

European Union

Judicial Review of the State Aid Decisions on Advance Tax Rulings: A Last Resort to Safeguard the Rule of Law

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Issue: European Taxation, 2022 (Volume 62), No. 2

Published online: 20 December 2021

In this article, the author provides a critical examination of various decisions addressing whether advance tax rulings on intra-group transfer pricing policies granted to multinational enterprises are illegal State aid under articles 107 and 108 of the Treaty on the Functioning of the European Union. Further, the author looks at whether the aid recovery process in these cases could be deemed to be contrary to the EU principles of legal certainty and the protection of legitimate expectations.

1. The Current Scenario

In recent years, the European Commission has issued various decisions^[1] that have qualified advance tax rulings on intra-group transfer pricing (TP) policies granted to multinational enterprises by several Member States - specifically, the Netherlands, Luxembourg, Ireland and Belgium - as illegal State aid under articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) (2007).^{[2] [3]} This stream of decisions certainly constitutes the most vigorous enforcement reaction, to date, at a supranational level, to alleged harmful tax competition policies. At the same time, it constitutes an unprecedented move by the EU institutions in the field of corporate income taxation, which is, in principle, a subject of exclusive competence of Member States. As a result, various legal and political concerns have been raised by scholars and commentators.

The Commission's reasoning leading to the qualification of the advance tax rulings as illegal State aid has, indeed, been severely criticized, especially as it seems to deviate from what was – at the time of issuance of the advance rulings at issue – the established interpretation and implementation of article 107(1) of the TFEU. According to this provision, a Member State's measure qualifies as State aid when it (i) is financed by the state or through state resources ("public funding" requirement); (ii) provides an advantage ("advantage" requirement); (iii) is selective ("selectivity" requirement); and (iv) affects trade between

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- Research Reported in this paper was partially funded by State Research Agency (AEI) – 10.13039/501100011033 Grant No. PID2020-117248GB-I00.
1. European Commission, Decision (EU) 2016/2326 of 21 Oct. 2015 on State aid SA.38375 (2014/C ex 2014/NN), which Luxembourg granted to Fiat, OJ L 351 (2015) [hereinafter *Fiat*]; European Commission, Decision (EU) 2017/502 of 21 Oct. 2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands in respect of Starbucks, OJ L 83/38 (2017) [hereinafter *Starbucks*]; European Commission, Decision (EU) 2016/1699 of 11 Jan. 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C), OJ L260/61 (2016) [hereinafter *Belgian Excess Profits*]; (note that the *Belgian Excess Profits* case differs from the other cases insofar as it does not tackle a specific tax ruling, but addresses legislation that allowed companies to enter into advance pricing agreements upon the fulfilment of specific conditions laid down in the legislation. The decision mentions that the legislation has given rise to 66 rulings granted by the Belgian tax administration to 55 companies); European Commission, Decision (EU) 2017/1283 of 30 Aug. 2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland in respect of Apple, OJ L 187/1 (2017), [hereinafter *Apple*]; and European Commission, Decision (EU) 2018/859 of 4 Oct. 2017 on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg in respect of Amazon, OJ L 153/1 (2018) [hereinafter *Amazon*].
 2. *Treaty on the Functioning of the European Union of 13 December 2007*, OJ C115 (2008), Primary Sources IBFD.
 3. Note that other recent Commission decisions concerning advance tax rulings granted to multinational entities – such as the decisions on *Engie*, *McDonald's* and *UK CFC* – are beyond the scope of the present analysis due to the fact that none of these cases addressed transfer pricing issues. Indeed, in *Engie*, the Commission examined tax rulings that endorsed classification of payments under the law leading to their tax exemption from a corporate income tax perspective (meaning, non-payment of tax), where no approximation of a transfer pricing (TP) methodology was involved. See European Commission, Decision (EU) 2019/421 of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of Engie, OJ L 78, pp. 1-62 (2018). In *McDonald's*, the Commission was alarmed by a possible misapplication of the *Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital* (3 Apr. 1996), Treaties & Models IBFD, resulting in double non-taxation of McD Europe's profits. See European Commission, (EU) 2019/1252 of 19 Sept. 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe, OJ L195, pp. 20-39 (2018). In *UK CFC*, the Commission examined a tax scheme implemented by the United Kingdom that exempted UK tax-resident entities from controlled foreign company (CFC) charges normally borne by companies on financing income obtained by their affiliates located in low-tax jurisdictions and that comes from another foreign group entity. See European Commission, Decision (EU) 2019/1352 of 2 Apr. 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption, OJ L 216, pp. 1-39 (2019).

Member States and distorts competition (“trade and competition distortion” requirement). The peculiarity of the Commission’s decisions at issue relates to two main pillars that concern, respectively, the advantage and the selectivity requirements.

The first pillar of the Commission’s reasoning is grounded on the use of an arm’s length principle (ALP) – allegedly derived from either EU law and/or OECD guidelines – as a de facto counterfactual against which the existence of an advantage granted to a specific undertaking should be assessed. As will be illustrated in the following sections, commentators have criticized this position on the basis that it is inconsistent with the traditional interpretation of article 107(1) of the TFEU, according to which the advantage should be assessed based on a counterfactual benchmark relating to the effective treatment under national law, and not on the basis of approximations resulting from the application of external and abstract standards and criteria.^[4]

The second pillar of the decisions at issue consists in an apparent conflation of the advantage and the selectivity requirements, according to which an economic advantage provided to multinational enterprises, and not available to standalone undertakings, would automatically also meet the selectivity requirement. This argument has also been criticized as being inconsistent with article 107(1) of the TFEU, based on the consideration that the granting of an “advantage” and its “selective” nature should be the subject of separate assessments. Consequently, an alleged deviation from the ALP can, at most, be deemed to be proof of an economic advantage but cannot, per se, determine the selective nature of the measure under review.^[5]

All of the Commission’s decisions at issue have been the subject of actions for annulment brought by the Member States and taxpayers involved. Thus, the judges – in the first instance, the General Court (GC), and, ultimately, the Court of Justice of the European Union (ECJ) – are currently in charge of assessing whether or not the legal reasoning and arguments advanced by the Commission are in line with the relevant EU law. As the author has already highlighted in a previous contribution,^[6] the ECJ’s ultimate decision in one direction or the other will have an unprecedented impact on the scope and the exercise of the Member States’ sovereignty in the field of corporate income taxation.

