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# The Possibility of Protection of Legitimate Expectations in Recovery of Unlawful State Aid

## 1. Introduction

Forty years ago, the European Court of Justice (ECJ) stated for the first time, in its 1973 judgement in the *Kohlegesetz* case, that the European Commission may order recovery of unlawful and incompatible state aid.<sup>\*1</sup> In Estonia, state aid has become a household topic recently and precisely because aid might have been granted unlawfully.<sup>\*2</sup>

Article 14 (1) of the Council Regulation laying down detailed rules for the application of Article 93 of the EC Treaty<sup>\*3</sup> (Council Regulation (EC) No. 659/1999) provides that in situations wherein negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all measures necessary to recover the aid from the beneficiary. The Commission shall not require recovery of the aid if to do so would be contrary to a general principle of Community law. In this context, 'general principle' embodies mostly the principles related to protection of legitimate expectations and legal certainty.<sup>\*4</sup>

The principle of the protection of legitimate expectations is among the fundamental principles of the European Union (EU).<sup>\*5</sup> The hope that recipients of aid hold to treat the principle of protection of legitimate expectations as a lifeline to safeguard against recovery of state aid is remarkable if one looks at the case law

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<sup>1</sup> Notice from the Commission: Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible state aid. – OJ C 272, 15.11.2007, pp. 0004–0017, reference in para. 9 to Judgment of the Court of Justice of the European Communities of 12.7.1973, C-70/72, *Commission v. Germany*, para. 13.

<sup>2</sup> The Commission has informed Estonia of having decided to extend the procedure in relation to several measures extended by Estonia to Estonian Air. State aid SA.35956 (2013/C) (ex 2013/NN) (ex 2012/N) – Estonia Rescue aid to Estonian Air. Available at [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_35956](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_35956) (most recently accessed on 22.5.2013). Some other cases in the aviation sector: can be cited: The Commission ordered Hungary to recover the aid from Malév in its Commission Decision of 9 January 2012 SA.30584 (C 38/10, ex NN 69/10) on the state aid implemented by Hungary in favour of Malév Hungarian Airlines Zrt. – OJ L 92, 3.4.2013, pp. 1–15. The Commission has notified Latvia of its decision to initiate the procedure in relation to the aid to airBaltic, state aid SA.34191 (2012/C) (ex 2012/NN): Alleged aid to airBaltic. – OJ C 69, 8.3.2013, pp. 40–52. The Commission has notified Slovenia of its decision to initiate the procedure in relation to the aid to Adria Airways, state aid SA.32715 (2012/C) (ex 2012/NN): Alleged aid to Adria Airways. – OJ C 69, 8.3.2013, pp. 53–65.

<sup>3</sup> Council Regulation No. (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. – OJ L 83, 27.3.1999, pp. 1–9.

<sup>4</sup> Notice from the Commission (see Note 1), para. 17.

<sup>5</sup> Judgment of the Court (First Chamber) of 24.3.2011, C-369/09 P, *ISD Polska and Others v. Commission*, para. 122. – ECR 2011, p. I-02011.

of the Court of Justice of the European Union (EU case law).<sup>6</sup> This article is an attempt to assess, on the basis of EU case law, the possibility of applying the principle of the protection of legitimate expectations where unlawful state aid is being recovered from the recipient of aid.

## 2. State aid

### 2.1. The notion of state aid

The founding treaties do not precisely and exhaustively define the term ‘state aid’. It has been claimed that the key problem and the source of most of the actions filed by recipients of aid is the fact that it is unclear what exactly qualifies as state aid.<sup>7</sup> The provisions of the Treaty on the Functioning of the European Union<sup>8</sup> (TFEU) on state aid are subject to the competition rules (TFEU, Title VII, Chapter 1). Article 107 (1) of the TFEU sets out that, save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be deemed incompatible with the internal market. It has been settled by case law that classification as state aid requires all of the conditions set out in Article 107 (1) of the TFEU to be fulfilled. First, there must be intervention by the state or through state resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage to the recipient. Fourth, it must distort competition or threaten to do so.<sup>9</sup> The court has also referred to meeting of these four conditions as the principle for prohibition of state aid.<sup>10</sup>

