (negative) reactions from, firstly, the public, various interest groups, and the media and, then, from governments globally. It also drew the attention of the Commission on specific types of tax deals, the details of which were made public during hearings in the UK's House of Commons in 2012 and the US Senate in 2013, as well as through information revealed by journalists, particularly the *LuxLeaks* investigation by the International Consortium of Investigative Journalists. The reaction of the Commission was prompt and resolute. It responded by announcing, on the one hand, the beginning of the work related to the fight against base erosion and the transfer of profits through increased transparency and tax harmonization and, on the other hand, by confirming that such now-public information was going to start State aid investigation.

In 2013, Belgium, Cyprus, Ireland, Luxembourg, Malta, the Netherlands and the United Kingdom received information requests from the Commission concerning schemes or specific tax rulings. Between June and October 2014, the Commission successively decided to open State aid examination procedures against Ireland, the Netherlands, and Luxembourg to analyse certain tax rulings awarded to multinational companies on the basis of State aid rules. The Commission also decided to extend its requests for information to all Member States to obtain the names of companies that had benefited from tax rulings between 2010 and 2013. In 2015 and 2016, the Commission opened a review procedure against Luxembourg and against Belgium. The Commission has, to date, issued in the following decisions[105]: against the Netherlands for Starbucks[106], Ireland for Apple[107], Luxembourg for Fiat[108], Amazon[109] and Engie[110], and Belgium for excess profits regime[111]. In all these decisions, the Commission have concluded that tax incentives granted by the public authorities in each of these cases constituted State aid that was incompatible and had to be recovered from the beneficiaries. As we will see below, the General Court of the European Union has so far expressed itself on only three of the European Commission's tax rulings decisions, namely those relating to Belgian Excess Profit,

[105] The analysis of the recent approach adopted by the European Commission will focus, for the purposes of this work, exclusively on formally concluded negative decisions.

[106] Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands.

[107] Commission Decision of 30 August 2016 on State aid to Apple, SA.38373 (2014/C), Ireland.

[108] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg.

[109] Commission Decision of 4 October 2017 on State aid to Amazon, SA.38944 (2014/C), Luxembourg.

[110] Commission Decision of 20 June 2018 on State aid to GDF Suez, SA.44888 (2016/C), Luxembourg.

[111] Commission Decision of 11 January 2016 on State Aid Excess profit tax ruling system in Belgium, SA.37667 (2015/C), Belgium.

Starbucks and Fiat cases. Instead, relating to rulings granted by Luxembourg to Mc Donald's[112] and in the tax scheme for multinationals (CFC) established by United Kingdom[113], the Commission decided that the measures in question did not constitute aid. Currently, Commission' investigations are still ongoing in the following cases: Ikea[114], Nike[115] and Huhtamaki[116].

Though State aid rules have always been applied to tax rulings, in recent years, due to the mentioned Commission's action, State aid law has taken on an ever-increasing significance in the tax sector. It is well established that taxation activities (including reductions and exemptions) may constitute State aid. According to the Commission, any tax ruling that departs from general tax rules, and benefits individual undertakings as a result, can be presumed to be State aid. In essence, it is the substance of the tax measure and not its form that is relevant. According to settled Court of Justice jurisprudence, a measure is to be considered as falling within the prohibition if the cumulative requirements of Art. 107 TFEU are met.

In general, tax rulings, as a regular tool used by tax authorities, are useful instruments to enhance the predictability of administrative decisions. Rulings can considerably contribute to legal certainty, as complex questions arising in practice are resolved in advance and, consequently, subsequent tax disputes are avoided. A ruling mechanism enables authorities to assess a certain case prior to its actual realization and binds them to a certain legal evaluation with regard to that specific situation. Therefore, the taxpayer has, in advance, information about the way the authorities will actually apply the law and can already take account of the authorities' assessments when planning its business activities.

Several recent State aid investigations and decisions, in particular, concern Advanced Pricing Arrangements (hereinafter, APAs) by which the respective national tax authorities determine, in advance of intra-group transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time. APAs are prior administrative rulings by the tax authorities on how specific transactions will be treated fiscally for reasons of legal certainty and confer rights to individual taxpayers (the entities within a multinational company) to use a given transfer-pricing methodology and to determine their taxable revenues deriving from a set of cross-border transactions over a fixed period of time. In essence, APAs are requested by taxpayers from tax authorities in order to have legal certainty. By these rulings the tax authorities determine arm's-length

[112] Commission Decision of 3 December 2015 on State aid to MC Donald's Europe, SA.38945 (2014/C), Luxembourg.

[113] Commission Decision of 26 October 2017 on State Aid to CFC Group Financing Exemption, SA. 44896 (2017/C), United Kingdom.

[114] Commission Decision of 18 December 2017 on State aid to Ikea, SA.46470 (2017/C), Netherlands.

[115] Commission Decision of 10 January 2019 on State aid to Nike, SA.51284 (2018/NN), Netherlands.

[116] Commission Decision of 7 March 2019 on State aid to Huhtamaki, SA.50400 (2019/NN), Luxembourg.

profits for related party transactions where the uncertainty may justify an advance ruling practice designed to ascertain whether certain controlled transactions are conducted at arm's length.

Transfer pricing concerns the prices for commercial transactions between various parts of the same corporate group, e.g. prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group. Those prices increase the profits of the good-selling/service-providing subsidiary and decrease the profits for the buying subsidiary. By that, transfer pricing has a direct impact on the respective taxable base of both subsidiaries.

There is no doubt that tax rulings in general, and APAs in particular, by their very nature (as they involve a discretionary power), are inherently potentially selective. Individual tax rulings are considered to constitute State aid where such rulings involve the exercise of discretionary powers that extend beyond the simple management of tax revenue in accordance with objective criteria. According to settled Court of Justice case law[117], the existence of discretionary powers, such as an authorization procedure, does not preclude a justification based on the nature of the general scheme, provided that the degree of latitude of the competent authorities is limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent to the nature of the tax regime. Moreover, according to the Commission, rulings are not State aid *per se*[118]. Rulings may, however, involve State aid when, in particular: the tax authorities have discretion in granting administrative rulings; the rulings are not available to undertakings in a similar legal and factual situation; the administration appears to apply a more "favourable" discretionary tax treatment compared with other taxpayers in a similar factual and legal situation; or the ruling has been issued in contradiction to the applicable tax provisions and has resulted in a lower amount of tax.

The same for the APAs: the advantage may give rise to State aid if it can be proven that selective tax relief has been granted. Even if favourable or effectively beneficial to a company, they are selective only if unjustified under the nature of the tax system in question.

If this is true in principle, at the same time the conduct of the Commission has generated a great deal of uncertainty because, following these recent investigations and decisions, each and every ruling can give rise to State aid because every individual tax ruling constitutes preferential taxation as opposed to taxation that would result from the general application of ordinary tax rules for domestic businesses. The Commission's action and its innovative framework has subtracted, *de facto*, consistency at the principle of legal certainty in the application of State aid rules to individual rulings.

[117] Case C-241/94, *France v Commission*, par 23.

[118] Draft Commission Notice on the Definition of State Aid pursuant to Article 107 (1) TFEU (2014 Draft Commission Notice), par. 175.

Moreover, in hindsight any *ex post* re-examination of a tax ruling can lead to a different result than the one made *ex ante* by the tax administration.

As we will see, the Commission's reassurances that it 'does not call into question the granting of tax rulings by the tax administrations of the Member States' because it recognises the importance of advance rulings as a tool to provide legal certainty to taxpayers provided they do not grant a selective advantage to specific economic operators do not seem too reassuring, nor does the Commission give certainty in light of its commitment to focus on cases where there is a manifest breach of the arm's length principle, since it is not clear what a constitutes a manifest breach.

It is considered useful here to briefly review the content of the tax rulings that have been the subject of the decisions taken in recent years by the European Commission. The first decision to arise from the Commission's investigation into the tax ruling practices of the Member States concerns a tax ruling issued by Luxembourg in 2012, which, according to the Commission, gave a selective advantage to Fiat Finance and Trade (hereinafter, FFT)[119]. The tax ruling endorsed a method of profit allocation to FFT within the Fiat Group and has enabled FFT to determine its corporate tax liability in Luxembourg. The Commission found that the tax ruling granted by Luxembourg was in breach of State aid rules because it has conferred a selective advantage on FFT[120]. FFT provided intra-group loans mostly throughout Europe, but with the exception of Italy. FFT interacted with a number of other treasury companies set up around it and it was involved both in intra-sector treasury transactions (i.e. with the other treasury companies of the Fiat group) and in intra-group financing (i.e. with the Fiat group companies). FFT performed functions such as market funding and liquidity investments, short- and medium-term intercompany funding. As concerned the interest rate on intra-group loans in particular, this was set as the sum of the group's weighted average cost of capital (WACC) and a margin. The deposit interest rate was set at the risk-free rate increased by a margin on short term deposits with banks as defined by the group liquidity policy.

Against this background, the Commission contested the advance tax ruling on the transfer pricing methods used by FFT issued by the Luxembourg authorities in 2012 for a period of five years. The tax ruling actually consisted of two letters exchanged between FFT's tax advisor and the Luxemburg authorities and a report containing an analysis of the transfer pricing methods used. In essence, the Luxembourg tax administration (in its second letter of 2012) confirmed that the analysis presented by FFT regarding the transfer prices applied to the services performed and the risk derived was in

[119] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg.

[120] The Commission found that the method employed by the State to determine FFT's taxable profits in Luxembourg departed from the arm's length principle and stated that this resulted in the ruling conferring a selective advantage on FFT, insofar as it led the lowering of the latter's tax liability under the Luxembourg general corporate tax system in contrast to non-integrated companies whose tax base is determined by profits generated under market conditions.

line with the arm's length principle and the OECD's respective Guidelines. The transfer pricing report applied the transactional net margin method (TNMM), which is also recognized by the OECD transfer pricing Guidelines: by way of an external comparison, it identified the net margins that would have been earned in comparable transactions by independent enterprises. The comparison was made in relation to a large number of third companies operating independently in the financial sector.

Instead, Starbucks Decision concerned a tax ruling issued by the Netherlands in 2008 in favour of Starbucks Manufacturing EMEA BV[121] (hereinafter, SMBV), that is a subsidiary of the Starbucks Group based in the Netherlands. The State endorsed royalty payments made by the Starbucks Manufacturing EMEA BV to another society based in the UK for coffee-roasting know-how. These royalty payments would be exempt from corporate income tax and would not be subject to national withholding tax. The ruling also endorsed payments made for the purchase of green coffee beans from Starbucks Coffee Trading SARL, which is based in Switzerland. In particular, the advance transfer pricing agreement concluded between the Dutch tax authorities and SMBV, concerned, inter alia, the deductibility of SMBV's payment of a specific level of royalties to a related entity, resulting in a reduction in the tax base of SMBV. The Commission concluded that there had been illegal and incompatible State aid requiring recovery because it identified a derogation from the reference system of ordinary Dutch tax rules that could not been justified. The derogation arose from the fact that the valuation methodology chosen in the transfer pricing report in support of the APA was inadequate and did not reflect normal market conditions. According to the Commission, if the arm's length principle would have been properly applied, no royalties should have been paid at all (or the deductible amount of the royalty payments should have been equal to zero). The Commission also compared Starbucks' situation to that of a company that did not outsource its coffee-roasting function to third parties, but to a group company designated as a toll manufacturer that did not pay any royalty for the use of the intellectual property or the know-how used in the roasting process.

The Belgium Excess Profit Decision[122] concerned a tax scheme which had been applicable since 2005 allowing Belgian resident multinational integrated companies to reduce their tax base in Belgium for alleged "excess profit" on the basis of a binding tax ruling[123]. The Commission analysed the alleged State aid scheme based on an arm's length provision modelled after Article 9 of the OECD Model

[121] Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands.

[122] Commission Decision of 11 January 2016 on State aid Excess profit tax ruling system in Belgium, SA.37667 (2015/C), Belgium. See, BLOCKX J., *The Belgian Excess Profit Exemption: Tax Incentives for Multinational Groups as State Aid,* in *Journal of European Competition Law & Practice*, 2017.

[123] According to the Commission, the derogation from the reference system and from the arm's length principle conferred a selective advantage on the beneficiaries under the scheme. The methodology employed for determining the taxable profits of Belgian group entities under the scheme departed from the arm's length principle, reducing the tax liabilities to beneficiaries under the scheme as compared to other companies not eligible for the scheme which are taxed on the basis of their actually recorded profit.

Treaty. In particular, in 2004, Belgium introduced a rule making it possible for multinational enterprises to obtain an advance ruling on profit allocation and/or on the arm's length character of pricing arrangements in the framework of cross-border related-party relationships. It also permits downward adjustments to the taxable income tax base of Belgian companies, on assumption that it would entail an excess profit (i.e., the amount of profit that exceeds the profit that would have been realized by the Belgian company under arm's length conditions and that result from group synergies). The Commission deemed the excess-profit tax-ruling scheme to be illegal under EU State aid rules, pointing to inconsistencies in the choice of transfer pricing methodologies made by the Belgian tax authority (e.g., the fact that exempted profit did not have to be included in the tax base of an associated foreign-group entity in another tax jurisdiction, nor did that profit have to be effectively taxed by that other jurisdiction); it further contested the Belgian tax authority's assertion that the scheme was an application of the arm's length principle. The three aforementioned decisions had already been submitted to the scrutiny of the General Court.

With regard to the Starbucks case, the General Court of the European Union[124] annulled the Commission's decision and stated that the Commission was unable to demonstrate the existence of an advantage in favour of Starbucks. The court found that the Commission had erred in demonstrating that the beneficiary of the tax ruling, despite any methodological errors by the Member State, effectively benefitted from a reduction of its normal tax burden.

With regard to the Fiat case, the General Court[125] confirmed the Commission's decision on the aid measure granted by Luxembourg to Fiat Chrysler Finance Europe. For Belgium Excess Profit Decision, the General Court[126] annulled the Commission decision on procedural grounds and, therefore gave only little insight on the material matters on the case. According to the Court, the Commission had erroneously considered that the Belgian excess profit system at issue, constituted an aid scheme and not an individual aid. For this case, the cancellation means that the Commission's decision of January 11, 2016 is deemed never to have existed. In other words, the decision was withdrawn *ex tunc* (i.e. retroactively) and *erga omnes* (i.e. not only with regard to the parties to the dispute) from the Union's legal order[127].

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[124] Judgment in Cases T-760/15 *Netherlands v Commission* and T-636/16 *Starbucks and Starbucks Manufacturing Emea v Commission*.

[125] Judgment in Cases T-755/15 *Luxembourg v Commission* and T-759/15 Fiat *Chrysler Finance Europe v Commission*.

[126] Judgement of the General Court of 14 February of 2019, Joined Cases T-131/16 and T-263/16, *Magnetrol International*, par. 135.

[127] LUTS J., *Excess profit rulings: les conséquences de l'arret de la Saint-Valentin,* in *Le fiscologue International*, 422, 2019.

The Apple Decision[128] concerned two tax ruling issued by Ireland in favour of Apple Sales International and Apple Operations Europe, which made annual payments to the parent company, Apple Inc., for research and development efforts conducted on behalf of Irish companies in the United States[129]. The two tax rulings endorsed methods for profit allocation for both companies to their respective Irish branches and allowed them to determine their yearly corporate tax liability in Ireland. Pursuant to these methods, most of companies' profits were internally allocated away from Ireland to a head office that was not based in any country, while a fraction of the profits was allocated to their Irish branch and subject to tax in Ireland. According to the Commission, the existence of a selective advantage was satisfied as the profit allocation methods endorsed by the rulings resulted in a taxable profit for the entities concerned that deviated from the arm's length principle, which led to a lowering of their corporate tax liability under the ordinary rules of taxation of corporate profit in Ireland as compared to non-integrated companies whose taxable profits were inconsistent with the arm's length principle.

The Irish tax rulings endorsed a method of splitting profits in two: the rule chosen in Apple for profit allocation was, just like in Fiat, the TNMM, with operating costs as a net profit indicator. Most profits were internally allocated away from Ireland to a head office within Apple Sales International. However, that head office was apparently just fictional: it was not physically based anywhere, did not have any employees and its activities consisted solely of occasional board meetings. The share of the profits allocated to that head office remained untaxed. The remainder of the profits was allocated to the Irish branch and subject to tax in Ireland.

The decision of the European Commission issued in the Apple case has also been subjected to scrutiny by the General Court[130].

The General Court annulled the Apple decision because the Commission failed to demonstrate the existence of the required legal requirement, i.e. the existence of an advantage, for the purposes of Article 107 (1) TFEU.

According to the General Court, in particular, the Commission was wrong to declare that companies incorporated in Ireland had been granted a selective economic advantage and, consequently, State aid. After endorsed the Commission's assessments relating to normal taxation under the Irish tax law

[128] Commission Decision of 30 August 2016 on State aid to Apple, SA.38373 (2014/C), Ireland.

[129] For further information, see BARRERA R., BUSTAMANTE J., *The Rotten Apple: Tax Avoidance in Ireland,* in *The International Trade Journal*, 2018; GREGGI M., *Il caso Apple: vecchi e nuovi limiti europei alla potestà impositiva statale nei Tax Rulings,* in *Quaderni Costituzionali*, 36, 2016; RUSSELL D., GRAHAM T., *The EU Commission's finding that Irish tax rulings in relation to Apple amounted to illegal state aid; reflections on this and the legislative underpinning of Common Reporting Standard,* in *Trusts &Trustees*, 2016.

[130] Judgement of the General Court of 15 July of 2020, Joined Cases T-778/16, *Ireland v Commission* and T-892/16, *Apple Sales International and Apple Operations Europe v Commission*.

applicable in the present instance, the General Court nevertheless found that the Commission did not demonstrate that the methodological error in determining the taxable amount led to a reduction of the chargeable profits in the branches of the two companies, nor that the rulings were granted on a purely discretionary basis.

Amazon Decision[131] concerns Luxembourg's tax treatment of two companies in the Amazon group based in Luxembourg. The ruling allows it to pay a tax-deductible royalty to another Luxembourg-based Amazon limited liability partnership that is not subject to corporate taxation in Luxembourg.

The Commission has taken the preliminary view that the amount of the royalty, which ultimately allows Amazon to lower its taxable profits every year, might not reflect market conditions and, thus, constitutes illegal and incompatible State aid. The Commission decided that the ruling conferred an economic advantage on Amazon by endorsing a transfer pricing arrangement that depart from a reliable approximation of a market-based outcome, which ultimately resulted in the reduction of Amazon's tax base in Luxembourg. During this period, the Commission focused in two cases, also, on mismatches' theme, referring to which, for the purpose of State aid, they become relevant if the concurrent application of rules results in lower or non-taxation on a selectivity basis, in the two following cases.

Engie Decision[132] concerned financial transactions were loans that could be converted into equity and bear zero interest for the lender. In this case, the Commission addressed a mismatch which appeared in a pure intra-state situation and led to double non-taxation of income in Luxembourg.

The McDonald's Decision[133], by contrast, concerned a mismatch in an inter-state scenario which led to non-taxation in neither of the two States involved. Different from the finding in Engie case, in this case the Commission concluded that through the interpretation of the tax treaty the Luxembourg tax authorities did not misapply the national law and thereby did not confer a selective advantage on particular undertakings.

The Commission's recent investigations and decisions fall certainly under the Commission's broad priority of ensuring fairness and equality of the corporate tax system within the EU. Substantially, the Commission alleges that Advanced Pricing Arrangements could be State aid because they confer a selective economic advantage on the companies concerned by lowering their tax liabilities in certain jurisdictions.

Despite this, there are a number of problematic aspects arising from the decisions of the European Commission. First of all, normally the Commission examines individual rulings issued by the national

[131] Commission Decision of 4 October 2017 on State aid to Amazon, SA.38944 (2014/C), Luxembourg.
[132] Commission Decision of 19 September 2016 on State aid to GDF Suez, SA.44888 (2016/C), Luxembourg.
[133] Commission Decision of 3 December 2015 on State aid to MC Donald's Europe, SA.38945 (2014/C), Luxembourg.

tax authorities on the basis of their national tax law instead of limiting the examination to tax rules. Until now the Commission examined whether a tax rule that provided for an exemption from the general tax rule constitutes State aid. In the cases at hand, instead, the general tax rules in the Member States were no problem. But their application in individual cases became a problem that led to the European Commission to initiate formal investigations.

In State aid decisions under comment, the Commission found a selective advantage, as already mentioned, resulting from a deviation of the arm's length principle which, according to the Commission, forms part of its assessment under Article 107 (1) TFEU, regardless of whether the Member State has incorporated the principle into its national legal order. The Commission applies the principle, which is a general principle of equal treatment in taxation falling within the application of Article 107 TFEU and not the arm's length principle derived from Article 9 of the OECD Model Tax Convention[134].

The Commission has stressed repeatedly that the arm's length principle it is referring to is not the one referred to in the OECD Transfer Pricing Guidelines, as the Guidelines are a non-binding instrument. In contrast, the Commission is of the opinion that an independent arm's length principle (principle of equal treatment for taxation) can be derived from Court of Justice case law: the arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107 (1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope[135].

In doing so, the Commission is referring to the decision of the Court of Justice in the Belgian coordination centre case (*Forum 187*)[136], dealing with the Commission decision regarding the Belgian tax regime that was available to companies meeting certain specific criteria in terms of size, the multinational character of the group and the nature of activities carried out within the group. The coordination centre regime, amongst others, provided for a fixed tax base calculated on a cost-plus basis, thereby excluding certain important elements from the basis. The Court of Justice ruled that the regime indeed constituted State aid on the basis of the following test: *"In order to decide whether*

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[134] TRAVERSA E., SABBADINI P.M., *Rulings et aides d'État fiscales: un état des lieux,* in *Journal de droit européen*, 4, 2017. According to the authors, in the Apple Decision "*La Commission va même plus loin en considérant que même si la législation fiscale irlandaise ne contient pas de référence au principe de pleine concurrence, son application s'impose à l'État membre par l'interprétation des règles en matière d'aide d'État donnée par la Cour de justice, selon laquelle ce principe permet de garantir l'égalité de traitement entre sociétés « isolées » et sociétés appartenant à un groupe multinational. Sur base de ce raisonnement la Commission considère que la répartition des bénéfices organisée par les rulings aboutit à diminuer indûment la charge fiscale qui aurait dû être supportée dans des conditions de marché par les filiales d'Apple et constituent donc des dérogations aux règles fiscales irlandaises ordinaires*".

[135] Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands.

[136] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*.

a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests at point 95 of the contested decision, to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition"[137].

As will be widely seen below, the Commission has been heavily criticized for this approach, but has attempted to mitigate such criticism by stating that, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method, and a reliable approximation of a market based outcome is the result, a tax ruling endorsing that arrangement is unlikely to give rise to State aid. Contrary to the Commission, the major opinion is that the Court of Justice, in *Forum 187* judgement, did not formulate an independent arm's length principle under Article 107 (1) of the TFEU, but merely established, on the basis of paragraph 95 of the Commission decision, that the ordinary tax system applicable in Belgium was thus based on the difference between profits and costs of an undertaking carrying on its activities under free competition conditions[138].

Application of the arm's-length standard is notoriously complex, and it involves considerable discretion. Given this environment of legal uncertainty, it is no surprise that multinationals seek confirmation from governments about how to apply the standard to their particular facts. Many countries supply this confirmation in the form of tax rulings. Such rulings are usually prospective and cover several years, they describe the taxpayer's situation and how the taxpayer intends to allocate income from its economic activities. Since arm's-length determinations require taxpayers to disclose sensitive business information, they are confidential, although they may be forwarded to tax administrators in other countries in which the multi-national has activity.

As it is known, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the 'OECD Guidelines') refer to Article 9 (1) of the OECD Model Convention as the authoritative statement of the arm's length principle, but that does not give it legal effect without national law that imposes an arm's length rule. If the Commission has doubts about the compatibility of the arm's length principle as applied under OECD Guidelines and incorporated in national tax laws, it ought to focus on national tax legislation rather than individual rulings. An examination of national tax rules must be undertaken as those rules are, and not as the Commission feels they ought to be. Moreover, the Commission adopts a rigid interpretation of the arm's length principle, which is

[137] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, par. 95.

[138] VERHAGEN H., *State Aid and Tax Rulings – An Assessment of the Selectivity Criterion of Article 107(1) of the TFEU in Relation to Recent Commission Transfer Pricing Decisions*, in *European Taxation*, 7, 2017, 285.

inconsistent with that in the OECD Guidelines, which acknowledges that the arm's length principle is a method aimed at 'estimation' and 'approximation' denoting that a precise result is not possible to achieve.

The problem is the uncertainty inherent in the arm's length principle and the way in which the Commission applies it. The Commission relies upon the concept of a prudent market operator. It is not clear from the opening decisions whether this is a standalone test or whether it is to be incorporated within the arm's length. The problems with this concept in EU State aid law are threefold: firstly, it is not clear whether this concept is intended to replace the so-called market economy operator (MEO) test if at all different from the MEO in tax-related matters; secondly, it creates inconsistency between the arm's length principle applied in international tax law reflected in the OECD Guidelines, which refers to the concept of an independent enterprise, rather than a prudent one; finally, the opening decisions are ambiguous, and it is unclear whether the Commission aims the prudent market operator test at the alleged recipients or whether the Commission is implying that there is a correct 'market-based' tax outcome calculated in reference to a prudent market operator test. In this regard, it is unclear who the Commission is aiming the prudent market operator test at, i.e. the Member State or the beneficiary or indeed both. What is clear, however, is that the Commission should not apply any such market-based comparison test to the State acting in its public capacity.

The Commission does not engage in an assessment of whether the relevant APAs were 'selective' in nature. On the contrary, the Commission states, without reference to specific facts of the case, that a tax ruling which deviates from the practice of issuing rulings have the effect of lowering the tax burden of the undertakings concerned as compared to undertakings in a similar legal and factual situation. The Commission seems to rely on the assumption that if there is a derogation from a general measure there is prima facie aid. In these transfer pricing cases, the Commission fails to clearly identify what the general measure is.

In Fiat, Starbucks and Belgium Excess Profit cases, the Commission applies the three-step analysis to determine the measure was selective. First, the Commission concluded that the Member State's general corporate tax system was the correct reference system. According to the Commission, it was irrelevant whether corporate income tax was imposed on the profit of an integrated company or non-integrated company. Second, the Commission found there to be a selective advantage conferred on undertakings concerned due to a derogation from this reference system, which led to unequal treatment between companies in a factually and legally similar situation. The Commission stated that where the tax measure derogates from the reference system, this would usually coincide with the

identification of an advantage granted to the beneficiary under the measure: "*the identification of an economic advantage is, in principle, sufficient to support the presumption that it is selective*"[139].

In order to analyse the reference system established by the Commission in transfer pricing, it is possible to distinguish the decisions into two groups based on the national legal framework: (*i*) cases where the domestic legislation did not provide for an arm's length rule explicitly (Apple); and (*ii*) cases where the domestic legislation contained the arm's length requirement (Fiat, Amazon, Starbucks).

As previously stated, each selectivity and advantage analysis under State aid should start by delimiting what is "normal". Defining what is "normal" will give us a clear picture of the pool of undertakings that should be compared with when deciding whether the treatment under scrutiny is different (selective) and advantageous (grants an economic benefit) as compared to the reference system[140]. In that respect, the Commission always built a cascade of arguments in the alternative. In all cases under examination, it started by arguing that the frame of reference should be the general corporate tax system. It contended that the general corporate tax system should contain a set of rules (e.g. identification of the taxable persons, the taxable base, the taxable events, and the applicable tax rates), which apply consistently to all undertakings falling within its scope as defined by its objective. Such a view on the reference system naturally leads to the inevitable conclusion that all profit-oriented companies are comparable. Therefore, any advantageous treatment to some undertakings (be it individual or a group of such) will be granting a selective advantage for the purposes of State aid, leading to the result that Member States will need to defend virtually all their tax policies. In the alternative, the Commission argued for a narrower frame of reference, consisting usually of a concrete rule that encompasses the "default" treatment from which the country deviates by the APA. In Apple, for example, that was the rule on profit attribution and the substantive discretion for the tax authorities that it potentially entailed; in Starbucks, the Commission briefly addressed the domestic arm's length rule, which refers to the OECD TP Guidelines, as the potential narrower frame of reference. The same approach was adopted in Amazon; thus, narrowing down the pool of comparable undertakings to those which form a multinational group.

According to the several *dictum* of the Court of Justice, the determination of the reference system is crucial for the accuracy of the selective advantage test, making it important to elaborate on the Commission's analysis. Traditionally, the Commission has identified illegal State aid by comparing the tax treatment of a selective class (or a particular company) to a reference system composed of a

[139] Case C-15/14, *MOL v Commission*, par. 60; Case T-385/12, *Orange v Commission*.

[140] BURIAK S., LAZAROV I., *Between State Aid and the Fundamental Freedoms: The Arm's Length Principle and EU Law*, in *Common Market Law Review*, 2019.

consistent set of rules that generally apply. This is a tax-expenditure approach. Crucially, it uses the State's own domestic law as the baseline for measuring the tax advantage.

But in the decisions under scrutiny, compared to the past, instead of evaluating Member State tax rules against a background of the challenged State's own generally applicable tax regime, the Commission began to evaluate Member State tax rules against external norms. In some cases, the Commission used an external norm derived from internationally accepted tax practices; in others, the norm consisted of the Commission's own view of good tax practices. This approach is very problematic[141].

Understood in these terms, in fact, the Commission's use of external benchmarks in recent cases represents a response to a deficient methodology, rather than a blatant power grab or an attempt to impose single taxation. But judging Member State regimes against external norms infringes State sovereignty; it violates the federal system described in the EU's foundational treaties. Benchmarking by external norms invades reserved Member State tax authority. The Court of Justice repeatedly has held that the TFEU places only limited restrictions on States' tax systems. The fundamental freedoms and the prohibition of State aid both promote competitive neutrality; they prevent States from enacting protectionist regimes and rules that function equivalently to import or export subsidies. The prohibition of State aid also forbids rules that discriminate by sector. But, beyond that, States are free to choose their tax rates, bases, and income-allocation rules. If this is so, then benchmarking by norms is overbroad because it eliminates tax provisions simply because they do not comply with the Commission's chosen norm, even if the particular provision does not adversely discriminate between cross-border and domestic commerce[142].

In fact, the practice of benchmarking by external norms generates several problems: whether the Commission has the capacity to make tax policy decisions; if the Commission is free to impose external benchmarks on Member States, neither taxpayers nor States can predict the outcome of State aid cases; it make State aid enforcement less effective[143].

With regard to the specific cases, in Starbucks, the Commission found that the Netherlands had incorporated into its own domestic law the OECD arm's-length standard and the OECD Transfer Pricing Guidelines as its standard for allocating income, but the Netherlands deviated from the standard and guidelines to relieve Starbucks of tax that normally would have been due under Dutch rules. The Commission took exactly the same analytical approach in Amazon and Fiat, the two cases involving Luxembourg. To this extent, all three decisions employed a traditional tax-expenditure

[141] MASON R., *Identifying illegal subsidies*, American University Law review, 2019.
[142] SHON. W., *Taxation and State aid law in the European Union*, in *Common Market Law Review*, 1999, 923.
[143] MASON R., *Identifying illegal subsidies*, American University Law review, 2019.

approach. All three cases involved selectivity, the States deviated from their regularly applicable law to favour a particular company, and particular companies are a selective class.

The Apple case is peculiar as Irish law provided no arm's length rule, leading some to argue that the Commission established its own hypothetical frame of reference and tested against it. Since there was no arm's length rule, the Commission needed to find some general benchmark for analysis of selectivity; in this case that was the corporate tax system (as a primary line of reasoning). It is questionable whether such frame of reference is in line with the established case law. What the Commission argued instead, is that the objective of the Irish corporate tax system is to tax all resident and non-resident companies on their profits. Hence, in the Commission's view, in light of that objective, the system must not differentiate between integrated and stand-alone undertakings as they are in a comparable situation.

As a rule, all companies, whether part of a group or not, are taxed based on their accounting result, subject to certain adjustments (e.g. expenses that were made not for business purposes). Thus, in principle the default rule – the "normal" – for both integrated and stand-alone entities is the same: taxation on their accounting profits. What the Commission is arguing in essence, therefore, is that Ireland should have applied a derogation from this general rule in order to ensure equal treatment. Hence, by not acting, by not adopting the arm's length principle, Ireland allowed itself to issue the contested tax ruling with arbitrary allocation of profits to Apple in the country. The logic of the Commission looks at the other side of the coin of the general principle of equality, different situations must not be treated alike.

The Commission has assumed that the taxable base of integrated undertakings should be assessed in a different way from stand-alone companies, by using proxies, which have to indicate the market outcome in conditions of free competition between independent companies (i.e. the arm's length principle). The question in that respect is whether only integrated companies have the possibility to manipulate their accounting result by transfer mispricing of transactions.

There are two problems with this point of the Commission. First, a deviation from the arm's length principle is conceivable also in some circumstances when non-integrated entities are concerned. The OECD Model (and usually domestic law) provides, for a reason, that the arm's length principle applies to "related" or "associated" enterprises, which is a broader term than "integrated entities". The term "associated parties" refers to "an enterprise which participates directly or indirectly in the management, control or capital of (another) enterprise", while "integrated parties" concerns only capital participation. Therefore, two stand-alone companies might be related because of reasons other than capital participation, for example, if they have the same director. There is no harmonization

under Union law as to the definitions of related/unrelated companies. Therefore, Member State legislation is not uniform in its scope as to what is treated as a related entity.

Second, the stand-alone unrelated companies might also have the means to manipulate the pricing of transactions. It is inaccurate for the Commission to argue that the transactions of stand-alone entities do not deviate from market conditions.

The Commission specifically considers that the advantage of non-application of the arm's length principle to integrated undertakings is the possibility to avoid the tax that would normally be payable on profits generated by activities undertaken on the national territory, i.e. the advantage is the possibility to shift profits.

The domestic legal framework in Amazon, Fiat, Starbucks was different, as the national laws of both Luxembourg and the Netherlands did explicitly provide for an arm's length requirement. Nevertheless, in all these cases, the analysis of the Commission was very much identical to the one employed in Apple where the whole corporate tax system of the Member States in question was used as a reference base. Compared to the Apple case, here it was easier to specify what the default rule was; the transfer prices between related parties shall be set at arm's length terms.

All individual APAs that permit a transaction to derogate from a reliable approximation of market-based outcome, insofar as they grant an economic benefit to an undertaking, should be considered an advantage. Moreover, in the case of an individual measure such as the APAs, the selectivity can be presumed. Hence, an APA will confer a selective advantage, if it derogates from the arm's length principle and such derogation leads to an economic benefit for the undertaking. The frame of reference should be defined as the domestic rule on profit allocation between related entities and between the different divisions of one and the same entity in cross-border situations. Absent harmonization, Member States are at liberty to design this rule as long as it applies in law and in fact consistently to all undertakings.

Finally, in all these cases, the cumulative criteria of selectivity and advantage are conflated. The Commission only focusses on advantage and ignores selectivity. It has been argued that, since each ruling concerns a single company, there is no need to linger long on the issue of selectivity[144]. If this is the reason for ignoring an analysis of selectivity, it not only conflicts with Article 107 TFEU, but it also ignores recent case law, which requires a separate analysis of these two conditions: the requirement as to selectivity under Article 107 (1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage[145]. While a detection of an economic advantage

[144] GORMSEN L., *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, in *Journal of European Competition Law & Practice*, 7, 2016, 370.
[145] Case C-15/14, *Commission v MOL*, par. 59.

could create a rebuttable presumption that it is selective, it does not alter the fact that economic advantage and selectivity are two separate conditions, which requires a separate analysis. This is all the more important in cases concerning fiscal measures[146].

5. What is the taxpayer's perspective? A -still- unresolved issue

Fiscal State aid has become a topic of particular interest as growing attention has been paid to recent European Commission investigations and decisions concerning tax rulings granted to multinational companies. In fact, the conduct of the European Commission and the extent of State aid control on tax ruling systems has stimulated a broad debate that sees, on the one hand, Member States that considered that the European Commission acted in their exclusive tax jurisdiction, and, on the other hand, the European Commission argues that State aid rules applies also to areas not harmonized, such as direct taxation.

In this first chapter, the regulatory framework of the State aid law and the current state of art was outlined. Following this preliminary analysis of the State aid framework, some first critical points can be outlined on a principle level, which emerge even more clearly from the recent action implemented by the European Commission in the context of tax measures. First of all, the notion of aid, especially referring to the field of taxation, constitutes a nebulous and unclear concept and the current definition of State aid by the European Commission, as well as case law, are contributing to add on a layer of complexity and uncertainty for taxpayers. On this point, it is necessary to underline that the value of a Commission notice on the notion of fiscal aid is necessarily limited, because it is not possible, not even for the Commission, to restrict the boundaries of State aid.

In this respect, nothing leads to a conclusion that guidelines are going to be adopted to help distinguish whether individual rulings should be notified or not as potential State aid. Guidelines are not legislation and may, at most, bind the Commission. Guidelines are, accordingly, insufficient to provide the needed certainty to national authorities faced with their obligations resulting directly from European law. If one was to draw a conclusion from the Commission's proceedings reviewing individual rulings, it would be to suggest a new framework under which individual tax rulings could be subject to *ex ante* review by the Commission, instead of waiting for single episodes to be brought

[146] According to Opinion of Advocate General Kokotte in Case C-66/14, *Finanzamt Linz v Bundesfinanzgericht*, par. 114 and 115: *"In matters of tax law in particular, however, the decisive criterion is whether a provision is selective, because the other conditions laid down in Article 107(1) TFEU are almost always satisfied. The criterion relating to the selectivity of a national provision therefore requires careful handling. If the pro- vision concerns neither one or more individually identifiable sectors capable of being defined by reference to their economic activity, nor individually identifiable undertakings, as the wording of Article 107(1) TFEU requires, then the provision in question cannot in principle be assumed to be selective"*.

to the attention of the Commission. This seems necessary with a view aimed to bringing legal certainty to an area of State aid control that is arguably problematic because of the overlap between national exclusive competence in taxation and the Commission's prerogatives in applying State aid rules[147].

Secondly, the European Commission has taken on an increasingly prominent role in the fight against harmful tax competition through the use of the State aid ban instrument and in doing so, it has gone beyond the limits of its competences established at Union level. With regard to the elements that constitute and outline a measure as State aid, it has been seen that, in fact, the conditions of the tax advantage and selectivity are closely connected and, for this reason, they are difficult to distinguish in the concrete application put in place by the Commission and the Court of Justice. Furthermore, the notion of selectivity represents the most controversial and discussed point of the State aid discipline, especially in the tax area. It is, in fact, an unclear and cumbersome concept, whose interpretation by the Court of Justice has been utterly smoky and fluctuating. This key criterion of the assessment of State aid should also be clarified and based on objective assessment methodology.

It was then analysed the power to investigate the European Commission on tax rulings granted by individual member states to multinationals. A new interpretation has emerged from the recent cited decisions. The fact that in the Commission' opinion arm's length principle is inherent to Art. 107 TFUE raises doubts as to whether is a notifiable aid. There is in fact no rule that makes arm's length principle a European wide rule and no case law that confirms that it must be applied in all Members State. But there is more. The European Commission has adopted its own version, new and unprecedent; it is, in fact, evident the divergence in the interpretation of the arm's length principle, that it is not equivalent from OECD Model.

From this state of the art, an unclear, neither certain, nor *a priori* established discipline emerges. In this context, in which, traditionally, it has always been tried to find a balance between, on one side,

[147] See ROSSI-MACCANICO P., *A proposed Framework to review tax rulings*, in HASLEHNER W., KOFLER G., RUST A., *EU Tax Law and Policy in the 21st Century*, Kluwer Law International, New York, 2017, 76. Regarding to this aspect, it is proposed that such rules take the form of Commission directives in accordance with Article 106 (3) TFEU. In this sense, as opposed to adopting decisions to find infringements and imposing the appropriate remedies contemplated by the same Article 106 (3) TFEU, the function of these directives is to provide general rules for the future, to specify obligations, and to possibly prevent future infringements. The directives issued pursuant to Article 106 (3) TFEU may operate in two ways: first, by creating the necessary mechanisms to enable the Commission to detect infringements in the event that they occur; and, secondly, by specifying the meaning and scope of the obligations that already exist under Article 106 (1) TFEU and/or the exception under Article 106 (2) TFEU. In both cases, legal certainty is increased and the risk of unintentional infringements is reduced. According to the author, a specific procedural framework is not only appropriate, but also required to restore legal certainty for both the Member States' administrators and taxpayers. In those circumstances, State aid proceedings relating to specific tax assessments under Articles 107 and 108 TFEU demand clear boundaries and can no longer be left to the self-discipline of national tax administrators or to episodic Commission interventions.

the protection of free competition and internal market, and, on the other, the protection of Member States' autonomy about internal economic and tax policy's choices, no attention is paid to the taxpayer involved in a State aid procedure and limited legal protections are afforded to taxpayer. In the field of State aid, there is still a high degree of taxpayer uncertainty: it is difficult, if not impossible, to predict the nature of a fiscal measure as State aid.

The real focus is mainly and only on the relationships between European Institutions and the Member States and it seems that the position of the ultimate beneficiaries of so-called State aid is often overlooked, or even ignored. As will be explained in detail below, there are very limited margins of protection for the taxpayer involved in the procedure for defining State aid.

Consequently, the need to find a new balance of interests that takes into account also and above all taxpayer's protection and rights emerges, especially in the fiscal area due to the relevance of the interests involved and because concrete tax consequences directly affect the taxpayer.

As it will be seen extensively, one can only underline a paradox regarding the current assessment of tax measures entailing State aid: the undertakings and taxpayers, who are primary actors of the process (being the actual beneficiaries of such schemes), are somewhat left aside when it comes to the procedural stage, be it the assessment process by the EU Commission, where only the Member State concerned will provide information, or the litigation process where the right of the taxpayers to access the file and even being party to the litigation action has been established recently, and only in some defined cases.

A number of measures would help the taxpayers to achieve the level of certainty that is necessary for the conduct of their business under acceptable conditions. The first step enabling improvement should be the clarification of the concept of State aid and the way it is assessed. This implies a clarification of its definition and its limits and the reach of State aid versus harmful tax measures and a clear framework for the review of selectivity test, as well as the provision of an advance procedure enabling to confirm that a measure does not entail State aid. This would demonstrate a clear and global picture of all the implications of the decisions made in this respect. State aid is not only a theoretical and controversial question between European institutions and Member States, but does have significant practical implications for taxpayers.

Chapter 2. The Taxpayer's position in State Aid Investigation Procedure

1. The procedural rules

The implementation of the ban on State aid by the European Commission is subject to a specific procedure in Article 108 TFEU, which determines the powers of the Commission and the obligations of the Member States in relation to the measures relevant for the application of this discipline. The powers of the Commission relate to the preliminary investigation, with different characteristics in relation to existing aid, new aid and the authorization of the aforementioned.

The State aid system is, in principle, based on the *ex ante* control. The Member States, in fact, have to notify the Commission with plans to grant new aid or alter existing aid. However, the Commission has investigative powers and can act upon the complaints of any interested party or on its own initiative. The Commission has a central role in the monitoring system. Pursuant to Article 108 (1) TFEU, the European Commission has, in fact, an obligation to monitor the existing aid schemes in the Member States, while the following Article 108 (3) establishes for new aid an additional procedure aimed at eliminating the aid, which prevents the Member State from applying this measure in its own legal system.

The concept of existing aid and new aid are the subject of the Procedural Regulation established by the European Council in order to codify the implementation modalities of Article 108 TFEU. Regulation 2015/15891 currently in force distinguishes mainly between two categories of aid: those that have been duly notified, so-called "notified aid", and those that are considered unlawful State aid because they have not been notified to the Commission prior to implementation, in violation of the stand-still obligation of the Member State under Article 108 (3). The distinction between notified and unlawful [1]. Article 108 TFEU requires a Member State to inform the Commission of a planned State aid measure prior to its implementation and to give the Commission the opportunity to assess the compatibility of the State aid with the internal market under Article 107 (2) or (3) TFEU. The so-called stand-still obligation, laid down in Article 108 (3), third sentence TFEU, does not allow even a partial implementation of the measure until the Commission has made its assessment.

Notified aid refers to any new aid measure, individual aid or aid scheme, that has been notified by the Member State to the European Commission, as foreseen by Article 108 (1) TFEU and that has

[1] HOFMANN H.C.H., MICHEAU C., *State Aid Law of the European Union*, Oxford, 2016, 348.

not been implemented prior to the Commission taking a position. Non-notified or unlawful aid, by contrast, refers to any State aid measure that has been implemented either without prior notification to the European Commission, even though a notification requirement existed, or that was notified but implemented prior to the Commission taking a position on the compatibility with the internal market.

The distinction between notified and unlawful aid does not, however, qualify the State aid in terms of its compatibility with the internal market. It merely determines the different procedures to be applied. Incompatible aid is a State aid that has been found by the European Commission not to be compatible with the internal market under Article 107, paragraph 2 or 3 TFEU. Notified State aid may be declared compatible or incompatible with the internal market, in this case the procedure provided for in Articles 2 to 11 of Regulation 2015/1589 apply. Unlawful aid will also have to be examined as to its compatibility with the internal market, but a different procedure, laid down in Chapter III of Regulation 2015/1589, applies, according to which the Commission is not tied by deadlines. An aid that has not been notified but is being investigated by the Commission will be considered unlawful; the Commission must nonetheless assess whether the measure may be declared compatible with the internal market, if it fulfils the requirements of Article 107, paragraph 2 or paragraph 3, TFEU. In fact, the Commission may not refuse to investigate the compatibility of the State aid with Article 107 TFEU even if the measure is an unlawful aid. There are thus four possible results: (*i*) notified aid, declared compatible, resulting in authorized aid; (*ii*) notified aid, declared incompatible; the incompatible aid may simply not be granted; (*iii*) unlawful aid, declared compatible with the internal market: the beneficiary will have to pay interest for the time period between the receipt of the aid and the positive decision; and (*iv*) unlawful aid, declared incompatible: the decision will also impose the recovery of the amount received, plus interest since the granting of the aid.

Existing aid falls under the regime of constant review by the Commission. Member States have to submit annual reports on all existing aid schemes. With regard to full or partial tax exemptions, this includes an estimation of the budgetary revenue lost. Existing aid may be implemented as long as the Commission has not found it incompatible with the internal market. As long as the Commission does not raise any objections to existing aid measures, they are permissible and may be granted by the Member States. Where the Commission considers that existing aid is not compatible with the internal market, it may propose any appropriate measures required. Although the proposal of appropriate measures is a recommendation and thus not legally binding for the Member State concerned, it may be seen as preliminary to the formal investigation procedure. If the respective Member State is not willing to comply with the measures suggested within a certain period of time, the Commission starts the formal investigation procedure under Article 108 (2) TFEU. Individuals who have concerns about

an existing aid may give notice to the Commission and propose that an investigation procedure be initiated, according to Article 24, Procedural Regulation. However, they have no right to claim the initiation of a formal investigation procedure under Article 108. The negative decision about the existing aid not in line with the internal market has effect for the future (*ex nunc*). If the Member State continues to apply the incompatible State aid measure, a request for recovery is possible[2].

With regards to new aid, as previously stated, Article 108 (3) TFEU provides that the Member States must inform the Commission of any plans to grant or alter new aid. Member States have to notify any measure that creates the suspicion of State aid. The notification requirement for new aid is preparatory to the introduction of the measure into the legal system of the Member State concerned. The obligation to notify creates a possibility for the Commission to exercise a preliminary investigation to whether a planned aid or an aid scheme is compatible with the common market and can be implemented or whether it should be target for a formal investigation. For what concerns aid schemes, it is enough for the Commission to examine the scheme, and not each particular individual case in which it applies. In addition to notification, Member States are under the obligation to standstill; this means that a Member State shall not put its proposed aid measures into effect until the Commission has given a final decision. The prohibition of implementation of the notified measure continues as long as it is not declared compatible with the internal market by the Commission or is deemed to have been declared compatible. This standstill obligation is effective during the whole investigation procedure until the final decision is made. If that aid is implemented without prior notification, it is least formally illegal. So, measure potentially constituting State aid should be notified to the Commission before their legal adoption in the respective Member State[3].

After receiving notification of a new measure, the Commission initiates a preliminary examination procedure that has to result in a decision within a period of two months, according to Article 4 (5) Procedural Regulation. This period may only be extended with the consent of the Member State concerned. Pre-notification is only available for notified measure.

The pre-notification phase is introduced by the Code of Best Practices for the first time emphasising the added value of the pre-notification contacts with Member States to pave the way for a quicker treatment of the notifications. Pre-notification contacts create the possibility to discuss and guide the Member State concerned about the notification process related to the scope of the information to be submitted or on whether the case is prima facie eligible for the simplified procedure. However, during this phase also substantive issues can be discussed. The Code provides for a timeline of two months,

[2] Case C-387/92, *Banco Exterior de Espana*, par. 20.

[3] There are a number of exceptions to the notification requirements: notification is not necessary in respect of *de minimis* aid and if the aid is granted on the basis of an authorized aid scheme.

but pre-notification may last also several months depending on the complexity of the case. At the end of this phase the Commission provides the Member State concerned with an informal preliminary assessment of the project, which is not an official position of the Commission, but it is a simple informal guidance on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the Internal Market. The purpose of pre-notification is to ensure that notifications of State aid by Member States are complete and contain the appropriate quality of information necessary for the Commission to conduct its preliminary analysis. It offers the possibility for Member States to start having (confidential) discussions with the Commission from an early stage, and allows the Commission to provide case-specific guidance about, inter alia, legal and other key issues, economic analysis, the scope of required information, and, if necessary, proposals on the modification of aid. Pre-notification is only mandatory for notifications subject to the simplified procedure. Although in all other cases, pre-notification is optional and informal in nature, it is strongly recommended for cases that contain particular novelties or specific features that would justify prior discussions with the Commission.

As expressed in the Procedural Regulation the Commission can conclude the preliminary examination in three different ways. Firstly, the Commission can come to the conclusion that the measure does not constitute State aid. It follows from such a decision that no obligations or conditions can be imposed, thus, it is for the Member State and the beneficiary a favourable decision. Secondly, the preliminary procedure can be completed by a positive decision, which means that the Commission has found that the measure constitutes State aid but is compatible with the common market. The measure can, in other words, be exempted under one of the exceptions given by the Treaty. Thirdly, the Commission can conclude the preliminary procedure by initiating the formal investigation procedure. Such a decision will be taken where the Commission finds that doubts are raised as to the compatibility with the common market of a notified measure.

According to the provisions of Article 4 of the Regulation, the decision can also be considered tacit and, consequently, the aid authorized if, within two months from the notification of the measure by the Member State, the Commission has neither opened the formal investigation, nor asked for additional information or nor it has requested an extension of the investigation[4]. Otherwise, if, after the preliminary examination, the Commission comes to the conclusion that the notified measure constitute aid, it decides to initiate the formal investigation procedure pursuant to Article 108 (2) TFEU.

The decision to initiate the formal investigation procedure is communicated to the respective Member State by letter. The other Member States and interested parties are informed by note in the Official

[4] The Regulation implements an orientation of the Court of Justice expressed in Case C-120/73, *Lorenz*.