If the ECJ ultimately does not uphold the two pillars of the Commission’s decisions, the use of tax policy by certain Member States to attract businesses at the expense of other Member States’ public revenue and economies will inevitably be boosted. This would certainly impair the effectiveness of the fight, by EU institutions, against harmful tax competition and aggressive tax planning. At that point, the only feasible solution would continue to be bilateral or multilateral initiatives at the EU, OECD and G20 levels, the development and implementation of which would require significant time and negotiations and the success and effectiveness of these measures would not be guaranteed.

If, conversely, the judges uphold the reasoning of the Commission, the role and influence of the EU institutions in the design and implementation of cross-border corporate tax policies will necessarily escalate. Indeed, Member States will no longer be comfortable with unilaterally granting taxpayers advance certainty about the tax treatment of their intra-group transactions given the difficulties in predicting the outcome of a potential review, by the Commission, of the consistency of those national measures with the ALP. This “harmonization through the back door” may significantly increase the chances of even broader harmonization in the field of direct taxation. In particular, under the threat of being constantly exposed to the Commission’s review of their tax measures, even the more reluctant Member States may finally agree, in the medium/long run, on the adoption of a Common Consolidated Corporate Tax Base (CCCTB),^[7] which would be a decisive step forward in the establishment of a real fiscal union.

The GC has already decided five of the cases brought before it, the latest one being *Amazon* (Joined Cases T-816/17 and T-318/18).^[8] Although not all of these five rulings ended up upholding the Commission’s decisions – indeed, only the ruling

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4. D. Kyriazis, *From Soft Law to Soft Law Through Hard Law: The Commission’s Approach to the State Aid Assessment of Tax Rulings*, 15 Eur. St. Aid L. Q. 3, pp. 428-439 (2016); G. Allevato, *The Commission’s State Aid Decisions on Advance Tax Rulings: Criticisms and Potential Impact on the Future of Direct Taxation within the European Union*, in *Combating Tax Avoidance in the European Union: Harmonization and Cooperation in Direct Taxation* pp. 490-492 (J.M. Almudi, J.A. Ferreras Gutiérrez & P. Hernández González-Barreda eds., Wolters Kluwer 2018); P. Rossi-Maccanico, *Fiscal State Aids, Tax Base Erosion and Profit Shifting*, 24 EC Tax Rev. 2, pp. 73-77 (2015); R. Lyal, *Transfer Pricing Rules and State Aid*, 38 Fordham Intl. Law J. 4, p. 1041 (2015); E. Traversa & A. Flamini, *Fighting Harmful Tax Competition through EU State Aid Law: Will the Hardening of Soft Law Suffice?*, 14 Eur. St. Aid L. Q. 3, p. 330 (2015); V.S., Moreno González, *State Aid and Tax Competition: Comments on the European Commission’s Decisions on Transfer Pricing Rulings*, 15 Eur. St. Aid L. Q. 4, pp. 556-574 (2016); and T. Joris, & W. De Cock, *Is Belgium and Forum 187 v. Commission a Suitable Legal Source for an EU “Arm’s Length Principle”?*, 16 Eur. St. Aid L. Q. 4, pp. 607-616 (2017).
 5. L. Lovdahl Gormsen & C. Mifsud-Bonnici, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax*, 8 Journal of European Competition Law & Practice 7, p. 424 (2017); Kyriazis, *supra* n. 4, at p. 433; and Allevato, *supra* n. 4, at pp. 493-494.
 6. Allevato, *supra* n. 4, at pp. 494-495.
 7. On the Common Consolidated Corporate Tax Base project, see European Commission, [Proposal for a Council Directive on a Common Corporate Tax Base](#), COM(2016) 685 final (25 Oct. 2016), Primary Sources IBFD and European Commission, [Proposal for a Council Directive on a Common Consolidated Corporate Tax Base](#), COM(2016) 683 final (25 Oct. 2016), Primary Sources IBFD.
 8. BE: GC, 14 Feb. 2019, Joined Cases T-131/16 and T-263/16, *Kingdom of Belgium and Magnetrol International v. European Commission*, EU:T:2019:91 (concerning the *Belgian Excess Profits* rule); LU: GC, 24 Sept. 2019, Case T-755/15, *Grand Duchy of Luxembourg and Fiat Chrysler Finance Europe v. European Commission*, ECLI:EU:T:2019:670; NL: GC, 24 Sept. 2019, Joined Cases T#760/15 and T#636/16, *Kingdom of the Netherlands and Starbucks v. European Commission*, ECLI:EU:T:2019:669; IE: GC, 15 July 2020, Joined Cases T#778/16 and T#892/16, *Ireland and Apple Sales International and*

in *Fiat* (Case T-755/15) entirely confirmed the Commission's decision, while the other four rulings, the *Belgian Excess Profits* rulings (Joined Cases T-131/16 and T-263/16), *Starbucks* (Joined Cases T-760/15 and T-636/16), *Apple* (Joined Cases T-778/16 and T-892/16) and *Amazon* annulled the Commission's decisions – the GC did not tear down the two pillars of the reasoning of the Commission as described above in any of them, i.e., the use of the ALP as a counterfactual and the intrinsically selective nature of the advance tax rulings. In fact, the GC either avoided pronouncing on such issues – for example, in the decision on the *Belgian Excess Profits* rule – or expressly endorsed the legal reasoning of the Commission, even in those cases where it ultimately annulled the decision based on certain technicalities related to the implementation of the transfer pricing methodologies (such as in *Starbucks* and *Apple*). As far as the ECJ is concerned, to date, it has pronounced itself on only one of the appeals (the case concerning the *Belgian Excess Profits* rule), setting aside the decision of the GC and referring the case back to it for a new ruling, without dealing, however, with the legitimacy of the two pillars of the Commission's reasoning as highlighted above.^[9]

Therefore, as of today, it seems that, regardless of the final result of their rulings (i.e., whether the Commission's decisions are confirmed or annulled), the judges do not share the same concerns on the veracity of the Commission's legal reasoning raised by most scholars and experts and are, so far, supporting – or, at least, are not impeding – the Commission in its attempt at negative integration. Thus, it makes sense to contemplate and prepare for a scenario in which the ECJ, regardless of the final outcome of its rulings (i.e., whether or not it confirms or annuls the Commission's decisions), will uphold the use of the ALP as a counterfactual benchmark and the intrinsically selective nature of the advance rulings granted to multinational enterprises. In such a scenario, the Member States and the taxpayers involved in the current proceedings (and those that may be involved in future investigations) would ultimately be exposed to significant recovery duties going back in time to before the Commission clearly disclosed its approach towards the interpretation of the advantage and selectivity requirements with regard to advance tax rulings. This would be the case in respect of advance tax rulings granted before 2016, the qualification of which as unlawful State aid under articles 107 and 108 of the TFEU might be confirmed by the judges, as will be illustrated in the following paragraphs.

