Navigating the Tension between Recovery Obligations and the Principle of Legitimate Expectation in EU State Aid Law

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1. Aid Recovery in EU State Aid Law: Context and Recent Case Law

The European debate on State aid and the duty to recover has moved to centre stage in tax law, driven by a series of landmark judgments from the European Court of Justice (ECJ). Recent case law has brought renewed attention to both the Madeira Free Zone and iconic multinationals such as Apple (C-465/20 P). Heightened scrutiny from EU institutions reflects a collective determination to safeguard competition and stamp out selective tax advantages, leading to unprecedented regulatory activism and a fresh interpretation of the balance between national autonomy and European uniformity.

A growing body of precedent now firmly consolidates the recovery of unlawful State aid as a legal imperative. In addition to earlier precedents such as *Commission v. Spain* (C-704/19), *Mediaset* (C-403/10 P and C-69/13), and joined cases *Aer Lingus* and *Ryanair* (C-164/15 P and C-165/15 P), the Court recently adjudicated, on 13 November 2025, a series of appeals arising from the Madeira Free Zone regime, including *AFG, SA v. Commission* (C-13/24 P), *Bourbon Offshore Interoil Shipping – Navegação, Lda v. Commission* (C-803/23 P), *Renco Valore SpA and Others v. Commission* (C-806/23 P) and *Sonasurf Internacional and Others v. Commission* (C-9/24 P). Taken together, these judgments reaffirm that recovery is essential to restoring a level playing field in the internal market. Member States are mandated to extinguish the effects of incompatible aid, using objective beneficiary identification and transparent economic computation, which includes interest payments and judicial review mechanisms.

Yet companies regularly invoke the protection of legitimate expectations. Cases like *Eesti Pagar* (C-349/17) clarify that protection only arises from precise, unconditional and consistent assurances issued by EU institutions themselves, rather than mere omission or repeated national practice. Even where tax regimes have operated for years – as in the Madeira Free Zone or Ireland (Apple) – the ECJ has denied that simply the passage of time or absence of intervention constitutes sufficient protection against recovery.

The *Apple* rulings (C-465/20 P) reinforced this paradigm: despite a full decade of advantageous tax rulings and procedural complexity, the formal and objective requirements of State aid law prevailed, confirming that legitimate expectations must be grounded in compliance with EU authorization procedures and regulatory transparency.

Reflecting on these challenges related to legitimate expectation protection, it is clear that the ECJ has set a new benchmark: such protection is now subordinate to strict procedural legality and the clarity of institutional decisions. This dynamic compels Member States and recipients of special regimes to adopt a cautious, forward-looking posture, managing the risk of retroactive reinterpretation and the reinforced supervisory powers of the Commission. The future of fiscal State aid depends, ultimately, on a delicate balance between EU-wide transparency and respect for the European Union's constitutional values.

2. The Duty to Recover

The duty to recover incompatible State aid is expressly set out in article 108(2) of the Treaty on the Functioning of the European Union (TFEU). This provision establishes that, when the European Commission finds that State aid is

not compatible with the internal market, it "shall decide that the Member State concerned shall abolish or alter such aid within a period of time to be determined by the Commission". Consequently, the Member State is not only required to cease granting the aid but is also under an obligation to take effective measures to eliminate the effects of the unlawful support, notably by recovering the aid from the beneficiaries.

The recovery of incompatible aid is firmly embedded in European jurisprudence, with its primary aim being the restoration of competition and the elimination of undue advantages obtained by recipient undertakings. The ECJ, in its judgment of 29 April 2021, *Commission v. Spain* (C-704/19), reaffirmed that the obligation of the Member State to abolish aid considered incompatible with the internal market aims to restore the previous situation, depriving the beneficiary of the advantage which it has enjoyed over its competitors. This was expressly reiterated in *Sonasurf* (C-9/24 P), confirming that recovery must be immediate and effective and that Portugal was required to implement the measure within the prescribed time limit following notification.

The ECJ case law further makes clear that, as a general rule, Member States are under a strict obligation to recover aid declared illegal and incompatible, except in absolutely exceptional circumstances where recovery would be contrary to a general principle of EU law. While the ECJ, notably in *Mediaset v. Commission* (C-403/10 P), acknowledges the theoretical existence of such an exception, it simultaneously underscores its extremely restrictive scope.