Journal. According to Article 6 of Procedural Regulation, within a period of one month, the Member State and all parties (other Member States, individuals, undertakings, the recipient of the aid, its competitors) may submit their comments. After taking all relevant information into consideration and all doubts have been removed, the Commission should conclude its examination within a period of 18 months[5]. Despite its significance, there are few constraints on the Commission as to the duration of the formal investigation and its scope. The formal investigation procedure is terminated in a similar way as the preliminary investigation: the Commission can conclude that the notified measure does not constitute State aid, that the measure constitutes State aid but one of the exemptions is applicable or that the aid is incompatible with the common market and should be recovered. In addition to this, the Commission often finds aid measures partly incompatible with the common market. This means, in other words, that only a part of the proposed aid is compatible and thus approved.

To challenge the final decision of the Commission before the Court by means of an action for annulment as regulated by Article 263 TFEU, the parties must make it clear that they are directly and individually concerned by the Commission's decision. Not only the actual recipient itself, but also potential aid recipients may challenge a negative or conditional decision if they were identified or at least readily identifiable at the time of the adoption of the decision[6]. Moreover, as concerns competitors of the beneficiary, they must demonstrate that they have a significant role in the State aid procedure and that their position in the market is significantly affected by the aid[7].

Concerning the beneficiaries' role during the formal investigation procedure, it is necessary to underline that traditionally State aid procedures are a bilateral dialogue between the Commission and the Member State concerned, where third parties are involved only incidentally. It should be noted that the interested parties do not have the same rights as the Member States. In addition, the person receiving aid is not in a special position because, from a formal point of view, the proceeding is not against the addressee of the aid[8]. The Procedural Regulation 2015/1589 is, in fact, based on two related concepts: loyal cooperation between the Member States and the Commission and the conduct of the administrative procedures as a form of privileged dialogue between these two parties. This arrangement corresponds to the formal structure of the procedure that see as formal parties the Commission and the Member State responsible for granting aid and in which, as will be seen below, the interested parties enjoy very limited procedural rights. In so far as the Member State cooperates loyally, by notifying a planned measure together with all the relevant information such as to allow

[5] European Ombudsman, Case 1184/2012, *PMC*, according to which the duration of the formal investigation is contrary to the principles of good administration if lasted more than six years.

[6] Case C-2013/16, *Dirk Andres*, par.40.

[7] Case C-169/84, *Cofaz*, par. 25.

[8] MAZZOCCHI, F., *The Procedure before the Commission*, in SANTA MARIA, A., *Competition and State Aid, An Analysis of the EU Practice*, Wolters Kluwer, 2015, 123.

the Commission to reach a preliminary decision on the measure, the Regulation provides at least for the Member State concerned a clear framework for the investigation in its first phase.

If the planned measure or scheme is notified in full and in a timely manner, beneficiaries do not have any formal or substantive rights until the Commission issues a final decision on the matter. Since notified measures are subject to a stand-still obligation until a decision has been taken, arguably the position of beneficiaries and/or competitors has not been impacted on until the time of the final decision. Nevertheless, and given that the Commission s final decision may well have future economic consequences, the total exclusion of all such interests from the early procedural phases seems to be difficult to justify[9].

There are at least two aspects which, according the Commission's view, mitigate the formal exclusion of third parties (understood as non-formal parts of the procedure, including both the aid beneficiary and the other interested parties[10]). First of all, the Commission itself sees it as a matter of best practice to also involve the aid recipient in the discussions, especially for cases that may lead to major technical, financial, and project related implications. Second, the duration of the preliminary investigation is one of the factors that the Courts take into account when deciding if the Commission held serious doubts and, as a consequence, should have opened formal investigation procedure. The Courts have been reluctant to allow actions to succeed purely on the basis of the duration of the preliminary investigation phase. The Commission's failure to reach a preliminary conclusion on a measure within a reasonable timeframe may well be of consequence for the position of interested parties such as beneficiaries or their competitors. It can be argued, however, that an excessive duration of this phase may be in breach of the reasonable delay requirement, a general principle of law and a sub-component of the right to good administration.

In principle, a beneficiary can be involved in the dialogue between Commission and Member State, but it has no formal rights. The fact that the rules impose obligations and duties on interested parties without according them any improvement in their procedural rights whatsoever has been met with criticism, in particular for picking out the most useful pieces of the Commission's antitrust enforcement rules to reinforce the effectiveness of State aid procedure[11]. There are obviously cases where Member States do not act loyally and fail to provide the Commission with the necessary market

[9] The implicit position of the Commission, that has clearly informed the recent modernization of its procedures, consist in the interests of good administration that at this preliminary stage the Commission, being constrained by the binding two-month time period, must be entitled to proceed as expeditiously as possible.

[10] According to the Article 1, h), of the Procedural Regulation 2015/1589 of 13 July 2015, third party is "*any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations*".

[11] It may be noted that these new powers are not fully comparable with those conferred on the Commission by Regulation 1/2003, as there are no equivalent powers to take statements from natural or legal persons or to inspect business or private premises.

information. Where the Commission adopts the decision to open a formal investigation pursuant to Article 7, this is addressed also to the interested parties. In only this limited context, interested parties are also addressees of such a decision and should be guaranteed, in principle, a right to a fair hearing in the formal investigation as well. The decision to proceed to the formal investigation is, in fact, of crucial importance for the Member State concerned, potential beneficiaries, and their competitors. Its scope shapes the participation rights of third parties. In this context, interested parties have only one chance, that is, to submit written observations on the issues summarized in the opening decision[12].

When performing its review, the Commission is bound to conduct a diligent and impartial examination, which follows from the interest of sound administration and the fundamental rules of the Treaty. In particularly complex cases, the Commission may request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete final assessment of the national measure at stake. The exercise of this power is, however, subject to a number of conditions as listed in Article 7 (1) of the Regulation 2015/1589: it can only be used, first, during the formal investigation; and second, if the Commission has taken the view that the information provided by a Member State during the preliminary investigation is not sufficient. In addition, Article 7 (2) stipulates that the information is limited to formal investigation procedures that have been identified by the Commission as ineffectual to date, and further, and most importantly insofar as beneficiaries are concerned, only if the Member State concerned consents. Undertakings must submit the market information simultaneously to the Commission and the Member State concerned, to the extent that this is not confidential. The Commission shall steer and monitor the information and shall verify confidentiality. Article 9 (10) states that, as a matter of principle, the Commission shall take due account of the legitimate interests of undertakings in the protection of their business secrets and other confidential information. Nevertheless, at the same time, Article 9 (9) provides for a specific procedure allowing the Commission exceptionally to use confidential information that cannot be aggregated or otherwise anonymized, even without the consent of the party submitting the information. The procedure culminates in a decision, notified to the undertakings concerned, and setting a date after the information will be disclosed.

The impact deriving from the lack of effective participation not only affects the investigative phase, but also has effects for the subsequent phases[13]. In fact, as to the scope of the decision, it is settled case law that it is sufficient for the Commission to summarize the relevant issues of fact and law, to

[12] HOFMANN H.C.H., MICHEAU C., *State Aid Law of the European Union*, Oxford, 2016, 352.

[13] Di Pietro A., *La tutela europea ed internazionale del contribuente nell'accertamento tributario*, Cedam, Padova, 2009.

include a provisional assessment as to the aid character of the State measure in question, and to set out its doubts as to the measure's compatibility with the internal market. As to what the relevant issues in fact and law are in this regard, this is for the Commission to ascertain. In any event, it must be sufficient to give the interested parties and the Member State the opportunity to participate effectively in the formal investigation procedure. It is thus considered sufficient for this purpose that the interested parties are aware of the reasoning which led the Commission to conclude provisionally that a measure is to be classified as a new State aid and to be incompatible with the internal market. This test does not appear to be particularly demanding and is once again linked to the limited rights of interested parties to be heard and the limited right to be involved in the procedure to the extent appropriate in the light of the circumstances of the case. Hence if the latter rights are weak in the first instance, inevitably it must follow that there will be few valid grounds available to an interested party on which to object to the lack of clarity or completeness of an opening decision and to the eventual failure of the Commission to arrive at its final or concluding decision on the same facts and issues of law.

The role of third parties in State aid procedures has often been criticised and the latest reforms adopted at European level have not been entirely exhaustive in this regard. Recently, in fact, there are implemented important reforms of the State aid law by the Commission through its State Aid Action Plan (so-called SAAP) and next through its Communication on State Aid Modernisation (SAM). The Commission in its State Aid Action Plan proposed an ambitious reform of State aid procedures including more effective procedures, better enforcement and enhanced transparency. The Commission, through a soft law reform, introduced the Notice on the enforcement of State Aid Law by national courts (the Enforcement Notice), the Notice on a simplified procedure for treatment of certain types of State aid (the Notice on Simplified Procedures) and a Code of Best Practices for the control of State aid procedures (the Code of Best Practices). Another ambitious reform of the State aid law was introduced through the SAM aiming at more efficient procedures and at the implementation of the substantive rules. In the framework of this reform regarding the regulation of EU State aid procedures some amendments of the Procedural Regulation were introduced. Regarding the right to participate, these reforms are, however, disappointing leaving third parties with very limited procedural rights. The State aid procedures are still developed between the Commission and Member States considering the third parties as a mere "source of information". While, the Code of Best Practices hasn't been able to address the shortcomings and inefficiencies in the procedures resulting from the insignificant role given to aid beneficiaries and third parties, the Procedural Regulation creates an imbalance between the efficiency of the State aid procedures and limited procedural rights granted to third parties during these procedures. Furthermore, the new Procedural

Regulation by enhancing the investigatory powers of the Commission increases the procedural duties of the third parties while their procedural guarantees are still missing.

In the interest of procedural efficiency and economy, and as initially explained in the Commission's draft of the new Procedural Regulation, the recent reforms seek to empower the Commission to reach the appropriate parties directly and simultaneously and to guarantee more transparent, accurate and swift information flows.

However, these new powers have only led to a reduction of administrative burdens for Member States, have not further changed the bilateral nature of the state aid procedure and have not changed the role of third parties as a source of information. The amended Regulation has failed to introduce a clearer and more transparent set of administrative rules to protect the interests of third parties. The Commission, in fact, can only invoke its new powers where Member States have failed to provide it with adequate information in the preliminary phase, this is the only basis for justifying the imposition of far-reaching duties on interested parties.

2. Benchmark: the fundamental rights as general principles of EU law and the possible application of the EU Charter of fundamental rights

The reason for investigating the position of the taxpayer in the State aid investigation procedure derives from the need to analyse the real effectiveness of this phase, which concerns, in particular, a question of good administration and fiscal certainty and a question of respect for the taxpayer's rights. In particular, it is necessary to ask ourselves if a different level of protection of the taxpayer can be justified compared to that established in general and in principle in the EU legal order and, in particular, by the EU Charter, considering that scenarios in which fundamental rights are not duly protected and recognized do not appear to be tolerated under Union law. In fact, it is not only just relevant that one has a right, but also whether such a right can be effectively enforced. The issue is, for this reason, not just whether taxpayers have in principle rights, but also and especially whether and how they can make such rights effective[14].

As peacefully recognized, taxpayers are human beings and, as such, they are to be entitled to the protection of human rights. However, the protection of such fundamental rights is often prevented or overshadowed by the predominant interest in securing the general support of the community for the

[14] PISTONE P., *The Protection of Taxpayers' Rights in European Tax Law*, in NYKIEL W., SEK M., *Protection of Taxpayer's Rights: European, International and Domestic Tax Law Perspective*, Wolters Kluwer, 2009, 35.

public interest in tax collection[15]. But, only fundamental rights, and in particular procedural fundamental rights (since in relation to substantive tax provision States enjoy a wide margin of appreciation) can provide the necessary balance between the public power and the rights of taxpayers[16]. Taxation and human rights are this way linked through protection of the taxpayers' rights[17]. In this sense, the concept of protection of taxpayers' rights is a function of the broader notion of human rights whose movement started only after the Second World War. Human rights that seek to protect individuals especially against the exercise of public power, in fact, is the starting point for the analysis of taxpayers' rights. Taxation is arguably the most visible, persistent and almost universal interference with this ownership. Taxation, in fact, provides ground for conflict between the exercise of public power, on one hand, and the need to respect the rights of individual taxpayers, including corporate, on the other[18]. It does not seem reasonable to assert that human rights, as recognized under international and European law, can be denied whenever the individual who demand them has the status of taxpayers and therefore face the national tax authorities[19]. For example, International agreements concerning tax issues seem to recognize the need to provide taxpayers with suitable rights. The Joint Convention between the Council of Europe and OECD on Mutual Administrative Assistance[20] in tax matters recall, in its recital, the need to implement adequate protection of the rights of taxpayers. The Convention shows that, during the procedures leading to the application of taxes, there is no ontological difference between individuals and taxpayers. Each individual, in fact, has the right whenever he is involved in a proceeding aiming at the assessment or at the enforcement of tax liability, to have at his disposal such guarantees in order to avoid abuses by the sovereign State.

Generally speaking, there is no universally accepted definition of taxpayers' rights: these are primarily political and civil rights concerned with balancing the rights of individuals with their obligations to the State. The scholarly debates usually classify these rights in two categories: procedural rights arising from taxpayers' guarantees in the case of tax audits, and substantive rights mostly directed against arbitrary taxation. The first debates at academic level where issues related to

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[15] PISTONE P., *The EU Law Dimension of Human Rights in Tax Matters*, in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 92.

[16] PERROU K., *Fundamental rights in EU tax law*, in PNANAYI C., HASLEHNER W., TRAVERSA E., *Research Handbook on European Union Taxation Law*, Edward Elgar, 2020, 511.

[17] BROKELIND C., *The role of the EU in International Tax Policy and Human Rights. Does the EU need a policy on taxation and Human Rights?,* in VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 115.

[18] *Taxpayers' rights and Obligations: a survey of the legal situation in OECD Countries*, Paris, OECD, 1990.

[19] CORDEIRO GUERRA R., DORIGO S., *Taxpayers' Rights as Human Rights during Tax Procedures,* in VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 425.

[20] The Convention signed on 25 January 1988 was amended the 27 May 2010 with the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters.

fundamental rights in taxation were raised, concerned the possibility to transplant fundamental rights protected in other fields of the law to this one. The historical reason for taxation law was so reluctant in granting and protecting taxpayers' rights (including human and fundamental) has been tracked back by the most prominent academics to the notion of 'Tax primacy' of the State. So important and outstanding is the need for money by the State to be spent in pursuing public goals, that rights of the taxpayers have been misperceived as countervailing factors to the quick and full collection of the resources needed. Even when, for example, the Court of Justice[21] emphasized the importance of the adversarial procedure in the audit protocols and the right to be heard by the taxpayer during reassessment by the Tax office, in most of Member States[22] it was affirmed that this principle is applicable only to taxes falling into the scope of the EU Treaty or away covered by secondary European legislation.

It was stated that tax law, since it implies the exercise of a sovereign power by the authorities, would represent a separate sphere, where the usual rules concerning the protection of human rights would not be automatically applied. Over time, the declared discrepancy between the position of the State, which holds interest that are considered as prevailing in the tax field, and the one of the individual, who is obliged to pay the taxes imposed by the former, has been considered as the base for some theoretical constructions. According to a dated interpretation, not only would there not be substantive rights of the taxpayer with regard to the public authorities when the latter decide how to finance the services for the collectively, but also during the proceedings[23], when these general rules are applied to each singular case, there would not be a form of protections such as the one provided by international law and usually summarized in the "fair trial" expression. Today, however, these reconstructions have no foundation.

In tax law, individual rights have their foundation on multiple levels: national, international and the purely European level. On the national level, European law plays a twofold role[24]: first, because of the influence of the *interpretative acquis*, the fact that the content of national constitutional and other individual rights is shaped by national courts taking into consideration the interpretation adopted by the European Court of Human Rights and, indirectly, European law has entered the national arena; and second, the case law of the Court of Justice has consistently recognized that the common constitutional principles of the Member States form integral part of European law. Although not always written in a constitution, in many countries different principles regarding the behaviour of the

[21] Case C- 349/07, *Sopropè*.

[22] In the Italian system, see Supreme Court, Case n. 28314/2017.

[23] CORDEIRO GUERRA R., DORIGO S., *Taxpayers' Rights as Human Rights during Tax Procedures,* in VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 426.

[24] FORTSAKIS T.P., *The role of individual rights on the Europeanization of Tax Law,* in VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 97.

tax administration and taxpayers' rights apply. The following examples can be mentioned: the principle of good administration; the principle of proportionality; the principle of legal certainty or legitimate expectations, the right to secrecy concerning the tax position of an individual taxpayer[25].
At International level, within the OECD, originally most countries did not have an explicit Taxpayers' Charter but some rights were already present in all systems. Among other rights, the right to a fair trial, the right to certainty, the right to privacy were expressed in the rule of law protecting taxpayers in each country and, as a counterpart of these rights, taxpayers have certain obligations, such as the cooperation duty, the obligation to provide accurate information on time or to pay taxes on time. The OECD policy has constantly tried to list the common themes or elements underlying a politically correct system of taxpayers' protection as a minimum standard (basic rights), such as: the right to be informed, assisted and heard; the right of appeal; the right to pay no more than the correct amount of tax; the right to certainty (providing advice on the tax implications of taxpayers' actions); the right to privacy (meaning limiting investigations to tax audit situations and keeping information confidential), and, finally, the right to confidentiality and secrecy. Most of these rights as common to all tax systems do coincide with the legality principle, according to which no tax may be imposed except on the basis of law, and the principle of fair play or public trust, meaning that the tax authority must not be allowed an unfair advantage in its dealings with taxpayers. At international level, today, the relationship between human rights and taxation is undeniable, and so is the influence of the former on the different facets of the tax relationship, both materially and formally[26]. From the first point of view, human rights affect the settings of fair taxation within limits that allow the effective enjoyment of the fundamental rights of the people, under the conditions of freedom and dignity (education, health, work, etc.), balanced with the adequate financing of State activity aimed at the procurement of essential public services. From a formal standpoint, rights allow the recognition of taxpayers' positions vis-à-vis tax claims, and therefore their right to participation and defence in administrative and judicial proceedings related to the assessment of the tax liability. Human rights also define the relationships between tax administrations and individuals. In this context, all human rights have become paramount general criteria for the protection of human beings, and therefore of taxpayers, in lieu of the current broadening of tax administrations' assessment powers, the multilateral efforts being performed by States in addressing and tackling tax avoidance.

[25] VV. A.A., *Procedural Rules in Tax Law in the Context of European Union and Domestic Law*, Kluwer Law International, New York, 2010, 14.
[26] IBFD Observatory on the Protection of Taxpayers' Rights - 2015-2017: General Report on the Protection of Taxpayers' Rights, 26 April 2018.

At the purely European level, there is, in addition to the European Convention of Human Rights[27], an European base on which individual rights are founded, i.e. the European Charter of Fundamental Rights. The implementation of a European tax policy in the area of taxpayer protection was always hoped for by many parties[28]. In fact, one often wonders whether the rights of taxpayers are sufficiently protected in the existing legal rules or do they need a broader political commitment by the Member States of the European Union. The European Union's policy in this field was until recently limited to some aspects of taxpayers' protection through the case law of the Court of Justice applying human rights as general principles of law, especially within its case law on non-discrimination and on effectiveness of EU law. It is also stated that the existence of two legal orders dealing with human rights (EU law and European Convention of Human Rights) leads some uncertainty about the scope of each of them. Moreover, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR) did not consistently offer, until recently, adequate taxpayers' rights' protection, unless the circumstances of the case fall within the extended scope of the concept of a criminal charge as interpreted by the European Court of Human Rights[29]. In fact, various obstacles may have to be overcome before this line of interpretation gains consensus, starting from the very acknowledgement that the protection of human rights should apply to taxpayers just as much as to any other persons. In this sense, taxpayers are no different from all other human beings and, as such, are entitled to receive protection against improper or unlawful action by tax authorities just like all persons have the right to protect their personal life from the action of the State. This line of interpretation sets some objective limits to a potential expansion of the well-known *Ferrazzini* case law[30]. In this case, the European Court of Human Rights has, in fact, still considered taxation to be part of "*the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant*" [31]. The inference of the Court was clear: if taxation does not *impair* the exercise of the fundamental (civil) rights guaranteed by the

[27] The European Convention of Human Rights is an integral part of European law. Article 6 (3) TEU provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principle of the Union's law. Non only did the EU, from very early on, recognize the application of the rights contained in the ECHR in the EU legal order without further conditions, but it has also undertaken the obligation to become a party to the ECHR itself, as is every Member States.

[28] PISTONE P., *The protection of taxpayers' rights in European Tax Law*, in VV. A.A., *Protection of Taxpayers' rights: European, International and Domestic Tax Law Perspective*, Wolters Kluwer, 2009, 33.

[29] BAKER P., *The decision in Ferrazzini: time to reconsider the application of the European Convention on Human Rights to Tax Matters*, in *Intertax*, 2001, 360.

[30] ECtHR, n. 44759/98, *Ferrazzini v Italy*. The Grande Chamber of the European Court of Human Rights revisited the issue of the applicability of Article 6 of the European Charter of Human rights to tax matters and excluded taxes from the meaning of civil rights on the premise that "*tax matters still form part of the hard core of public authority prerogatives with the public nature of the relationship between the taxpayer and the community remaining predominant*".

[31] ECtHR, n. 44759/98, *Ferrazzini v Italy*, par. 29.

Convention, it must be deduced that taxes are not of the same nature, i.e. "civil obligations"[32]. Then, due to the general exclusion of tax obligations from its scope, Article 6 (1) of the ECHR assumed a reduced role in the protection of the taxpayer position in respect to EU law[33].

Following a slow jurisprudential evolution, the European Convention of Human Rights has progressively built a set of principles applicable, under certain conditions, also to tax matters. After the first traumatic approach of the European Convention to taxation, as seen, in *Ferrazzini* case, the Court developed the principle that the Convention is in fact allowed to be invoked when the tax claim, in itself removed from its rule, also defines a sanctioning response to the order[34]; and, to this end, it has adopted an extremely broad interpretation of the relative concept, suitable to embrace, in almost all cases, even administrative tax penalties. The foregoing is true for Article 6: it has found applications in tax matters in relation to the procedural guarantees of the taxpayer subjected to tax investigations[35], the right to silence and not to incriminate themselves[36], to witness evidence in the tax process[37], to the obligation to make available to the taxpayer all the documents in their possession that concern them even in the event that the latter refuses to collaborate and the prohibition for the Supreme Courts to overturn decisions on the basis of a new examination of the facts[38]. But the respective tax declination of fundamental rights is also emerging in relation to other norms of the European Convention of Human Rights: Article 8, relating to the right to respect for private and family life, has been applied, for example, jointly with Article 6, relating to the protection of professional secrecy between lawyer and client in connection with a document acquisition that took place at the first's office[39]; while the principle of *ne bis in idem* referred to in Article 4 of Protocol 7 has found recognition in relation to the overlap between the tax process, also involving administrative sanctions, and the criminal-tax process[40]. Another rule of the Convention which has found application in the tax field is Article 1, Protocol 1 in terms of property protection. The Court has, among other things, found to be in conflict with this right: (*i*) the lack of clarity of the tax law[41], (*ii*) its unreasonable

[32] BIZIOLI G., *The impact of the Right to a fair trial on Tax Evidence: an EU Analysis*, VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 495.
[33] See, in particular, Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*.
[34] ECtHR, n. 73053/01, *Jussilla v Finland*.
[35] ECtHR, n. 18497/03, *Ravon v France*.
[36] ECtHR, n. 11663/04, *Chambaz v Switzerland*.
[37] ECtHR, n. 73053/01, *Jussilla v Finland*.
[38] ECtHR, n. 7359/06, *Agurdino v Moldova*, par. 26.
[39] ECtHR, n. 18603/03, *André v France*.
[40] ECtHR, n. 11828/11, *Nikänen v Finland*.
[41] ECtHR, n. 23759/03 and 37943/06, *Shchokin v Ukraine*.

retroactivity where it has substantial or procedural content[42], (*iii*) the disproportion of the imposition[43], of the sanction[44] and the actions for the recovery of the taxes due[45].

With regard to the European legal framework, originally, the EU founding treaties, which formed the predecessors of the EU and have now been replaced by the EU Treaties (i.e., the TEU and TFEU), did not include references to human rights nor did they bind EU institutions or EU Member States to any international or EU human rights duties. It did not seem necessary, originally, to protect fundamental rights in a treaty setting up a community with enumerated competences in a mainly economic sphere. Hence, the very existence and protection of fundamental rights at the European level was entirely a product of the Court's case law. The Court of Justice developed EU fundamental rights as general principles of EU law[46] and they still are indirectly derived by the Court of Justice in its case law as general principles of EU law from national constitutional traditions and Member States' international human rights duties. As early as 1969, the Court recognized fundamental rights as part of the general principles of EU law[47] and often referred to fundamental rights as stemming from constitutional traditions common to the Member States and to the European Convention on Human Rights. Compliance with such rights has become an obligation of the Member States. The basis for developing EU fundamental rights in the field of taxation was in a case of 1970[48], in which the standard of legal protection through common principles at the supranational level was set[49]. Since then, the protection of taxpayer fundamental rights has become even more entrenched. Since the late 1980s, the Court of Justice has been called upon to rule on disputes that specifically concern taxpayer rights. In this specific context, we mean by rights[50] of the taxpayer of essentially procedural rights, which differ, although the dividing line between the two categories is not always clear in practice, from the so-called rights substantive of the taxpayer, concerning the legitimacy of the tax obligation or the quantification of the tax liability. The Court, in fact, held that "*Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the European*

[42] ECtHR, n. 72638/01, *Belmonte v Italy*, and n. 30345/05, *Joubert v France*.
[43] ECtHR, n. 49570/11, *Gàll v Hungary*.
[44] ECtHR, n. 32798/06, *Monedero v France*.
[45] ECtHR, n. 27183/04, *Rousk v Sweden*.
[46] Case C-6/64, *Costa v Enel*; Case C-4/73, *Nold v Commission*.
[47] Case C-29/69, *Erich Stauder v City of Ulm - Sozialmt*.
[48] Case C-11/70, *Internationale Handelsgesellschaft*.
[49] KLOFER G., PISTONE P., *General report*, in VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 5.
[50] According to some authors, in the field of taxation, the term "rights" seems inappropriate and the concept of "legitimate interest" should be used instead, in most of the situations. See FANTOZZI A., *Diritto Tributario*, Torino, 2012.

Union"[51]. The Court consolidated this approach, holding that "*In safeguarding these rights, the Court is bound to draw inspiration form constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States*"[52].

In the field of taxation, the Court of Justice has reached a satisfactory result by using autonomous general principles of EU law and by interpreting secondary EU legislation in a manner aimed at balancing the conflicting interest of the authorities and of taxpayers, in order to ensure a coherent tax system. Despite an apparent lack of competence in that area, the Court held that, in what is now settled case law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. In order to understand the scope and limits of these EU fundamental rights, it is important, first, to analyse the reasons for the creation of that line of case law: the Court of Justice initially ruled that the validity of an EU measure (i.e., a legislative act of the EU in accordance with the competences conferred on it by the Treaties) cannot be affected by allegations that run counter to national fundamental rights or national constitutional principles. The Court found that to be the necessary consequence of the doctrine of unconditional supremacy of EU law. Following the establishment of that doctrine, and under some pressure from national constitutional courts, the Court of Justice acknowledged that, while being immune from any challenge based on national constitutional principles, EU measures are, nevertheless, subject to scrutiny pursuant to the fundamental human rights enshrined in the general principles of European law, whose protection must be ensured within the framework of the structure and objectives of the European Union. Neither the content nor the sources of these EU fundamental rights was thereby conclusively established, however. The Court merely stated that they would be inspired by the constitutional traditions common to the Member States[53]. The Court subsequently clarified its position by developing the fundamental rights standard of the EU, using guidelines from international treaties for the protection of human rights concluded by the Member States. It later explicitly included the European Convention on Human Rights (ECHR) among such sources of fundamental rights and stated its special importance for EU law. It should be noted *in limine* that the Court based its decisions on general principles of the European legal system created by it and not on rules of directives or EU regulations of a fiscal nature or on provisions of the Treaty on the Functioning of the European Union or, later, of the Charter of Fundamental Rights of the European Union. It can therefore be said with reasonable certainty that the elaboration of a broad protection of European taxpayers is largely the result of a jurisprudential

[51] Case C-11/70, *International Handelsgesellshaft*, par. 4. Case C-29/69, *Stauder v Stadt Ulm*, par. 7.
[52] Case C-4/73, *Nold*, par. 13.
[53] Case C-11/70, *Internationale Handelsgesellshaft m*BH, par. 4.

elaboration of the Court of Justice, to which the merit of having clearly placed must therefore be ascribed limits on the action of legislators and tax administrations whenever this action has resulted in a violation of the fundamental rights of the taxpayer[54].

There are two axes of protection of rights under European law: first, the principle of effectiveness, stemming from the constitutional traditions of most Member States, requires each State to ensure the actual exercise of the rights granted by the European treaties, prohibiting measures that may undermine the direct effect of European law or make it more cumbersome; secondly, the principle of equivalence obliges each Member State to apply the same levels of protection to purely domestic and cross-border situations.

Alongside the Treaty, the Court of Justice has identified a number of general principles of law, including fundamental rights, which, though not laid down expressly by the Treaties, are common to the legal systems of Europe, and which may also be relevant to staff law. A good example is the right for a person to be heard before a decision is taken which may adversely affect his legal position. This was developed in the case law of the Court long before it was included in Article 41 of the EU Charter. Substantially, the fundamental rights guaranteed by the European Convention and as they result from constitutional traditions common to the Member States, constitute general principles of EU law. Fundamental rights and human rights are two equivalent concepts depending on the legal system under which the rights are claimed.

The judicial development described above has been mirrored later by a gradual inclusion of references to fundamental rights in the EU Treaties: Article 6 of the Treaty on European Union (TEU)[55] states that fundamental rights, as they results from the constitutional traditions common to the Member States, shall constitute general principles of the Union law. This is provision underlines the position of fundamental human rights in the EU legal system, by stating that they constitute a part of EU law, as its general principles. Article 6 TEU also orders the EU to formally accede the ECHR and makes explicit the conclusion that could be drawn from the Court of Justice case law: fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental

[54] TRAVERSA E., TRAVERSA E., *La protezione dei diritti dei contribuenti nella giurisprudenza della Corte di Giustizia dell'Unione Europea,* in *Dir. e prat. trib.*, 3, 2016, 1365.

[55] Article 6 TEU: "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

In recognition of the role of fundamental rights within the EU legal system[56], it was also proclaimed the Charter of Fundamental Rights of the European Union (hereinafter, the EU Charter), whose text was approved in 2000 and, subsequently, in 2009, entered into force and it was incorporated as having the same legal status into EU primary law by the Lisbon Treaty. The entry into force of the Lisbon Treaty, on 1 December 2009, so marked a significant development since it regards the protection of fundamental rights in Europe. The EU Charter of Fundamental Rights should now be viewed as the primary source of EU fundamental rights to be relied on and it may lie in addition to the panoply of tools at the Court of Justice's disposal in its examination of tax cases and its use may contribute to clarity and to consistency in reasoning. Legislature is not wholly free in its decision-making but must take into account the essential interest of European citizens[57]. As such, secondary law has to be compatible with the Charter of fundamental rights.

While putting the protection of fundamental rights explicitly within the treaty framework arguably fulfilled an important signalling function, it does not, for the most part, lead to a substantial extension of that protection: virtually all actionable rights protected by the Charter had already been included in the Court of Justice's jurisprudence prior to its incorporation, as they widely mirror the ECHR and the fundamental rights found in the Member States' national constitutions. The Charter may seem to limit the application of fundamental rights more generally, as it contains a number of general rules that are helpful to clarify its scope, its relationship to other norms, and the substantive content of the rights guaranteed by it. It is widely accepted that the Charter's scope of application coincides with that of the general principles of EU law and, therefore, includes all circumstances where Member States act within the scope of EU law. In this sense, Article 51 (1) of the Charter[58] defines its scope of application. Accordingly, its provisions apply, firstly, to the Institutions, bodies, offices and agencies of the Union, with due regard for the principle of subsidiary. Instead, the Charter in not binding on the Member States, unless and only insofar when they are implementing Union law. Consequently, the Charter is always binding upon the organs of the Union, even "*when they act*

[56] KOFLER G. W., POLARES MADURO M., PISTONE P., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 425.

[57] LYAL R., *Tax and Fundamental Rights in EU Law: Procedural Issues*, in VV. A.A., *Human Rights and Taxation in Europe and the World*, IBFD, Amsterdam, 2011, 458.

[58] Article 51 of EU Charter of fundamental rights: "*The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*".

outside the EU legal framework"[59], but upon the Member States only when they are implementing European law. This is particularly important for the application of EU law by national courts, since legal principles can serve as interpretative sources and impose obligations on the Member States, and sometimes private parties, in situations where relevant national provisions have not been adopted in fulfilment of obligations arising from EU law. The only point in which a difference still exist, is when principles of domestic legal system provide for a better protection *vis à vis* the European ones[60].

The established principles in the Charter of fundamental rights do not constitute *stricto sensu* rules of law. This means that they function as interpretation principles and are not, in principle, directly applicable. They are a declaratory nature and are the expression of the founding principles of supranational law. This means also that national courts have the competence to assess fully the compatibility of any domestic measure with the Charter of fundamental rights[61]. At the same time, the Charter of fundamental rights is not an exhaustive list of fundamental rights. It acknowledges the existence of other fundamental rights, beyond its scope. As such, it can be perceived as a basis that aims to enhance legal certainty and it provides a framework that can be expanded within the EU law in the future[62]. The EU Charter of Fundamental Rights should therefore not be perceived as a normative cage within which EU law must frame its future development, but rather as a legal instrument to enhance legal certainty and the ability to predict the boundaries of supranational law not just by reference to the ability of EU legal principles to expand, but also by reference to a more precise framework. At the same time, some principles of EU law are mandatory for the EU and the national legislator. This means that when secondary EU legislation or national legislation violates these principles individual taxpayers are entitled to invoke these principles before national courts and the Court. The Court of Justice will take account of these principles and base its decisions on them. This does not necessarily mean that the relevant principle will be applied in a hard and fast way, but if the principle does not decide the case, the Court certainly needs to have very powerful arguments for not applying it where the principle *prima facie* applies to the facts. It also means that such a principle is to be taken into account *ex officio*, even when the parties do not invoke the principle before the Court. Examples of such principles are: the primacy of EU law over national law, direct effect of treaty law and secondary EU law, the rights defined in the European Charter, the principle

[59] Joined Cases C-8/15 and C-10/15, *Ledra Advertising Ltd and Others v European Commission and European Central Bank*, par. 67.

[60] GREGGI M., *Human Rights and Taxation in Italy*, in *Itax Paper on Taxation*, 2017, 9.

[61] ADAMCZYC L., MAJDANSKA A., *The Sources of EU Law Relevant for Direct Taxation*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 13.

[62] PISTONE P., *The EU Law dimension of Human Rights in Tax Matters*, VV. A.A., *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014, 102.

of non-discrimination in the European treaties, the fundamental economic freedoms and the principle of proportionality.

The Court of Justice stated that any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided by law and must respect the essence of those rights and freedoms[63]. In fact, a limitation on the exercise of the rights recognized by the Charter is allowed under the following conditions: it must be provided for by law; it must respect the essence of those rights and freedoms; it must pursue objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others (legitimate aim); it must, in accordance with the principle of proportionality, be necessary and genuinely meet the aims pursued (principle of proportionality). The analysis of the Court of Justice indicates the growing significance of the Charter of fundamental rights, and, as some claim, it is likely to play an important role in fields that are highly harmonized, e.g. indirect taxes[64].

The nature of the EU Charter of Fundamental Rights should not be determined in general, but rather by looking at the different features that its rules exhibit. For this purpose, the Charter rules can be grouped into three categories, namely: (*i*) rules that reflect fundamental legal principles as enshrined in national constitutions, (*ii*) those that give human rights a specific legal dimension within the legal system of the European Union and (*iii*) those that are specifically directed at the institutions and bodies of the European Union. In so far as EU law incorporates the protection of human rights and fundamental principles that are common to the tradition of its Member States into its own legal system, it is also clear that the institutions and bodies of the European Union should respect such standards. Accordingly, all provisions that are specifically directed at the institutions of the European Union, to the extent that they express principles that are related to fundamental rights, must derive their validity from the underlying principle, whether it is contained in the EU Charter, in other provisions of primary EU law, or otherwise remains an unwritten principle. In so far as the validity is derived by a principle of EU law that neither reflects human rights, nor is based on the common constitutional tradition of EU Member States, nothing would prevent the European Union from adopting a stronger protection of such rights than that which is otherwise available in the Member States[65].

It is important to underline, moreover, that the scope of EU law cannot differ depending on its content, therefore the general principles of law which are recognized by EU law have the same scope as EU

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[63] Case C-419/14, *WebMindLicenses Kft v Nemezet Adoes Vamhivatal Kiemelt Adoes Vam Foigazgatosag*.

[64] Case C-682/15, *Berlioz Investement Fund*, par. 37-40; Case C-105/14, *Ivo Taricco and Others*.

[65] HETTNE J., *European Legal Principles and National Legal Challenges*, in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements*, in *European Taxation*, 2016, 21.

law in general.[66] It would be, in fact, highly illogical if the Charter had a narrower field of application than the principles included in it. This was confirmed also by the Court of Justice[67]. The Court, in fact, pointed out that since the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law, situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable. The applicability of EU law entails consequently the applicability of the fundamental rights guaranteed by the Charter. According to the Court of Justice, "*It is also important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States*"[68].

Where the Charter applies, individuals can rely on its provisions. Depending on the right and circumstances in question, this goes also for private legal persons, such as corporations and other such legal entities[69].

Although the Charter of fundamental rights does not include expressly specific tax provisions, several articles may be relevant to taxpayers. As will be seen below, certain provisions are, in particular, worth mentioning, such as Article 8 (protection of personal data), Article 17 (right to property), Article 20 (equality before the law), Article 21 (non-discrimination principle), Article 41 (right to good administration), Article 42 (right to access to documents). The EU Charter can apply to taxpayers in the same way and under the same conditions as in any other case covered by its scope of application.

With regard to the importance and relevance of the protection of taxpayers' rights, in the context of European law, further initiatives adopted in this sense at European level must necessarily be mentioned. In 2012, in fact, the European Commission drew up an Action Plan[70] (hereinafter, the 2012 Action Plan) to pursue the primary objective of providing an effective response, at the EU level, to tax evasion and avoidance practices. It was considered, in fact, that the development of relationships between Tax Authorities and taxpayers, based on transparency and fair competition, cannot leave aside the definition of clear-cut and certain rules, which ought to be codified within a

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[66] ROSAS A., ARMATI L., *EU Constitutional Law*, Hart Publishing, 2012, 165.

[67] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, par. 21: "*Since the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*".

[68] Case C-206/13, *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo*, par. 31.

[69] Case c-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*.

[70] Communication from the Commission to the European Parliament and the Council, Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion, COM (2012) 722, par. 17.

'European Taxpayers' Code' context and the spirit of the social responsibility of enterprises. One of the initiatives launched by the 2012 Action Plan establishes – always with the aim to enhance taxpayers' tax compliance – the introduction of a European Taxpayer's Code. Such a tool mainly patterned after 'best administrative practices' of Member States, should contain principles and regulations focused on enhancing cooperation, trust, and reliability between Revenue Offices and Taxpayers, so as to guarantee more transparency on rights and obligations of Taxpayers, while fostering a structural service-driven approach. The European Commission was requested to keep faith with its expressed intention to submit a proposal for the introduction of a European Taxpayer's Code, in the hope that both EU institutions and Member States could develop a document that guarantees the right balance in relations between Tax Authorities and Taxpayers[71].

On the 24th November 2016, the European Commission released its Guidelines for a Model for a European Taxpayers Code with the aim of consolidating a set of common principles underlying the relationships between taxpayers and the tax administrations of the Member States and provides a core of principles, which compiles the main existing rights and obligations that govern the relationships between taxpayers and tax administrations in Europe.

The Model Code Guidelines, as such, are a soft-law instrument that is not binding on the Member States: they simply propose a model set of principles that the Member States are free to adapt to their own specific legal system and culture. The Model Code Guidelines are divided into two main parts: the first part includes nine general principles that have been observed to underpin – or should underpin – the entire network of relationships between taxpayers and tax administrations. It also includes some more-specific principles, particularly arising out of three identified areas of taxpayer/tax administration interaction[72]. The second part goes beyond the scope of a mere taxpayers' code, *stricto sensu*, by also outlining tax related best practices that have already been implemented in some Member States and that could be deemed useful in addressing deficiencies identified in the legal systems of other Member States. The general principles included in the Model Code Guidelines are the following: lawfulness and legal certainty, non-discrimination and taxpayer equality, the presumption of honesty, courtesy and consideration, respect of law, impartiality and independence,

[71] In structuring its proposal for a European Taxpayer's Code, the European Commission considered choosing either a binding Directive (i.e., a Directive proposal) or a non-binding measure, so-called soft law, represented, for example, by a code of conduct. Within the EU, such latter instrument was resorted to in relation to transfer pricing (with a Code of Conduct on documentary requirements and with a Code of Conduct for the implementation of the Arbitration Convention) and harmful tax practices (with the Code of Conduct on taxation of EU enterprises). A soft law measure may also be a recommendation, which has no binding effect.

[72] With regard to the specific principles included in the Model Code Guidelines, they are presented as relevant to three particular core areas of interaction between taxpayers and tax administrations, each specifying in detail the respective rights and obligations:– cooperation between tax administrations and taxpayers, which is essential to establish lawfulness and legal certainty within the tax system and to boost tax compliance; procedures (e.g., tax declarations, tax assessments, audits, payment and debt collection, voluntary disclosures, and imposition of sanctions) and efficient dispute resolution.

fiscal secrecy and data protection, privacy, and representation. These principles incorporate, in essence, the fundamental civil rights and obligations of taxpayers in the context of their relationships with tax administrations, who represent the Member State. According to the Model Code Guidelines, such principles constitute common standards within the EU Member States. By virtue of the Model Code Guidelines, the Commission pursues the following long-term goals: improving transparency and clarity as far as taxpayers' rights and obligations are concerned; fostering certainty and efficiency in the interactions between taxpayers and tax administrations; improving compliance and minimizing the risk of disputes; and setting benchmarks among the different tax systems of Member States. The Model Code Guidelines invite and encourage all Member States to align their legislation to the general standards set forth therein and draw further inspiration from the best practices used to tackle deficiencies in their tax system[73].

In essence, the European Taxpayers' Code contains guidelines that aim to ensure a balance between the rights and obligations of both taxpayers and tax administrations. It is based on the main general principles and best practices in Member States deemed useful for enhancing cooperation, trust and confidence between tax administrations and taxpayers, ensuring greater transparency on the rights and obligations of both, and encouraging a more service oriented approach of tax administrations. It encourages tax administrations and European taxpayers to adopt and apply all these principles and practices, including new developments and further ideas. As a consequence, this code should be considered as a model to follow, to which Member States could add or adapt elements to meet national needs or context and, therefore, it should contribute to more improve relations between taxpayers and tax administrations, where the mutual understanding of tax rules will reduce the risk of mistakes with potentially severe consequences for taxpayers and subsequent costs for tax administrations. According to the Guidelines, it can be considered that all kinds of relationships between taxpayers and tax administrations should be governed by the general principles contained therein, which are fundamental for an effective protection of the taxpayers; moreover, during all procedures, tax administrations should respect taxpayers' rights and taxpayers should fulfil fairly their obligations and act in such a manner that they do not obstruct the procedures.

Having noted the relevance of the Guidelines, it is appropriate to put the light on the fact that the application of EU law necessarily entails the application of fundamental rights as guaranteed by the

[73] VALENTE P., *An enhanced relationship between Taxpayers and Tax Authorities: A Taxpayer Charter of Rights and The European Taxpayer's Code*, in HASLEHNER W., KOFLER G., RUST A., *EU Tax Law and Policy in the 21st Century*, Kluwer Law International, New York, 2017, 153.

Charter[74]. All taxpayers are persons, and all persons are holders of rights[75]. As holders of rights, taxpayers are entitled to a timely and effective protection of these rights in their dealings with tax authorities[76]. There is a *minimum standard* for the protection of taxpayers' rights, which emerges from the content of rights protected by the European Charter, from general principles of EU law derived from national constitutional traditions of Member States and from international recognition.

This *minimum standard* includes the following so-called taxpayers' procedural rights[77], that will be examined in this chapter. Firstly, the right to a fair investigation phase, and, in this sense, the relevance of the interests involved and the direct link between tax litigation and tax investigation justifies the protection of the right to a fair trial extending throughout the entire procedure as an expression of a fundamental right of the taxpayer. The minimum requirement of respect for taxpayer rights consist in one fundamental aspect: the right to participation in the proceeding that concern the affected taxpayer. There are fundamental principles considered the cornerstones of this right, such as the proportionality for balances the general public interest and fundamental rights[78] (in its application, any request by the tax authorities must be linked to what they strictly need for a specific tax audit purpose) and the *audi alteram partem* principle, i.e. the right to be heard before any decision is taken. The specific implications of this principle are that taxpayers not only enjoy the rights to be informed of all decision taken in the course of the procedure, but also attend all relevant meeting with tax authorities, to be heard and provide factual information, even when not requested by the tax authorities. Moreover, this principle gives a taxpayer the right to be heard and submit its comments and present his views in respect of the object of the investigation before any measure potentially affecting him is adopted. This principle is a *minimum standard* of good practice in administrative reviews.

Secondly, the right to privacy, including the protection of confidential information from disclosure. The protection of confidentiality of information by the law is, in fact, a minimum requirement.

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[74] Case C-617/10, *Åkerberg Fransson*.

[75] The issue of recognition of fundamental rights to taxpayers and enforcement in the tax area has been much discussed. See BAKER P., *Taxation and Human Rights*, in *GITC Review*, 2001, 1, according to which "*Some would say that taxation and human rights is an oxymoron*".

[76] BAKER P., PISTONE P., *General Report*, in BAKER P., PISTONE P., BEUSCH M., *The Practical Protection of Taxpayers' Fundamental Rights, Cahiers De Droit Fiscal International Studies on International Fiscal Law by the International Fiscal Association*, 2015, 21.

[77] It is not an exhaustive list, but it is about the rights of the taxpayers, peacefully recognized, which are relevant for the purposes of the analysis.

[78] In European law, the principle of proportionality, as a common general principle, taken from the legal systems of the Member States, is a tool for weighing fundamental rights to identify the boundaries of application in cases of conflict: a disproportionate protection of the interest protected by a fundamental right leads to the injury of the different conflicting fundamental right. See Del Federico L., *Tutela del contribuente ed integrazione giuridica europea*, Giuffrè, Milano, 2010, 24.

Finally, the right to access information held by the authorities, that is one of the most significant safeguards for taxpayers. This right is not absolute, but there will be some information the tax authorities are entitled to keep confidential.

Whether these rights derive from national constitution or from European or international instruments, taxpayers in all jurisdictions are entitled to these basic rights, although some may consider that the *minimum standards* simply reflect "good administrative practice". The relationship between taxpayers and authorities, regardless of national, European or international level, should be based on mutual trust and cooperation and should be regulated by a clear definition of the rights and duties of both taxpayers and tax authorities. Although they are not directly related to taxation, these constitutional rules may affect national tax rules, in particular during a procedure (audits, evidence and burden of proof), but also material rules of taxation in cases dealing with equal treatment or the legality of a tax rule[79]. This level of taxpayers' rights protection should be the Union *minimum*.

Part I. The Taxpayer's right to be heard

1. The principle of a good administration in EU Charter of fundamental rights

Respect for the rights of the defence is a general principle of the European legal system, developed initially by the jurisprudence of the Court of Justice and which, following the entry into force of the Lisbon Treaty, has found its own "constitutionalization" in the Charter of Fundamental Rights of the European Union, specifically in Article 48 (2) for the criminal trial, and in Article 41[80] on the administrative procedure in relation to which it is defined as "right to be heard" derivate from constitutional traditions common to all Member States, international agreements on human rights and EU law. The "constitutionalization", through insertion in the aforementioned Article 41, of the right to good administration as a general principle of EU and, as a result, of all procedural rights connected

[79] VANISTENDAL F., *The Role of (Legal) Principles in EU Tax Law,*, in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 34.

[80] Article 41 of the EU Charter of Fundamental Rights: "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.
Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language".

to it, while not taking on an innovative character, as mere reaffirmation of rights already existing in the living law of the European Union, however, had the advantage of raising the right to good administration to the rank of fundamental right, so much so as to mark "*an epochal turning point in the relations between administrations and administered, sanctioning, in in a definitive way, the need for the public action to be exercised in compliance with the various corollaries of which the right in question is summarized*"[81].

Article 41 of the Charter is the main provision in the context of procedural rights which states that every person has the right to be heard. In this sense, the right to be heard before the measure is taken is a basic requirement of the general right to defence[82] and procedural fairness reflecting the principle of *audiatur et altera pars*. It requires, in particular, that the administration would give the person concerned a chance to communicate their viewpoint in order for it to be taken into consideration[83]. The *audi alteram partem* principle is of the essence in any procedure and should be protected during all administrative processes. Regarding the fiscal field, it is a taxpayer's right to be notified of the initiation of a tax procedure. Moreover, the taxpayer shall be informed of the tax administration's arguments and have the opportunity to file his defences and evidences during the procedure. Best practices suggest, in fact, that the tax administration should hold preliminary meetings with taxpayers to allow for the comprehension of the facts under investigation, as well as the possibility of advantageous arrangements that reduce the litigiousness of tax affairs.

In line with Article 41 of the Charter, a person has the right to an oral hearing in administrative proceedings when a proceeding was initiated against him/her and might adversely affect a person. The right to a hearing requires that the natural or legal person has the opportunity to make its view known on the truth and relevance of the facts, charges, and circumstances relied upon by the decision-maker[84]. Article 41 (2) of the Charter sets two conditions for the application of the right to administrative proceedings. First of all, it must be an individual measure[85]; this condition reiterates the common understanding that the right to be heard does not apply to measures of a legislative or regulatory nature. Secondly, the measure is liable to culminate in a measure adversely affecting that person. This condition reiterates the common understanding that if a person is not affected by or is

[81] PROVENZANO P., *L'articolo 41 della Carta dei diritti fondamentali dell'Unione europea e la "costituzionalizzazione" delle garanzie procedimentali*, in *GALETTA D.U., Diritto amministrativo nell'Unione europea – Argomenti e materiali*, Torino 2014, 332.

[82] Case C-322/82, *Michelin*.

[83] LOCK T., *Article 41 of Charter of Fundamental Rights - Commentary*, in KELLERBAUER M., KLAMERT M, TOMKIN J., *The EU Treaties and the Charted of Fundamental Rights*, Oxford University Press, 2019, 2205.

[84] Case C-85/76, *Hoffman la Roche v Commission*, par. 9.

[85] Case C-40/85, *Belgium v Commission*, par. 28.

fully satisfied with the outcome of a procedure, it would be needless to hear that person[86]. Thus conceived, the right to be heard is part of the fundamental principle of the rights of the defence[87] and, suggesting a maximal scope of application, it "*must be respected in all proceedings, even those of an administrative nature*"[88]. In contrast to other provisions in the Charter, however, Article 41 only applies, in principle, to measures taken by EU institutions[89]. Irrespective of the field, the right implies that a person who may be adversely affected by a legal administrative verdict is entitled to take any available legal steps to protect rights. This has been illustrated in the following way: "*Respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of European law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question"*[90].