In light of the above, it is worth speculating on whether or not the aid recovery process could be deemed to be contrary to general principles of EU law – specifically, legal certainty and protection of legitimate expectations. It must be noted, indeed, that, according to article 16(1) of Procedural Regulation No. 2015/1589, “the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law”.^[10] The principles most commonly invoked in the context of recovery, and on which there is more established case law, are, indeed, the principles of legal certainty and protection of legitimate expectations, which prevent the recovery of the aid in the event that a Commission decision manifests a novel approach.^[11] It is true that the ECJ has traditionally interpreted article 16(1) of the Procedural Regulation in a very restrictive manner.^[12] However, several past Commission decisions on the non-recovery of tax aid, to comply with the principles of legal certainty and legitimate expectations, may constitute important precedents and thus should be taken into serious consideration.^[13] Consequently, the analysis conducted in this article will investigate whether or not the main two pillars of the Commission decisions constitute a novelty regarding the interpretation of article 107(1) of the TFEU. Finally, a few considerations concerning potential solutions and strategies to be adopted in relation to the aid recovery will be outlined.

2. The Novelty of the Commission's Reasoning

2.1. The arm's length principle as a counterfactual benchmark

As the Commission itself pointed out in its 2016 Notice, an “advantage” for State aid purposes is intended to be “any economic benefit which an undertaking could not have obtained under normal market conditions”,^[14] i.e., absent the state intervention at

Apple Operations Europe v. European Commission, ECLI:EU:T:2020:338; and LU: 12 May 2021, Joined Cases T-816/17 and T-318/18, *Grand Duchy of Luxembourg, Amazon EU Sàrl and Amazon.com, Inc. v. European Commission*, ECLI:EU:T:2021:252.

9. BE: ECJ, 16 Sept. 2021, Case C-337/19 P, *European Commission v. Kingdom of Belgium and Magnetrol International*, ECLI:EU:C:2021:741.

10. On the concept of general principles of EU law, see EU Commission, Commission Notice on the recovery of unlawful and incompatible State aid (2019/C 247/01), sec. 2.4.1; P. Craig, UK, *EU and Global Administrative Law: Foundations and Challenges*, p. 337 (CUP 2015); P.J. Wattel, *The Cat and the Pigeons: Some General Comments on (TP) Tax Rulings and State Aid After the Starbucks and Fiat Decisions*, in *State Aid Law and Business Taxation* p. 192 (I. Richelle, W. Schön & E. Traversa eds., Springer 2016).

11. L. Lovdahl Gormsen, *European State Aid and Tax Rulings*, pp. 62-85 (Edward Elgar Publishing 2019).

12. DE: ECJ, 20 Sept. 1990, Case C-5/89, *Commission of the European Communities v. Federal Republic of Germany*, ECLI:EU:C:1990:320, para. 14.

13. European Commission, Decision 2003/81/EC of 22 Aug. 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, OJ L 31, p. 26, para. 44 (2003); European Commission, Decision 2003/512/EC of 5 Sept. 2002 on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, p. 17, para. 43 (2003); European Commission Decision 2003/755/ EC of 17 Feb. 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, p. 25, para. 122 (2003); European Commission Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, p. 1, para. 81 (2004); and European Commission, Decision 2006/621/EC of 2 Aug. 2004 on the State Aid implemented by France for France Telecom, OJ L 257, p. 11, paras. 263-264 (2006).

14. European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union of 19 July 2016, OJ C 262, para. 66 (2016) [hereinafter *2016 Notice*].

issue. Thus, in order to assess whether a certain measure grants an advantage, a comparative analysis relative to a standard situation should be performed. The core of such a comparative analysis is, indeed, the identification of a counterfactual, which serves as a benchmark.

With regard to tax measures, the Commission had, for a long time, asserted that “the advantage must be assessed, within the framework of the State aid investigation, purely at national level”,^[15] meaning that the decisive counterfactual benchmark could only be the tax treatment resulting from the implementation of the domestic tax legislation and practice of the relevant country, and not tax standards as applied in other states or set forth by external sources of law or institutions. The correctness of such an interpretation of the concept of advantage for State aid purposes has also been asserted in the tax literature. In particular, Schön (2015) highlights how, based on applicable ECJ case law, “the relevant benchmark treatment cannot be derived autonomously from European law”.^[16] This should be particularly true in the field of direct taxation, an area in which Member States generally retain exclusive competence. Therefore, according to such a consolidated interpretation of the advantage requirement, the counterfactual should have been identified by looking at the actual treatment the undertaking would have been subject to under the actual tax legal framework of the Member State and absent the tax measure at issue, rather than engaging in speculation about the use of fictitious “versions” of national law or external fiscal standards.^[17] An advantage could only be found to exist, for State aid purposes, in the presence of measures deviating from such a counterfactual and leading to a different and lower tax burden.

In determining whether the tax rulings in the cases at issue granted an advantage, the European Commission – consistent, in principle, with its established interpretation of the “advantage” requirement – claimed that the reference framework should be the general corporate income tax systems of the countries involved, insofar as they did not differentiate between group or standalone entities.^[18] Nevertheless, in practice, the Commission’s assessment did not involve a comparison of the corporate income tax treatment granted by the advance rulings versus the actual treatment to which those same entities would have effectively been subject under the national corporate income tax system and absent the tax rulings. The Commission, indeed, concluded that the tax rulings gave rise to an advantage since the application of the transfer pricing methodology endorsed by the tax authorities departed from an ALP approximation.