Article 107 (1) of the TFEU states an aim of not distorting competition in the internal EU market. The General Court has clarified that the aim of Article 87 (1) of the EC Treaty (TFEU, Art. 107 (1)) is to prevent trade between Member States from being affected by advantages granted by public authorities that, in various forms, distorts or threatens to distort competition by favouring certain undertakings or certain products. In order to determine whether a state measure constitutes aid, one must, therefore, establish whether the recipient undertaking receives economic advantage that it would not have obtained under normal market conditions.<sup>11</sup> The established case law indicates that Article 87 (1) of the EC Treaty (TFEU, Art. 107 (1)) does not distinguish between the causes or the objectives of state aid but defines them in relation to their **effects**.<sup>12</sup>

### 2.2. Compatible aid

The prohibition of state aid is not absolute. Certain categories of aid shall be compatible with the internal market (TFEU, Art. 107 (2)). Certain categories of aid may be considered to be compatible with the internal market (TFEU, Art. 107 (3)). Pursuant to Article 108 (4) of the TFEU, the Commission may adopt regulations related to the categories of state aid that the Council has determined may be exempted from the procedure provided for by paragraph 3 of Article 108, and the Commission has, indeed, adopted regulations

<sup>6</sup> A search of the database Infocuria yields 130 results for enforced judgements. A note on the criteria employed (on 23.5.2013): Court = ‘Court of Justice, General Court’; documents = documents published in the ECR Judgments; text = ‘legitimate expectations’; subject matter = ‘State aids’; case status = ‘Cases closed’.

<sup>7</sup> A. Giraud. A study of the notion of legitimate expectations in state aid recovery proceedings: ‘Abandon all hope, ye who enter here?’ – *Common Market Law Review* 2008 (45), p. 1408; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU State Aid Modernisation (SAM), COM(2012) 209 final, 8.5.2012, para. 23(a). – OJ C 11, 15.1.2013, pp. 49–53.

<sup>8</sup> Treaty on the Functioning of the European Union (consolidated version 2012). – OJ C 326, 26.10.2012, pp. 47–200.

<sup>9</sup> Judgment of the Court (First Chamber) of 8.5.2013, C-197/11, *Libert and Others*, references for a preliminary ruling: Cour constitutionnelle – Belgium, p. 74. These conditions are also mentioned as ‘the four cumulative elements’: European Commission. Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises, 10.2.2012. Available at [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/swd\\_guidance\\_paper\\_en.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/swd_guidance_paper_en.pdf) (most recently accessed on 21.5.2013).

<sup>10</sup> Judgment of the General Court (Fifth Chamber) of 1.7.2010, T-335/08, *BNP Paribas and BNL v. Commission*, para. 159. – ECR 2010, p. II-03323.

<sup>11</sup> Judgment of the General Court (Fourth Chamber) of 3.3.2010, T-163/05, *Bundesverband Deutscher Banker v. Commission*, paras 34, 35. – ECR 2010, p. II-00387.

<sup>12</sup> Judgment of the Court (Third Chamber) of 8.12.2011, C-81/10 P, *France Télécom v. Commission*, para. 17.

pertaining to certain categories of aid that are exempted from the requirement of prior notification of the Commission. Examples are investment and employment aid to small and medium-sized enterprises; aid for creation of enterprises by female entrepreneurs; aid for environmental protection; aid for research, development, and innovation; training aid; and aid for disadvantaged or disabled workers.<sup>\*13</sup> The Commission has set out various *de minimis* aid thresholds beneath which aid measures are not subject to the notification procedure provided for in Article 108 (3) of the TFEU.<sup>\*14</sup> The total *de minimis* aid granted to any one undertaking shall not exceed 200,000 euros over any period of three fiscal years, in the road transport sector 100,000 euros<sup>\*15</sup>, and to undertakings providing services of general economic interest 500,000 euros.<sup>\*16</sup> The Commission has initiated modernisation and simplification for EU state aid policy that has to do with the previously mentioned aid as well.<sup>\*17</sup>