Paragraph 1 of Article 41 contains an umbrella provision spelling out a general right to have one's affairs handled impartially, fairly and within a reasonable time, while paragraph 2 enumerates three specific aspects of that right in a non-exhaustive list, clarifying the right in question include in particular: (*i*) the right of each person to be heard before an individual measure is adopted that prejudices them[91]; (*ii*) the consequent right of each person to access the intra-procedural documents concerning him, so as to view and extract a copy of the documents deemed relevant by the administration proceeding with the decision to be taken (while always respecting the legitimate interests of confidentiality and professional secrecy); (*iii*) the obligation for the authority to justify its decisions, as a tool to verify the legitimacy of administrative decisions, a corollary of the more general right of defence, which is commonly understood as an "*exemplary statement of that minimum standard of law modern administrative; statement that must be complemented by effective creative interpretative activity by legal operators* "[92].

Intersecting widely established European case law, the main interest of this provision consists in protecting everyone against administrative errors and it is characteristic of the "community of law" which unites the Member States. As such, it appears to be the counterpart of the right to good justice,

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[86] RABINOVICI I., *The Right to be Heardin the Charter of Fundamental Rights of the European Union,* in *European Public Law*, 2012, 151.

[87] Case T-450/93, *Lisrestal v Commission*, par. 42.

[88] Case C-85/76, *Hoffmann la Roche v Commission*, par. 9.

[89] Case C-482/10, *Cicala*.

[90] Case T-450/93, *Lisretal*, par. 42.

[91] Case C-315/99, *Ismeri Europa Srl v Cour des comptes: "Le principe du contradictoire est un principe général du droit dont la Cour de justice assure le respect. Il s'applique à toute procédure susceptible d'aboutir à une décision d'une institution communautaire affectant de manière sensible les intérêts d'une personne*".

[92] ZAGÀ S., *La violazione del diritto ad una buona amministrazione: le conseguenze sulla validità degli atti tributari,* in *Neotepa*, 2018, 52.

in a modern approach to administrative democracy, such as the right of everyone to the treatment of their affairs by the institutions and bodies of the Union in an impartial, fair and within a reasonable time. It aims to control the Union's commitment to the rule of law, which according to Article 2 TEU is one of its founding values. Further objectives are to ensure that the administration pays sufficient respect to the individual and to enhance the efficiency of administration.

The relationship of the terms used with the right to judge of Article 6 of the ECHR and Article 47 of the Charter reflects the inspiration of the authors of the Charter: it is a question of enshrining the right to good administration in the just as there is a right to good justice. The characteristics of public action derive from it: impartiality, fairness and expeditiousness therefore command the response of the European administration, which translate into the respect for the guarantees conferred by the European legal order in administrative procedures. Among these guarantees are, in particular, the obligation for the competent institution to examine, with care and impartiality, all the relevant elements of the case[93], this with the required discretion[94] and in a time limit which does not prejudice the interests of the addressee[95] in particular when the institution in question enjoys discretionary jurisdiction[96].

One can infer from taxpayers' right to good administration that various levels of protection are available, including a review of the request by the competent authorities (in case of exchange upon request and spontaneous exchange), rights of the defence, rights to access to documents and files, and the right to a minimum content during the collection procedure[97]. The scope of the right to good administration does not have a general application, but is rather limited, as opposed to Article 51 of the Charter, which provides that the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to Member States only when they are implementing Union law. Nonetheless, limitations arise when the right to good administration is invoked as a Charter right. Alternatively, the concept of 'good administration' can also be relied upon as a general principle of EU law, thus allowing extended protection to situations not only affecting EU institutions, but also taxpayers in their relationships with tax authorities.

The right to good administration found in Article 41 has been recognised law well before the adoption of the Charter and the pronouncements of the European Judge on the subject are manifold. The Court of Justice has stated this on a number of occasions for a long time[98] and it has formulated it in terms

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[93] Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte.*

[94] Case T-62/98, *Volkswagen v Commission.*

[95] Case C- 270/99, *Z v Parlement européen*.

[96] Case T-54/99, *Max. mobil Telekommunikation Service GmbH v Commission*.

[97] CHAOUCHE F., HASLEHNER W. P., *Cross-Border Exchange of Tax Information and Fundamental Rights,* in HASLEHNER W., KOFLER G., RUST A., *EU Tax Law and Policy in the 21st Century*, Kluwer Law International, New York, 2017, 196.

[98] Case C-17/74, *Transocean Marine Paint v Commission*.

of principle[99]. The European Judge recognized this fundamental principle of procedural law[100] whether it is disciplinary proceedings[101] or whether it is substantive law and in particular competition law, with regard to the Member States as individuals, even without specific regulations. The judge, in addition to the fundamental nature of this principle, expressly links this guarantee to the discretionary nature of the discretion enjoyed by the European institutions[102]. In fact, the Court ruled that the right of the defence must be interpreted as a fundamental right and as a general principle of EU law[103], which forms part of the EU legal order.

It is general rule that a person whose interests are affected by a decision taken by a public authority must be given the opportunity to make his point of view known[104]. This rule requires that an undertaking should be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject a measure and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions which impose considerable obligations having far-reaching effects[105]. Its observance requires *inter alia* that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement[106] and the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim.

The right to be heard, recognized in principle, in disciplinary procedures against civil servants of Union institutions[107], now applies in all possible fields of Union law not only in proceedings which may result in the imposition of penalties, but also in other investigative proceedings: in the area of competition law, in case of undertakings subject to an exemption[108] or undertakings subject to administrative procedures which may lead to the imposition of penalties under the rules of

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[99] Case C-135/92, *Fiskano AB v Commission: "Le respect des droits de la défense dans toute procédure ouverte à l'encontre d'une personne et susceptible d'aboutir à un acte faisant grief à celle-ci constitue un principe fondamental de droit communautaire et doit être assuré, même en l'absence de toute réglementation concernant la procédure en cause*".

[100] Case C-301/87, *France v Commission*.

[101] Case C- 35/67 *Van Eick v Commission*.

[102] Case C-374/87, *Orkem.*

[103] Case C-276/12, *Sabou*, concerning the interaction between mutual assistance procedures in tax matters and respect for fundamental rights, with particular reference to the right to a defence (and, particularly, the taxpayer's right to be heard by the tax administration).

[104] Case C-17/74, *Transocean Marine Paint v Commission*.

[105] See also Case C-85/76, *Hoffmann-La Roche v Commission* and Case C-322/81, *Michelin v Commission.*

[106] Case C-85/87, *Dow Benelux NV v Commission*.

[107] Case C-32/62, *Alvis v Council*.

[108] Case C-17/74, *Transocean Marine Paint v Commission*.

competition[109], anti-dumping[110] and customs duties[111] areas. This principle is also recognized, incidentally, in State aid field[112]: the Court stated, in fact, but with regard to the position of the Member State, that observance of the right to be heard, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, is a fundamental principle of European law which must be guaranteed even in the absence of any rules governing the procedure in question and with regard to the examination by the Commission of plans to grant aid. Moreover, this principle requires the Member State in question to be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties and on which the Commission proposes to base its decision. In so far as that Member State has not been afforded the opportunity to comment on such observations of third parties, the Commission may not incorporate them in its decision against that State without infringing the right to be heard. However, in order for such an infringement to lead to annulment, it is necessary to establish that, in the absence of that irregularity, the procedure could have led to a different result.

The Court of Justice affirmed, also, that the right stretches no further than the parties under investigation[113]. The right to be heard means that the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of infringements of EU law[114]. However, the failure to take into account their comments does not constitute a breach of their rights of defence or their right to be heard. Although for those rights to be observed, the EU institutions must enable the applicants to effectively make known their views, those institutions cannot be required to adhere to them.

At the same time, the Court stated that the right to be heard applies even where the applicable legislation does not expressly provide for such a procedural requirement, but it guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely[115]. Therefore, in the light of its character as a fundamental general principle of EU law, the application of the principle of the rights of the defence cannot be excluded or restricted by any legislative provision. Respect for that

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[109] Case C-322/81, *Michelin v Commission*.

[110] Case C-49/88, *Al Jubail Fertilizers v Council*; Case T-260/11, *Fisheries*.

[111] Case C-349/07, *Sopropé.*

[112] Case C-301/87, *France v Commission.*

[113] Case T-65/96, *Kish Glass*.

[114] Case C-49/88, *Al-Jubail Fertilizer v Council*, par. 17, and Case T-459/07, *Hangzhou Duralamp Electronics v Council*, par. 110.

[115] Case C-277/11, *M.M.*, par. 81 to 87; Case C-135/92, *Fiskano v Commission*, par. 39 and 40; Case C-32/95, *Commission v Lisrestal and Others*, par. 21, and Case C-287/02, *Spain v Commission*, par. 37.

principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle[116].

Referring to this right in the fiscal field, the Court[117] stated that respect for the rights of the defence in any proceeding which could result in an act adversely affecting the interests of the person liable to pay the tax, constitutes a fundamental principle of EU law and therefore also of legislation European tax law, including the legislation of the Member States which implements Union directives. The same interpretative principle was expressed in a sector contiguous to the fiscal one of the European customs legislation, in the *Sopropé*[118] judgment: this case, as an essential question, concerned the existence, in the general Tax Law of Portugal, of a term sufficient granted to the operator to make his point of view useful in the event that the administration proposes to take a measure against him which is detrimental to his interests, such as an order for payment of customs duties. After recognizing the legitimacy of setting a deadline, in European and national customs legislation, for submitting observations and having enumerated some general criteria for setting such a deadline, the Court ruled that a deadline between eight and fifteen days is to be considered compliant with the general principle of respect for the rights of the defence. The Court finally explicitly adds an important obligation on the tax administration, and implicitly to guarantee the debtor of the tax, i.e. the obligation to examine the observations of the company involved with all the necessary attention and to duly take into account the comments that have been sent to it since, otherwise, the taxpayer's hearing would be reduced to a pure formality with a consequent circumvention, in fact, of the obligation to respect the rights of the defence.

In a subsequent judgment[119], also concerning the interpretation of some provisions of the European Customs Code, the Court of Justice was again called upon to apply the general principle of respect for the rights of the defence in a quasi-tax area and in a situation in which the importer had not been heard before the administration had notified the payment orders of the customs duties as neither the European Customs Code nor the regulations as national implementation, provided for the right of the operator to submit observations. The Court of Justice first ruled, in this regard, that the person liable for the tax or customs duty can enforce the right to be heard directly before the national court before the adoption of the post-clearance recovery decisions even when neither Union nor national legislation provides for such a procedural guarantee. At this conclusion the Court was received on the basis of the general principle of respect for the rights of the defence, given that the main case concerned a matter that certainly fell within the scope of European law. It follows that there is a

[116] Case T-260/94, *Air Inter v Commission*, par. 60.
[117] Case C-395/00, *Cipriani*, par. 51.
[118] Case C-349/07, *Sopropè*, par. 44.
[119] Case C-129/13, *Kamino*.

violation of the taxpayer's defence rights if the recipient of the payment order has not been heard by the administration before the adoption of this provision, even if said tax payer has the possibility to assert its reasons in the course of a complaint procedure, following the notification of this order for payment. This judgment therefore represents, in the wake of the previous mentioned judgments, a significant development of the principle of the taxpayer's right to a contradictory with the administration, given that in the event of failure to hear the recipient of the assessment or collection of the tax, it is even the invalidity of such an act which risks being declared by the tax judge[120].

Another relevant procedural aspect, as we will see later, which derives from the right to good administration is constituted by the right to access to file formulated by paragraph 2 of Article 41(2) as a fundamental right of non-contentious administrative procedure in order to ensure the effective protection of a fundamental right conferred by the Treaty. Its beneficiaries should in fact be able to defend it in the best conditions and have the power to decide whether or not to exercise their right to legal protection, this purpose explaining that the guarantee concerns final decisions. It obviously takes on a particular meaning in procedures likely to lead to a sanction or an unfavourable decision and it is an integral part of the non-contentious procedure[121]. It is also noted that the split between Article 41 (2) (a) and Article 41 (2) (b) allows the EU courts to keep the dichotomy between interests that enjoy enhanced procedural protection and interests that enjoy more limited protection. The difference is typically in the level of access to the authorities' file and, consequently, the ability to respond to the issues and views that are raised there by the authorities and other parties. The separation between the right to be heard and the right of access to file would allow the EU courts to develop independently the scope of application of each right.

Referring to this specific aspect, more intensive protection of rights should be considered in the case of taxpayers. To the extent that common fiscal confidentiality standards are established for tax authorities and that no losses can occur, an approach that respects the limits set out in the European Charter is believed to overcome the legitimacy scrutiny of any action.

2. The taxpayer's position in State Aid investigation procedure

Until 1999 there was no Procedural Regulation providing for the exercise of the powers of the Commission, consequently the procedures of the Commission regarding State aid maters were based on the primary legislation and case law. The only provision that attributed a role to interested parties

[120] TRAVERSA E., TRAVERSA E., *La protezione dei diritti dei contribuenti nella giurisprudenza della Corte di Giustizia dell'Unione Europea,* in *Dir. e prat. trib.*, 3, 2016, 1371.

[121] Case C-85/76, *Hoffmann-La Roche v Commission*.

(including State aid beneficiary, its competitors and complainants) was Article 108 (2) TFEU according to which the Commission during the formal investigation procedure, has the obligation to give invite to the parties concerned to submit their comments before finding that State aid is incompatible with the internal market. The parties concerned were, traditionally, interpreted to include "*not only the undertaking or undertakings receiving the aid but equally the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations*"[122].

The European Judge had consistently held that: "*The procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its European obligations, for granting the aid*"[123] and had insisted repeatedly that State aid procedures are not initiated against the parties concerned, not even against the specific beneficiary of the aid. Consequently, the parties concerned enjoyed procedural guarantees under Article 108 (2) TFEU, but did not enjoy the protection of the fundamental rights[124].

The role of interested parties was subsequently defined by Article 1 (h) of the 1999 Procedural Regulation, which differentiated between the beneficiary of aid on one hand, and complainants or competitors on the other.

With the adoption of the current Procedural Regulation 2015/1589[125], Article 24 that regulates the rights of the interested parties has been introduced. The provision, in essence, mentions as the essential procedural rights of interested parties the right to submit comments after the opening of the formal investigation procedure and states that the Commission sends to any interested party which has submitted such comments and any beneficiary of individual aid a copy of the final decision in the procedure. The same Regulation mentions in Recital 31 the aim to set out all the possibilities which

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[122] Case 323/82, *Intermills v Commission*, par. 16.

[123] Case C-74/00, *Falck v Commission*, par. 81.

[124] Case T-109/01, *Fleuren Compost v Commission*, par. 44.

[125] Council Regulation (EU) 2015/1589 of 13 July 2015, Article 24: "*Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 9".*

Any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. To that effect, the interested party shall duly complete a form that has been set out in an implementing provision referred to in Article 33 and shall provide the mandatory information requested therein.

Where the Commission considers that the interested party does not comply with the compulsory complaint form, or that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed 1 month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn.

The Commission shall inform the Member State concerned when a complaint has been deemed to have been withdrawn.

The Commission shall send a copy of the decision on a case concerning the subject matter of the complaint to the complainant.

At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 9, Article 12(3) and Article 13".

third parties have to defend their interests in State aid procedures. The amended Regulation, in reality, creates an asymmetry between two measures: the limited rights in comparison with legal and economic obligations of individuals in the procedure and secondly the scope of obligations for State parties in comparison with those for private parties.

Afterwards, the Commission within the framework of the State Aid Action (so-called the SAAP) initiated in 2005 with the aim to reform State aid policies and procedures, adopted the Enforcement Notice, the Notice on Simplified and, in 2018, the Code of Best Practices. With the Code of Best Practices[126] (hereinafter, the Code), the Commission tried to make State aid procedures as productive and efficient as possible for all parties concerned. In principle, the Code aims at providing guidance on the day-to-day conduct of State aid proceedings, by developing cooperation and understanding between Member States, the Commission services and business community and, moreover, and, above all, it is set as an objective to contribute to a greater transparency, predictability and efficiency of State aid procedures complementing the existing Procedural Regulation, introducing a pre-notification phase, the possibility for a mutually agreed planning and finally attempting to make more efficient the preliminary and the formal investigation and the complaints' procedure[127].

In the Code, the Commission recommends the involvement of the aid beneficiaries during the pre-notification discussions. If it is true that the involvement of the aid beneficiary is "recommended" in principle, however there is no specific provision or details of how this should take place. On this point, the pre-notification phase has been criticised as the focus on the pre-notification contacts might reduce the rights of third parties. The preliminary investigation procedure is not, in fact, transparent and potential beneficiaries have little or no possibility to find out what are the exact contents of the notification. Moreover, their views and the views of competitors or complainants do not have to be taken into account by the Commission during this phase. The possible discussion of the merits of the case during the pre-notification communications denies, substantially, third parties from the possibility to exercise even their limited rights acknowledged by the Procedural Regulation.

Furthermore, the Code, at Section 4, establishes a mechanism of mutually agreed planning which is a form of structured cooperation between the Commission services and the Member State by which they can agree on the priority of the treatment of the case concerned. In return the Member State should suspend the examination of other cases notified from it. This mechanism can be used in cases that represent a novelty or that are technically complex or sensitive, for which a clear preliminary

[126] Code of Best Practices for the conduct of State aid control procedures 2018/C 253/05.

[127] According to the Commission, the Code describes and clarifies the procedures followed by the Commission services when assessing State aid cases. It does not provide an exhaustive overview of EU State aid rules, but should rather be read together with all other documents containing those rules. The code does not create any new rights in addition to those laid down in the Treaty on the Functioning of the European Union, the Procedural Regulation and the Implementing Regulation and their interpretation by the EU Courts. It also does not alter those rights in any way.

assessment proves impossible at the end of the pre-notification phase. However, the Code doesn't regulate time frames. From a perspective of the third parties' rights, this mechanism may raise concerns as it establishes the suspension of non-priority cases without the involvement of the beneficiary of aid.

Although the Commission has in the Code of Best Practice now recognised the usefulness of involving the aid beneficiary in preliminary investigations, this recognition translates exclusively into a statement of principle, not having translated into a strengthening of the taxpayers' rights. The Code has certainly led to an improvement in State aid procedures, but it is questionable whether the reforms have been sufficient to address the shortcomings and inefficiencies in the procedures flowing from the marginal role given to aid recipients and interested third parties. An important aspect that emerges from amended Regulation and the Code is that the Commission, in essence, does not intend to change the bilateral nature of the State aid procedure.

3. The taxpayer's procedural rights

Turning to the specific analysis of the provisions contained in the Regulation and in the Code, it can be observed that the procedural structure of the roles assigned to the parties that gravitate around the State aid investigation procedure is supported by a purely formalistic approach.

While on the one hand, in order to preserve the procedural status of the Member States, particular attention, as it should be, is reserved to the prerogatives of intervention of the Member State as a "formal" part of the State aid procedure in a strict sense, on the other hand the same rights are not recognized to the interested parties and, in particular, to the taxpayer as beneficiary of the aid.

Indeed, as far as the Member State is concerned, Article 6a (8) of the Code imposes an obligation on the Commission to provide the Member State concerned with a copy of its request or decision for information at the time of its adoption. According to Article 6a (5), the Commission may send to Member States simple requests for information based on Article 6a (6) giving them a deadline of no more than one month with the possibility to remind the Member State concerned after the expiry of that deadline. Furthermore, in order to protect the right of defence of Member States according to Article 7 (8), Member States have the possibility to make known their views before the adoption of the final decision within a deadline of no more than one month, on the information received by the Commission and provided to that Member State according to Article 6a (3). The right to be heard of the Member State entails a right to be officially invited to submit its observations before any decision that would have an adverse effect (i.e., the final decision and interim decision to suspend existing

aid)[128], the right to comment on third-party submissions[129], and a right to comment on every item of evidence relied on by the Commission in its decision. With regards to the position of the taxpayers, according to what is established in the Regulation and in the Code, the aid beneficiary enjoys the following limited rights. According to Article 6 (1) of Procedural Regulation, the taxpayer can submit comments on an opening decision. Parallel to this, at Article 7 (2) of the Code, it is stated that interested parties, including the beneficiary of the aid, may comment on the opening decision within one month of its publication and that, in very complex cases, the Commission services may send a copy of the opening decision to interested parties, including trade or business associations, and ask them to comment on specific aspects of the case. According to the Code of Best Practice, par. 18-36, the beneficiary can participate in pre-notification and investigation stages, but only if the Member State so decides. According to the provisions of Article 7 (1) of Regulation, the beneficiary can provide information only if asked by Commission in particular in technically complex cases subject to a substantial evaluation, but prior Member State approval required and a penalty is payable in case of incorrect information or in case of non-response (Articles 8, Procedural Regulation). The same provision is contained in the Code, where it is specified, in Article 6a (3), that the answers given by undertakings based on a request for information shall be submitted at the same time to the Commission and the Member State.

On this account, the Commission's power to request information is severely limited and not generalized, but subject to specific conditions. The Commission, in fact, is allowed to request information only during the formal investigation procedures that have been identified by the Commission as being ineffective to date, and on the other hand an authorisation from the Member State is required prior the request for information is sent to the aid beneficiary. These limitations were dictated by the Member States which wanted to control and to limit the information flow between the interested parties and the Commission.

Moving on, furthermore, with regard to the exchange of information between various parties to the State aid administrative procedure and possible emerging issues of secret business protection and other confidential information, Article 7 (10) of the Procedural Regulation provides that the Commission shall pay attention to the legitimate interests of the undertakings in the protection of their business secrets and other confidential information. Nevertheless, Article 7 (9) of Procedural Regulation allows the Commission through a specific procedure to exceptionally use confidential information that cannot be aggregated or anonymised even without the consent of the respondent who has submitted that information.

[128] Case C-301/87, *France v Commission*, par. 19.
[129] Case C-288/96, *Germany v Commission*, par. 100.

Finally, the beneficiary can receive copy of formal decision (Article 24 (1) and (3), Procedural Regulation) and can submit complaint to Commission (Article 24, Procedural Regulation) or to European Ombudsman (Article 228 TFEU).

Despite the possibility of significant consequences (i.e. full recovery), as seen, the beneficiaries of the aid enjoy significantly limited rights and are still lacking many fundamental rights. They do not enjoy the right to be personally invited to a hearing and the Commission can discharge its obligation to inform the parties concerned about the opening of the formal phase only by publishing a notice in the Official Journal. The General Court, in fact, has confirmed that the publication of a decision on the opening of the formal investigation procedure in the Office Journal is sufficient to inform third parties about the State aid procedure[130]. Furthermore, it is at the Member State's discretion to keep the beneficiary informed of the process. The right to be informed of the essential facts before an opening decision is adopted[131] and to make comments is severely limited. They enjoy a limited right of access to the Commission's file[132] and they do not have the right to comment upon the submissions of the other parties. They do not enjoy a right to be heard on the legal questions raised in the procedure [133] before a decision under Article 108 (3) TFEU is taken nor to open a formal investigation[134] and they have no right to participate in Commission and Member State meetings. The Commission can disregard any unsolicited submissions made by the beneficiary because the Member State is the formal interlocutor. In essence, the Commission has discretion and no burden to hear third parties in the State aid procedure and to propose the submission of comments.

Notwithstanding the acknowledgement in the Code of Best Practice of a greater role for aid recipients in the preliminary and formal investigation procedures, the State aid procedure continues to be a dual system between the Commission and the Member State concerned. Aid recipients, together with other interested parties, act primarily as possible and eventual sources of information.

But, indeed, the need to expressly recognize rights has often been mentioned. From many sides, attempts have been made to focus attention on the limited rights afforded to aid recipients during the Commission process. In a case under scrutiny by the Court of Justice[135], Advocate General Mengozzi, in fact, had noted that the European Court of Justice has traditionally adopted a rigid approach to the rights afforded to aid recipients and consistently found that review of State aid essentially involves

[130] Case T-127/99, *Territorio Historico v Commission*, par. 255; Case T-371/94, *British Airways v Commission*, par. 58.
[131] Case T-354/05, *TF1 v Commission.*
[132] Case C-139/07, *Commission v Technische Glaswerke Imenau GmbH*. In Case T-134/17, *Hércules Club de Fútbol*, the General Court confirmed the longstanding principle of no access to the file for interested third parties.
[133] Case C-367/95, *Commission v Sytraval*, par. 57.
[134] Case C-84/82, *Germany v Commission*, par. 13.
[135] Case C-290/07, *Commission v Scott*.

the Commission and the Member State, with no particular role reserved for the aid recipient or his right to participate in the Commission procedure.

In his opinion, Advocate General explained that consistently rigid approach of the European Court of Justice to treating aid recipients in the general category of interested parties under Regulation is "*markedly formalistic*" and that "*it is artificial and not always realistic to take as a premise the idea that the interests of the State which granted the aid are the same as the interests of the aid recipient*" [136]. The positions of the State and the aid recipient are different in important respects, including that the State can at most be ordered to recover illegal aid, while the aid recipient can be ordered to repay the aid, potentially exposing the undertaking to a risk of insolvency. Aid is not necessarily granted by the national government of the State, but might be granted by a regional State body. In such cases, it is not necessarily true that the interests of the central government, which alone has the right to participate in the procedure, are the same as those of the local body. In this vein, it was indeed considered necessary to change the Procedural Regulation to accord to aid recipients the formal status of a party to the Commission procedure or alternatively it might be also sufficient to rely on the principle of good administration as embodied in Article 41 of the Charter of Fundamental Rights. The Charter states, in fact, that essential implications of the principle of good administration are, among others, the right of every person to be heard before any measure is taken that would affect him adversely, the right to have access to his file, and the obligation of the administration to give reasons for its decisions. Accordingly, the Commission cannot unrelentingly and without exception reject comments submitted by the aid recipient out of time, but must assess whether the principle of good administration requires the Commission to take them into account, for example where the information in question is of real use for purposes of clarifying or supplementing what it already known.

On this issue, the Court of Justice is swinging in its decisions, continuing, on the one hand, to defend the right to present comments from the beneficiaries, but, on the other hand, remaining reluctant to extend and raise the limited rights recognized to a minimum standard. The Court's approach in *Fleuren* case[137] shows the severe limitations placed on third party rights. In this case, the applicant claimed that, before taking an unfavourable decision in its regard, the Commission should have insisted that the authorities provided them with the information which would have allowed them to assess the real impact of the aid at issue on inter-State trade and, if those authorities persisted in their refusal, it should have asked the applicant to provide that information. In that context, the applicant maintained that they could not be charged with having failed to observe or, therefore, react to the invitation to submit comments. It took the view that they could have reasonably expected the Member

[136] Opinion Advocate General Mengozzi in Case C-290/07, *Commission v Scott*.
[137] Case T-109/01, *Fleuren Compost v Commission*.

State to take the requisite measures and make appropriate observations. They also considered that the Member State which grants aid has the obligation to inform the recipients of those measures. In that regard, they pointed out that, in the letter initiating the procedure, the Commission had asked the Member State authorities to send a copy of that letter to potential recipients without delay. In this case, the reasoning of the Court is that the formal investigation allows interested parties the right to submit written observations on the relevant issues of fact and law as summarized in the opening decision; it is presumed that the Member State will defend the latter's interests. If it fails to do so, this cannot be seen as undermining the rights of the beneficiary. Although Article 108(2) TFEU requires the Commission to seek comments from interested parties before it reaches a decision, it does not, however, prevent the Commission from determining aid to be incompatible with the common market in the absence of any such comments[138].

Yet in *Le Levant* case[139], the General Court ruled that the Commission had violated Article 108(2) TFEU and Article 6 (1) of the Procedural Regulation because it had failed to identify the correct recipients of aid when opening the formal investigation procedure and then, after altering its view as to the identity of the alleged aid recipients, did not permit the alleged aid recipients to comment outside the time for submitting comments. The beneficiary argued, firstly, that the decision to open the procedure did not enable them to consider the possibility that they might be named as beneficiaries of the aid. Accordingly, once it had changed its assessment of the beneficiaries following publication of the decision to open the procedure, the Commission should have published a fresh decision to open the procedure, giving the applicants a period to enable them to submit their comments, or should have taken appropriate measures to draw their attention to the hitherto unknown status which was to be conferred on them in the final decision and differed significantly from the status contemplated in the decision to open the procedure. Such comments were all the more necessary in the light of the fact that the contested decision modified previous Commission practice and further did not take into account that the authorities did not communicate the decision to open the procedure to the applicants as it was asked to do. The General Court explained that "*the Commission cannot entrench itself behind a formalistic interpretation of its State aid obligations, given that the main issue here is the fact that an individual against whom the Commission is preparing to adopt an adverse decision designating that party as a beneficiary of incompatible aid from whom that aid is to be recovered must be given the opportunity to submit comments prior to the adoption of such a decision*". The General Court

[138] Case C-113/00, *Spain v Commis*sion, par.39.

[139] Case T-34/02, *Le Levant and Others v Commission*. In this judgment, the Court held that for the Commission to discharge its obligation to give notice on the initiation of a formal investigation, it must make clear who the beneficiaries of the aid are. It went on to say that a State aid decision is made against the beneficiaries and they, therefore, enjoy the protection of the general principle.

concluded that the Commission breached a general principle of EU law, i.e. the right to be heard which requires giving any person against whom an adverse decision may be taken the opportunity to make his views known effectively. As the recovery decision related directly to the investors and they were directly affected by the economic consequences of the decision, they should have received such a right. The Court recalled in this respect Article 41(2) of the Charter of Fundamental Rights. This constitutes a promising development, but it would also appear that this unique ruling (as far as State aid cases are concerned)[140] seems to turn upon the specific facts and circumstances of the case, as opposed to a more general endorsement of general principles of fairness.

Moreover, in proceedings for interim measures to suspend recovery of unlawful aid in *Technische Glaswerke Ilmenau GmbH v Commission*[141], the General Court considered that the aid recipient should have been given an opportunity to respond to comments made by a third-party competitor. According to the President of the General Court, the Commission has a duty to treat impartially all the parties concerned in a formal investigation procedure pursuant to the right of the parties to sound administration. Accordingly, there has been recognition in judgments of the General Court that the rights of aid recipients should be extended at least to ensure that the principle of good administration is observed. Although it may be questioned whether the principle of good administration is sufficient to protect the rights of aid recipients without according them the formal status of parties to the Commission procedure, the Commission has at least been put on notice that it should do more to ensure that the rights of aid recipients are given proper protection. This is important not only for the direct benefits that will flow to aid recipients, but also for the State aid procedures more generally. Indeed, extending greater rights to aid recipients would likely increase the efficiency of State aid procedures[142].

In other cases, the Court annulled the Commission's decision as it did not open a formal investigation despite the existence of serious doubts, proven by the length and circumstances of pre-notification phase and the incomplete and insufficient reasoning in the decision due to lack of appropriate Commission investigation at pre-notification phase[143]. The Court also annulled the Commission's decision as it did not contain the basic elements to enable all (including third) parties to comment[144].

The protection of the rights to defence was also invoked to prevent recovery, but regarding to the Member State' right. The Commission noted, in fact, that despite all its efforts, in the case in which

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[140] Although in other areas of EU law, various references have been made to the right to be heard as a sub component of Article 41 Charter of Fundamental Rights. See Case C-277/11, *M.M.*; Case C-604/12 *H.N.*.

[141] Case C-139/07, *Commission v Technische Glaswerke Imenau GmbH*.

[142] NORDLANDER K., WENT D., *Checks and balances in EU State aid procedures: should more be done to portect the rights of aid recipientand third parties?*, Springer, 2010, 369.

[143] Case T-793/14, *Tempus Energy v Commission*.

[144] Case T-683/15, *Freistaat Bayern*.

it is impossible to arrive either at a quantification of the aid or at providing a sufficiently precise methodology to quantify it, "*in these particular circumstances, respect for the Member State's rights of defence might constitute an obstacle to recovery*"[145].

In one case, the Commission refrained from ordering recovery because to have done so would have meant infringing the principle of good administration. In 2007, the Commission had written to the Italian authorities stating that a given aid measure could be prolonged for a certain period if they implemented measures to make the electricity market in Sardinia more competitive. At a larger stage the Commission concluded that even the adoption of the virtual power plant would not have been sufficient basis for ensuring the compatibility of the aid. The Commission found that its 2007 letter had created the impression that the aid could have been considered as compatible and as a consequence the aid beneficiary may have changed its investments behaviour and stopped receiving the aid at an earlier stage. The Commission found that its behaviour was not consistent with the principle of good administration and did not order recovery of the aid granted in the period from its letter until the adoption of the final decision[146].

Likewise, the Court also stated that an excessively lengthy investigation procedure is likely to make it more difficult for the Member State concerned to refute the Commission's arguments[147] and thus it would infringe the rights of defence of the Member States[148]. Regarding this case, if the parties challenging the decision do not establish that the excessive duration of the procedure has affected their capacity to effectively defend themselves, the breach of the principle concerning a reasonable duration of the proceedings remains without incidence on the validity of the administrative procedure. Of course, if the decision is invalid for that reason, *a fortiori* the recovery order will also be struck down. Those examples on which protection of the rights of defence was invoked to prevent recovery could be explained on the basis of the principle of legal certainty. By the same token, legal certainty prevents the Commission from indefinitely delaying the exercise of its powers and thus excessively long procedural delays prevent the Commission form ordering recovery.

As seen, it was affirmed that this right cannot be claimed by persons adversely affected by legal measures where the proceedings are not formally conducted against them, i.e. where such persons are not parties to the proceedings. This is particularly evident in State aid cases. However, when applying the right of defence to State aid cases, it is evident that adverse consequences of these cases mostly

[145]Commission Decision of 2 August 2004, on State aid implementation by France for *France Telecom*, C-3060/2004.

[146] Commission Decision of 19 November 2009 on State aid measures implemented by Italy for *Alcoa Trasformazioni*, C-38/A/04 and C-36/B/06.

[147] Case T-579/98, *Eridania Sadam v Commission*, par. 80.

[148] Case C-501/00, *Spain v Commission*, par. 52.

affect the aid beneficiaries, rather than Member States. The beneficiaries, in fact, face the gravest consequences of the Commission decisions.

The right may only be claimed by parties to proceedings, thus excluding the beneficiaries since such proceedings are conducted against Member States. This reasoning may be taken even further, leading to the conclusion that beneficiaries, despite not being parties to proceedings, are considered interested parties and entitled to participate in the proceedings, as justified by circumstances.

Such arguments are highly unsatisfactory, as those who bear the gravest consequences of Commission decisions are deprived of the opportunity to effectively defend their legal interests. Nevertheless, only Member States are the status of a party to proceedings before the Commission. Beneficiaries are not given the same right, even though a Commission decision may have relevant implications for their activities. They are regarded as nothing more than a source of information which may then be used by the Commission, at its own discretion, in the course of proceedings that are formally conducted against a Member State, but substantially against the beneficiary.

As can be seen from what is illustrated, various attempts were made to bring the beneficiaries under the protection of the fundamental rights, most notably in the *Le Levant* judgment[149], but they were not followed later[150] and did not actually translate into an express recognition supported by adequate guarantees. In a long list of later judgments, in fact, the EU Courts reaffirmed the case law according to which State aid proceedings are initiated only against the granting Member State, and therefore, it is the only subject in the game that enjoys the protection of the fundamental right to be heard[151].

The role of beneficiaries in State aid remains controversial. This is largely due to the fact that State aid control is perceived by the Commission and, generally, Member States, as a procedure essentially between public authorities, where third parties are involved only incidentally and beneficiaries have a marginal role.

4. Is there an asymmetry with the recognition of protection of complaints' rights?

It is widely believed that complainants often play an essential role in revealing the existence of State aid and, even if they are not the lead players in State aid control proceedings, it seems only fair that a sufficient right to be heard is granted to them, as they are usually seriously affected by market distortions arising out of State aid.

[149] Case T-34/02, *Le Levant v Commission*, par. 81.

[150] Case T-68/03, *Olympiaki Aeroporia Ypiresies v Commission*, par. 37. In this judgement, the General Court reiterated the old case law on the inapplicability of the fundamental principle to the beneficiaries of State aid.

[151] Case T-301/01, *Alitalia v Commission*, par. 169.

Over time there has been an increasing attention to the complainants' rights. The EU Courts have adopted, in recent years, a consistent body of decisions enhancing the protection of complainants' rights in State aid procedure, most notably with regards to their association with proceedings and their access to justice when their claims are dismissed[152].

As with the aid recipient, Article 108 (2) TFEU states that the Commission, during the formal investigation procedure, must give notice to the parties concerned to submit their comments. The Procedural Regulation contains a specific provision regarding complainants: Article 24 (2) entitles the complainant to inform the Commission of any alleged unlawful aid or misuse of aid, and in turn to be informed if the Commission considers that there are insufficient grounds for taking a view on its complaint, and to receive a copy of the decision that is adopted concerning the subject matter of the complaint. The relatively vague wording has led to considerable uncertainty as to the formal and substantive requirements incumbent on the Commission, the degree of its discretion in treating or rejecting a complaint, and the complainants' access to judicature against such a rejection.

The complainant's access to judicature is therefore limited to its ability to challenge a decision on the subject matter of the complaint that is addressed to a Member State, which therefore justifies its right to receive such a decision via an administrative letter.

In addition to this limitation to their access to judicial review, case law has on several occasions excluded that complainants enjoy any significant rights of defence during the administrative State aid proceedings before the Commission. More specifically, the Court ruled out any obligation for the Commission to conduct an exchange with the complainants or to give them an opportunity to state their views, let alone to access the file, during the preliminary examination stage. Moreover, the Commission has no duty, in its decisions, to state its position on every aspect of the complaint, with the consequence that it can ignore matters that are manifestly irrelevant, insignificant or of secondary importance. With regard to the formal investigation procedure, the General Court clarified that concerned parties are involved only to the extent of appropriate in light of the circumstances of the case and that they do not have right to a hearing[153]. Moreover, when opening a formal investigation procedure, the Commission may confine its communication in the Official Journal to those aspects on which it still harbours doubts, and it is not required to discuss all the issues of fact and law raised by interested parties.

The hybrid nature of State aid procedure, however, seems to have implications only as regards the parties against which proceedings are carried out, whilst it does not seem decisive for the purpose of

[152] MEROLA M., ARMATI L., *Complainants' Rights in State Aid matters: lost in modernisation?*, in *GCLC Working Paper*, 2013, 4.

[153] Joined Cases C-371/94 and C-394/94, *British Airways and Others v Commission*, par. 60.

distinguishing the status of third parties in the two procedures. Generally, these are undertakings that are affected by an allegedly anticompetitive behaviour, whose main function is to contribute to the disclosure of infringements and, as a result, to the removal of market distortions. Moreover, in light of the transparency duty incumbent on many public administrations in the EU, and the Commission's duty to avoid disclosure of confidential information which would also apply to information coming from national authorities, it is difficult to argue that State aid proceedings should be more secretive than antitrust proceedings. If this is true, the reason for the absence of specific rights for complainants in State aid can hardly be justified by the mere assumption that the procedure is essentially between the Commission and Member States.

Complainants' procedural rights in both the preliminary and the formal investigation procedure were limited to the minimum, in light of the perceived role of complainants as mere information sources. The restrictive approach of the Procedural Regulation rested on the case law preceding its adoption.

In *Cook*[154] and *Matra*[155] judgements, the Court of Justice for the first time explicitly recognised that a decision finding that a measure does not constitute State aid or declaring it compatible with the Internal Market is a reviewable act for complainants, in that it amounts to a refusal to open the procedure provided in Article 108 (2) TFEU, and therefore is a denial of their only procedural guarantee provided by law. In *Sytraval* case[156], the General Court first recognised the reviewable nature of a decision rejecting a complaint, but the ruling was overturned by the Court of Justice on appeal and the complainant's right to challenge decisions in State aid matters was carefully circumscribed. According to the judgment, in the field of State aid, decisions must be held to be addressed to the Member State concerned only.

The significant evolution in favour of complainants' access to judicature was pushed even further in *Athinaiki Techniki* case[157]. In this judgement, the Court of Justice concluded, after a clear reasoning inspired by general principles of law, human rights, and antitrust procedure, that the Commission's rejection of the complaint was indeed an actionable decision. The first innovative statement in the judgment concerns the status of complainants in the preliminary examination stage: although they cannot rely on rights of defence, they have the right to be associated with it in an adequate manner. The Court of Justice therefore considers that a complaint on allegedly unlawful aid triggers the initiation of the preliminary stage investigation under Article 108 (3) of the Treaty, and accordingly frames the Commission's review of a complaint from the very start in a procedural context, considering it tantamount to a notification from a Member State. The consequence is that the

[154] Case C-198/91, *Cook v Commission*, par. 22.
[155] Case C-225/91, *Matra v Commission*, par. 16.
[156] Case T-95/94, *Sytraval v Commission*, par. 51.
[157] Case C-521/06, *Athinaiki Techniki.*

Commission has an obligation to close that preliminary examination stage by adopting a formal decision. *Athinaiki Techniki* case suggests that the transmission of one such letter is merely a preliminary step in proceedings that must anyway lead to a decision.

Human rights, in particular the need to ensure effective judicial protection, have also been an important source of inspiration for the Court of Justice, as is clear from the wording of paragraph 45 of the judgment: "*as the European Union is a community based on the rule of law in which its Institutions are subject to judicial review of the compatibility of their acts with the EC Treaty, the procedural rules governing actions brought before the European courts must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under European law*"[158].

This judgement has been defined as a silent revolution in the jurisprudence relating to the status of complainants in State aid law. It brings about a long-awaited evolution in favour of complainants' access to justice in the field of State aid.

The judgment of the Court of Justice in *Cook* and in *Athinaïki Techniki* cases mentioned above surface very often, for their significance lies in the fact that provide the right of competitors to participate in the State aid procedures and that it articulates a special rule of standing to enforce this right through the European judicature.

Insofar as it allows competitors to follow up their complaints and to challenge the premature closure of their file, the possibility of invoking the serious difficulties test can be seen as a first departure from the purely bilateral paradigm. The Court of Justice's cases allowed complainants to benefit from a set of procedural guarantees initially recognized in favour of Member States, the right to challenge the preliminary closure of the State aid procedure and the right to a decision within a reasonable time.

Despite the difficulties raised by the strongly bilateral design of the system of State aid control, the practice of the Commission and the case law of the European Courts secured the possibility for competitors to have access to State aid procedures through the submission of complaints. This possibility was implicitly recognised in the original version of the Procedural Regulation and is now explicit after the reform. The definition of the status of complainants (and hence of their actual chances of influencing the outcome of State aid procedures) has after taken longer. It seems, however, that the Court (in *Athinaïki Techniki*) and the legislator (in the Procedural Regulation, especially after the 2013 reform) have both made a choice to grant State aid complainants a power that they seldom enjoy in other fields of EU administrative law, namely the power to force the Commission to investigate and take a decision on the merits of their claims. This power is subject to important

[158] Case C-521/06, *Athinaiki Techniki*, par. 45.

limitations, which stems for the most part from the privileged position of Member States within the State aid procedure, but it challenges the instrumental conception of competitors that is normally associated with the bilateral design of State aid procedures[159].

Part II. The taxpayer's right to privacy and confidentiality

1. The right to privacy and confidentiality in the EU Charter of fundamental rights

The protection of the personal sphere constitutes a fundamental right that is safeguarded by national constitutions, by the Charter of Fundamental Rights of the EU, at Article 7 for the protection of private life[160] and Article 8 which provides for an independent fundamental right to the protection of personal data[161], and by the Council of Europe Convention n. 108 of 2000. Furthermore, Article 16 (1) of the TFEU, which was adopted with the Treaty of Lisbon, having the same wording as Article 8 (1) of the Charter, states that "*Everyone has the right to the protection of personal data concerning them*". In addition, Article 16 (2) of the TFEU lays down a legal basis for implementation of data protection rules which covers all areas of EU law.

Personal data is also protected as a part of the right to a private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[162]. Fundamental constitutional principles of several States offer a protection similar to that provided in Article 8 ECHR and in European law. In fact, the Court of Justice affirmed that "*European law must take into account the principles and concepts common to the laws of Member States concerning the observance of confidentiality, which serves the requirement, the importance of which is recognized in all of the Member States*"[163].

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[159] PASTOR-MERCHANTE F., *The Role of Competitors in the Enforcement of State aid law*, Hart Publishing, Oregon, 2017, 112.

[160] Article 7 of EU Charter of Fundamental Rights, "*Everyone has the right to respect for his or her private and family life, home and communications*".

[161] Article 8 of EU Charter of Fundamental Rights, "*Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
Compliance with these rules shall be subject to control by an independent authority".

[162] Article 7 of the EU Charter corresponds to Article 8.1 of the ECHR, but provides for the protection of the right to private and family life without admitting the exception grounds that are explicitly listed in the latter provision. The possible reason for not doing so lies in the foundations of Union law, which implicitly admits them as components of the legal system. Consequently, the two provisions run in parallel and therefore the standards of protection of this human right as recognized by the ECtHR should also apply within the European Union.

[163] Case C-155/79, *AM & S Europe Limited v Commission*.

At the European level, the protection of the right to privacy results, in particular, from the combination of Articles 7 and 8 of the EU Charter. Personal data is broadly defined as "*any information relating to an identified or identifiable natural person*"[164]. This means that not only specific personal information or data related to private and family life is protected by EU data protection legislation. Instead, any information about an individual is covered[165]. In this sense, the wording of Articles 7 and 8 of the EU Charter makes a general reference to everyone. Despite the absence of a specific reference to individuals, one may question whether the fact that such provision refers to private and family life could imply that the intention, in fact, was to refer to individuals only. However, even if that interpretation was regarded as appropriately reflecting the wording, if this provision refers to freedoms, such freedoms should be enjoyed by all persons, except when specifically stated otherwise. In reference to this, it has in fact been argued that the wording of Article 8 of the ECHR and Article 8 of the EU Charter does not provide only individuals but, instead, everyone the right to data protection. This could indicate a broad personal scope which also covers legal persons[166].

There is, in fact, a broader debate on the question whether legal persons, in particular companies, should be able to invoke certain fundamental rights from the Charter, including the right to privacy and the protection of personal data. Legal persons are, in fact, not entirely without fundamental rights protection under EU law. However, this protection is limited only to particular fundamental rights. Already in one of the first fundamental rights cases of the Court of Justice, *Nold*[167], the applicant was a German company, invoking its fundamental right to property and freedom to pursue economic activity. The Court, in its judgment, not only expressly accepted these fundamental rights as part of the European legal order, but implicitly also recognized that *Nold*, as a legal person, can rely on these rights. Further, in *DEB*[168] case, the Court of Justice recognized that legal persons can invoke the principle of effective judicial protection, enshrined in Article 47 of the Charter. As far as we see here, it can be peacefully stated that legal persons are entitled to invoke the privacy and confidentiality of communications provided by Articles 7 and 8 of the Charter. The Court of Justice clearly stated, in fact, that legal persons are protected by Articles 7 and 8 of the EU Charter "*insofar as the official title of the legal person identifies one or more natural persons*"[169].

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[164] Council of Europe, Convention for the protection of individuals with regard to the processing of personal data n. 108, Article 2.

[165] ECtHR, A*mann v Switzerland*, 16 February 2000, par. 65.

[166] WOHRER V., *Data Protection and Taxpayers' Rights: Challenges created by Automatic Exchange of Information*, IBFD, Amsterdam, 2018, 333.

[167] Case C-4/73, *Nold v Commission*, par. 14.

[168] Case C-279/09, *DEB*, par. 63.

[169] Joined Cases C-92/09 and C-93/09, *Schecke*, par. 53; Case C-419/14*WebMindLicenses*, par. 79.

Generally, the protection of personal data must be reconciled with freedom of expression and information which includes the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers.

To ensure a high level of protection for personal data, Article 8 of the Charter lays down a number of criteria for the processing of personal data. To start with, personal data must be processed fairly and lawfully. The processing of personal data should also take place on the basis of legislation defining in sufficient detail appropriate data protection conditions and requirements. Moreover, the requirement is that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.

As a fundamental right, the protection of personal data does not merely require that the EU institutions or the Member States bodies abstain from illegal interferences in the personal data. There also exists a positive obligation to secure the protection of personal data. In essence, the positive obligation presupposes the adoption of legislation laying down more precise rules and principles concerning the protection of personal data. In accordance with the provisions of Article 8, paragraph 2, of the Charter the protection of personal data shall be exercised in accordance with the conditions and limits defined by the measures adopted to give effect to it.

Taking into account the interpretation of the foundation principles of the European Union, the standards contained in the aforementioned European standards represent the mere minimal standards of protection. In particular, the influence of EU law and its supranational integration on the scope of such exceptions sets limits on the possibility to deem their existence in specific cases. Accordingly, for instance, the need to protect the economic well-being of the country could only be invoked to the extent that it does not infringe the existing rules of Union law. Therefore, one State could not legitimately invoke it to create some interference in private life, for example of taxpayers, which indirectly creates some selective advantage in favour of some economic operators or gives rise to discrimination.

As said, the scope of Article 8 of the EU Charter, concerning the protection of personal data, must be bundled together with that of Article 7 of the EU Charter, since the former provision gives specification to the latter within the boundaries of the protection of the more general right to privacy. This conclusion is based on the fact that the right protected in Article 8 could also be derived from the mere interpretation of the latter one.

There are several aspects of transparency which have a normative effect both on the institutional organs of the EU, when acting either in a legislative or an administrative capacity, and on the Member States and their administrations. Subsequently, are those aspects of transparency that emerge in certain areas of European Economic Law, such as the State aid and the public procurement law, and

relate to the obligations of the public authorities to facilitate or supervise market transparency, mainly by providing adequate information to market participants. The Court of Justice of the European Union has accepted a restriction of transparency when other fundamental values, such as the protection of personal data or the right to fair trial, could be undermined due to the publication of the relevant documents. In particular, in three judgements the Court of Justice of the European Union interpreted the relevant exceptions invoked in the light of more specific rules contained in the Personal Data Protection Regulation[170], the State Aid Regulation[171] and its own Rules of Procedure[172]. It clearly emerges from the case-law that a source, as the Regulation, cannot deprive these specific access rules of fundamental rights of their effectiveness[173].

The right to privacy stands clear of all other rights, since the protection of the personal life of the taxpayer comes as a specific expression of his freedom towards the interest of the general community[174].

Regarding the fiscal field, tax information may be a particularly sensitive form of personal information as it includes a taxpayer's income and an individual's personal circumstances and can be used to build a detailed profile of individual identity. Tax information may reveal, among other things, information about income, spending and savings, employment status, personal belongings, disability status. An effective protection of the right of privacy of all persons should in general be secured through an *ex ante* approach, rather than with a right to obtain compensation and indemnities for undue interferences with it on the basis of the damage which may have arisen. In tax matters there are insufficient grounds to conclude that a different level of protection of privacy should be enjoyed in respect of tax control affecting private as opposed to business taxpayers. A current instance of conflict with the right to the respect for private life and correspondences is raised by the disclosure of personal data held by the tax authorities and collected from tax returns filed by taxpayers[175]. The Court specified that tax data should be considered as personal data[176]. Therefore, information that is necessary for calculating taxes, e.g. data on employment, income, assets, and property, clearly

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[170] Case C- 28/08, *Commission v Bavarian Lager*, par. 58.

[171] Case C-139/07, *Technische Glaswerke Ilmenau*, par. 61.

[172] Case C-528/07, *API v Commission*, par. 86.

[173] GODIN G., *Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?*, in *Journal of European Competition Law & Practice*, 2011, 22.

[174] PISTONE P., *The EU Dimension of Human Rights in Tax Matters,*, in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 108.

[175] Case C-73/16, *Puskàr*, par. 41.