In particular, the Commission stated that the ALP stems either from the principle of equal treatment, which is supposedly inherent to article 107(1) of the TFEU (hereinafter “EU ALP”),^[19] or, as in the *Amazon* case, from the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter “OECD ALP”).^{[20] [21]} Consequently, the outcome of the Commission’s assessment with regard to the advantage requirement seems to be based on the application of an abstract criterion, such as the ALP, sourced from external principles or standards, rather than from the concrete tax legal framework as determined under national legislation and administrative practice.^[22] Thus, for the purposes of this analysis, it is worth investigating whether the use of the ALP in assessing the advantage requirement is consistent with the concept of a “counterfactual” as traditionally defined and illustrated above or, conversely, constitutes a novelty in the interpretation of article 107(1) of the TFEU.

In the first official document where this approach was publicly disclosed – that is, the 2016 Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (2016 Notice)^[23] - the Commission claimed that the use of the ALP is indispensable in assessing whether a tax ruling reflects a “reliable approximation of a market-based outcome”.^[24] In the same document, the Commission stated that the ALP stems directly from article 107(1) of the TFEU, which “prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation”^[25] and is not prevented or limited by the lack of incorporation of such a principle into the domestic laws of certain Member States.^[26] However, neither the actual legal source nor the rules governing the ALP were (or are) clear. In particular, it was not clear how and since when the Commission has derived the EU ALP from the principle of equal treatment in taxation and, specifically, from article 107 of the TFEU. Indeed,

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15. European Commission, Decision 2003/51 5/EC Commission Decision of 17 Feb. 2003 on the State aid implemented by the Netherlands for international financing activities, OJ L 180, p. 52, para. 82 (2003).
 16. W. Schön, *Tax Legislation and the Notion of Fiscal Aid – A Review of Five Years of European Jurisprudence*, Max Planck Institute for Tax Law and Public Finance Working Paper, p. 6 (2015).
 17. Kyriazis, *supra* n. 4, at p. 433 and Allevato, *supra* n. 4, at p. 491.
 18. *Fiat*, *supra* n. 1, at paras. 193-199; *Starbucks*, *supra* n. 1, at paras. 231-236; *Belgian Excess Profit*, *supra* n. 1, at paras. 121-122; *Apple*, *supra* n. 1, at para. 228; and *Amazon*, *supra* n. 1, at paras. 558-589.
 19. *Fiat*, *supra* n. 1, at para. 228; *Excess Profits*, *supra* n. 1, at para. 150; *Starbucks*, *supra* n. 1, at para. 141; and *Apple*, *supra* n. 1, at para. 257.
 20. The *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (10 July 2017), Primary Sources IBFD [hereinafter OECD TP Guidelines].
 21. *Amazon*, *supra* n. 1, at paras. 402-405, wherein, unlike in the other cases, the Commission does not refer to the ALP as stemming from art. 107(1) TFEU, but, instead, refers to the OECD TP Guidelines.
 22. Kyriazis, *supra* n. 4, at p. 434.
 23. *2016 Notice*, *supra* n. 14, at paras. 172-173.
 24. *Id.*, para. 172.
 25. *Id.*
 26. *Id.*

no reference to the existence of an EU ALP had ever appeared in any prior Commission decision or ECJ case law, and no precise explanation or guidance about its concrete functioning and implementation has been provided. In contrast, in the same 2016 Notice, the Commission stated that, in determining the arm's length value, it may seek guidance from the OECD TP Guidelines.^[27]

The lack of explanation concerning the origins, the determination of and the use of the EU ALP does not seem to be resolved by the Commission's reference to the case law cited in the footnotes to paragraphs 169 to 172 of the 2016 Notice or the decisions at issue.^[28] The Commission, indeed, referred to five sources: two previous ECJ and GC decisions (the decisions in *Forum 187* (Joined Cases C-182/03 and C-217/03)^[29] and *Belgium v. Commission* (Case T-538/11), respectively),^[30] and the first three Commission decisions on the cases involving the advance tax rulings at issue (specifically, *Starbucks*, *Fiat* and *Excess Profits*), which were not yet published when the 2016 Notice was issued, and that, in any event, also made reference to the two other abovementioned decisions.

Specifically, in the 2016 Notice, the Commission referred to the ALP as originating from paragraphs 96 and 97 of the *Forum 187* case, – which was at the apex of a series of investigations on the Belgian special regime on coordination centres in 2006 – and minimized the relevance of the OECD TP Guidelines, which are defined as simply guidance that may be worthy of consideration.^[31] A careful reading of the *Forum 187* decision, however, does not necessarily lead to the conclusion that, back in 2006, the ECJ had advocated for the use of an EU ALP in State aid cases.^[32] Indeed, in the part of *Forum 187* the Commission refers to, the ECJ simply stated that:^[33]

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, [...], to compare that regime with the ordinary tax system, based on the difference between profit and outgoings of an undertaking carrying on its activities in conditions of free competition.

It would be rather questionable, therefore, to claim that this excerpt reflects a clear and established assertion by the ECJ that an EU ALP exists and that there is a link between the conferral of an advantage and a deviation from such an ALP. In *Forum 187*, indeed, the Court did not even mention or refer to an ALP from which the special tax regime granted by Belgium to coordination centres would have deviated. Instead, it simply stated that the conferral of the advantage should be assessed by comparing the tax liability under the special tax regime with the liability that would have been incurred under the ordinary corporate income tax system.

In addition, both academics and practitioners agree on the fact that, even assuming that, in *Forum 187*, the ECJ had actually linked the existence of an advantage with a deviation from the ALP, it was the OECD ALP that the ECJ was referring to, and not an EU ALP.^[34] Indeed, in paragraph 94 of its decision, the Court explicitly referred to the OECD's "cost-plus" method. And, in paragraph 95, it endorsed the reasoning of the Commission as expressed in paragraph 95 of the decision being appealed, wherein it is made clear that, in testing the appropriateness of the cost-plus method implemented under the special tax regime for coordination centres, the OECD's soft law instruments should be applied. Also, in light of this, *Forum 187* could not be deemed to be, at the time when the rulings were granted, evidence of the existence of an inherent EU ALP as invoked by the Commission.^[35]

The second case referred to in the Notice – and in the Commission's decisions on the advance tax rulings that were still unpublished at the time of the issuance of the Notice – is the GC's decision in *Belgium v. Commission* (specifically, paragraphs 65 and 66 of that decision). The wording of these paragraphs, however, simply declares that articles 107 and 108 of the TFEU may be used to intervene in areas of direct taxation under EU State aid law. Such paragraphs, in fact, do not contain any reference or expression that may support, directly or indirectly, the existence, in the EU legal system, of an inherent EU ALP.^[36]

27. *Id.*, para. 173.