### 2.3. Recovery of aid

Nevertheless, practice has demonstrated that state aid has been granted contrary to the rules. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision (TFEU, Art. 108 (3)). When aid is implemented without prior reporting to the Commission, that aid is unlawful.<sup>\*18</sup>

Article 108 (2) of the TFEU specifies that if the Commission finds that aid granted by a state or through state resources is not compatible with the internal market with respect to Article 107, or that such aid is being misused, it shall decide that the relevant state shall abolish or alter said aid within a span of time to be determined by the Commission. Pursuant to Article 14 (1) and Article 15 (1) of Council Regulation (EC) No. 659/1999, there are only two limits to ordering of recovery of unlawful and incompatible aid. First, the Commission shall not require recovery of the aid if doing so would be contrary to a general principle of Community law. Second, the powers of the Commission to recover aid shall be subject to a limitation period of 10 years.<sup>\*19</sup>

Pursuant to the established case law, abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. By repaying the aid, the recipient forfeits the advantage it had enjoyed over its competitors in the market and the situation prior to payment of the aid is restored.<sup>\*20</sup>

## 3. The principle of protection of legitimate expectations in recovery of unlawful state aid

Pursuant to the firmly established EU case law, the protection of legitimate expectations is one of the fundamental principles of the Union.<sup>\*21</sup> The EU Treaty does not define that principle; this has been derived by the ECJ mainly on the basis of the laws of the Member States.<sup>\*22</sup> The ECJ has decided that the principle of

<sup>13</sup> Commission Regulation (EC) No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of articles 87 and 88 of the Treaty (General Block Exemption Regulation), Article 1 (1). – OJ L 214, 9.8.2008, pp. 3–47.

<sup>14</sup> Commission Regulation (EC) No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, Preamble (1), Article 2 (1). – OJ L 379, 28.12.2006, pp. 5–10.

<sup>15</sup> *Ibid.*, Article 2 (2).

<sup>16</sup> Commission Regulation (EU) No. 360/2012 of 25 April 2012 on the application of articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, Article 2 (2). – OJ L 114, 26.4.2012, pp. 8–13.

<sup>17</sup> Communication, SAM (see Note 7), para. 20.

<sup>18</sup> C-81/10 P, *France Télécom v. Commission*, para. 59.

<sup>19</sup> Council Regulation No. (EC) 659/1999.

<sup>20</sup> Judgment of the Court of Justice of the European Communities (Sixth Chamber) of 29.4.2004, C-298/00 P, *Italy v. Commission*, paras 75, 76. – ECR 2004, p. I-04087.

<sup>21</sup> C-369/09 P, *ISD Polska and Others v. Commission*, para. 122.

<sup>22</sup> T. Tridimas. *The General Principles of EU Law*. Second edition. New York: Oxford University Press 2006, reprinted 2009, p. 4.

legitimate expectations, which is part of the Community legal order, is a corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and it aims to ensure that the situations and legal relationships governed by Community law remain foreseeable.<sup>\*23</sup>

It has been claimed that invoking the principle of legitimate expectations in the area of state aid is not achievable, since the application of protection of legitimate expectations is, in part, blurred in the area of state aid.<sup>\*24</sup> Several authors have referred to the strictly restricted application of the principle of the protection of legitimate expectations by the EU courts in the context of recovery of unlawful state aid and have to a greater or lesser extent criticised such strict application.<sup>\*25</sup> The Commission itself has noted that the ECJ employs very restrictive interpretation of these principles in the context of recoveries.<sup>\*26</sup>

Pursuant to the case law, the recipient's legitimate expectations of being protected must be justified. Below, we take a look at the justifications used to protect legitimate expectations when unlawful state aid is being recovered.