[176] Case C-201/14, *Smaranda Bara and Others v Casa Naţională de Asigurări de Sănătate and Others*, concerning the transfer of data relating to a taxpayer's declared income from the tax authority to the National Health Insurance Fund.

constitutes personal data[177]. The Court has also confirmed that the publishing the earned and unearned income and assets of individual taxpayers in a newspaper constitutes the processing of personal data[178], as well as the information about bank accounts, which is also personal data[179]. Moreover, the Court of Justice stated that the use of evidence obtained without the knowledge of the taxable person in the context of the tax procedure must not violate the rights guaranteed by EU law, including those contained in Article 7 of the EU Charter[180].

The right to privacy can present in tax matters some additional features combined with the protection of the right to be heard, in particular in relation to what concerns fact finding and the methodologies followed by tax authorities for obtaining evidence in the framework of tax procedures. The need for an effective, complete and timely protection of the right to privacy is an important argument to support the view that the protection of human rights in tax matters should not be limited to a separate analysis of the static issues of this right.

In principle, this right binds the European Union and its Member States to secure an effective protection of personal data concerning every person, individual or other, regardless of his citizenship. This conclusion is evident to the extent that, unlike other provisions of the Charter, no reference to EU citizenship is included in this provision or to any personal characteristics of the person. Accordingly, the Charter upgrades the legal status of protection of personal data that would be available under secondary law within the European Union. This is a particularly important development in tax matters especially if one considers that some Member States have been often actively supplying confidential information concerning personal data of taxpayers.

In recent years, there was also an intense media activity in the reporting of cases of fraud or major tax avoidance, such as in so-called *Panama Papers* or *LuxLeaks* cases. The increased availability of information in this sense constitutes a challenge with regard to the protection of the taxpayer's rights. Privacy and the right to it is, in fact, a (relatively) recent discovery as it has never been considered a priority in the overall hierarchy of rights and prerogatives to be protected under the law. Less that, it has been in taxation law, where privacy is rather seen as an instrument for avoidance and evasion rather than a human right deserving protection. With reference to the tax area, this right and its necessary corollaries have often been valued, in the European context, in the context of exchange of

[177] Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk* par. 64; Case C-92/09 and C-93/09, *Schecke*, par. 52.

[178] Case C-73/07, *Satakunnan Markkinapörssi and Satamedia*, par. 35. Case C-201/14, *Smaranda Bara and Others v Casa Naţională de Asigurări de Sănătate and Others.*

[179] Case C-580/13, *Coty Germany GmbH*, par. 26.

[180] Case C-419/14, *WebMindLicences*.

tax information[181]. The right to access public information, the right to confidentiality and the right to privacy are, in fact, three important rights for taxpayers with respect to tax information exchange. The instruments for exchange of information provide that exchanged information has to be kept confidential and may only be disclosed to persons and authorities that are concerned with taxes and may only be used for taxation purposes[182]. All taxpayers have the right to expect that the tax authorities will not intrude unnecessarily upon their privacy. In practice, this is interpreted as avoiding unreasonable searches and requests for information which is not relevant for determining the correct amount of tax due. Similarly, strict rules must apply to obtaining information from third parties on the affairs of a taxpayer. Another basic taxpayers' right is that the information available to the tax authorities on the affairs of a taxpayer is confidential and will only be used for the purposes specified in tax legislation. Tax legislation usually imposes very heavy penalties on tax officials who misuse confidential information and the confidentiality rules that apply to tax authorities are far stricter than those applying to other government departments.

The right to confidentiality requires that a person's information is not disclosed to an unrelated third party, whether intentionally or by accident. In tax information exchange the right to confidentiality means that the taxpayer should have confidence that "*the information exchanged is used and disclosed only in accordance with the agreement on the basis of which it is exchanged*"[183]. Confidentiality rules, consequently, are supposed to prevent the use of tax information for purposes other than taxation, e.g. for extra fiscal purposes.

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[181] In this specific area, however, the debate about the protection of the taxpayer's rights to privacy and confidentiality is constantly evolving and not excluded, as shown by the judgments of the Court of Justice in the cases *Sabou* (Case C-276/12) and *Berlioz* (Case C-685/15), in which the Court stated that DAC does not address the procedural rights of the taxpayer and instead leaves it to the EU Member States to decide on the appropriate level of procedural safeguards, distinguishing between the purely fact finding investigation stage during which information may be exchanged between different tax authorities and the contentious stage which begins when the taxpayer is sent the proposed adjustment.
Moreover, in this jurisprudential wake, the judgment of the Court of Justice expressed in the joined cases C-245/19 and C-246/19, *État du Grand-duché de Luxembourg*, should be noted. In this case, the European Court expressed the right to take legal action against a request for information on tax matters according to Directive 2011/16 / EU of 15 February 2011, so-called the DAC. The Court noted, as regards the right to an effective remedy, that the protection of natural and legal persons against arbitrary or disproportionate intervention by public authorities in their private sphere is a general principle of European law. Such protection may also be claimed by a legal person who is the addressee of a decision ordering information to be provided to the tax administration, in order to challenge in court that decision or the relevant penalties imposed in case of non-fulfillment of that decision. The Court also held that the request for information is able to infringe the taxpayer's right to privacy guaranteed by Article 7 of the Charter and the right to the protection of personal data guaranteed by Article 8. In this respect, the European Court clarified that such rights are preserved if there are one or more remedies available before the national courts enabling the taxpayer to activate, although in an incidental manner, an effective judicial review of any measure affecting his rights without running the risk of being penalized for doing so. On this point, see also, SELICATO G., *Scambio di informazioni, contraddittorio e Statuto del Contribuente*, in BODRITO, CONTRINO, MARCHESELLI, *Consenso, Equità ed imparzialità nello Statuto del Contribuente*, Giappichelli, Torino, 2012, and CONTRINO A., *Banche date tributarie, scambio di informazioni fra autorità fiscali e protezione dei dati personali: quali diritti e tutele per i contribuenti*, in *Riv. trim. dir. trib.*, 2019.

[182] BAKER, PISTONE P., *General Report*, in *The Practical Protection of Taxpayers' Fundamental Rights*, IBDF, Amsterdam, 2015, 61.

[183] OECD, *Keeping it Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, 2012, 5.

The information pertaining to the taxpayer is also protected by the right to privacy. The right to privacy is widely acknowledged as a fundamental right. Considering the massive loads of information that tax administrations possess on their taxpayers and the sensitive nature of the information so collected, it is a general minimum standard of all tax systems that they take measures to provide such information with protection from any breach or misuse, either by tax administration officials or by third parties that have access to the taxpayers' information. Privacy is sometimes defined as the right to have one's affairs kept secret, while the right to confidentiality, as said, means that information disclosed to a person or entity should not be disclosed to an unrelated third party whether intentionally or by accident. Within the broad scope of the definition of privacy, for taxation, the right to privacy should protect tax information which often includes a taxpayers' income and other details about an individual's personal circumstances and the right to confidentiality means that the taxpayer should have confidence that the information exchanged is used and disclosed only in accordance with the agreement on the basis of which it is exchanged. However, even a very straightforward example of exchange of tax information reveals that the relationships of privacy and confidentiality are more complex when a concrete situation is being evaluated.

The precise content of these rights is unclear[184]. For example, the right to privacy has physical and spatial aspects. At the same time, others have affirmed that a more modern notion of the right to privacy should also entail control over one's personal data streams, which adds a connotation making the right to privacy more suited for evaluating the transfer and exchange of tax-related information. It was also submitted that the definition of privacy is context-dependent, meaning that the application of this right can lead to different results depending on the factual constellation to which it is applied. This makes it clear that privacy, data protection and confidentiality should not be viewed as separate, but are actually intertwined. At the same time, both privacy and confidentiality are sometimes mentioned as forming part of a wider right to data protection.

The use of huge amounts of data can have an actual and potential impact on the right to confidentiality and privacy of the taxpayer in case the taxpayer's personal and business information may be used to construct a detailed profile of an individual's identity[185].

In line with the current European development on data protection, in order to protect the use of big data, the requirements of transparency and accountability should also be applicable to public administration when dealing with fiscal and business data of the taxpayer. Several tax scholars have argued that taxpayer protection should be increased in this field. For instance, in 2014, the General

[184] DEBELVA F., MOSQUERA I., *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, in *Intertax*, 2017, 363.

[185] COCKFIELD A., *Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: Toward a multilateral taxpayer bill of rights*, U.B.C. Law Review, 2010, 437.

Reporter for the European Association of Tax Law Professors stated that there is "*a tension between the legitimate rights of States to protect their tax base by collecting information of taxpayers as much as possible to guarantee taxation and the legitimate rights of taxpayers on privacy and to be protected against the almighty power of these States*"[186]. Similarly, it was also made an appeal[187] for an increased taxpayer protection stating that stronger powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers' basic rights.

In essence, the protection of the taxpayer's right to confidentiality and privacy may help to ensure a better relationship between the taxpayer and the tax administration which should be based on trust, voluntary compliance and protection of taxpayer' rights.

In this field, in fact, data protection is not simply about the confidentiality of the data being gathered and exchanged. That the information will be kept confidential, and that there will be no unauthorized disclosure of information, is simply the starting point. Data protection gives the data subject much more extensive rights. Data may only be gathered and exchanged for a lawful purpose which must be clearly identified in sufficiently specified terms that any misuse of the data can be challenged, and must not be retained longer than it is necessary for the identified purpose. The data subject has the right to be notified and to have access to the data and the right to correct any inaccuracies. Legal remedies need to exist to protect the rights of the data subject, and compensation has to be paid for improper processing of data. The rights to protection in connection with data processing go well beyond the matter of confidentiality.

Currently, special challenges for the protection of personal data arise in the fiscal context where the challenge is to strike the right balance between the legitimate public interests and the protection of taxpayers' privacy.

2. The right to access to documents and files

Closely related to the right to be heard, on the one hand, and to the right to privacy and confidentiality, on the other hand, is the right of access to documents and files.

An essential precondition of an effective exercise of the right to be heard is, in fact, the right to access documents. Article 41 of the Charter includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business

[186] MARINO G., *General Reporter. New Exchange of Information versus Tax Solutions of Equivalent Effect*, *EATLP Annual Congress 2014*, IBFD, Publications Amsterdam, 2015.

[187] PISTONE P., *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, World Tax Journal, 2014, Journals IBFD.

secrecy. The Charter limits this right to "one's file", thereby excluding access to the files of other parties. Third parties that would like to request access to the Commission's file could do so by means of Article 42 of the Charter[188]. Right of access to documents recognized to interested individuals is an integral part of the legal framework seeking to ensure democracy and represents the most concrete manifestation of the degree of public transparency of the EU decision-making process. In this sense, Article 41 conveys the commitment contained in Article 1 of the European Union Treaty to a decision-making process which respects the principle of transparency, and confirms the desire expressed in Declaration of the Final Act of the Treaty of Maastricht to improve public access to the information held by the institutions in order to strengthen the democratic nature of the Union's institutional system. The added value of the Charter is that it acknowledges right of access to documents in a Charter which aggregates fundamental rights in the European Union. In this way, the Charter goes further than international human rights treaties which do not contain right of access to documents. For instance, the European Convention on Human Rights is silent on this right.

At the same time, right of access to documents must be reconciled with other fundamental rights, most notably the protection of the privacy and integrity of the individual and personal data provided by Articles 7 and 8 of the Charter. Whenever the request for access relates to documents whose disclosure may involve the processing of personal data, it becomes necessary to balance the interests of the applicant with those of the person affected by the processing of such data. Access to documents must be refused to the extent that disclosure would undermine the protection of the privacy and integrity of the individual. The right of confidentiality and the right to privacy may conflict with the right to access to documents that implies disclosure of information. The requirement to disclose the file may, however, come into conflict with the confidentiality of certain documents and the obligation of the Commission to keep those documents secret and a clear tension can be seen here between two principles, disclosure *versus* confidentiality. On the one hand, the Commission should disclose all documents that are collected during its administrative proceedings. On the other hand, it may not disclose confidential information.

While the EU institutions are under obligation to refuse totally or partly access to a document where disclosure would undermine the protection of personal data, this exception should not be interpreted so as not to disproportionately limit the right of access to documents. Hence, the crucial issue is to define the weight of the respective rights and to optimize the application of each of them, and even

[188] Article 42 of the Charter provides that any natural or legal person has a right to access documents of EU institutions. See also Regulation 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43. However, the legal bases of those rights are different. The general right of access to documents (Article 42) is derived from the democracy principle, whereas the right to access to one's file is an administrative procedural right.

so that the right which loses in the process of weighing remain as far as possible relevant in the concrete case.

According to Article 41 of the European Charter, according to which the right to good administration also includes the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, undertakings are, in principal, entitled to have access to the Commission's file for the purpose of preparing a representation in their own defence[189]. In competition proceedings, in particular, the European Judge has made it clear that "*the purpose of access to the file is in particular to enable the addressees of a statement of objections to acquaint themselves with the evidence in the Commission's file, so that they can express their views effectively, on the basis of that information, on the conclusions reached by the Commission in its statement of objections*"[190].

It emerges from the general principle of the right to be heard that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim. That is why Article 41 of the Charter stipulates the right to have access to the file in connection with the right to be heard: as corollary of the principle of respect for the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence[191]. In other words, the undertaking concerned must have been enabled to express its views effectively on the documents used by the Authority to support its allegation of an infringement.

It inevitably follows from that there cannot be any decision based on procedural documents and items which haven't been made available to the representatives of the parties and on which they have been given an opportunity of expressing their views.

The principle is infringed where a decision is based on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment[192]. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest[193].

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[189] Case C-310/93, *BPB Industries and Britisch Gypsum v Commission*, par. 25.

[190] Case T-24/07, *ThyssenKrupp Stainless v Commission*, par. 247.

[191] Case C-407/08, *Knauf Gips*, par. 22.

[192] Joined Cases C-42/59 and C-49/59, *SNUPAT v High Authority*; Case C-199/99, *Corus UK v Commission*.

[193] Case C-450/06, *Varec SA v État belge*.

Provisions prescribing limits on grounds of public or private interest regarding access to documents must always be construed strictly and in accordance with the principle of proportionality. The need to ensure the public the widest possible access to document entails, together with the principle of proportionality, that the EU institutions are obliged to consider giving partial access to the information which is not covered by the exception. Therefore, the fact that some part of the document contains information covered by the exception does not necessarily entail that the whole document falls beyond access.

Fundamental rights of the Charter cannot be considered as absolute so that they could not be restricted in any way, manner or form, although Article 41 of the Charter is silent on the limitations for access to documents. There are certain important public interests that may provide a justification for the limitation on right of access to documents. Such interests may have to do with public security, defence and military matters, international relations, financial, monetary or economic policy. All exceptions to right of access to documents must, however, be interpreted strictly, and in the light of the principle of the right to information and the principle of proportionality. In the final analysis, decision-making concerning access to documents often involves the process of balancing and weighing, in accordance with the principle of proportionality, between the right of access to documents, on the one hand, and the private or public interest, on the other hand. Total refusal of access to a document is often unwarranted because it may be possible to grant partial access to a document, while at the same time sufficiently safeguarding some important public or private interest.

In addition to the specific provision pursuant to Article 41, the European Charter contains an additional right of access to documents in Article 42, which in any case is independent of the fact that the applicant is part of an administrative procedure involving them. Article 42 of the EU Charter gives European citizens and persons established in the Union access to documents of EU institutions. In this case too, the plain wording of the provision indicates that its scope is limited solely to the EU institutions. However, some external elements lead to the conclusion that the protection of this right should not be granted in complete isolation from the context of the EU Charter and the more general protection of rights under Union law. If the document is available to EU institutions, Article 42 of the EU Charter would in fact allow an immediate entitlement to it, thus providing also an effective exercise of the right to defence under Article 48 of the EU Charter. Moreover, the European legislature has balanced the public interest in the transparency of European action against interests liable to militate against such transparency in various acts of secondary legislation, *inter alia* in Regulation 45/2001 and Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

In the tax field, unlike what happens in the administrative sense in the strict sense, procedural transparency does not (yet) rise to an absolute and fundamental principle, being placed in opposition to other interests, to the recurring of which the law usually deems the compression of transparency legitimate. The European Judge affirmed the principle according to which the right of access by taxpayers, even if exercised prior to the issuance of an imposing measure, must generally be allowed, since it can only be denied when "*general interest objectives*" are used by to oppose the interests of the applicants[194]. Therefore, EU case-law generally admits the right of access to the tax procedure. In fact, this right is also allowed in the preliminary phase where the only limit is represented by the balance with the aforementioned general interest objectives. Indeed, the Court recognizes that the latter can include the right to privacy of physical persons or legal entities, the professional secret, as well as the cases in which the knowledge of the documents could damage the effective investigative activity of the tax administration[195].

In essence, transparency is fundamental to ensuring the integrity of the tax system and maintaining public confidence, a key driver of voluntary compliance[196]. Although transparency must be balanced against the right to privacy, it might be inevitable that increasingly more tax information will enter the public domain through mandatory reporting initiatives, data leaks, and the media. In any case, this must always take into account, in a context of increase in available information, a minimal adverse consequence if there is accurate reporting and appropriate contextualization.

3. The (im)balance between the right to privacy and to access and the need to transparency in State Aid investigation procedure

Transparency is beneficial for society as a whole because it promotes accountability and provides an opportunity for citizens to be better informed about public policies. Generally, as seen, transparency must be understood as total accessibility of data and documents held by public administrations, aimed at realizing the principles of equality, impartiality, good performance, responsibility, efficiency in the use of public resources, integrity and loyalty in service to the community. It integrates the right to good administration and contributes to the creation of an open administration, at the service of the individuals. And precisely the right, recognized to interested individuals, to access administrative documents represents the most concrete manifestation of the degree of public transparency of an organization.

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[194] Case C-298/16, *Teodor Ispas e Anduța Ispas contro Direcția Generală a Finanțelor Publice Cluj.*

[195] LOGOZZO M., *Il diritto ad una buona amministrazione e l'accesso agli atti del procedimento tributario,* in *Neotepa,* 2018, 24.

[196] See Case C-682/15, *Berlioz* and Case C-73/17, *Puškár*, in the context of an exchange between tax administrations.

According to the Commission, transparency is even more important in the area of State aid. Transparency promotes compliance, reduces uncertainty and allows firms to check whether aid awards granted to competitors are legal. It promotes a level playing field across Member States and firms in the internal market, which is even more important in the present economic context. It facilitates enforcement by national and regional authorities by raising awareness on aid granted at various levels, hence ensuring better control and follow-up also at national and local levels. For all these reasons, transparency constituted a pillar of the State aid modernisation (SAM)[197]. One of the main objectives of SAM is, in fact, to enable the Commission to focus on the most distortive cases while leaving more flexibility to Member States to put in place less distortive aid. In this context, the expanded General Block Exemption Regulation makes it possible to grant aid on the basis of pre-defined criteria with no need to notify to the Commission. This saves time, reduces the administrative burden, and helps promote models of good aid. In principle, there is no requirement for public information on beneficiaries of aid awarded under notified or block-exempted schemes, that representing almost 90% of the total State aid spent in the EU, except for large regional and R&D aid. As a condition for granting aid, the 2014 Communication with Guidelines on transparency requires that Member States must publish on a specialized State aid website, at regional or national level, information on aid measures and their beneficiaries[198]. Following practice on publication of information, a standard format should be used, allowing the information to be searched, downloaded and easily published on the internet.

From a fiscal point of view, it has also been proposed that neither information on companies' tax bases nor the exact amount of their tax relief should be disclosed, to ensure tax confidentiality and protection of business secrets. However, at the same time, since such derogations are selective, confer an advantage to undertakings and thus constitute State aid, accountability on the use of public resources and State aid control also has to be preserved. Accordingly, it was deemed necessary for aid granted under fiscal schemes or under risk finance schemes, ranges can be published instead of the exact amounts.

The information generally accessible by all, in State aid field, consists of the identity of the individual beneficiaries, the form and amount of aid granted to each beneficiary, the date of granting, the type of undertaking (SME/large company), the region in which the beneficiary is located and the principal

[197] European Commission, Transparency Communication, 2014, which aligned the transparency requirements across a number of State Aid guidelines and the General Block Exemption Regulation.

[198] The transparency provisions require Member States to publish detailed information on individual aid awards equal or above €500.000 as from 1st of July 2016. To assist Member States in complying with the transparency requirement, and in cooperation with their representatives, the Commission has developed an IT platform, the Transparency Award Module (TAM), currently used by 25 Member States.

economic sector in which the beneficiary has its activities. The information must be made public within six months of the granting of the State aid, being a requirement for the validity of its granting. In the area of fiscal State aid, the search for a balance between the need for transparency, the right to confidentiality of the tax information in question and the right to access the Commission's file, seems to be very difficult and still being explored. In particular, the right to access to file in State aid investigation procedure has until now not been completely clarified and recognized.

Regulation 1049/2001[199] grants to every citizen of the Union independent or reasoned interest the right to request from the Commission access to documents of the Commission. In principle, this rule potentially is also applicable to the area of State aid control, but it has been claimed that the general rule is not applicable until the relevant State aid procedure has been closed and deadlines for legal remedies have expired. According to this line, this follows from the circumstances that the provision on the procedural rights of the interested parties is encompassing and conclusive as it is explicitly confirmed in the Regulation.

Although the EU Courts initially appeared willing to confirm the application of the Council Regulation 1049/2001 on Access to Information to State Aid Control Procedures, albeit that they failed to allow access to the file as an essential pre-condition of any effective right to be heard, subsequent case law has reduced the importance of this regulation in the area of State aid. The amended Procedural Regulation of 2015, moreover, does nothing to restore the position of interested parties, despite the fact that the right of access to information and access to file are recognized as a citizen's right in Article 42 of the Charter of Fundamental Rights, regardless of whether the applicant is formally a part of the proceedings.

Despite some early developments in the case law on the application of Regulation 1049/2001 to State aid procedures by the General Court, currently the position of beneficiaries in State aid proceedings before the Commission differs materially in many respects from the rights of access to the file established in general in European law and in the EU Charter.

In a case-law[200], the Commission had denied the applicant access to documents relating to a procedure of State aid control on capital increases made in favour of its parent company. The request to access such documents had been submitted by the company pursuant to Article 6 of aforementioned Regulation 1049/2001, which defines the principles, conditions and limits governing the right of access. In this sense, it is guarantees to any person residing in a Member State the "*right of access to documents of the Union institutions, bodies, offices and agencies*". The denial of access in the

[199] Council Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[200] Case C-271/15, *Sea v Commission*.

contested decision was based on the exceptions referred to in Article 4, paragraph 2, first and third indent, of the Regulation. According to these provisions, access to the information requested may be refused where it would undermine the protection, respectively, of commercial interests of a natural or legal person, including intellectual property, or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. The Court of Justice has however considered that further evidence did not emerge in this case in order to rebut the presumption of compromise of the mentioned interests, nor company had demonstrated an overriding interest to their disclosure. The Court has also added that, in accordance with its case-law, the general presumption previously referred applies both when the party is seeking access to the entire file, and where access to individual documents is requested. The Court, in dismissing the claims, has made it clear that the mere fact that the request for access has precisely identified, or not, that the document has no effect on the applicability, or not, of the general presumption of confidentiality. The Court has explained that this element has no effect on the underlying rationale of the exception provided for in the Regulation, which is to guarantee the outcome of the administrative proceeding.

In another case[201], the Court of Justice interpreted Article 4 (2) of the Regulation, regarding the protection of the purpose of the investigation, to the effect that interested parties except for the Member State responsible for granting aid, do not have right to consult the documents on the Commission's administrative procedure, and further that a general presumption exists that disclosure of documents in principle undermines protection of the objectives of State aid investigation activities. The substantive question brought before the Court refers to the substantive rules governing access to documents in a State aid Commission file by interested parties other than the Member State concerned in the course of the procedure. By refusing a general right of access to the entire Commission file to interested parties the judgment rendered by the Court of Justice is consistent with the ideal concept of State aid control procedures as a pre-emptive mechanism. However, by refusing access *a priori* to individual documents in the Commission's file on State aid cases because this would lead to a "denaturalization" of State aid procedures, the Court is more cryptic. It is true that in *ex ante* control of national measures cases, granting access to documents submitted by Member States which outline a measure not yet made public merits such documents remaining confidential. However, it appears more doubtful that this "denaturalization" is equally likely to occur in cases which refer to investigations opened once where the measures have been already implemented and when the beneficiary undertakings, and their competitors, are directly and actually concerned by the outcome of the procedure. Moreover, the Court was asked to decide whether the limited role reserved for beneficiaries in State aid procedures, compared to the role of Member States, gives rise to a breach

[201] Case C-139/07, *Commission v Technische Glaswerke Ilmenau*.

of the fundamental rights enshrined in the European Convention on Human Rights and the European Charter of fundamental rights, and in particular, the right to an effective remedy and a fair trial provided for in Article 47 of the Charter, the right of defence, the right to be heard before a decision is taken, and the right to good administration provided by Article 41 of the Charter. In that connection, the European Judge stated that the Court cannot, on the basis of the general legal principles, such as those of the right to due process, the right to be heard, sound administration or equal treatment, extend the procedural rights which the Treaty and secondary legislation confer on interested parties in procedures for reviewing State aid. This ruling clearly limits the scope of access to the file while a case is still under investigation, as confirmed by the subsequent *Ryanair* cases[202].

However, despite this stable judicial interpretation, a more flexible approach was adopted by the European Ombudsman, who emphasized in a decision on a complaint against the Commission for a refusal to supply documents in a State aid investigation that the general presumption does not exclude an interested party from having a right to demonstrate that a given document is not covered by that presumption[203]. Following the adoption of an administrative decision, the Commission remains entitled to rely on Article 4 (3) of the Regulation 1049/2001 (protection of the Commission's decision-making process) unless there is an overriding public interest in disclosure. Disclosure must be likely to seriously undermine the decision-making process; furthermore, that risk must be reasonably foreseeable and not merely hypothetical. The overriding public interest in disclosure must be objective and general in nature and must not be indistinguishable from individual or private interests such as those relating to the pursuit of an action brought against the Union institutions, since such individual or private interests do not constitute an element which is relevant to the balancing of interests provided for in Article 4 (3) of the Regulation 1049/2001[204]. In effect, this means that access will remain very limited in the event that a State aid decision is appealed to the Courts.

In another decision of European Ombudsman[205], the issue of the Commission's continuous practice of refusing, in the context of a State aid formal investigation, to provide beneficiaries of State aid and other interested parties with access to its State aid file was addressed. The complainant argued that, following the entry into force of the Charter of Fundamental Rights of the European Union, the Commission's practice was in breach of Article 41 (right to good administration) and Article 47 (right to an effective remedy and to a fair trial) of the Charter. The complainant criticized the fact that interested parties have limited rights during a formal State aid investigation since they are given the

[202] Joined Cases T-494/08, T-495/08, T-496/08, T-497/08, T-498/08, T-499/08, T-500/08, and T-509/08, *Ryanair v Commission*.

[203] European Ombudsman, Case 1735/2010, *MHZ*.

[204] Case C-506/08, *Sweden v My Travel and Commission*.

[205] European Ombudsman, Case 1179/2014 on the involvement of "interested parties" in State aid investigations carried out by the Commission.

opportunity to provide comments only following the Commission's decision opening a formal investigation into a notified aid measure. He added that, in some cases, the Commission sought the views of interested parties, during the course of a formal investigation, but only with a view to supporting its own views. As regards consulting the beneficiary, the situation is even worse: he stated that the beneficiary of the aid can comment only with the consent of the Member State that granted the aid, while this is not the case for the complainant. The Ombudsman inquired into the issue and found, however, that the Commission's practice was in line with the relevant State Aid Procedural Regulations and the jurisprudence of the EU Courts regarding the procedural rights of interested parties. The fact that beneficiaries and other interested parties do not have access to the Commission State aid file reflects their limited role in a State aid investigation and the fact that a State aid investigation is initiated against a Member State rather than against a beneficiary. Therefore, the Ombudsman found that there was no maladministration.

In light of the aforementioned cases, it is evident that the Commission is still in the opinion that the administrative procedure regarding the granting of a State aid is initiated against the Member State concerned, not against the beneficiary or any other "interested parties". This is why the jurisprudence of the EU Courts confers on such parties merely the role of information sources. Thus, interested parties do not have a right, under the State aid rules, to consult the documents on the Commission's administrative file. As the Court ruled[206], if those interested parties were able to obtain such access, the system for the review of State aid would be called into question. What that system does provide is that, when the Commission decides to initiate the formal investigation procedure, it is obliged to publish a notice in the Official Journal and to invite all interested parties to submit their observations, in full respect for the principle of good administration. In the Court's opinion, this is sufficient. A decision by the Commission not to open a formal investigation in a particular State aid case, with the consequence that interested parties are deprived of the opportunity to submit observations, however, it is not taken into account.

The fact that interested parties are not therefore "parties to the procedure" was also made explicit in Recital 11 of the Procedural Regulation 2015/1589: "*in the light of the special relationship between aid beneficiaries and the Member State concerned, the Commission should be able to request information from an aid beneficiary only in agreement with the Member State concerned. The provision of information by the beneficiary of the aid measure in question does not constitute a legal basis for bilateral negotiations between the Commission and the beneficiary in question*".

[206] Case C-139/07, *Commission v Technische Glaswerke Ilmenau.*

The reforms adopted, therefore, have not included any provision providing interested parties with a right of access to the Commission's State aid file or any other procedural right that went beyond the mere submission of comments following the opening of a formal investigation.

These limitations and the formalistic approach adopted by both the Commission and the Court of Justice strongly undermine the protection of the taxpayer involved in a State aid investigation procedure, who finds himself, in this specific (and only) area of European law, not have recognized no procedural rights, although the direct consequences of the Commission's decisions could potentially affect it, and above all, from a substantial point of view, even if the same does not formally assume the status of a party within the procedure.

Moreover, the lack of express and specific provisions in this sense is more accentuated in the tax area, also with regard to the right to privacy and confidentiality of the information held. With specific regard to the tax field, in fact, it should also be noted that in December 2015 the ECOFIN Council added an automatic exchange of tax ruling information to the Administrative Cooperation Directive, effectively regulating the creation of an EU-wide database of those national tax rulings that have cross- border effects as of 2017. On its relevance to State aid investigations, the ECOFIN Council added a specific restriction to the Directive which prohibits the Commission from using the information in the database for any purpose other than to determine whether and to what extent Member States comply with their ruling sharing obligations. In principle, effectively the Commission will be barred from using any information in the database for State aid purposes. This raises a number of relevant issues. It is not known, in fact, whether the Commission has an adequate barrier to prevent the Directorate-General for Taxation and Customs Union (DG Taxud) from sharing information with the Directorate-General for Competition (DG Comp)[207]. Furthermore, it is not understood how the Commission can be prevented from accessing the database for State aid purposes. And above all, in the absence of such access, at least officially, one wonders how the Commission can be prevented from relying on press revelations or various complaints, without guaranteeing an adequate right of access and information and, consequently, of control.

4. Final remarks

The protection of taxpayers' fundamental rights is a highly important subject. The relevance of this issue is demonstrated by the growing multi-level attention that is reserved to it and the continuous implementation of tools that can guarantee the effectiveness of the protection of these rights.

[207] LUJA R., *State Aid Benchmarking and Tax Rulings: Can we keep it simple?*, in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 127.

At international level, the best practices and minimum standards regarding taxpayer's rights have been determined. At European level, the European Commission, on the 24th of November 2016, released its Guidelines for a Model for a European Taxpayer's Code with the aim of proposing and consolidating a model set of principles that are considered as a minimum standard, based on the main general principles and the best practice in Member States. From the joint examination of all these initiatives taken at international level and in the EU in relation to taxpayers' rights, it emerges that citizens as taxpayers enjoy a range of basic rights.

In the underlying context of these soft-law instruments, the European Charter lays the foundations for the recognition of the protection of fundamental rights, not only for the Member States, but mainly to be implemented in the European context and within of the European institutions. As illustrated above, taking as a benchmark the European Charter of Fundamental Rights, which is not a soft law instrument, but has primary law status and the same legal value as the European Treaties, the following minimum standard as parameter can be stated: the taxpayer has, in fact, the right to be informed, assisted and heard; the right to certainty, the right to privacy and, finally, the right to confidentiality and secrecy in the administrative procedure. The taxpayers' protection is, in fact, reinforced when they have to deliver information to administrations, with consequent related attention to the confidentiality and proper use of taxpayers' information. The recognition of fundamental taxpayers' rights emerges above all in circumstances in which they may be considered as defenceless when there is an interaction between the taxpayer and the public administration to avoid possible injuries caused by the circumstances.

From here, the basic question emerges: what is the current position of taxpayers' rights in a State aid investigation procedure?

First of all, in light of the above, it is not understood how fundamental rights, recognized in a European Charter having the same value as the Treaties, with regard to the procedural rights linked to the proceedings before the European institutions, cannot be recognized in the "classical" administrative procedure conducted at European level, such as that of investigating State aid. In this sense, regarding the possibility to invoke, in State aid field, the Charter of Fundamental Rights of the European Union, it can be recalled the recent Opinion of Advocate General Kokott[208], who clarified that whether Article 41 (2) (c) of the Charter of Fundamental Rights of the European Union, related to the obligation of the administration to give reasons for its decisions, could be invoked by a Member State. In this regard, and with reference to the recent case-law of the Court, the Advocate concluded that Article 41 of the Charter, concerning the right to good administration, reflects a general principle of EU law that can be invoked in a State aid procedure.

[208] Opinion Advocate General Kokott in Case C-465/18, *Hungary v Commission*.

As seen, the beneficiary should have the same rights to be heard and of access to the Commission State aid file not only as the Member State involved, but above all as any other entity that can be affected by a measure. These rights derive unequivocally from the principles of good administration stated in Article 41 of the EU Charter, which recognizes these rights to *everyone* before any individual measure that may adversely affect it is adopted.

Indeed, the view that State aid procedures are exclusively between public authorities should be reconsidered: the procedure on the model of administrative procedure established in general by the Charter should be adapted, with the consequent recognition of the right to a good administration, which establishes the minimum standard of rights that must be recognized to all those who may be affected by a decision taken by a European institution. It is a minimum standard of protection aimed at safeguarding the level of protection of the basic rights granted to taxpayers, below which any administrative procedure cannot be considered legitimate and compliant.

As widely seen above, the decisions made by the Commission to this effect and the decisions adopted by the European Judge which deny the recognition of these basic rights, are mainly based on a single basic reason, that is, that the formal part of the State aid investigation procedure is exclusively the Member State and not the beneficiary of the aid. But, in the current context, where there is a continuous debate that focuses on the greatest attention and the need for increasing protection of taxpayers' rights, is this formalistic view of the procedure still justified today? Is it still possible to find a justifying basis for the prevalence of the "form" of the procedure over the "substance" of the same, which undoubtedly sees the beneficiary and, in particular, the taxpayer in case of fiscal aid, as the person who will actually be affected by the Commission's decision? Can we still justify, in the balancing of potentially opposing interests, the prevalence of form over substance, when, moreover, the recognition of the protection of fundamental rights is under discussion? Can the qualification and recognition of fundamental rights be assessed through a purely formalistic approach?

The gap between the rights proclaimed in principle by the European Charter and those actually recognized in one of the administrative procedures which take place before the European Institutions, as State aid investigation procedure, is evident and is based on a strictly formalistic view of the procedure itself, despite the actual beneficiaries of aid measures granted of which the Commission can order recovery are individually concerned.

Regarding the role and the rights of the third parties the Procedural Reform has been seen as a lost opportunity of increasing the insufficient procedural rights of the beneficiaries and, in general, of the interested parties. In the end from this procedural reform the losing teams are, indeed, the third parties. And the State Aid Modernisation (SAM) plan constituted certainly a missed opportunity for the

Commission to propose an alignment of beneficiaries' rights to fundamental rights recognized by the European Charter.

In this prospective, giving a clearer role to aid recipients and interested third parties in the State aid procedures would not merely be beneficial to them, but more importantly would increase the efficiency and robustness of State aid procedures. Clarifying the role of third parties and increasing their rights would be not only to the benefit of State aid beneficiaries, their competitors and complainants but also to the benefit of the efficiency of the State aid control consequently to the benefit of the Commission itself. This is particularly important in light of the drive towards a more economic approach in State aid cases. For example, involving the aid recipient more heavily in the State aid procedure would likely ease the burden on the Commission when seeking to obtain the detailed information required to evaluate the necessary incentive effects of the aid and to conduct the balancing test. Indeed, economic and market data that is key to such assessments is most often in the hands of third parties as opposed to the Member State in question. On the other hand, continuing to consider the flow of communication between the Commission and the Member States and lack of any binding deadlines will also contradict the interests of the Member States themselves. Enabling the Commission to engage directly with the aid recipient would, in fact, remove the limiting effect associated with the current dual-party system. Not only the Union's legal system but also the Commission itself have only to gain from a deep and structured review of this important area of law and from the greater legal certainty for beneficiaries resulting from it.

Moreover, it may wonder if eventually, the Member States and the taxpayer's interests are actually aligned in this context. For this reason, a recovery decision ordered by the EU Commission or the Court of Justice would result in additional and unexpected income for the Member State concerned, which is not necessarily, from its point of view, a bad consequence. However, this decision will inevitably mean an additional payment by the undertakings which have benefited from the alleged advantage.

Furthermore, this structure does not logically correspond to the fact that the beneficiaries of the aid represent potential actors who can bring an action for the annulment of a Commission decision on State aid. If individual aid is declared incompatible with the Treaty and recovery is required, it is normally accepted that the beneficial owner has the right to bring legal action against this decision[209].

[209] Article 263 (4) TFEU: "*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*".
In principle, natural or legal persons who bring an action for annulment under Article 263 (4) TFEU must show that they have a personal interest in bringing proceedings. This is a condition, in addition to locus standi, of admissibility which must be satisfied in order to bring an action for annulment under Article 263 TFEU.
Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences or, in other words, the action must be liable, if successful, to procure an advantage for the party who has brought it.

In conclusion, the question of beneficiaries' rights remains to be a procedural aspect of European State aid law that has not yet been resolved, that determine an issue of the procedural fairness of the European Commission's State aid procedures.

It may now be time to consider fundamental procedural reform which can only constitute an adequate recognition of the rights afforded to aid recipients and also interested third parties.

The question as to whether, in the field of State aid, private applicants should seek judicial review against Commission measures affecting their interests before the Union courts rather than before the national courts has been the subject matter of intense debate in connection with the criteria of 'direct and individual concern' under Article 263 (4) TFEU, but the Court of Justice has basically always recognizes the possibility for the beneficiaries of State aid to challenge a Commission decision addressed to the Member State concerned, as third parties. In this sense, see Case C-198/91, *William Cook v Commission*, and Case C-225/91, *Matra v Commission*, in which the Court of Justice, for the first time ever in its case law, it gave a broad interpretation of the concept of 'individual concern' for the purpose of protecting interested third parties. Generally, standing of beneficiary undertakings to challenge Commission decisions prohibiting the granting and/or ordering the recovery of individual aid that are adopted at the end of the formal investigation procedure has never posed a problem with regard to the fulfilment of admissibility criteria of 'direct and individual concern'.

Moreover, the Court of Justice expressly also recognized that the actual beneficiaries of individual aids granted under a State aid scheme, that is, by definition a measure of general application, of which the Commission has ordered recovery are individually concerned within the meaning of Article 263(4) TFEU. See Joined Cases C-71/09 P, C-73/09 P, and C-76/09, *Comitato 'Venezia vuole vivere' and Others v Commission*, par. 53.

Chapter 3. The Taxpayer's Position in State Aid Recovery Procedure

1. The Recovery of Fiscal Aid: rules, purpose and limits

Article 108 (3) of the Treaty on the Functioning of the European Union (TFEU) requires Member States to notify State aid measures to the Commission before their implementation and also to await the outcome of the Commission's investigation before implementing notified measures. If, following a formal investigation procedure, the Commission considers the State aid measure incompatible with the internal market, it will require the Member State to recover the aid from the beneficiary through a recovery decision.

The main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid[1] and to restore the competitive position and the situation before the granting of aid (*status quo ante*). In particular, the objective of the recovery is to re-establish the situation that existed in the market prior to the granting of the aid. The recovery of unlawful and incompatible aid is not a penalty[2], but the logical consequence of the finding that the aid is unlawful. In order to re-establish the situation, the full amount of the aid, including interests, has to be recovered from the beneficiaries.

The requirement of an immediate and effective recovery serves also the purpose to ensure a certain level of equal treatment in the context of the enforcement of recovery decision in the different Member States. Since repayment of the aid is only meant to restore the prior legal situation, it cannot be regarded as a sanction[3]. Even in the case of aid granted in the form of a tax measure of an apparently general nature, the recovery of unlawful State aid for the purpose of restoring the situation existing previously cannot, in principle, be regarded as disproportionate to the objectives of the provisions of the Treaty on State aid. The Court of Justice has also made clear that recovery of unlawful and incompatible State aid granted in the form of a tax exemption does not amount to the retroactive application of a higher tax burden. The authorities of the Member State concerned merely have to take measures ordering the undertakings which have received the aid to pay sums corresponding to the amount of the tax exemption or other benefit unlawfully granted to them. Thus, by repaying the aid, including interest, the recipients will forfeit the advantage which they enjoyed over their competitors on the market, and the situation prior to payment of the aid is restored.

[1] Case C-277/00, *SMI*, par. 76.
[2] Case C-75/97, *Belgium v Commission*.
[3] Case C-75/97, *Belgium v Commission*, par. 65.

Neither Article 107 nor 108 TFEU expressly provide that unlawful aid has to be recovered from the beneficiaries. The Commission's power to order the recovery was established by the Court of Justice[4]. Later the basic rules on the recovery of unlawful and incompatible aid were laid down first in the Regulation 659/1999 and now by Procedural Regulation 2015/1589 (hereinafter, Procedural Regulation), which provides, in general, that the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. Furthermore, in 2019, the Commission has adopted the so-called 'Recovery Notice'[5], which contains the principles and procedures of the European Union governing the recovery of State aid.

In essence, the proceeding for the recovery of unlawful aid consists in two steps. First, the Commission obliges the Member State by a recovery decision at European law level to demand from the beneficiary the reimbursement of the aid. Second, the Member State implements the Commission decision at national law level by enforcing the recovery claim against the beneficiary of the aid[6].

With regard to the Commission' side, Article 16 (1) of Procedural Regulation 2015/1589 requires the Commission to order the recovery of unlawful and incompatible aid. According to that provision, Member State concerned must also take all necessary measures to recover the aid which has proved to be incompatible with the internal market. By means of a recovery decision, the Commission may only provide for recovery of aid that is both formally and materially unlawful but not for aid which is just formally unlawful[7]. When ordering recovery, the Commission cannot and is legally not required to identify the beneficiaries of the State aid or to fix the exact amount to be recovered. It is sufficient for the Commission to include in its decision information enabling the Member State to determine the beneficiaries and the amount without too much difficulty[8]. In fact, the absence of individual amounts to be recovered cannot justify non-recovery[9].

According to Article 17 (1) of Procedural Regulation, the Commission's power to order recovery is subject also to a ten-year limitation period. The limitation period begins on the day on which the

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[4] Case C-70/72, *Commission v Germany*.

[5] Commission Notice on the recovery of unlawful and incompatible State aid, July 22nd, 2019, 2019/C 247/01.

[6] The direct efficacy of the negative decisions that provide for the recovery of illegal and incompatible tax aid, even though it consists of a substantially administrative act subject to any judicial review of legitimacy and a preliminary reference to the Court of Justice, is now a well-established fact: the Member State concerned has the obligation to execute the decision, which therefore has direct effects in national law, taking all the necessary legal measures. See BIZIOLI G., *La diretta efficacia delle decisioni in tema di aiuti di Stato nell'ordinamento tributario interno fra nuovi problemi (art. 117, primo comma, cost.) e questioni teoriche ancora irrisolte (la rilevanza della riserva in materia di prestazioni patrimoniali imposte ex art. 23 cost.)*, in *Riv. dir. fin. sc. fin.*, 1, 2004. See also, DORIGO S.T., *L'efficacia delle decisioni della Commissione in materia di aiuti di Stato secondo la Corte di Cassazione: nuovi orizzonti nei rapporti tra ordinamento comunitario e nazionale*, in *Rass. Trib.*, 3, 2003, 1074.

[7] Case C-301/87, *France v Commission*, par. 11.

[8] Case C-81/10, *France Telecom SA*, par. 102.

[9] Case C-243/10, *Commission v Italy*.

unlawful aid is awarded to the beneficiary[10] and may be interrupted by any action taken by the Commission or the national authorities at the request of the Commission. The Court of Justice had decided that national judges must leave shorter limitation periods unapplied[11]. Even if the Member State or an aid beneficiary has applied for annulment of the Commission's decision, this does not automatically suspend recovery.

As it says, the recovery decision obliges the Member State to take all necessary measures to enforce against the beneficiary the reimbursement of the aid is incompatible with the internal market[12]. Article 16 (3) provides that recovery shall be affected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission decision. The national authorities have the obligation to identify the beneficiaries and the individual amounts to be recovered[13]. Member State must determine first the beneficiary of the aid if this has not already been done. For this aspect, the Court of Justice has ruled that the beneficiary of the aid is the one which actually benefitted from it and the person or entity that benefitted from the economic value of the aid[14]. It is evident, therefore, that the relevant Member State, and not the beneficiary of the aid, is the addressee of the recovery decision.

Article 16 (2) provides that the aid to be recovered shall include interests from the date on which the unlawful aid was available to the beneficiary up to the date of actual recovery of the aid, at the level fixed by the Commission for the period of unlawfulness[15]. This way, the advantage in time gained by the premature receipt of the aid is neutralized. The Court of Justice[16] clarified that in respect of formally unlawful aid, national courts must order recovery of interest even where the aid is compatible with EU law and the Commission has issued a positive decision[17]. Thus, interest needs to be recovered because the aid should have been granted at a later point in time, after a notification and the Commission's subsequent decision, and causes competitors to suffer from the measures' effect earlier than they would have had to. However, the consequence of formally unlawful aid depends

[10] Case C-81/10, *France Telecom v Commission*.

[11] Case C-24/95, *Alcanll*.

[12] On the effectiveness of the recovery of State aid granted, see DEL FEDERICO L., *Recupero degli aiuti di Stato, procedure applicabili e principi di equivalenza ed effettività, nota a Comunicazione della Commissione europea 2007/C 272/05,* in *Gius. Trib.*, 1, 2008.

[13] The beneficiaries of an exemption may be unknown because they were not required to report the tax authorities, see Case C-214/07, *Commission v France*. It is not excluded that aid to be recovered amounts to zero, see Case C-69/13, *Mediaset*.

[14] Case C-308/88, *Eni/Lanerossi*.

[15] Case C-199/06, *CELF*, par. 55.

[16] Case C- 199/06, *CELF and Ministre de la Culture and de la Communication*.

[17] Case C-199/06, *CELF*, par. 50-55.

solely on national law. This fact can reduce the effectiveness of both the notification and standstill obligation[18].

The restoration *ex ante* of the competitive situation and the undoing of the negative effects caused by the measure leads to several difficulties. A relevant issue concerns the implementation of the recovery decision at national level. When implementing the recovery decision, the Member States must, in the absence of relevant EU law provisions, follow the procedural and substantive provisions of their national law. Hence, the application of national procedural law must comply with the requirements of the principle of effectiveness and the principle of equivalence. The principle of effectiveness provides that national proceedings may not render practically impossible, or disproportionately aggravate, the exercise of rights conferred on the basis of EU legislation. The principle of equivalence requires that national proceedings for the enforcement of claims under EU law may not be less favourable than proceedings in purely national matters. In this way, minimum standards are set for the effective enforcement of claims based on Art. 108 (3) TFEU. Therefore, the enforcement of the recovery order depends on the procedural rules and remedies available in the respective Member State's legal system and is thus different in each State[19].

The necessity to recover unlawful State aid has been criticized a curtailing economic prosperity in the internal market. Exposure to retroactive payment demands could discourage economic players from pursuing business within the EU, in particular in cases where undertakings have relied in good faith on tax rulings that were structurally designed to achieve legal certainty as to the application of the rules[20].

National courts have the obligation to ensure immediate and effective recovery of the State aid and have no jurisdiction themselves to declare the Commission decision invalid[21]. They must request a preliminary ruling from the Court of Justice[22]. In this case, national courts can suspend the execution of the recovery decision but only subject to the very strict legal requirements as determined by the

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[18] MILADINOVIC A., *The State Aid Provisions of the TFEU in Tax Matters*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 139.

[19] Case C-120/73, *Lorenz*, par. 8.

[20] Regarding the value of tax rulings, see BROKELMANN H., GANINO M., *DTS v Commission: When is a Tax Measure State Aid?*, in *Journal of European Competition Law & Practice*, 2017; NEVEN D., *State Aid control and Tax rulings. Is there a really competition issue?*, in *Concurrences Review*, 4, 2017; PETROPOULOS G., *State Aid and Tax Rulings*, in *Competition Policy International*, 2016; ROBINS N.; SHAMSI S., *The European Commission's State Aid clampdown: the end of the selective tax ruling?*, in *Derivatives & Financial Instruments*, 2016; PEPE F., *Sulla tenuta giuridica e sulla praticabilità geo-politica della "dottrina Vestager" in materia di tax rulings e aiuti di Stato alle imprese multinazionali,* in *Riv. trim. dir. trib.*, 3-4, 2017.

[21] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato contro Lucchini SpA*.

[22] There is a principle of direct collaboration with national judges. The latter are indeed inviting to consult the Court for procedural information and clarifications on the limits of applicability of the State aid rules. FONTANA C., *Certezza del diritto e primato del diritto europeo nelle procedure di recupero degli aiuti fiscali incompatibili: il ruolo del giudice nazionale*, in *Riv. dir. trib.*, 5, 2011.

Court of Justice[23]. Moreover, national courts may only suspend recovery under the following strict legal conditions[24]: (*i*) the court has serious doubts as regards the validity of the decision; If the validity of the contested act is not already in issue before the Court of Justice, it must itself refer the question to the Court; (*ii*) there must be an urgency in the sense that the interim relief is necessary to avoid serious and irreparable damage to the party seeking relief and (*iii*) the court has to take due account of the Commission interest.

The question of the relationship between the recovery of State aid and the principle of *res judicata* also deserves particular attention.

In the notorious *Lucchini* case, national court stated that the repayment was not possible based on the principle of *res judicata* because the Italian civil court had already decided that the beneficiary was entitled to the aid. The Court of Justice[25] decided, however, that the principle of *res judicata* was not applicable here since the decision of the Italian court did not concern the State aid in question because national courts have no jurisdiction to reach a decision on whether State aid is compatible with the common market, so the decision of the Italian court could not have dealt with this question. In another judgement[26], the Court of Justice explained that the case differs from *Lucchini* since the court's judgement possessed of the force of res judicata precedes the decision of the Commission. Furthermore, the Court acknowledged the importance of the principle of res judicata both at EU level and at Member States level. In other words, the Court of Justice held that res judicata might be set aside, but only under exceptional circumstances: e.g. if the judgment would also have binding force for future judicial decisions on the same issue or if the application of res judicata would prevent the recovery of State aid which had been found to be incompatible with the common market in a final decision of the Commission.

Moreover, another question, relevant at national level, concern the fact that the recovery period is ten years, which exceeds the domestic statute of limitations for tax in most countries. Under EU law, however, expiration of the domestic statute of limitations does not constitute an adequate defence for failure to recover[27], as will be discussed next.