28. *Fiat*, *supra* n. 1, at para. 223; *Excess Profits*, *supra* n. 1, at paras. 146-147; *Apple*, *supra* n. 1, at para. 250; and *Starbucks*, *supra* n. 1, at para. 259.

29. BE: ECJ, 22 June 2006, Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium and Forum 187 ASBL v. Commission of the European Communities*, ECLI:EU:C:2006:416.

30. BE: GC, 25 Mar. 2015, Case T-538/11, *Belgium v. Commission*, ECLI: EU:T:2015:188.

31. *2016 Notice*, *supra* n. 14, at para. 173.

32. Joris & De Cock, *supra* n. 4, at p. 607 and Kyriazis, *supra* n. 4, at p. 435.

33. *Forum 187* (C-182/03 and C-217/03), paras. 96-97.

34. Kyriazis, *supra* n. 4, at p. 435. See, for example, Lovdahl Gormsen, *supra* n. 11, at p. 380; P. Andrews, *Uncle Sam Is Right: The EU Probe Into Ireland's Tax Treatment of Apple Is Overreach*, Wolters Kluwer Competition Law Blog (30 June 2016), available at <http://competitionlawblog.kluwercompetitionlaw.com/2016/06/30/uncle-sam-is-right-the-eu-probe-into-irelands-tax-treatment-of-apple-is-overreach/> (last accessed 8 Dec. 2021).

35. Lovdahl Gormsen, *supra* n. 11, at pp. 77-81

36. *Belgium v. Commission* (T-538/11), paras. 65-66, wherein it is stated that:
(65) It should be observed, moreover, that intervention by the Member States in areas which have not been harmonized in the European Union is not excluded from the scope of the rules on the monitoring of State aid. To accept the contrary would necessarily deprive Articles 107 TFEU and 108 TFEU of their practical effect;

Based on the above, it seems that, in its 2016 Notice, the Commission overstretched *Forum 187* and *Belgium v. Commission*, as, in fact, such case law does not really support the Commission's assertions concerning the existence of an EU ALP and its use as a benchmark for the purposes of identifying an advantage for State aid purposes. It can also be safely assumed that if there had been other prior State aid cases explicitly enshrining an EU law version of the ALP in article 107 of the TFEU, the Commission would have spotted them and heavily relied on them. Instead, as already observed, the Commission referred to statements by the judges that neither explicitly discuss the use of an ALP to assess the existence of an advantage nor can be unquestionably considered to be case law recognizing the existence of an ALP derived from article 107(1) of the TFEU. One can thus conclude that the assertion, by the Commission, of the existence of an EU ALP reflects, in fact, a novel interpretation of article 107(1) of the TFEU.

In this regard, it is also worth pointing out that, in the draft version of the Notice, released by the Commission on January 2014 for public consultation, there was no reference to the fact that a deviation from the ALP may be deemed to constitute an advantage.^[37] This claim was made for the very first time by the Commission only a few months later, in its decisions opening investigations into the advance tax rulings granted to *Apple*, *Fiat* and *Starbucks*, wherein the Commission referred to the ALP as being based on the OECD guidelines.^[38] It was only in the final decisions in *Fiat* and *Starbucks*, issued in October 2015, and in the final version of the 2016 Notice that the Commission explicitly started referring to an EU ALP. And, in both circumstances, as already mentioned, the Commission stated that, in determining the arm's length value, it may seek guidance from the OECD guidelines or that a ruling consistent with such guidelines is unlikely to qualify as State aid. As a result, this would mean that an unstable non-binding instrument ultimately regulated and interpreted by non-domestic institutions – the ECJ in the case of the EU ALP and the OECD in the case of the OECD ALP – would, in fact, be playing a role in determining the benchmark against which an advantage should be assessed and measured for State aid purposes, regardless of its effective incorporation into the tax/legal systems of the Member States at issue. Also in light of these considerations, the position of the Commission appears to conflict with – or at least not reflect – the previously established interpretation of the concept of an advantage for State aid purposes, according to which, as already highlighted, the counterfactual benchmark should have been determined purely at the national level.^[39]

2.2. The conflation of the advantage and selectivity requirements

A careful analysis of the Commission's decisions at issue shows how the assertion, by the Commission, of the appropriateness of the use of the ALP is rooted in the same assumption that underlies the second pillar of the Commission's reasoning, that is, the conflation of the advantage and selectivity requirements. Indeed, the adoption of a market-based proxy, such as the ALP, to replicate the "conditions of free competition" implies placing integrated and non-integrated undertakings in a comparable situation, and this, in turn, allowed the Commission to relieve itself from the evidentiary burden related to the assessment of the selective nature of the alleged advantage.

In the decisions at issue, the Commission deemed the tax rulings, allegedly departing from the ALP, to be intrinsically selective^[40] based on the assumption that a measure available to multinational enterprises and not to standalone undertakings, such as an APA, would a fortiori meet the selectivity requirement.^[41] Therefore, rather than separately assessing the existence of an advantage and the selective character of the measure, the Commission appears to have, in practice, conflated the advantage requirement and the selectivity requirement by stating that the measures at stake conferred a "selective advantage".^[42] As pointed out by the US Treasury in its White Paper on the Commission's investigations into the tax rulings at issue, this position seems to be based on the fact that:^[43]

(66) Thus, for example, State intervention in areas which fall within the exclusive competence of the Member States, such as direct taxation, may be examined by reference to Articles 107 TFEU and 108 TFEU (see, to that effect, judgments of 15 November 2011 in *Commission v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, ECR, EU:C:2011:732 and of 29 March 2012 in *3M Italia*, C-417/10, ECR, EU:C:2012:184, paragraph 25, and order of 29 March 2012 in *Safilo*, C-529/10, EU:C:2012:188, paragraph 18) ...

37. European Commission, Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (2014).

38. European Commission, Decision on Alleged aid to Apple, SA.38373 (2014/C), OJ C 3606 final, para. 70 (2014); European Commission, Decision on Alleged aid to FFT, SA.38375 (2014/C), OJ C 3627 final, para 82 (2014); European Commission, Decision on Alleged aid to Starbucks, SA.38374 (2014/C), OJ C 3626 final, para 125 (2014).