### 3.1. The notion that there can be no legitimate expectations without notification

In many cases, the root of the problem is in that the state aid is not reported.<sup>\*27</sup> For instance, the Commission may learn about the granting of state aid from the media and make a decision that the relevant EU member state must recover unlawful state aid.<sup>\*28</sup> The ECJ has clarified that the obligation of notification is one of the fundamental features of the system of control put in place by the Treaty in the field of state aid. In that system, Member States are under an obligation, first, to notify the Commission of each measure designed to grant new aid or alter aid for the purposes of Article 87 (1) of the EC Treaty (TFEU, Art. 107 (1)) and, second, not to implement such a measure, in accordance with Article 88 (3) of the EC Treaty (TFEU, Art. 108 (3)), until that institution has taken a final decision on the measure. Thus, in view of the mandatory nature of the review of state aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 88 of the EC Treaty (TFEU, Art. 108), and a diligent business operator should normally be able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification of the Commission, with the result that it is unlawful under Article 88 (3) of the EC Treaty (TFEU, Art. 108 (3)), the recipient of the aid cannot at that time have a legitimate expectation that its grant is lawful. Where the Commission has not been notified of the aid, any apparent failure on its part to act in relation to the measure is irrelevant.<sup>\*29</sup>

This standpoint of the Court prevents invocation of legitimate expectations from the onset insofar as this is possible only if the aid was compatible with the procedure. However, for the recipients the gist of the problem has been in that the aid has not been granted in compliance with the procedure. The ECJ has proclaimed a clear statement: an undertaking must be capable of determining whether or not the procedure was complied with.<sup>\*30</sup> The ECJ has noted that the recipients being small undertakings cannot justify a

<sup>23</sup> Judgment of the Court of Justice of the European Communities (Sixth Chamber) of 15.2.1996, C-63/93, *Duff and Others*. Reference for a preliminary ruling: Supreme Court – Ireland, para. 20. – ECR 1996, p. I-00569.

<sup>24</sup> A. Giraud (see Note 7), p. 1399.

<sup>25</sup> *Ibid.*; T. Tridimas (see Note 22), p. 296; W. Weiß, M. Haberkamm. Legitimate expectations in state aid and the CFI. – *European State Aid Law Quarterly*, June 2010 (9)/2, p. 537; A. Winckler; F.-C. Laprèvote. Reconciling legal certainty, legitimate expectations, equal treatment and the prohibition of state aids. – *European State Aid Law Quarterly*, June 2011 (10)/2, pp. 321–326; N.A. De Vos. Europeanization of the principle of legitimate expectations: *The Significance of the European Principle of Legitimate Expectations for the Equivalent Principles in the Netherlands, France and Belgium in the Framework of a Growing Ius Commune (with a Summary in English)*. Boom Juridische uitgevers 2011, pp. 613–621; M. Koillinen. *Luottamuksensuoja eurooppalaisena oikeuseriaatteenä*. Helsinki: Suomalainen Lakimiesyhdistys 2012, pp. 368–383.

<sup>26</sup> Notice from the Commission, p. 17, and the case law referred to therein.

<sup>27</sup> Judgment of the Court of Justice of the European Communities of 20.9.1990, C-5/89, *Commission v. Germany*. – ECR 1990, p. I-03437; Judgment of the Court of Justice of the European Communities of 11.7.1996, C-39/94, *SFEI and Others*. Reference for a preliminary ruling: Tribunal de commerce de Paris – France. – ECR 1996, p. I-03547; Judgment of the Court of Justice of the European Communities of 20.3.1997, C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*, reference for a preliminary ruling: Bundesverwaltungsgericht – Germany. – ECR 1997, p. I-0159; C-298/00 P, *Italy v. Commission*.

<sup>28</sup> C-5/89, *Commission v. Germany*, para. 2.

<sup>29</sup> C-81/10 P, *France Télécom v. Commission*, paras 58–60.

<sup>30</sup> *Ibid.*, para. 59.

legitimate expectation on their part as to the lawfulness of that aid.<sup>\*31</sup> However, the ECJ has not completely closed the door to protection of legitimate expectations in cases wherein state aid is being recovered—namely, one may appeal to exceptional circumstances.