Taking into account these relevant issues that emerge in the area of the recovery of State aid, it is important to take the taxpayer's perspective here and to analyse their position. The aid must be recovered from the beneficiary of the aid. However, the taxpayer is not formally a party neither to the

[23] Case C-143/88, *Zuckerfabrick*; Case C-465/93, *Atlanta*.
[24] Case C-143/88, *Zuckerfabrick.*
[25] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato contro Lucchini SpA*.
[26] Case C-507/08, *Commission v Slovack Republik*.
[27] MASON R., *State Aid Special Report - Tax Rulings as State Aid: Whose arm's length standard?*, in *Tax Notes*, University of Virginia School of Law, 2017.

investigation phase, neither to the recovery phase[28]. As a result, the taxpayer cannot directly defend itself, although, as an interested party, it is entitled to submit comments to the Commission. Once the Commission concludes its investigation, the taxpayer can file its own appeal. The Commission should not proceed for recovery by itself, *ex officio*, without the parties to the case being forced to make any claims[29]. The taxpayer, as consequence, can suffer significant repercussions from adverse Commission decisions, even if those decisions are ultimately vacated by the EU courts. Unfortunately, there are very limited protection tools for the taxpayer against a recovery decision, which pose a series of questions and doubts regarding the effectiveness of the taxpayer protection system. In fact, the recovery of obligation is not absolute, but there are limitations to the recovery of State aid. There are two expressly established limits which prevent the Commission from recovering State aid.

First, the Commission shall not require recovery of the aid if this would be contrary to a general principle of European law, such as the principle of legitimate expectations or the principle of legal certainty, or if it is absolutely impossible for the Member State to recover the aid[30]. The Commission decides exceptionally that a Member State is not obliged to recover an unlawful aid from the beneficiary if this would be contrary to a general principle of European law. In view of the restrictive interpretation of the term general principle by the Court, only the principle of legal certainty and of protection of legitimate expectations, in addition to the absolute impossibility, can be regarded as conflicting general principles of European law. In fact, other broader principles such as the principle of proportionality have always been rejected by the Court[31].

Secondly, Article 17 Procedural Regulation provides that the Commission can only order recovery of unlawful aid incompatible aid granted within a period of ten years. The limitation period begins to run from the day on which the unlawful aid was awarded to the beneficiary[32] and any action taken by the Commission interrupts the limitation period, which then starts running afresh.

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[28] This could mean that if, subsequent to a company starting to benefit from an unlawful State aid measure, its shares were sold to another shareholder, it could be this new shareholder who (indirectly) bears the burden of the recovery, whereas it was the old shareholder who (indirectly) benefited from the unlawful State aid measure. Recovery at the group level is, however, a possibility. Nevertheless, the Court of Justice case law has consistently held that if a company, having enjoyed unlawful State aid, is bought at the market price (that is to say, according to the Court of Justice, at the highest price that a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid), the aid element was assessed at the market price and included in the purchase price and that in such circumstances, the purchaser cannot be regarded as having benefited from an advantage. Similarly, where a company, having enjoyed unlawful State aid, continues to carry out, on its own account, the activities subsidized by the State aid, the Court of Justice has held that it is normally this company that must be required to repay an amount equal to that aid and not the purchaser. See Case C-277/00, *Germany v Commission*, par. 80.

[29] JAROS K., RITTER N., *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid,* in *EStAL*, 4, 2004.

[30] Case C-349/93, *Italy v Commission*, par. 12.

[31] Case C-142/87, *Tubemeuse*, par. 65.

[32] Case C-81/10, *France Telecom SA*, par. 80.

It is extremely necessary to point out immediately that only the absolute impossibility to implement a recovery decision can justify non-compliance. This exception is extremely narrow[33]. The Court of Justice has confirmed that legal, political or practical difficulties without taking any real steps and without proposing any alternative arrangements cannot be taken into account[34]. Absolute impossibility of recovery is not a defence unless the company is liquidated and has no recoverable assets[35]. Moreover, the circumstance that Member State did not have the information required to identify the beneficiaries since there was no reporting obligation is an example in which the Court accepted that recovery was not possible[36].

It is important to underline that the Court of Justice has stated that, first of all, when aid has been implemented without prior notification to the Commission, so as to be unlawful under Article 108 TFEU[37], the beneficiary of the aid at that point cannot place any legitimate expectation on the regularity of the granting of the aid, unless exceptional circumstances exist[38]. In the absence of exceptional circumstances, therefore, there would be, not only the lack of legitimacy of the beneficiary to obtain aid disbursed in violation of the procedures provided for by European legislation, but also the compulsory recovery, even in the presence of legitimate expectations[39].

This chapter examines the general rules governing the recovery of aid, which also fully apply to tax aid and discusses some specific issues that arise in that particular context. In fact, with regard to tax

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[33] The following arguments for instance were rejected by the Court of Justice: the risk of double repayment resulting from concurrence of State aid rules and insolvency procedures (Case C-331/09, *Commission v Poland*) the fact that refund may cause a risk of social unrest (Case C-63/14, *Commission v France*) and the fact the beneficiary is insolvent or subject to bankruptcy proceedings (Case C-529/08, *Commission v Spain*).

[34] Case C-63/14, *Commission v France*.

[35] Case C-499/99, *Commission v Spain*.

[36] Case C-214/07, *Commission v France*.

[37] The current notification procedure is an advance ruling procedure. In that regard, the Treaty requires that before introducing a tax incentive. The Member State asks the Commission for its opinion about whether the incentive is compatible with the State aid provisions. Once the Commission authorizes the implementation of the tax incentive, the Member State may implement the measure, certain in the knowledge that the incentive has been determined to be in line with the State aid provisions. Moreover, taxpayers can rely on the Commission's decision: once a particular measure is authorized by the Commission, a taxpayer is assured he can make use of it without suffering the risk that he could be required to thereafter disgorge the aid. The notification procedure is, therefore, highly advantageous for the taxpayer. However, the legal certainty offered by the notification procedure is patchy, at best. For example, no notification procedure is available for existing aid, such as existing beneficial tax provisions. Thus, a taxpayer may have relied for years on an advantageous provision in force, but which finally comes under the Commission's scrutiny and is then declared incompatible with the internal market. The same uncertainty exists with respect to almost any new advantageous tax provision; it may later be determined to constitute State aid. Member States only notify the Commission if they already believe a measure constitutes aid; if a Member State does not so believe, it will not notify the Commission, but will simply implement the measure. It is only later, when other constituents come to believe that the already-implemented measure constitutes State aid, that the Commission will become aware of the measure. At that point, those taxpayers who have relied on it risk having to repay all the benefits they have received. This result lacks legal certainty for the taxpayer, and it would substantially increase legal certainty if the Treaty would be amended to allow a process similar to advanced rulings which would permit both Member States and taxpayers to obtain the Commission's advance confirmation that a particular measure does not constitute incompatible State aid.

[38] Joined Cases T-427/2004 and T-17/2005, *France Telecom v Commission*.

[39] Case C-119/2005, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini S.p.A.*

measures, in principle, recovery takes the form of retroactive taxation. In this sense, retroactive taxation based on primary law without any legal basis in national tax law might conflict with the rule of law, which constitutes a general EU principle[40]. The two limits expressly established in order to avoid the recovery of State aid, namely compatibility with the general principles of the European Union and the limitation period, will be examined in two separate sections. In particular, in the first section, relating to the compatibility with the EU general principles, the principles of legal certainty and the protection of legitimate expectations will be analysed, both in their general application in the European legal system and in the specific sphere of State aid. In the light of these two principles, the recent decisions of the European Commission on tax rulings will also be examined. In the second section, we will analyse the specific features of the limitation period, and then briefly consider specific issues that emerge in the context of the recovery of tax aid.

Part I. Compatibility with the general principles of EU Law

1. The role of the general principles in EU tax law

Article 16 (2) of the Procedural Regulation provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law. Neither the Commission, in its decision-making practice, nor EU Courts, in their case law, are consistent in their approach to the issue of the general principles of EU law with regard to the Commission recovery decisions.

In general, the notion of a general principle of EU law has not been defined in the EU legislation, has been derived from the case law of the Court of Justice, which developed a relatively autonomous meaning of that notion. The relative character of the court's doctrine manifests itself in frequent references to national legal systems or to constitutional traditions which are common to Member States. In particular, the Court of Justice developed the notion of general principles emanating from national constitutions in order to avoid conflicts with national provisions that Member States deemed indispensable[41]. This allowed the Court to reconcile the primacy of European law with protection of fundamental rights in the European Union. Article 6 (3) TEU ascertains that the general principles are to be located at the same level as the Treaties of the European Union and therefore deemed to

[40] MILADINOVIC A., *The State Aid Provisions of the TFEU in Tax Matters*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 140.

[41] RZOTKIEWICZ M., *Compatibility of the State Aid Recovery Order with the General Principles of EU Law*, in *Polish Review of International and European Law*, 2016; RZOTKIEWICZ M., *The General Principles of EU Law and Their Role in the Review of State Aid put into effect by Member States*, in *EStAL*, 2013.

have a constitutional status[42]. Article 6 (3) TEU links the general principles of European law not only to Member State's constitutional traditions, but also to individual rights. The Court found that these general principles should apply across all matters covered by the EU Treaties, although the concrete application of these principles can be influenced by the subject matter of a specific area of law.

Regarding EU tax law, it is usual to refer to the legal principles and to the general principles of EU law as a valid source of law[43]. Doctrinal debate in EU tax law usually boils down to analysing the judicial activism of the Court of Justice in the field of taxation, where the lack of written legislation (direct taxation) makes recourse to the general principles of EU law necessary. A principle is considered as an accepted unwritten source of law by the judges, or as a benchmark for legislators to carry out reforms. Referring to the *dictum* of the Court of Justice[44], the principles in question give birth to individual rights or any legally protected interest, and that they influence their material, personal and temporal scope, with a relative strength depending on the principle studied. Some principles (neutrality, fairness, prohibition of double taxation) have had some bearing on taxpayers' rights although they reflect an underlying societal value rather than a fundamental human right. Some others have had a much deeper impact on the extent of taxpayers' rights, especially those dealing with procedural rights such as effective judicial protection, or access to court, as perhaps they are rather rights than principles.

The Union legal order has always been characterized by a striking absence of rules in comparison with the legal orders of its Member States. Moreover, EU rules rarely replace national rules entirely. They contribute to the harmonization or approximation of national rules and diminish troublesome differences in national law which stand in the way of a well-functioning Union, in particular an effective Single Market. One way to facilitate the uniform interpretation and application of EU rules in the Member States is to develop general principles of law that complement the incomplete EU legal order and provide guidance in situations not regulated by the written EU law[45]. The EU law method differs from national juridical methods, since it is characterized by different legal traditions and is practiced in an international and multicultural context, in which general principles of law can be readily utilized.

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[42] VAN MEERBEECK J., *The principle of legal certainty in the case law of the European Court of Justice: from certainty to trust,* in *European Law Review*, 2016, 280.

[43] HELMINEN M., *EU Tax Law: Direct Taxation*, IBFD, Amsterdam, 2019.

[44] VANISTENDAEL F., *The Role of the European Court of Justice as the Supreme Judge in Tax Cases,* in *EC Tax Rev*, 1996, 114.

[45] HETTNE J., *European Legal Principles and National Legal Challenges*, in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 18.

The sources from which the Court of Justice derives general principles of law are therefore of great importance. When developing legal principles, the Court makes an effort to find support in pan-European principles and legal traditions. The principles derived in this way, therefore, correspond with the common constitutional traditions of the Member States.

The Court of Justice has always affirmed that the principles of legal certainty and protection of legitimate expectations belong unequivocally to the fundamental principles of European Union law. The Court provided that the protective principle of legal certainty and protection of legitimate expectations, although applicable to State aid matters, are applied flexibly, on case by case basis[46]. These principles are therefore part of the European legal order and can, at the same time, be used as parameters for checking the validity of the rules of European Union law. These principles constitute, in fact, rules of higher law that can equally establish the responsibility of the European Union in case of violation resulting from the regulatory provisions[47].

The principle of legal certainty carries even more weight as a sub-principle of the rule of law, which is enshrined in Art. 2 TEU as a core value of the European Union. According to the principle of clarity and definiteness, laws that lead to detrimental effects for individual legal subjects must be clear and precise so that addressees can deduce their detailed rights and obligations. The principle of legal certainty manifests itself in several key rules of EU administrative law. Firstly, in limitation periods which require that recovery of aid is limited to what the beneficiary received for the past 10 years. Secondly, in the idea that rules, including State aid rules, should be clear and precise – also in their application – and that such rules should never apply retroactively. This aspect is strictly connected with the principle of legitimate expectations: "*this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities*"[48].

In fact, the principle of legitimate expectations cannot be applied to block future legislation or even administrative work by EU institutions, so long as the effects are not retroactive. This precisely encapsulates the tension between a beneficiary's right to reasonable legitimate expectations and the inherent retroactive character of an order for recovery.

Nevertheless, private parties' rights in State aid procedure are rather limited. While the Court reaffirms the general principles of legal certainty and legitimate expectations, it makes equally clear

[46]WINKLER A., LAPRÉVOTE F.C., *Reconciling legal certainty, Legitimate expectations, equal treatment and the prohibition of State Aids*, in *EStAL*, 2, 2011, 324.

[47] Case C-74/74, *Comptoir national technique Agricole (CNTA) SA v Commission*.

[48] Case C-84/78, *Ditta Angelo Tomadini Snc*, par 21; Case C-596/13, *Commission v Moravia Gas Storage*, par. 46.

that these principles must be weighed against the principle of State aid prohibition[49], equally important in its view.

2. Legal Certainty: characters and application in European legal system

The recognition of the common principles of the internal legal systems of the Member States implies the qualification of certain essential values as general principles of the European legal system, characterized by orientation rules and at the same time limiting the regulatory power. The result is a dual legal function: in fact, these principles are not only parameters for assessing the legitimacy of the exercise of regulatory power and, consequently, a super-legislative limit to the validity and effectiveness of European standards, but they also perform an interpretative function, particularly with respect to the decision-making activity of the European Courts, as selection criteria among the various possible regulatory interpretations[50]. The reference to these values, in the State aid field, is essentially to make the recovery system more flexible, especially in those cases in which the latter presents itself as an excessive measure or, in any case, difficult to achieve in practice.

In this context, one of the more fundamental elements of the rule of law is the principle of legal certainty, that is a fundamental principle of EU law[51] and part of the general overarching principles of EU law, which essentially seeks to ensure that laws are foreseeable, clear, precise and predictable as regards their effects[52]. Legal certainty requires a proper balance between stability and flexibility. It contains both the formal and substantive elements where the former requires laws and adjudications to be predictable as to their legal consequences in order to avoid unnecessary arbitrariness[53]. So as a general rule, EU actions have to be founded on treaties that have been approved voluntarily and democratically by all EU Member States. The founding treaties of the European Union which were created directly by the Member States and their amending and supplementing instruments are considered to be the primary source of Union law setting out the constitutional framework for the European Union. It is well recognized and widely accepted by the Member States, EU institutions and particularly by the Court of Justice as mentioned earlier, that this principle of legal certainty is

[49] See Case C- 67/09, *Nuova Agricast v Commission*.

[50] FONTANA C., *Gli aiuti di Stato di natura fiscale,* Giappichelli, Torino, 2012, 326.

[51] Joined Cases C-42/59 and C-49/59, *S.N.U.P.A.T. v High Authority*.

[52] Joined Cases C-72/10 and C-77/10, *Marcello Costa et alia*, par. 74.

[53] WEBER D., SIRITHAPORN T. *Legal Certainty, Legitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Tax Law,* in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 236.

one of the fundamental unwrite general principles of EU law[54]. One of the reasons why this principle is not stated expressly in the provisions of the EU Treaties is probably because the circumstances in which the principle of legal certainty ought to be applied are difficult to determine and thus cannot be formulated into a specific scope of application. Rather it is intertwined with other principles stated in EU law which ensure the stability of a legal system, for example, the principle of non-retroactivity and legality[55], the protection of legitimate expectations, the principle of objectivity, the prohibition of arbitrariness in decision-making.

In the jurisprudence of the Court of Justice the principle of legal certainty, although frequently invoked, above all as an interpretative canon, is never defined in precise terms in its content. In 2011, the Venice Commission of the Council of Europe identified legal certainty as one of the six necessary elements that comprise the rule of law, and therefore, legal norms must be clear and applied in a foreseeable and consistent manner[56]. Subjects of the law must be able to know its precise content, so as to plan their conduct accordingly. The principle of legal certainty is a fundamental element of the rule of law. The Court of Justice[57] has confirmed this understanding: "*The principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them"*. The Court of Justice has repeatedly held legal rules must be clear and precise in their application, otherwise the foreseeability of situations and legal relationships governed by EU law is doubted[58]. However, the normative content of legal certainty is not exhausted with this general aphorism. The Court has often been referred to by the European judge to affirm the general rule according to which European standards must present the characteristics of clarity and predictability for citizens[59]. The Court[60] held that: "*The principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly"*. For fiscal field, in particular, "*the principle of legal*

[54] Joined Cases C-18/65 and 35/65, *Gutmann*; Case C-98/78, *Racke*; Case C-96/78, *Decker*; Case C-61/79, *Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl*; Cases C-66/79, 127/79 and 128/79 *Salumi*; Case C-70/83, *Gerda Kloppenburg v Finanzamt Leer*.

[55] The principle of legality and non-retroactivity has been clearly stated in Article 49 of the EU Charter of fundamental rights: "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed*".

[56] European Commission for Democracy through Law (Venice Commission), Report on Rule of Law, Venice, 25-26 March 2011, par. 41-51.

[57] Case C-201/08, *Plantanol GmbH & Co. KG contro Hauptzollamt Darmstadt*, par. 46.

[58] Case C-199/03, *Ireland v Commission*, par. 69.

[59] Case C-212/1980, *Meridionale Industria Salumi*.

[60] Case C-345/06, *Heinrich*, par. 44.

certainty requires that a regulation that imposes charges on the taxpayer is clear and precise so that he can unambiguously know his rights and obligations and can act appropriately"[61].

The principle of legal certainty, therefore, serves to ensure that legal rules are clear and precise[62] and also that the legal situations and relationships governed by European law are foreseeable[63]. Accordingly, the principle safeguards the ability of interested parties to ascertain what their legal rights and obligations are at a certain moment which in turn ensures that they can be certain as to the legal and economic consequences of their actions[64], so that they may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly. The Court of Justice elaborated on the requirements for justifying a restriction on the fundamental EU freedoms by emphasizing the relationship between the principle of legal certainty and the principle of proportionality[65]. The Court noted that the restriction on the fundamental freedoms may be justified if there is an overriding reason that the restriction is in the public interest and if it pursues a legitimate objective which is not disproportionate to what is necessary to achieve such an objective.

Moving on, the principle of legal certainty entails, also, that legislation may only enter into effect after it has been published, although there are exceptions to this whereby account must be taken of the principle of the protection of legitimate expectations[66].

In fact, the principle of legal certainty entails that judgments of the Court are only limited in time by exception. In relation to the principle of legal certainty, the Court of Justice accepts that the Member States observe a reasonable period for objection and appeal, on penalty of lapse of rights[67].

In accordance with the principle of legal certainty, EU law does not in principle require that an administrative body must reconsider a decision of an administrative body that has become definitive after the lapse of a reasonable period for lodging appeal or after all rights of appeal have been exhausted[68]. Only in certain cases[69], must an administrative body investigate anew and possibly reconsider a decision that has become definitive. The principle of legal certainty is also the basis for the principle of a judicial decision becoming definitive. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits

[61] Case C-169/1980, *Amministrazione delle Dogane v Societé Anonyme Grondand*.
[62] Joined Cases C-205/82 and C-215/82, *Deutsche Milchkontor*.
[63] Case C-63/93, *Duff*, par. 20.
[64] Case C-143/93, *Van Es*.
[65] Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État Belge*.
[66] Case C-98/78, *Racke*.
[67] Case C-30/02, *Recheio – Cash & Carry*, par. 18.
[68] Joined Cases C-392/04 and C-422/04, *Germany GmbH*.
[69] Case C-453/00, *Kühne & Heitz*.

provided for in that connection can no longer be called into question[70]. Moreover, a discretionary power of the tax administration not to apply EU law on the basis of evasion or abuse (in this case, the fiscal EU Merger Directive) is not permitted. It is clear that otherwise, the principle of legal certainty would be at risk[71]. The principle of legal certainty also comes into play in regards to the issue of the limitation period. A fundamental element of the principle of legal certainty is a presumption against the validity of the retroactive application of legal norms. As a general rule, retroactivity cannot be reconciled with the requirements of the principle of legal certainty and by extension with the rule of law. This applies not only in criminal law, but also in administrative law and especially in tax law, insomuch as the retroactive application of a legal rule would negatively affect rights and legal interests of the subject of the law. The EU Courts have developed a very interesting jurisprudence on the matter, the departure point of which is that the principle of legal certainty precludes a rule from being applied retroactively[72]. Therefore, it cannot be excluded, as far as it matters here, that the principle of legal certainty might advocate against the retroactive application of State aid law in a particular case, insomuch as the Commission endorses a new interpretation of State aid.

As regards the principle of clarity and definiteness, the Court of Justice also established a rule of interpretation stating that vague laws are to be interpreted in favour of the addressee[73].

Another implication of the principle arises when multiple sources of law applies. European law is a complex, multi-layered body of law with a heavy influence of quasi-legislative activity by the Court of Justice. Situations may arise where individuals find themselves unable to determine the applicable law. In such a situation the principle of clarity and surety may be violated. This is even more so in the area of direct taxation, where the Commission has no competence[74].

This general principle of law cannot be confused with other general principles and has its own rules of application, as was just noted. As the Court of Justice correctly recalled[75], this principle must not be confused with that of legitimate expectations, since the former "*does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the recipient of the*

[70] Case C-234/04, *Kapferer*, par. 20.
[71] Case C-28/95, *Leur-Bloem*, par. 44
[72] Case C-98/78, *Racke*, par. 15.
[73] Case C-169/80, *Administration des Douanes v Gondrand Frères*, par. 17. See TRIDIMAS T., *The General Principle of EU Law*, Oxford University Press, 2006, 244.
[74] GORMSEN L., *European State Aid and Tax Rulings*, Edward Elgar, 2019, 67.
[75] Case T-308/00, *Salzgitter v Commission*, par. 166.

aid"[76]. In short, it is a different principle with different conditions of application[77]. Although the principles of legal certainty and legitimate expectations are related and intertwined and both principles are well established and serve towards the protection of the individual, the difference between the two principles is basically: the situations in which legitimate expectation can be violated are seriously restricted by the case law, which poses a number of rather clear cut conditions.

For a violation of legal certainty, the conditions are not so clearly and restrictively identified by the case law. In particular, it is not required to traders to check that the aid has been granted in compliance with the procedure laid down in Article 108 (3) of the Treaty and precise assurances on the part of the Commission are not necessary as inaction seems to play a greater role. In the same way, they are both viewed as types of rule of law-based principles [78] which are derived from the laws of Member States and are recognized as sources of EU law. The principles of legal certainty and legitimate expectations have the function in public law of protecting the individual against the public authorities both at national and at EU level while at the same time they also have a gap-filling function: to ensure the autonomy and coherence of the EU legal system as well as the functioning of the Union. These principles also enhance the legitimacy of the Court in applying and interpreting the EU and national laws in the light of those principles. In general, the scope in applying the principles of legal certainty and legitimate expectations to different forms of European taxation varies. More reliance is placed on these principles in the area of indirect taxation, particularly customs duties and value added tax (VAT), which area is supposed to be more integrated and harmonized when compared to that of direct taxation. In direct taxation, there is not much scope for these principles to be applied, except in relation to some particular issues relevant to, for example, State aid or relating to the fundamental freedoms[79]. The Court have to decide which of the valid principles it is appropriate to apply in any individual case, that is, to a particular factual situation by weighting and balancing the principles of legal certainty and legitimate expectations against other interests and principles in the case at hand. This balancing exercise for consideration of the conflicting principles requires the explicit articulation and comparison of rights or structural provisions, mode of infringement, and government interests. With regard always to the fiscal field, the Court of Justice has also had occasion to affirm, that a tax rule that does not meet the requirements dictated by the principle of legal certainty cannot be

[76] Note that the decision recalls that this judgment has been upheld on appeal by the Court of Justice in Case C-408/04P. It is true that the Court has finally upheld in the case analyzed therein that the lack of legal certainty alleged by the claimants at first instance did not exist yet it obviously does not question the principles and definition which the Court gives of this general principle of law.

[77] PASTORIZA J.S.., *The Recovery Obligation and the Protection of Legitimate Expectations: The Spanish Experience*,, in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 250.

[78] TRIDIMAS T., *The General Principle of EU Law*, Oxford University Press 2006.

[79] Case C-399/03, *Commission v Council*.

considered as proportionate to the objectives pursued and not in compliance with European legislation[80]. The objective pursued by the institutions is linked to the need for legal certainty and the uniform application of European Union law. However, the Court of Justice interprets these principles restrictively. In this context, the principles of legal certainty and protection of the taxpayer's legitimate expectations take on a minimal character. Consequently, the balance between these principles, on the one hand, and the legality of the administration and financial interests on the other, remain reserved to national law. The resulting effect is clearly contrary to the principle of uniformity of European law[81] and to the purpose of the principles in comment.

However, returning to the State aid area, the scope of EU State aid enforcement in tax area is unpredictable. The legal uncertainty arises partly because the Commission uses the State aid rules to pursue several conflicting values, and it does not always specify clearly in each case what value it pursues. The goals of State aid control should be more clearly articulated, and the Commission's enforcement actions should be limited by those goals. Those limitations could be self-imposed by the Commission, using clearer published guidance and more explicit reasoning in decisions, or those limitations could come from the European Courts through less deferential judicial review of the Commission's State aid decisions[82].

In this context it arises the principle of legal certainty to avoid a recovery order. This principle is based on the need for certainty in the law, which means the certainty that one knows or can know what is or will be foreseen, prohibited, ordered or permitted by the State. The Court of Justice has defined it as the principle "*which requires that legal rules be clear and precise, and aims to ensure that situations and legal relations governed by Community law remain foreseeable*"[83]. For its application, all that is required is for the application of the State aid rules to the specific case to be certain and present sufficiently clear.

In exceptional circumstances, the principle of legal certainty may prevent recovery of the aid even when all the conditions for relying on the principle of legitimate expectations are not fulfilled. Sometimes, the General Court accepted the argument that the Commission had infringed the principle of legal certainty and consequently could not order the recovery of the aid[84]. According to the General Court, breach by the Commission of that principle in the case before it could not be excluded due to the failure to give prior notification of the aid measures. In another case, the Commission, for reason

[80] Case C-17/03, *VEMW*, par. 80; Case C-72/10, *Costa et Cifone*, par. 74.

[81] TRAVERSA E., MODONESI D., *Les principes de sécurité juridique et de la confiance légitime en droit douanier et fiscal*, in *Revue du Droit de l'Union Europeenne*, 2, 2015, 31.

[82] MASON R., *State Aid Special Report: Arm's Length on Appeal,* in *Tax Notes*, University of Virginia School of Law, 2018, 796.

[83] Case C-63/93, *Duff and others*, par. 20. See also Case T-348/03, *Friesland Foods v Commission*, par. 125.

[84] Case T-308/00, *Salzgitter*, par. 161.

of legal certainty, limited the recovery to aid granted since the decision to open the formal investigation procedure was published[85]. It does not establish that a prolonged lack of action on the part of the Commission, in spite of its awareness of the aid, is sufficient to violate that principle. Prolonged inaction should be combined with other circumstances creating a situation of uncertainty concerning the regularity of the measure.

As said, for a violation of legal certainty, the conditions are not so clearly and restrictively identified by the case law. In particular, it is not required for traders to check that the aid has been granted in compliance with the procedure laid down in Article 108 TFEU, precise assurances on the part of the Commission are not necessary and inaction seems to play a greater role.

However, the principle of legal certainty is not unlimited. For reasoning of legal certainty, a recipient of incompatible State aid cannot challenge the validity of a Commission decision ordering recovery before a national court only if a recipient, having the legal standing to appeal the relevant decision, did not challenge the Commission decision in an appeal before the General Court[86].

Thus, if the validity of an order of recovery by Commission decision was not challenged before the General Court within the time limits provided, by virtue of legal certainty, a recipient of State aid cannot challenge the validity of the decision before national court after the Commission's decision has become definitive.

2.1. What is the notion of Fiscal Aid after the European Commission decisions on tax rulings? A question of legal certainty

In the field of State aid, the nebulous concept of what is effectively aid is crucial. If a measure does not qualify as aid within the meaning of Article 107 (1) TFEU, the notification obligation flowing from Article 108 (3) TFEU and the relevant provision in the Procedural Regulation are not respected. What happens if doubts are raised as to whether a measure is a notifiable aid (for example, a measure with an atypical form)? How might a beneficiary be sure whether the measure should be notified?

A new interpretation of the notion of aid poses a significant threat to principle of legal certainty and of protection of the legitimate expectations of any potential beneficiary within the internal market.

If the Commission decides to adopt a distinct and different interpretation of Article 107 TFEU, without allowing companies a reasonably transitional period to adjust their tax affairs, it should not order recovery of that aid. While recovery is a mechanism, which attempts to restore the situation

[85] Commission Decision of 20 December 2006 on the aid scheme introduced by France for financing assets leased by fiscal economic interest groupings.

[86] Case C-135/16, *Georgsmarienhutte and Others*, par. 14-18.

before the granting of aid, and is not equivalent to imposing a fine for anticompetitive behaviour, it may also be punitive in nature if the recovery is disproportionate, goes back up to 10 years and more importantly is applied retroactively. The Commission should engage with its Member States, their tax and accounting bodies and multinational groups affected by its change in State aid analysis to afford those affected the opportunity to amend their conducts in the light of the new rules.

These issues are more and more current and important in the light of the recent conduct of the Commission. In recent years, there has been a shift from scrutinizing "general" State aid towards examining "targeted" State aid. The Commission's focus has shifted from preferential tax regimes whose selectivity results from criteria contained in the tax legislation of Member States (e.g., size, nature of the activity, and prior authorization) to administrative decisions on the application of general rules or principles whose effects are to validate complex, international tax-planning schemes set up by multinational groups of companies that ultimately result in a very low level of overall taxation.

The Commission's order of recovery in the recent tax cases is highly questionable due to the Commission's new legal analysis of EU State aid law[87] and it seems arbitrary and runs against three key EU law principles: legal certainty (in the means of clarity, precision and non-retroactivity), protection of legitimate expectations and proportionality. While the Commission is in its good right to change the way in which it thinks about State aid, it should change its thinking in a manner that is foreseeable. The most widespread opinion is that the new Commission's interpretation of a fiscal aid runs against the general EU law principle on legal certainty and breaches the legitimate expectations of taxpayers, which make use of tax rulings issued by national tax authorities to manage their tax liability efficiently. The very objective of a tax ruling is the achievement of legal certainty to a multinational's tax liability through the establishment, in advance, of the application of national tax law to a particular case and to lay down the methods through which transfer pricing for intra-group transactions within a corporate group is to be determined to be considered at arm's length principle in order to provide legal certainty to taxpayers.

Legal certainty exists also to prevent a public authority, like the Commission, from acting in an arbitrary manner. The Commission's decisions in the transfer pricing cases have been heavily criticized both from a legal and political perspective. Among other things, the Commission has been criticized for extending its competences conferred by TFEU. It has been argued that direct tax law is secretly being harmonized through the application of competition law to individual direct taxation despite the reluctance of the Member States in this regard. A question that comes to mind when

[87] GORMSEN L., *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, in *Journal of European Competition Law & Practice*, 7, 2016; GORMSEN L., MIFSUD-BONNICI C., *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax*, in *Journal of European Competition Law & Practice*, 8, 2017, 423.

discussing this shift is, in fact, to what extent should the fight against tax avoidance and the promotion of fair tax competition between EU Member States influence the nature and scope of State aid control? In addition to affecting the sovereignty of the Member States, there is no doubt that this new interpretation of the concept of tax aid and the consequent recovery order of the aid itself has direct implications for the taxpayer.

In order to understand this direct impact, preliminarily, it is considered useful to retrace, from a historical point of view, the development of the conduct of the European Commission through the official documents adopted by the Commission itself regarding aid measures specifically in the tax area.

Early in 1998, the Commission stepped on its pace on its practice to review international tax arrangements, by adopting a Notice on the application of State aid rules to measures relating to direct taxation (the Fiscal Aid Communication)[88]. With it, the Commission committed to a strict application of State aid rules in the area of taxation and, in particular, the granting of tax subsidies aimed at attracting the location of multinational undertakings, as necessary to limit the proliferation of tax distortions refraining the internal market from functioning effectively.

In 1997, following a wide-ranging discussion on the need for coordinated action at European level to tackle harmful tax competition, the Council (*Ecofin*) adopted a series of conclusions and agreed on a Code of Conduct for Business Taxation (hereinafter, the Code of Conduct). Within the Code, a Group made of the representatives of Member States assisted by the Commission was created to establish a list of tax measures providing for a significantly lower effective taxation, including zero taxation, than those levels which are generally applied. The Code established that its Group had to take into account, among others, the following factor in order to establish whether a tax measure had to be considered harmful and committed the Member States to agree on rolling back such measures: whether the rules for profit determination in respect of activities within a multinational departs from international standards, notably those agreed upon within the OECD. On that occasion, the Commission felt the need to clarify the boundaries between, on the one hand, general tax measures and, on the other hand, tax aid, based on an extensive scope of Article 107 TFEU based on the effects of the measures. The Commission stated at Point 30 of its Notice that the qualification of a tax measure as harmful under the Code of conduct did not affect its possible qualification as a State aid. However, the assessment of the compatibility of fiscal aid with the internal market has to be made, taking into account, inter alia, the effects of aid that are brought to light in the application of the Code.

[88] Commission Notice on the application of State aid rules to measures relating to direct taxation, November *11th*, 1998, OJ C 384, Dec. 10, 1988, p. 3. The Notice is largely based on the dicta of the Court of Justice, Case C-173/73, *Italy v Commission*.

In 2012, the Commission launched its State Aid Modernisation initiative (so-called SAM), which was intended to provide legal certainty and cut red tape for public authorities and companies, as well as to help the Commission focus resources on enforcing State aid rules in cases with the biggest impact on the Single Market. SAM updated all major State aid guidelines and simplified the rules, so that unproblematic State aid measures could be implemented without prior Commission scrutiny.

Thereafter, in mid-2016, the Commission issued its Notice on the Notion of State Aid (so-called 'NofSA Notice') as the final piece of its SAM initiative: the NofSA Notice replaced the State Aid Business Tax Notice. The Section 5.4 of the NofSA Notice addresses specific issues concerning tax measures (such as cooperatives, undertakings for collective investment, tax amnesties, tax rulings and settlements, depreciation and amortization rules, regimes that fix basis for specific activities, anti-abuse rules, excise duties) and high-lights that, while Member States are free to spread the tax burden as they see fit across the various factors of production, they must exercise that competence in accordance with Union law. On the specific issue of administrative tax rulings, the NofSA Notice acknowledged that, for reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally, particularly how 'arm's-length profits' will be set for related-party transactions. The Commission emphasized that such administrative ruling practices are best if they are transparent and the rulings made public and, indeed, that the grant of a tax ruling must, in all cases, respect the State aid rules.

In this regard, the Commission specifically indicated that tax rulings confer a selective advantage on their addressees, particularly when the administration applies a 'more favourable' tax treatment when compared to other taxpayers in a similar factual and legal situation, for example, by accepting a transfer pricing arrangement that is not at arm's length because (*i*) the methodology endorsed by the ruling produces an outcome that departs from a reliable approximation of a market-based outcome or (*ii*) the ruling allows its addressee to use alternative, more indirect methods for calculating its taxable profits (e.g., the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing) when more direct methods are available. The Commission defined the arm's length principle as the way to establish whether the taxable profit on the corporate income of a company that is part of a group has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. The Commission indicated that, independently of whether or in what form a Member State has incorporated it into its national legal system, the arm's length principle applies to national tax rules and binds the Member States, such that and it necessarily forms part of the Commission's assessment of tax measures granted to group companies, particularly in the form of transfer pricing rulings.

In particular, on the question of how to apply the arm's length principle, the Commission stated that it may, but is not obliged to, look at OECD guidance, particularly the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. At the same time, the Commission recognized that those guidelines do not deal with matters of State aid as such, but that they materialize the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a particular transfer pricing methodology produces an outcome in line with market conditions.

In addition to the NofSA Notice, in the framework of the High Level Forum on State Aid Modernisation on June 3th, 2016, the Commission the Commission published a Working Paper on State aid and tax rulings[89], which contained a summary of the its preliminary review of more than one thousand tax rulings, notably those endorsing transfer pricing arrangements and the Lux Leaks rulings and which explains its own understanding of arm's length principle and provides guidance on how a market-based outcome is to be determined correctly in order to be in line with Article 107 TFEU. In particular, in its Working Paper, the Commission noted that recourse to the arm's length principle to determine whether a fiscal measure prescribing a method to establish the taxable profit of a company forming part of an integrated group gives rise to a selective advantage for the purposes of Article 107 (1) TFEU was endorsed by the Court of Justice in its precedent judgement of 2006 in the case *Forum 187*[90]. The Commission added that it will focus on cases where there is a manifest breach of the arm's length principle.

Moreover, the Commission states that the OECD Transfer Pricing Guidelines, which have been established on the basis of international consensus, provide useful guidance on how to achieve such an outcome. According to the Commission, a tax ruling endorsing an arrangement based on the OECD Transfer Pricing Guidelines unlikely to give rise to State aid.

All the clarification documents mentioned, adopted by the European Commission, were issued and made public in the course of investigations on tax rulings, on an ongoing basis, and not as a preventive measure: in fact, no possibility was given of knowing in advance the interpretative change by the Commission, in violation of the most basic cardinal principles which support the general principle of legal certainty and which form the foundation of any legal system.

The new Commission approach is, in fact, of a legal nature and concerns its compatibility with the wording of Article 107 TFEU. In particular, the critical points posed by the Commission's approach, in addition, as already seen, to the question of the extension of the powers conferred on it by the Treaties and the impact on sovereignty attracted to the Member States in the field of direct taxation,

[89] DG Competition Working Paper on State Aid and Tax Rulings, June 3th, 2016.

[90] Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 v Commission.*

are as follows. First of all, the lack of selectivity inherent in the nature of the rulings and the Commission's error in its identification of the reference framework. Secondly, the Commission's use of the arm's length principle to assess a hypothetical advantage in favour of multinational companies, even challenging the existence of such an arm's length principle in EU law. In fact, the Commission rejected the methodological choices made by the taxing authorities and the relevant group of companies to simulate market conditions for setting prices in certain transactions[91]. Finally, the approach developed in the Commission's decisions constitutes a departure from the OECD TP Guidelines, which the Commission had accepted in previous decisions. The Commission, by using its powers in the area of State aid, has sent a powerful signal to the Member States that it is not acceptable to redirect and channel investments in favour of a single national economy to the detriment of other EU Member States and that the Internal market's objective is not the promotion of international tax competition.

But despite the correctness and legitimacy of the objective pursued, it cannot be said that the Commission's way of proceeding is free from criticalities and serious violations which affect individual taxpayers. These critical issues constitute, in fact, a breach of the principle of legal certainty.

As already widely noted, there are wide margins of uncertainty in the area of tax aid since it is not clear how tax measures can be caught by Article 107 TFEU and especially under which conditions tax measures can be found to constitute selective treatment of certain undertakings[92]. But in addition to this not clear background, the underlying uncertainty created by the unprecedented and in no way predictable conduct of the European Commission is currently added. From a legal perspective, there is a considerable legal uncertainty as regards the approach adopted by the Commission through its various negative decisions adopted so far, in particular as regards the status of the arm's length principle in EU State aid law.

Referring to the next paragraph for a more detailed analysis, it can already be argued that, in the first instance under the new approach, the Commission declared that the TFEU's prohibition on State aid requires Member States to allocate income under the Commission' *sui generis* arm's length standard. According to the Commission, this standard applies independently of whether the State adopted the arm's length principle in its domestic law and it may differ from the arm's length principle described in OECD Transfer Pricing Guidelines.

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[91] DE BROE L., *Can Tax Treaties confer State Aid?,* in *EC Tax Review*, 2017. In Mc Donald's decision (Commission Decision of 3 December 2015 on State aid to MC Donald's Europe, SA.38945 (2014/C), Luxembourg), there is a complicating factor that is the fact that the Commission does not seem to have a fundamental problem with double non-taxation, at least not where the State of residence applies the treaty correctly and the State of source correctly applies its domestic law when it does not tax the income for which it has received taxing rights under the treaty.

[92] NICOLAIDES P., *Fiscal State Aid in the EU: the limits of Tax Autonomy,* in *World Competition*, 2004, 368.

This new approach is not well supported by any precedent[93]. Despite the Commission's arguments about *Forum 187* judgement, no clear precedent supports the notion that independently of Member States domestic law, the State aid rules require parts of an enterprise to hold each other arm's length[94]. In fact, the Commission's new approach generates unprecedent legal certainty, potentially calling into question every transfer price and profit allocation reported by every multinational, whether under a tax ruling or self-assessment without a ruling. There is no EU statute that makes the arm's length principle an EU-wide rule nor any case law, which confirms that the principle must be applied in all 28 Member States. The arm's length principle to determine economic advantage in transfer pricing cases was only vaguely confirmed by the Court of Justice in *Forum 187*. The latter case confirmed that the Commission should use the cost-plus method recommended by the OECD apparently implying that a reference is to be made to the OECD Model Convention and Guidelines. As explained, there is a disparity between the arm's length principle applied in the OECD Guidelines and that applied by the Commission in its recent opening decisions. At face value, it seems that the Commission has departed from *Forum 187* and applied the arm's length principle contrary to what multinationals would have legitimately expected.

It should be highlighted that the General Court of the European Union has so far expressed itself on only four of the European Commission's tax rulings decisions, namely those relating to Starbucks, Fiat, Belgian Excess Profit and Apple cases.

With regard to the Starbucks case, the General Court of the European Union[95] annulled the Commission's decision and stated that the Commission was unable to demonstrate the existence of an advantage in favour of Starbucks. The Court found that the Commission had erred in demonstrating that the beneficiary of the tax ruling, despite any methodological errors by the Member State, effectively benefitted from a reduction of its normal tax burden.

First, the Court examined whether, for a finding of an advantage, the Commission was entitled to analyse the tax ruling at issue in the light of the arm's length principle as described by the Commission in the contested decision. In that regard, the Court notes in particular that, in the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation and that, in order to determine whether there is a tax advantage, the position of the recipient as a result

[93] MASON R., *State Aid Special Report - Tax Rulings as State Aid: Whose Arm's Length Standard?,* in *Tax Notes,* University of Virginia School of Law, 2017, 951.

[94] MASON R., *State Aid Special report: Arm's Length on Appeal,* in *Tax Notes,* University of Virginia School of Law, 2018, 786. The author underline that, although the Court of Justice endorsed the arm's length income allocation standard in *Forum 187*, in that case the Member State had itself adopted the standard in domestic law.

[95] Judgment in Cases T-760/15 *Netherlands v Commission* and T-636/16 *Starbucks and Starbucks Manufacturing Emea v Commission*.

of the application of the measure at issue must be compared with his position in the absence of the measure at issue and under the normal rules of taxation.

The Court goes on to note that the pricing of intra-group transactions is not determined under market conditions. It states that where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. The Court holds that, in those circumstances, when examining, pursuant to the power conferred on it by Article 107 (1) TFEU, a fiscal measure granted to such an integrated company, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions. The Court makes clear that the arm's length principle as described by the Commission in the contested decision is a tool that allows it to check that intra-group transactions are remunerated as if they had been negotiated between independent companies. The Court therefore rejects the claim that the Commission erred in identifying an arm's length principle as a criterion for assessing the existence of State aid. According to the Court, in essence, the Commission has not managed to demonstrate the existence of an economic advantage within the meaning of Article 107 TFEU.

With regard to the Fiat case, instead, the General Court[96] confirms the Commission's decision on the aid measure granted by Luxembourg to Fiat Chrysler Finance Europe (FFT). In the first place, with regard to the plea relating to tax harmonization in disguise, the Court notes that, when considering whether the tax ruling at issue complied with the rules on State aid, the Commission did not engage in any 'tax harmonization' but exercised the power conferred on it by EU law by verifying whether that tax ruling conferred on its beneficiary an advantage as compared to 'normal' taxation, as defined by national tax law. Moreover, as regards the pleas relating to the absence of an advantage, the Court first considered whether, for a finding of an advantage, the Commission was entitled to analyse the tax ruling at issue in the light of the arm's length principle as described by the Commission in the contested decision. In that regard, the Court notes in particular that, in the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation and that, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his position in the absence of the measure at issue and under the normal rules of taxation.

[96] Cases T-755/15 *Luxembourg v Commission* and T-759/15 Fiat *Chrysler Finance Europe v Commission*.

The Court makes clear that the arm's length principle as described by the Commission in the contested decision is a tool that allows the Commission to check that intra-group transactions are remunerated as if they had been negotiated between independent companies. Thus, in the light of Luxembourg tax law, that tool falls within the exercise of the Commission's powers under Article 107 TFEU. The Commission was therefore, in the present case, in a position to verify whether the pricing for intra-group transactions endorsed by the tax ruling at issue corresponds to prices that would have been negotiated under market conditions. The Court further notes that it does not follow from the contested decision that the Commission found that every tax ruling necessarily constitutes State aid. Second, with regard to demonstrating the actual existence of an advantage, the Court examined whether the Commission was right to find that the methodology for calculating FFT's remuneration, as endorsed by the tax ruling at issue, did not enable an arm's length remuneration to be obtained and whether this resulted in a reduction of FFT's taxable profit. In that regard, the Court concludes that the Commission correctly found that the arrangements for the application of the transactional net margin method (TNMM) endorsed by the tax ruling at issue were incorrect. The Court, finally, considers that recovery of the aid at issue does not breach the principle of legal certainty or infringe the rights of the defence.

For Belgium Excess Profit Decision, the General Court[97] annulled the Commission decision on procedural grounds and, therefore gave only little insight on the material matters on the case. According to the Court, the Commission has erroneously considered that the Belgian excess profit system at issue, constituted an aid scheme and not an individual aid.

Lastly, in the Apple case, the General Court[98] annulled the Apple decision because the Commission failed to demonstrate the existence of an advantage for the purposes of Article 107 (1) TFEU.

According to the General Court, in particular, the Commission was wrong to declare that that companies incorporated in Ireland had been granted a selective economic advantage and, consequently, State aid. After endorsed the Commission's assessments relating to normal taxation under the Irish tax law applicable in the present instance, the General Court nevertheless found that the Commission did not demonstrate that the methodological error in determining the taxable amount led to a reduction of the chargeable profits in the branches of the two companies, nor that the rulings were granted on a purely discretionary basis.

In the present case, it appears that, although the reasoning of the General Court, which had the practical effect of making the OECD guidelines the benchmark for determining whether Ireland has

[97] Judgement of the General Court of 14 February of 2019, Joined Cases T131/16 and T-263/16, *Magnetrol International*, par. 135.

[98] Judgement of the General Court of 15 July of 2020, Joined Cases T-778/16, *Ireland v Commission* and T-892/16, *Apple Sales International and Apple Operations Europe v Commission*.

granted State aid in its transfer pricing rulings, seems to hand a large victory to the Commission, the Court has simultaneously bound the Commission in two ways. First, although the Court approved the Commission's use of free competition as a benchmark, it denied that the Commission could produce content for this standard at its will.

Second, the Court has indeed separated from the Commission on the application, rather than the applicability, of the arm's length rule and the approved OECD approach[99].

In Starbucks and Fiat cases, the Court makes clear that the arm's-length principle as described is a tool that allows the Commission to check that intragroup transactions are remunerated as if they had been negotiated between independent companies. Thus, in the light of Luxembourg and Dutch tax law, that tool may be used by the Commission.

In both cases, the pricing of intragroup transactions was not determined under market conditions. However, in the Luxembourg case, the Court established that the Commission was fully entitled to conclude that the tax ruling at issue conferred an advantage on the company because it resulted in a lowering of tax liability. In that specific case, the European Judge confirmed that the Commission was entitled to identify the arm's length principle as a criterion for assessing the existence of State aid. Substantially, these judgements support the Commission in its scrutiny of advance tax rulings on transfer pricing, explicitly confirming the possibility for the Commission to verify the arm's length nature of transactions between related parties, even if there is no arm's length principle clearly laid down in domestic law.

In both Fiat and Starbucks cases, the General Court found that the Commission did not exceed its powers when assessing compliance of the tax rulings with the arm's length principle. The General Court, so, confirmed the right of the European Commission to assess the correct application of the arm's length principle by the Member States on the basis of Article 107 (1) TFEU, even if the measure assessed is an advance tax ruling or an advance pricing agreement.

However, the reasoning of the European Judge is somewhat confusing as it did not strictly stick to domestic tax law, at least not in a literal manner, both to determine the objective of the reference system and to give material content to the arm's length principle. In relation to the material content of the principle, the Court stated that suffice it to note that it is apparent from the contested decision that the principle is a tool for checking that intra-group transactions are remunerated as though they had been negotiated between independent undertakings. But this is extremely insufficient to justify a legal basis at the arm's length principle within the regulatory framework established by Article 107 TFEU.

[99] MASON R., DALY S., *State Aid: The General Court Decision in Apple*, in *Tax Notes International*, 2020, 1318.

Numerous doubts therefore remain, even after the General Court has pronounced it on Starbucks and Fiat cases: the treatment of the arm's length standard, the possibility that the decisions mean that the OECD transfer pricing Guidelines have been incorporated into EU law via the State aid rules, and, finally, the implications of the General Court's conceptualization of arm's length income allocation as analogous to the market economic operator test[100].

2.2. The Arm's length principle

The most controversial point and which affects the principle of legal certainty concerns, in particular, the elaboration of the arm's length principle by the Commission.

It is necessary, in fact, to ask what the Commission's legal basis are for adopting an autonomous arm's length principle.

The arm's length principle is not mentioned in Article 107 TFEU. Instead, the internationally agreed definition of the arm's length principle is to be found in Article 9 of the OECD Model Tax Convention[101]. According to the Commission, however, the arm's length principle corresponds to a general principle of equal treatment in taxation falling within the application of Article 107 (1) TFEU[102] and it is not derived from Article 9 of the OECD Model Tax Convention.

The first time the Commission argued expressly that the arm's length principle was an inherent part of Article 107 TFEU was when it issued its decisions in Fiat[103] and Starbucks[104] cases. It was also the first time the Commission applied Article 107 TFEU to individual tax rulings regarding transfer

[100] MASON R., *Implications of the Rulings in Starbucks and Fiat for Apple State Aid Case,* in *Tax Notes Federal*, 2019, 93. According to the author, the General Court seems to have inadvertently transferred the power to determine how to allocate income form cross-border activity form the Member States to the Commission and such a reallocation of power is not supported by the interpretation of the TFEU.

[101] Article 9 OECD Model Tax Convention provides: "*Where an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly*".

[102] See Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg: "*The arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU, which binds the Member States and from whose scope the national tax rules are not excluded*".

[103] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg, par. 228.

[104] Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands, par. 264.

pricing. The Commission adopted a similar view in subsequent decisions[105] and, later, in the Commission's 2016 Notice on the Notion of State aid.

It is asked, from many sides, given the absence of an explicit legal basis at European level, how national tax authorities are supposed to apply the arm's length principle in the Commission's version, when they did not know about this principle before the final decisions in Fiat and Starbucks. In the absence of clear case law precedent and given the lack of harmonisation, no such EU arm's length principle should exist[106]. In fact, the opinion according to which the Commission based its analysis on an undefined version of the arm's length principle, without any legal foundation, arises more and more. Indeed, it seems that the Commission's version violates the principle of legal certainty as the Commission has implemented a change of course compared to the past and this represents a serious injury for the tax payer, as well as an overcoming of the competences attributed to it on the basis of to the Treaties.