39. European Commission, Decision 2003/51 5/EC of 17 Feb. 2003 on the State aid implemented by the Netherlands for international financing activities, OJ L 180, p. 52, para. 82 (2003).

40. *Fiat*, *supra* n. 1, at para. 218, *Starbucks*, *supra* n. 1, at para. 254; *Apple*, *supra* n. 1, at para. 224; *Amazon*, *supra* n. 1, at paras. 582-83. In *Amazon*, nevertheless, the Commission also examined, for the sake of completeness, whether that ruling was selective under the three-step analysis as devised by the ECJ. See Commission Decision in *Amazon*, *supra* n. 1, at paras. 585-86.

41. US Department of the Treasury, The European Commission's Recent State Aid investigations of Transfer Pricing Rulings [hereinafter *US Treasury White Paper*] (24 Aug. 2016, p. 5, available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf>).

42. *Fiat*, *supra* n. 1, at para. 217; *Starbucks*, *supra* n. 1, at para. 254; *Excess Profits*, *supra* n. 1, at para. 113; *Apple*, *supra* n. 1, at para. 224; and *Amazon*, *supra* n. 1, at paras. 582-83.

43. *US Treasury White Paper*, *supra* n. 41, at p. 172.

because an advantage arises from deviations from the arm's length principle pursuant to a transfer pricing ruling, and a transfer pricing ruling is available only to multinational companies, then the advantage is also selective because it provides a benefit to particular multinational taxpayers but not to standalone companies, which must pay market prices.

Conversely, among scholars, it has been claimed that the granting of an alleged favourable tax treatment as a result of a deviation from the ALP does not necessarily imply that the addressee of the tax ruling has been the beneficiary of a selective measure.^[44] Indeed, it can be argued that other undertakings in the same legal and factual situation – i.e., other entities belonging to multinational groups – could have benefited from the same advantage had they applied for the granting of an advance ruling as well.^[45] ^[46] That is because the ALP, by nature, is a determinant of value. Therefore, its application would allow for the determination of whether a certain measure grants a benefit, rather than *who* is benefitting from it. In support of this argument, prior ECJ cases and Commission decisions – showing that disparate treatment attributed solely to the difference between multinational and standalone entities has not necessarily resulted in a tax measure being deemed selective – have been invoked.^[47]

For the purposes of the analysis in this article, it is worth investigating whether the conflation by the Commission in most of the decisions at stake is indeed in line with the practice and case law that existed at the time the advance rulings were issued and implemented, as claimed by the Commission (and by the GC in the decisions issued to date), or whether, instead, it constituted a novelty in terms of the application of article 107 of the TFEU and, more specifically, in the interpretation of the selectivity requirement. A review of the case law of the ECJ and the Commission shows, indeed, that their approach to the assessment of the selective character of a measure - i.e., whether to consider selectivity as a separate criterion from the advantage requirement or conflating the two into a concept of “selective advantage” – has been prone to fluctuation.

On the one hand, in its pivotal decision in *Paint Graphos* (Joined Cases C-78/08 to C-80/08), decided on 8 September 2011, the ECJ asserted that the selectivity character of a measure should be assessed separately from (and subsequent to) the advantage requirement. In this regard, the ECJ has developed a three-fold test that should assist in determining whether or not a certain advantage granted by a tax measure is also selective. This test has, seemingly, provided clarification as to how selectivity should be determined in respect of fiscal State aid measures. First, it is necessary to define a reference system that will serve as a benchmark for examination of the case. Second, it needs to be determined whether or not the specific measure derogates from the previously established reference system: a derogation is deemed to arise when the measure “differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation”.^[48] Third, if a derogation is identified, it needs to be determined whether the measure could be justified by “the nature or the general scheme of the (reference) system”.^[49]

According to this test, the Commission should have shown, in its decisions, that the advantage allegedly granted in the advance rulings to their addressees was not available to other undertakings in a comparable legal and factual situation. In this regard, the key factual difference between multinational group entities and standalone entities is that intra-group transactions may be concluded based on conditions that differ from those that would arise in respect of a transaction between two independent entities. This consideration stems from the fact that entities belonging to a multinational group may not always act in their own best interest when determining the price to be charged for the transfer of their goods or services, while independent actors would apply market-based prices. This difference is also reflected in the legislative framework of most Member States, which typically does not require tax authorities to closely monitor transactions between separate entities, whereas transactions between entities belonging to the same group are specifically regulated through various anti-tax avoidance tools, including transfer pricing rules. If the two types of transactions were indeed considered as the same circumstances, as proclaimed by the Commission, there would be no need for such rules. Furthermore, at the time when the Commission's 2016 Notice and the early decisions on tax rulings were issued, the Commission had reiterated its rejection of standalone companies as the benchmark for the selectivity criterion in its decisions in *Hungarian Intra-Group Interest*,^[50] *Irish Company Holding Regime*^[51]

44. Lovdahl Gormsen & Mifsud-Bonnici, *supra* n. 5, at p. 424 and Kyriazis, *supra* n. 4, at p. 433.

45. See A. Gunn & J. Luts, *Tax Rulings, APAs and State Aid: Legal Issues*, 24 EC Tax Rev. 2, p. 122 (2015) and D. Russel & T. Graham, *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*, 22 *Trusts & Trustees* 10, p. 1043 (2016).

46. In a message to its European customers, Apple's CEO Tim Cook indeed claimed that “over the years, we received guidance from Irish tax authorities on how to comply correctly with Irish tax law – the same kind of guidance available to any company doing business there”. T. Cook, *A message to the Apple community in Europe* (30 Aug. 2016), available at <https://www.apple.com/ie/customer-letter/>.

47. PT: ECJ, 6 Sept. 2006, Case C-88/03, *Portuguese Republic v. Commission of the European Communities*, ECLI:EU:C:2006:511, para. 54 and IT: ECJ, 8 Sept. 2011, Joined Cases C-78/08 to C-80/08, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. Paint Graphos Soc. coop. arl and Others*, ECLI:EU:C:2011:550, para. 49. See also 2016 Notice, *supra* n. 14, at para. 128.

48. 2016 Notice, *supra* n. 14, at para. 128.

49. *Paint Graphos* (C-78/08 to C-80/08), para. 49 et seq.