### 3.2. Exceptional circumstances as potential justification for legitimate expectations

The ECJ has decided that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and, accordingly, declining to return that aid. If such a case is brought before a national court, it is for that court to assess the material circumstances—if necessary, after obtaining a preliminary ruling on interpretation from the ECJ.<sup>\*32</sup>

The author is aware of just one judgement in EU case law wherein the Court found that there existed exceptional circumstances: *RSV v. Commission*<sup>\*33</sup>. Whereas the Court does not even mention *expressis verbis* in this judgement that the circumstances appealed to by the applicant were exceptional, we learn only from subsequent judgements that the Court had treated the circumstances of the case as exceptional. Namely, in *Germany v. Commission*, Germany claimed that the Commission's delay in making a decision created legitimate expectations and referred to *RSV v. Commission* as a similar situation.<sup>\*34</sup> In *Germany v. Commission*, the ECJ found nevertheless that the circumstances underlying the judgement in *RSV v. Commission* were exceptional and dissimilar to those in the case in hand.<sup>\*35</sup> Likewise, the EU courts have in many cases rejected the applicant's arguments that the circumstances were exceptional and that they led the recipient to expect legitimately that the aid was lawful and thus that the recipient is justified in refusing to return it.<sup>\*36</sup>

As the circumstances of the *RSV v. Commission* judgement seem to be a yardstick for the EU courts and applicants alike with which they determine exceptional circumstances that may lead to legitimate expectations, the circumstances of this particular case are worthy of outlining. In *RSV v. Commission*, the applicant relied, *inter alia*, on the principle of legitimate expectations.<sup>\*37</sup> The applicant (RSV) had been, with the Commission's approval, in receipt of state aid under a restructuring programme designed to terminate certain activities.<sup>\*38</sup> Further aid was granted to RSV, paid before notification of the Commission thereof, which was the subject of the contested decision.<sup>\*39</sup> The applicant argued that, inasmuch as the Commission, in taking 26 months to render the contested decision, disregarded the requirements of legal certainty, it failed to comply with the rules of good administration.<sup>\*40</sup>

The Court found that the aid in question involved only the supplementary costs of one operation, the cessation of certain RSV activities, which had already been the subject of aid authorised by the Commission. The Court found that the situation was, therefore, known to the Commission. It was apparent to the Court that the aid in question was intended to meet additional costs of an operation that had been in receipt of authorised aid. The Court found that the applicant therefore had reasonable grounds for believing that the Commission's doubts no longer existed and that the aid would encounter no objection. The ECJ concluded that the Commission's delay in issuing the contested decision could in the case in question establish a legitimate expectation on the applicant's part that refunding of the aid would not be ordered. Insofar as the contested decision of the Commission from which such a requirement was to be inferred as therefore unlawful, it had to be declared void.<sup>\*41</sup>

<sup>31</sup> C-298/00 P, *Italy v. Commission*, para. 88.

<sup>32</sup> *Ibid.*, para. 86.

<sup>33</sup> Judgment of the Court of Justice of European Communities of 24.11.1987, C-223/85, *RSV v. Commission*. – ECR 1987, p. 04617.

<sup>34</sup> Judgment of the Court of Justice of the European Communities of 28.1.2003, C-334/99, *Germany v. Commission*, paras 34, 35. – ECR 2003, p. I-01139.

<sup>35</sup> *Ibid.*, para. 44.

<sup>36</sup> C-298/00 P, *Italy v. Commission*, para. 86; Judgment of the General Court (Second Chamber) of 15.6.2010, T-177/07, *Mediaset v. Commission*, paras 174–178. – ECR 2010, p. II-02341; C-81/10 P, *France Télécom v. Commission*, para. 64.

<sup>37</sup> C-223/85, *RSV v. Commission*, para. 7.

<sup>38</sup> *Ibid.*, para. 2.

<sup>39</sup> *Ibid.*, para. 6.

<sup>40</sup> *Ibid.*, para. 12.

<sup>41</sup> *Ibid.*, paras 12–18.