By imposing a new arm's length principle on Member States or deciding according to which national framework the principle should have been applied, the Commission disregards the national tax authority's margin of appreciation and the Member State's fiscal sovereignty. The assessment regarding the existence of an advantage, in fact, should be based on the applicable national law. This view is consistent with the European system of competences and safeguards the prerogative of Member States in tax matters[107].

The Commission, instead, infringed the principle of legal certainty, and as consequence, the principle of protection of legitimate expectations on the basis that it departed from agreements reached in the Code of Conduct and the OECD Forum of Harmful tax Practices[108].

While the Commission admits that it departed from the OECD's arm's length principle and replaced it with its own principle, it rejected the grievances and criticisms, at first, on the basis that the defence of legitimate expectations cannot be raised by a Member State and that there are no precise assurances[109].

In reference to the breach of the principle of legal certainty caused by the new interpretation of State aid, the Commission argued that there were no past Commission decisions that might have created

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[105] Commission Decision of 11 January 2016 on State aid Excess profit tax ruling system in Belgium, SA.37667 (2015/C), Belgium, par. 150; Commission decision of 30 August 2016 on State aid to Apple, SA.38373 (2014/C), Ireland, par. 255.

[106] GORMSEN L., *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, in *Journal of European Competition Law & Practice*, 7, 2016, 381.

[107] SHON W., *State aid in the area of taxation*, in HANCHER L., OTTERVANGER T., SLOT P., *EU State Aid*, Sweet & Maxwell, London, 2016, 415; SHON. W., *Tax legislation and the notion of Fiscal aid - A review of five years of European jurisprudence*, Mark Plank Institute for Tax Law and Public Finance Working Paper 6, 2015.

[108] GORMSEN L., *European State Aid and Tax Rulings*, Edward Elgar, 2019, 75.

[109] The Commission argued that the Code of Conduct was a non-binding agreement and therefore could not be characterised as an assurance. It also argued that the OECD is not an EU institutions and the European Union is not a member of OECD.

uncertainty about the fact that tax rulings can constitute measures of aid and, secondly, it affirmed that the Notice on Direct Business Taxation makes express reference to tax rulings and the circumstances according to which they could be considered to lead granting of State aid. In this Notice, however, there is no sign or reference to the Commission' arm's length principle or the OECD for that matter.

In particular, the Commission rejected the idea of the new approach by arguing: "*the Commission notes that it has applied the arm's length principle in its past decision-making practice, in particular with respect to measures adopted by the Member State, and it concluded that a violation thereof could constitute State aid. That conclusion has further been confirmed by the Court of Justice. There is therefore nothing new in the Commission's approach to the contested tax ruling. Member States should be aware that an agreement between a tax authority and a company that leads to a favourable treatment for the company in terms of artificially lowering its tax base, because the transfer prices it employs do not give a reliable approximation of a market-based outcome, lead to a violation of the State aid rules and should, in case of doubt, be notified to the Commission*"[110]. According to this version, Commission's arm's length principle version is an inherent part of Article 107 TFEU that give to the Commission the power to impose its own transfer pricing system across the Union.

Contrary to what the Commission said, there is no European statute that makes the arm's length principle a European wide rule nor any case law that confirms that the principle must be applied in all Members State[111]. Indeed, the Commission's version of this principle was neither mentioned in the Commission's 1998 Notice on Business Taxation, nor in the Commission's draft Notice on the notion of State aid of 2014. Only in the Notice on the Notion of State aid in 2016[112], which was published after the opening decisions, did the Commission claim that the arm's length principle is the logical

[110] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg, par 362.

[111] PARADA L., *The Fiat and Starbucks State Aid Tax Cases: an absolute loss for legal certainty,* in *MNE Tax - Multinational Tax & Transfer Pricing News*, 2019. According to the author, there is no such thing as a "European arm's length principle". Indeed, EU law does not even require Member States to have any arm's length or other transfer pricing legislation, let alone apply any specific adjustment method and not even the inclusion of a provision similar to Article 9 of the OECD model treaty among Member States tax treaties would, by itself, ensure the conclusion that the arm's length standard is a necessary element of that Member State's tax system.

[112] Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01), par. 172: "*This arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. A tax ruling endorsing such a methodology ensures that that company is not treated favourably under the ordinary rules of corporate taxation of profits in the Member State concerned as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length. The arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope*".

consequence of the principle of equality, which prohibits unequal treatment in taxation of undertakings in similar and factual legal situations. Furthermore, in Notice of Notion of State aid of 2016, the Commission refers to the OECD Transfer Pricing Guidelines to emphasise that compliance with the guidelines is unlikely to give rise to State aid[113]. In other words, according to the Notice, a tax ruling on transfer pricing is unlikely to give rise to State aid within the meaning of Article 107 (1) TFEU when it complies with the OECD Transfer Pricing Guidelines. This has been the situation from 2016 onwards.

However, for the previous years, the Notice on Direct Business Taxation, in making explicit reference to tax rulings and to the possibility that they could be considered grants of State aid, did not contain any reference to the arm's length principle to the OECD. Similarly, in the Notion of Aid of 2014 there is no explicit reference to the principle of free competition or to the OECD guidelines, but only the claim that administrative tax rulings can be used to determine the profits of free competition, for transactions with related parties in which uncertainty may justify an early regulatory practice aimed at ascertaining whether certain controlled transactions are conducted at arm's length[114].

In order to find a foundation for its approach, the Commission stated that principle to determine economic advantage in transfer pricing cases was a result of the first wave of tax investigations in 2001 and find foundation in the case-law of the Court of Justice in the Belgian coordination centres cases, known as *Forum 187* case, to find that a method of profit allocation had to be based on the arm's length principle. Accordingly, prior to the *Forum 187* case, there was, therefore, no final decision of the Commission or the Court of Justice which employed the arm's length principle for purposes of calculating transfer pricing. But, contrary to the Commission affirmation, it is even more unclear whether *Forum 187* constitutes a clear legal authority of this principle. In fact, the principle was only vaguely mentioned and not expressly by the Court of Justice in this judgement.

The arm's length principle was originally examined in a couple of final decisions by the Commission in the context of the domestic tax systems of a number of Member States. In those cases[115], the

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[113] Notice on the Notion of State aid, 2016, par. 173: "*OECD guidelines do not deal with matters of State aid per se, but they capture the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions. Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid*".

[114] Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU of 2014: "*As a result, tax rulings should only aim to provide legal certainty to the fiscal treatment of certain transactions and should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation (but which were not granted such rulings). As demonstrated by the Commission's decisional practice, rulings allowing taxpayers to use alternative methods for calculating taxable profits, e.g. the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, may involve State aid*".

[115] Commission Decision 2003/438/EC of 16 October 2002 on the aid scheme for Finance companies implemented by Luxembourg; Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme for Coordination Centres implemented by Luxembourg. See also Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme

Commission describes the arm's length principle as follows: firstly, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. The objective of using alternative methods of determining taxable income in order to prevent certain transactions from hiding undue advantages or donations with the sole purpose of avoiding taxation must normally be to achieve taxation comparable to that which could have been reached between independent operators on the basis of the traditional method, whereby the taxable profit is calculated on the basis of the difference between the enterprise's income and charges. This complies with the principle of full competition. In the area of transfer prices, this international principle is set out in Article 9 of the OECD Model Tax Convention (and, in more detail, in the OECD Transfer Pricing Guidelines).

In July 2001, the Commission launched an investigation into fifteen tax regimes that had been listed among the sixty-six measures identified by the Primarolo Group[116] as potentially harmful on the basis on the criteria laid down in the Code of Conduct. Four of those regimes had been previously vetted by the Commission under Article 107 TFEU, such as the Belgian Coordination Centres scheme. Under that regime, adopted in 1982, Belgium applied a special tax regime for approved coordination centres. This regime was scrutinized by the Commission in 1984 and, after a series of amendments, it was declared to be in line with State aid Treaty provisions. In 1999, the Primarolo Group included it in the list of Member States' potentially harmful measures. The OECD did the same, by inserting the measure in its list of potentially harmful preferential regimes. The Commission closed its reassessment of the measure in 2003, after concluding that it was incompatible with State aid provisions.

In *Forum 187*, the Court of Justice does not even refer to the term arm's length principle, but rather focusses on the application of the 'cost-plus method', and it does not clarify whether its endorsement should be read to be applied only to the Belgian legal system or to all Member States. More importantly, the Court of Justice made specific reference to the cost-plus method as recommended by the OECD seemingly indicating that its interpretation should be strictly in line with the OECD Guidelines.

implemented by Spain in favour of coordination centres in Vizcaya; Commission Decision 2003/512/EC of September 5th, 2002 on the aid scheme implemented by Germany for control and coordination centres; Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium; Commission Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres.

[116] The Primarolo Group was instituted within the Code of Conduct to assess tax measures that may fall within the scope of the code of conduct for business taxation. The obligations and the scope of application of State aid rules and the Code of Conduct seem to be quite similar, but there are major differences in terms of the legal consequences. See MILADINOVIC A., *The State Aid Provisions of the TFEU in Tax Matters*, in VV. A.A., *Introduction to European tax law on direct taxation*, Linde, 2018, 13.

What we do know from the Court of Justice's *Forum 187* decision, is that EU Member States should apply the at arm's length principle as embedded in their national tax system to resemble prices that would have been charged "in conditions of free competition".

In *Forum 187* a cost-plus method was used where certain highly relevant costs were excluded from the cost-plus base. In addition, a fixed profit margin was used that was not determined on a case-by case basis. The Belgian Government and *Forum 187*, representing numerous affected taxpayers, pointed out that the Belgian tax administration was bound by the OECD transfer pricing guidelines as a proper standard for reference in their defence in this case, so here the Commission had the opportunity to use the OECD guidelines and its arm's length principle as it was deemed part of the national reference system.

Although there are no EU guidelines on how to determine a transfer price, in theory, we know that in order to determine whether an advantage is present we need to compare the outcome of a transfer pricing analysis "*with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition"*[117].

At Paragraphs 122–126 of the *Forum 187* judgment, the Court specifically pointed to the lack of consistency of the method of assessment of the taxable income in a ruling as proof of selectivity. That judgment shows that, when assessing a tax advantage, the Court adopts a rule of reason, by which the presence of a favourable tax system does not, per se, mean that this constitutes State aid. It must first be proven that the advantage is not justified by the logic or scheme of the tax system and only then that the tax system qualifies as State aid. It follows that a tax regime, such as one that uses APAs, cannot be deemed selective by its nature, just because it allows tax arbitrage, but that it is critical to investigate the possible justification of the tax preference by the logic of the tax system before concluding that the preference is State aid.

Contrarily, the Commission argued that its reasoning is identical to that carried out in the previous cases in that the analysis is still based on the *Forum 187* judgement[118] and an outcome departing from the arm's length principle is considered to amount to a selective advantage[119]. According to the Commission, its authority for the principle of equal treatment is *Forum 187* in paragraph 81: "*It should be pointed out, first, that rules relating to tax are not excluded from the scope of Article 87*

[117] LUJA R., *State Aid Benchmarking and Tax Rulings: Can we keep it simple?,* in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 118.

[118] Joined cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, par. 95-96: "*In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests at point 95 of the contested decision, to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition*".

[119] Commission Decision of 4 October 2017 on State aid to Amazon, SA.38944 (2014/C), Luxembourg, par. 416.

EC (now Article 107 TFEU)". But this passage does not legally justify the arm's length being a general principle of equal treatment in taxation falling within the application of Article 107 TFEU.

This judgement does not explain how the arm's length principle, which is deeply enshrined in tax law and transfer pricing methodology, suddenly has become a general principle of equal treatment in taxation falling within the application of Article 107 TFEU and how it is different from that of the OECD.

In that regard, the staff costs and the financial costs incurred in cash-flow management and financing are factors which make a major contribution to enabling the coordination centres to earn revenue, inasmuch as those centres provide services, particularly of a financial nature. The effect of the exclusion of these costs from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition. This is a weak authority for the proposition that an autonomous European arm's length principle exists in Article 107 TFEU.

Although, the *Forum 187* judgement, at paragraph 96, endorses a method of assessment of taxable income allowing it to charge transfer prices that do not resemble those which would be charged in conditions of free competition, it does not even expressly mention of the principle. Rather the judgement establishes that exclusion of specific costs when using this method to calculate profits may constitute State aid. It was simple considered that the cost-plus method as the basic method to calculate the arm's length profit, in an aid scheme voluntarily adopted by a Member State, led to the granting of an advantage.

While admitting that *Forum 187* can represents the affirmation of the arm's length principle, the principle relied on by the Commission in this judgement can only be that of the OECD Model Tax Convention and not a principle derived from Article 107 TFEU.

In *Forum 187* decision[120], the Belgian tax rules already relied on the arm's length principle from the OECD for establishing transfer prices. Thus, any reference to this principle in this case could only be that of the OECD.

A degree of divergence exists between the interpretation of State aid that the Court of Justice approved in *Forum 187* and the Commission's interpretations in the recent decisions on tax rulings. In fact, taxpayers were entitled to entertain legitimate expectations that if the arm's length principle were applied, it would be applied, in line with *Forum 187*, consistently with the OECD Guidelines: the origin of the principle applied by the Commission to assess economic advantage can be found only in the OECD Model Tax Convention. Moreover, *Forum 187* was a particularly extreme case, in which

[120] Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, 2003/757/EC, par. 19-20.

companies were essentially taxed on a completely national basis. This is rather different from a case in which a tax authority tries to apply the arm's length principle.

The difference is that the earlier cases concerned provisions of the law that deviated from the OECD Guidelines, while most current cases involve transfer pricing reports based on the OECD Guidelines that are being challenged by the Commission as not leading to an arm's length price. If this is the origin of the principle, as applied by the Commission today, it can only coincide with the OECD Model Tax Convention and the accompanying OECD Guidelines.

In order to avoid artificial profit shifting, as it is known, the OECD established in Article 9 of the OECD Model Tax Convention the so-called arm's length principle according to which commercial and financial relations between associated enterprises should not differ from relations which would be made between independent companies[121]. Whilst the arm's length principle sounds completely convincing in abstract terms, it gets extremely difficult when applying it. In order to do so, the OECD Transfer Pricing Guidelines provide five methods to apply the arm's length principle to the pricing of transactions and profit allocation between companies of the same corporate group:

- the comparable uncontrolled price method: this method observes a comparable transaction between two independent companies and applies the same price for a comparable transaction between group companies.
- the cost-plus method: this method approximates the income from goods sold or services provided to a group company.
- the resale minus method: this method approximates the costs of goods acquired from or services provided by a group company.
- the transactional net margin method: this method compares the net profit margin (relative to an appropriate base) that the group company earns in the controlled transactions to the same net profit margins earned by the group company in comparable uncontrolled transactions or alternatively, by independent comparable companies.
- the transactional profit split method: this method seeks to eliminate the effect on profits of special conditions made or imposed in a controlled transaction by determining the division of profits that independent enterprises would have expected to realise from engaging in the transaction or transactions.

In sum, the methods are based on a comparison of intra-group transactions with transactions between independent undertakings. However, the different methods can result in a wide range of outcomes as regards the amount of the taxable basis. They are highly dependent on the facts and circumstances of

[121] PERRONE A., *Tax Competition e Giustizia Sociale nell'Unione Europea*, *Problemi Attuali di Diritto Tributario*, 2019.

the taxpayer in question and, by that, not all methods approximate a market outcome in a correct way. The real purpose of transfer pricing is to ensure that intra-group transactions are priced in the same way as they would be priced between independent parties, i.e. at arm's length, thereby eliminating the potential advantage that group companies may have in determining their profits (and the resulting tax base) from being part of a group. The aim is, therefore, to establish a level playing field between stand-alone and group companies. Every tax system contains rules that only apply to taxpayers that meet certain facts (for example, allowances, credits, group consolidation rules). The purpose of these rules is typically to consider specific circumstances of such taxpayers. A country's transfer pricing rules, therefore, are an integral part of the reference system. This does not mean that MNCs applying these transfer pricing rules are a distinct group to which a separate reference system applies. Even if transfer pricing rules were considered as not being part of the reference system and if they were considered as de facto selective, such perceived selectivity would be justified by the nature and purpose of the tax system (considering the purpose of transfer pricing rules, i.e. ensuring equal treatment of MNCs and stand-alone companies)[122].

However, a degree of divergence can be observed between the interpretation of that principle by the OECD and how the Commission applied in its recent decisions. In particular, first of all, according to the Commission[123], the arm's length principle that it applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a general principle of equal treatment in taxation falling within the application of Article 107 (1) of the TFEU, which binds the Member States and from whose scope the national tax rules are not excluded. The Commission thus does not even seem to accept the OECD standards as an indicator for explanation or justification of the methodology used. This is particularly surprising in view of the fact that the Member State tax systems under exam explicitly refers to the OECD rules as the national benchmark[124].

The Commission therefore applies free-floating assessment criteria on two levels, constructing its own reference system. On the first level, it detaches its assessment from the explicit reasoning of national tax law on the reference standards for the rules laid down and develops its own, fully abstract understanding of the national tax system and its logics. This is an extremely far-reaching interference with national tax sovereignty insofar as the Commission does not only (correctly) reserve the right to second-check tax norms against the State aid prohibition, but even (in overstepping the boundaries of

[122] TAFERNER A., KUIPERS J., *Tax Rulings: in line with OECD Transfer Pricing Guidelines, but contrary to EU State Aid Rules?,* in *European Taxation*, 2016, 139.

[123] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg, par 228.

[124] JAEGER T., *Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?,* in *Journal of European Competition Law & Practice*, 8, 2017, 227.

competition law) replaces the explicitly applicable national tax logics by its own understanding of the national tax system. In rejecting the explicit general framework constructed by national law, the Commission essentially seems to apply a pan-European, quasi-harmonized notion of tax law (i.e. income tax logics, tax base calculation etc.). But this interferes with the fiscal autonomy of the Member States and circumvents the Article 115 TFEU[125].

On the second level, subsequently, the Commission also applies its own interpretation of the arm's length principle, detached from the international standard. It is true that this standard is not binding. At the same time, Member States tax system, by making reference to it, declared that standard as binding for the jurisdiction even if Member States remain free to deviate from international (OECD) standards or to even decide not to implement them at all, but, in theory, such a Member State's tax policy choice should not influence the Commission's assessment of the existence of State aid.

The Commission has effectively imposed the arm's length principle (as interpreted by it) as the tool to measure whether there is economic advantage in any transfer pricing scenario in the internal market. Transfer pricing tax rules are not subject of harmonisation measures at EU level, and it may well be the case that some Member States either have not implemented this principle in their national laws or that there are divergences in its transposition and application from Member State to Member State. The arm's length principle is not a rule of international law (whether treaty law or customary law) and as such no Member State has a legal obligation to implement it in its national law and to apply it consistently with OECD Guidelines. Most modern tax treaties contain Article 9 of the OECD Model Convention, and in some quarters, the assertion is made that there is an international body of tax rules, which contains the arm's length principle as enunciated by the OECD.

The Commission's approach essentially removes the national legislator's freedom to follow the international standard and forces it to accept the Commission's case-by-case notion. Legal certainty for taxpayers, which the OECD rules confer, is thereby removed and replaced by a different standard.

Another degree of differentiation is on rigid approach of the arm's length principle by the Commission. In the recent tax cases, the Commission has embarked on an aggressive application of the arm's length principle as if it were an exact science which produces a precise result on which economic advantage can be determined. The OECD Guidelines acknowledge that the choice of the methodology depends on a number of circumstances and note that each method will not generate a precise result, but likely an approximate range. More crucially, the Commission has imposed the arm's length principle, as interpreted by it, on all Member States despite the absence of harmonisation on transfer pricing assessment in the EU.

[125] GORMSEN L., *European State Aid and Tax Rulings*, Edward Elgar, 2019, 45.

A rigid application of the arm's length principle may have the effect of distorting the relationship to achieve an outcome, which may not necessarily reflect what would have been obtainable on the market. The same OECD Guidelines emphasise a flexible approach, which attempts to approximate what would actually happen in real life in arm's length scenario, and in fact, the result is usually in the form of a range of values. One of the key characteristics of transfer pricing, in fact, is that it is not an exact science and, in most instances, there is no simple way of determining the arm's length price, particularly as a taxpayer's situation is often not exactly comparable with that of other companies.

Referring to the new Commission's methodology applied in the tax rulings and to the not-uniform application of the selectivity criterion, some argued in some extent to the vague, complex and uncertain understanding of selectivity of fiscal aid in case law due to the very case specific approach taken in many of the cases[126], while others argued that the difficulty with tax rulings is that the selectivity test should be applied at the level of one Member State, while the problem is clearly cross-border[127].

But the real question is if the Commission can effectively require Member States to follow the arm's length standard for the determination of their taxable profit. It is debatable whether State aid law can require the application of the arm's length standard to taxpayer. First, the standard is itself increasingly controversial in the international tax law debate, not only because of technical difficulties of determining its content in practice, but also because of its significant theoretical shortcomings[128]. Second, even if it were a sound principle, the standard approaches to determine State aid under Article 107 (1) TFEU does not rely on a comparison of a Member State's tax system with an international standard.

Elevating the arm's length principle to be a general principle of equal treatment inherent in Article 107 TFEU so allows the Commission to apply its new approach independently of whether a Member State has incorporated the principle in its national legal system.

The Commission's arm's length principle thereby becomes an integral part of the direct taxation provision of the Member State. Any deviation from it would constitute a derogation, which would give rise to a State aid. As a result, the application of the Commission' arm's length principle extends

[126] MEROLA M., *The Rebus of selectivity in Fiscal Aid: a nonconformist view on and beyond case law*, in *World Competition*, 2016, 39.

[127] DERENNE J., *State aid and tax ruling: is there really a competition issue?*, in *8th International Cuncurrences Review Conference*, panel 3, 26 June 2017.

[128] HASLEHNERW., *Double Taxation Relief, Transfer Pricing Adjustment and State Aid Law*, in RICHELLE I., SCHÖN W., TRAVERSA E., *State Aid Law and Business Taxation*, Springer, Heidelberg, 2016, 158.

to all Member States in the European Union, independently of whether or not they have transposed this principle into their legal systems[129].

If transfer pricing rules are part of the general reference framework that is determined in the three-step approach, there would be no room for a ruling on a transfer price to be selective as long as the transfer pricing rules were applied consistently in that Member State.

If a Member State has not a comprehensive transfer pricing rules at the time the ruling was granted and all companies were essentially in the same situation as the same reference framework (i.e. one without transfer pricing rules) applied to all undertakings, there would be no room for selectivity, provided the profits of all companies were determined in a comparable manner[130].

There is a deep rift with respect to the usual terms of application of the State aid rules in the presence of tax rulings addressed to multinational companies. If one observes well, the legal basis of the ruling was always evaluated, *de jure* or *de facto*, selective (because limited to only a few companies, due to the rigidity or poor reasonableness of the legal criteria evaluation, for the excessive "discretion" granted to the administration). In the most recent decisions, the genesis of the aid is instead linked to the administrative act in its concreteness and singularity. In other words, the Commission does not question the "compatibility" of the various national APAs disciplines, reiterating their usefulness in terms of certainty of tax relations. What disputes is rather the specific terms of the agreement reached on the estimate of the TP by national administrations and MNEs. This marks a profound difference with the past, not only in relation to the aforementioned tax rulings decisions, but also in relation to the practice relating to individual State aid: in almost all cases the latter stemmed from non-fiscal measures. This circumstance makes them objectively incomparable to recent cases (of a fiscal nature): the benchmark used for the former (so-called private investor or creditor test) is in fact unusable in contexts, such as the tax one, characterized by authoritative structures and although improperly evoked times[131].

As we know, where the national reference framework lack detail, tax authorities have discretion to apply divergent methodologies and parameters. Those should then only be tested against a discrimination standard, i.e. *vis-à-vis* the methodologies and parameters applied in comparable cases. The Commission, instead of criticizing Member State for using an arbitrary benchmark might really have filled in the margin of discretion accorded under the OECD rules. At least, the Commission should have explained why such a margin of discretion does not exist. Also, it seems odd that the

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[129] GORMSEN L., *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, in *Journal of European Competition Law & Practice*, 7, 2016, 369.

[130] Commission Decision of 21 October 2015 on State aid to FFT, SA.38375 (2014/NN), Luxembourg, par. 226.

[131] PEPE F., "*Concorrenza fiscale dannosa" e tax rulings: l'uso "strategico" dell'arm's lenght principle nella disciplina europea sugli aiuti di Stato e l'imprevista (?) "egemonia" della Commissione europea nell'area della fiscalità internazionale*, in *Federalismi.it*, 2018.

Commission demands general assessment criteria to be laid down, while at the same time embracing a case-by-case approach in its own interpretation of the arm's length principle.

The application of both the arm's length standard and the OECD Guidelines in a State aid case is appropriate only when the State itself adopted the arm's length standard and the OECD Guidelines into domestic law[132]. This principle could be binding on Member States as the benchmark set by its own domestic law. Taxation of companies in line with the arm's length standard would, under this view, be the correct reference system to determine a selective advantage. If, therefore, the arm's length standard is considered to be a general principle applied by the tax administration when interpreting the statutory rules, it might equally be part of the reference system. Under this view, the arm's length standard is mandatory regardless of the internal law of a Member State because a corporation tax only treats legally and factually comparable taxpayers in a consistent manner if it is based on that principle.

Under the standard approach taken for State aid review in tax cases, Member States are bound to apply their tax rules consistently in light of the general tax system in question. The first step on the road to find illegal State aid has thus traditionally been for the Commission to define the "reference system", against which a concrete measure could be tested. If such measure represents a deviation from that reference system and, in addition, resulted in a lower tax burden for the taxpayer than if that measure had not existed, the Commission would find a selective advantage, leaving only the question as to whether such advantage might be justified by the system's internal logic. The question to resolve, so, is whether the general system of taxation, applicable to all undertakings that are subject to that tax, requires a determination of profits in line with the arm's length standard.

Moreover, another relevant issue is whether the Commission' arm's length principle assessments falls within the analysis of economic advantage or selectivity. In general, the Commission requires two criteria: to define an economic advantage and to establish how the specific economic advantage benefits one or more undertakings[133].

In the Commission's opinion, a derogation from the reference system will generally coincide with the identification of the advantage granted to the beneficiary under the measure[134]. In all the recent decisions, instead, the analysis of the selectivity overlaps with the analysis of the advantage[135]. This approach is, to a significant extent, supported by the case law of the Court of Justice, whereby the Court conflates the two criteria and looks for a selective advantage granted by a tax measure, as well

[132] MASON R., *State Aid Special Report: Apple*, in *Tax Notes*, University of Virginia School of Law, 2017, 748.

[133] Case C-15/14, *Commission v MOL*, par. 59.

[134] Commission Decision of 21 October 2015 on State aid to Starbucks, SA.38374 (2014/C), Netherlands, par. 253.

[135] Commission Decision of 11 January 2016 on State aid Excess profit tax ruling system in Belgium, SA.37667 (2015/C), Belgium; Commission Decision of 30 August 2016 on State aid to Apple, SA.38373 (2014/C), Ireland; Commission Decision of 4 October 2017 on State aid to Amazon, SA.38944 (2014/C), Luxembourg.

as by the Commission's previous decisional practice in tax cases. It might seem that the Commission benefits from the presumption of selectivity and does not have to show that the advantage benefits one or more undertakings[136].

The presumption of selectivity relies on finding an economic advantage, but the Commission is of the opinion that a derogation from the reference system will coincide with the identification of the advantage granted to the beneficiary. Thus, the Commission appears to establish an economic advantage by finding a derogation from the reference framework.

In conclusion, the Commission notion that it can apply its own sui generis standard for allocating income form cross-border activities finds only limited support, at judicial level[137] and in a minority doctrine[138]. Taken to its logical conclusion, it would invalidate all methods of allocating cross-border income other than the Commission's own arm's length standard.

The Commission's approach raises an innumerable series of, currently unresolved, questions[139]. Does it even make sense to talk about compliance with OECD guidelines, when those guidelines rely on a different arm's length principle from that of the Commission? What happens if a Member States has incorporated the OECD into national law and followed the OECD Guidelines, but the outcome is different from what it would have been had the Member State incorporated the Commission's version of this principle? Is a deviation from the OECD arm's length principle a departure from the OECD Transfer Pricing Guidelines that is likely to give rise to State aid? How can national tax authorities and undertakings have any legal certainty that the application of national transfer pricing rules, relying on OECD Guidelines, is compliant with Article 107 TFEU? How can all this be reconciled with the principle of legal certainty?

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[136] On presumption of selectivity, see Opinion of Advocate General Kokotte in case C-66/14, *Finanzamt Linz v Bundesfinanzgericht*, point 114: "*In matters of tax law in particular, however, the decisive criterion is whether a provision is selective, because the other conditions laid down in Article 107(1) TFEU are almost always satisfied. It is thus settled case-law that it is not necessary to establish that the aid in question is actually distorting competition or having a real effect on trade between Member States, but only to examine whether the aid is liable to distort competition and affect trade between Member States. Moreover, it is not even necessary for the beneficiary undertakings themselves to be involved in trade between Member States, it being sufficient that they might be so involved in future or that their foreign competitors might try to expand into the domestic market. The criterion relating to the selectivity of a national provision therefore requires careful handling. If the provision concerns neither one or more individually identifiable sectors capable of being defined by reference to their economic activity, nor individually identifiable undertakings, as the wording of Article 107(1) TFEU requires, then the provision in question cannot in principle be assumed to be selective*".

[137] In Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 v Commission*, the Court of Justice accepted the Commission' reasoning that to determine whether there was an advantage, the Commission had to compare the challenged Member State tax regime with the ordinary tax system, based on the difference between profits and outgoings of an undertakings carrying on its activities in conditions of free competition and that standard was evaluated by reference to te OECD arm's length standard.

[138] M. LIENEMEYER, F. TOMAT, *Application to specific fields, Fiscal aid*, in PESARESI N., VAN DE CASTEELE K., FLYNN L., SIATERLI C., *Eu Competition Law - State Aid, Claeyns & Casteels*, 2016, 422.

[139] GORMSEN L., *European State Aid and Tax Rulings*, Edward Elgar, 2019, 48.

3. The protection of legitimate expectations. The standard in the general application of the fiscal European law

The violation of a general principle of European law, as mentioned, prevents the Commission from recovering State aid. In addition to the principle of legal certainty, there is another principle which falls within the general principles of European law, namely the principle of protection of legitimate expectations, which deserves to be explored. The principle of legitimate expectation constitutes an instrument for the protection of individual economic operators against the regulatory and administrative action of the Institutions: in concrete terms, it tends to safeguard the particular subjective legal situation acquired by the private individual, in strict adherence to another basic postulate of the European law, i.e. legal certainty[140].

It is firstly necessary to emphasize that since tax legislation is suitable for entailing financial consequences, it is necessary to allow interested parties to know exactly and *a priori* the extent of the obligations to which they are required[141].

According to the jurisprudence of the Court of Justice, in fact, the principle must be observed with particular rigor when it comes to "*legislation suitable for involving financial charges, in order to allow interested parties to know exactly the extent of the obligations that it imposes*"[142] and, moreover, "*Likewise, in matters governed by Union law, the legislation of the Member States must be formulated in an unequivocal way in order to allow interested parties to know their rights and obligations clearly and precisely and to the national courts to guarantee compliance*"[143]. As ruled on several occasions by the Court of Justice, legislation that has disadvantageous consequences for private individuals and, in particular, in case of tax rules, both at European level and at Member States level relating to taxes of European origin (so-called harmonized), must therefore be certain and their application foreseeable for those who are subjected to them[144]: "*the principle of legal certainty [...] requires that a discipline that imposes obligations on legal entities is clear and precise, so that they are unequivocally aware of their rights and obligations and can act appropriately*"[145].

In the European legal system, the principle of legitimate expectations has been progressively elaborated by the jurisprudence of the Court of Justice which has drawn it from some national experiences, especially the German one and it has acquired its own characteristics and a plurality of

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[140] SALVINI L., *Aiuti di Stato in materia fiscale*, Cedam, Padova, 2007 379.
[141] SARTORI N., *Il principio di buona fede e collaborazione nello Statuto dei diritti del contribuente*, in *Giur. It.*, 2018.
[142] Case C-492/13, *Traum*, par. 28 e 29; Case C-201/08, *Plantanol*, par. 46.
[143] Case C-183/14, *Salomie*, par. 31 e 32; in the same sense, Case C-257/88, *Commission v Italia*, par. 12.
[144] C-17/03, *VEMW*, par. 80.
[145] C-439/01, *Cipra and others v Bezirkshauptmannschaft Mistelbach*.

facets such that there are now various cases and different judgment schemes on it. Although there is no explicit constitutional recognition of the principle of protection of legitimate expectation in the EU primary Treaties, this principle represents one of the fundamental general principles of EU law which have been long adopted and developed by the Court of Justice to protect the rights of individuals and to ensure that the interpretation and application of EU law are duly observed.

The principle of the protection of legitimate expectations forms part of the EU legal order and, on that basis, it must be observed, both by the EU Institutions and by the Member States in the implementation of EU law, or by each national authority which is responsible for applying EU law. A number of domestic legal system protect legitimate expectations, which are intended as the entitlement of an individual to legal protection form harm caused by a public authority resulting from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation[146]. The individuals' capability to foresee the consequences of their actions is, in fact, prerequisite for rational legal framework in a fair and acceptable economic system.

In essence, legitimate expectation is a way for the public law principles that will, in some circumstances, place limitations on a public authority's ability to act inconsistently with a person's expectation as to how the authority would exercise its powers in a particular situation or case, where the expectation is reasonably based on a representation by, or consistent past practice of, the authority. The principle affords a measure of protection for "*any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations*"[147]. The Court of Justice has recognised, for example, that taxpayers must be able to understand that the law may be changed[148], but such changes can normally apply only with prospective effect, save perhaps to stop an abuse of rights[149].

One significant difference at EU level from the application in a domestic level is that the EU principle is capable of protecting a legitimate expectation to a particular treatment even where, for the public authority to apply that treatment, it would be acting directly contrary to a duty imposed on it by legislation. EU law does not regard the fact that fulling the assurance would be unlawful as necessarily decisive against giving effect to the expectation, but weighs that strong interest in legality against the principle that legitimate expectations merit protection, so as to decide which principle outweighs the other in the circumstances of the case[150].

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[146]POTESTA' M., *Legitimate expectations in Investment Treaty Law: understanding the roots and the limits of a controversial concept,* in *Foreign Investment Law Journal*, 2013, 93.

[147] Case C-289/9, *Mavridis v Parliament*, par. 21.

[148] Case C-487/01, *Gemeente Leusden v Staatssecretaris van Financie.*

[149] Case C-396/98, *Grundstückgemeinschaft Schloßstraße GbR v Finanzamt Paderborn*.

[150] Opinion of Advocate General Gulmann in Case C-187/91, *Belgium v Societe Cooperative Belovo*, point 19.

The expectations refer to all forward projections made by a person about the content of the legal order. It follows that legal stability is the object of the expectations. There are two different kinds of expectations of legal stability[151]. The first occurs when a person is currently subject to a law. The expectations concern the continuing application of the law in a way at least as advantageous as it is at present. The second expectations of legal stability occur when a person expects to be subject to the law in the future. It does not yet apply but it should apply in the future.

While legitimate expectations have long since been established as a general principle of EU law[152], there are many unresolved issues surrounding it. For example, it is clear that as a general principle, it was established by the Court in a critically comparative evaluation of the Member States' legal traditions; but beyond this, its deeper axiological basis remains a matter of controversy. Traditional European doctrine sees the principle of legitimate expectations as following from the principle of legal certainty (and thus rooted, ultimately, in the rule of law)[153]. However, more recent literature, particularly the German literature, following similar trends in national constitutional law, also posits a connection to fundamental rights[154]. The aim of such a reconceptualization is usually not so much to deny the connection to the rule of law as such, but rather to emphasise the principle's importance for individuals and the corresponding importance it should be given in legal argumentation[155]. In any case, the principle's assessment can only be made in light of the concrete situation and the attitude held by the interested parties. Therefore, from the jurisprudence of the Court of Justice it is deduced that there must exist in the first place what is identified as the "basis of custody", more specifically an act or behaviour of the Financial Administration that generates a well-founded expectation.

In this context, the judgements in which the Court of Justice has jointly referred to the principle of legal certainty and that of legitimate expectations are not uncommon, without however taking on the task of making a clear distinction from each other. This circumstance essentially depends, as mentioned, on the fact that legitimate expectation, in addition to representing an autonomous general principle, also constitutes a corollary of the principle of legal certainty[156]. It was stressed that, on the one hand, both legal certainty and legitimate expectation constitute a corollary of the principle of legitimacy; on the other hand, that the two principles under consideration would differ essentially in

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[151] COLLA A., *Elements for a general Theory of Legitimate Expectations*, in *Moral Philosophy and Politics*, 4, 2017.

[152] LOGOZZO M., *La tutela dell'affidamento e della buona fede del contribuente tra prospettiva comunitaria e nuova codificazione*, in *Boll. trib.*, 2003, 1131; POTESTA' M., *Legitimate expectations in Investment Treaty Law: understanding the roots and the limits of a controversial concept*, in *Foreign Investment Law Journal*, 2013; SCHÖNFELD J., ELLENRIEDER B., *Vertrauensschutz bei steuerlichen Beihilfen*, in *IStR*, 2018; PERRONE L., *Certezza del diritto, affidamento e retroattività*, in *Rass. trib.*, 4, 2016, 934.

[153] TRIDIMAS T., *The General Principle of EU Law*, Oxford University Press, 2006, 242.

[154] FRENZ W., *Grundrechtlicher Vertrauensschutz - nicht nur ein allgemeiner Rechtsgrundsatz*, 2008, 468.

[155] MACIEJEWSKI T., THEILEN J., *Temporal Aspects of the Interaction between National Law and EU Law: Reintroducing the Protection of Legitimate Expectations*", in *European Law Review*, 2017, 713.

[156] Case C-63/1993, *Duff*.

terms of time. While the former would have a static character, in the sense that it imposes "*clarity and precision of the legal norms and of the individual disciplines that come to form, in a given matter, the legal framework in which the bodies exercise their competences and the individual their activities*", the second, it would have a dynamic character, in the sense that it requires the European legislator and the other European bodies (or national bodies that operate to implement European law) to exercise, over time, their powers in such a way as to not do any harm in legal situations and relationships that have come into being by virtue of European legislation. In other words, although both principles have the same objective and thus are somewhat interwoven with each other, differences can be distinguished in the application of the two principles: the principle of legal certainty provides for certainty with regard to legislation at a certain moment in time, whereas the principle of the protection of legitimate expectations provides for the reliance that a certain law (or certain policy) will also be applied in the same manner to future situations.

According to the General Court, "*The applicant is not pleading a legitimate expectation that aid was properly granted but rather a breach of the principle of legal certainty, a matter which does not depend solely on the conditions required for the creation of a legitimate expectation on the part of the recipient of the aid*"[157]. Moreover, the Court has not only distinguished between these two principles but also pointed out that, with regard to legal certainty, requirements have to be more restrictive.

With regard to the individuation of the hypothesis of the protection of the expectations created in individuals by the conduct of the European Institutions, from the jurisprudence of the Court of Justice, it does not emerge unequivocally what is the degree of predictability necessary to exclude the violation of legitimate expectations. The same assessment of the elements on the basis of which the European judge establishes the predictability or otherwise of a legislative measure appears strictly connected to an overall examination of the whole case examined from time to time.

Wide and varied, in fact, is the case law relating to cases in which the principle of legitimate expectation is asserted with reference to the conduct of the European Institutions. For constant jurisprudence, the principle in question can be invoked by anyone in a situation from which it appears that the Institutions, having provided precise indications[158], have raised well-founded expectations[159], the existence of which must be assessed with reference both to the objective behaviour of the European Institution, both in the subjective state of the individual.

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[157] Case C- 308/00, *Salzgitter*, par. 166.

[158] Joined Cases T-427/2004 and T-17/2005, *French Republic v France Telecom SA*. According to the European judge, the precise indications must consist of precise, unconditional and concordant information, which derive from authorized and reliable sources, regardless of their formal form.

[159] Case C-289/1991, *Klaus Kuhn v Landwirtschaftskammer Rheinland-Pfalz*. See, aldso, Case C-183/2002, *Demesa e Territorio Histórico de Álava v Commission*

With reference to this last element, it has been specified that the entrustment in a behaviour of the European Institutions cannot be considered legitimate if the person who invokes it has acted in bad faith or in violation of legal obligations. Hence, for expectations to be legitimate, they have to be derived from a European Institution's conduct. This suffices some kind of identifiable positive behaviour on the part of the European Institutions, and can, for instance, be in the form of a favourable administrative measure or a precise and specific assurance that may cause a person to entertain justifiable hopes. Justified expectations may, furthermore, be created by consistent administrative practice or concern the continuation of a legal position. Inaction during the passage of time may also constitute assistance to a claim of legitimate expectations[160], while the positive behaviour from a European Institution shall be in the form of a clear and precise commitment from the European Institutions[161].

The action on the part of a European Institution, in fact, must create a situation that justifies a reliance on the principle. Such an action may be produced by a lawful or unlawful administrative measure, which confers some kind of benefit. It can also concern the continuation of a legal situation. In essence, the practice of the European Courts seems to put more emphasis on whether or not individuals reasonably relied on circumstances influenced by European law[162]. It should be noted that the "generic" or "conservative" administrative practice is not sufficient to support legitimate expectations[163].

Recently, the Court has stated that "*according to constant jurisprudence the right to make use of the principle of legitimate expectation extends to every individual in whose hands an administrative authority has given rise to well-founded hopes due to precise assurances that it would have provided him*".

The notion of the principle of legitimate expectations requires certain conditions to be fulfilled, if a company or an individual should be able to rely on it. It is therefore necessary to ask what are the requirements under which the Court recognizes the protection of the taxpayer.

According to EU case law, legitimate expectations may only arise where the legal situation caused expectations on which the addressee relied, the reliance was reasonable and the individual interest preponderates conflicting public interests, evaluated on the basis of the principle of proportionality. These three conditions are now analysed in turn.

Regarding the first condition, the expectations on which the addressee relies, the principle of legitimate expectations, as a principle of EU law as well as civil law principle, is acknowledged in

[160] Case C-223/85 *Rijn-Schelde Verolme* (RSV).
[161] Case C-289/81 *Mavridis*, par. 21.
[162] Case C-24/97, *Land Rgìheinland-Pfalz v Alcan Deutschland*, par 34.
[163] Case C-350/88, *Delacre e a. v Commissione*.

cases of individual decisions of administrative authorities; that is the revocation or annulment of lawful and unlawful administrative acts. It is, however, also generally accepted that even informal representations can be the source of legitimate expectations[164]. When it comes to laws and general policies, instruments that are not addressed to a specific individual, the general rule of EU law states that individuals cannot invoke the principle of legitimate expectations on the basis that the prevailing legal situation shall remain unchanged. Regulatory and administrative bodies have a margin of discretion within which they can alter policies.

While EU law knows a variety of situations from which legitimate expectations may arise, not every reliance of individuals is protected under the principle. The reliance, in fact, must be reasonable.

In this sense, the principle of legitimate expectations has an inherent connection to the principle of good faith[165]. Only those who act in good faith can rely on the principle. Individuals are not in good faith where a change in policy was 'foreseeable'. Good faith is difficult to rely upon where a change in policy was foreseeable[166]. To assess foreseeability, the Court investigate whether a prudent well-informed market participant[167] could have foreseen the changes made by European Institutions. It is necessary, in fact, for the assignment in question to be "legitimate", that is, it is not possible to demand from any economic operator in the sector, prudent and diligent, a behaviour different from that actually carried out in observance of precise indications of the financial administration.

On this point, the European Union Court has repeatedly stated: "*As regards the principle of protection of legitimate expectations, the right to make use of this principle extends to every individual in whose hands an administrative authority has raised well-founded hopes as a result of precise assurances they would provide. In this regard, it is necessary to verify whether the acts of an administrative authority have generated reasonable expectations of a prudent and prudent economic operator and, if this has happened, to ascertain the legitimacy of these expectations* "[168].

On this point, it should be noted that if a prudent economic operator is in any case able to foresee the adoption of a measure suitable to harm his interests, he cannot invoke the violation of his legitimate expectation in the event that the measure turned out to be foreseeable, in consideration of the evolution of the market and of the policy adopted by the European Institutions[169]. Furthermore, the

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[164] CRAIG P., *EU Administrative Law*, Oxford University Press, 2018, 567.

[165] Case T-115/94, *Opel Austria GmbH v Council*, par 93.

[166] TRIVELLIN M., *Il principio di buona fede nel rapporto tributario*, Giuffrè, Milano, 2009.

[167] Case C-350/88, *Société Française des Biscuits Delacre et alia v Commission*, par. 37.

[168] Case C-144/14, *Cabinet Medical Vetrinar Dr. Andrei*. In the case cited, the Court correctly excludes that for the recognition of legitimate expectation the administrative practice of the Romanian tax authorities regarding the subjecting to VAT of certain services rendered by veterinary doctors "*cannot be sufficient, a priori, except for very particular circumstances, to create a reasonable reliance on an economic operator normally predicted and prudent in the non-applicability of VAT to certain services (...). A similar practice, however regrettable, cannot, in itself, be considered suitable to provide the taxable persons concerned with precise assurances in this sense* ".

[169] Case C-350/88, *Delacre*; Case C-119/95, *Petridi.*

Court of Justice[170] specified that "*the right to assert the principle of the protection of legitimate expectations belongs to any administration in which a Union Institution has generated well-founded expectations by providing precise assurances (...). We can talk about such insurance when precise, unconditional and concordant information is provided, whatever the form in which it is communicated* ".

In other words, in the jurisprudence of the Court of Justice of the European Union, the recognition of the full protection of the taxpayer is peaceful when precise, unconditional and concordant information has been provided by the administration, regardless of the form they are communicated in. The latter statement is particularly significant for cases of legitimate expectations, which recognition is independent of the nature of the acts with which the administration has manifested its decisions[171].

Following the reasoning of the Court of Justice, it can be identifying the conditions both under the objective profile (presence of precise and detailed indications by the administration), and under the subjective profile (diligence of the taxpayer), which exclude their general application to all cases in which the administration modifies its own interpretative guidelines, *in peius* for taxpayers[172].

Finally, reasonable reliance on the continuity of policies alone does not lead to the protection of individual interests under the principle of legitimate expectations. In fact, legitimate expectations may only arise where there are no precluding public interests. To assess whether public interests override individual expectations both positions are weighed in a proportionality test. The Court will attach more weight to individual interests where individual representations have been made and will generally let public interests prevail where EU bodies chose to change general policies. The principle of proportionality may also require transitional provisions to make sure that individual rights are not violated.

The protection of custody responds, also in the European context, to reasons of certainty and stability of legal relationships: in fact, it provides for the consolidation of the advantage situation within the sphere of the citizen, as the latter must have maintained the good or the legal situation for a certain period of time, thus determining the stabilization of the belief about the right of the good itself or the situation in question. These are what are called vested rights, which consist of those rights that are constituted by the administration through acts with the semblance of the character of legitimacy: they cannot be subsequently sacrificed as they have led to the belief that they are "acquired" rights to the patrimony of the beneficiary citizen.

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[170] Case C-537/08, *Kahla Thuringen*. See also Case C-47/07, *Masdar v Commission*.

[171] LOGOZZO M., *I principi di buona fede e del legittimo affidamento: tutela "piena" o "parziale"?*, in *Dir. e prat. trib.*, 2018.

[172] VIOTTO A., *Tutela dell'affidamento, consulenza giuridica e interpello*, in *Riv. dir. trib.*, 2017.

However, it is necessary to consider that, in the same jurisprudence of the Court, the approach that fixes in the course of time a definitively stabilizing factor of the assignment, and consequently preclude the exercise of the power of self-protection, does not present a continuity character, since although, this factor is intended to gradually consolidate the assignment, it does not inevitably preclude the exercise of the withdrawal power of the act, which would be subordinated to the emergence of a more substantial public interest. The public interest, therefore, emerges as a limit, even if in reality it cannot always be said that if the act is revoked in the presence of a higher public interest, the award is not protected, since the injured party could be restored adequately through indemnification or, if necessary, request compensation for damage to the State if it has relied in good faith on repeated aid.

It should be added that in balancing the opposing interests, the behaviour of the counterparty subject to the elimination of the provision is also considered by the Court, since, rightly, it does not deserve protection of the illegitimate assignment of those who, cooperating with their own conduct, determined the issuance of an also illegitimate measure providing, for example, false or incorrect information, such as to mislead the issuing authority.

With particular regard to the implementation of the principle in the fiscal field, an important judgment of the Court of Justice, in identifying the conditions in which the above principle can be invoked, is *Elmeka* judgment of September 14th, 2006[173].

In *Elmeka* judgement, the EU legal certainty and the principle of the protection of legitimate expectations are applied in a VAT case, in which the Greek tax authorities in reply to a specific question from *Elmeka*, had indicated that, in the framework of supplies to vessels, *Elmeka* was exempted from VAT. This reply was incorrect and further to an audit, an additional assessment was imposed on the underassessment of VAT (with increase due to an incorrect tax return and a penalty). The Court confirmed that the principles of protection of legitimate expectations and legal certainty form part of the European legal order and stated that "*the national authorities are required to respect the principle of the protection of legitimate expectations of economic operators*", underlining that to establish if this principle can be invoked by the recipient of information favourable to him from the

[173] Joined Cases C-181/04 to C-183/04, *Elmeka NE v Ypourgos Oikonomikon*. In this case a local tax authority provided information to a company, stating that some of their services were exempt from value added tax (VAT). The company adhered to that statement and did not pass on the tax to its customer. It was subsequently decided by both national courts and ultimately the Court of Justice that, when interpreting the provisions of the national tax code consistently with the VAT directive, the services were not exempt from VAT and thus the information provided by the local tax authority was erroneous. However, with regard to the general principle of legitimate expectations, the Court ruled that, in principle, a taxpayer could rely on the information provided by a competent tax authority and it was for, "*the referring court to decide whether, in the circumstances of the main proceedings, the taxable person could reasonably have believed that the decision in question had been taken by a competent authority*". See also, MACIEJEWSKI T., THEILEN J., *Temporal Aspects of the Interaction between National Law and EU Law: Reintroducing the Protection of Legitimate Expectations*", in *European Law Review*, 2017, 716.

tax administration, it is necessary, first of all, to verify whether the acts of the administrative authority have generated well-founded expectations for a prudent and prudent operator[174]. If the answer to this question gives a positive result, it is necessary, secondly, to ascertain the legitimacy of these expectations. In particular, the Court in the *Elmeka* case dwells, as regards the diligence of the economic operator, on the origin of the qualified information of the competent administrative authority, affirming that it is for the national court to assess whether "*the VAT taxable person could reasonably presume that the contested decision was has been adopted by a competent authority*". Therefore, the erroneous information provided by the tax authority could give rise to legitimate expectations protected by EU Law.