50. European Commission, Decision 2010/95/EC of 28 Oct. 2009 on State aid C 10/07 (ex NN 13/07) implemented by Hungary for tax deductions for intra-group interest (notified under document C(2009) 8130), OJ L 42/3, para. 111 (2010). In this decision, dealing with an intra-group loan agreement, the Commission pointed out that standalone and multinational entities are not in the same legal and factual circumstances since the latter are not engaged merely in a commercial transaction but, rather, share the same interests.

and *Dutch Groepsrentebox Scheme*.^[52] Further, this was upheld in the GC's ruling in *Autogrill Espana* (Case T-219/10).^[53] Therefore, taxpayers and Member States could have reasonably expected that measures available to all companies with foreign affiliates, but not to domestic standalone companies, were not, solely by virtue of this difference, selective measures for State aid purposes.

On the other hand, in other decisions, most of which were issued recently and much later than when the rulings at issue were granted, the ECJ has conflated the advantage and the selectivity criteria by reaching the conclusion that the determination of an advantage conferred on a recipient immediately suffices to satisfy the selectivity criterion when the measure constitutes "individual aid" granted to a specific addressee, rather than a general scheme available to a broader scope of applicants.^[54] In particular, in the decision in *MOL* (Case C-15/14), of 4 June 2015, which was expressly referred to by the Commission in the 2016 Notice and in the decisions at issue, the ECJ stated that "the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid".^[55] In the latter case, the identification of an economic advantage is, in principle, sufficient to also support the presumption of selectivity.^[56]

The fact that the 2016 Notice – i.e. a Commission document aimed at illustrating, rather than establishing, the criteria to be adopted in assessing a tax measure under article 107 of the TFEU – made explicit reference to the three-fold test,^[57] seems to corroborate the argument that the approach in the ECJ's *Paint Graphos* decision constitutes the reference case law in assessing the selectivity criterion and thus that states and beneficiaries should have expected the selectivity requirement to be the subject of a separate assessment by the Commission. Furthermore, in the same 2016 Notice, the Commission pointed out that "not all measures which favor economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors".^[58]

It is true that, in the same 2016 Notice, the Commission affirmed that:^[59]

when Member States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings.

It can be rebutted, however, that in that paragraph the Commission refers to very specific measures available only to one or few undertakings specifically identifiable in advance. As far as advance tax rulings are concerned, instead, the Commission clarified that such measures should not be assumed to be selective. Specifically, the Commission did not see the mere use of tax rulings as problematic^[60] and actually recognized the legitimacy (and the opportunity) of advance rulings in fields and cases where such measures help governments and taxpayers achieve legal certainty and predictability regarding the application of general tax rules, such as, indeed, intra-group transfer pricing.^[61]

The argument that advance tax rulings should not be assumed to constitute a selective advantage is furthermore reinforced by the fact that the Commission has duly specified when, instead, a ruling has to be deemed to confer a selective advantage. Indeed, in paragraph 174 of the 2016 Notice, it is clearly stated that a tax ruling is deemed to confer a selective advantage to the addressee when: (i) domestic tax law is misapplied and, as a consequence, leads to a lower tax liability of the addressee; (ii) the measure is not available to entities in similar legal and factual circumstances; or (iii) the tax authorities provide a better

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51. European Commission, Decision COMP/N 354/2004 of 22 Sept. 2004 on State aid granted through Ireland Company Holding Regime, OJ C 131/10, para. 16 (2005), wherein, in determining that the special tax regime granted by Ireland to entities having foreign subsidiaries was not selective due to the circumstance that all multinational companies could benefit from it, the Commission recognized that such entities are not in the same factual and legal circumstances as standalone entities.
52. European Commission, Decision 2009/809/EC of 8 July 2009 on the Groepsrentebox scheme that the Netherlands is planning to implement, OJ L 288/26, para. 104 (2009), wherein the Commission stated that standalone companies were not in a comparable situation as groups with related parties since, according to the Commission, "a different rate of taxation for debt financing between related parties merely reflects objective differences and does not affect tax neutrality".
53. ES: GC, 7 Nov. 2014, Case T-219/10, *Autogrill España v. Commission*, ECLI:EU:T:2018:784, paras. 55-57, in which the GC annulled a Commission State aid decision on a Spanish regime allowing companies to depreciate goodwill in respect of acquisitions of foreign subsidiaries. The GC stated that the measure was not selective due to the fact that any company could have potentially benefitted from the special tax regime by purchasing shares of a foreign entity.
54. HU: ECJ, 4 June 2015, Case C-15/14, *European Commission v. MOL Magyar Olaj- és Gázipari Nyrt. MOL*, ECLI:EU:C:2015:362, para. 60; ES: ECJ, 21 Dec. 2016, *European Commission v. World Duty Free Group and Others (Joined Cases C-20/15 P and C-21/15 P)*, ECLI:EU:C:2016:981, para. 55, Case Law IBFD; FR: ECJ, 26 Oct. 2016, Case C-211/15, *Orange v. European Commission*, ECLI:EU:C:2016:798, paras. 53-54; and BE: ECJ, 17 June 1999, Case C-75/97, *Kingdom of Belgium v. European Commission*, ECLI:EU:C:1999:311, para. 49.
55. *MOL* (C-15/14), para. 60.
56. *MOL* (C-15/14), para. 60; *Belgium v. Commission* (C-75/97), para. 49; and *Orange* (C-211/15), paras. 53-54.
57. *2016 Notice*, *supra* n. 14, at para. 128.
58. *2016 Notice*, *supra* n. 14, at para. 117.
59. *Id.*, para. 126, quoting *Mol* (C-15/14), para. 60.
60. Moreno González, *supra* n. 4, at p. 560.
61. *2016 Notice*, *supra* n. 14, at para. 169.

tax treatment to an addressee when compared to other taxpayers in similar legal and factual circumstances.^[62] With specific regard to the criterion under (iii), the Commission indeed clarified that “this could, for instance, be the case where the tax authority accepts a transfer pricing arrangement which is not at arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome”. It must be noted, however, that, in making this statement, the Commission exclusively referred to its decisions in the *Starbuck* and *Fiat* cases, which, as already highlighted, were issued in 2016 and were not yet published when the 2016 Notice was issued. Again, if there had been other prior State aid cases strengthening this position, the Commission would have cited them and heavily relied on them. Therefore, this position, as well as the position in the *MOL* case (which was decided in June 2015), was disclosed years after the advance rulings at issue.