It is precisely in connection with the case law of the EU courts after the *RSV* judgement that W. Weiß and M. Haberkamm have claimed that the protection of legitimate expectations should not merely be a theoretical principle, as in the wake of the *RSV* judgement the Court has taken a very rigid stance. W. Weiß and M. Haberkamm believe that the EU courts should justly weigh all circumstances, including the role of the Commission. If the Commission keeps a recipient of state aid in a state of uncertainty for extremely long periods of time, the situation should also be treated as exceptional.<sup>\*42</sup>

### 3.3. Legitimate expectations rooted in precise assurances

Pursuant to established court practice, the right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the EU, by giving that person precise assurances, has led him to entertain well-founded expectations.<sup>\*43</sup>

The EU courts have generally not found that EU institutions had given precise assurances regarding state aid such that the applicant would have been caused to entertain legitimate expectations.<sup>\*44</sup> However, *ESF Elbe-Stahlwerke Feralpi v. Commission* indicates that the Court of First Instance found that the Commission was not justified in requiring recovery of the aid element because of specific assurances provided by the Commission.<sup>\*45</sup> The Commission found that the aid element was not authorised and that it is incompatible with the common market.<sup>\*46</sup> In that case, the Court of First Instance observed that recovery cannot be justified solely on the grounds that the aid in question was not reported to the Commission.<sup>\*47</sup> The Court of First Instance recalled that the recipient of illegal aid may, in order to challenge its repayment, plead exceptional circumstances that legitimately give rise to a legitimate expectation that the aid was lawful. In the case we consider here, the applicant did not even rely on exceptional circumstances<sup>\*48</sup> but referred to the fact that the aid element was included in the state guarantees covering the operating loans and that the Commission had authorised those guarantees in its letters.<sup>\*49</sup> The Court of First Instance decided that, by approving the state guarantees, the Commission granted the applicant precise assurances of such a kind as to give it legitimate expectations as to the lawfulness of the aid element in those guarantees—assurances that prevent the Commission from ordering recovery after a subsequent finding that the guarantees are incompatible with the common market.<sup>\*50</sup>

Also in the case *Belgium v. Commission*, assurances were relevant, but in different circumstances and with different effect. The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation wherein a Community authority has caused him to entertain expectations that are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a Community measure that is likely to affect his interests, he cannot appeal to that principle if the measure is adopted. Furthermore, even if the Community had first created a situation capable of giving rise to legitimate expectations, overriding public interest may preclude transitional measures from being adopted in respect of situations that arose before the new rules came into force but that are still subject to change. However, the Court has also held that, in the absence of an overriding public interest, the Commission infringed a superior rule of law by failing to couple the repeal

<sup>42</sup> W. Weiß, M. Haberkamm (see Note 25), p. 536, 537 and Note 71 therein.

<sup>43</sup> Judgment of the Court (First Chamber) of 16.12.2010, C-537/08 P, *Kahla Thüringen Porzellan v. Commission*, paras 63, 146. – ECR 2010, p. I-12917; *ISD Polska and Others v. Commission*, para. 123.

<sup>44</sup> For instance, Judgment of the General Court (Fifth Chamber) of 1.7.2010, T-53/08, *Italy v. Commission*, para. 131. – ECR 2010, p. II-03187; C-537/08 P, *Kahla/Thüringen Porzellan v. Commission*, paras 65, 66; C-369/09 P, *ISD Polska and Others v. Commission*, para. 126.

<sup>45</sup> Judgment of the Court of First Instance (Third Chamber, extended composition) of 5.6.2001, T-6/99, *ESF Elbe-Stahlwerke Feralpi v. Commission*, paras 188, 191. – ECR 2001, p. II-01523.

<sup>46</sup> *Ibid.*, para. 12.

<sup>47</sup> *Ibid.*, para. 177.

<sup>48</sup> *Ibid.*, paras 183, 184.

<sup>49</sup> *Ibid.*, para. 188.

<sup>50</sup> *Ibid.*, para. 190.

of a set of rules with transitional measures for protection of the expectations that a trader might legitimately have derived from the Community rules.<sup>\*51</sup>