Moving on, a very important aspect to be assessed, in the context of the principle of legitimate expectation and which gave the Court room to rule on it, concerns retroactivity[175]. EU or national legislation which bears influence on situations which have arisen before its entering into force does not in general have any substantive retroactive effect, but only has an immediate effect on situations which it arises from and after the time of entering into force of the legislation[176]. This leads to the question of whether in such cases, the principle of the protection of legitimate expectations implies that the new legislation is not of immediate application to existing situations and transitional provisions should apply. In such cases, the Court of Justice has ruled that a prudent and discriminating trader cannot invoke the principle of the protection of legitimate expectations when he could have foreseen the adoption of a European measure likely to affect his interests[177]. The Court of Justice emphasized in this framework that traders are not justified in having a legitimate expectation regarding an existing situation which can indeed be altered by the EU Institutions in the exercise of their discretionary power as it will be maintained. The Court of Justice[178] acknowledged that the principles of legal certainty and protection of legitimate expectations in general precludes the application of substantive EU law regulations with retroactive effect. Only procedural rules can have retroactive effect. The Court, however, permits an exception in the case where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. In fact, the Court of Justice[179] has had the opportunity to affirm that European jurisprudence has consistently affirmed that the principle of legal certainty which, as it is known, has, as a corollary,

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[174] See to this effect, Joined Cases C-95/74 to 98/74, 15/75 and 100/75, *Union nationale des coopéeratives agricoles de cèrèales and Others v Commission and Council.*

[175] On the retroactive nature of the recovery in relation to the assignment of the beneficiary, see FALSITTA G., *Recupero retroattivo degli aiuti di Stato e limiti della tutela dei principi di capacità contributiva e di affidamento,* in *Riv dir. trib.*, 11, 2010, 663.

[176] Case C-519/03, *Commission v Luxembourg*, par. 49.

[177] Case C-265/85, *Van den Bergh en Jurgens*, par. 44.

[178] Case C-98/78, *Racke*, par. 20.

[179] Case C-702/17, *Unareti S.p.A.*.

the protection of legitimate expectation and requires a regulation that entails disadvantageous consequences for private individuals to be clear and precise and that its application is foreseeable for the administrated[180]: "*in this perspective, the retroactive application of a national provision, which is devoid of a reasonable justification, contrasts with the aforementioned principle*". In this decision, the EU Court of Justice distinguishes the consequences deriving from an infringement of the principle of custody deriving from the violation of obligations under European law (in which case, that principle is imposed on national authorities, as well as on European ones, such as mandatory rule of European law and can therefore act as an interpretative parameter of internal rules) from those deriving from the violation of obligations established by national rules (in which case, however, as stated in the decision under review, the assignment does not constituted a parameter European law applicable to the case to be decided).

Substantially, the principle of the protection of legitimate expectations prevents that a modification of the national legislation deprives the taxpayer, with retroactive effect, of the right which he enjoyed prior to this modification, consisting in obtaining the reimbursement of taxes received in violation of Union law[181].

In the same vein it was also ruled that, in a situation where taxpayers, in accordance with national law, have the choice between two possible remedies regarding the repetition of a tax received in violation of the law of the Union, one of which benefits from a longer limitation period, the principles of effectiveness, legal certainty and protection of legitimate expectations prevent national legislation from reducing this limitation period without notice and retroactively.

Another tax case in which the question was raised of whether a taxpayer might rely on existing legislation being maintained is in *Plantanol* judgement [182]. In that case, a tax exemption on energy products had been withdrawn prior to the expiry date initially scheduled in the national regulation. The question was whether the withdrawal of the tax exemption was foreseeable and in accordance with the principle of legal certainty and the principle of the protection of legitimate expectations. The Court of Justice considered that "*It must be accepted that a trader, such as the applicant in the main proceedings, who commenced his activities under the tax exemption scheme in favour of biofuels at issue in the main proceedings, and who, to that end, made costly investments, could see his interests considerably affected by the withdrawal of that scheme before the date announced, all the more so if that withdrawal takes place suddenly and unforeseeably, without leaving him enough time to adapt*

[180] Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue*.
[181] C-62/00, *Marks & Spencer*, par. 46.
[182] Case C-201/08, *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt*.

to the new legal situation"[183]. Subsequently, the Court observed "*as regards the expectation which a taxable person might have as to the application of a tax advantage, the Court has already held that when a directive on fiscal matters gives wide powers to the Member States, a legislative amendment adopted under the directive cannot be considered to be unforeseeable*".

3.1. The principle's application within the fiscal State Aid field

Protection of legitimate expectations in the field of the European Union State aid law has a particularly important function as it aims at preserving the rights of individuals within the internal market and during the recovery phase. In principle, affected companies can rely on the protection of legitimate expectations as part of a national recovery procedure. However, this principle is used extremely restrictively in State aid law so as not to undermine the principle of effectiveness applicable in State aid law. It has been claimed that invoking the principle of legitimate expectations in the area of State aid is not fully achievable, since the effective application of protection of legitimate expectations is blurred in the area of State aid[184]. In fact, even if taxpayers rely on legitimate expectations, public policies may only be restrained if there is a significant imbalance between the public reasons to depart from the original legal or administrative framework and private expectations on its stability[185].

Despite the general context in which the principle is developed, European Courts and the Commission advocate a specific meaning for the principle in the sphere of State aid, different and a stricter one, with the recipient's expectations being considered as ground for defence against recovery orders only in exceptional circumstances.

This particular meaning of legitimate expectations is unique and quite different from the scope we usually find in common European law, in national Member State's system or in the International law. Moreover, the obstacles to applying the principle of protection of legitimate expectations are even more stringent and problematic with regard to tax aid and it would seem that this principle doesn't benefits from a particular statute in the tax area, which is part of the more general principle of tax security.

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[183] WEBER D., SIRITHAPORN T. *Legal Certainty, Legitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Tax Law,* in BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 246.

[184] FINK E., *The possibility of protection of legitimate expectations in recovery of unlawful State Aid*, in *Juridica International*, 1, 2013.

[185] PINTO C., *The 'Narrow' Meaning of the Legitimate Expectations Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations,* in *EStAL,* 2, 2016, 273.

First of all, the legislative point of reference for the application of the EU notion of legitimate expectations in matter of State aid is Article 16 (1) of the Procedural Regulation. According to this provision, the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law, and, as it is well known, protection of legitimate expectations is recognized as a general principle of Union law[186]. Even when a Member State or a beneficiary concerned has not presented the Commission with any argument based on the existence of legitimate expectations, the Commission is, pursuant Article 16, required *ex officio* to take into consideration the exceptional circumstances that provide justification. In principle, when the Commission has failed to take into account legitimate expectations allegedly entertained by the recipient of unlawful aid, the decision can be challenged before the General Court under Article 263 TFEU and/or, indirectly, in national enforcement proceedings.

Member States have very well developed their own notion of what constitutes, in their respective legal orders, legitimate expectation[187].

However, the case law and the decision practice relating to legitimate expectations in State aid recovery proceedings only take partial account of the traditional conditions of the recognition of legitimate expectation. In this sense, the Court of Justice have interpreted the principle of protection of legitimate expectations in a restrictive manner because it is an exception from the general rule that unlawful aid must be recovered from the beneficiary. Furthermore, some supplementary conditions or requirement have been added to fit the field of State aid and for invoking this defence[188].

In particular, the evaluation test requires the following parameters. First of all, it is only the beneficiary, and not the Member State concerned, that may entertain a legitimate expectation. Secondly, according to the Court of Justice, beneficiaries cannot enjoy protection and rely in this principles, unless the measure has been granted in compliance with the procedure laid down in Art. 108 TFEU. So, the State aid notion of legitimate expectations assumes relevance only in case of a respect of Article 108 (3) TFEU and, as a consequence, the notion has been developed very strictly. Thus, every time there is a breach of Article 108 (3) TFEU, the relevance of legitimate expectations is excluded, unless the beneficiary is able to prove that, due to exceptional circumstance, it legitimately expected the measure to be lawful. In this context, in fact, the Court has expressly ruled that no legitimate expectations can be entertained in case of violation of EU law[189] and the principle of protection of legitimate expectations cannot be invoked by a person who has manifestly violated

[186] Cases 205/82 to 215/82, *Deutsche Milchkontor GmbH*, par. 30.

[187] The first EU legitimate expectations cases concerned the question whether EU law tolerates the application of a national notion of legitimate expectations which could prevent the application of EU law. It is only subsequently that EU law developed its own autonomous notion of legitimate expectations.

[188] Case C-5/89, *Commission v Germany*, par 14.

[189] Case C-67/84, *Sideradria v Commission*, par. 21.

the applicable law[190]. Thirdly, it is assumed by the Court the parameter of the diligent business operator, which should normally be able to determine whether that procedure has been followed and whether the aid was notified or not[191].

In addition, only specific circumstances of an exceptional character can be relied on by the beneficiary. The latter condition requires a case by case assessment. On this point, the Court constantly emphasizes that legitimate expectations in the field of State aid can be invoked only in exceptional circumstances. Accordingly, legitimate expectations are acknowledged only in limited circumstances, i.e. in the event of assurances of a measure's compatibility resulting either from a positive action or inaction involving the Commission or the EU Courts[192] (such as, for example, a positive decision on the same measure in the past, an extraordinary delay by the Commission in deciding that the aid must be recovered and the Commission's interpretation of a case decided by the Court of Justice that gives grounds to believe that the measure is in accordance with State aid law).

Moreover, it is required that the beneficiary is in a situation in which it is clear that the European institutions, by giving him precise assurances that the measure in question does not constitute State aid or that it is not covered by the standstill obligation[193], led him to entertain reasonable expectations, but these assurances must be precise, unconditional and contain consistent information[194] (for example, assurance by an EU official who is acting outside the scope of his mandate cannot be taken into account[195]). Therefore, a person may not plead infringement of the principle unless it has been given precise unconditional and consistent assurances by an institution, body or agency of the Union regardless of the form of such assurance[196].

There are broader categories of precise assurances on the basis of past administrative decisional practice and the jurisprudence of the Court of Justice[197]. Basically, as will be shown by Court of Justice's cases, legitimate expectations can only be invoked successfully if they are the result of conduct by the Commission, or other EU institutions that meet certain requirements. The misconduct of the granting authority cannot give rise to legitimate expectations either[198]. The recipients can rely

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[190] Joined Cases T-394/08, T-408/08 and T-454/08, *Regione Autonoma della Sardegna and others v Commission*, pa. 261.

[191] Case C-81/10, *France Telecom v Commission*.

[192] HANCHER L., OTTERVANGER T., SLOT P., *EU State Aid,* Sweet & Maxwell, London, 2016, par. 26-017; Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, par. 153-155.

[193] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*.

[194] Joined Cases T-66/96 and T-221/97, *Mellet*, par. 104; Case T-332/06, *Alcoa*, par. 106.

[195] Case C-129/96, *Preussag Stahl*.

[196] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, par. 147; Case C- 67/09, *Nuova Agricastand Cofa v Commission*, par. 146 and 108.

[197] JAROS K., RITTER N., *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid,* in *EStAL*, 4, 2004, 579; GIRAUD A., *A study of the notion of legitimate expectations in State Aid recovery proceeding: "Abandon all hope, ye who enter here?"*, in *Common Market Law Review*, 5, 2008, 1413.

[198] Case C-39/06, *Commission v Germany*.

on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework of the recovery procedure before the national courts, and it is for them alone to assess the circumstance of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice[199].

It is necessary also the balancing of the interest of the private person in the stability of the situation and of the public interest pursued by the Union measure. The prevalence of private interests' condition over public ones is similar to the balancing test applied in general European law when assessing the existence of legitimate expectations. It has, however, two particularities: firstly, the burden of proof to demonstrate the existence of an overriding public interest lays on the EU institutions; secondly, the comparison shall take into account the particular circumstances of the State aid context, like the value of aid, the size of a beneficiary and its position on the market, the size of its competitors, their position on the market, and the real influence that the aid under scrutiny can have on the market, as well as the duration of market distortion.

Finally, a relevant issue concerns the role of national courts[200] have also the role to guarantee the beneficiaries' fundamental rights, such as the principle of protection of legitimate expectations.

All these stringent conditions show that the actual scope of protection of undertakings' expectations is quite restricted[201]. The principle of legitimate expectations is, in fact, one of the most commonly invoked pleas against recovery orders, but rarely succeeds before EU Courts[202].

The aforementioned parameters are analysed separately, in order to underline the profound difference and distance between the application of the principle under comment in the context of general EU law and the concrete application in the context of State aid.

The first limit identified concerns the subjects who can invoke legitimate expectations. The principle is, in fact, invocable only by the beneficiary subjects and not also by the Member States. According to the Court, the defence of legitimate expectations is only available to those liable to repay the aid. Member States can invoke neither the legitimate expectations of the aid beneficiary nor their expectations when they have failed to notify the aid. To allow them to do so would deprive of contents Articles 107 and 108 TFEU since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions of the Treaty

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[199] Case T-109/01, *Fleuren Compost v Commissio*n, par. 137.

[200] National courts have the power to adopt suspension measures during the recovery procedure, but at the same time they are required to guarantee the full effectiveness of the decision ordering the recovery itself, DEL FEDERICO L., *I principi di equivalenza ed effettività nelle procedure di recupero degli aiuti di Stato fiscali,* in M. INGROSSO E G. TESAURO (a cura di), *Agevolazioni fiscali e aiuti di Stato,* Napoli, 2009, 361.

[201] See PISTONE P., *Legal Remedies in European tax law*, IBFD, Amsterdam, 2009, p. 255.

[202] See PINTO C., *The 'Narrow' Meaning of the Legitimate Expectations Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations,* in *EStAL,* 2, 2016, p. 273.

ineffectual. The Member State cannot rely on its own unlawful conduct to deny the competence of the Commission to adopt a decision obliging the Member State to recover the unlawfully granted aid. The second stringent condition necessary to meet in order to successfully invoke legitimate expectations is the following: taxpayers may only entertain legitimate expectations when aid is granted in compliance with the procedure laid down in Article 108 TFEU[203]. The perimeter of invocation of the same is, therefore, limited to existing aid only. For illegal aid, i.e. for aid awarded without being notified, the legitimate expectation has no hope of being recognized.

In particular, the EU notion of legitimate expectations, as applicable in matters of State aid, has been developed by the Court in connection with the scope and function of Article 108 (3) TFEU, which establishes an obligation for Member States of notifying the Commission of any plan to introduce new aid measures. As a consequence, new aid measures cannot be implemented until the Commission has approved them.

With regard to a new aid, a stricter State aid procedure applies: the Member State must first notify their proposed plans to the Commission and obtain its authorization before implementation. Article 108 (3) TFEU provides for the prohibition of implementation or a standstill obligation, meaning that the Member State's authorities and courts may not implement the intended measure prior the Commission 's approval.

It should be emphasized that, in the field of State aid, the nebulous concept of what is effectively aid is crucial. New interpretations of the notion of aid in particular, pose a significant threat to the legitimate expectations of any potential beneficiary within the internal market. Similarly, in complex transactions State aid elements may be invisible or at least very difficult to detect[204]. The key difficulty is, in fact, the interpretation of the notion of aid upon which the beneficiary may rely.

The meaning of the conditions of a notification obligation is complex and it has significantly evolved throughout the case law of the Court, thus creating a significant degree of uncertainty on the part of both Member States and recipients. The Court has never, to this date, explicitly accepted that legitimate expectations claims could have as their object the absence of State aid qualification of the measure concerned. Both the Court of Justice and the Court of First Instance have nevertheless admitted this type of argument, at least implicitly. The Court has extended the scope of the notion of legitimate expectations also to the compatibility of the aid. In fact, this result is coherent with the limitation of the scope of the standstill clause to avoid the introduction of incompatible aid within the

[203] Case C-5/89, *Commission v Germany*, par. 14.

[204] JAROS K., RITTER N., *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid,* in *EStAL*, 4, 2004, 578.

internal market. In a case concerning France Telecom[205], the Commission, for its part, has accepted legitimate expectations arguments based on the absence of State aid qualification: "*The Commission recognizes that this is the first time it has had to examine whether this type of conduct constitutes aid. In conclusion, the Commission finds that France Télécom could legitimately have confidence in France's conduct not constituting State aid*." On the basis of the above, it may be concluded that a recipient of an unlawful aid wishing to oppose the recovery of the aid it benefited from, may argue that it had legitimate expectations as to the absence of State aid qualification of the said aid. However, it remains completely uncertain how this reconstruction of the notion of legitimate expectations can be reconciled with the features of this notion (including the very strict burden of proof) as developed by the Court of Justice in its previous case law and exclusively based on the unlawfulness of the aid. Moreover, it is affirmed that the duty to verify whether the aid has been properly granted can be mitigated in situations in which the aid is granted in a very unusual form. In those situations, it may be difficult to ascertain whether the measure is aid or has been adopted in conformity to the State aid rules[206]: for example, an instance in which the Commission decided not to require the recovery of the aid because that might have infringed, inter alia, the principle of legitimate expectations due to the particular modalities of granting the aid[207].

Legitimate expectations can also be invoked in cases concerning existing aid. In such cases recovery will not be an issue. According the Court, in the cases the question is granting not transitional measures or sufficient period to allow the economic operators concerned to adapt to the new legal situation resulting from the Commission' action, "*even if the Union had first created a situation capable of giving rise to legitimate expectations, an overriding public interest may preclude transitional measure from being adopted in respect of situations which arose before the new rules came into force but which are still subject to change*"[208].

However, the Court also held that, in the absence of overriding public interest, the Commission infringed a superior rule of law by failing to couple the repeal of a set of rules with transitional measures for the protection of the expectations which a trader might legitimately have derived from the Union rules.

A particularly distinctive aspect of the legitimate expectations principle in State aid law resides in the benchmark of a diligent businessman. A subject to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in

[205] Commission Decision of 2 August 2004 on the State Aid implemented by France for *France Télécom* 2006/621/EC, par. 263.

[206] It is paid attention to the fact that undertakings may be uncertain as to whether or not certain forms of atypical aid need to be notified. See Opinion of Advocate General Darmon in Case C-5/89, *Commission v Germany*, point 30.

[207] Commission Decision of 2.08.2004, C-3060/2004, on the State aid implemented by France for *France Telecom*.

[208] Case C- 183/95, *Affish v Rijksdienst voor de keuring van Vee en Vlees*, par. 57.

compliance with the procedure laid down in that article: a diligent businessman should normally be able to determine whether that procedure has been followed[209] and respected[210]. A recipient of a non-notified aid can't rely on legitimate expectations in general, but only under exceptional circumstances[211].

The Court of Justice[212], while reaffirming that "*The right to exercise the principle of the protection of legitimate expectations extends to every individual in whose hands a Community institution has raised well-founded hopes because of the precise assurances that he would have given him*", added that, "*if a prudent and prudent economic operator is able to foresee the adoption of a Community measure capable of harming his interests, he cannot invoke the benefit of this principle in the event that such a measure is adopted*". In this case, the Court ruled out that legitimate expectations could be recognized in favour of the taxpayer who had joined a favourable tax regime which, however, constituted State aid incompatible with the common market.

Despite being an overall requirement of European law, the demands placed on a prudent, discriminating and well-informed trader constitute a hurdle particularly difficult to overcome in areas where common policies operate, like State aid rules. This requirement is strictly connected to the one just examined and, therefore, inherently related to the procedural path established in Article 108 TFEU. Diligent businessman is said to be under a duty of care to ensure before receiving aid that it is granted lawfully, in particular by verifying in the Official Journal.

The European Court have adopted a rather inflexible interpretation of this qualifying requirement and held that recipients of aid cannot, on ground of their size, be relieved of the obligation to keep themselves informed of the rules of European law[213]. This means that the diligent businessman benchmark applies in the exact same way to big multinationals and small and medium size enterprises, to beneficiaries and third parties that are in any way related to the aid.

The prospect of overall application of this criterion is not entirely consensual and some dissenting voices argue that such approach may be unwarranted in certain situations. This will be the case when it concerns fiscal aid, and area where European Courts have not yet adopted a clear line[214]. In some cases, in fact, as said, a company could not safely determine whether a measure constitutes notifiable

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[209] Case C-5/89, *Commission v Germany*, par. 14.

[210] Case C-5/89, *Commission v République fédérale d'Allemagne*, par. 14.

[211] Case C-183/91, *Commission v Greece*, par. 18; Joined Cases C-183/02 and C-187/02, *Demesa-Territorio Historico de Alava v Commission*, par. 51.

[212] Case C-519/07, *Commission v Koninklijke FrieslandCampina NV*.

[213] Case T-109/01, *Fleuren Compost v Commission*, par. 140.

[214] JAROS K., RITTER N., *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid*, in *EStAL*, 4, 2004, 573.

aid[215]. Ordering the recovery of the aid would be inappropriate since a diligent businessman would not be able to determine whether the procedure set out in Article108 (3) TFEU has been respected[216]. The opposite interpretation would be source of legal uncertainty. It would be wrong to expect any subject to submit to any charge in law or policy if it wants to operate in the internal market. It is also true, at the same time, that a diligent economic operator is certainly not entitled to entertain legitimate expectations after the Commission has opened a formal investigation procedure, which according the Court of Justice means that the Commission has serious doubts as to the compatibility of the aid in question with European Union law[217].

In any case, the Court of Justice rejected also the argument that the Commission had always interpreted Article 107 (3) a) TFEU in a certain and constant way, as not conferring upon a beneficiary a legitimate expectation that the Commission's interpretation was the correct one[218]. In some cases, it was argued by the beneficiary of aid that a Commission decision approving the measure at issue causes a legitimate expectation and would therefore preclude recovery even if the decision is annulled at a later stage. However, the Court have held that so long as the period for bringing an action against such a positive decision has not expired, and so long as the appeal procedure is pending, the beneficiary cannot be certain as to the lawfulness of the aid and therefore, cannot entertain legitimate expectations[219]. A positive decision of the Commission, therefore, cannot give rise to a legitimate expectation on the part of the aid recipient, firstly, where that decision has been challenged in due time before the Union Courts, which annulled it, or, secondly, so long as the period for bringing an action has not expired or, where and action has been brought, so long as the Union Courts have not delivered a definitive ruling. Those restrictive conditions also applied in a case where the Commission had repeatedly declared the aid comparable only to have each decision to that effect annulled by Union Courts[220]. The Commission has considered that a previous positive decision on a similar aid scheme may justify the legitimate expectations of beneficiaries of another aid measure. That approach is doubtful when the previous decision has declared a given measure to be compatible State aid since the case law stresses the need for assurances to have been given to the person invoking legitimate expectations and also underlines that an economic operator cannot rely on the maintenance of a practice that can be charged by the Commission. The public interest in preventing market distortions

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[215] See Opinion of Advocate General Jacobs in Case C-39/94, *SFEI*, point 76: "*It seems doubtful whether a diligent businessman ought to have realized that the measure in question constitute aid, because the measures are not ones which self-evidently constitute aid. Such circumstance may be justified in considering it inappropriate to order repayment of the aid*".

[216] Case C-5/89, *Commission v Germany*.

[217] Case C-192/12, *Magdeburger Muhlenwerke v Finanzamt Magdburger*, par. 47.

[218] Case C-169/95, *Spain v Commissio*n.

[219] Case C-116/01, *P&O European Ferries v Commissio*n.

[220] Case C-1/09, *CELF and ministre de la Culture et de la Communication*, par. 45.

requires repayment of illegal aid and encompasses the right of competitors to challenge positive decisions. Balancing the public interest against the private interest of the beneficiary, the Court of Justice concluded that where the Commission issues a second negative recovery decision after a first positive but not final decision (because subject a judicial review) has been annulled, the beneficiary cannot rely in legitimate expectations[221].

If the action of the Commission was foreseeable by such an operator, it cannot plead that principle of the measure is adopted[222]. In that respect, it is established that the aid beneficiary has the duty to ascertain, either from the Commission or from the national administration, whether or not the aid has been duly notified and approved.

As said before, the Court of Justice seems to justify invoking the principle of legitimate expectation in the presence of exceptional circumstances. At the same time, the European Judge does not provide a clear definition of what is meant by the expression exceptional circumstances. A notion of legitimate expectations that is based on the exceptional nature of the circumstances at issue results as very difficult to apply in concrete terms. It is difficult to imagine exceptional circumstances that could meet the interests of European law which respond to the need for recovery, with the exception, probably, of the Commission's hypothesis of prolonged inaction or the case in which the latter recognizes the beneficiaries a legitimate expectation in reference to the compatibility of the aid or, again, the case in which there is the impression that the measure in question does not constitute State aid.

The need to define circumstances which are exceptional excludes to a big extend the possibility to apply by analogy the case law of the Court of Justice. In this respect, national judges are substantially dependent on the preliminary rulings of the Court of Justice. But an approach based on the need to systematically request preliminary rulings necessarily damages the effectiveness of State aid law[223].

There are various examples of cases where the Commission in its decision took into consideration exceptional circumstances and refrained from ordering the recovery of unlawfully granted aid because such recovery would be contrary to the respect for the legitimate expectation of the beneficiary. One example concerns selective tax exemptions and tax reductions: in *Adria-Wien Pipeline* case[224], the Commission's decision stated that the wording of the Court's answer to the second question in Adria-Wien Pipeline may have led some beneficiaries to believe in good faith that the national measures would cease to be selective. In its decision, the Commission comes to the

[221] Case C-199/06, *CELF v SIDE*.

[222] Case C-265/85, *Van de Bergh en Jurgens v Commission*.

[223] DE PIETRO C., *The EU notion of legitimate expectations on the context of State aid law: what role for national judges?*, in V.V. A.A., *New Perspective on Fiscal State Aid*, Kluwer Law International, New York, 2019, 115

[224] Case C-143/99, *Adria-Wien Pipeline*.

conclusion that in this case the recovery would be contrary to the principle of legitimate expectations[225].

Moving on, to the substance and consistency of the principle of legitimate expectation, it should be emphasized that in order to qualify an assignment as legitimate, it is indeed necessary "*that there is a specific, objective reason for believing that the Commission has no objection to the aid measure*"[226] and that the beneficiary's expectation is attributable to specific acts of the European body.

To evaluate this condition, we need to know more about the legitimate expectation's doctrine, which can excuse recovery in a State aid case. The legitimate expectation standard, as interpreted by the EU Courts, is stringent. According to the Court of Justice, the legitimate expectation has to be created through the ''precise assurances'' by a European authority. The Court stated: "*the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration*"[227].

According to the Court, legitimate expectations arise when beneficiaries have received precise assurance by an EU institution. In a case, the Court broadened the recognition of legitimate expectations, already acknowledged in the contested decision of the Commission, exactly on the basis of previous assurances given by the Commission itself on the absence of aid element characterizing the tax regime in question[228].

The concept of 'precise assurance' has been interpreted widely in certain circumstances and this warrants that a beneficiary may, in 'exceptional circumstances', entertain legitimate expectations on the basis that the Commission adopts a new interpretation and application of EU State aid law, in particular, since this may have prejudicial retroactive effects on the beneficiary.

A person claiming legitimate expectations should prove that they received an assurance from an EU institution. The existence of legitimate expectations cannot, as said, depend on the behaviour of the Member State granting the aid. Therefore, the fact that the Member State concerned has not informed the aid beneficiary of the ongoing State aid investigation cannot be regarded as an exceptional circumstance capable of giving rise to legitimate expectation that the aid was lawful. Likewise, incorrect information provided by the Member State about the legality of the aid cannot under any

[225] Commission Decision of 9 March 2004 on aid scheme implemented by Austria for a refund from the energy taxes on natural gas and electricity, 2005/565, par. 66.

[226] GALLO F., *Inosservanza delle norme comunitarie sugli aiuti di Stato e sue conseguenze nell'ordinamento fiscale interno, in Rass. Trib.*, 6, 2003, 2296.

[227] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, par. 147.

[228] Joined Cases C-182/03 and C- 217/03, *Belgium and Forum 187 v Commission*, par. 147.

circumstances give rise to legitimate expectations, especially where the Commission has not even been informed of that information[229].

Not all EU institutions can be the source of legitimate expectations[230]: in case of a political declaration of the Council, it did not have legal consequences.

The Court of Justice accepted that legitimate expectations can also be based on implicit and general rather than specific assurances, and that the former can also be derived from the latter by interested third parties. This acknowledgement confirms that legal acts adopted by a European institution as well as its factual behaviour may provide a reasonable basis for legitimate expectations[231].

An assurance from an EU institution can take the form of a positive action or inaction. In line with the requirement that assurances by the Union administration must be precise, the main trend of State aid case-law is to require a positive action on the part of administration for legitimate expectation to arise[232].

Thus, the simple fact that the Commission was informed or should have been aware of the measure and it remained inactive would not be sufficient to create any legitimate expectations[233].

Likewise, the absence of explicit restrictions in a decision declaring an aid scheme compatible by the Commission excluding the eligibility of firms in difficulty or private undertakings cannot be deemed to constitute precise, unconditional and consistent information provided by the Commission that those undertakings can benefit from the scheme.

However, some case law in the State aid field seems to suggest that very prolonged inaction by the Commission and the length of the procedure could generate legitimate expectation[234]. It is not reasonable, in fact, for the beneficiaries to be confronted with an extreme time of uncertainty just because the Commission is not poised to use all its investigative powers. Such behaviour could well be seen as exceptional circumstances, all the more as it is the Commission's obligation to determine the compatibility of State aid with the common market[235].

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[229] Case T-109/01, *Fleuren Compost v Commission*.

[230] GRESPAN D., *Recovery of unlawful and incompatible aid*, in PESARESI N., VAN DE CASTEELE K., FLYNN L., SIATERLI C., *EU Competition Law - State Aid, Claeyns & Casteels*, 2016, 671.

[231] Case C-344/85, *Ferriere San Carlo*, par. 13; Case C-408/04, *Commission v Salzgitter*, par. 100.

[232] Joined Cases T-427/04 and T-17-05, *France Telecom v Commission*.

[233] Case T-332/06, *Alcoa Trasformazioni v Commission*; Joined Cases T-427/04 and T-17-05, *France Telecom v Commission*, par. 266; Case T-62/08, *ThyssenKrupp Acciai Speciali Terni v Commission*, par. 280. In a specific case, the Commission recognized that certain statements made by some of its members and statements contained in one of its previous decisions had created a legitimate expectation as regard the use of a tax benefit in case of acquisition of majority stakes in a certain jurisdiction, see Commission Decision of 12 January 2011 on the tax amortization of financial goodwill for foreign shareholding acquisition implemented by Spain.

[234] Case C-233/95, *RSV v Commission*, par. 17.

[235] WEIB W., HABERKAMM M., *Legitimate expectations in State Aid and CFI – Notes on the Judgements of September 9th, 2009 concerning the Basque Tax Cases*, in *EStAL*, 2, 2010, 537.

In a case[236], the Commission had delayed a procedure for twenty-six months with regard to an aid which was intended to meet the additional costs of an operation previously the subject of authorized aid and which did not call for a thorough investigation. The Court held that the Commission's conduct had created on the part of the beneficiary of the aid a legitimate expectation of such a nature as to prevent it ordering the recovery of the aid.

In another case[237], the Court confirmed the link between excessive delay of procedure and the protection of legitimate expectations. The Court stated that a delay by the Commission in deciding that aid is unlawful and that it must be abolished and recovered by a Member State may, in certain circumstances, establish a legitimate expectation on the recipients' part so as to prevent the Commission from requiring that Member State to order the refund of that aid, but such delay may be imputed to the Commission only from the time when it learnt of the existence of the aid in question.

However, in another case, the Court found that the lapse of five years could not be regarded as an unreasonable delay[238]. The Court seems to accept that in principle an unreasonable delay may suffice to constitute a procedural defect or undermine the principle of the protection of legitimate expectations, although in that case the procedure had not been unreasonably lengthy also because some of the delay was due to the Member State's behaviour[239]. On the other hand, in response to the claim of an applicant relying on the lack of action of the Commission in respect of an aid scheme which was known to the Commission, the Court stated that "*any apparent failure to act is irrelevant when an aid scheme has not been notified to the Commission*"[240].

In principle, the Court made very clear that mere silence of any European institution normally has no legally binding effects. The General Court held that doubts of the beneficiary ad to the character of the measure and inactivity of the Commission for a longer period of time are not sufficient to qualify as legitimate expectations[241]. Even a letter from a Member of the Commission to the beneficiary of the aid, by which it is informed that the aid has been approved, it is not sufficient to justify the legitimate expectations that the Commission will not decide to recover the aid[242].

On the consistence of the principle of the protection of legitimate expectation, and on its limits if declined towards the European institutions themselves, it is necessary to consider the following relevant precedents of the jurisprudence of the Court of Justice. The Court of Justice[243], with reference

[236] Case C-233/85, *RSV v Commission*.
[237] Case C-372/97, *Italy v Commission*.
[238] Case T-78/77, *Fleuren Compost*, par. 147.
[239] Joined Cases C-346/03 and C-529/03, *Atzeni and others*.
[240] Joined Cases C-183/02 and C-187/02, *Demesa and Territorio Historico de Alava v Commission*.
[241] Case T-55/99, *CEMT v Commission*, par. 128.
[242] Case T-129/96, *Preussag v Commission*.
[243] C-526/14, *Tadej Kotnik*, par.62-66.

to previous and consolidated jurisprudence, reiterated that, towards the European institutions, the principle of protection of legitimate expectations can be invoked if precise, unconditional and concordant reassurances, from authorized and reliable sources, have been provided to the interested party by the competent authorities of the Union. In fact, the right mentioned belongs to any person in charge of whom, an institution, a body or an organism of the Union has generated founded expectations, providing him with precise reassurances. In this context, it was added, however, economic operators cannot legitimately rely on the preservation of an existing situation which can be changed within the discretion of the institutions of the Union, especially in an area such as that of State aid, whose object implies a constant adaptation according to changes in the economic situation. Moreover, even if in principle the introduction of a transitory regime to protect situations arisen before the entry into force of a new regulation is appropriate, a mandatory public interest can prevent the adoption of transitory measures: in the case of the species (which concerned the retroactive application of State aid rules for support measures to banks in the context of the financial crisis), it was considered that "*the objective of guaranteeing the stability of the financial system, while avoiding excessive public spending and minimizing distortions of competition, it constitutes a superior public interest of this nature*".

In addition, the Commission admitted that it had created legitimate expectations also in the Spanish goodwill decision[244]. In that case, the Commission partially waived recovery because of the existence of the legitimate expectations of the beneficiaries of the aid. In fact, according to the Spanish authorities and the interested parties, legitimate expectations arose out of some Commission replies to written parliamentary questions and from the alleged similarity of the aid scheme to earlier measures which had been declared compatible by the Commission. The Commission recognized the existence of legitimate expectations for the period from the entry into force of the measure until the date of publication in the Official Journal of the opening decision on the basis of those parliamentary replies. The Commission conceded that it may create legitimate expectation by starting in a previous decision that it could not a priori completely excluded that a tax differentiation as regards transactions concerning third counties, notably where legal barriers to foreign acquisition existed, could be justified under State aid rules.

In a number of previous State aid cases[245], the Commission did not order the recovery of the aid due to the legitimate expectations of the parties to the decisions. In those cases and in others, the authority

[244] Commission Decision of 12 January 2011, C-45/07, on the tax amortization of financial goodwill for foreign shareholding acquisitions implemented by Spain.

[245] Commission Decision of 16 October 2002 on the aid scheme for finance companies implemented by Luxembourg, 2003/438/EC; Commission Decision of 16 October 2002 on the aid scheme for coordination centres implemented by Luxembourg, 2003/501/EC; Commission Decision of 11 December 2002 on aid scheme for central corporate treasuries implemented in France, 2003/883/EC; Commission Decision of 17 February 2003 on aid implemented by Netherlands

was based on a decision delivered on May 2nd, 1984[246] regarding tax relief for coordination services of multinational companies. The decision was never published on the Official Journal but was referred to in others documents[247]. The Commission has relied on the decision of May 2nd, 1984 in many later decisions, specifically to conclude that the beneficiaries under the scheme in those cases had a legitimate expectation that the aid would not be recovered. The Commission relied on the 1984 decision as a precise assurance in a number of State aid cases decided between 2002 and 2006. This is a crucial precedent which should not be underestimated either by the Commission or by alleged beneficiaries in more recent tax rulings cases[248].

Subsequently, the Commission reiterates therein that, by means on the 1984 decision, the Belgian scheme for coordination centres was initially found not to involve State aid. The Commission decided to deviate from the long-established approach only in 2001 and pursuant to a political initiative of the Council to counter harmful tax competition. Since, however, the Commission had not raised objections when it examined the initial Belgian scheme, it held that this decision created legitimate expectations not only for the Belgian authorities, but for a number of other Member States that had implemented similar schemes in the meantime. This line of Commission decision relies on an assurance in the form of a past Commission decision.

Thus, the Commission's prior public pronouncement that the Belgian coordination centre regime was not State aid created a legitimate expectation for taxpayers in Belgium and in other countries with similar regimes that those regimes were not aid.

It is worth noting that in the coordination centre cases, it was the Commission, not the EU Courts, that applied the legitimate expectations doctrine to justify recovery. Some commentators argued that although that doctrine applied to protect Belgian taxpayers from recovery, it could not bar recovery from taxpayers in other Member States because those Member States had not notified the Commission regarding their own regimes or received specific Commission approval. According to

for international financing activities, 2003/515/EC; Commission Decision of 17 February 2003 on aid scheme by Ireland for foreign income; Commission Decision of 24 June 2003 on aid scheme implemented by Belgium for tax ruling system for United States foreign sale corporations, 2004/77/EC.

[246] Royal Decree n. 187 of 30 December 1982 on the taxation of coordination centres.

[247] On this point, see JAROS K., RITTER N., *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid*, in *EStAL*, 4, 2004, 582. The authors, with reference to the Commission's decision to recognize legitimate expectations based on the 1984 decision, observed the Commission's approach is unusual and that the line of arguments adopted by the Commission is not convincing: on the one hand, the acknowledgement of legitimate expectations cannot depend on whether the Commission finds that the measure in question is sufficiently equivalent to a decision issued 20 years previously; and, on the other hand, such a weakly justified assumption of legitimate expectations is rather doubtful in the field of taxation, as the State aid element results directly from the nature of the respective tax regime and thus any decisions on measures adopted by one Member State which have been issued on the basis of its tax regime will not have any meaning for the measure adopted on the basis of the tax regime of another Member States.

[248] In Commission Decision 2011/5/EC on the tax amortization of financial goodwill for foreign shareholding acquisitions implemented by Spain, however, the Commission held that the 1984 decision could not be relied upon by Spain in order to invoke the existence of legitimate expectations as the measure at issue did not concern intra-group activities.

this position, the Commission applied the legitimate expectations doctrine too broadly in the coordination centre cases was not considered by the EU Courts[249]. The Commission, in principle, prepared to accept that new interpretations of State aid could give rise to legitimate expectations under EU law without the need for an assurance, in whatever form.

The Commission held that a company was entitled to entertain legitimate expectations that oral declarations, which were not per se legally binding, could not fall within the scope of Article 107 (1) TFEU[250] and, consequently, it did not order recovery.

The case law concerning the Belgian tax regime for coordination centres provides also a good example. In fact, by decisions in 1984 and 1987 the Commission declared that the tax regime of coordination centres in Belgium did not contain aid element. It repeated that line in a reply to a parliament question in 1990. However, in 1998, after a resolution of the *Ecofin* Council requiring investigating into tax exemption regimes, the Commission issued a notice in which it announced that it intended to examine or re-examine case by case all tax arrangements in force in the Member States. In July 2000 the Commission informed Belgium that it considered that the coordination centres scheme constituted an existing incompatible State aid and it started the existing aid procedure. Since the Commission and Belgium did not find an agreement, in February 2003 the Commission closed the existing incompatible State aid procedure with a negative decision, which was subsequently amended in April 2003. The Commission conceded that the abrupt withdrawal of the 1984 decision might be contrary to certain fundamental principles of Union law, in particular legal certainty and protection of legitimate expectations. It recognized that centres were established, investments made and commitments entered into a reasonable and legitimate expectations of a certain degree of continuity in the economic conditions including the tax regime. Consequently, the Commission permitted the centres that held an approval on December 31st, 2000 to continue to enjoy the benefits

[249] LUJA R., *EU State Aid Control: Balancing Tax Benefits and Fair Competition in Pursuit of an Internal Market*, in *Comparative Fiscal Federalism*, 2016, according to which "*What this effectively comes down to is that a taxpayer should second-guess the actions of his own government, determine whether or not there is state aid and then check whether it was either notified and approved of or whether a block exemption was properly applied. So [the] doctrine is as simple as it is controversial: any businessman should know of and understand EU State aid law, and he cannot merely rely on what his government is telling him. Only actions from the EU's institutions might effectively contribute to legitimate expectations*".

[250] Commission Decision of 2 August 2004, 2006/621/EC, on the State aid implemented by France for *France Telecom*, par. 263-264: "*The Commission recognizes that this is the first time it has had to examine whether this type of conduct constitutes aid. In so far as the aid depends, as a result, on con- duct which preceded the notification of the shareholder loan proposal, a diligent operator could have had confidence in the lawfulness of the conduct of the Member State concerned, which, for its part, had duly notified the loan proposal. As AG Darmon stated in his Opinion in Case C-5/ 89, 'the doubts with which some undertakings may be assailed, when faced with 'atypical' forms of aid, as to whether notification is necessary should not be made light of'. In conclusion, the Commission finds that France Télécom could legitimately have confidence in France's conduct not constituting State aid. In the light of the above, the Commission considers that, in the present case, ordering the aid's recovery would be contrary to the general principles of Community law."*

of the aid scheme until the end of their period of approval, if it was ongoing at the time when the decision was adopted.

At the same time, the Commission decided that as from February17th, 2003 (the date in which the Commission decision was notified to Belgium) it would be illegal to grant new approvals for coordination centres under the scheme as well as to grant renewals for centres already benefiting from that tax regime[251].

The Court recognized that the 1984 and 1987 decisions as well as the 1999 reply created an expectation that the scheme in question did not contain aid[252]. According to the Court of Justice, "*the centres were on any basis entitled to expect that a Commission decision reversing its previous approach would give them the time necessary to address that charge in approach. Indeed, the regime is a tax regime under which authorizations for a period of 10 years are granted, which calls for measure of an accounting nature and financial and economic decisions which cannot be taken in such a brief time by a prudent economic operator (...). The period which elapsed between the publication of the decision to initiate the formal investigation procedure of 20 June 2002 and the contested decision of 17 February 2003 was not sufficient to enable all the centres to address the possibility that there might be a decision terminating the regime in question".*

The Court concluded that the coordination centres were legitimately entitled to expect that, in case of modification of the Commission policy, there would be a reasonable period for them to adjust to the consequences of the decision[253]. At the same time, the Commission did not provide sufficient evidence that there was an overriding public interest which might take precedence over the interest of the coordination centres to be granted such transitional period.

It should also be remembered that the principle of protection of legitimate expectations, like the principle of legal certainty, concerns situations existing before the entry into force of new provisions, and not situations that are temporary[254]. The applicant was in the temporary situation in which a Member State had notified a new aid project to the Commission and requested that it examined the compatibility of the aid with the Union rules. Moreover, an undertaking that started to execute an investment project before the notification of the correlative aid could not invoke the principle of protection of the legitimate expectations[255].

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[251] Commission Decision of 17.2.2003, C-564/2003, on the aid scheme established by the Kingdom of Belgium for coordination centres established in Belgium, par. 117.

[252] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*.

[253] Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission, par. 163*.

[254] Case C-34/92, *GruSa Fleisch v Hauptzollamt Hamburg-Jonas*, par. 22.

[255] Case T-551/10, *Friel Acerra v Commission*.

Finally, the last condition for successfully invoking the principle concerns the balancing of the interest of the private person in the stability of the situation and the public interest pursued by the Union measure. In cases where a legitimate expectation has been recognized concerning unlawful and incompatible aid in general, the balancing prevents recovery of the aid but does not prevent its termination or modifications[256]. According to the Court, legitimate expectations can be acknowledged only if there are no overriding public interests, which must prevail over the interests of the beneficiaries[257]. In this way, the Court has very much limited the autonomy of the national judges in applying the respective national notions under the principle of procedural autonomy.

In this view, the requisite for claiming legitimate expectations is that the result of a comparison between the public interest in the recovery of the aid and the private interest in keeping it, is favourable to the beneficiary opposing the recovery. It remains unclear, however, how such a test should be made. As stated by the Court[258], the comparison of the aforementioned interests does have to show that private interest prevails over the public interest. It is for an EU institution to prove the existence of an overriding public interest in excluding protection based on legitimate expectations.

In the leading case *Commission v Germany*[259], the German government argued that the principle of legitimate expectations under German law obliged the national authority to give the protection of legitimate expectations of the undertakings that received the aid, greater weight that the public interests of the European Union in having the aid recovered. The Court of Justice rejected this argument. As the Court of Justice has consistently ruled, in principle the recovery of aid unlawfully paid must take place in accordance with the relevant procedural provisions of national law, as long as these provisions are to be applied in such a way that the recovery of the aid is not rendered impossible in practice. Where a provision, such as that contained in German Code, requires the various interests involved to be weighed before a defective administrative measure is withdrawn, the European interests must be taken fully into considerations.

This principle was taken into account in another case[260]: the German government argued again that the protection of legitimate expectations of the undertakings which received the aid must prevail over the European public interest in having the aid recovered. In addition, German law prohibited the revocation of an administrative measure granting a benefit more than one year after the administrative authority became aware of the circumstances constituting grounds for revocation. The Court of

[256] See Opinion of Advocate General Léger in Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, point 370.

[257], Joined Cases C-182/03 and C- 217/03, *Belgium and Forum 187 v Commission*, par. 148.

[258] Case C-74/74, *CNTA*, par. 44.

[259] Case C-94/87, *Commission v Germany*.

[260] Case C-5/89, *Commission v Germany*.

Justice held that a Member State may not plead provisions, practices or circumstances in its own internal legal system as a reason for not complying with European law obligations. In this case, the one-year time limit would clearly render the application of Article 108 TFEU impossible in practice. The Court of Justice ruled that undertakings which received aid should not have any legitimate expectations unless the aid has been granted in accordance with Article 108 TFEU.

The beneficiary has the burden of demonstrating the following circumstances: the received assurances to the compatibility of the aid with the internal market (or of a lack of aid in the measure under examination), and the assurance in question was provided by an EU institution; that even the most prudent person would not have been able to predict a change that could adversely affect their legal interests; and, finally, a comparison and weighing of a specific private interest against a public interest give precedence to the private interest.

It is important also to underline the application of the principle at national level. There are, in fact, two key cases in which the defence of legitimate expectations is examined: first, before the Commission prior to an order for recovery; and secondly, before the national courts of Member States when enforcing an order for recovery issued by the Commission.

General Court has stated that aid beneficiaries are entitled to invoke the principle of protection of legitimate expectations not only exclusively before national courts, but also before Union Courts, in particular because Article 14 (1) of the Procedural regulation requires the Commission to take into account the general principles of Union law when it adopts a State aid decision[261].

It is not merely possible to claim legitimate expectations before the European Courts, since a Commission decision naturally precedes an action for annulment. Thus, the first possibility to make such claims is before the Commission, under the procedure of a formal investigation. This is a natural consequence since, according to the Procedural Regulation Article 6, should the Commission launch such a procedure, interested parties are to be called upon to submit comments.

National Courts have also the role to guarantee the beneficiaries' fundamental rights such as the principle of protection of legitimate expectations[262]. In fact, only national judges can preserve the legitimate expectations of beneficiaries of unlawful aid during the period that precedes the decision of the Commission and, even after that period, when the measure is considered by the Commission to be compatible with the internal market. An effective protection of legitimate expectation implies the autonomy of national judges. But the availability of legitimate expectations as a defence in national courts and before the European Courts increases the possibility of discrepancy in interpretation and application of the test developed by the Court of Justice. There is a gap in practice

[261] Case T-62/08, *ThyssenKrupp Acciai Speciali v Commission*, par. 272-276.
[262] Case C-24/95 *Alcan*; Case C-5/89, *BUG-Alutechnik*; Case C-223/85, *RSV*.

where a beneficiary, which has not challenged a Commission decision in terms of Article 263 TFEU, raises the defence of legitimate expectations before the national courts. A tension between the principle of administrative finality of the Commission decision and the need to afford protection of legitimate expectations of the beneficiary exists[263]. A proposition was forwarded for national courts to apply the test developed by the Court of Justice and consider exceptional circumstances only where they were not made known to the Commission during the investigation procedure since the beneficiary could not rely on that evidence at that stage[264].

The fact that the defence of legitimate expectations can be raised both before national courts and the European Courts has given rise to a discrepancy in the level of protection of legitimate expectations of beneficiaries present under the relevant national laws generally compared to that applicable within the context of State aid[265].

The question, in this context, is to what extent national courts can rely on the national version of the principle of protection of legitimate expectations. According to the Court of Justice, full respect of the principle of effectiveness requires that also the national principle of legitimate expectations is left unapplied when the State aid has not been duly notified to the Commission[266].

But the reality is different from the principle. Although, the enforcement of State aid law at national level is governed by the principle of procedural autonomy, the power of national judges has been substantially limited through the case law of the Court of Justice. In fact, the Court has developed a very stringent notion of legitimate expectations[267], which not only substantially limits the application of the correspondent national concepts, but, at the same time, makes national judges actually dependent on the preliminary rulings of the Court of Justice.[268].

4. Concluding remarks

As widely illustrated, the search for a balance between interests that takes into account also and above all the protection and rights of taxpayers, in particular in the tax area, is limited and the actual risk, in terms of concrete effectiveness, is high since the exercise of taxpayers' rights is prevented.

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[263] JAROS K., RITTER N., *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid,* in *EStAL*, 4, 2004, 574.

[264] GORMSEN L., *European State Aid and Tax Rulings*, Edward Elgar, 2019, 71.

[265] Case C-213/06, *EAR v Karatzoglou*, par. 33.

[266] Case C-24/97, *Alcanll*.

[267] Commission Notice on the Enforcement of State Aid Law by National Courts, 2009/C 85/01, 2009, par. 32.

[268] DE PIETRO C., *The EU notion of legitimate expectations in the context of State aid law: what role for national judges?*, in V.V. A.A., *New Perspective on Fiscal State Aid,* Kluwer Law International, New York, 2019, 104.

In the European Union, there are divergences in the national tax ruling systems implemented in each of the EU Member States. This coexistence of heterogeneous rules may be considered an obstacle to cross-border businesses within the European Union as taxpayers need to deal with difficulties in complying with as many tax administrations as the number of jurisdictions in which they are involved. Therefore, tax rulings can often produce a more certain and thus better taxation.

The notion of fiscal aid, as seen, is highly uncertain and questionable. In fact, there are no clear or foreseeable boundaries, even in light of the recent decisions of the European Commission on tax ruling and the new methodological approach for identifying fiscal aid and for defying the arm's length principle.

A rather uncertain and indefinite picture emerges identifying as a benchmark the general principles of European Union, as well as the application of the European principles in tax cases by the Court of Justice, and therefore comparing the position of the taxpayer in State aid with the standard of the rights foreseen at a general level in the European Union.

The gap in taxpayer rights in the area of State aid and the different application in State aid area (extremely restrictive) of the European principles it seems not justified. EU Courts and the Commission, in fact, advocate a specific and stricter meaning for these principles in the sphere of State aid, whose recognition is granted only in exceptional circumstances. This particularly narrow meaning of legal certainty and legitimate expectations is unique and substantially different from the scope we usually find in common EU law, national Member State's order or International law.

However, assigning a stricter meaning and limiting the application of general principles of law, which are, moreover, the basis for protecting the rights of taxpayers, basically means depriving these principles of content.

As said, the principle of legal certainty and its corollary, the principle of protection of legitimate expectations, are described as “superior rule of law” for the protection of individuals[269], as fundamental principles of the EU[270] and as general principle[271].