In light of the elements highlighted above, the conflation of the selectivity and advantage requirements, based on the assumption that MNEs and standalone companies are in a comparable legal or factual position, lacked, at the time when the rulings were issued and implemented, a substantive basis. As a result, it could not have been reasonably concluded that the advance tax rulings were of a selective nature and incompatible with EU State aid regulation simply as a result of the circumstance that a deviation from the ALP had allegedly been identified.

3. Final Remarks

According to the analysis conducted herein, several elements support the novel character of the Commission's reasoning in the cases at issue. The use of the ALP and the assertion of the existence of an EU ALP to assess whether the tax rulings granted an advantage for State aid purposes, and the allegedly intrinsic selectivity of advance tax rulings, seem to unveil an approach to the interpretation and implementation of article 107(1) of the TFEU that could not have reasonably been expected by Member States and taxpayers before at least 2016. Indeed, this article has illustrated how the case law precedents referred to by the Commission do not appear to reflect a consolidated approach that could have been discernible by Member States and taxpayers when the rulings were granted. On the contrary, the Commission established a loop of sources that is ultimately either faulty or overstretched – or tautological, as the Commission also referred to its own and, at the time, unpublished decisions. For this reason, the decisions at issue represent a departure from what used to be the consolidated interpretation and implementation of article 107(1) of the TFEU with regard to the assessment of national tax measures.

Due to the lack of established precedents to support the Commission's reasoning, requiring recovery of the aid would violate general principles of EU law, such as legal certainty and the legitimate expectations of the taxpayers and Member States involved^[63] and, consequently, would be inconsistent with the rule of law.^[64] Indeed, the principle of legal certainty requires laws and their interpretation to be clear, precise and foreseeable, whereas legitimate expectation refers to the right not to be penalized or suffer a loss for adhering to a rule established by an official institution.^[65] Thus, granting relief from recovery in cases where the advance tax rulings are deemed, by the judges of last instance, to be unlawful aid, would strike a balance between entitlement and the duty of EU institutions to update their settled interpretation of EU law – specifically State aid legislation – and the right of Member States and taxpayers not to be retrospectively impaired by such changes.

In most of the cases at stake, Member States and taxpayers have invoked the principles of legal certainty and legitimate expectations in their actions for annulment of the Commission's decision. In the *Apple* and *Amazon* cases, this plea has been superseded due to the GC's decision to annul the Commission's decision as a result of technical issues related to implementation of the transfer pricing method. But this may still have to be considered by the ECJ should it decide to overturn the decisions of first instance. In *Starbucks*, in contrast, the plea was not raised before the GC. In the other case decided to date – specifically, *Fiat*, – the claim has, instead, been rejected by the GC. This is due, in the author's opinion, to a combination of the plaintiff's argument not being effectively made and a rather superficial examination of that argument by the GC. Specifically, in *Fiat*, the Court spelt out that FFT has neither established nor even claimed in what respect it might have received precise assurances from the Commission that the tax ruling at issue would not meet the aid test within the meaning of article 107 of the TFEU.^[66] This response, indeed, appears to disregard the broad expansion of the concept of “precise assurance” for the purposes of identifying legitimate expectations under EU administrative law. According to both administrative practice and case law, “precise assurance” can be deemed to also arise from past Commission decisions and ECJ decisions that do not concern the beneficiary directly.^[67]

62. Id., para. 174.

63. *US Treasury White Paper*, supra n. 41, at p. 16.

64. Lovdahl Gormsen, supra n. 11, at pp. 62-85; Wattel, supra n. 8, at p. 192; *US Treasury White Paper*, supra n. 41, at p. 14.

65. D. Chalmers, *European Union Law: Text and Materials* p. 381 (Cambridge University Press 2019).

66. *Fiat*, para. 186.

67. K. Jaros & N. Ritter, *Pleading Legitimate Expectations in the Procedure for the Recovery of State Aid*, 3 Eur. St. Aid L. Q. 4, p. 578 (2003).

In light of the possibility that the ECJ will also confirm the two pillars of the Commission's reasoning without simultaneously annulling the decisions for other technical reasons, it is of pivotal importance, for the Member States and the taxpayers at issue, to reinforce their pleas concerning a violation of the principles of legal certainty and legitimate expectations. Indeed, having these pleas accepted by the ECJ would likely constitute a last resort in combining the establishment of the Commission's novel approach to the interpretation and application of article 107(1) of the TFEU with the preservation of the rule of law in the field of EU State aid legislation, as the taxpayers and Member States involved would remain unharmed by the retrospective application of that new course of action by the EU institutions.

Indeed, the recovery proceedings before the national authorities are unlikely to offer additional opportunities to invoke the violation of the principles of legal certainty and the protection of legitimate expectations.^[68] Indeed, unlike in the past, there is now consolidated ECJ and national supreme court case law, according to which, in light of the principle of prevalence and effectiveness of EU law, national courts cannot block the implementation of a Commission decision.^[69] In the event that the ECJ rejects the pleas advocated herein, taxpayers may still consider filing a claim for damages against the Member States based on the argument that, by granting the aid, the State authorities had given rise to legitimate expectations.^[70] This option, however, is also likely to be unsuccessful in light of recent ECJ case law, which provides that an unlawful aid measure does not generate a legitimate expectation for the beneficiary, who has the duty to verify in advance that the measure complies with the relevant EU legislation.^[71]

68. According to art. 16(3) of the State Aid Procedural Regulation, indeed, the Member States' domestic authorities are in charge of implementing the recovery of the aid according to domestic legislation.

69. ES: ECJ, 28 July 2011, Case C-474/09 P, *Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya*, ECLI:EU:C:2011:522. See also IT: Council of State (*Consiglio di Stato della Repubblica italiana*), 13 May 2015, Decision 2401/2015 (*Venezia/Chioggia*).

70. In this regard, see IT: Court of Appeal of Cagliari, Case No. 517/2017. Note, however, that in a decision of 29 Mar. 2012, the ECJ found that Italy had not taken all the measures necessary in order to recover the aid, and, therefore, imposed periodic sanctions on Italy. See IT: ECJ, 29 Mar. 2012, Case C-243/10, *European Commission v. Italian Republic*, ECLI:EU:C:2012:182.

71. EE: ECJ, 5 Mar. 2019, Case C-349/17, *Eesti Pagar AS v. Ettevõtlike Arendamise Sihtasutus*, ECLI:EU:C:2019:172, paras. 98-104.