In the case *Belgium v. Commission*, the Commission found that a tax regime for co-ordination centres—i.e., a certain type of undertaking in Belgium—did not have an aid element.<sup>\*52</sup> Later, the Commission altered its appraisal and handed down a decision (the contested one) that the tax scheme constitutes aid that is incompatible with the common market.<sup>\*53</sup> Significant in this context was Article 88 (1) (TFEU, Art. 108 (1)). Pursuant to this article, the Commission shall, in co-operation with Member States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required for progressive development or by the functioning of the common market. Should effect not be given to those proposals, Article 88 (2) (TFEU, Art. 108 (2)) entitles the Commission to require the Member State concerned to alter or abolish the aid within the span of time to be determined. The ECJ observed that it is beyond doubt that the tax regime in question constitutes an existing measure, as the Commission was notified of it in the context of its earlier decision and the regime had not been materially altered. The ECJ found also that application of the contested decision was foreseeable by those subject to it.<sup>\*54</sup> The Commission argued that the co-ordination centres could not plead a legitimate expectation in the continued existence of the scheme in question, because there was information available to them that the scheme would not be maintained. The ECJ found that the centres were entitled to expect in any case that a Commission decision reversing the previous stance would give them the time necessary to address that change in approach. It follows that the co-ordination centres were entitled to have a legitimate expectation that a reasonable transition period would be granted for allowing them to adjust to the consequences of that decision. The ECJ stated that the Commission had not shown how the interests of the Community preclude a transition period of that kind. The Court concluded that the plea alleging infringement of the principle of the protection of legitimate expectations was well founded.<sup>\*55</sup>

In the case *Alcoa Trasformazioni v. Commission*, the ECJ clarified that, as far as state aid is concerned, the principle of the protection of legitimate expectations can be infringed when the Commission alters its appraisal of a measure on the basis only of more rigorous application of the treaty rules on state aid. In such a case, the applicants are entitled to expect that a Commission decision reversing the previous approach will give them the time necessary for addressing that change of approach. Such a situation must be distinguished from that in which the Commission does not, in the new decision, question its assessment of the measure examined in an earlier decision but entertains doubts as to the measure at issue on account of, first, the fact that its conclusions in the earlier decision were limited in duration of applicability and based on the circumstances prevailing at a specific time and, second, the changes undergone by the measure to which that decision pertained. In such a case, the earlier decision cannot give rise to a legitimate expectation that the Commission's conclusions in that decision remain valid.<sup>\*56</sup>

### 3.4. The relationship of the law of Member States to EU law in recovery of state aid

The principle of the protection of legitimate expectations is an attempt to ensure that situations and legal relationships governed solely by Community law remain foreseeable; it does not apply to legal situations that are governed solely by national law.<sup>\*57</sup> N.D. Vos states that the European principle of legitimate expectations is, within the scope of European law, the minimum standard. Whether a national principle of legitimate expectations can be applied depends on the question of whether or not a particular case falls within

<sup>51</sup> Judgment of the Court of Justice of the European Communities (Second Chamber) of 22.6.2006, C-182/03, *Belgium v. Commission*, paras 147–149. – ECR 2006, p. I-05479.

<sup>52</sup> *Ibid.*, para. 16.

<sup>53</sup> *Ibid.*, paras 28–34.

<sup>54</sup> *Ibid.*, paras 73–77.

<sup>55</sup> *Ibid.*, paras 160–167.

<sup>56</sup> Judgment of the Court (Second Chamber) of 21.7.2011, C-194/09 P, *Alcoa Trasformazioni v. Commission*, paras 72–75; *Alcoa Trasformazioni v. Commission*, Summary of the Judgment, para. 4.

<sup>57</sup> Judgment of the Court of Justice of the European Communities (Third Chamber) of 17.9.2009, C-519/07 P, *Commission v. Koninklijke FrieslandCampina*, para. 28. – ECR 2009, p. I-08495.

a domain that is fully Europeanised.<sup>\*58</sup> In a domain such as state aid, the principle of legitimate expectations is strongly restrained by European conditions.<sup>\*59</sup>

In *Commission v. Germany*<sup>\*60</sup>, the ECJ clarified the application of legitimate expectations when a Member State has failed to adhere to the procedure. The Commission ordered Germany to recover the aid.<sup>\*61</sup> Germany did not contest the Commission's decision<sup>\*62</sup> but neither did it implement that decision; the claim was that it was absolutely impossible to implement the decision, by reason of the principle of the protection of legitimate expectations, which is embodied in particular in §48 of the *Verwaltungsverfahrensgesetz* (Law on Administrative Procedure) (VwVfG) of the state of Baden-Württemberg, which was applicable to the case. Germany claimed that, in accordance with that paragraph and the principles of German constitutional law, a public authority may not revoke an unlawful administrative measure granting a benefit without first weighing the various interests involved. Germany found that, in the circumstances of the case, the national authority was obliged to accord greater weight to the protection of the legitimate expectations of the undertaking that had received the aid than to the public interest of the Community in having that aid recovered. The German Government furthermore argued that recovery of the aid is also prevented by the prohibition in §48 of the VwVfG of revocation of an administrative measure granting a benefit more than one year after that administrative authority became aware of the circumstances constituting grounds for revocation.<sup>\*63</sup>