In practical and operational terms, both the ECJ, in *Mediaset* (C-69/13) and the General Court, in *Kuwait Petroleum v. Commission* (T-354/99), have confirmed that national authorities are required to identify each beneficiary objectively and, by applying objective and transparent methods, to calculate the exact amount of aid to be recovered. As the General Court highlighted in said judgment, when difficulties arise in implementing a recovery decision, the assessment of the measures ultimately adopted falls to the national courts, even where the Commission has expressed its approval. Any remaining disputes concerning factual findings or the quantification of the advantage may be resolved by the national courts, which may, where necessary, seek guidance from the Commission or refer questions to the ECJ for a preliminary ruling.

It is important to note that the case law distinguishes between recovery strategies depending on the type and implementation of the aid, always requiring that remedial measures be proportionate and based on transparent, objective criteria to avoid discrimination and ensure equal treatment – as illustrated by the *Aer Lingus* and *Ryanair* judgments (C-164/15 P). In its recent judgment in *Sonasurf* (C-9/24 P), concerning the Madeira Free Zone, the ECJ confirmed that Portugal was required to specifically identify and recover the advantages granted in breach of the notified decisions, leaving no scope for a broad or flexible interpretation of the applicable exceptions.

Finally, the obligation to pay interest from the date the illegal aid was granted is confirmed by both Regulation 2015/1589 and the settled case law of the Court of Justice – most notably *A2A SpA* (C-89/14) – thereby emphasizing the restorative nature of the recovery measure.

3. Duty to Recover versus Principle of Legitimate Expectation

The principle of legitimate expectation in European State aid law is anything but clear-cut or uncontroversial. Rather than reflecting a settled doctrine, it exposes the inherent tension between legal stability and regulatory change. Trust in the law is not a simple or uniform notion; it is an inherently elusive concept, shaped by indeterminacy and competing meanings, and resistant to any single, definitive formulation within legal discourse. Attempts to circumscribe its scope tend to oscillate between excessive abstraction and undue restriction, offering little practical guidance to those who must rely on the law in real economic contexts.

For taxpayers and economic operators, trust in the legal order is built on the perceived competence, coherence and credibility of the normative framework and of the institutions that produce and apply it. This trust – presupposing loyalty and good faith – is pivotal in enabling autonomous organization of business activities from a fiscal perspective, underpinning the enjoyment of liberty and property rights. Such high-intensity reliance on legal stability naturally invites robust protection – even more so in the context of tax planning and regulatory predictability.

Legitimate expectation thus functions as a shield for individual interests where a person, not protected by acquired rights or vested legal acts, acts in good faith on the validity – or appearance of validity – of a general or individual normative act, only to have this expectation dashed by the termination or discontinuance of such measures. The issue thus extends beyond mere technicalities to questions of legal certainty, continuity and the legitimate reliance private parties should be able to place on the state.

Ultimately, the principle of legitimate expectation operates not merely as an interpretative aid, but as a structural element of the rule of law itself. It reflects an ongoing demand placed on the legislature, the executive and the judiciary to act in a manner that projects reliability and foreseeability into the future – conditions without which confidence in the legal order, and compliance with it, inevitably erode.

Within the jurisprudence of the ECJ, the criteria for protection of legitimate expectation in State aid cases are stringent. In *Eesti Pagar* (C-349/17), the ECJ made clear that only assurances which are explicit, precise and unconditional, and which emanate from the relevant EU institutions, can ground a legitimate expectation; mere national administrative practice or regulatory omissions do not suffice. This approach was expressly confirmed in *Sonasurf* (C-9/24 P), in which the ECJ rejected beneficiary reliance on the absence of Commission action, holding that only strict compliance with the notification procedures under article 108 of the TFEU can give rise to a protected legitimate expectation.

In 2023, in *Eutelsat Madeira v. Commission (Zone franche de Madère)* (Joined Cases T-718/22 and T-723/22), another Madeira case, the General Court held that delays or omissions on the part of the Commission do not relieve Member States from their obligation to recover unlawful aid, nor do practical difficulties in identifying beneficiaries or calculating the amounts to be recovered shield recipients from the binding force of recovery orders. The Court further clarified that legal uncertainty relied upon by undertakings may warrant judicial protection only in truly exceptional circumstances. This position was expressly upheld by the ECJ in its decision of November 2025 in *Sonasurf* (C-9/24 P), thereby confirming the continued validity of the General Court's reasoning and reinforcing the strict approach to the enforcement of recovery obligations under EU State aid law.