The principle of legal certainty and the protection of legitimate expectations constitute general principles of Union law, by reference to which the Union Courts will review the legality of the acts of the Institutions. Furthermore, the Court of Justice has also stressed that the principle of legal certainty is all the more prominent when the measure at issue is capable of having financial consequences[272].

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[269] Case C-74/74, *CNTA v Commission*; Case C-152/88, *Sofrimport v Commission*.

[270] Case C-104/97, *Atlanta v European Community*; Case C-17/03, *VEMW and others*.

[271] Joined Cases C-104/89 and C-37/90, *Mulder and Others v Council and Commission*; Case C-403/99, *Italy v Commission*.

[272] Case C-94/05, *Emsland-Starke*, par. 43.

The substantive content of these principles requires that Union legislation must be certain and its application foreseeable by persons. Therefore, when rules are altered certain protection can be granted to situations legitimately entered into by natural or legal persons irrespective of whether the Commission actually knows of all the concrete situations and legal relations which are affected by the alteration of those rules. Moreover, legal certainty prevents the Commission from indefinitely delaying the exercise of its power.

The EU notion of legitimate expectations, it is good to reiterate, has the fundamental function of protecting individuals against the retroactive effects of the measures taken by the EU institutions. In the field of State aid, the notion of this principle is aimed at protecting the beneficiary of an aid which had legitimately expected this measure to be lawful.

But, in its concrete application, it remains completely uncertain and substantially impossible to invoke. The case law dealing with legitimate expectations is not transparent as applied to the field of State aid. Moreover, the notion of legitimate expectations constitutes an exception to the application of positive law and leads to disregarding an underlying rule without disputing its validity.

Two main factors differentiate State aid cases from the general cases of application of the principle of legitimate expectation. First, as seen above, the protection of legitimate expectations in the field of State aid serves the purpose of resisting (the adoption of) a recovery order in relation to an unlawful State aid. In contrast with the situation where a European institution adopts a new norm using its largely discretionary powers to do so, the Commission, in the field of State aid, merely applies the law as it stands in Article 107 and 108 TFEU (under the control of the Court). Therefore, any possible uncertainty facing parties in a State aid case is related to the ambiguity of the law itself rather than to the unpredictable behaviour of a legislator or regulator. In this respect, the application of the notion of legitimate expectations to State aid cases simply seems at odds with the principle *nemo jus ignorare censetur*.

Second, it has already been mentioned above that, in substance, the protection of legitimate expectations aims at preventing the deterrence effect that an excessive degree of uncertainty could have on economic agents. In other words, economic agents must be protected against unreasonable and unforeseeable increase in the costs of complying with new regulatory provisions.

It is true that this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities. The principle of legitimate expectations cannot be applied to block future legislation, so long as the effects are not retroactive. This emerges in the tension between a beneficiary's right to reasonable legitimate expectations and the inherent retroactive character of an order of recovery.

At the same time, it is equally true that European institutions have the onus to perform their duties in a manner which is predictable. The application of a new interpretation and application of State aid, like any other aspects of European law, should be forward looking even in the absence of a precise assurance. Furthermore, in the specific application of the principle of protection of legitimate expectations in the State aid area, there is a double protection of the public interest. In fact, one of the conditions necessary to recognize the legitimate expectation of the taxpayer is the prevalence of the private interests over public ones (so called proportionality test). But, in reality, the Court of Justice, as seen, justifies the different and restrictive application of the principle precisely on the basis of the general and public interest involved in the area of State aid. Consequently, this double protection seems not justified as it translates into a reinforced affirmation of the unsurpassed public interest and an impediment to effective access to the principle.

All this without considering that the principle manifests itself in other key rules of European law: first, in limitation periods which requires that recovery of aid is limited to what the beneficiary received for the past ten years; secondly, in the idea that rules, including State aid rules, should be clear and precise, also in their application, and that such rules should never apply retroactively.

Regarding the general prohibition on the retroactive application of legal norms, this can only be circumvented when the precise conditions are fulfilled[273]: "*Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected*". Only where there is no significant individual interest may the public interest prevail retroactively.

With regard to this very last aspect, it can reasonably be argued that the Commission, in its recovery orders in the recent tax cases, considering that they are based on a new interpretation of State aid, should have applied the mentioned test before engaging in a new interpretation of State aid law to the detriment of a beneficiary's already established legal and economic situation. The Commission's failure to apply this test renders the order of recovery in breach of the principles of legal certainty and protection of legitimate expectations. Furthermore, when the Commission decides to change the way in which it applies the State aid rule to tax arrangements, it ought to give affected parties, in these tax cases the national tax authorities and the multinational companies, a reasonable transitional period to adjust their affairs. This is what national tax authorities are obliged to do.

An overriding public interest could not justify that the Commission modifies the rules without even adopting transitional measures for the protection of the expectations which a beneficiary of aid might legitimately entertain.

[273] Case C-98/78, *Racke*, par. 20; Joined Cases C-212 to 217/80, *Meridionale Industria Salumi and Others*, par. 10.

A final issue worth mentioning is the lack of opportunity to invoke the proportionality principle within the recovery phase of fiscal aid. Referring to this principle, such claims are consistently dismissed by EU courts, reasoning that the obligation to recover aid is a logical consequence of finding it unlawful[274]. The Court of Justice holds that recovery for the purpose of re-establishing the previously existing situation cannot, in principle, be regarded as disproportionate to the objectives of the Treaty provisions on State aid[275]. But the proportionality principle refers to all fields of EU law, as confirmed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality. State aid law is no exception here. The proportionality principle also refers to all kinds of actions by EU institutions. The principle of proportionality may also consider in the evaluation of transitional provisions to make sure that individual rights are not violated. The order for recovery is in fact, in principle, restorative and not punitive in nature.

Instead, actually, in the State aid field, the existence and possible injury of the principle of proportionality can be asserted only in the constancy of a judgment instituted following an appeal for annulment or non-fulfilment, by the applicant, required to demonstrate, through concrete elements, that the obligation reimbursement of individual Aid imposed on it is clearly disproportionate to the objectives of the Treaty[276], and the cited principle is considered, in particular, only in the relationship between the *quantum* for which recovery is claimed, on the one hand, and the economic advantage concerning and actually enjoyed by the beneficiary company, on the other hand[277].

In this sense, it is stated that if the recovery measure is aimed at restoring the *status quo ante*, the sum actually requested must necessarily be equivalent to the economic and financial advantage actually derived[278].

Ultimately, it is assumed that, in order to protect taxpayers' rights, the principle of legal certainty should be enhanced so as to avoid non-retroactive or other undesirable effects arising from legislation or administrative interpretations. Thus, a clear, simple and consistent legislative drafting procedure is considered necessary. In addition to an appropriate legislative drafting process, the development of a well-defined tax ruling system, an interpretation tool for tax administration and compliance, is also considered to be one of the keystones to enhancing legal certainty. The ruling systems provide guidelines on which taxpayers, at least to a certain extent, can rely for advance knowledge of what is expected with regard to the likely tax treatment of their transactions.

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[274] Case C-142/87, *Tubemeuse*; Case C-169/95, *Spain v Commission*.

[275] Case C-372/97, *Italy v Commission*, par. 103.

[276] Joined Cases T-298/1997 and T-312/1997, *Alzetta e altri*.

[277] FONTANA C., *Gli aiuti di Stato di natura fiscale*, Giappichelli, Torino, 2012, 347.

[278] GALLO F., *Inosservanza delle norme comunitarie sugli aiuti di Stato e sue conseguenze nell'ordinamento fiscale interno, in Rass. Trib.*, 6, 2003, 2289.

Without taking into consideration, moreover, the national limitation of the invocation of the principle. In fact, with regard to the legal validity of a decision of a national court, the taxpayer's trust only appears to be worth protecting under narrow conditions and only if the court, in compliance with the *acte claire* doctrine, has not violated its duty to present. However, this only protects the taxpayer involved in the procedure. For taxpayers who are not involved in the procedure, only an appeal to the protection of legitimate expectations is considered, but also not retrospectively in terms of time, but only after the final decision based on a disposition[279]. In this context, it becomes critical to find a point of balance between the need to guarantee a uniform application of State aid law and the need to assure that national judges have a degree of autonomy which guarantees an effective enforcement of State aid law at national level and legal certainty. The hoped for harmonization of EU rules and national laws should start with the provision of detailed rules to identify the beneficiaries and to determine the amount to be recovered, explicitly provide a domestic legal basis for administrative repayment orders and align national limitations periods with the European limitation period of ten years.

In conclusion, in light of the superior analysis and evaluation, it is important to emphasize that one of the key elements to further legal certainty in the Union is to construct laws that are designed to be absolutely clear and easily understandable so that they can be correctly implemented in an intelligible, reasonable and consistent manner. In order to protect taxpayers' rights, the principles of legal certainty and the protection of legitimate expectations should be enhanced so as to avoid non-retroactive or other undesirable effects arising from legislation or administrative interpretations. Thus. a clear, simple and consistent legislative drafting procedure is considered necessary. In addition to an appropriate legislative drafting process, the development of a well-defined tax ruling system, an interpretation tool for tax administration and compliance, is also considered to be one of the keystones to enhancing legal certainty, with guidelines on which taxpayers, at least to a certain extent, can rely for advance knowledge of what is expected with regard to the likely tax treatment of their transactions.

[279] SCHÖNFELD J., ELLENRIEDER B., *Vertrauensschutz bei steuerlichen Beihilfen*, in *IStR*, 2018, 444.

Part II. Open question on Recovery level

1. The specific questions raised in the context of recovery of Fiscal Aid

For the sake of completeness, it is considered useful to proceed with the analysis of various issues that emerge in the recovery phase, especially when the aid to be recovered consists of a fiscal aid.
The most prominent issues that arise in relation to fiscal State aid are manifold. For example, the ten-year limitation period for the recovery of fiscal State aid does not always coincide with the domestic limitation periods that apply to domestic taxes. Moreover, the fiscal State aid must be recovered from the beneficiary of the aid, but the concept of "beneficiary" is interpreted in a broad manner and, therefore, this does not exclude recovery at the group level and legal proceedings against recovery decisions in relation to fiscal State aid may differ from administrative law or tax law proceedings. In fact, because fiscal aid is almost always granted in the form of a scheme, the Commission will usually not be in a position to identify each individual beneficiary from whom the Member State must require reimbursement of the aid, nor to quantify the precise amount to be recovered from each recipient. This is the responsibility of the Member State concerned. However, it is incumbent upon the Commission to verify that the Member State has correctly implemented the recovery decision. For that purpose, the recovery decision will specify a time-limit within which the Member State will be required to provide complete information on the identity of the beneficiaries, on the amounts of aid involved and on the national procedure applied to obtain recovery. The Member State will also be required to provide documentation showing that the beneficiaries have been notified their obligation to repay the aid.
All specific questions raised in the context of recovery of Fiscal Aid, which will be analysed below, appear to be closely connected to the fact that the recovery phase of State aid is mainly carried out at national level. The role of national judges and national authorities is extremely important as aimed at protecting the rights of individuals under Article 108 (3) TFEU[280].
An effective enforcement of fiscal State aid law necessarily requires a direct connection of the rules at national level, clarity on the legitimacy of fiscal State aid control and the application of a clear notion of fiscal State aid under Article 107 (1) TFEU.

[280] See DE PIETRO C., *Introduction: Legitimacy and effectiveness of Fiscal State Aid Control and the role of national tax judges*, in V.V. A.A., *New Perspective on Fiscal State Aid*, Kluwer Law International, New York, 2019, 2, according to which, since the role of national judges consists also in evaluate the existence of possible fiscal State aid under Article 107 (1) TFEU and in the recovery phase, this central position requires a substantial autonomy of national tax judges and the existence of clear rules defining their powers.

In general, in the context of disputes on the recovery of State aid, jurisprudence shows a tendency to exceed in the non-application of national rules. This trend is criticized and traced back to European principles. Indeed, to ensure the effective implementation of European law, the Court of Justice has developed the principle of equivalence and the principle of effectiveness. But such principles can justify the non-application of national procedural rules only where they make protection practically impossible. Therefore, based on the principle of procedural autonomy of the Member States, all interventions restoring European law, involving property, tax or extra-tax relations, between States and citizens, administrated or taxpayers, must be implemented in the ways and terms provided by each national system for normal equivalent shares. And this is indifferently, both for the actions for the reimbursement of taxes, or for other public levies, collected in violation of European law, and for the recovery of State aid wrongly used. In the absence of a (desirable) specific European system, any and all restorative intervention of European legality must be implemented in the ways and terms provided by each national system for the normal equivalent actions, without prejudice, however, to the actual possibility of experiencing the action.

Where the protection of internal subjective situations affected by laws and implementing measures in contrast with the constitutional rules is resolved on the level of mere illegitimacy, placing the protection of subjective situations of European significance on the level of radical disapplication configures an intolerable difference in treatment with respect to balance between constitutional and European values[281]. This aspect, therefore, determines a lack of harmonization of the recovery rules and a differentiation within each Member State which can lead to various concrete problems which ultimately impact on the situation of the taxpayer.

In most Member States, the recovery procedure is normally determined by the nature of the measure on which the granting of the aid is based. In this sense, it is worth noting that the peculiarities of fiscal aid may lead to the introduction of specific or tailored recovery procedures[282]. The Spanish authorities, for example, rely directly on the enforceable character of the recovery decisions, save for fiscal aid. In the case of fiscal aid, an ad hoc recovery procedure has been introduced in 2015, which regulates the rules to be followed for the enforcement of decisions to recover State aid. An ad hoc law to allow recovery of tax aid has also been adopted in Belgium. This trend is not uniform: the recently adopted Dutch law on aid recovery explicitly excludes tax measures from its scope.

[281] DEL FEDERICO L., *Le controversie sul recupero degli aiuti di stato nella giustizia tributaria italiana: profili critici, orientamenti giurisprudenziali e linee evolutive*, in *Riv. trim. dir. trib.*, 3, 2012.

[282] Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001), carried out by Spark Legal Network, the European University Institute, Ecorys and Caselex, in cooperation with a network of national legal experts, for DG Competition of the European Commission.

It should be noted that a new Recovery Notice was recently adopted. On July 22nd, 2019, the European Commission published a new State Aid Recovery Notice. The new Notice replaces the Recovery Notice of 2007 which was introduced to address the slow and sometimes inadequate implementation of State aid recovery decisions by EU Member States. Without actual recovery of unlawful aid, the State aid rules are largely ineffective. As a consequence, the Commission considered actual and speedy recovery essential to an effective State aid policy.

The new Recovery Notice provides, in respect of the past, more details on certain aspects of the recovery procedure, in particular on how the beneficiaries of the aid and the amount to be recovered are to be identified. The new Notice also contains specific details for recovery of aid granted through tax measures, which constituted a focus of State aid enforcement in recent years. It states, for example, that national limitation periods applicable to recovery of tax arrears must be left unapplied if this would impede full recovery of the aid.

Despite some critical comments from stakeholders, the final version of the Notice, however, does not contain many substantive changes compared to the draft. Stakeholders had been particularly critical of the, in their view, one-sided reference in the draft Notice to case law which sees few limitations on the recovery of State aid. According to them, the Commission should accept that recovery should not be attempted in some instances, e.g. if the Commission has created legitimate expectations, when the necessary information for recovery is unavailable, or when a national court ruling dealing specifically with the existence of aid becomes final. Despite these reflective inputs, the Commission did not soften its strict approach in the final version of the new Recovery Notice.

Several parties had also pointed to continued uncertainty over the identification of aid beneficiaries and the quantification of the aid amounts to be recovered. Although the new Notice contains additional clarifications on this, there also appears to be a tendency in the Commission's decisional practice to leave these matters open in the original decision which identifies the existence of unlawful aid and orders its recovery. Although lack of cooperation of Member States and beneficiaries may sometimes explain this approach, it leads to further uncertainty, also on this point, during the recovery process and seems to have played a role in the recent annulment of some Commission decisions by the General Court.

2. Limitation period: deadline for recovery and interruption of the prescription

The provision of a limitation period serves the purpose to achieve legal certainty for those cases where the grant of unlawful aid has remained undetected for a long period of time. In the case in which after more than ten years, no competitor complained about the grant of unlawful aid to the Commission, it

can be assumed that the grant of the unlawful aid has not caused a sustainable distortion of competition. The Commission, therefore, is only entitled to request the recovery of an aid within a period of ten years. This deadline starts as of the point in time at which the aid is granted to the beneficiary as individual aid or in the context of an aid scheme.

In the case of a scheme the relevant date is the date in which the individual aid was granted to the recipient under an aid scheme and not the date in which the scheme itself was introduced[283]. It follows that the limitation period for recovery starts to run, not on the day on which the scheme was introduced but on the day on which the aid was actually granted to the recipient. The determination of the date on which aid was granted may vary depending on the nature of the aid in question.

Moreover, in case of an aid scheme providing for an annual grant of aid the limitation period starts to run afresh each time an advantage is actually granted, which may be on an annual basis[284]. According to the Court, the limitation period begins to run on the day when the aid can be considered being granted. The General Court concluded that the actual presence of aid can only be established on an annual basis by comparing the normal rate of taxation and the rate applicable to the beneficiary, and thus the limitation period cannot start running on the date in which the aid scheme was first introduced[285].

The limitation period is interrupted by any action taken by the Commission or by the Member State acting in the request of the Commission with regard to the unlawful aid. To interrupt the limitation period, the Commission does not need to adopt a formal act, such as a decision to initiate a formal investigation or an information injunction, but may simply make a request for information pursuant to Article 10 (2) TFEU[286]. Furthermore, it is not necessary for the beneficiary of the aid to be aware of the request for information for the limitation period to be interrupted[287].

According by Article 15 of the Procedural Regulation, after each interruption, time starts running afresh and the limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union[288].

An interesting issue arising in the fiscal field and in the case that a measure is State aid and that recovery is decided, is the one of the statute of limitation. In fact, what if the taxpayer has filed its tax returns based on the applicable laws in force at that time, has had its tax liabilities assessed by the tax

[283] Case C-81/10, *France Telecom v Commission*.
[284] Case C-81/10, *France Telecom v Commission*, par. 82-83.
[285] Joined Cases T-427/04 and C-17/05, *France v Commission*.
[286] Case T-369/00, *Departement du Loiret v Commission*, par. 77.
[287] Case T-369/00, *Departement du Loiret v Commission*, par. 84.
[288] BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements*, in *European Taxation*, 2016, 428.

authorities of its State of residence, has paid its tax charge and no claim is introduced in this respect within the prescription period provided by the domestic law, and, only afterwards, a measure this taxpayer has benefitted from is considered incompatible aid that has to be recovered? Will the taxpayer be forced to repay the amount of aid it has benefitted from, despite the fact that domestic prescription applies?

It is argued that as a general rule, State aid assessment is performed by the EU Commission as an *ex ante* procedure, so that the taxpayers ideally would not end up in a situation where they have to repay any amount. This situation is the theoretical and desired frame created by the EU Commission. In reality, however, it is not rare that a measure is considered State aid while already implemented and recovery is ordered. A legally acceptable approach would consist in objecting that the principle of legitimate expectation of the taxpayers is recognized in certain circumstances, so that this may lead to existing aids being repealed or amended, but without recovery. But, as seen above, this defence is far from linear and easy.

Finally, it is necessary to note that the limitation period in relation to State aid recovery may even be extended to take into account the period during which the decision of the European Commission was under appeal. As such, the limitation period may severely reduce the fiscal State aid risk protection.

In addition, in relation to the retention of records and documents, a tax agreement generally contains specific provisions dealing with confidentiality, as well as the term during which relevant records need to be retained by the target group. Note that, as with the limitation period in relation to tax assessments, this retention obligation is often limited to a fixed period of time, not uncommonly seven years. As a result, fiscal State aid recovery may cover a period exceeding the period in relation to which these records have been retained. This could mean that, ultimately, the company is no longer in a position to come up with proper documentation in relation to the period during which it is perceived to have received fiscal State aid, with the result that the company will be in a worse position from the standpoint of obtaining proof. This is particularly relevant in determining the amount of the tax benefit that is being recovered, in respect of which, typically, information from the taxpayer may be needed.

3. Quantification of recoverable Fiscal Aid. Tax credits and restoring the *status quo*

The purpose of recovery, as accepted by the Court of Justice and the General Court, is to restore the previously existing situation (*status quo*) by removing the financial advantage. In this respect, the recovery is not intended to set enterprises back beyond this *status quo*.

The difficulty in determining the exact amount of tax aid to be recovered also contributes to uncertainty of rules. In so far as the calculation of the amount of aid to be recovered may call for consideration of tax regimes in which the basis of assessment, rates, and rules governing recovery are fixed directly by the relevant domestic legislation, the Commission is merely entitled to make a general statement that the recipient is obliged to repay the aid in question and to leave it up to the national authorities to calculate the exact amount of aid to be recovered. The Commission, in fact, is not obliged to determine the exact amount of aid to be recovered, but it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount; it is merely required to indicate that the tax situation must be restored to that which would have prevailed if taxation had been imposed without the ruling, which calls for the recovery from the beneficiaries of the difference between theoretical standard tax, which may not necessarily take into account the incidence of foreign double taxation[289], and the tax effectively paid as a result of the ruling at issue.

As a prerequisite for adopting a decision ordering the recovery of fiscal aid, as said, the Commission must have established that the fiscal measure at hand, which has been put into effect by the Member State, conferred a selective advantage on certain economic operators or on certain economic sectors ("*favouring certain undertakings or the production of certain goods*" according to the terminology in Article 107 (1) TFEU). In this context, it is common ground that the tax advantages covered by the prohibition of State aid may take very different forms[290].

Nonetheless, only an undertaking which has actually benefited from the tax measure entailing a selective advantage will be required to reimburse the aid. At the stage of recovery of the aid it is therefore necessary to look at the individual situation of each undertaking concerned. Thus, although an undertaking may be eligible to apply for a particular tax exemption or another type of fiscal benefit, it should only be subject to recovery if it has indeed availed itself of that possibility and fulfilled the necessary conditions for that purpose. If no aid has been put at its disposal, then it enjoyed no advantage that it should forfeit. For instance, in the case of aid granted in the form of a reduction in the rate of tax levied on profits, the advantage only accrues to those undertakings that have indeed made profits during the relevant period. A tax credit conditional on carrying out a particular activity or investment will only benefit the undertakings which meet those conditions and which are in a position to offset the tax credit against a tax liability.

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[289] CONTRINO A., *Recupero degli aiuti di Stato concessi a imprese di Paesi non europei e protezione dei diritti dei contribuenti mediante il ricorso ai Bilateral Investment Treaties (BITS),* in *Riv. trim. dir. trib.*, 2020.

[290] DI BUCCI V., *Direct Taxation, State Aid in Form of Fiscal Measures,* in RYDELSKI, *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, 76, London, 2006.

In certain cases, however, the effects of a temporary tax benefit may extend beyond the fiscal years during which the unlawful measure was in force. Where the beneficiary is allowed to carry forward losses incurred during the years that the measure was in force, or to benefit from a tax reduction on profits made within a specified number of years thereafter, then the effects of the aid are simply spread over a longer period of time. The advantage procured in this manner must of course be forfeited, but for the purpose of recovery account will be taken of the dates on which the aid, in whole or in instalments, was put at the disposal of each beneficiary.

One of the pillars of the system for protection against tax risks is the definition of "taxes". Typically, a very broad definition of tax is used, often along the following lines: "*Tax means all governmental, state, community, municipal or regional taxes, levies, imposts, duties, charges, deductions, with holdings and social security contributions of any kind arising in any part of the world, including*"[291].

The first question that comes to mind is whether or not the recovery of unlawful State aid would qualify as a "tax" for the purposes of this definition. Since recovery is an obligation of the Member States, the manner in which the recovery is affected will form the starting point of this analysis. If, for instance, the recovery is achieved through civil law rather than administrative law, it seems less likely that the recovered amount would be *de jure* a tax, even though de facto the recovery concerns amounts in relation to tax.

The restoration of the previous situation, which would have prevailed if taxation had been imposed without the tax reduction, accordingly, calls for the recovery form the beneficiaries of the difference between the standard tax and the reduced tax resulting from the measure at issue[292].

For State aid in the form of tax measures, the Commission Notice states that the amount to be recovered is calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule, and not the incompatible advantage, had been applied. However, for tax incentives, recovery can be problematic as the number of beneficiaries can be quite large and the amount to recoup can be difficult to determine. For example, in calculating the difference between the amount actually paid and the amount that should have been paid in the absence of the illegal State aid, may a taxpayer rely on other tax advantages he would have been entitled to had he not benefited from the illegal State aid. In this regard, Commission policy seems to have shifted in favour of the taxpayer: alternative tax advantages may now be taken into account when calculating the amount to be recovered.

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[291] BONDRAGER R., HEMELS S.J.C., PANIS I., YORKE C., SCHAFFNER J., ALBIÑANA C., GUELFI F., BREUNINGER G.E., SCHADE D., G. HÖNG, *The impact of Fiscal State Aid Recovery risks on share purchase agreements,* in *European Taxation,* 2016, 429.

[292] ROSSI-MACCANICO P., *A new framework for State Aid Review of Tax Rulings,* in *EStAL*, 3, 2015, 377.

As mentioned, since recovery should take place according to national procedures, to the extent that they allow for the immediate and effective execution of this order, it is up to the Member State to decide how to recover State aid. Even though it might be preferable to have State aid in the corporate tax scene recovered via the tax system, Member States are at liberty to use any other means of private or public law available to them to recover aid.

This is a relevant aspect regarding the possibility to access to a tax credit. Member States consider to amend their national procedures accordingly as to ensure that any corporate tax benefit is recovered as back taxes as to be eligible for foreign tax credits (to the extent foreign time limits to claim such credits have not passed, as recovery may go back about 10 years). If not, the EU may end up in a situation where other countries (also non-EU) would benefit from effective State aid recovery via non-fiscal means by being able to avoid to award tax credits that would normally have been granted. In case corporate tax benefits would not be recovered via the tax system, the other country might argue that no credit is to be awarded since any such retroactive payment is not to be treated as a tax. Therefore, if Member State rules would allow for recovery of fiscal aid to take place via non-fiscal procedures, foreign crediting is rather unlikely even if the State and the company voluntarily agree to recovery via tax system.

What if the other country refuses to give a credit for the additional taxes paid? Countries that do provide credits may impose a deadline to claim a credit which may be at odds with a payment of back taxes that may cover a period of up to 10 years. In such a situation, a credit might be restricted to the amount that relates to the years for which the deadline did not yet pass. If tax assessments have been filed and no tax credit was claimed at the time, retroactive abroad may not necessarily offer a second chance to claim a credit abroad.

In order to restore the *status quo,* it should be considered the situation as it should have been. The taxpayer should have paid a higher amount to start with, but they might have been able to claim a full or partial credit abroad as well. From a State aid perspective, a foreign tax credit will not be taken into account when determining the amount that is to be recovered. So, if we recover the full amount, would European Union law still allow for a consideration of damages due to the missed tax credit? The answer is likely to be negative, although it would put the entire concept of restoring the *status quo* in a somewhat different perspective given the potential of overkill if we look beyond what happens in a single State.

Moreover, it follows from the *Unicredito* case[293] that the taxpayers themselves will have to live with the consequences of the choices that they made. The Court of Justice, in fact, held: "*It would not be right to determine the amounts to be repaid in the light of various operations which could have been*

[293] Case C- 148/04, *Unicredito*, par. 114-116.

implemented by the undertakings if they had not opted for the type of operation which was coupled with the aid. That choice was made in the knowledge of the risk of recovery of aid granted contrary to the procedure laid down in Article 108(3) TFEU. Those undertakings could have avoided that risk by opting immediately for operations structured in other ways".

It also pointed out that in order to determine the amount of aid that has to be recovered in order to re-establish the status quo on the EU's internal market, past events should not be reconstructed differently on the basis of hypothetical alternatives the taxpayer could have opted for.

In the area of fiscal aid, foreign tax credit entitlement may, therefore, warrant a reconsideration of the current approach towards recovery as there would be a direct link between the additional taxes to be paid after recovery and possibly missed entitlements abroad. As other EU or non-EU States may be at risk of facing increased credits due to recovery, the Commission might consider compensating for this part the recovery process as to avoid such foreign crediting.

In this sense, it has been suggested that, in the context of the quantification of the aid to be recovered, account should also be taken of any higher taxes which the beneficiary has paid in its State of residence as a result of the tax advantage that it received in the State of the source of the income. This suggestion draws its inspiration from the Court of Justice judgement in *Amurta* case[294], which envisages taking account of a Convention for the avoidance of double taxation concluded with another State in order to consider neutralized the effects of a restriction on the free movement of capital maintained by a Member State. According to this line of argument, the economic advantage granted by a Member State through fiscal aid could be deemed neutralized, or reduced, by the operation of a Convention for the avoidance of double taxation which forms part of the wider legal and tax framework applicable to the activities of the beneficiary.

4. Recovery interests

The interest to be obtained on the sums illegitimately granted aims to eliminate the financial advantage inherent in the contributions to be returned in a strictly observant perspective of the principle of *restitutio ad integrum*[295]. It is deemed necessary to charge interest on the recovery amount in order to fully achieve the purpose of recovery, namely retroactive undo the competitive advantage resulting from the grant of the aid. Only by charging interest it can be prevented that the beneficiary of an unlawful aid benefits even after the reimbursement of the aid *de facto* from an interest free loan.

[294] Case C-379/05, *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam*.

[295] SALVINI L., *Aiuti di Stato in materia fiscale*, Cedam, Padova, 2007 395.

In principle, the determination of the interest calculation criterion is delegated by the EU law to the domestic provisions in force in the member countries. However, European law subsequently regulated the question of interest applicable to the recovery of State aid in a more precise manner in the Regulation n. 794/2004, as modified by the Regulation n. 271/2008.

The aid to be recovered must include interest at an appropriate rate fixed by the Commission. The beneficiary of the aid is obliged to pay interest including compounded interest for the period during which the reimbursable aid was actually at the disposal of the beneficiary until the date the reimbursement of the aid is made.

The recovery interest is calculated on the basis of the one-year money market rates for the relevant year in the months of September, October and November. In the exceptional event that no such rates should be available, the calculation of the recovery interest will alternatively be based on the money market rates for the three-month money market rate respectively on the basis of the yield on State bonds.

The Court of Justice ruled that if the Commission has already issued a final positive decision at the moment when a national judge is required to decide, there is no obligation for the judge to order the recovery of the capital amount: according to the Court, EU law does not impose an obligation of full recovery of the unlawful aid[296].

In these circumstances, the national judge is only obliged to order the recovery of the interests for the period of unlawfulness. The only advantage given to the beneficiary by granting an unlawful aid which is compatible with the internal market consists of not payment on the received sum. According to the Court, this reasoning derives from the aim of the last sentence of Article 108 (3) TFEU, that is based on the preservative purpose of ensuring that an incompatible aid will never be implemented.

Since recovery only seeks to eliminate the economic advantage accruing to undertakings, the amounts to be recovered may turn out to be lower that the tax revenue forfeited by the Member State. A particular problem arises in situations where the State aid has been granted in the form of an exemption from a tax imposed on a narrow sector of the economy (exceptional tax burden). In order to eliminate the advantage that, within the relevant sector, was unlawfully granted to undertakings which were exempted from the tax in question, it may be appropriate to have recourse to an "inverse remedy". This means that the level-playing field will be restored by allowing the Member State to reimburse with interest the tax to those undertakings which have paid it and were therefore previously put at a disadvantage, instead of requiring all exempted undertakings within the relevant sector to forfeit their advantage.

[296] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, par. 45-55.

Conclusions

Fiscal State aid has, during the time, become a topic of particular interest. In fact, a growing attention has been paid to recent decisions of the European Commission concerning tax rulings granted to multinational companies. State aid law is a potentially instruments effective tool for eliminating harmful tax practices. However, there is a fine line between the essentially repressive character of State aid control, which is limited to neutralizing the competition effects of aid, and a proactive tax policy for the internal market, which is reserved to the legislator. Respect the line between the fiscal policy and State aid control is considered essential to safeguard the democratic balance of powers between the institutions and the rights of individuals in State aid procedures. For this reason, the conduct of the European Commission and the recent extent of State aid control over tax ruling systems has stimulated a broad debate and the Commission has been charged of interfering in the fiscal sovereignty of Member State.

The present research developed in this context in which the current balance of powers in tax matters between the national and European dimensions is questioned. The main object of the investigation is represented by the role and position of the taxpayer in a State aid procedure and the possible configuration of its rights in this field. In the era of proliferation of debates on the proclamation of rights and, in particular, the rights invocable by the taxpayer, it was considered relevant to investigate the level of protection of the taxpayer's rights and, specifically, to ask if a different level of protection of the taxpayer in the State aid field and the different application, extremely restrictive in respect to the general context, can be justified compared to that established in principle in the European legal order, in particular by the European general principles and the European Charter, considering that scenarios, in which fundamental rights are not duly protected and recognized, do not appear to be tolerated under European Union law.

The methodology considered in the research, consisting of both the identification as a benchmark the general principles of European Union, the European Charter of Fundamental Rights and the application in tax cases by the Court of Justice, and the comparison of the position of the taxpayer in State aid with the standard of the rights foreseen at a general level in the European Union, allowed to highlight, on one hand, that there are very limited margins of protection for the taxpayer involved in the procedure for defining State aid and, on the other, made possible to underline a paradox with respect to the current assessment of tax measures involving State aid: undertakings and taxpayers, who are primary actors of the process (being the actual beneficiaries of these schemes), are left aside when it comes to the procedural phase, both during the process evaluation by the European

Commission, in which only the Member State concerned provides information, and in the recovery phase, which has direct effects and consequences on the beneficiary, especially in the tax field.

As illustrated above, taking as a benchmark the European Charter of Fundamental Rights, which has primary law status and the same legal value as the European Treaties, the following minimum standard of protection as parameter can be stated: the taxpayer has, in fact, the right to be informed, assisted and heard; the right to privacy and, finally, the right to confidentiality and secrecy in the administrative procedure, within a general context in which recognition of the right to legal certainty and protection of legitimate expectations play a primary action. The taxpayers' protection is, in fact, reinforced and its recognition of fundamental rights emerges remarkably above all in circumstances in which there is an interaction, having as object direct consequences on the individual, between the public administration and the taxpayer. From here, using this benchmark, it emerged that the current position of taxpayers' rights in a State aid procedure does not correspond to the minimum standard thus defined. In fact, in the context of State aid law, no attention is paid to the taxpayer involved in a State aid procedure and limited legal protections are afforded to taxpayer, because the real focus is mainly and only on the relations between European Institutions and the Member States and it seems that the position of the ultimate beneficiaries of State aid is often overlooked, or even ignored.

Having thus defined the current state of art, many critical issues have emerged in each level of the present analysis, namely the State Aid Investigation procedure and the State Aid Recovery procedure.

As regards the first level of analysis, it emerged that fundamental rights, recognized in the European Charter and having the same value as the Treaties, and, in particular, procedural rights linked to proceedings before European institutions, do not find application and recognition in the "classic" administrative procedure conducted at European level, such as the investigation into State aid. As seen, the beneficiary should have the same rights to be heard and of access to the State aid file not only as the Member State involved, but above all as any other entity that can be affected by a fiscal measure. These rights derive unequivocally from the principles of good administration stated in Article 41 of the EU Charter, which recognizes these rights to *everyone* before any individual measure that may adversely affect it is adopted.

As widely seen, the decisions made by the Commission to this effect and the decisions adopted by the European Judge which deny the recognition of these basic rights, are mainly based on a single basic reason, that is, that the formal part of the State aid investigation procedure is exclusively the Member State and not the beneficiary of the aid. The only parties to such an infringement procedure are, therefore, the Commission and the Member State, while a taxpayer benefiting from the challenged aid has no role at all. Whether or not taxpayer input will even be considered is at the discretion of the Commission and the relevant Member State. Moreover, although any judgment

issued by the Court of Justice will have immediate consequences for taxpayers, if a Member State is obliged to revoke the aid, taxpayers are not allowed to put forward their arguments during the infringement procedure or any appeal thereof to the Court of Justice. Thereafter, the Court of Justice's judgment is binding on the Member State's national judges in any subsequent legal challenge to the manner in which the State aid is revoked. As a result, any arguments the taxpayer might have had concerning the legality of the State aid will never be heard, either before the Court of Justice or before the national court. But, in the current context, where there is a continuous debate that focuses on the greatest attention and the need for increasing protection of taxpayers' rights, is this formalistic view of the procedure it no longer seems to be justified. It no longer seems possible today to find a justifying basis for the prevalence of the "form" of the procedure over the "substance" of the same, which undoubtedly sees the beneficiary and, in particular, the taxpayer in case of fiscal aid, as the person who will actually be affected by the Commission's decision. In other words, in the balancing of potentially opposing interests, it no longer seems possible to justify the prevalence of form over substance, when, moreover, the recognition of the protection of fundamental rights is under discussion because of a purely formalistic approach.

The gap between the rights proclaimed in principle by the European Charter and those actually recognized in one of the administrative procedures which take place before the European Institutions, as State aid investigation procedure, is evident and is based on a strictly formalistic view of the procedure itself, despite the actual beneficiaries of aid measures granted of which the Commission can order recovery are individually concerned. The question of beneficiaries' rights is, in this sense, a procedural aspect of European State aid law that determine an issue of the procedural fairness of the State aid procedures.

In order to overcome this critical point, the view that State aid procedures are exclusively between public authorities should therefore be reconsidered: the procedure on the model of administrative procedure established in general by the Charter should be adapted, with the consequent recognition of the right to a good administration, which establishes the minimum standard of rights that must be recognized to all those who may be affected by a decision taken by a European Institution. It is a minimum standard of protection aimed at safeguarding the level of protection of the basic rights granted to taxpayers, below which any administrative procedure cannot be considered legitimate and compliant. It appears no longer to can be postponed consider a fundamental procedural reform which can only constitute an adequate recognition of the rights afforded to aid recipients and also interested third parties. And all this also for the benefit of the overall coherence of the system.

Also with reference to the second level of analysis, a rather indefinite and uncertain picture emerges, identifying as a benchmark the general principles of European Union and therefore comparing the

position of the taxpayer in State aid with the standard of application of these principles foreseen at a general level in the European Union. The gap in taxpayer rights and the different application of the European principles in State aid area (extremely restrictive), it seems in fact not justified. European Courts and the Commission, in fact, advocate a specific and stricter meaning for these principles in the sphere of State aid, whose recognition is granted only in exceptional circumstances. This particularly narrow meaning of general principles, and, in particular, of legal certainty and legitimate expectations, is unique and substantially different from the scope we usually find in common EU law, national Member State's order or International law. However, assigning a stricter meaning and limiting the application of general principles of law, which are, moreover, the basis for protecting the rights of taxpayers, basically means depriving these principles of content.

As extensively illustrated above, the principle of legal certainty and its corollary, the principle of protection of legitimate expectations, are described as "superior rule of law" for the protection of individuals, as fundamental principles of the European Union and as general principles. Furthermore, the Court of Justice has also stressed that the principle of legal certainty is all the more prominent when the measure at issue is capable of having financial consequences[1]. The substantive content of these principles requires that Union legislation must be certain and its application foreseeable by persons. Therefore, when rules are altered certain protection can be granted to situations legitimately entered into by natural or legal persons irrespective of whether the Commission actually knows of all the concrete situations and legal relations which are affected by the alteration of those rules.

From the perspective of the first principle analysed in order to protect taxpayers' rights, that is the principle of legal certainty, a notion of fiscal aid highly uncertain and questionable emerged. In fact, there are no clear or foreseeable boundaries, even in light of the recent decisions of the European Commission on tax ruling and the new methodological approach for identifying fiscal aid. The notion of aid, especially referring to the field of taxation, constitutes a nebulous and unclear concept and the current definition of State aid by the European Commission, as well as case law, are contributing to add on a layer of complexity and uncertainty for taxpayers. The State aid rules lack level of precision and instead rely on interpretation, the responsibility of which is *de facto* delegated by Member States to the Commission.

In particular, with regard to the elements that constitute and outline a measure as State aid, it has been seen that the conditions of the tax advantage and selectivity are closely connected and, for this reason, they are difficult to distinguish in the concrete application put in place by the Commission and the Court of Justice. The notion of selectivity represents, in fact, the most controversial and discussed point of the State aid discipline, especially in the tax area. It is, in fact, an unclear and cumbersome

[1] Case C-94/05, *Emsland-Starke*, par. 43.

concept, whose interpretation by the Court of Justice has been utterly smoky and fluctuating during the time. This key criterion of the assessment of State aid, on the contrary, should be clarified and based on objective assessment methodology.

The deep-rooted stratification of the assessment of State aid based on the interpretation of the moment, together with the absence of real legal certainty in this area and the variable extension of the legal concepts that animate the State aid framework, has led to the current situation, in which the Commission has had room to introduce an own interpretation of State aid and to adopt its own version of arm's length principle, new and unprecedent.

In fact, in its recent decisions, the Commission has adopted a new approach that departs not only from prior Court of Justice's cases, but also the law on State aid. The European Commission has examined, with regard to tax measures, whether a "selective advantage" was granted without assessing separately the existence of an "advantage" and "selectivity", both concepts being not only distinct, but also essential in order for a measure to be identified as State aid. By collapsing these two concepts, the result could be the creation of a new rule and this create legal uncertainty for Member States and their taxpayers. Moreover, there does not seem to exist any European arm's length pricing principle. European law does not require member States to have any (arm's length or other) transfer pricing legislation, let alone any specific method of transfer pricing adjustment. Therefore, such arm's length principle can hardly be part of a State aid assessment. The only references to an OECD soft law arm's length principle in documents connected to the EU are in the Code of Conduct for Business taxation, which is a legally non-binding gentlemen's agreement not defining nor prioritizing any arm's length pricing methods, and in Article 4 of the multilateral Arbitration Convention between the member States, which is not a European law instrument and which does not describe, prescribe or prioritize any transfer pricing method either.

From this state of the art, an unclear, neither certain, nor *a priori* established discipline emerges. The conclusion is that, in the field of State aid, there is still a high degree of taxpayer uncertainty: it is difficult, if not impossible, to predict the nature of a fiscal measure as State aid.

In this sense, the principle of legal certainty should be enhanced so as to avoid non-retroactive or other undesirable effects arising from legislation or administrative interpretations. A clear, simple and consistent legislative drafting procedure is considered necessary. In addition to an appropriate legislative drafting process, the development of a well-defined tax ruling system, an interpretation tool for tax administration and compliance, is also considered to be one of the keystones to enhancing legal certainty.

From the perspective of the other general European principle taken into consideration in the analysis, it is highlighted that European notion of legitimate expectations, as seen, has gained a fundamental

importance in the sphere of tax law in Europe and is often regarded as a legal category of equal standing to other legal imperatives such as the principles of proportionality, legality, legal certainty, the precept of reasonableness. It is one of the frequently invoked criteria in regard of which the courts review the legality of the activities carried by the public administration. Additionally, the purpose of the application of the principle is to increase the predictability of the tax assessments. But, in its concrete application in the field of State aid, it remains completely uncertain and substantially impossible to invoke. The case law dealing with legitimate expectations is not transparent as applied to the field of State aid. Moreover, the notion of legitimate expectations constitutes an exception to the application of positive law and leads to disregarding an underlying rule without disputing its validity. It is true that this principle cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules in the absence of obligations entered into with the public authorities. The principle of legitimate expectations, in fact, cannot be applied to block future legislation, so long as the effects are not retroactive. At the same time, it is equally true that European institutions have the onus to perform their duties in a manner which is predictable. The application of a new interpretation of State aid, like any other aspects of European law, should be forward looking even in the absence of a precise assurance.

Furthermore, in the specific application of the principle of protection of legitimate expectations in the State aid area, there is a double protection of the public interest. In fact, one of the conditions necessary to recognize the legitimate expectation of the taxpayer is the prevalence of the private interests over public ones (so called proportionality test). But, in reality, the Court of Justice, as seen, justifies the different and restrictive application of the principle precisely on the basis of the general and public interest involved in the area of State aid. Consequently, this double protection seems not justified as it translates into a reinforced affirmation of the unsurpassed public interest and an impediment to effective access to the principle.

A final critical aspect should also be noted: concerning the recovery of illegally provided State aid through taxation, at the level of the Member States no uniform procedural rules apply. There is a great divergence in whether and by which means this aid is recovered. It may take place indiscriminately by means of a procedure according to civil law or according to tax law. Procedural law in this respect is not harmonized. Among Member States there is still a great amount of uncertainty as to how illegal tax State aid should be recovered. It should be kept in mind that the recovery of illegal State aid under national law is subject to the supremacy of European law containing, amongst others, the principles of equivalence and effectiveness. Therefore, for instance the principle of legal certainty is set aside in an individual case for reasons of public policy of European law. If no specific tailor-made national recovery procedure applies, Member States rely on existing procedural rules. This causes frictions

because terms and legal positions are not especially designed for the recovery of illegally provided State aid through taxation. Also, Member States have little experience with the actual recovery of State aid in the case of a condemned tax measure.

Ultimately, as highlighted, in addition to the obvious need to overcome and abandon an obsolete approach based on the prevalence of form over substance, strongly rooted, from a procedural point of view, within the framework of the State Aid discipline, it would also be necessary to adopt a series of instruments aimed at achieving a necessary level of certainty about which measures can be considered State aid. First of all, to create legal certainty, State aid control must be more clearly aligned with the rationale for the State aid ban, which is to avoid distortions in cross-border trade. A fundamental step enabling improvement should be the clarification of the concept of State aid and the way it is assessed. This implies a clarification of its definition and its limits and the reach of State aid versus harmful tax measures and a clear framework for the review of selectivity test, as well as the provision of an advance procedure enabling to confirm that a measure does not entail State aid. This would demonstrate a clear and global picture of all the implications of the decisions made in this respect.

State aid is not only a theoretical and controversial question between European Institutions and Member States, but does have significant practical implications for taxpayers. And this aspect can no longer be ignored.

Lastly, it is considered appropriate, for reasons of completeness and exhaustiveness of the analysis of the discipline, to mention to the recent event of historical significance, in reference to which the State aid discipline is assuming a leading role. The year 2020 was dominated by a global pandemic and the spread of the virus Covid-19, which gave rise an unprecedented public health emergency that involved the whole world and which, even today at the time of finalization of this research, is ongoing. In order to stem the economic negative impacts as much as possible and support the economy of the European Union and the various Member States in the context of the Covid-19 outbreak, the European Commission has adopted a Temporary Framework[2] to enable Member States to use the full flexibility foreseen under State aid rules, with the aim of ensure that sufficient liquidity remains available to undertakings of all types and to preserve the continuity of economic activity during and after the Covid-19 outbreak.

[2] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, C/2020/1863 of 19 March 2020. The Framework was subsequently modified and integrated (on 3 April 2020, on 8 May 2020, on 29 June 2020, on 13 October 2020) until the last modification of 28 January 2021, with which the Commission has ordered the extension, until 31 December 2021, of its validity, at the same time providing for the extension of the scope of the envisaged measures and increasing the ceilings of the benefits granted.

The coordinated action of the European Institutions and the Member States, essential to mitigate the negative repercussions and face this unprecedented crisis, is certainly appreciable and to be welcomed. The Temporary Framework, based on Article 107(3)(b) of the Treaty on the Functioning of the European Union, enables Member States to use the full flexibility foreseen under State aid rules to support the economy at this difficult time, in derogation of the ordinary rules, and so mainly aims to simplify and shorten the approval procedures for State aid but also contains indications on the interaction between national and EU economic policies.

A point of attention, from the perspective of the taxpayer's rights, with a view to future analysis, is represented by the suggestion of the European Commission contained in the Recommendation of 14 July 2020[3], with which the European Institution recommend to Member States not to grant financial aid to companies which have links with countries on the European list of non-cooperative jurisdictions for tax purposes, in order to prevent companies benefiting from public aid from adopting tax avoidance practices involving tax havens. The Recommendation, by providing for coordination of Member States to prevent their tax bases from being unduly eroded and to ensure that they adopt solutions that do not create significant discrepancies or market distortions, aims to offer Member States a model, a guidance, to be used to prevent the misuse of European funds and strengthen safeguards against tax abuses, preventing public aid from being awarded to companies engaged in practices and systems of fraud, tax evasion and avoidance, money laundering or financing of terrorism. In particular, it is correctly suggested that undertakings that have links to jurisdictions on the European list of non-cooperative jurisdictions for tax purposes (for example, undertakings with tax residence in one of those jurisdictions) should not benefit from State aid[4].

In this context, a critical point that deserves to be monitored is constituted by the Commission proposal of a number of conditions that should be met in order to qualify for financial aid, and the recommendation of the prevision, under strict conditions, of exceptions to these restrictions, in order to protect honest taxpayers[5]. This is because even undertakings that have links to jurisdictions on the

[3] Commission Recommendation of 14 July 2020 on making State financial support to undertakings in the Union conditional on the absence of links to non-cooperative jurisdictions, C (2020) 4885.

[4] This question is in line with the Commission's decision in case SA.56996 (2020/N) concerning Poland, in which it was found, incidentally, that it is legitimate to exclude companies controlled by beneficiaries from the recipients of tax aid persons residing in non-cooperative States. The scheme under review by the Commission excludes Polish companies from the list of recipients of financial aid in cases where the beneficial owner of the latter, identified according to the current anti-money laundering legislation, is fiscally resident in one of the jurisdictions of non-cooperating countries for tax purposes, the list of which is contained in the conclusions of the Council of the EU (2020/C 64/03). For Polish companies excluded from State aid, an exception is envisaged, consisting in the commitment, by the beneficiary effective, to transfer their tax residence to a Member State or the European Economic Area.

The Commission's decision specifies that deviation from this rule is only possible if the aid beneficiary and/or its beneficial owner commit to transfer their tax resident within nine months form the date of granting aid under the measure.

[5] Commission Recommendation of 14 July 2020: "(*7) In order to ensure that the financial support can flow to eligible undertakings, Member States should establish reasonable requirements to demonstrate the absence of links to a*

EU list of non-cooperative tax jurisdictions for tax purposes should in principle be able to demonstrate that they are eligible for financial aid, for example, if they provide proof to have paid the taxes due in the Member State for a certain period of time (for example, the last three years) or to carry out a genuine economic activity in the analogue country. In this view, according to the Commission, Member States should agree on reasonable requirements to allow companies to demonstrate the absence of links with jurisdictions on the EU list of non-cooperative jurisdictions for tax purposes.

Given, however, the vagueness and abstractness of these indications, which remain on a level of principle, it is hoped that detailed and specific national measures are adopted that grant an effective right to demonstrate the lack of connection with tax havens, in order to access the planned aid, and that introduce an effective possibility of defence of the taxpayers concerned, in the absence of any limitation of action.

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jurisdiction that features on the EU list of non-cooperative jurisdictions. At the same time, it is essential to guarantee that undertakings cannot circumvent the requirements for entitlement to financial support.

Member States may disregard the existence of links to the listed non-cooperative jurisdictions, when the undertaking provides evidence that one of the following circumstances is met:

(a) where the level of the tax liability in the Member State granting the support over a given period of time (e.g. the last three years) is considered adequate when compared to the overall turnover or level of activities of the undertaking receiving the support, at domestic and group level, over the same period.

(b) where the undertaking makes legally binding commitments to remove its ties to EU listed non-cooperative jurisdictions within a short timeframe, subject to appropriate follow-up and sanctions in case of non-compliance.

Member States should disregard the existence of links to the listed non-cooperative jurisdictions where the undertaking has substantial economic presence (supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances) and performs a substantive economic activity in listed non-cooperative jurisdictions".

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