The ECJ stressed that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 of the EEC Treaty (TFEU, Art. 108) may not rely on the legitimate expectations of recipients for justification of a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty establishing the EEC (TFEU, Articles 107 and 108) would amount to naught, since national authorities would be able to rely on their own unlawful conduct so as to deprive decisions taken by the Commission of their effectiveness. Finally, the ECJ found that the German Government may not rely on the obligations to which the competent administrative authority is subject under the particular rules governing the protection of legitimate expectations in §48 of the VwVfG with regard to the weighing of the interests involved and the period within which an administrative act granting a benefit may be revoked. The Court also mentioned that it has consistently held that a Member State may not refer to provisions, practices, or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law.<sup>\*64</sup>

In *Land Rheinland-Pfalz v. Alcan Deutschland*, the ECJ clearly stated that where state aid is found to be incompatible with the common market, the role of the national authorities is merely to give effect to the Commission's decision. The national authorities do not have any discretion with regard to revocation of a decision granting aid. Therefore, where the Commission, in a decision that has not been the subject of legal proceedings, orders the recovery of unduly paid sums, the national authorities are not entitled to come to any other findings.<sup>\*65</sup>

<sup>58</sup> N.A. De Vos (see Note 25), p. 614.

<sup>59</sup> *Ibid.*, p. 620.

<sup>60</sup> C-5/89, *Commission v. Germany*.

<sup>61</sup> *Ibid.*, paras 1–4.

<sup>62</sup> *Ibid.*, para. 5.

<sup>63</sup> *Ibid.*, paras 9–12.

<sup>64</sup> *Ibid.*, paras 17–18.

<sup>65</sup> C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*, para. 34.

## 4. Conclusions

Undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure.<sup>\*66</sup> Meanwhile, the ECJ has pointed out that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid.<sup>\*67</sup> Legitimate expectations based on precise assurances that the aid is compatible with the internal market may prevent the Commission from ordering recovery<sup>\*68</sup>, and the recipient undertakings are entitled under certain circumstances to expect that a transition period will be granted when the Commission alters its appraisal.<sup>\*69</sup> EU case law indicates that the Court has adopted a very rigid position and has generally identified neither the existence of exceptional circumstances nor precise assurances from institutions. Therefore, the likelihood of the EU courts finding that the principle of legitimate expectations has been infringed in recovery of unlawfully granted state aid is very limited.<sup>\*70</sup> At the same time, it may be said that the case law addressing application of the protection of legitimate expectations to a recipient of unlawful state aid is symmetrical to the essence of the extent of state aid in the EU: the general principle of the prohibition of state aid set out in Article 107 of the TFEU. The goal is non-distortion of competition. It arises from Articles 107 and 108 of the TFEU that state aid is not a conventional measure; it must be compatible with the internal market and feature, *per se*, the dimension of exceptionality. One can only rhetorically ask how the EU courts's 'softer' approach to the application of legitimate expectations to recipients of unlawful state aid would affect competition and through it the internal market.

<sup>66</sup> C-81/10 P, *France Télécom v. Commission*, para. 59.

<sup>67</sup> C-298/00 P, *Italy v. Commission*, para. 86; C-223/85, *RSV v. Commission*.

<sup>68</sup> T-6/99, *ESF Elbe-Stahlwerke Feralpi v. Commission*, para. 190.

<sup>69</sup> C-182/03, *Belgium v. Commission*, para. 163.

<sup>70</sup> Successful cases for recipients of the aid: C-223/85, *RSV v. Commission*; T-6/99, *ESF Elbe-Stahlwerke Feralpi v. Commission*; C-182/03, *Belgium v. Commission*.