The *Apple* case (C-465/20 P) epitomizes this strict approach: despite a decade of favourable tax rulings and a regulatory framework endorsed by the Irish authorities, when challenged by the Commission in the investigation opened in 2014, the ECJ held in 2024 that recoverability ultimately depends on the objective application of State aid rules, rather than on subjective expectations or perceptions of regulatory stability.

Ultimately, while the concept of legitimate expectation remains elusive and frequently debated in legal theory, the current jurisprudence of the ECJ converges on the view that expectation alone can rarely be invoked against the duty to recover, unless it is supported by clear, precise and unconditional acts of the Union's institutions.

4. Conclusion

Recent case law of the ECJ has made unmistakably clear that EU State aid control operates within a structural tension: while the Union proclaims legal certainty and the protection of legitimate expectations as foundational principles of the rule of law, its jurisprudence applies these guarantees with remarkable restraint when set against the imperative to recover unlawful aid.

The duty to recover, rooted in article 108(2) of the TFEU, has evolved into a near-absolute obligation. Once aid is found to be illegal and incompatible, Member States face no discretion, and beneficiaries enjoy virtually no shelter, regardless of how long a regime operated, how consistently it was applied, or how tacitly it may have been tolerated at the EU level. The imperative is corrective, retroactive and uncompromising: the competitive distortion must be eliminated, even if this entails revisiting well-established fiscal practices decades later.

Conversely, the protection of legitimate expectation has been confined by the Court to an exceptionally narrow scope. Only explicit, precise and unconditional assurances originating from the EU institutions themselves may give rise to protected expectations. National administrative practice, long-standing schemes, repeated Commission inaction or complex regulatory contexts never suffice, as reaffirmed in *Sonasurf* (C-9/24 P), *Eesti Pagar* (C-349/17) and, most strikingly, *Apple* (C-465/20 P).

This produces an inherent conflict within the system: (i) the duty to recover operates with strict and retroactive effect; (ii) the principle of legitimate expectation requires stability and predictability, and (iii) EU jurisprudence consistently prioritizes the former at the expense of the latter.

The consequence is a regulatory environment characterized by an increased degree of legal risk for both Member States and undertakings. Even where tax regimes have been applied transparently and over extended periods, the possibility of subsequent reassessment by the Commission cannot be entirely excluded. In this sense, a degree of asymmetry emerges: EU institutions retain the ability to revisit past measures, while private actors may be exposed to residual uncertainty as to the long-term stability of such regimes.

The Apple and Madeira Free Zone rulings crystallise this dynamic. The ECJ's reasoning reflects a consistent emphasis on procedural compliance and the effectiveness of State aid control, which, in practice, may limit the

scope afforded to considerations of reliance, stability or normative clarity. This jurisprudential approach suggests that, within the current framework, enforcement effectiveness occupies a central position among the values underpinning EU State aid law.

IBFD references:

- EU tax law developments are reported on the daily IBFD Tax News Service page.
- G. Allevato, *Judicial Review of the State Aid Decisions on Advance Tax Rulings: A Last Resort to Safeguard the Rule of Law*, 62 Eur. Taxn. 2 (2022), Journal Articles & Opinion Pieces IBFD.
- O. Popa, *The ECJ Final Decision in* Apple *– A Key Milestone in the EU Fight against Tax Avoidance*, EU Tax Focus (18 Sept. 2024), IBFD.
- IE: ECJ, 21 Dec. 2016, Case C-164/15_P, *European Commission v. Aer Lingus and Ryanair Designated Activity Company*, Case Law IBFD.
- IE: ECJ, 10 Sept. 2024, Case C-465/20 P, *European Commission v. Ireland, Apple Sales International, Apple Operations International, formerly Apple Operations Europe, Grand Duchy of Luxembourg, Republic of Poland, EFTA Surveillance Authority*, Case Law IBFD.
- For details on harmful tax competition and State aid, *see* C. Valério & D. Arsenovic, *European Union – Direct Taxation*, Global Topics IBFD.
- For links to IBFD summaries of the final Commission decisions, IBFD summaries of ECJ judgments and the latest news reports, IBFD articles and papers on cases investigating the compatibility of Member States' tax ruling practices with EU State aid law, see the State Aid and Tax Rulings Tax Dossier.